## OWNER OF CITY PROPERTY OWNS EARTH OF STREET

Supreme Court Holds Owner of Abutting Property Is Entitled to the Earth Removed From Street Unless Needed to Improve Said Street Elsewhere.

name of Scott & McDougal, appel- has provided a district, composed of tween 31st and 33d streets.

inous for insertion here, alleges in the most reasonable and inexpensive following allegations: substance, that W. Scott and T. Me- place for defendants to deposit the

en and diverted there will be no ade- At Fountains & Elsewhere J. Connelley, at the time of submitquate and complete remedy at law for the estimation of damages of the premises; that defendants are pro- 66 1 ceeding under a claim that they are authorized so to do by the City of Portland; that plaintiff has no plain, speedy, or adequate remedy at law; that defendants, by their acts and proceedings, are taking the property of plaintiff in violation of law, of the state constitution, and of the constitution of the United States; that plaintiff is unable to state how much earth has been removed from Frank-Sharkey v. City of Portland, et al, during all the time mentioned here- lin street between 31st and 33d A quick lunch prepared in a minute.

Multnomah County. In, fulfilling the same; that the con- streets, and prays the court that the Take no imitation. Just say "HORLICKS." in, fulfilling the same; that the con- streets, and prays the court that the spondent, v. The City of Portland, a shall make the excavation at an and state the amount of earth and municipal corporation, M. J. Connel- agreed price, but it is silent as to other material heretofore removed by leigh Heights and in the vicinity of ter, W. Scott and T. McDougal, part- where he shall deposit the earth so the defendants and converted to their said Franklin street, and all the earth lin street, and said bid was for an ners doing business under the firm excavated; that the City of Portland own use from Franklin street be- which has been excavated and to be amount much lower than the same

let it to defendants. Scott & McDou- tion of law, and diverting it to their ed and carried on as a general im-

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Join P. Sharkey Company, re- tract provides that the contractor defendants be required "to acquire In No Combine or Trust

excavated out of said Franklin street | could have otherwise have been made lants. Appeal from the decree of the property belonging to plaintiff, to pay The defendants appealed separate- under the contract between the de- without loss to the defendant concircuit court of Mulinomah county. for the excavation, because such ly and demurred to the complaint as fendant contractors and the City of tractors, all of which facts were and The Hon. William N. Gatens, judge. property will be specially and pecul- not stating facts sufficient to consti- Portland, not necessary for or re- are known to the plaintiff herein, Ralph E. Duniway and A. E. Clark, larly benefited by the improvement, tute a cause of suit, and the demur-quired in the improvement of said and unless these defendant contracfor respondent. W. C. Benbow (J. P. and that defendants are attempting er being overruled, they filed separ- Franklin street, is used and to be tors are permitted to use said earth Kavanaugh and Frank S. Grant, on to make the excavation at the ex- ate answers, admitting the formal used by the defendant contractors they will be subjected to and will brief) for City of Portland. Law- pense and charge of plaintiff's prop- allegation of the complaint, but deny- and the City of Portland in said oth- suffer a great financial loss in the rence A. McNary (on brief) for M. J. rety only; that plaintiff is the equit- ing the portions above set out, except er streets being improved and to be carrying out of said contracts with Connelley, Scott & McDougal, appel- able owner not only of blocks 23 and as stated in their further answer. improved under said general plan of the City of Portland, and that by realants. Argued and submitted March 24 in Waverleigh Heights, but of the The further answer alleges, that on improvement of the streets in said son of the bid of said contractors 14, 1911. McBride, J. Affirmed as to soil in Franklin street between those April 24, 1907, plaintiff's predecessor Waverleigh Heights Addition. That having been placed at said reduced Connelley. Scott & McDougal. Re- blocks, and it has in no way disposed in interest in Waverleigh Addition it is necessary for said defendant, the assessment for said imof its ownership in the soil; that filed a petition with the city auditor City of Portland, to use all of said provement as to the property bene-This is a suit to restrain the de- plaintiff has heretofore requested and for the grading and improvement of earth so excavated and to be excav- fitted thereby will be greatly reduced." fendants from wrongfully removing demanded of defendants, and each of several designated streets in that ad- ated from said Franklin street, in earth from an excavation being made them, that they deposit the sofl be- dition, including Franklin street, and said general plan of improvement of matter set up in defendants' answer. improvement of Franklin longing to plaintiff which has been that thereafter, in pursuance of an said streets in Waverleigh Heights Upon the trial a decree was renstreet in the City of Portland, and to excavated out of Franklin street be- ordinance passed for that purpose, and that the defendant, the City of dered asignst defendants, restraining compel defendants to account for and tween blocks 23 and 24, Waverleigh the city advertised for bids for such Portland, appropriated said earth for them from further converting the pay the value of earth which plaintiff Heights, upon block 24 thereof, so improvement and that the contract said purpose and the same is not be-earth claimed by plaintiff and fixing claims has been already unlawfully that plaintiff will not be deprived of for a portion of the improvement of ing used for any other purpose but plaintiff's damages for that already its use and will receive the benefit of Franklin street was let to M. J. Con- is being used by the City of Portland converted at \$2500. Defendants an-The complaint, which is too volum- the contract; that plaintiff has offered nelley & Company. Then follows the and the defendant contractors for peal. such purpose only.

"That between said 24th day of That said the City of Portland, plaint in its entirety we do not think Dougal, defendants, are partners do- earth, on block 24. Waverleigh April, 1907, and the time of the com- through its executive board adver- it states a cause of suit against the ing business under the firm name of Heights; that plaintiff, as an equita- mencement of this suit, the City of tised for and received bids for the City of Portland. It sufficiently ap-Scott & McDougal; that plaintiff, ble owner of the property, claims the Portland enacted resolutions, ordi- improvement of said Franklin street pears from the complaint that the during all times mentioned in the benefit of the excavated soil for the nances and proceedings for the im- on the 1t0h day of April, 1908, that contract was let in the reuglar mancomplaint, was the owner in equity filling of its adjacent property; that provement of a large number of oth- the said bids were advertised ac- ner and without reference to what of all of blocks 23 and 24 in Waver- the defendants and each of them are er streets in said Waverleigh Heights cording to law and provided that it disposal should be made of the surleigh Heights, in the City of Port- unlawfully claiming the right to take Addition, and being the larger por- would receive said bids for said im- plus dirt obtained during the cause land; that Franklin street, between the earth belonging to plaintiff and tion of said streets above mentioned, provement in accordance with the of excavation. Nothing is alleged 31st and 33d streets, lies between excavated out of Franklin street be- the improvement of which was peti- ordinance providing for the time and showing that the city contemplated blocks 23 and 24; that the John P. tween 31st and 33d street, and divert bloned for by said H. W. Lemcke Com- manner of the same and the plans or authorized the alleged unlawful Sharkey company is the owner in it to their own use; that defendants pany, predecessors of the plaintiff and specifications of the city engineer acts of the other defendants who equity of all the dirt in such street, and each of them have refused and herein, and contracts were awarded therefor, and the plaintiff herein had were independent contractors whom and of the title to such street, sub- continue to refuse to deposit the soil by the City of Portland for the im- full knowledge of all the acts and the city had a right to expect would fect only to the easement for street so excavated upon block 24, as re- provement of said divers streets and proceedings had and taken by the de- carry out their contract in a lawful purposes for the benefit of the pub- quested by plaintiff; that there is still portions thereof in said Waverleigh fendant, the City of Portland, in the manner. The pleading is somewhat lic therein; that the City of Portland a large amount of earth to be excav- Height's Addition, and said improve- matter of said improvement and vague but, taking it by its four corhas let a contract to excavate Frank- ated out of Franklin street between ment of Franklin Street between and made no objection to the awarding of ners, we think that this is the only in street, between 31st and 33d 31st and 33d streets, and unless en- adjacent to blocks 17, 18, 23, 24, 31 said contract for the same, and the fair construction that can be placed streets, lying opposite and between joined by this court defendants will and 32, Waverleigh Heights, and the plaintiff was aware and had full upon it. The principal question is blocks 23 and 24, Waverleigh Heights, continue to excavate the same and improvement of said other streets in knowledge of the fact that the earth whether the city, by justifying the ac- be true had not these allegations of 31 Cyc. 716; Sterling v. Sterling, 43 to the established grade, and also to divert it elsewhere, to the irreparable said addition which had been peti- so to be taken from said Franklin tion of the defendants and expressly the answer been denied by the reply. Or. 200; Cohn-Baer-Myers & Aronson lay artificial stone sidewalks and injury of plaintiff; that defendants, tioned for by said H. W. Lemcke street in the improvement thereof, alleging that it and the defendants But the rule is, that a party cannot Co. v. Realty Transfer Company, 102 curbs; that such contract was let to by these acts are destroying plaintiff's Company, and for which contracts had been appropriated by and did be- appropriated by appropriat M. J. Connelley, defendant, who sub- estate in the real property, in viola- had been awarded, are being conduct- long to the defendant, the City of the right so to do, has not by express sary to cure defects in his own American Ins. Co.; 50 Minn. 341; 52

ting his bid for the improvement of said Franklin street, based the said bid on the ownership of the earth of said street having been appropriated by the defendant, the City of Portland, and owned by it and that other streets in the vicinity of said Franklin street were about to be improved under a general plan therefor and that the earth so to be taken from said Franklin street could be and was to be used in the improvement of said streets in the vicinity of said Franklin street. That his bid for sald improvement was made much lower by reason of his said knowledge that said earth could and was to be used in the improvement of said streets in the vicinity of Frank-

gal; that they are, and have been own use, that then the dirt is so tak- provement of streets in said Waver- That the defendant contractor, M. plaint, and this undoubtedly would pleading he denies such allegation

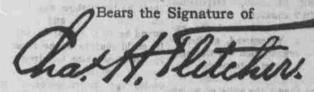
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aider cured the defect in the com- pleadings, when in a subsequent

(Continued on Page 6.)

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