

Lee v. Scriver, 143 Minn. 17, 172 N.W. 802, 1919 Minn. LEXIS 432 (1919)

[*18] [**802] TAYLOR, C.

In 1895 the city of [***3] Northfield adopted an ordinance authorizing F. J. Wilcox [**803] and some 20 other persons named therein, their representatives or assigns, to construct and maintain a sewer along a designated portion of Second street in that city with a branch extending from Second street [*19] to Fourth street, and providing that any person desiring to connect with such sewer should be permitted to do so on paying to said grantees his proportionate part of the cost thereof, with interest at the rate of 6 per cent from the time of the completion of the sewer to the time of so connecting therewith. The grantees were residents along the line of the proposed sewer. They formed an organization designated as "Second Street Sewer Association," elected officers consisting of a president, secretary and treasurer, and, although unincorporated, conducted their business in the manner of a corporation through these officers. They constructed the sewer in 1896 at a cost of \$1,234.54 and connected their own dwellings with it. Thereafter, from time to time, others connected their dwellings with this sewer, and on making such connections each one paid his proportionate part of the cost and thenceforth [***4] was accepted and considered as a member of the association and as entitled to a pro rata share of subsequent payments. Certain property owners, at their own expense, constructed an extension to the sewer three blocks in length. Thereafter, and in 1816, defendant connected his house with this extension. He refused to pay for connecting with or using the original sewer and this suit followed. The court made findings of fact and conclusions of law and directed judgment against him for the sum of \$40.53 with interest from the date he connected with the sewer. He appealed from an order denying a new trial.

Defendant states the questions presented as follows: "First: Assuming the validity of the ordinance, is defendant subject to its provisions? Second: Is the ordinance valid and constitutional? Third: Has plaintiff legal capacity to sue?"

Defendant's contention that plaintiff has no legal capacity to sue is predicated on the erroneous assumption that the Second Street Sewer Association, an unincorporated body, is the plaintiff. Fifty-four persons, Carleton College, Estate of William Watson and Estate of Robert Watson, are named in the complaint as plaintiffs. The fifty-four [***5] individuals and Carleton College clearly had legal capacity to sue, [Holden v. Great Western Elev. Co. 69 Minn. 527, 72 N.W. 805, 65 Am. St. 585](#), and can maintain the action even if it be conceded that the two estates are not legal entities and cannot be recognized as plaintiffs. The two estates may be stricken out or the words designating them be disregarded as [*20] surplusage. If the decedents had an interest in the cause of action and their successors in interest have not been made parties, this at most would only amount to a defect of parties, and such ^{HN1}defect has been waived by failing to point it out and designate the necessary parties who have been omitted. 2 Dunnell, Minn. Dig. § 7551.

In support of his claim that the ordinance is unconstitutional and void, defendant seems to contend that the city could not authorize property owners to construct a private sewer in the streets. ^{HN2}It was not a private sewer except in a restricted sense, for the ordinance provides that when constructed any person who so desires shall be permitted to connect with it on paying his proportionate share of the cost. The city had control of the streets, and, while it could not

divest itself [***6] of the power to exercise such control in the future, it could give private parties the privilege of furnishing a service necessary for the convenience and welfare of the citizens of that locality. Street-car lines, telephone lines, water mains and similar facilities, owned by private parties, are found in the streets of nearly all cities, and the power of the city to authorize the use of its streets for such purposes is too well settled to require the citation of authorities. Defendant further contends that the ordinance gives the grantees named therein the power to levy and collect assessments for the sewer, and is void for that reason. The ordinance does not purport to confer any such power. ^{HN3} It merely provides that any person desiring to connect with the sewer may do so on paying his proportionate share of the cost. No one is under any obligation to pay, unless he uses the sewer and he may use it or not as he elects. Defendant's contention that no part of the cost of the sewer can be collected from him, because he did not connect with it directly, but with an extension of it constructed by other parties, is answered by the cases of [***7] [City of Fergus Falls v. Boen, 78 Minn. 186, 80 N.W. 961](#); and [City of Fergus Falls v. Edison, 94 Minn. 121, 102 N.W. 218, 70 L.R.A. 238](#).

Defendant's further contention that plaintiffs are not entitled to recover because they have already collected the full cost of the sewer from others who have connected with it since it was constructed, is not sustained by the facts. The amount which a property owner was required to pay for the privilege of connecting with the sewer seems to have been determined by dividing the cost of the sewer by the number of buildings [*21] which would be served by it after such connection was made. These payments, over and above the amounts expended for repairs and improvements, were distributed pro rata among all who were then members of the association. While the aggregate amount of these payments exceeds the original cost of the sewer, the practical result of the manner in which they were applied is that the original cost has been distributed pro rata among [*804] about 60 members instead of being borne wholly by the original grantees named in the ordinance. The amount sought to be collected from defendant appears to be no greater than the share of the original expense still borne by [***8] all other members of the association. We are unable to sustain any of defendant's contentions and the order is affirmed.