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Municipal Corporations: Owner's Right to Exclusive Use of Private Sewer Under Public Street

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MUNICIPAL CORPORATIONS: OWNER'S RIGHT TO
EXCLUSIVE USE OF PRIVATE SEWER UNDER
PUBLIC STREET

Newport Manor, Inc. v. Carmen Land Co., 82 So.2d 127 (Fla. 1955)

Plaintiff subdivider constructed a private sewer system under a dedicated city street and connected it with the main city line. The City of Homestead, disclaiming any control over the sewer, agreed that plaintiff should have exclusive use. Defendant subsequently subdivided its adjacent property and connected its private sewer with that of plaintiff, who brought suit, *inter alia*, to compel defendant to disconnect its line. On appeal from a decree for plaintiff, HELD, when the municipality relinquished jurisdiction over the sewer system exclusive right to its use was vested in the property owner. Decree affirmed, Justice Thomas dissenting.

It was recognized at an early date that a municipality may permit excavation of its streets for a privately financed sewer.¹ The city may expressly reserve any right that would accrue to the owner of a fixture to land, such as the right to its use, the duty of maintenance, or any other control. In the absence of such reservations, courts usually hold that the sewer remains the exclusive property of the owner, who may enjoin its appropriation by others.²

Some courts hold that a privately constructed sewer becomes a part of the city system unless there is a specific agreement excluding its use by others.³ These courts strictly construe any agreement against the individual on the theory that the public's right to the use of city streets exceeds any private right. Some of these courts mistakenly rely on *City of New York v. Rice*,⁴ which dealt with the encroachment of a privately constructed masonry wall upon a street surface. The New York court clearly distinguished the facts of this case from one involving use of the subsoil by abutting owners, implying that the former would be an intrusion on the orderly flow of traffic while the latter might not affect public rights.

¹See *Carroll v. Connor*, 93 N.Y. Supp. 1077 (1905).

²*E.g.*, *Atkinson Trust & Sav. Bank v. DeRoo*, 332 Ill. App. 251, 75 N.E.2d 46 (1947); *Boyden v. Walkley*, 113 Mich. 609, 71 N.W. 1099 (1897); *Carroll v. Connor*, *supra* note 1.

³*E.g.*, *Cornwall v. Garrison*, 59 Idaho 287, 81 P.2d 1094 (1938); *Glenn v. Woodworth*, 197 S.C. 56, 14 S.E.2d 555 (1941).

⁴198 N.Y. 124, 91 N.E. 283 (1910).