

A. E. SCHALKENBACH, E. YANCEY
COHEN, and W. R. F. CALL,

Complainants,

VS.

THE FAIRHOPE SINGLE TAX CORPORATION,
a corporation, THE TOWN OF FAIRHOPE,
a municipal corporation, THE TOWN
COUNCIL OF FAIRHOPE, M. F. NORTHRUP,
as Mayor of the TOWN OF FAIRHOPE,
and NORVIN DU BROCK, J. E. GASTON,
R. P. GREGG, HOWARD RUGE, and ELOF
M. TUVESON, as Members of the Town
Council of Fairhope,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY.

The original bill was based on the idea that a Constitutional Amendment was necessary before the action complained of, in respect to the parks, could have been taken, and the Amendment introduced the additional contention that the Town had no authority to accept the conveyance with the conditions therein imposed. The bill set out in full the act under which the Fairhope Single Tax Corporation was created, its charter, and Constitution. Also all the proceedings leading up to the transfer of the management of such parks, and the instrument providing for same. If such bill, on its face, shows that the Fairhope Single Tax Corporation had authority to make this transfer, and the Town of Fairhope to accept it, the complainants would not be entitled to the relief asked for, and such bill should be dismissed because, on its face, it shows there is no equity therein.

Hence the first ground of demurrer covers the whole matter, and

was intended to be treated as such in our original brief, and we submit that such is the case.

Assuming the correctness of his position, learned counsel lays down incontrovertible propositions, it being an easy matter to tear down the straw man, but we insist that such contentions are without foundation, and therefore the whole structure must fall. We attempted to fully cover the matter in our original brief, and think it unnecessary to repeat same, but cannot too strongly impress the Court with the fact that the provision for parks is a mere incident in the make-up of a model community, and that the declared purpose of this Corporation, the like of which was not provided for under the laws of this State, causing it to have prepared and passed a suitable act, was that it might demonstrate the beneficency, utility and practicability of the single tax theory, with the hope of its general adoption by the governments of the future. It was the privilege of our Mr. Webb to prepare and secure the passage of this Act for the purpose of forming this Corporation, and draft the Articles of the Corporation, and we submit that he clearly expressed the idea above advanced, in the following words contained in such Articles of Incorporation.

"The purpose of said corporation is to demonstrate the beneficency, utility and practicability of the Single Tax theory, with the hope of its general adoption by the governments of the future; in the meantime securing for ourselves and our children and associates the benefits to be enjoyed from its application, as fully as existing laws will permit, and to that end to conduct a model community, free from all forms of special privileges, securing to its members therein equality of opportunity, the full reward of individual efforts and the benefits of co-operation in matters of

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general concern, holding all land in the name of the corporation, and paying all taxes on the same and improvements and other personal property of lessees thereon, charging the lessees the fair rental value, and in the prosecution of its plans for the general welfare of its members to do and perform all the acts and exercise all the powers permitted under Section 5 of said Act."

And following the provisions of such Act, the following was also embraced:-

"That said corporation has the power to elect such officers as it may deem necessary, in such manner and for such terms as it may provide, and remove the same at any time, and adopt such Constitution and by-laws as it may see fit, not in conflict with the Constitution and laws of this State. Said corporation shall have the power to buy, sell and lease real estate, to build and operate wharves, boats and other means of transportation and communication, to build, erect and operate water works, electric lighting and power companies, libraries, schools, parks, and to do any other lawful thing incident to its purpose for the mutual benefit of its members; and may admit such other persons to participate in its benefits as it may see fit to upon such conditions as it may impose."

Both the Act and the Charter were designedly made sufficiently flexible to meet changing conditions, and hence in addition to the broad powers given, this was added:-

"And do any other lawful thing incident to its purpose, for the mutual benefit of its members; and may admit such other persons to participate in its benefits as it may see fit, AND UPON SUCH CONDITIONS AS IT MAY IMPOSE." (Italics ours).

As pointed out in our original brief, the provision of the Constitution concerning parks provides that they shall be public, and that the school, library and natatorium, maintained at the expense of the colony, would be for its members, and it is therefore surprising that the able counsel for complainants persist in insisting that such Constitution provided that the use of the

parke should be confined to the members of the Corporation.

As pointed out in the original brief, when this hand full of enthusiasts began with a few acres in a calf pasture, the thought of a thriving municipality on its holdings was not envisaged, and the Constitution of the Fairhope Industrial Association, substantially adopted by the Fairhope Single Tax Corporation, announced its purpose as follows:-

"ARTICLE 2: PURPOSE.

Its purpose shall be to establish and conduct a model community or colony, free from all forms of private monopoly, and to secure to its members therein, the equality of opportunity, the full reward of individual efforts and the benefits of co-operation in matters of general concern."

In line with this it established its own water-works, electric lighting and telephone system, the first two being afterwards turned over to the municipality, because it was in a better position to supply all of the inhabitants, regardless of whether they were located on colony land, and public ownership of public utilities being preserved.

Suppose a large majority of the present members of the Fairhope Single Tax Corporation should conclude that the restrictions incident to municipal government, the additional burden of taxation for municipal purposes and assessments for improvements, interfered with its original purposes, particularly the demonstration of the desirability of single tax, and after appropriate action by the Executive Council, confirmed by referendum, as in this instance, should decide to sell all of its holdings within the corporate limits the lessees consenting, so far as their portions were concerned, and

continue its program on its vast holdings outside of the City limits, and such action, as recited in the Act and in its Charter, was, "Incident to its purpose for the mutual benefit of its members", would it not be lawful to do this under the present law, Charter and Constitution? Or suppose in the course of time property it had used as a park became so built about that it was more suitable and valuable for business or residential purposes, could not the colony, unless objected to by those interested in lots fronting on said park, use it for such purpose for which it was better suited, and establish a park in a more favorable location? In this instance it was merely proposed, for the benefit of all concerned, to more effectually secure the use of such property for park purposes. Such law and charter expressly authorized the Corporation to "Admit such other persons to participate in its benefits, as it may see fit to, upon such conditions as it may impose." By its action in this instance the Corporation provides for the use of its parks, not only by the public, but concessionaires of the municipality on conditions imposed in the instrument objected to.

In our original brief, we called attention to the fact that while in form of a deed, the intention and effect of the instrument in question was merely to transfer the management of this park property to the municipality, for the benefit of all concerned, and that the rules of law were in some respects different from cases where the city secured the property by purchase or condemnation, and that in cases like this a municipality is authorized to accept a conditional transfer. Abundant authority was cited. In the very elaborate reply brief able counsel do not seek to con-

trovert this, indeed, by silence, assent.

In examining particular cases applying certain principles to corporations, it is well to keep in mind the peculiar character of this one, having no stock and opposed to the attainment of any pecuniary profit to its members, their reward being the demonstration of the soundness of the principles of the Single Tax, the securing of "Equality of opportunity, the full reward of individual efforts, and the benefits of co-operation in matters of general concern."

On page 12 of brief of opposing counsel, is the following quotation from Corpus Juris 14A, 526, Par. 2430:-

"A corporation formed for a special purpose and whose property is to be used only for such special purposes cannot convey such property where the effect of conveyance would be to free it from its use for such special purposes."

The notes citing its authority for such statement, ^{name only} the case of Smith vs. Humbervale Cemetery Company, 33 Ont. L. 452. This is a Canadian report not contained in local libraries, and it is not unlikely that there was some provision in the laws of Canada, or the grant upon which the decision is based. For example, that the property therein embraced, or any part thereof, should never be sold, but perpetually used for burial purposes. It is also to be noted that because of the sanctity of the resting place of the dead, our Courts have been very mindful thereof. However, except for such provisions mentioned, cemetery property not needed for burial purposes may be sold where it does not in any way prejudice the rights of lot-holders therein, or sometimes where it will continue to be used for burial purposes.

In the case of Morgan vs. Rogers, 79 Fed. 577, U.S. Supreme Court of Appeals, the facts were as follows:- Rt. Rev. Joseph P. Machedauf, Bishop of Denver, represented that the North-east quarter of the southeast quarter of Section 2, Township 4, Range 68, had been used by the members of the Catholic Church of Denver and Orapahoe County as a burial place since 1863 and requested that it be conveyed to him and his successors in office, which was done in consideration of fifty dollars, February 7, 1874. On April 25, 1887, the Bishop conveyed to Morgan the land in dispute, for the consideration of twenty thousand dollars, and on May 2, 1887, the Colorado Catholic Loan & Trust Association, to whom the Bishop had previously conveyed the same land, also deeded the same to Morgan, who entered thereon and platted same as an addition to Denver. This case is also reported in 106 Fed. page 452, in which the facts are more fully set out, in which it is said:-

"The facts appeared sufficiently stated in the former opinion of this Court, and the question there reached was that by virtue of the Acts of Congress, and patent of November 15, 1873, referred to in the opinion, the City of Denver acquired an unconditional title in fee simple absolute to a tract of land, including that now in controversy; and that, notwithstanding the act of Congress in question authorized the City of Denver to make an entry of the land "To be held and used as a burial place for the City and vicinity", the patent issued granted to the City such title in fee simple, without condition, as enabled the City to sell and dispose of the land unconditionally, for any purpose deemed by it desirable."

The Supreme Court of the United States, 48 Law Ed., page 89, in affirming the decision of the Circuit Court, says in part:

"If the City got a fee simple absolute, as in our opinion it did, we are not called upon to spend time

on the question of its powers under the laws of the State, for its action in the premises. These questions were not much argued here. The City had a general power of alienation by charter, and we are not prepared to say the power did not extend to burial grounds. The vote to adopt the report was a sufficient vote to sell, and the question is not upon whether there was any informality in the execution of the sale by the mayor, rather than by a special commissioner. The supposed error would be corrected by equity, if necessary."

By statute and its charter, the Fairhope Single Tax Corporation has a general power of alienation which could not be and is not taken away by its Constitution, required by such Act to be not contrary to the laws of the State, and the fact that the provisions that the land of the Corporation must be held in trust for the members, does not deprive it of the power to dispose of same, but to hold the proceeds thereof subject to the same trust.

In the case of City of Tacoma vs. Tacoma Cemetery, 68 Pac. Rep., page 723, it is said:-

"When the deed was executed, the donor knew that the trustees selected by the town of New Tacoma to accept its gift were clothed with power to manage the cemetery grounds as they deemed best. Knowing that the trustees possessed this power of management, the donor conveyed to them the 71 acres of land 'for a cemetery,' 'for cemetery purposes'; granting the land to 'the board of trustees of New Tacoma Cemetery, their successors and assigns'. We do not think it follows that, because the donation was for cemetery purposes, all of the land was conclusively to be used in specie for the burial of the dead. The trustees and their successors were to have the management of the cemetery grounds as they deemed best. Some portion of the land might have been unfit for the burial of the dead. We know from common observation that it is not every tract of land that is fit for such a purpose. In this 71 acres the portion sold may have been low lands, or otherwise unfit for the final sepulture of the dead. Were the trustees to keep this in specie? We think not. It would still be a gift for cemetery purposes if the unfit portions were sold and the proceeds applied in beautifying the remainder. In

the course of time, in a growing city like the city of Tacoma, it might all become unfit for cemetery purposes, and the public health might require the removal of those buried. This was a contingency reasonably to be expected. Hence the donor inserted in the deed power to sell when he declared the grant to be to the trustees, their successors and assigns."

The bill says that the Fairhope Single Tax Corporation acquired this land, but does not specify how, and as it must be construed more strongly against the pleader, it will be presumed that this was a warranty deed to the grantee, its successors or assigns.

On page 13 of said brief, is the following quotation from *Maben vs. Gulf Coke, etc. Co.*, 173 Ala., 259, 55 So., 607:-

"To the general rule authorizing free alienation of its property by a corporation, there are many exceptions arising from the nature of the particular corporation, the purposes for which they are created, and the duties and liabilities imposed on them by their charters."

In this case minority stockholders objected to the sale of the entire property of the corporation, and the only question involved was the validity of such sale, which was upheld, and while the portion quoted is mere dictum, it is correct when properly applied, which is not done in the case under consideration.

On page 14 of said brief it is asserted that it was unconstitutional to dispose of lands acquired for park purposes. The land in question was not acquired for park purposes, but a portion of that acquired for general purposes, this part being up to the present used for park purposes, which use will be continued under the present arrangement and does not constitute a disposition of same in opposition to the spirit of the charter or constitution.

As pointed out in the original brief, the provision as to a referendum does not compel the governing authorities to abide by the result of same, and they have the option of doing so if agreeable, and if not, permitting the title to revert to the Fairhope Single Tax Corporation, if it so desires. However, if the requirement appears to be unreasonable it could waive the enforcement of this condition. However, as pointed out in our original brief, these city fathers would have been elected by these same voters, for the most part members of the Corporation, and theoretically became their servants, and it is not supposed that they will be inclined to disregard a reasonable request so expressed.

The contention that if the right to so arrange for the management of this park property should be upheld "The reason for the existence of the Fairhope Single Tax Corporation is immediately destroyed," is ridiculous, such feature being merely an incident in connection with, and not the purpose of the Corporation.

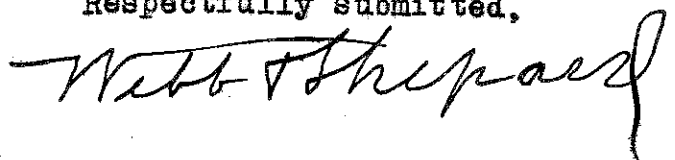
Article 12 of the Constitution says that,

"Ample provision shall be made in platting the lands of the Corporation, for land for parks, and all other public purposes".

and if this was done, it might amount to a dedication thereof to the public for such use, and the instrument objected to would be in line with, and in a way but confirmatory of same.

We therefore confidently assert that the action complained of was reasonable, seasonable, sensible and legal; that the demurrers should be sustained and the bill dismissed.

Respectfully submitted,



A. E. SCHALKENBACH, E. YANCEY
COHEN, and W. R. F. CALL,

Complainants,

vs.

THE FAIRHOPE SINGLE TAX CORPORATION, a corporation, THE TOWN OF FAIRHOPE, a municipal corporation, THE TOWN COUNCIL OF FAIRHOPE, M. F. NORTROP, as MAYOR of the Town of Fairhope, and NORVIN DU BROCK, J. E. GASTON, R. P. GREGG, HOWARD RUGE, and ELOF M. TUVESON, as Members of the Town Council of Fairhope,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY.

The bill of complaint alleges the incorporation of the Fairhope Single Tax Corporation, August 4, 1904, under the provisions of General Acts of the State of Alabama of 1903, page 342 (now embraced in Section 7046 of the Code of 1923, which was construed in the case of Fairhope Single Tax Corporation vs. Melville, 193 Ala., page 289, 69 So. page 466) which reads as follows:-

"An act to provide for the organization and regulation of corporations not for pecuniary profit in the sense of paying interest or dividends on stock, but for the benefit of its members through their mutual co-operation and association.

Section 1. Be it enacted by the Legislature of Alabama, that ten or more persons desiring to associate themselves together, not for pecuniary profit in the sense of paying interest or dividends on stock but for mutual benefit through the application of co-operation, single tax, or other economic principles, may become a body corporate in the manner following:

Section 2. The parties proposing to form such

corporation shall file with the probate judge in the county in which it proposes to establish itself, a declaration in writing, setting out the name of said proposed corporation, the names of the charter members, and the purposes of said corporation.

Section 3. Upon the filing of such declaration the judge of probate shall issue to such corporation a charter which shall be perpetual - subject to revocation at any time by the Legislature of Alabama.

Section 4. It may elect such officers as it may deem necessary, in such manner and for such terms as it may provide and remove the same at any time, and adopt such constitution and by-laws as it may see fit not in conflict with the Constitution and laws of this state.

Section 5. Such corporation shall have the power to buy, sell, and lease and mortgage real estate, to build and operate wharves, boats and other means of transportation and communication, build, erect, and operate waterworks, electric lighting and power companies, libraries, schools, parks, and do any other lawful thing, incident to its purposes, for the mutual benefit of its members; and may admit such other persons to participate in its benefits as it may see fit and upon such conditions as it may impose."

Also (Par. 4) that "Long prior to the year 1931", it adopted a constitution, made part of the bill, and "Acquired large acreages of land within and without the corporate limits of the Town of Fairhope", and that complainants were admitted to membership in such corporation "Prior to the year of 1931." The bill does not state that the complainants were among the incorporators, or that the land involved in this case was acquired after they became members and construing the allegations thereof most strongly against them, they were not, and so far as appears from said bill, their membership fee may have been used in aid of schools, library, wharves, waterworks, electric lighting or other purposes. Section 3 of said bill of complaint reads as follows:

"3. The declaration of incorporation filed in the office of the Judge of Probate of Baldwin County, Alabama, on August 9th, 1904, contained, among other recitals, the following:-

'The purpose of said corporation is to demonstrate the beneficency, utility and practicability of the Single Tax theory, with the hope of its general adoption by the governments of the future; in the meantime securing for ourselves and our children and associates the benefits to be enjoyed from its application, as fully as existing laws will permit, and to that end to conduct a model community, free from all forms of special privileges, securing to its members therein equality of opportunity, the full reward of individual efforts and the benefits of co-operation in matters of general concern, holding all land in the name of the corporation, and paying all taxes on the same and improvements and other personal property of lessees thereon, charging the lessees the fair rental value, and in the prosecution of its plans for the general welfare of its members to do and perform all the acts and exercise all the powers permitted under Section 5 of said Act.'

The charter of said corporation issued by the judge of Probate of Baldwin County, Alabama, on or about the 9th day of August, 1904, provided, among other things,

"That said corporation has the power to elect such officers as it may deem necessary, in such manner and for such terms as it may provide, and remove the same at any time, and adopt such Constitution and by-laws as it may see fit, not in conflict with the Constitution and laws of this State. Said corporation shall have the power to buy, sell and lease real estate, to build and operate wharves, boats and other means of transportation and communication, to build, erect, and operate waterworks, electric lighting and power companies, libraries, schools, parks, and to do any other lawful thing incident to its purpose for the mutual benefit of its members; and may admit such other persons to participate in its benefits as it may see fit to upon such conditions as it may impose.'"

And the preamble and Articles 1, 2 and 3 of the Constitution adopted (Exhibit "A" to the bill) read as follows:-

"PREAMBLE.

Believing that the economic conditions under which we now live and labor are unnatural and unjust, in violation of natural rights, at war with the nobler impulses of humanity and opposed to its highest development; and believing that it is possible by intelligent association, under existing laws, to free ourselves from the greater part of the evils of which we complain, we, whose names are hereunto subscribed, do associate ourselves together and mutually pledge ourselves to the principles set forth in the following constitution.

ARTICLE I - NAME.

The name of this organization shall be
FAIRHOPE SINGLE TAX CORPORATION.

ARTICLE II - PURPOSE.

Its purpose shall be to establish and conduct a model community or colony, free from all forms of private monopoly, and to secure to its members therein, equality of opportunity, the full reward of individual efforts, and the benefits of co-operation in matters of general concern.

ARTICLE III - MEMBERSHIP.

Sec. 1. Any person over the age of eighteen years whose application shall be approved by the Executive Council and who shall contribute to the Corporation one hundred dollars, shall be a member of the Corporation; provided that on petition of ten per cent of the qualified membership filed with the secretary within thirty days after action on any application by the Executive Council, such application shall be submitted to a vote of that membership.

Sec. 2. The husband or wife of a member shall, upon signing the constitution, also be considered a member and entitled to vote in the government of the Corporation, while such relation exists in fact; but only while such member remains in good standing.

Sec. 3. Any member against whom complaint of violation of the spirit and purpose of the Corporation, or invasion of the rights of its members, is preferred in writing by ten per cent of the membership, may be

expelled by the Executive Council, after full investigation of the charges preferred. Such investigation shall be public, and the accused shall be entitled to be represented by counsel.

Sec. 4. In case of the expulsion of a member the Corporation shall return to him in lawful money of the United States, the amount contributed by him to the Corporation.

Sec. 5. Certificates of membership shall be transferrable only on the books of the Corporation, to persons acceptable as members."

The dominant purpose of this organization was to demonstrate the feasibility of Single Tax by its application, as far as the Constitution and laws of this state would permit.

How was it intended to demonstrate the benefits of Single Tax? By establishing a model community, platting the land, establishing parks, schools, public buildings, and doing other things beneficial for the members? Clearly not, as these things were merely incidentals. It was by the leasing of lands not needed for public purposes, (for the right of eminent domain was reserved to condemn even leased lands for public purposes) at a rental to be fixed annually, equal to the value of use of such land, not taking into consideration the improvements thereon, such rental to be used in the payment of taxes levied thereon by the State and County, which practice was afterwards extended to municipal taxes, the remainder to be used for the common benefit of the community, which under Article 15 might, at the discretion of the Executive Council and on such terms as it saw fit to impose, be extended to non-members.

It is clear that parks, public schools and buildings, paying no ~~rent~~, could not demonstrate the single tax idea. This

48 N.E. 927
79 Pac. 780
22 Iowa 351
63 Pa. St. 489
77 Ill. 325
56 Atl. 272
60 Atl. 1134
48 Mo. 361
33 Atl. 112
79 Ill. Apps. 439 "

Continuing, this outstanding authority, in Section 1156, says:

"The use and control of public parks, whether directly by the officers of the municipal corporation, wherein or near which such parks are located, or by commission or board of commissioners chosen either by the City or by authority of the Legislature as may be provided, is subject to the restrictions in the dedication or donation, if so acquired, the limitations imposed by authority of the state, and the further general limitation that the uses shall be reasonable and not inconsistent with the uses and purposes of their establishment."

Should the City authorities propose to lease the privilege of placing advertising signs in the parks, thereby spoiling their beauty, or the sale, or exhibition of things objectionable, it is not unreasonable that the majority of the voters should have a voice in putting a stop to same.

It is not only a part of public policy that the electorate of a municipality should name its servants, but also have control of their actions in certain matters touching the public good.

(1) They must vote on the question of incorporation, Code, 1923, Section 1745.

(2) Also on the extension of the boundaries thereof, Code, Sections 1765 and 1772.

(3) Likewise, in the consolidation of two municipalities, Code, Sections 1822 and 1861.

(4) Sale or lease of public utilities, Code Section 2061.

(5) Sale of bonds for public improvements,

Hence when the trustees refused to hold the election provided for in Article 6 of the Constitution, they were rightly removed and others vested with such authority. The same section also authorizes the Corporation to "Adopt such constitution and by-laws as it may see fit, not in conflict with the Constitution and by-laws of this State", and Section 5 authorizes such Corporation:

"To buy, sell, lease and mortgage real-estate * * * and do any other lawful thing incident to its purposes, for the mutual benefit of its members, and may admit such other persons to participate in its benefits as it may see fit, and upon such conditions as it may impose."

Therefore the Corporation had no authority to adopt a provision in its constitution prohibiting the sale of real estate and it might admit lessees, though not members, to participate in the affairs of the corporation, upon such terms and conditions as it saw fit to impose.

To sum the whole matter up, as Andy would say "In a couple of nut shells", it was practically the unanimous wish of those on the ground and best able to judge of what was best, that the management of the parks should be entrusted to the municipality, and in order that the corporation might be relieved of state, county and municipal taxes thereon and assessments for paving and sewerage for which it might be liable, it was necessary to vest the title in such municipality, which was done with carefully worded reasonable limitations, so that while in form, a conveyance, it was in effect merely a transfer of management and an additional assurance that such property should forever remain devoted to the purposes

for which it was intended, regardless of the fortunes of such corporation.

We respectfully submit that such action was not only wise, but legal, and should stand.

Webb & Shepard

ATTORNEYS FOR FAIRHOPE SINGLE
TAX CORPORATION.

the Court having any equitable claim, except those who were members of the order at the date of dissolution. It follows that such persons and their representatives are entitled to the property to the exclusion of the heirs of the grantor.'

What are the equitable rights of the interested parties in this case? Is it right that the lands which Joseph Fels gave the corporation for the purpose of testing out the principles of the single tax should be made the booty of a discontented member of the corporation? In the cases just cited the property was paid for out of the funds of the order. No persons before the Court had any equitable claim except the members of the order, and they were manifestly entitled to the property. But here the lands of the corporation were derived in large measure by pure gift; they can in no wise be attributed to the thrift or contributions of the members, and to the donors the lands should in equity revert upon the dissolution of the corporation, should that fatality ever ensue.

Gray on Perpetuities, Sec. 45(a), Sec. 47,
Mott v. Seminary, 129 Ill. 403,
Acklin v. Paschal, 48 Tex. 147.
Church of Jesus Christ v. U.S. 136 U.S. 1,
35 L.R. A. (N.S.) 895, note.

In the case at bar, this principle is peculiarly applicable. The bill shows that there are eighty-four members of the corporation, each of whom has paid \$100.00 into the funds of the corporation, on an aggregate of \$8,400.00. This money was invested in 140 acres of land, and approximately 3860 acres of land, worth many thousands of dollars, have been given to the corporation for the purposes set out in its declaration of incorporation. The declaration shows that it was not intended that the stockholders should reap a pecuniary benefit from its ownership of this property, and yet the complainant, after inducing this gift for the purposes set out in the declaration of incorporation, and after he and the other members of the corporation represented that this could and would be accomplished and that they would and should not receive any pecuniary benefit therefrom, now seeks to put an end to the use for which the property was donated, and convert the entire value of these gifts to the personal pecuniary benefit of himself and associates. The effort simply is to obtain from the donors an enormous property upon false pretenses made in the most solemn form and under the guise of humanity. The accomplishment of this result would certainly shock the common honesty of mankind.

McDonnell vs. Alabama Gold Life Ins.Co.,
85 Ala., 401."

We earnestly insist that it is unthinkable that it ever was intended that non-member lessees, whose leases might be for a term of ninety-nine years, *far beyond the lives of the incorporators*, would ever be called upon to suffer the loss of the use of the parks, because forsooth, the corporation had become bankrupt, or its members desirous of winding it up and dividing the spoils, *or the membership fees not paid for profit, be considered as investment in property rights.*

When the small band originally founding this colony purchased a comparatively small acreage on the Eastern Shore, although they had fair hope they probably did not envisage the thriving municipality that was to be, and with the passing years it was in order and reasonable to adapt measures and policies suited to changing conditions. Hence when the roads, which had been platted on its lands, became public roads, they were turned over to the County, and after they became streets, to the municipality. The Court not only takes judicial knowledge of the Town of Fairhope and its location, but likewise has personal knowledge that it is a health and pleasure resort, rather than an industrial center, and to best subserve the interest of its tenants, whether members or not, and promote the general welfare, it was neither prudent nor practicable to confine the use of the parks, which included the entire beach, to its own members, and it was never so intended. Article 12 of the Constitution set out in Paragraph 7 of the bill of complaint, reads as follows:-

"Article 12. Ample provision shall be made in platting the lands of the corporation for land for parks and all other public purposes as rapidly as may be, lands thus intended shall be improved and beautified and schools, libraries, public halls, natatoriums, etc. established and maintained at the expense of the

corporation for the free use and enjoyment of the members and their children."

And parks were designated for public purposes, whereas schools, libraries, public halls, natatoriums, etc., established and maintained at the expense of the corporation, were free to the use and enjoyment of the members and their children, but a charge might be made for the use of same by others.

As before stated, the provision of the Constitution against individual ownership was intended to apply to lands held for leasing, and never to that donated for the public benefit, as, for example, a site for a school house, rights of way for public thoroughfare and the like, and as to the parks anything that would aid the altruism of this unusual organization in securing their permanency and attractiveness was a consummation devoutly to be wished in that connection, as well as ^{for} the public good.

As pointed out in the demurrer, the effect of this carefully guarded conveyance was not more than to transfer the management of this park property to the municipality, which, by reason of its greater powers and resources, is in a position to handle same to the best advantage, ~~thereby~~ relieving the Fairhope Single Tax Corporation of heavy taxation and expense of maintenance, thereby enabling it to apply that money saved for the good of its tenants and the public, by aiding education or lowering rentals, or even in some cases not exacting same in a period such as that through which we are passing. By such saving and the enormous

outlay which, in time, it would be called upon to make for paying and sewers, would likewise enable it to continue to pay the municipal and poll taxes of its tenants, which it is not required to do under the Constitution.

As a last straw, the complainants, by way of amendment, grab at one of the wisest and reasonable provisions of the conveyance reading, as follows:-

"a. That in case of disapproval of any detail of park management evidenced by a petition filed with the body in control of the parks, signed by 10% of the qualified electors, the question as framed must be submitted to vote of the electors and the body in control of the parks shall be guided by the wishes of a majority as expressed by their votes and the filing of any such protest shall estop action upon any matter with which such petition shall deal until the same is voted upon."

As has been pointed out, this is not a purchase in the usual sense by the municipality, but more of a donation, and the donor very well made the carefully worded conditions embraced in the conveyance, and in this instance, did not even reserve to itself the power to dictate, but left it to the voice of the people living in the municipality, regardless of whether or not they are members or tenants of the Fairhope Single Tax Corporation, and even then the municipal authorities, responsible to the people, are not compelled to accede to the wish so expressed, but may instead, if preferred, surrender control of these parks.

McQuillen on Municipal Corporations, Section 1155, says:

"The use and control of parks may be subject to the restrictions contained in the grant of land therefor", citing:

48 N.E. 927
79 Pac. 780
22 Iowa 351
63 Pa. St. 489
77 Ill. 325
56 Atl. 272
60 Atl. 1134
48 Mo. 361
33 Atl. 112
79 Ill. Apps. 439 "

Continuing, this outstanding authority, in Section 1156, says:

"The use and control of public parks, whether directly by the officers of the municipal corporation, wherein or near which such parks are located, or by commission or board of commissioners chosen either by the City or by authority of the Legislature as may be provided, is subject to the restrictions in the dedication or donation, if so acquired, the limitations imposed by authority of the state, and the further general limitation that the uses shall be reasonable and not inconsistent with the uses and purposes of their establishment."

Should the City authorities propose to lease the privilege of placing advertising signs in the parks, thereby spoiling their beauty, or the sale, or exhibition of things objectionable, it is not unreasonable that the majority of the voters should have a voice in putting a stop to same.

It is not only a part of public policy that the electorate of a municipality should name its servants, but also have control of their actions in certain matters touching the public good.

- (1) They must vote on the question of incorporation, Code, 1923, Section 1745.
- (2) Also on the extension of the boundaries thereof, Code, Sections 1765 and 1772.
- (3) Likewise, in the consolidation of two municipalities, Code, Sections 1822 and 1861.
- (4) Sale or lease of public utilities, Code Section 2061.
- (5) Sale of bonds for public improvements,

Code 2258 and 2259, under which last Section, Item 19, provides, among the purposes for which such bonds may be issued, "Purchasing or condemning of necessary land for parks."

(6) Sale of electric lighting plant.

(7) Reduction of City limits, Code, Section 2419.

Moreover, there may never be any need for the exercise of this power by the electorate and hence the question is now moot.

"VOX POPULI VOX DEI"

As further indication of the fact that the payment of the membership fee was not intended to vest in the holder an interest in the property of the Corporation in proportion to the number of members thereof, is conclusively shown not only by what has already been said, but by the fact that, though in the beginning such property may have been worth only a few dollars and subsequently millions, the cost of membership would remain the same, and as further indicating that it was merely intended to give the member a voice in the affairs of the association, the husband or wife was also entitled to the privileges of a member, and in case of expulsion the member was only entitled to the return of the membership fee.

Section 4 of the Act under which respondent was incorporated, reads:-

"Section 4. It may elect such officers as it may deem necessary, in such manner and for such terms as it may provide and remove the same at any time, and adopt such constitution and by-laws as it may see fit not in conflict with the Constitution and laws of this state."

Hence when the trustees refused to hold the election provided for in Article 6 of the Constitution, they were rightly removed and others vested with such authority. The same section also authorizes the Corporation to "Adopt such constitution and by-laws as it may see fit, not in conflict with the Constitution and by-laws of this State", and Section 5 authorizes such Corporation:

"To buy, sell, lease and mortgage real-estate * * * and do any other lawful thing incident to its purposes, for the mutual benefit of its members, and may admit such other persons to participate in its benefits as it may see fit, and upon such conditions as it may impose."

Therefore the Corporation had no authority to adopt a provision in its constitution prohibiting the sale of real estate and it might admit lessees, though not members, to participate in the affairs of the corporation, upon such terms and conditions as it saw fit to impose.

To sum the whole matter up, as Andy would say "In a couple of nut shells", it was practically the unanimous wish of those on the ground and best able to judge of what was best, that the management of the parks should be entrusted to the municipality, and in order that the corporation might be relieved of state, county and municipal taxes thereon and assessments for paving and sewerage for which it might be liable, it was necessary to vest the title in such municipality, which was done with carefully worded reasonable limitations, so that while in form, a conveyance, it was in effect merely a transfer of management and an additional assurance that such property should forever remain devoted to the purposes

A. E. SCHALKENBACH, E. YANCEY
COHEN, and W. R. F. CALL,

Complainants,

vs.

THE FAIRHOPE SINGLE TAX CORPORATION, a corporation, THE TOWN OF FAIRHOPE, a municipal corporation, THE TOWN COUNCIL OF FAIRHOPE, M.F. NORTHROP, as Mayor of the Town of Fairhope, and NORVIN DU BROCK, J. E. GASTON, R. P. GREGG, HOWARD RUGE, and ELOF M. TUVESON, as Members of the Town Council of Fairhope.

Respondents.

IN THE CIRCUIT COURT

OF

BALDWIN COUNTY,

ALABAMA.

IN EQUITY.

BRIEF FOR COMPLAINANTS ON DEMURRERS.

Smith & Johnston,
Solicitors
for
Complainants.

The bill of complaint in this case is by three members of the Fairhope Single Tax Corporation against the Fairhope Single Tax Corporation, and the Town Council of Fairhope, and the purposes of the bill is to declare certain resolutions ~~and~~ elections of the Fairhope Single Tax Corporation null and void, and to declare null and void a certain deed executed by the Fairhope Single Tax Corporation conveying certain lands to the town of Fairhope as null and void, and to require the surrender of the deed for cancellation. The bill alleges that the Fairhope Single Tax Corporation was incorporated on August 4, 1904, under and by virtue of the General Acts of the State of Alabama, of 1903, Page 342, in the County of Baldwin, State of Alabama; that the declaration of incorporation filed in the office of the Judge of Probate of Baldwin County, Alabama, on August 9, 1904, contain, among other recitals, the following:

"The purpose of said corporation is to demonstrate the beneficency, utility and practicability of the Single Tax theory, with the hope of its general adoption by the governments of the future; in the meantime securing for ourselves and our children and associates the benefits to be enjoyed from its application, as fully as existing laws will permit, and to that end to conduct a model community, free from all forms of special privileges, securing to its members therein equality of opportunity, the full reward of individual efforts and the benefits of co-operation in matters of general concern, holding all land in the name of the corporation, and paying all taxes on the same and improvements and other personal property of lessees thereon, charging the lessees the fair rental value, and in the prosecution of its plans for the general welfare of its members to do and perform all the acts and exercise all the powers permitted under Section 5 of said Act."

The charter of said corporation issued by the Judge of Probate of Baldwin County, Alabama, on or about the ninth

day of August, 1904, provided, among other things,

"That said corporation has the power to elect such officers as it may deem necessary, in such manner and for such terms as it may provide, and remove the same at any time, and adopt such Constitution and by-laws as it may see fit, not in conflict with the Constitution and laws of this State, Said corporation shall have the power to buy, sell and lease real estate, to build and operate wharves, boats and other means of transportation and communication, to build, erect and operate water works, electric lighting and power companies, libraries, schools, parks, and to do any other lawful thing incident to its purpose for the mutual benefit of its members; and may admit such other persons to participate in its benefits as it may see fit to upon such conditions as it may impose."

That pursuant to the authority conferred by the General Acts of the Legislature and by the charter of the said corporation, a constitution was adopted by the corporation long prior to 1931, the time of the conveyance in question, and a copy of the constitution is attached to the bill of complaint; That the complainants were admitted to membership in the said Fairhope Single Tax Corporation prior to 1931, and each contributed to said corporation One Hundred Dollars (\$100.00), as required by the constitution, and were members in good standing at the time the matters complained of in the bill occurred, and have been ever since, and are now members of good standing of the said corporation; that to accomplish and demonstrate the object of said corporation, the Fairhope Single Tax Corporation required large acreages of land, and that the same were used and occupied by the corporation, and its members a long time prior to 1931, and that among said lands were the lands conveyed by the conveyance attacked by this bill.

The bill further alleges that Article 12 of the constitution of said corporation provides as follows:

"Ample provision shall be made in platting the lands of the corporation for land for parks and all other public purposes as rapidly as may be, lands thus intended shall be improved and beautified and schools, libraries, public halls, natoriums, etc., established and maintained at the expense of the corporation for the free use and enjoyment of the members and their children."

And that pursuant to the mandates of said article, of said constitution, the corporation set aside and improved, and beautified the lands conveyed by the conveyance attacked, as parks for the free use and enjoyment of members of said corporation, and their families, and that said land was so used, up until the time of the execution of the deed referred to in the bill of complaint; that under Section 1 of Article 7 of the constitution, it is provided that there should be no individual ownership of land within the jurisdiction of the corporation, but the corporation should hold as trustee for its entire membership, title to all lands upon which its community shall be maintained; that under Section 1 of Article 4 of the constitution of said corporation the supreme authority shall always be vested equally in the membership of the corporation to be exercised through the initiative and referendum provided for in said constitution, and that under Section 2 of Article 4, every member not in arrears, is entitled to one vote at all elections involving changes in the constitution. In matters, however, concerning the election of officers, and local administration of affairs, only those members are entitled to vote who are in person on the corporation grounds on the day of the election, and who are not in arrears; that under Section

1 of Article 6 of the constitution, ten per cent of the qualified membership may propose a measure which must be submitted to the membership, with the provision however that on amendments proposed to the constitution, thirty days notice must be given to the membership of such election. That under Section 7 of Article 6 of the constitution, it is provided that the affirmative votes of three fourths of the members is necessary to amend or repeal any part of the constitution; that under Section 10 of Article 5, of the constitution the Executive Council of said corporation shall have general charge of the administration of affairs of the corporation, with the mandate that they shall perform all duties necessary to the carrying out of the principles and purposes set forth in the constitution. The bill further alleges that one of the duties imposed by said constitution is the laying out of parks, improving and beautifying same, which shall be established and maintained at the expense of the corporation for the free use and enjoyment of the members and their families, and that lands referred to in the bill of complaint were so laid out as parks, improved and beautified by said corporation for the free use and enjoyment of the members of said corporation and their families.

The bill further alleges that on the 21st day of September, 1931, the Executive Council of said corporation adopted a resolution that the lands referred to in the bill of complaint and which have been established and maintained by the said corporation as parks for the free enjoyment of the members of said corporation, and their families, should

be conveyed to the town of Fairhope, subject to the following terms and conditions:

1. That the property conveyed shall be forever used as public parks of the Town of Fairhope, according to general usage of public parks and according to the wishes of a majority of the qualified electors of the Town, provided that in such use there shall be no special privileges of any kind to individuals or organizations and no profit to individuals, but the latter shall not apply to use made of any concession which may be given by the Town Council or other body in which control of the parks may be placed, for the fuller enjoyment of same by the public and awarded for terms not exceeding a year, on a competitive basis; but, provided further, that the natural function of gullies included in conveyance as drainage ways for water from streets and other public and private lands, shall be recognized as a proper use of same in conjunction with their use as parks; also that if in the future the Town decides upon putting in a sewer system and the Town Council and engineers agree that the best location for a disposal plant as an essential part of the sewer system is in or along the gully north of the cemetery as now located, such use may be made of the needed land, with laying of such sewer lines leading to the same and pipe lines for carrying the effluent therefrom as may be necessary, but modern methods shall be made use of to render the same inoffensive.

2. That in case of disapproval of any detail of park management evidenced by a petition filed with the body in control of the parks, signed by 10 per cent of the qualified electors, the question as framed by petitioners must be submitted to vote of the electors and the body in control of the parks shall be guided by the wishes of a majority as expressed by their votes and the filing of any such protest shall estop action upon any matter with which such petition shall deal until the same is voted upon.

3. That the land conveyed west of Bay View Street, north of Fairhope Ave., bounded on the north by Magnolia Avenue, and the Swift land and extending on the west to the top to the bluff above Mobile Bay, shall be designated and known as Henry George Park.

4. That the party of the first part shall be entitled to place and maintain at its expense suitable markers, (subject to approval of the party of

the second part) setting forth that the lands on which the same are placed were donated by it to party of the second part for park purposes.

5. That full riparian rights to the land conveyed touching the margin of Mobile Bay shall pass to party of the second part for appropriate development and use in harmony with the conditions of this conveyance, but unless and until the party of the second part acquires the frontage used in connection with Fairhope Wharf, not included in this conveyance, no wharf shall be permitted to be built in competition with wharf owned and controlled by party of the first part, its successors or assigns.

6. That should the party of the second part cease at any time to use the lands conveyed in harmony with the conditions of this conveyance the title to the same shall immediately revert in the party of the first part.

The bill further alleges that thereafter on September 23rd, 1931, fifteen members of said corporation filed with the Executive Council a petition asking for the calling of a special referendum election to be held at the office of the Treasurer of said corporation on September 25th, 1931, between the hours of one and six o'clock for a submission of the following question:

"Shall the action of the Executive Council, Monday, September 21st, 1931, relative to the transfer to the town of Fairhope of park lands of the corporation (including gulley) be approved."

And that on said date the Executive Council of said corporation adopted the resolution calling for an election as asked. The bill then alleges that on September 25th, 1931, an election was had upon the question above set out, and that only members on the grounds of the corporation that day, voted upon the question; that at said time there were one hundred and thirty-five (135) members of said corporation not in arrears, and that fifty-two (52) of said members were not on the grounds of

of said corporation on the day of said election, and did not therefore vote; that there were only fifty votes cast, which were less than the majority of the membership, and that forty-six voted, "Yes," three "No," while one ballot was spoiled; that on the 29th of September, 1931, the President of the Fairhope Single Tax Corporation purporting to act for and on behalf of said corporation, did in the name of said corporation execute a deed to the town of Fairhope, a municipal corporation, attempting to convey the lands referred to in the bill of complaint which had been laid out, established and maintained as parks for said corporation for the enjoyment and use of the members and their families, a copy of which deed is attached to the bill of complaint.

The bill further alleges that at and prior to the adoption of the resolution of September 21st, 1931, the trustees of said corporation, namely Delia K. Bancroft, Annie B. Call and Alice M. Smith, strenuously objected to the passage of such resolution, to the calling of an election thereon, and to the conveyance of said parks, without submitting the matter to the vote of the entire membership of the corporation, and without the passing of an amendment to the constitution of said corporation permitting the conveyance of said property, and that the complainants have always objected to said conveyance as violative of the constitution of said corporation and have not acquiesced to the same, and that A. E. Schalkenbach, one of the complainants, was in Chicago, Illinois, on September 21, 1931, and that your other two complainants were on the corporate grounds but declined to vote or participate in the

election; that the trustees above mentioned declined to hold said election, and that other persons were selected by said Executive Council to act as trustees in the holding of said election, and for declining to hold said election, the above mentioned trustees were removed from office.

The bill then alleges that the requirement to establish and maintain parks for the free use and enjoyment of the members of said corporation and their families was a constitutional duty imposed upon the officers of said corporation, and that the establishment and maintenance of said lands as parks was the performance by the officers of a constitutional duty; that a conveyance of said parks could only be authorized by an amendment to the constitution of said corporation, in which the entire membership had a right to vote, whether they were on the corporate grounds on election day or not, and that thirty days notice had to be given on an election to be held on the question of an amendment ~~of~~ ^{to} the constitution, and that to amend the constitution, and to authorize the conveyance of the parks it was necessary that the affirmative votes of three fourths of the members should authorize the same.

The bill then alleges that thirty days notice of said election was not given as required by Section 1 of Article 6 of the constitution; that the entire membership did not have an opportunity to vote upon said question, and that three fourths of the membership did not affirmatively vote to convey the lands. That the resolution of September 21st, 1931, the calling of an election of September 23, 1931,

to be held on September 25, 1931, the election on September 25th, 1931, and that the deed conveying said lands maintained and used as parks by said corporation was in violation of the constitution of said Fairhope Single Tax Corporation, and was void, and that the town of Fairhope acquired no title to said property. The bill further alleges that as ^{the} a title to all the lands of the said corporation, ~~it~~ is held in trust for the entire membership of said corporation, the legal title thereto is in said corporation while the equitable title to said lands is in the entire membership, including the complainants, and that your complainant's equitable interest in said lands is a very valuable property right, which cannot be taken away from them except by due provision of law, or by their consent, and that the constitution of said corporation is in effect a contract between the membership of said corporation, and the corporation, and its membership cannot be deprived against their consent of their equitable interest in the lands referred to except in the manner agreed upon, which in this particular instance would be through an amendment to the constitution. The bill then alleges that the Executive Council have general charge of the administration of the affairs of the Fairhope Single Tax Corporation, and is required to perform all the duties necessary to the carrying out of the principles and purposes of said corporation, and that the complainants, personally, and through their representatives, prior to September 21, 1931, objected to the Executive Council taking any steps toward conveying the lands, above referred to, to the Town of Fairhope, and they

objected to the conveyance upon the grounds that the method proposed would be in violation of the constitution, and that the Executive Council ignored the protests of the complainants and their representatives, and the protests of the trustees, and insisted that the method that they pursued, and all proceedings in connection with the conveyance referred to were in strict accordance with the constitution, and that the Executive Council always has been and are now in favor of said conveyance, and that said conveyance was made under their direction, and that they will take no steps to cancel said deed or to undo the injury which has been done to the corporation and its membership, and that they have refused to do anything to establish the illegality of the conveyance of said lands.

The bill as amended further alleges that the Fairhope Single Tax Corporation had no legal authority to make said conveyance and dedicate said lands and parks for public use, and that said action on its part was wholly ultra vires and void; and further, that the alleged deed executed by the Fairhope Single Tax Corporation to the Town of Fairhope purporting to convey and dedicate said lands as public parks was made upon the following condition:

"2. That in case of disapproval of any detail of park management evidenced by a petition filed with the body in control of the parks, signed by 10% of the qualified electors, the question as framed must be submitted to vote of the electors and the body in control of the parks shall be guided by the wishes of a majority as expressed by their votes and the filing of any such protest shall estop action upon any

matter with which such petition shall deal until the same is voted upon. "

and then averred that the Town of Fairhope is a municipal corporation, organized and existing under the laws of the State of Alabama, and that the control of its municipal affairs is reposed in the Town Council of Fairhope, which is the governing body of said town, and that such Council has not, nor did have, any legal authority to comply with a petition signed by 10% of the qualified electors of such town objecting to any donation of park management by submitting the question to the qualified electors of such municipality, and that such an act on the part of such Town Council would be ultra vires and void, and that the Town of Fairhope and its Town Council had no legal authority to accept a deed conveying and dedicating such property on any such condition as above set out, and therefore said conveyance was void.

From the foregoing resume of the bill of complaint it will be seen that the Fairhope Single Tax Corporation was incorporated, chartered and organized pursuant to authority granted by the Legislature, and that it was formed for certain definite purposes set out in the charter and constitution, and that pursuant to the power given by the Legislature, it adopted a constitution defining the powers of the corporation itself, and prescribed the methods of procedure and the essential requirements by which the constitution might be changed. It designated where the supreme authority should be, and how it should be exercised,

and how it could be changed. The Legislature gave it power and authority to do this. It could then adopt in this constitution such restrictions as it saw fit, upon disposing of its property.

14 A - Corpus Juris, 526, Par. 2433.

In Article 12 of the Constitution as set out above, it provided in the form of a mandate that the lands intended for park purposes shall be improved and beautified, etc., established and maintained at the expense of the corporation for the free use and enjoyment of the members and their children, and under Section 1 of Article 7, it was provided that there should be no individual ownership of land within the jurisdiction of the corporation, but the corporation shall hold as trustee for its entire title to all lands upon which its community shall be maintained. By these provisions of the constitution it was provided how the parks were to be maintained, and for whose use they should be maintained, and how the lands should be held and by whom. By these restrictions the corporation could not convey the lands to someone else or permit it to be used for other purposes without amending the constitution.

"A corporation formed for a special purpose and whose property is to be used only for such special purposes cannot convey such property where the effect of conveyance would be to free it from its use for such special purposes. "

14 A - Corpus Juris, 526, Par. 2430.

From the quoted part of the declaration of incorporation cited above, and in the bill of complaint, the

purpose of the corporation is given and following it is the following:

"And to that end to conduct a model community, free from all forms of special privileges, securing to its members therein equality of opportunity, the full reward of individual efforts, and the benefits of corporation in matters of concern, holding all lands in the name of the corporation. "

From this it will be seen that the corporation was organized for a particular purpose, that it assumed particular obligations to its members and imposed particular duties on its officers and particular restrictions on the disposition of its property. The bill alleged that the transfer of the property in the manner in which it was done was contrary to its general purpose, and that the Executive Council had no power to convey it, and also that the methods prescribed in the constitution were not carried out. This would make the conveyance void.

"To the general rule authorizing free alienation of its property by a corporation, there are many exceptions arising from the nature of the particular corporation, the purposes for which they are created, and the duties and liabilities imposed on them by their charters. "

14 A - Corpus Juris, 526, Note 47.

Maben vs. Gulf Coke, etc. Co., 173 Ala., 259.

35 L. R. A. N.S. 396.

"A corporation cannot convey, lease or otherwise dispose of its property if the terms of its charter or the duties imposed on it are such as to impliedly prohibit such transfer."

12 A. Corpus Juris, Page 526, Note 45.

parks for the free use and enjoyment of its members and their families, and that it should hold title to the land in trust. It is the contention of the complainants in their bill that the corporation or the Executive Council would have no power under the constitution as it existed, to convey its park property to the town of Fairhope and that the bill alleges such incapacity, and the above authorities sustain it.

As set out above in this brief, the constitution placed certain requirements and provided certain methods for changing the constitution. It provided under Section 1 of Article 4, that supreme authority was vested equally in the membership to be exercised through the initiative and referendum provided for, and under Section 2 of Article 4, each member not in arrears is entitled to one vote at all elections involving changes in the constitution. And under Section 1 of Article 6, provided that on all amendments proposed to the constitution, thirty days notice must be given to the membership, of such election, and under Section 7 of Article 6 it is provided that the affirmative vote of three fourths of the membership is necessary to amend or repeal any part of the constitution.

If the title was required to be held in the corporation by the constitution, from the above authorities, the constitution would have to be amended before it could be transferred. The bill alleges and shows that thirty days notice was not given to the membership at the election on September 21, 1931, and that each member not in arrears was not given the privilege of voting on the resolution, and that the affirmative votes of three fourths of the membership was not had on the reso-

lution, but that the resolution was passed on September 21st, 1931, by a vote of only forty-six of the one hundred and thirty-five members, and that only fifty-two were on the grounds to vote, and that the election was held on the 25th day of September, 1931, and was called on September 23, 1931, and the bill further alleges that such a question was a constitutional question, and not one of local administration. So it is clear that the bill shows that the mandates of the constitution were not carried out, and that if the allegations in the bill were true, that the conveyance is void.

The complainants also contend that a dedication or attempted dedication of the lands in question to the town of Fairhope was beyond the power and legal authority of the corporation, and that it was ultra vires and void. From the foregoing quotations from the constitution as to the holding of title to lands of the corporation, and the purposes of the corporation, it is evident that no authority was given to dedicate the property of the corporation, and that any implied authority to do so would be directly in contravention of the spirit and purposes and declarations of the constitution and articles of incorporation; Therefore, if the deed be construed as a dedication, it is void.

"And dedications cannot be made by a corporation not having express or implied authority to dedicate its property."

14 A. Corpus Juris, Pg. 530, Par. 2441.

Westpoint vs Bland, 56 SE. 802.

Stacey vs. Glenn Ellyn Hotel, etc., Co.,
79 NE. 133.

8 L. R. A. N.S. 966.

"One having no power to alienate land, cannot dedicate it."

Burleson vs. Town of Hamilton, 213 Ala. 198.

As set out in the foregoing part of this brief, complainants further contend that the conditions in the deed to the town of Fairhope was void, because the town of Fairhope and the Town Council of Fairhope, did not have legal authority to comply with the conditions in said deed and that any such act on the part of the town of Fairhope would be ultra vires and void. ~~One~~ conditions in said deed ~~are~~ as follows:

"That in case of disapproval of any detail of park management evidenced by a petition filed with the body in control of the parks, signed by 10% of the qualified electors, the question as framed must be submitted to vote of the electors and the body in control of parks shall be guided by the wishes of the majority as expressed by their votes, and filing of any such protest, shall estop action upon any matter with which such petition shall deal, until the same is voted upon."

This restriction is placed upon the town of Fairhope, a municipal corporation, organized under the general laws of Alabama. Under the laws of Alabama, such municipal corporation would have no authority nor capacity to accept the land with such duties attached to it.

• A municipal corporation in the State of Alabama has only the power granted it by the Legislature, and can exercise those powers only in the manner permitted by the Legislature. •

Section 1739, et sequa, Code of Alabama 1923.

Under the laws of Alabama, the management and control of property, real and personal, belonging to the City and Town, are vested in the Town Council.

See Section 1908, Code of 1923.

The above quoted condition in the deed gives the control and management to citizens by means of a referendum ~~instigated~~ by 10% of the qualified electors of the city and town of Fairhope. This is contrary to the policy of this State, and the laws applicable to municipal corporations. There is no right of referendum vested in the citizens of the town incorporated in the laws of Alabama permitting them to control the management of the town, and its property, but such power vests in the Town Council only. If the town of Fairhope had no authority or power to abide by the condition above quoted in case of a disapproval of any detail of park management, evidenced by a petition filed with the body in control, signed by 10% of the qualified electors, then such a condition being beyond the power of the town of Fairhope, and being against the policy of the State of Alabama, with reference to municipal corporations, then such condition would make the deed void, as it is a condition subsequent, and would defeat any estate which may have been granted by the deed. The effect of this condition upon the deed is very similar to conditions often found in deeds from parents to their children, providing that the grantee support the parents during their lifetime, and such conditions have been uniformly held by the Courts to be conditions subsequent.

See First National Bank of New Brockton vs. McIntosh, 201 Ala. 649.

Sherill vs. Sherill, 211 Ala. 105.

No technical words are required in a deed to create a condition subsequent, but it depends upon the circumstances surrounding the conveyance, and the intention of the parties taken in the light of the purpose of the conveyance.

Seaboard Air Line Railway Company vs. Anniston Manufacturing Co. 186 Ala. 264.

First National Bank of New Brockton vs. McIntosh, 201, Ala. 649.

The above cases discuss the difference between the condition precedent, which in most instances is a mere restriction, and a condition subsequent, which defeats the estate.

"A condition subsequent is created by a conveyance wherein an estate vests on a condition, and may thereafter be defeated by non-performance of such condition or by happening of an event stipulated against, and when act is done or event happens, it defeats an estate already vested."

Lowery vs. May, 213 Ala. 66.

See, also, Woodley vs. Woodley, 201 Ala. 662. for another example of a condition subsequent.

It is clear from the circumstances surrounding the execution of this conveyance in question, that the parties contemplated the further carrying out of the purposes of the Fairhope Single Tax Corporation, and if the town of Fairhope failed to carry out such purposes, that they could be required to do so by a referendum instigated by 10% of the qualified electors.

This, plainly, is a condition subsequent, and the town of Fairhope being unable and without power, as shown above, to carry out this condition subsequent, such condition defeats any estate granted by this conveyance, and gives the complainants the right to go into equity.

Having demonstrated from the above and foregoing part of this brief that the Executive Council of the Fairhope Single Tax Corporation acted without authority and in contravention of the constitution and articles of incorpo-

ration of said corporation in conveying the property in question to the town of Fairhope and that such action was null and void, ultra vires, and beyond the capacity of the corporation to so convey, and that the town of Fairhope had no authority to, and could not accept the lands upon such conditions as were imposed in the deed, it is clear that the complainants bill has equity, and that they have sought the proper tribunal for relief. Treating the bill as one for mere cancellation of a void instrument effecting the title to real estate, equity would have jurisdiction of the bill.

Smith vs Rorey, 182 Ala. 540.

Davidson vs Brown, 215 Ala. 205.

And others cited therein.

In addition to this, as alleged it was provided in the constitution of the respondent that it should hold title to the land in trust for the benefit and enjoyment of its members, and their families. This also gives the bill equity as it is well settled that Courts of Equity in dealing with transactions between persons occupying fiduciary relations toward each other are not confined to cases in which there is any formal or relationship such as guardian and ward, but they apply this principle to all cases in which confidence is reposed by one party in another, and the trust or confidence is accepted, under circumstances which show that it was founded on intimate, personal, or business relations, existing between the parties which gives the one advantage or superiority over the other.

Cannon vs. Gilmer, 135 Ala. 302.

The case of Stead vs Kankaskie, 90 NE. 654, held that the trustees of Kankaskie commons were not public officers, but trustees of an educational and religious trust, the administration of which is within the jurisdiction of the Court of Chancery.

The Attorneys for respondent, in their brief, on pages 5 and 6, contended that Article 15 of the Constitution, which provides, "lands not desired for use by members may be leased to non-members, and any services which the corporation may undertake to perform for its members may be performed also for non-members at the discretion of the Executive Council, on such terms as it may provide", gives ample authority to the Executive Council for the course complained of in this proceeding, in that such practice would tend to demonstrate the single tax idea by such use by those who were not members. But this Article of the constitution did not provide that parks might be leased to non-members, or that the lands which the corporation was using to carry out its purposes could be leased to non-members, but what this article means, taking it in connection with the balance of the constitution, is that if the corporation owns lands which are not used for park purposes, that the corporation may lease it to non-members. This construction is entirely consonant with the remainder of the constitution and with the idea, promotion and demonstration of the Single Tax Colony theory. The conveyance which is attempted to be cancelled by this bill sets out specifically that the corporation had used this land for park purposes, and that the party of the second part, namely, the Town of Fairhope, was willing to take it over and continue such use. Consequently, such argument as advanced by the counsel for respondent is not applicable to the facts presented by the

bill, but merely argues the powers of the Executive Counsel to do some acts which are not brought in question. That this contention is sound is made clear by the provision in the constitution above referred to, that the lands are to be held in trust.

Taking up the respondent's demurrers to the bill of complaint, we find that there are seven grounds of demurrers assigned. The first is that the complaint is wanting in equity. The respondent evidently abandoned this ground of demurrer in its brief, as he did not attempt to argue it, nor cite any authorities defeating the jurisdiction of the Court of Equity over this controversy. It is clear that equity has ample jurisdiction for this purpose, as already shown in this brief.

Authorities cited supra.

The respondent's second ground of demurrer is to the effect that the bill shows that the respondent was fully authorized to execute the instrument referred to to the Town of Fairhope.

The third ground of demurrer is that it appears from the bill that the intent and effect of the deed is to make more effectual the purposes expressed in the constitution of the respondent, and that such was not in violation of its constitution.

The fourth ground of demurrer is that a greater public good will flow from the administration of the single tax theory when this property is conveyed to the Town of

Fairhope, thus relieving the Fairhope Single Tax Corporation of the burden of expenses and taxes.

The fifth ground of demurrer takes the point that there may be other parks operated by the respondent sufficient to supply the need.

The next ground of demurrer, namely, "A" assigned to Paragraph 15-B of the amended complaint, attacks said amendment, because the condition in the deed set up in said amendment does not compell the governing authorities of the Town of Fairhope to do anything of which it does not approve, but merely provides for the return of the control of the property to the Fairhope Single Tax Corporation, should such authority (Town of Fairhope), under the management of such parks, adopt a policy obnoxious to the majority of the electors in such municipality.

The last ground of demurrer attacks the bill as amended because the question is now moot, as it is presumed that the governing authorities will properly manage such parks.

It is apparent that the only one of the above grounds of demurrer which could properly be considered as raising the sufficiency of the bill of complaint is the first ground which says that the bill is without equity. The remainder of the grounds do not attack the sufficiency of the bill, but in effect are nothing more than arguments as to the proper construction to be placed upon the constitution and charter of the Fairhope Single Tax Corporation, in the consideration of the demurrers in this case.

It is difficult to conceive, as contended by the respondent's third ground of demurrer, how the true intent and effect of the transfer of the property in question can be considered to be making more effectual the purpose expressed in the constitution of the Fairhope Single Tax Corporation to furnish enjoyment to its members through a park system, merely because such transfer would relieve the Fairhope Single Tax Corporation of the burden of maintenance, taxation and assessments, when it is specifically provided in the constitution that the corporation shall hold title to the land in trust for its members and their families. It is clear from this provision that the originators of the corporation and the subsequent members reposed confidence and trust in the Fairhope Single Tax Corporation, because of its ideals as expressed in its Articles of Incorporation, and in its constitution, and by the restrictions placed on its operation and control in the constitution itself. If the respondents contention is that the purposes of the Fairhope Single Tax Corporation, as expressed in its constitution and articles of incorporation, could be more truly and effectually attained by permitting its property and its parks to be operated and controlled by a municipality, instead of by its members or itself, then such condition would be directly arguing against the very circumstances or reason for the existence of the Fairhope Single Tax Corporation, and the single tax theory itself, because its members could secure such purposes as the Town of Fairhope in its capacity as a municipality could offer

or perform, just as well by merely being citizens of the municipality as it could by becoming members of the Fairhope Single Tax Corporation. In other words, if the ideas and purposes of the single tax theory could be as effectually carried out by municipalities as by the Fairhope Single Tax Corporation itself, then the reason for the existence of the Fairhope Single Tax Corporation is immediately destroyed. So it is apparent that the members of the Fairhope Single Tax Corporation desired and intended by their articles of incorporation and constitution to conceive a form of community life, which could not be had from a mere municipality, and to develop these conceptions in their distinct and separate entity. The Acts of the Legislature of Alabama of 1903, page 342, which authorized the incorporation of Fairhope Single Tax Corporation, in Section 4, granted such corporation the power and authority to adopt such constitution and by-laws as it may see fit, not in conflict with the constitution and laws of this State. Pursuant to this authority and power, the Fairhope Single Tax Corporation adopted a constitution which is set out in the bill of complaint and in that constitution the powers of the governing body of the Fairhope Single Tax Corporation were set out, and the methods and procedure of changing those powers were set out. This constitution, therefore, defines the powers of the corporation itself. It had the power to adopt in this constitution such restrictions as it saw fit upon disposing of its property.

Authorities cited supra.

Article 12 of the constitution provides that, "Ample provision shall be made in platting the lands of the corporation for land for parks and all other public purposes * * * etc. established and maintained at the expense of the corporation for the free use and enjoyment of the members and their families. " This constitutional provision shows the intention of the incorporators that the corporation itself should establish and maintain its parks for the free use and enjoyment of the members and their families, and excluded any idea, impliedly or otherwise, that it was ever the intention to convey its property to third parties or to municipalities for them to operate, and the argument of the counsel for the respondent, on page 10 of their brief, to the effect that this conveyance was nothing more than a carefully guarded transfer of the management of the park to the municipality, which, by reason of its greater powers and resources, is in a position to handle same to the best advantage, thereby relieving the Fairhope Single Tax Corporation of heavy taxation and expenses of maintenance, is clearly in contravention of the provisions of the constitution and against its clearly expressed intentions and purposes. The admission that the municipality could operate the parks with a greater facility and with less expense, and for the greatest good to the public, is an admission that there is no reason for the Fairhope Single Tax Corporation, but is no argument that as long as the Fairhope Single Tax Corporation is existent and its constitution is in

in effect that such procedure or such acts are authorized by its constitution. As long as the corporation is in existence, and its constitution in effect, and until its constitution is amended, the corporation can act only as authorized by its constitution and the constitution must be adhered to, regardless of whether or not, under the changed conditions since the drafting of the constitution and its adoption, the Town of Fairhope could better operate parks than could the Fairhope Single Tax Corporation.

In Article 2, whose subject is "Purposes", the phrase is used, "and to secure for its members therein equality of opportunity, the full reward of individual efforts and the benefits of corporation in matters of general concern."

Section 1 of Article 8 provides that the corporation holds the lands as trustee for its members. The fact that the original membership adopting the constitution deemed it expedient to include Article 12 above referred to, clearly indicates that parks for free use and enjoyment of the members and their families were deemed necessary to the attainment of those nobler enjoyments of the purposes of the Fairhope Single Tax Corporation and the single tax theory. Running throughout the constitution were two thoughts, the first being that titles to all lands shall be in the corporation for the use, benefit and enjoyment of the whole membership, and the second being that parks should be created and maintained for the free use and enjoyment of the members and their families.

Section 10 of Article 5 provides that the Executive Council shall have general charge of the administration of the

affairs of the corporation, "And shall perform all other duties necessary to the carrying out of the principles and purposes herein set forth. " If it is their duty under Article 12 to create and maintain parks for the enjoyment and use of the members and their families, it certainly cannot be either their duty or within their power to donate the parks to the Town of Fairhope or dedicate the same for public uses.

Section 1 of Article 6 provides that, where amendments to the constitution are proposed, thirty days' notice must be given.

Article 4 provides that the supreme authority shall be vested equally in the members to be exercised through the initiative and referendum as provided in Article 6, and that each member not in arrears to the corporation shall be entitled to one vote, and one only, at all elections involving changes in the constitution.

Section 7 of Article 7 provides that the affirmative votes of three-fourths of the members shall be necessary to amend or repeal any part of this constitution.

It will be seen from the above that, before a constitutional question could be voted on, or a constitution amended, the above requirements must be carried out. The bill alleges that none of these requirements were carried out. The fact that Section 1 of Article 8 provides that the corporation shall hold as trustee for its entire membership the title to all lands upon which the community shall be maintained, and the fact that Article 12 provides that the parks shall be created and maintained for the free use and enjoyment of members

and their families, clearly shows that these matters are constitutional matters, and are not merely questions of local administration, and that before title can be given to someone else, and the duty of maintaining the parks delegated to someone else, the constitution must be amended, and that such is not a question concerning local administration of affairs which could be authorized by vote of only those members who are in person on the corporation grounds on the day of election.

Counsel for respondent argues on page 11 that this was a mere donation, and that the donor very well worded the conveyance and did not reserve to itself the power to dictate, but left it to the voice of the people living in the municipality, regardless of whether or not they were members of the Fairhope Single Tax Corporation. This argument is all the more reason why such a conveyance is against the constitution of the respondent, because it shows that the people living in the community of the Town of Fairhope, regardless of whether or not they are members of the Fairhope Single Tax Corporation, can dictate the management of the parks, thus directly opposing the constitution. The argument of counsel, on page 14 of his brief, summing up the whole matter, as he puts it, when he says that it was practically the unanimous wish of those on the ground, and best able to judge what was best, that the management of the parks should be entrusted to the municipality, and that while the conveyance was executed, it was in effect merely a transfer of management, is not pertinent to the question. Such argument might properly be made and

addressed to the members of the corporation in endeavoring to persuade them to change their constitution, and make it so that a municipality could be allowed to operate its parks, but the advisability of such a course is not one of law to be decided by the Court, but is one which should be left up to the members themselves in drawing their constitution, and if such is the best method of operating the parks, the members of the Fairhope Single Tax Corporation should change their constitution, but as long as the present constitution is in force and effect, prohibiting such transfer and management, then all argument as to the expediency of such course, is beside the question.

In conclusion, we wish to say that from the foregoing it is apparent that the bill shows the constitution has not been followed by the Executive Council, or the corporation itself, in transferring its park to the Town of Fairhope, and that, in doing so, the provisions of the constitution were directly violated, and that no authority or power existed in the corporation to transfer its ^{property} ~~power~~ in the manner alleged in the complaint; that the Town of Fairhope would not accept the deed with the condition contained therein, and had no power to carry them out, which made the deed void; that such a transfer is null and void, and that all proceedings connected with such a transfer are null and void, and without force, and that the conveyance should be cancelled, and the proceedings declared null and void, and that the complainant should be granted the relief prayed for.

Complainants submit that the respondents demurrers should be over-ruled.

Respectfully submitted,

Smith & Johnston
Solicitors for Complainant