THE TOWN OF ROBERTSDALE, COMPLAINANT,	)	IN THE CIRCUIT COURT
VS.	)	OF BALDWIN COUNTY, ALABAMA.
W. R. DUCKWORTH and FRANK M. WHEATLEY,	)	IN EQUITY.

TO HONORABLE F. W. HARE, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, IN EQUITY:

The Complainant, THE TOWN OF ROBERTSDALE, a municipal corporation, humbly complaining against W. R. DUCKWORTH, and FRANK M. WHEATLEY, respectfully represents and shows unto your Honor and this Honorable Court as follows:

1. That the Complainant, The Town of Robertsdale, is a municipal corporation existing under the laws of the State of Alabama, and located in Baldwin County, Alabama;

2. That the Respondents, W. R. Duckworth and Frank M. Wheatley are both over twenty-one years of age and bona fide residents of Baldwin County, Alabama, living at Robertsdale;

3. That on January 14, 1938, Amos Garrett, as Mayor of the Town of Robertsdale, entered into an agreement with W. R. Duckworth; that a copy of said instrument is hereto attached, marked Exhibit "A" and asked to be taken as a part hereof as though herein fully set out;

4. That the said agreement contained the following provisions "it is understood and agreed by the parties hereto that a part of the consideration of this conveyance is made upon the condition and title does not pass to the Grantee until this condition is performed, and when it ceases to be performed, the title reverts to the Town of Robertsdale, and the condition is this: The Grantee, W. R. Duckworth is to construct upon this premise a building, and to construct and maintain a public rest room for men and women and to preserve, maintain and keep the same in a healthy and sanitary condition at all times, and upon default

of any of these terms, the title revests in the Town of Robertsdale, and the other portion of the property now used for these rest rooms can be used as the Grantee sees fit, but these rest rooms shall be maintained perpetually;

That the said W. R. Duckworth has breached said agreement in that he has failed to construct and maintain a public rest room for men and women;

That he has failed to maintain and keep public rest rooms for men and women in a healthy and sanitary condition at all times;

5. That all rights of the Respondent, W. R. Duckworth in, or under the agreement referred to in paragraph 3 hereof, have ceased, and that the title to said property has revested in the Complainant;

6. That the instrument referred to in paragraph 3 hereof, was illegal and void, abinitio, in that Amos Garrett as Mayor, and Florence M. Higgins, as Clerk, were not duly authorized to execute the same on behalf of the Town of Robertsdale;

7. That the building located upon the property, described in paragraph 3 hereof, is within the boundaries of the Street and therefore constitutes a public nuisance;

8. That the rest rooms located on said property, described in paragraph 3 hereof, not being maintained in a healthy and sanitary condition constitutes a hazard to the residents of Robertsdale, Alabama, and therefore are a public misance;

9. That the Respondents, Frank M. Wheatley is occupying the building located upon the property described in paragraph 3 hereof, as tenant of the Respondent, W. R. Duckworth;

10. That the Respondents, W. R. Duckworth and Frank M. Wheatley have failed and/or refused to keep and maintain the rest rooms located on the property described in paragraph 3 hereof, in a healthy and sanitary condition at all times.

11. The Complainant submits itself to the jurisdiction of the Court and agrees to comply with all decrees and requirements thereof.

WHEREFORE, the premises considered, the Complainant prays that your Honor will by proper process make the said W. R. Duckworth, and Frank M. Wheatley, Respondents to this Bill of Complaint and by appropriate process require them to plead, answer or demur to the same within the time and under the penalties prescribed by law and the practice if this Honorable Court.

Complainant further prays that on a final hearing hereof, this Honorable Court will give and grant to it the following relief;

(a) That a decree be made and entered that the purported deed from the Town of Robertsdale to W. R. Duckworth, is null and void;

(b) That all rights of the said W. R. Duckworth under the purported deed have ceased, and no longer exists;

(c) That the title to the property described in paragraph 3 hereof has revested in the Complainant, and that the Respondents no longer have any right to the use and enjoyment thereof;

(d) That the Respondent W. R. Duckworth be required within a reasonable time to remove the improvements located upon the property described in paragraph 3 hereof;

(e) That the Respondents be enjoined from permitting the improvements located upon the property described in paragraph 3 hereof, to remain thereon;

(f) That the title to the property described in paragraph 3 hereof is vested in the Complainant, and that the Respondents have no right, title, or interest therein;

(g) That if the Complainant is mistaken in the relief prayed for, that a decree be made and entered, granting to the Complainant such relief as it may be entitled to receive under the allegations of this bill of complaint;

(h) That the Complainant be granted such other, further, different, or general relief as it may be in equity and good conscience entitled to receive.

BEEBE & HALL

By W. C. Beebe
Solicitors for the Complainant.

STATE OF ALABAMA,

BALDWIN COUNTY.

THIS INDENTURE, made and entered unto on this 14th day of January, 1939, by and between the Town of Robertsdale, Alabama, and W. R. Duckworth, Witnesseth:

That WHEREAS the hereinafter described land has heretofore been used for Town purposes and the Town now being aware that this property is no longer necessary in their operation and the use of the same has been discontinued in excess of the past 6 years and WHEREAS, the property would be undesirable for municipal purposes, it has been decided by the Town Council of the Town of Robertsdale that it is for the benefit of the Town in general that this property be conveyed to W. R. Duckworth for the purposes of herein stated.

NOW, THEREFORE, in consideration of the premises and the further consideration of One Dollar ($1.00)cash in hand paid by W. R. Duckworth, to the Town of Robertsdale, the receipt whereof is hereby acknowledged, I, AMOS GARRETT, Mayor of the Town of Robertsdale, in pursuance of the authority conferred upon me and approved by the Town Council, and for and on behalf of the Town of Robertsdale, and in its name, do hereby grant, bargain, sell, quit claim, and convey and by these presents have granted, bargained, sold, quit claimed, and conveyed to the said W. R. Duckworth, all the right, title and interest of the Town of Robertsdale, in and to the following described tract or parcel of land lying and being in the Town of Robertsdale, County of Baldwin, and State of Alabama, and more particularly bounded and described as follows:

> "Beginning at a point where the South line of Pennsylvania Street intersects the L & N Railroad right-of-way running in a westerly direction following the southerly boundary of Pennsylvania Street to the East line of Chicago Street; thence following the East boundary of Chicago Street to the point which is the North boundary of the L & N Railroad Company property; thence in an easterly direction following the northerly boundary to the right-of-way of the L & N Railroad Company; thence in a northerly direction following the West boundary of the L & N Railroad Company right-of-way to the point of beginning; being a portion of land approximately forty-eight feet by one hundred and twelve

feet (48' x 112') and being all the property owned by the Town of Robertsdale, situated in this location.

It is understood and agreed by the parties hereto that a part of the consideration of this conveyance is made upon the condition and title does not pass to the Grantee until this condition is performed and when it ceases to be performed, the title reverts to the Town of Robertsdale, and the condition is this; the Grantee, W. R. Duckworth, is to construct upon this premise a building and to construct and maintain a public rest room for men and woman and to preserve, maintain and keep the same in a healthy and sanitary condition at all times, and upon default of any of these terms the title revests in the Town of Robertsdale, and the other portion of the property now used for these rest rooms can be used as the Grantee sees fit, but these rest rooms shall be maintained perpetually.

IN WITNESS WHEREOF, the said parties of the first part have hereunto caused the common seal of the Town of Robertsdale to be affixed, the day and year first above written.

TOWN OF ROBERTSDALE
BY AMOS GARRETT
Mayor

ATTEST:

FLORENCE M. HIGGINS,
Town Clerk
Corp. Seal.

THE STATE OF ALABAMA,
BALDWIN COUNTY.

I, ORVIS M. BROWN, a Notary Public, in and for said County in said State, hereby certify that Amos Garrett, whose name as Mayor of the Town of Robertsdale, and Florence Higgins, whose name as Town Clerk of the Town of Robertsdale, are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they, in their capacity as such Mayor and Town Clerk, respectively, executed the same voluntarily on the day the same bears date.

DEC 5 1946

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1946-47

1 Div. 268

W. R. Duckworth et al.,

v.

The Town of Robertsdale,

Appeal from Baldwin Circuit Court,
In Equity.

BROWN, JUSTICE.

The appeal is from the interlocutory decree of the circuit court overruling the defendant's demurrer to the bill. The demurrer challenged the bill on sundry specific grounds and for want of equity.

The major insistence is that the complainant has a complete and adequate remedy at law. We are of opinion that the demurrer was properly overruled.

The bill does not seek to recover possession of the segment of land of which the defendants are in possession, but seeks to abate a public nuisance by compelling the removal of a permanent obstruction erected in the street,--a building maintained and used for private business--and to declare void the instrument executed by the mayor in the name of the town purporting to convey a segment of a public street to the defendant Duckworth, with condition subsequent running with the land.

The alleged deed or license under which the defendants are holding is clearly ultra vires and void, and the building constructed and maintained in the street is a public nuisance, abatable at the instance of the municipality by bill in equity. --Code of 1940, Title 7, § 1085; McCraney v. City of Leeds, 241 Ala. 198, 1 So. (2d) 894; Sneed v. Tatum, 247 Ala. 442, 25 So. (2d) 162; 38 Am. Juris. p. 182, § 506; City of Enterprise v. Rawls, 204 Ala. 528, 86 So. 374, 11 A. L. R. 1175; Pearson v. Duncan & Son, 198 Ala. 25, 73 So. 406, 3 A. L. R. 242.

Affirmed.

Gardner, C. J., Livingston and Simpson, JJ., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 *Div., No.* 268

W. R. Duckworth, et al, *Appellant,*

vs.

The Town of Robertsdale, *Appellee,*

From Baldwin *Circuit Court.*
in Equity

The State of Alabama,
City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to 2 *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 5th *day of*

December, 19 46

J. Render Thomas

Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 46-47

1 *Div., No.* 268

W. R. Duckworth, et al
Appellant,

vs.

The Town of Robertsdale
Appellee.

From Baldwin Court.

COPY OF OPINION

Brown Printing Co., Montgomery, Ala., 1946

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 46-47

To the Register *of the* Circuit *Court,*

Baldwin *County—Greeting:*

Whereas, the Record and Proceedings of the Circuit *Court of said county, in a certain cause lately pending in said Court between*

W R Duckworth, *Appellant,*

and

Town of Robertsdale, *Appellee,*

wherein by said Court, ~~at the~~ ~~Term, 19~~, it was considered adversely to said appellant, were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered ordered, adjudged and decreed *by our Supreme Court, on the* 5 *day of* December, *19* 46, *that said* decree *of said* Circuit *Court be in all things affirmed, and that it was further considered* ordered, adjudged and decreed *that the appellant, ~~and~~* ~~xxx~~ W. R. Duckworth, and Georgiana Smith, and James A. Sanca, Sr., sureties on the appeal bond, pay

the costs accruing on said appeal in this Court and in the Court below for which let execution ~~issue accordingly.~~

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Capitol, this the 5 *day of* December, *19* 46

J. Render Thomas

Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 46-7

1 Div., No. 268

W R Duckworth

Appellant,

vs.

The Town of Robertsdale

Appellee.

From Baldwin Circuit Court.
In Equity

Certificate of Affirmance

The State of Alabama,
County. } Filed

this day of 19

BROWN PRINTING CO., MONTGOMERY, ALA. 1938

THE TOWN OF ROBERTSDALE COMPLAINANT VS W. R. DUCKWORTH, ET AL. RESPONDENT	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN EQUITY NO. 1401

B R I E F A N D A R G U M E N T

OF THE COMPLAINANT

B R E B B E & H A L L

SOLICITORS FOR THE COMPLAINANT

STATEMENT OF THE CASE

The Complainant on September 16, 1945 filed it's original Bill of Complaint, which was ammended on February 4, 1946, alleging among other things that the Respondents were holding possession of a piece of property, in the town of Robertsdale, Baldwin County, Alabama, included within one of the main streets; that the said property was held under and by virtue of an agreement entered into by and between Amos Garrett as mayor of the town of Robertsdale, and W. R. Duckworth, dated January 14, 1938; that said agreement contained certain conditions in that W. R. Duckworth was to construct and maintain private rest rooms for men and women and to preserve, maintain and keep the same in a healthy and sanitary condition at all times, and upon default of any of these terms the title to said property reinvested in the town of Robertsdale.

The bill of complaint alleges that the said Duckworth has breached the said agreement in that he has failed to construct and maintain a public rest room for men and women, and to maintain the same in a healthy and sanitary condition at all times; that all rights of the said Duckworth in or under said agreement have ceased, and that the title to said property has revested in the Complainant; that the agreement under which the said Duckworth holds was illegal and void; that the building located on said property being in the boundary of a street constitutes a public nuisance; that the rest room located on said property is not being maintained in a healthy and sanitary condition, constitutes a hazzard to the town of Robertsdale and therefore a public nuisance; that the Respondents have failed and/or refused to keep and maintain the rest rooms located on said property in a healthy and sanitary condition at all times; that the agree-

ment under which the Respondent holds was not authorized; that the town of Robertsdale was not at the time of such agreement authorized under the laws of the State of Alabama to convey said property; that there was no consideration of said agreement.

The Complainant prays that a decree be made and entered that the said agreement, is null and void; that all rights of the Respondents have ceased and no longer exist; that the title to said property has revested in the Complainant, and that the Respondents no longer have the right to use and enjoyment thereof; that the Respondents be required to remove the improvements located upon said property; that the Respondents be enjoined from permitting the improvement to remain on said property; that the title of said property is vested in the Complainant, and that the Respondents have no right title therein.

The Complainant also prayed for general relief.

PRINCIPLES OF LAW

" A Municipality has no inherent power to grant franchises or privleges to use its streets".
City of Birmingham vs Holt
194 Sou. 538; 239 Ala. 248.

"A City has not implied power to authorize the obstruction of streets"
Costello, et al vs State
18 Sou. 820.

"A City or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription can defeat the right of the city to maintain a suit in equity to remove the obstruction"
Webb,et al vs City of Demopolis
13 Sou 289; 95 Ala. 116.

" Where person plats land and lays off lots according to such plat, and makes sale of one or more of such lots with reference thereto, he irrevocably dedicates land designated therein as streets and alleys, highways, squares, and commons to public for public use"
Nashville C and St. L. RR Company vs Mulgan
21 Sou. 62; 219 Ala. 56.

" Where a street is dedicated by the mapping and platting of land by the owner and his selling and conveying lots with reference to the plat, it cannot be lost by mere failure to open it or non user, however long".
Smith, et al vs City of Opelika
51 Sou. 981; 165 Ala. 630.

"Permanent obstruction in City street in absents of due athorities is a "Public Nuisance"
City of Birmingham, et al vs Hood, etc
172 Sou. 114; 233 Ala. 352

The errection and maintances by Respondent of building within the public Street, constitutes a public nuisance.
Cassimus vs Levystein
58 Sou. 280; 176 Ala. 365.

" Construction and Maintenance of building in street constitutes public Nuisance subject to be abated in proper proceeding.
McIntosh et al vs Moody et al
153 Sou. 182; 228 Ala. 165.

" A permanent structure upon any portion of a public street employed in the conduct

of a private business on the street may be abated as a "Public nuisance" since it is invasive of the public right in the free and uninterrupted use of the street"
McCraney vs City of Leeds
1 Sou. (2D) 894; 241 Ala. 198.

"The Constitution recognizes the inherent power in towns and cities to withhold consent and to limit the use of a public street in any private enterprise".
1 Sou. (2D) 894; 241 Ala. 198

" The right of the Public to use a street for travel is paramount to that of an abutting owner, or any other person to use it for any other purpose".
Birmingham RR Company et al vs Smyer
61 Sou. 354; 181 Ala. 121

" An unauthorized permanent obstruction of a street, which prevents its use by the public, constitutes a nuisance which a court of equity in a proper suit will abate."
Birmingham RR Company et al vs Smyer
61 Sou. 354; 181 Ala. 121.

" The right of the Public to pass over a street extends to every part of it."
Birmingham RR Company, et al vs Smyer
61 Sou. 354; 181 Ala. 121.

" Public streets belong to public from side to side and from end to end, there being no such thing as rightful, private, permanent use of public streets."
Nashville C and St. L RR Company vs Hulgan
121 Sou. 62; 219 Ala. 56.

" The Respondent had no right to erect permanent improvements on street, though such improvements did not in fact interfere with traffic, since extent of use of street in no manner affects question of its dedication."
Nashville RR Company vs Hulgan
121 Sou. 62; 219 Ala. 56

" All municipalities in the State of Alabama may maintain a bill in equity in the name of the city to abate or enjoin any public nuisance injurious to the health, morals, comfort or welfare of the community, or any portion thereof, 1940 Code of Alabama, title 7, section 1088."
National Southern Products Corp., Inc. vs City of Tuscaloosa
20 Sou. (2D) 329.

" Equity has undoubted powers at the suit of a municipality, to enjoin the prepertration or continuance of an obstruction of its streets as a nuisance."
Smith vs City of Opelika
51 Sou. 821; 165 Ala. 630.

Demopolis vs Webb
6 Sou. 408; 87 Ala. 659.

Reed vs Birmingham
9 Sou. 161; 92 Ala. 339.

" The Complainants silent acquiescence in the construction of the building upon the street does not estop him from enjoining its future maintenance because constituting a nuisance."
L&N RR Company vs Mauter
74 Sou. 932; 199 Ala. 387.

" Any permit express or implied on the part of municipal authorities to infringe upon the public right by the conduct of a private business in a permanent structure on any portion of public street is revocable since the governing body cannot divest itself of the governmental powers granted to the municipality to be exercised as a public trust and each succeeding administration has unpaired powers and responsibilities in dealing with conditions as its funds therein."
McCraney vs City of Leeds
1 Sou. (2D) 894; 241 Ala. 198.

" A permanent structure placed and maintained on a public street in the absence of express statutory authority, though permitted and licensed by municipal authorities, is a " Public nuisance".
Ex Parte Ashworth
86 Sou. 84; 204 Ala. 391.

" Municipilities are authorized by statute to maintain a bill in equity in the name of the City to abate or enjoin any public nuisance injuries to the health, morals, comfort or welfare of the community."
City of Prichard vs Alabama Power Company
175 Sou. 294; 234 Ala. 339.

" In bill to abate nuisance resulting from operation of business, burden rest upon the Respondent to bring forward matters that abatement could be accomplished by necessary drastic means that prayed for by complainant."
National Southern Products Corp., vs City of Tuscaloosa
20 Sou. (2D) 329.

"The instrument under which the Respondent, Duckworth holds provided " This conveyances is made upon the condition and title does not pass to the grantee until this condition is performed - - - - - -" is a condition proceeded."
Tennessee and CR Company vs East Alabama RR Company
73 Ala. 426.

" The deeds under which Duckworth holds also provided any certain conditions ceased. to be performed the title reverts to the Complainant. This constitutes a condition subsequence."
Lowery vs May
104 Sou. 5; 213 Ala. 66.

" A condition subsequence is created by a conveyance wherein and estate vested on condition and may thereafter be defeated by non performances of such condition.

or by happening of an event stipulated against, and any acts is done or events happens, it defeats an estate already vested."
Lowery vs May
104 Sou. 5; 213 Ala. 66.

" The title to the property revested to the Complainant immediately upon failure of the Respondent to perform the goods therein."
Mitt Lumber Co. vs Gulman Coal & Coke Co.
98 Sou. 347; 200 Ala. 415.

" Rules of good pleading do not require that Complainant anticipate all possible defenses and undertake to negative or confess and avoid them."
National Southern Corp. vs Tuscaloosa
20 Sou. (2D) 329.

ARGUMENT

The instrument under which the Respondents hold was not authorized, neither Amos Garrett as Mayor of the town of Robertsdale, Florence M. Higgins, as town clerk nor the town or Robertsdale had any authority or right to execute the paper. The town of Robertsdale holds streets in trust for the public at large whose rights are not depending upon acts of ommission or commission of the city in that is, that anything done or omitted to be done in the allowance of the unlawful obstruction on the street, which interferes with the use within the dedication of that street, will not estop the public or those with a public interest from having the same removed as a nuisance.

Streets are dedicated for public use, not alone for that of the people of the city, the corporation being the mere trustee for the public. Erections by persons, on property thus dedicated cannot be authorized by the original proprietor, or by the city corporation, they can be authorized only by the legislature, and that unauthorized erections or obstructions thereon are public nuisances.

It is difficult to conceive upon what principle an equitable estoppel can be securely placed, in cases of this kind, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public; that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to private use. As a person who uses the street must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other. In addition to this consideration may be noticed another influential one, that is, the use of the street was wrong in the beginning and

wrong each day of continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim.

The present authorities of the town of Robertsdale, have rescinded, as they have the right to do, the actions of the Mayor of the town in the execution of the unauthorized agreement.

There is no question but that the town of Robertsdale has the right to come in to equity to abate a nuisance.

Not only is the building erected upon the street a public nuisance for that reason, but also it being a hazzard to the health of the citizens of the town, in the improper kept rest rooms, also renders it a public nuisance, and subject to be abated by this proceeding.

The instrument under which the Respondents hold contained a condition to be performed before it became operative, likewise a condition that title revested upon certain happenings. Upon the happening of the condition, the title, imaginary, and the rights of possession revested in the Complainant.

These are conditions, and in no sinse of the word limitations upon the rights of user of the Respondents.

We submit that the instrument under which the Respondents hold was absolutely void, that the erection of the building was unauthorized and is a public nuisance, then, and they too the Respondents having failed to comply with all the conditions forfeited any rights that they might claim to have had.

We therefore submit that the demurrers of the Respondents are not well taken and should be overruled.

BEERE & HALL

By: [signature]

Solicitors for Complainant.

We hereby certify that a copy of the above has this day been mailed to Messrs Hybart & Chason, Solicitors for the Respondent.

This the____day of February, 1943.

BEEBE & HALL

By: [illegible]
Solicitors for Complainant.

STATE OF ALABAMA,
BALDWIN COUNTY.

TO ANY SHERIFF OF THE STATE OF ALABAMA - GREETINGS:

WE COMMAND YOU that you summon W. R. DUCKWORTH, and FRANK M. WHEATLEY to be and appear before the Judge of the Circuit Court of Baldwin County, Alabama, exercising Chancery Jurisdiction, within thirty days after the service of summons, and there to plead, answer or demur, without oath, to a bill of complaint lately exhibited by THE TOWN OF ROBERTSDALE, against the said W. R. Duckworth, and Frank M. Wheatley, and further to do and perform what the said Judge shall order and direct in that behalf, and this the Respondents shall in no wide omit under penalty of the law. And we further command that you return this writ with your execution thereon to our said Court immediately upon the execution thereof.

WITNESS, R. S. DUCK, Register of said Court, this the 13 day of September, 1945.

Register

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THE TOWN OF ROBERTSDALE, COMPLAINANT, VS. W. R. DUCKWORTH, and FRANK M. WHEATLEY, RESPONDENTS.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN EQUITY.

TO HONORABLE F. W. HARE, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, IN EQUITY:

The Complainant, THE TOWN OF ROBERTSDALE, a municipal corporation, humbly complaining against W. R. DUCKWORTH, and FRANK M. WHEATLEY, respectfully represents and shows unto your Honor and this Honorable Court as follows:

1. That the Complainant, The Town of Robertsdale, is a municipal corporation existing under the laws of the State of Alabama, and located in Baldwin County, Alabama;

2. That the Respondents, W. R. Duckworth and Frank M. Wheatley are both over twenty-one years of age and bona fide residents of Baldwin County, Alabama, living at Robertsdale;

3. That on January 14, 1938, Amos Garrett, as Mayor of the Town of Robertsdale, entered into an agreement with W. R. Duckworth; that a copy of said instrument is hereto attached, marked Exhibit "A" and asked to be

taken as a part hereof as though herein fully set out;

4. That the said agreement contained the following provisions "it is understood and agreed by the parties hereto that a part of the consideration of this conveyance is made upon the condition and title does not pass to the Grantee until this condition is performed, and when it ceases to be performed, the title reverts to the Town of Robertsdale, and the condition is this: The Grantee, W. R. Duckworth is to construct upon this premise a building, and to construct and maintain a public rest room for men and women and to preserve, maintain and keep the same in a healthly and sanitary condition at all times, and upon default of any of these terms, the title revests in the Town of Robertsdale, and the other portion of the property now used for these rest rooms can be used as the Grantee sees fit, but these rest rooms shall be maintained perpetually;

That the said W. R. Duckworth has breached said agreement in that he has failed to construct and maintain a public rest room for men and women;

That he has failed to maintain and keep public rest rooms for men and women in a healthy and sanitary condition at all times;

5. That all rights of the Respondent, W. R. Duckworth in, or under the agreement referred to in paragraph 3 hereof, have ceased, and that the title to said property has revested in the Complainant;

6. That the instrument referred to in paragraph 3 hereof, was illegal and void, ab initio, in that Amos Garrett as Mayor, and Florence M. Higgins, as Clerk, were not duly authorized to execute the same on behalf of the Town of Robertsdale;

7. That the building located upon the property, described in paragraph 3 hereof, is within the boundaries of the Street and therefore constitutes a public nuisance;

8. That the rest rooms located on said property, described in paragraph 3 hereof, not being maintained in a healthy and sanitary condition constitutes a hagard to the residents of Robertsdale, Alabama, and therefore are a public nuisance;

9. That the Respondent, Frank M. Wheatley is occupying the building located upon the property described in paragraph 3 hereof, as tenant of the

Respondent, W. R. Duckworth;

10. That the Respondents, W. R. Duckworth and Frank M. Wheatley have failed and/or refused to keep and maintain the rest rooms located on the property described in paragraph 3 hereof, in a healthy and sanitary condition at all times.

11. The Complainant submits itself to the jurisdiction of the Court and agrees to comply with all decrees and requirements thereof.

WHEREFORE, the premises considered, the Complainant prays that your Honor will by proper process make the said W. R. Duckworth, and Frank M. Wheatley, Respondents to this bill of complaint and by appropriate process require them to plead, answer or demur to the same within the time and under the penalties prescribed by law and the practice of this Honorable Court.

Complainant further prays that on a final hearing hereof, this Honorable Court will give and grant to it the following relief:

(a) That a decree be made and entered that the purported deed from the Town of Robertsdale to W. R. Duckworth, is null and void;

(b) That all rights of the said W. R. Duckworth under the purported deed have ceased, and no longer exists;

(c) That the title to the property described in paragraph 3 hereof has revested in the Complainant, and that the Respondents no longer have any right to the use and enjoyment thereof;

(d) That the Respondent W. R. Duckworth be required within a reasonable time to remove the improvements located upon the property described in paragraph 3 hereof;

(e) That the Respondents be enjoined from permitting the improvements located upon the property described in paragraph 3 hereof, to remain thereon;

(f) That the title to the property described in paragraph 3 hereof is vested in the Complainant, and that the Respondents have no right, title, or interest therein;

(g) That if the Complainant is mistaken in the relief prayed for, that a decree be made and entered, granting to the Complainant such relief as it may be entitled to receive under the allegations of this bill of com-

plaint;

(h) That the Complainant be granted such other, further, different, or general relief as it may be in equity and good conscience entitled to receive.

HEBBE & HALL

By: W. C. Hebbe

Solicitors for the Complainant.

"A"

STATE OF ALABAMA,

BALDWIN COUNTY.

THIS INDENTURE made and entered unto on this 14th day of January, 1939, by and between the Town of Robertsdale, Alabama, and W. R. Duckworth, Witnesseth:

That WHEREAS the hereinafter described land has heretofore been used for Town purposes and the Town now being aware that this property is no longer necessary in their operation and the use of the same has been discontinued in excess of the past 6 years and WHEREAS, the property would be undesirable for municipal purposes, it has been decided by the Town Council of the Town of Robertsdale that it is for the benefit of the Town in general that this property be conveyed to W. R. Duckworth for the purposes of herein stated.

NOW, THEREFORE, in consideration of the premises and the further consideration of One Dollar ($1.00) cash in hand paid by W. R. Duckworth, to the Town of Robertsdale, the receipt whereof is hereby acknowledged, I, AMOS GARRETT, Mayor of the Town of Robertsdale, in pursuance of the authority conferred upon me and approved by the Town Council, and for and on behalf of the Town of Robertsdale, and in its name, do hereby grant, bargain, sell, quit claim, and convey and by these presents have granted, bargained, sold, quit claimed, and conveyed to the said W. R. Duckworth, all the right, title and interest of the Town of Robertsdale, in and to the following described tract or parcel of land lying and being in the Town of Robertsdale, County of Baldwin, and State of Alabama, and more particularly bounded and described as follows:

> "Beginning at a point where the South line of Pennsylvania Street intersects the L & N Railroad right-of-way running in a westerly direction following the southerly boundary of Pennsylvania Street to the East line of Chicago Street; thence following the East boundary of Chicago Street to the point which is the North boundary of the L. & N. Railroad Company property; thence in an easterly direction following the northerly boundary to the right-of-way of the L & N Railroad Company; thence in a northerly direction following the West boundary of the L & N Railroad Company right-of-way to the point of beginning; being a portion of land approximately forty-eight feet by one hundred and twelve feet (48'x112') and being all the property owned by the Town of Robertsdale, situated in this location.

It is understood and agreed by the parties hereto that a part of the consideration of this conveyance is made upon the condition and title does not pass to the Grantee until this condition is performed and when it ceases to be performed, the title reverts to the Town of Robertsdale, and the condition is this; the Grantee, W. R. Duckworth, is to construct upon this premise a building and to construct and maintain a public rest room for men and women and to preserve, maintain and keep the same in a healthy and sanitary condition at all times, and upon default of any of these terms the title revests in the Town of Robertsdale, and the other portion of the property now used for these rest rooms can be used as the Grantee sees fit, but these rest rooms shall be maintained perpetually.

IN WITNESS WHEREOF, the said parties of the first part have hereunto caused the common seal of the Town of Robertsdale to be affixed, tthe day and year first above written.

TOWN OF ROBERTSDALE
BY AMOS GARRETT
Mayor

ATTEST:

FLORENCE M. HIGGINS,
Town Clerk
Corp. Seal.

THE STATE OF ALABAMA,
BALDWIN COUNTY.

I, ORVIS M. BROWN, a Notary Public, in and for said County, in said State, hereby certify that Amos Garrett, whose name as Mayor of the Town of Robertsdale, and Florence Higgins, whose name as Town Clerk of the Town of Robertsdale, are signed to the foregoing conveyance, and who are know to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they, in their capacity as such Mayor and Town Clerk, respectively, executed the same voluntarily on the day the same bears date.

Given under my hand this the 14th day of January, 1939.

ORVIS M. BROWN
Notary Public,
My Commission expires April 2nd, 1939.

SEAL.

STATE OF ALABAMA,
BALDWIN COUNTY. PROBATE COURT.

Filed in office this 31st day of Oct. 1939. 3:05 PM and duly recorded in Deed Book 70 N.S. pages 464-5 and I certify that $ --, cts 50 deed tax, has been paid as required by law.

G. W. Robertson, Judge of Probate.

1401

#1

THE TOWN OF ROBERTSDALE,

COMPLAINANT,

VS.

W. R. DUCKWORTH, and
FRANK M. WHEATLEY,

RESPONDENTS.

SUMMONS AND COMPLAINT.

Filed Sept 13 1945
[illegible]

Executed Sept 14 1945
by serving copy of within Summons and Complaint on

Frank M Wheatley

C. E. Garrett Sheriff
By W R Duckworth Deputy Sheriff

Executed Sept. 14 1945
by serving copy of within Summons and Complaint on

W. R. Duckworth

C. E. Garrett Sheriff
By Deputy Sheriff

1011

THE TOWN OF ROBERTSDALE, COMPLAINANT,	)	IN THE CIRCUIT COURT OF
VS.	)	BALDWIN COUNTY, ALABAMA
W. R. DUCKWORTH, and FRANK M. WHEATLEY, RESPONDENTS.	)	IN EQUITY.

Come the Respondents in the above styled cause and for answer to the Bill of Complaint filed in said cause, and each and every paragraph thereof, separately and severally, say:

1. The Respondents admit the allegations of the first paragraph of the Bill of Complaint.

2. The Respondents admit the allegations of the second paragraph of the Bill of Complaint.

3. The Respondents admit the allegations of the third paragraph of the Bill of Complaint.

4. The Respondents admit that the conveyance executed by the Town of Robertsdale to W. R. Duckworth contained the allegations set out in paragraph four of the Bill of Complaint but the Respondents deny that W. R. Duckworth has breached said agreement as set out in paragraph four of the Bill of Complaint.

5. The Respondents deny the allegations of the fifth paragraph of the Bill of Complaint and demand strict proof thereof; the Respondents deny that the Town of Robertsdale now has or has ever had title to the land on which said building is erected.

6. The Respondents deny the allegations of the sixth paragraph of the Bill of Complaint and demand strict proof thereof; as above set out the Respondents deny that the Town of Robertsdale has any title to the property described in the agreement.

7. The Respondents deny the allegations of the seventh paragraph of the Bill of Complaint and demand strict proof thereof; the Respondents say that the building located upon the property described in the conveyance is not within the boundaries of any street in the Town of Robertsdale and is not a public nuisance.

8. The Respondents deny the allegations of the eighth paragraph of the Bill of Complaint and demand strict proof thereof; the Respondents allege the Rest Rooms located on said property

are now and have been maintained in a healthy and sanitary condition and that they do not constitute a hazard to the residents of Robertsdale, Alabama, and that they are not a public nuisance.

9. The Respondents deny the allegations of the ninth paragraph of the Bill of Complaint and demand strict proof thereof.

10. The Respondents deny the allegations of the tenth paragraph of the Bill of Complaint and demand strict proof thereof; the Respondents allege that they have maintained and kept the Rest Rooms now located on the property in a healthy and sanitary condition at all times.

Hybard & Parker

Solicitors for Respondents.

THE TOWN OF ROBERTSDALE COMPLAINANT, VS. W.R. DUCKWORTH AND FRANK M. WHEATLEY, RESPONDENTS.	)	IN THE CIRCUIT COURT OF BLADWIN COUNTY, ALABAMA. IN EQUITY.

Comes the respondents and demur to the amendment filed by the Complainant in said cause of action on February 4th, 1946, and for grounds of demurrer assigns the following:

1. Respondents assign the grounds of demurrer numbered a, b, and c, as filed to the original Bill of Complaint as grounds of demurrer to said amendment.

2. Respondent further demurs to that phase of said amendment in which it recites "that said conveyance is a cloud on Complainant's title and ought to be cancelled and removed", ~~xxx~~ on the ground that Complainant fails to aver that it was in possession of said premises, when the suit was brought.

Hubert A. Rason
Solicitors for Respondents.

Town of Poughkeepsie
Complainant
vs
W. R. Luckwaldt
et al
Respondent

#5

Filed Feb. 28-1946
[illegible]
Registrar

THE TOWN OF ROBERTSDALE,	)	
Complainant,	)	IN THE CIRCUIT COURT OF
VS.	)	BALDWIN COUNTY, ALABAMA.
W. R. DUCKWORTH AND FRANK M. WHEATLEY,	)	
Respondents.	)	IN EQUITY.

Come the Respondents in the above styled cause and demur to the Bill of Complaint filed in said cause and each and every paragraph thereof, separately and severally, and as grounds therefor, say:

1. That said Complaint does not state a cause of action.

Herbert S. Brown
Solicitors for Respondents.

THE TOWN OF ROBERTSDALE,	)	
Complainant,	)	IN THE CIRCUIT COURT OF
VS.	)	BALDWIN COUNTY, ALABAMA
W. R. DUCKWORTH AND FRANK M. WHEATLEY,	)	IN EQUITY.
	)	
Respondents.	)	

The Respondents for further grounds of Demurrer to the Complaint says:

a. That Complainant has an adequate remedy at law.

b. To that phase of the Complaint that attempts to set up a perpetuity as a subsequent condition for the vesting of the title to said property.

c. To that phase of the Complaint which alleges that the conditions in the Contract or Deed as a part or its consideration that the Respondent, Duckworth shall maintain on the land involved a public rest room for men and women and keep the same in a healthy and sanitary condition at all times and shall be maintained perpetually said conditions attempt to create a perpetuity is contrary to public policy the common law and the statutes and is null and void.

d. To that phase of the Bill of Complaint that attempts to prevent the vesting of title to said lands beyond ~~three~~ The lives of three persons in being and ten years afterwards.

Hubert T. Chason

Solicitors for Respondents.

February 20, 1946

Judge F. W. Hare
Monroeville, Alabama

Dear Judge:

We are enclosing our brief in the Town of Robertsdale - Duckworth case.

You will recall that at the last term of the Court you requested that briefs be furnished.

The Town is growing very impatient.

We are sending a copy of this letter, together with a copy of our brief to Messrs. Hybart & Chason.

Yours very truly,

BEEBE & HALL
By: [signature]

HMH/er

cc: Messrs. Hybart & Chason
Bay Minette, Alabma

THE TOWN OF ROBERTSDALE.
Complainant.
VS.
W.R. DUCKWORTH ET.ALS.
Respondants.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY No. 1401.

CERTIFICATE OF APPEAL.

I; R.S. Duck, Register of the Circuit Court of Baldwin County, Alabama, hereby certify the one of the Respondants, W. R. DUCKWORTH in a cause wherein THE TOWN OF ROBERTSDALE is Complainant, and W. R. DUCKWORTH AND FRANK M. WHEATLEY are Respondants, in the Circuit Court of Baldwin County, Alabama, has taken an appeal to the Supreme Court of the State of Alabama, from a Decree of the Circuit Court overruling the Demurrer filed by the Respondants in said cause,

I, Further certify that the appeal was taken on the 14th day of June 1946.

I, further certify that W.R. DUCKWORTH, GEORGANIA SMITH. AND JAMES A. SANCA. SR,are Sureties on the security for costs on said appeal and the Security for costs does not contain a waiver of exemptions

Given under my hand and seal this the 17th day of June 1946.

Register, Circuit Court of Baldwin County,
Alabama, in equity

THE TOWN OF ROBERTSDALE
Complainant
vs

W. R. Duckworth and
Frank M. Wheatley
Respondants

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO ~~xxx~~ 1401

To. FRANK M. WHEATLEY

You are hereby notified the W.R. Duckworth one of the Respondants ~~xxx~~ in the above styled cause did take an appeal to the Supreme Court of the State of Alabama from a Decree rendered by the Circuit Court of Baldwin County, Alabama. on the 17th day of May 1946. you are therefore cited to appear before the Supreme Court on the First Monday in November 1946 and join in said appeal if you think proper to do so,

Given under my hand this the 18th day of June. 1946

R S Deck

Register, Circuit Court of Baldwin County, Alabama.

THE TOWN OF ROBERTSDALE

VS.

W. R. DUCKWORTH and

XXXXXXXXXXXXXXXXXXXX

FRANK M. WHEATLEY

NOTICE TO PARTY RESPONDANT

NOT JOINING IN APPEAL.

Executed this 19 day of June June. 1946 by serving a copy of the XXXXX within notice on Frank M. Wheatley.

C. E. Jarrett Sheriff

Edleigh Steadham Deputy Sheriff

CITATION OF APPEAL

Moore Ptg. Co.

The State of Alabama
Baldwin County

IN THE CHANCERY COURT OF BALDWIN COUNTY

To THE TOWN OF ROBERTSDALE

Or To BEEBE & HALL, Solicitors of record.

Whereas, on the 14th day of June, 1946, W.R. Duckwotth and Frank M. Wheatley took an appeal from the decree rendered on the 17th day of May 1946, by the Circuit Court of said county, in the cause of The Town of Robertsdale versus W.R. Duckworth, and Frank M. Wheatley

Now, therefore, you are cited to appear as required by law, before the Supreme Court of Alabama. to defend on said appeal, if you think proper so to do.

Witness my hand this 18th day of May. 1946

R. S. Leach
Register in Chancery.

1401

1401

1401

Executed 6 - 18 1946
by serving copy of within Summons and Complaint on

W. C. Burbee & Hall
By leaving copy on H. M. Hall

C. E. Garrod Sheriff
By H. M. Hall Deputy Sheriff

THE TOWN OF ROBERTSDALE Complainant

vs.

W. R. DUCKWORTH & FRANK WHEATLEY Respondent

CITATION OF APPEAL

IN EQUITY

Issued 18th day of June, 1946

Moore Ptg. Co., Bay Minette

THE TOWN OF ROBERTSDALE, COMPLAINANT,	)	IN THE CIRCUIT COURT OF
VS.	)	BALDWIN COUNTY, ALABAMA.
W. R. DUCKWORTH & FRANK E. WEATHLEY, DEFENDANT.	)	IN EQUITY.

Comes the Complainant in the above styled cause and amends the Bill of Complainant in the said cause by adding thereto paragraph twelve (12), as follows:

12: That the Defendant claims to own the land described in Exhibit A hereto attached under said Exhibit A; that the Town of Robertsdale is and was at and before the execution of said conveyance, a Municipal Corporation organized and existing under the laws of the State of Alabama; that the lands attempted to be conveyed by the said deed was at and before the execution thereof a part of Chicago Street, a Public street within said town, on the West of which opposite said land is the business district of the town with numerous stores, shops and offices and East of which is the Louisville & Nashville Railroad right of way and within a few feet of buildings on said lands are shipping sheds for the loading and unloading of produce, fertilizer and other essential products shipped by railroad Robertsdale, and North and South and East of said lands is public street; and that the said conveyance is null and void and of no effect because the said conveyance was not authorized to be made by the Town Council or by any lawful officer or officers empowered thereto; that such attempted conveyance is void and of no effect because the Town of Robertsdale was not at the time of such conveyance authorized under the laws of the State of Alabama to convey to an individual for private use prop erty held by it for public street purposes; that such conveyance is null and void and of no effect because there was no consideration for the same; that said conveyance is a cloud on Complainant's title and ought to be cancelled and removed; all of which Defendant knew at the time of the conveyance.

Complainant further alleges said street at the point of the location of said lands and buildings is the heaviest trafficed

street in Robertsdale and that the Defendant has unlawfully and to the great inconvenience and detriment of the public, who have the full right to the uninterrupted use of said lands as a street, erected and uses for private purposes a building on saidlands which unlawfully excludes the public from the free and uninterrupted use of said streets and thereby greatly hampers and inconveniences the public, and said land is needed for the use of the public as a street and Defendant ought to be required to remove the said buildings and to desist from claiming title to said property and from excluding the public therefrom as a public street.

BEEBE & HALL,

BY: W C Beebe

Attorney's for Complainant.

1401

43

Marriage Certificate

Issued February 4 1944

The Town of Robertsdale, Complainant, VS. W. R. Duckworth and Frank M. Wheatley, Respondents.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY ALABAMA. IN EQUITY.

This cause coming on for hearing on demurrer to the complaint, and the same being understood by the court, the Court is of the opinion that the demurrer is not well taken -

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY the Court that said demurrer be and the same hereby is overruled.

This May 17, 1946.

T. M. Hare
JUDGE

1401

#16

Filed May 17-1946.
[illegible]
Clerk

THE TOWN OF ROBERTSDALE,)

Complainant. IN THE CIRCUIT COURT

VS.) OF BALDWIN COUNTY, ALABAMA.

W. R. DUCKWORTH AND FRANK M. WHEATLEY,) IN EQUITY.

Respondents.)

)

We, W. R. Duckworth, Georgiana Smith and James A. Sanca Sr., acknowledge ourselves security for all the costs of the appeal taken to the Supreme Court of the State of Alabama, by the said W. R. Duckworth from the Judgment rendered in the above styled cause, overruling the Demurrer filed by the Respondents in said cause.

W. R. Duckworth SEAL

Georgiana Smith SEAL

James A. Sanca Sr. SEAL

Taken and approved this

14 day of June, 1946.

P. S. Duck

Register. By Alice J. Duck D. R.

#7

SECURITY FOR COSTS.

TOWN OF ROBERTSDALE,

Complainant,

VS.

W. R. DUCKWORTH, ET AL,

Respondents.

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

Filed
6-14-46
R.S. Mack
Register
By Alice Hugg
D.R.

LAW OFFICES
ELLIOTT G. RICKARBY
RICKARBY & RICKARBY
FAIRHOPE, ALABAMA
E. G. RICKARBY, JR.

February 16, 1948

Mrs. Alice J. Duck
Clerk Circuit Court
Bay Minette, Alabama

Dear Mrs. Duck:-

Please check the file in Klumpp Motor Company Vs L. L. Powell and if everything is in order, here is Motion for Judgment by Default.

Yours very truly,
RICKARBY & RICKARBY

by:- E. G. Rickarby Jr.

EGRjr:pw
264
encl.

THE TOWN OF ROBERTSDALE

COMPLAINANT

VS

W. R. DUCKWORTH, ET AL,

RESPONDENT

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

IN EQUITY

NO. 1401

B R I E F A N D A R G U M E N T

OF THE COMPLAINANT

B E E B E & H A L L

SOLICITORS FOR THE COMPLAINANT

STATEMENT OF THE CASE

The Complainant on September 13, 1945 filed it's original Bill of Complaint, which was ammended on February 4, 1946, alleging among other things that the Respondents were holding possession of a piece of property, in the town of Robertsdale, Baldwin County, Alabama, included within one of the main streets; that the said property was held under and by virtue of an agreement entered into by and between Amos Garrett as mayor of the town of Robertsdale, and W. R. Duckworth, dated January 14, 1938; that said agreement contained certain conditions in that W. R. Duckworth was to construct and maintain private rest rooms for men and women and to preserve, maintain and keep the same in a healthy and sanitary condition at all times, and upon default of any of these terms the title to said property reinvested in the town of Robertsdale,

The bill of complaint alleges that the said Duckworth has breached the said agreement in that he has failed to construct and maintain a public rest room for men and women, and to maintain the same in a healthy and sanitary condition at all times; that all rights of the said Duckworth in or under said agreement have ceased, and that the title to said property has revested in the Complainant; that the agreement under which the said Duckworth holds was illegal and void; that the building located on said property being in the boundary of a street constitutes a public nuisance; that the rest room located on said property is not being maintained in a healthy and sanitary condition, constitutes a hazzard to the town of Robertsdale and therefore a public nuisance; that the Respondents have failed and/or refused to keep and maintain the rest rooms located on said property in a healthy and sanitary condition at all times; that the agree-

ment under which the Respondent holds was not authorized; that the town of Robertsdale was not at the time of such agreement authorized under the laws of the State of Alabama to convey said property; that there was no consideration of said agreement.

The Complainant prays that a decree be made and entered that the said agreement, is null and void; that all rights of the Respondents have ceased and no longer exist; that the title to said property has revested in the Complainant, and that the Respondents no longer have the right to use and enjoyment thereof; that the Respondents be required to remove the improvements located upon said property; that the Respondents be enjoined from permitting the improvement to remain on said property; that the title of said property is vested in the Complainant, and that the Respondents have no right title therein.

The Complainant also prayed for general relief.

PRINCIPLES OF LAW

" A Municipality has no inherent power to grant franchises or privleges to use its streets".
City of Birmingham vs Holt
194 Sou. 538; 239 Ala. 248.

"A City has no implied power to authorize the obstruction of streets"
Costello, et al vs State
18 Sou. 820.

"A City or town has no alienable interest in the public streets thereof, but holds then in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription can defeat the right of the city to maintain a suit in equity to remove the obstruction"
Webb,et al vs City of Demopolis
13 Sou 289; 95 Ala. 116.

" Where person plats land and lays off lots according to such plat, and makes sale of one or more of such lots with reference thereto, he irrevocably dedicates land designated therein as streets and alleys, highways, squares, and commons to public for public use"
Nashville C and St. L. RR Company vs Hulgan
21 Sou. 62; 219 Ala. 56.

" Where a street is dedicated by the mapping and platting of land by the owner and his selling and conveying lots with reference to the plat, it cannot be lost by mere failure to open it or non user, however long".
Smith, et al vs City of Opelika
51 Sou. 821; 165 Ala. 630.

"Permanent obstruction in City street in absence of due athorities is a "Public Nuisance"
City of Birmingham, et al vs Hood, etc
172 Sou. 114; 233 Ala. 352

The errection and maintances by Respondent of building within the public Street, constitutes a public nuisance.
Cassimus vs Levystein
58 Sou. 280; 176 Ala. 365.

" Construction and Maintenance of building in street constitutes public Nuisance subject to be abated in proper proceeding.
McIntosh et al vs Moody et al
153 Sou. 182; 228 Ala. 165.

" A permanent structure upon any portion of a public street employed in the conduct

of a private business on the street may be abated as a "Public nuisance" since it is invasive of the public right in the free and uninterrupted use of the street"
McCraney vs City of Leeds
1 Sou. (2D) 894; 241 Ala. 198.

"The Constitution recognizes the inherent power in towns and cities to withhold consent and to limit the use of a public street in any private enterprise".
1 Sou. (2D) 894; 241 Ala. 198

" The right of the Public to use a street for travel is paramount to that of an abutting owner, or any other person to use it for any other purpose".
Birmingham RR Company et al vs Smyer
61 Sou. 354; 181 Ala. 121

" An unauthorized permanent obstruction of a street, which prevents its use by the public, constitutes a nuisance which a court of equity in a proper suit will abate."
Birmingham RR Company et al vs Smyer
61 Sou. 354; 181 Ala. 121.

" The right of the Public to pass over a street extends to every part of it."
Birmingham RR Company, et al vs Smyer
61 Sou. 354; 181 Ala. 121.

" Public streets belong to public from side to side and from end to end, there being no such thing as rightful, private, permanent use of public streets."
Nashville C and St. L RR Company vs Hulgan
121 Sou. 62; 219 Ala. 56.

" The Respondent had no right to erect permanent improvements on street, though such improvements did not in fact interfere with traffic, since extent of use of street in no manner affects question of its dedication."
Nashville RR Company vs Hulgan
121 Sou. 62; 219 Ala. 56

" All muncipalities in the State of Alabama may maintain a bill in equity in the name of the city to abate or enjoin any public nuisance injurious to the health, morals, comfort or welfare of the community, or any portion thereof, 1940 Code of Alabama, title 7, section 1088."
National Southern Products Corp., Inc. vs City of Tuscaloosa
20 Sou. (2D) 329.

" Equity has undoubted powers at the suit of a municipality, to enjoin the prepertration or continuance of an obstruction of its streets as a nuisance."
Smith vs City of Opelika
51 Sou. 821; 165 Ala. 630.

Demopolis vs Webb
6 Sou. 408; 87 Ala. 659.

Reed vs Birmingham
9 Sou. 161; 92 Ala. 339.

" The Complainants silent acquiescence in the construction of the building upon the street does not estop him from enjoining its future maintenance because constituting a nuisance."
L&N RR Company vs Mauter
74 Sou. 932; 199 Ala. 387.

" Any permit express or implied on the part of municipal authorities to infringe upon the public right by the conduct of a private business in a permanent structure on any portion of public street is revocable since the governing body cannot divest itself of the governmental powers granted to the municipality to be exercised as a public trust and each succeeding administration has unmpaired powers and responsibilities in dealing with conditions as its finds therein."
McCraney vs City of Leeds
1 Sou. (2D) 894; 241 Ala. 198.

" A permanent structure placed and maintained on a public street in the absence of express statutory authority, though permitted and licensed by municipal authorities, is a " Public nuisance".
Ex Parte Ashworth
86 Sou. 84; 204 Ala. 391.

" Municipilities are authorized by statute to maintain a bill in equity in the name of the City to abate or enjoin any public nuisance injurious to the health, morals, comfort or welfare of the community."
City of Prichard vs Alabama Power Company
175 Sou. 294; 234 Ala. 339.

" In bill to abate nuisance resulting from operation of business, burden rest upon the Respondent to bring forward matters that abatement could be accomplished by necessary drastic means that prayed for by complainant."
National Southern Products Corp., vs City of Tuscaloosa
20 Sou. (2D) 329.

"The instrument under which the Respondent, Duckworth holds provided " This conveyances is made upon the condition and title does not pass to the grantee until this condition is performed - - - - - -" is a condition precedent."
Tennessee and CR Company vs East Alabama RR Company
73 Ala. 426.

" The deeds under which Duckworth holds also provided any certain conditions ceased, to be performed the title reverts to the Complainant. This constitutes a condition subsequent."
Lowery vs May
104 Sou. 5; 213 Ala. 66.

" A condition subsquent is created by a conveyance wherein and estate vested on condition and may thereafter be defeated by non performances of such condition,

or by happening of an event stipulated against, and any act is done or event happens, it defeats an estate already vested."
Lowery vs May
104 Sou. 5; 213 Ala. 66.

" The title to the property revested to the Complainant immediately upon failure of the Respondent to perform the conditions therein."
Hitt Lumber Co. vs Culman Coal & Coke Co.
76 Sou. 347; 200 Ala. 415.

" Rules of good pleading do not require that Complainant anticipate all possible defenses and undertake to negative or confess and avoid them."
National Southern Corp. vs Tuscaloosa
20 Sou. (2D) 329.

ARGUMENT

The instrument under which the Respondents hold was not authorized, neither Amos Garrett as Mayor of the town of Robertsdale, Florence M. Higgins, as town clerk nor the town or Robertsdale had any authority or right to execute the paper. The town of Robertsdale holds streets in trust for the public at large whose rights are not depending upon acts of ommission or commission of the city in that is, that anything done or omitted to be done in the allowance of the unlawful obstruction on the street, which interferes with the use within the dedication of that street, will not estop the public or those with a public interest from having the same removed as a nuisance.

Streets are dedicated for public use, not alone for that of the people of the city, the corporation being the mere trustee for the public. Erections by persons, on property thus dedicated cannot be authorized by the original proprietor, or by the city corporation, they can be authorized only by the legislature, and that unauthorized erections or obstructions thereon are public nuisances.

It is difficult to conceive upon what principle an equitable estoppel can be securely placed, in cases of this kind, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public; that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to private use. As a person who uses the street must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other. In addition to this consideration may be noticed another influential one, that is, the use of the street was wrong in the beginning and

wrong each day of continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim.

The present authorities of the town of Robertsdale, have rescinded, as they have the right to do, tha actions of the Mayor of the town in the execution of the unauthorized agreement.

There is no question but that the town of Robertsdale has the right to come in to equity to abate a nuisance.

Not only is the building erected upon the street a public nuisance for that reason, but also it being a hazzard to the health of the citizens of the town, in the improper kept rest rooms, also renders it a public nuisance, and subject to be abated by this proceeding.

The instrument under which the Respondents hold contained a condition to be performed before it became operative, likewise a condition that title revested upon certain happenings. Upon the happening of the condition, the title, imaginary, and the rights of possession revested in the Complainant.

These are conditions, and in no since of the word limitations upon the rights of user of the Respondents.

We submit that the instrument under which the Respondents hold was absolutely void, that the erection of the building was unauthorized and is a public nuisance, then, and then too the Respondents having failed to comply with all the conditions forfeited any rights that they might claim to have had.

We therefore submit that the demurrers of the Respondents are not well taken and should be overruled.

BEEBE & HALL

By: [signature]
Solicitors for Complainant.

We hereby certify that a copy of the above has this day been mailed to Messrs Hybart & Chason, Solicitors for the Respondent.

This the 19 day of February, 1946.

BEEBE & HALL

By: [signature]
Solicitors for Complainant.