

CITIES OF THE THIRD CLASS: 800 foot street improvement shall be done under Section 6989, R. S. Mo. 1939; owners of church property have right to file remonstrances.

August 24, 1944.

Mr. Harry J. Salsbury  
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Dear Sir:

This is to acknowledge your request for an official opinion of this office dated July 22, 1941, which is as follows:

"The Council of the City of Warrensburg, Missouri is desirous of widening a street here for a distance of less than 1200 feet, by extending the pavement laterally of 10 feet on one side of the street and 5 feet on the other side of the street. The abutting property owners consist of business property, church property and resident owners.

"The Council would like to know: 1. If a church property can remonstrate as provided for under Section 6988, R. S., if it does so through the action of its Board, and otherwise in a legal manner?

"2. The Council would further like an opinion on the legality of its proceedings to widen the street as mentioned above under the 1200 feet section. The said street to be widened is a long street of several blocks and the improvement of widening would connect at each end with paving. Thanking you for an early reply and with best wishes, I am,"

Section 6988, R. S. Mo. 1939, provides in part as follows:

"Before the city council shall be authorized under the provisions of section 6987, to grade or pave any alley, or to grade, pave or gutter the roadway part of any street, when the improvement is to be paid for with special tax bills, they shall, by resolution, declare that they deem such improvement necessary to be made, and shall cause such resolution to be published in some news-

paper printed and published in the city, for two consecutive insertions in a weekly paper, or seven consecutive insertions in a daily paper, and if a majority of the resident owners of the lands that would be liable for the cost of the improvement, at the date of the passage of the resolution, who shall own a majority of the front feet owned by residents of the city, abutting on the street or part of street proposed to be improved, shall not within ten days after the date of the last publication file with the city clerk their protest against such improvement, then the council shall have the power to cause the improvement to be made; \* \* \*

This section was construed in the case of State v. Eberhardt, 189 S.W. 641, l.c. 642, in the following words:

"On the question of the sufficiency of the remonstrance in point of number of remonstrators and amount of front footage represented by such remonstrators, appellants urge several objections to the counting of certain signers as lawful remonstrators as well as to the front feet owned by the remonstrators.

"It is first contended by appellants that the statute contemplates that only owners living on the street have a right to remonstrate. The statute should not be given any such restricted construction. The Supreme Court in the case of Miners' Bank v. Clark, 252 Mo. loc. cit. 30, 158 S.W. 597, 599, has held that:

"The statute in question gives the privilege of protesting to all persons within the city and owning property abutting the street sought to be improved."

"We therefore hold that any resident owner in Springfield, whether residing on or off the street to be improved, owning lands abutting the street, has a right to remonstrate under the statute (section 9255, R. S. 1909, as amended, Laws 1911, p. 340)."

Thus it would seem that any owner of abutting property would have a right to file a remonstrance.

In addition to the above, in the early case of Lockwood v. City of St. Louis, 24 Mo. 20, the Court held that church property

was liable to assessment for municipal improvements. We quote, l. c. 22 and 23:

"After directing the city to be laid off into sewer districts, with a view to a general plan of drainage, it provides that when a majority of the owners of real estate in any district shall apply for the construction of a sewer, the corporation is authorized to levy and collect for that purpose 'a special tax on the real estate within the district so drained,' 'not to exceed one half of one per cent. per annum on the assessed value of the real estate,' and to be 'annually levied and collected as other city taxes.' The question in the mind of the lawgiver was, whether this was a local improvement, and if so, upon what property the expense of constructing it ought to be assessed; and the legislature, having expressly laid the burden upon all the real estate within the district, without exempting any of it, the question is, whether an exemption ought to be implied by the courts in favor of church property, because by the city charter the general authority there given to levy and collect taxes is confined to 'property made taxable by law,' and by law church property is expressly exempted from state and county taxation. We think not. The words of the act import no such exempting, and the principle on which church property is exempted from contributing to the general expenses of the government, either state or municipal, is not applicable to a special assessment of this kind. \* \* \*"

Thus it follows that if the property is liable to assessment, certainly the owners of the property would have a right to file a remonstrance.

Your second question relates to the manner in which the city should proceed in a case of this kind and we quote from Section 6989, R. S. Mo. 1939, which is in part as follows:

"When the council of any city of the third class shall deem it necessary to pave, macadamize, gutter, curb, grade or otherwise improve the roadway of any street or avenue for a distance not more than twelve hundred feet in length so as to connect at both ends with paving, macadamizing, guttering, curbing, grading or other improvement either on the same street or avenue or on other streets or avenues, or

on the same street or avenue and another street or avenue, the council shall declare such work to be necessary to be done and shall cause the same proceedings to be had as are provided in Section 6988, except that no protest may be filed. \* \* \*"

This section was challenged in the case of Stone v. City of Jefferson, 293 S.W. 780, 52 A. L. R. 879. The plaintiff in that case challenged the right of the City of Jefferson, Mo., to proceed under what is now Section 6989, holding that it denied here the constitutional right of petition. In upholding the statute the Court said, l.c. 782:

"The nature of a protest, as used in the statutes under review, is a matter of moment in determining whether there is merit in the plaintiff's contentions. At most a protest is but a statutory privilege and partakes in its nature of none of the essentials of an inherent right. It is perhaps more tedious than difficult to enumerate what these fundamental rights are. One of them, as the courts have frequently held, is the right to acquire, hold, enjoy, and dispose of property, real or personal. Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230; Slaughter House Cases, 16 Wall. 75, 21 L. Ed. 394; Dutchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 535; Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432. No right of this character is violated in depriving the plaintiff of the privilege of protest in this proceeding.

"Although not entitled to the exercise of the privilege claimed on the ground that it does not involve an inherent or inalienable right, the futility of the plaintiff's contention is further demonstrated by the provisions of section 6525, which, in notifying the public of the proposed action of the council, states that 'any one desiring to do so may appear \* \* and' that 'he shall be heard, and the council shall \* \* state the result of such hearing.' In thus providing for a notice and a hearing, both of which the plaintiff has enjoyed, her contention as to a denial of due process of law is without merit. As we said in Gardner v. Robinson, 298 Mo. loc. cit. 610, 106 S.W. 646: 'Notice \* \* is \* \* the essence of due process of law.'

"It is further contended that section 8325 does not afford the plaintiff that equal protection of the law guaranteed by the federal Constitution. A statute does not conflict with this guaranty because it may be special in character or that certain persons may derive special benefits from its operation, if all persons within its purview are subjected to like conditions. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141, 12 A. L. R. 1121; *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. loc. cit. 123, 129, 17 S. E. 806, 44 Am. St. Rep. 893; *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 97 S. E. 363. The sole ground upon which this contention is based is that the plaintiff was not afforded the right of protest. We have shown that this is not an inherent right but a mere privilege, the granting of which is vested in legislative discretion. That discretion not having been exercised, the plaintiff has no ground of complaint."

#### Conclusion

It is therefore the opinion of this office that the City of Warrensburg, Missouri, being a third class city has a right to widen the street 800 ft in length which intersects at each end with paved streets, under the provisions of Section 6989, R. S. Mo. 1939. It is further the opinion of this office that if church property abuts upon streets to be improved in said city, the owner or owners of said church property have the right to remonstrate in the same manner as any other resident property owner as provided in Section 6988.

Respectfully submitted

APPROVED:

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