

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.

Sharkey v. City of Portland, et al, Multnomah County.

John P. Sharkey Company, respondent, v. The City of Portland, a municipal corporation, M. J. Connelley, W. Scott and T. McDougal, partners doing business under the firm name of Scott & McDougal, appellants. Appeal from the decree of the circuit court of Multnomah county. The Hon. William N. Gatens, Judge. Ralph R. Dunaway and A. E. Clark, for respondent. W. C. Bonbow (J. P. Kavanaugh and Frank S. Grant, on brief) for City of Portland. Lawrence A. McNary (on brief) for M. J. Connelley, Scott & McDougal, appellants. Argued and submitted March 14, 1911. McBride, J. Affirmed as to Connelley, Scott & McDougal. Reversed as to City of Portland.

This is a suit to restrain the defendants from wrongfully removing earth from an excavation being made in the improvement of Franklin street in the City of Portland, and to compel defendants to account for and pay the value of earth which plaintiff claims has been already unlawfully converted.

The complaint, which is too voluminous for insertion here, alleges in substance, that W. Scott and T. McDougal, defendants, are partners doing business under the firm name of Scott & McDougal; that plaintiff, during all times mentioned in the complaint, was the owner in equity of all of blocks 23 and 24 in Waverleigh Heights, in the City of Portland; that Franklin street, between blocks 23 and 24; that the John P. Sharkey company is the owner in equity of all the dirt in such street, and of the title to such street, subject only to the easement for street purposes for the benefit of the public therein; that the City of Portland has let a contract to excavate Franklin street, between 31st and 33d streets, lying opposite and between blocks 23 and 24, Waverleigh Heights, to the established grade, and also to lay artificial stone sidewalks and curbs; that such contract was let to M. J. Connelley, defendant, who sublet it to defendants, Scott & McDougal; that they are, and have been

en and diverted there will be no adequate and complete remedy at law for the estimation of damages of the premises; that defendants are proceeding 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 Franklin street between 31st and 33d streets, and prays the court that the defendants be required "to acquire and state the amount of earth and other material heretofore removed by the defendants and converted to their own use from Franklin street between 31st and 33d streets.

The defendants appealed separately and demurred to the complaint as not stating facts sufficient to constitute a cause of suit, and the demurrer being overruled, they filed separate answers, admitting the formal allegation of the complaint, but denying the portions above set out, except as stated in their further answer. The further answer alleges, that on April 24, 1907, plaintiff's predecessor filed a petition with the city auditor for the grading and improvement of several designated streets in that addition, including Franklin street, and that thereafter, in pursuance of an ordinance passed for that purpose, the city advertised for bids for such improvement and that the contract for a portion of the improvement of Franklin street was let to M. J. Connelley & Company. Then follows the following allegations:

"That between said 24th day of April, 1907, and the time of the commencement of this suit, the City of Portland enacted resolutions, ordinances and proceedings for the improvement of a large number of other streets in said Waverleigh Heights Addition, and being the larger portion of said streets above mentioned, the improvement of which was petitioned for by said H. W. Lemcke Company, predecessors of the plaintiff herein, and contracts were awarded by the City of Portland for the improvement of said divers streets and portions thereof in said Waverleigh Heights Addition, and said improvement of Franklin Street between and adjacent to blocks 17, 18, 23, 24, 31 and 32, Waverleigh Heights, and the improvement of said other streets in said addition which had been petitioned for by said H. W. Lemcke Company, and for which contracts had been awarded, are being conducted and carried on as a general improvement of streets in said Waver-

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leigh Heights and in the vicinity of said Franklin street, and all the earth which has been excavated and to be excavated out of said Franklin street under the contract between the defendant contractors and the City of Portland, not necessary for or required in the improvement of said Franklin street, is used and to be used by the defendant contractors and the City of Portland in said other streets being improved and to be improved under said general plan of improvement of the streets in said Waverleigh Heights Addition. That it is necessary for said defendant, the City of Portland, to use all of said earth so excavated and to be excavated from said Franklin street, in said general plan of improvement of said streets in Waverleigh Heights and that the defendant, the City of Portland, appropriated said earth for said purpose and the same is not being used for any other purpose but is being used by the City of Portland and the defendant contractors for such purpose only.

That said the City of Portland, through its executive board advertised for and received bids for the improvement of said Franklin street on the 10th day of April, 1908, that the said bids were advertised according to law and provided that it would receive said bids for said improvement in accordance with the ordinance providing for the time and manner of the same and the plans and specifications of the city engineer therefor, and the plaintiff herein had full knowledge of all the acts and proceedings had and taken by the defendant, the City of Portland, in the matter of said improvement and made no objection to the awarding of said contract for the same, and the plaintiff was aware and had full knowledge of the fact that the earth so to be taken from said Franklin street in the improvement thereof, had been appropriated by and did belong to the defendant, the City of Portland.

That the defendant contractor, M.

J. Connelley, at the time of submitting 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 said 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 Franklin street, and said bid was for an amount much lower than the same could have otherwise have been made without loss to the defendant contractors, all of which facts were and are known to the plaintiff herein, and unless these defendant contractors are permitted to use said earth they will be subjected to and will suffer a great financial loss in the carrying out of said contracts with the City of Portland, and that by reason of the bid of said contractors having been placed at said reduced amount, the assessment for said improvement as to the property benefited thereby will be greatly reduced."

Plaintiff's reply denied the new matter set up in defendant's answer. Upon the trial a decree was rendered against defendants, restraining them from further converting the earth claimed by plaintiff and fixing plaintiff's damages for that already converted at \$2500. Defendants appeal.

McBride, J.: Considering the complaint in its entirety we do not think it states a cause of suit against the City of Portland. It sufficiently appears from the complaint that the contract was let in the regular manner and without reference to what disposal should be made of the surplus dirt obtained during the cause of excavation. Nothing is alleged showing that the city contemplated or authorized the alleged unlawful acts of the other defendants who were independent contractors whom the city had a right to expect would carry out their contract in a lawful manner. The pleading is somewhat vague but, taking it by its four corners, we think that this is the only fair construction that can be placed upon it. The principal question is whether the city, by justifying the action of the defendants and expressly alleging that it and the defendants appropriated the dirt and claiming the right so to do, has not by express averment cured the defect in the complaint, and this undoubtedly would

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