CHAPTER VI.

MUNICIPAL CHARTERS — CONTINUED.

Special Powers and Special Limitations upon ordinary Municipal Powers.

§ 102 (66). **Outline of Subject.** — While municipal corporations are everywhere instituted for the same general purposes, heretofore explained,[1] and while there is a striking resemblance in the authority with which they are clothed, yet, except when organized under general acts, the powers given to them in their single and separate charters are various, both in character and extent.[2] True policy, indeed, requires, as before suggested, that the powers of these bodies should, in general, be confined to subjects connected with civil government and local administration; but legislatures are usually liberal in grants of this character, and there is no limit to the faculties and capacities with which municipal creations may be endowed, except as that limit is contained in the State or Federal Constitution.[3] The leading powers ordinarily granted to municipalities, such as those relating to contracts, eminent domain, streets, taxation, ordinances, corporate officers, actions, and the like, will be hereafter separately treated. But it will be convenient to notice in this place certain *special powers* usually or often conferred upon municipalities, and some *special limitations upon ordinary municipal powers*, and the construction which such provisions have judicially received.

We shall here consider the following subjects as they relate to municipal corporations: —

1. Wharves, §§ 103–113.
2. Ferries, §§ 114–116.
3. Borrowing Money, §§ 117–129.
4. Limitations on the Power to create Debts, §§ 130–138.
5. Rewards for Offenders, § 139.
6. Public Buildings, § 140.
7. Police Powers and Regulations, §§ 141, 142.
8. Prevention of Fires, § 143.

[1] *Ante*, chaps. i. ii.; *supra*, secs. 99, 100.

[2] *Ante*, sec. 39, where the general model of an ordinary municipal corporation is given.

[3] *Ante*, secs. 12, 14, 73, and chap. iv. *passim*. Aurora *v.* West, 9 Ind. 74 (1857).

9. Quarantine and Health, §§ 144–146.
10. Indemnifying Officers, §§ 147, 148.
11. Furnishing Entertainments, § 149.
12. Impounding Animals, § 150.
13. Party Walls, § 151.
14. Public Defence, § 152.
15. Aid to Railway Companies, § 153.

§ 103 (67). **Wharves and Wharfage.** — Among the special powers often conferred by the legislature upon municipal corporations bordering upon the high seas or navigable waters is the *authority to erect wharves, and charge wharfage* as a compensation for making and keeping the same and their approaches in a proper and safe condition for the landing, loading, and unloading of vessels.[1] The

[1] Commonwealth *v.* Alger, 7 Cush. 53, 82 (1851); Pollard's Lessee *v.* Hagan, 3 How. (U. S.) 212; Municipality *v.* Pease, 2 La. An. 538 (1847); Worsley *v.* Municipality, 9 Rob. (La.) 324; New Orleans *v.* United States, 10 Pet. 662, 737; The Wharf Case, 3 Bland Ch. (Md.) 383; Ill. &c. Co. *v.* St. Louis, 2 Dillon C. C. R. 70 (1872); Packet Co. *v.* Keokuk, 95 U. S. 80 (1877); distinguished, Baldwin *v.* Franks, 120 U. S. 688; Barney *v.* Keokuk, 94 U. S. 324 (1876); Weber *v.* Harbor Comm'rs, 18 Wall. 57 (1873); Packet Co. *v.* St. Louis, 100 U. S. 423 (1879); Vicksburg *v.* Tobin, 100 U. S. 430 (1879); Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881); note to 18 Am. and Eng. Corp. Cas. 511; Mayor of St. Martinsville *v.* Steamer Mary Lewis, 32 La. An. 1293; The Geneva, 16 Fed. Rep. 874; Leathers *v.* Aiken, 9 Fed. Rep. 679. Such a power does not violate the Constitution of the United States, Packet Co. *v.* Catlettsburg, 105 U. S. 559. The right of a municipality to collect wharfage is in compensation for actual use of structures provided by the municipality. Railroad *v.* Ellerman, 105 U. S. 166; New Orleans *v.* Wilmot, 31 La. An. 65. An incorporated town cannot charge wharfage for the use of an unimproved river bank in front of it. Christie *v.* Malden, 23 W. Va. 667 (1884). See *infra*, sec. 112, note. *For rights and powers of City of New York*, in respect to wharves, see Kingsland *v.* New York, 110 N. Y. 569 (1888); Williams *v.* New York, 105 N. Y. 419; Langdon *v.* Mayor, &c. of New York, 93 N. Y. 129, and cases cited; Turner *v.* People's Ferry Co., 21 Fed. Rep. 90. *Brooklyn:* Brooklyn *v.* New York Ferry Co., 87 N. Y. 204. *New Orleans:* The Lizzie E., 30 Fed. Rep. 876; Silver *v.* Tobin, 28 Fed. Rep. 545; Railroad Co. *v.* Ellerman, 105 U. S. 166; New Orleans *v.* Wilmot, 31 La. An. 65.

Wharfage charges must be *reasonable* (see *infra*, sec. 112), and may be *graduated by the tonnage of vessels* using a wharf; and this is not a duty of tonnage within the meaning of the Constitution of the United States. Ouachita Packet Co. *v.* Aiken, 121 U. S. 444 (1886); Packet Co. *v.* Catlettsburg, 105 U. S. 559; Packet Co. *v.* St. Louis, 100 U. S. 423; Packet Co. *v.* Keokuk, 95 U. S. 80; Transportation Co. *v.* Parkersburg, 107 U. S. 691 ("wharfage" and "duty of tonnage" defined and distinguished); N. W. Packet Co. *v.* St. Louis, 4 Dillon, 10 (1876); Keokuk *v.* Packet Co., 45 Iowa, 196 (1876); s. c. affirmed, 95 U. S. 80 (1877); Ellerman *v.* McMains, 30 La. An. 190. See, also, United States *v.* Duluth, 1 Dillon C. C. 469; Packet Co. *v.* Atlee, 2 Dillon, 479 (1873); s. c. 21 Wall. 389. In McMurray *v.* Baltimore, 54 Md. 103, it was held that the "*dedication of a street to public use as a street extending to the water* carried with it by necessary implication the right of the city to extend it into a harbor by the construction of a *wharf at the end*

authority of the State over navigable waters and the shores is, of course, *subject to the Constitution of the United States*, and the laws made in pursuance thereof regulating commerce, and to the admiralty jurisdiction of the Federal courts.[1] Although the power to erect wharves and charge wharfage is not strictly one relating to municipalities in their private or local character, it is, nevertheless, competent for the legislature to make them, in such measure as it deems expedient, the repository of it.[2] Such power may be modi-

thereof." To same effect, Backus *v.* Detroit, 49 Mich. 110. *Infra*, sec. 109 and note; sec. 110.

[1] State and authorized municipal *pilot and harbor regulations*, when not in conflict with the Federal Constitution or Federal legislation, are valid. Steamship Co. *v.* Joliffe, 2 Wall. 450; Cooley *v.* Board of Wardens, 12 How. (U. S.) 296; Pollard's Lessee *v.* Hagan, 3 How. 212; Ouachita Packet Co. *v.* Aiken (wharfage charges), 121 U. S. 444 (1886); Cisco *v.* Roberts, 36 N. Y. 292; Port Wardens *v.* Ship, &c., 14 La. An. 289 (1859); Same *v.* Pratt, 10 Rob. (La.) 459; Chapman *v.* Miller (pilotage fee), 2 Speers (S. C.) Law, 769; Alexander *v.* Railroad Co. (duty on *tonnage*), 3 Strob. (S. C.) Law, 594(1847); State *v.* City Council, 4 Rich. (S. C.) Law, 286; Commonwealth *v.* Alger, 7 Cush. 53, 82 (1850); Worsley *v.* Municipality, above cited; Jeffersonville *v.* Ferry Boat, 35 Ind. 19 (1870); Harbor-master *v.* Southerland, 47 Ala. 511 (1872). But State enactments, which amount to a regulation of commerce or impose a duty on tonnage, are of course void. Cannon *v.* New Orleans, 20 Wall. 577 (1874); Packet Co. *v.* St. Paul, 3 Dillon, 454; Peete *v.* Morgan, 19 Wall. 581 (1873); Steamship Co. *v.* Port Wardens, 6 Wall. 31 (1867). The collection of wharfage dues does not violate any provision of the United States Constitution. Where a municipal corporation under express legislative authority is clothed with the exclusive right to collect wharfage rates from all vessels that make use of its wharves, it is a vested right that cannot be impaired by the legislature. Ellerman *v.* McMains, 30 La. An. pt. 1, 190. But this is denied and overruled by the Supreme Court of the United States. Railroad Co. *v.* Ellerman, 105 U. S. 166. A city has no vested right to wharfage. "Whatever powers the municipal body rightfully enjoys over the subject are derived from the legislature, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration." Railroad Co. *v.* Ellerman, 105 U. S. 166, 172 (1881), *per Matthews*, J.

[2] Fuller *v.* Edings, 11 Rich. (S. C.) Law, 239 (1858); Waddington *v.* St. Louis, 14 Mo. 190 (1851); Baltimore *v.* White, 2 Gill (Md.), 444 (1845); Wilson *v.* Inloes, 11 Gill & J. (Md.) 351; Weber *v.* Harbor Comm'rs, 18 Wall. 57 (1873); Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881); Town of Ravenswood *v.* Flemings, 22 W. Va. 52, where an act conferring upon a town the *exclusive right* to erect wharves within its limits between ordinary high-water mark and low-water mark without compensation to the adjacent lot-owners, was held constitutional, and an adjacent owner enjoined from constructing a wharf within those limits without the consent of the town. The owner of a private wharf, whose land is compulsorily taken for a public wharf, is not necessarily entitled to be compensated for *loss of income* from his private wharf, resulting from the establishment of the public wharf near to the private one. Fuller *v.* Edings, *supra*. The grant of an *exclusive right to keep a wharf*, in order to secure its erection, does not violate the provision of a State Constitution, declaring "that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." Such an improvement is beneficial to the public, and, in order to secure it, the exclusive profits for a given period may be granted to the contractor. Martin *v.* O'Brien, 34

fied or revoked by the legislature at its pleasure if it does not deprive the municipality of property actually acquired under the exercise of the power.[1] It may authorize a municipal corporation to establish *a public wharf upon private property* on making compensation to the owner of the land; and the power, when conferred upon the

Miss. (5 George) 21, (1857); see, also, Geiger *v.* Filor, 8 Flor. 325 (1859). Effect of 14th Amendment to the Federal Constitution on the power of the legislature to grant *exclusive privileges*. See Slaughter House Cases, 16 Wall. 36 (1872).

[1] Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881). This case adjudged two important points. The city of New Orleans was empowered by the legislature to construct levees and wharves on the banks of the Mississippi River within its limits, and to charge reasonable compensation for their use. Under this authority the city, at its expense, graded the banks of the river at certain points, drove piles, covered them with plank flooring, and thus constructed wharves for the convenient landing of vessels. The legislature also authorized the defendant railroad company, whose terminus was in New Orleans, to construct, manage, use, and enjoy, not only its railroad property and appurtenances, but also any steamboat piers and wharves that the directors might deem necessary or convenient. And afterwards, by an act passed in 1869, the legislature authorized this railroad company to enclose a portion of the banks of the river (at a place never improved or used by the city as a wharf), and to use the place thus enclosed for the purposes of a wharf for vessels; and the act further provided that no vessel should use such wharf without the consent of the railroad company, and that all vessels so using such wharf and not using any other wharf in the city *should be exempt from the payment of levee and wharf dues to the city*. The railroad company afterward leased its wharf to others, which lease provided that vessels coming to the consignment, custody, or care of the lessees might load and unload their cargoes on the said wharf, *exempt from wharf and levee dues to the city*. The city made two points: *First*, that inasmuch as under its franchise to construct wharves it had expended large sums in making wharves for the public convenience, it had a *vested right* to the franchise and its revenues, of which it could not be deprived, as the legislature had sought to do, by the act of 1869. *Second*, it was also contended that it was a violation of the city's rights for the railroad company to permit the use and employment of their property as a wharf by persons not engaged in conducting the proper business of the railroad company, thus opening a rival wharf business in competition with the city; and that the act of 1869, if it authorizes this to be done, is in violation of the Constitution of the United States, which forbids the taking of private property without due process of law. See *ante*, sec. 68, note.

The Supreme Court decided that the action could not be maintained; that the act of 1869 did not infringe any vested rights of the city, and that the question as to whether the company in constructing its wharf and in leasing it out, as above stated, acted *ultra vires*, could not be raised by the city, which was not a stockholder in the defendant company.

The decision below (2 Woods, 120), following the decision of the Supreme Court of Louisiana in New Orleans *v.* The Railroad Co. (27 La. An. 414), based on the proposition that the act of 1869 did not confer upon the railroad company the right to charge wharfage dues against vessels landing at the said wharf which were in no way connected with the business of the railroad company, and the right to maintain a free wharf for such vessels, was reversed. On this point the Supreme Court was of opinion that the city was not entitled to raise the question that the company was violating its charter in this respect, and under that cover to create and protect a monopoly which the law did not give to it.

municipality, cannot be arrested by an offer on the part of the land-owner himself to erect a wharf.[1]

§ 104 (68). **Public and Private.** — Wharves, piers, quays, and landing places may be either *public or private.* They may be, in their nature, public, although the property be owned by an individual. If *private,* the public have no right to use the erection without the owner's consent, express or implied;[2] if *public,* they may be used by persons generally upon the payment of a reasonable compensation. Whether they are public or private depends, in case of dispute, upon circumstances, such as the purpose for which they were built, the uses to which they have been applied, the place where situated, and the character of the structure.[3]

§ 105 (69). **Duties and Rights of Owner.** — The keeping of a wharf or dock, erected and opened to the public, like the keeping of an inn, confers a *general license* to boats and vessels to occupy it for lawful purposes, — a license which can be terminated only by notice

[1] Waddington *v.* St. Louis, above cited; Iron Railroad Co. *v.* Ironton, 19 Ohio St. 299 (1869); Page *v.* Baltimore, 34 Md. 558 (1871); State *v.* Jersey City, 34 N. J. L. 390. Municipalities may under legislative grant build *wharves and levees on streets* bordering on the Mississippi River, and make or authorize the making of other improvements thereon; such as a *steamboat depot building,* for the storage of freight and the convenience of travellers. Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. below, 4 Dillon, 593; Ill. &c. Co. *v.* St. Louis, 2 Dillon, 70. Although its charter and the statutes give a city power to maintain wharves and collect wharfage, the legislature may lawfully grant to *a railroad company a portion of the water front* for its own wharf purposes, free from the control of the city. Railroad Company *v.* Ellerman, 105 U. S. 166.

[2] A town incorporated under the code of West Virginia has no power to assess and collect wharfage from the owner of a private wharf who uses it as the landing of a ferry of which he is the proprietor. Christie *v.* Malden, 23 W. Va. 667.

[3] Dutton *v.* Strong, 1 Black (U. S.), 23 (1861). The owner of a *private* pier may, it was held in this case, cut loose a vessel attached to it without a license if the pier be thereby endangered, no matter how great the stress of the weather or the peril to which the vessel may be thereby subjected. That compensation is received for the use of a public wharf does not deprive it of its public character. Galveston Wharf Co. *v.* Galveston, 63 Tex. 14.

Wharf: What constitutes. Upon a *nontidal stream,* any construction of timber or stone upon the bank, of such shape that a vessel may lie alongside of it, with its broadside to the shore, constitutes a wharf; and a *paved street extending to the water's edge,* and used by vessels as a place for receiving and discharging freight and passengers, may be so designated. Keokuk *v.* Keokuk, &c. Packet Co., 45 Iowa, 196 (1876).

Expenditures in providing wharves is the basis of the municipality's right to collect wharfage. Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881). A *paved street extending a sufficient depth into the water,* and used by the citizens generally for all purposes of a street and by vessels for a landing place, is a sufficient wharf to justify a city in charging wharfage on a nontidal stream like the Mississippi River. Keokuk *v.* Keokuk &c. Packet Co., 45 Iowa, 196, 206 (1876).

and request to remove the vessel.[1] When thus established, the owner at common law is, as respects the public, bound to *keep it in good repair.*[2] In view of these obligations on the part of the owner of the wharf, the common law gave him *the right to distrain* for his wharfage or toll.[3]

§ 106 (70). **Right of Riparian Owner.** — By the common law, the *riparian owner has the right to establish a wharf on his own soil,* this being a lawful use of the land.[4] The right is *judicially recognized in this country,* and riparian proprietors on ocean, lake, or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the State for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. The right terminates at the point of navigability, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such

[1] Heeney *v.* Heeney, 2 Denio, 625; Nicoll *v.* Gardner, 13 Wend. 289 (1835); Lansing *v.* Smith, 4 Wend. 9; Dutton *v.* Strong, 1 Black, 23, distinguished from Heeney *v.* Heeney, *supra;* Chicago Dock Co. *v.* Garrity, 115 Ill. 155.

[2] A municipality owning a wharf is bound to exercise the same care as is required of an individual owner, for the convenience and safety of boats, &c., using it. Willey *v.* Allegheny, 118 Pa. St. 490. See, also, Watson *v.* Turnbull, 32 La. An. 856; *infra,* sec. 114.

[3] Hale de Port. Maris, 77; Bradley on Distress, 133; Nicoll *v.* Gardner, 13 Wend. 289. The *right of distress* is regulated by statute in the city of New York, and it was there held, that where wharfage accrued in the seventh ward, the owner of the wharf might distrain therefor in the eleventh ward. 13 Wend. 289. See Lansing *v.* Smith, 4 Wend. 9, 21. Wharfage *is not properly a tax,* like that levied to support government, but rather compensation paid by owners of vessels for accommodation for their boats and merchandise. Swartz *v.* Flatboats, 14 La. An. 243 (1859); s. p. Keokuk *v.* Keokuk Packet Co., 45 Iowa, 196 (1876). If a city is entitled to the wharfage from public wharves, and the owner of a lot adjacent to such wharf receives wharfage, he is liable to the city therefor. Baltimore *v.* White (assumpsit), 2 Gill (Md.), 444. The right, as between private persons and a city corporation, to the money collected for wharfage, may be tried in an action for money had and received. Murphy *v.* City Council, 11 Ala. 586 (1847). See Grant *v.* Davenport, 18 Iowa, 179.

[4] Nicoll *v.* Gardner, 13 Wend. 289, (1835), *per Nelson,* J.; Lansing *v.* Smith, 4 Wend. 9, affirming s. c. 8 Cow. 146. See observations of *Finch,* J., in Mayor *v.* Hart, 95 N. Y. 443, 457 (1884), as to nature of riparian rights and privileges. Heeney *v.* Heeney, 2 Denio, 625; Myers *v.* St. Louis, 82 Mo. 367; s. c. below, 3 Mo. App. 266; Union Depot Co. *v.* Brunswick, 31 Minn. 297; R. R. Co. *v.* Schurmeir, 7 Wall. 272; Yates *v.* Milwaukee, 10 Wall. 497; Weber *v.* Harbor Comm'rs, 18 Wall. 57; Potomac Steamboat Co. *v.* Upper Potomac &c. Co., 109 U. S. 672; Hoboken *v.* Penn. R. R. Co., 124 U. S. 656. *Infra,* sec. 107, and note.

structures are presumptively lawful where they are confined to the shore, and no positive law is violated in their erection.[1]

[1] Heeney *v.* Heeney, 2 Denio, 625; Thornton *v.* Grant, 10 R. I. 477 (1873); s. c. 14 Am. Rep. 701; Sherlock *v.* Bainbridge, 41 Ind. 35 (1872); s. c. 13 Am. Rep. 302; Wisconsin, &c. Co. *v.* Lyons, 30 Wis. 61; Dutton *v.* Strong (action of trespass by owner of vessel against owner of private pier for cutting the vessel loose), 1 Black (U. S.), 23 (1861), distinguished from Heeney *v.* Heeney, above cited. Same principle reaffirmed, Railroad Co. *v.* Schurmeir, 7 Wall. 272; Yates *v.* Milwaukee, 10 Wall. 497; approved, Weber *v.* Harbor Comm'rs, 18 Wall. 57 (1873); Illinois *v.* Illinois Central R. R. Co. (Chicago lake front case), 33 Fed. Rep. 730; State *v.* Jersey City, 1 Dutch. (N. J.) 525, 530; Wetmore *v.* Brooklyn Gas Co., 42 N. Y. 384; Galveston *v.* Menard, 23 Tex. 349; Grant *v.* Davenport, 18 Iowa, 179, *per Wright*, J. But in *California*, see Dana *v.* Jackson, &c. Co., 31 Cal. 118. As to *right to erect wharf by other than riparian owner* on a tidal river, below high-water mark, *quære;* see Hagan *v.* Campbell, 8 Port. (Ala.) 9. In this case it is said: "It is clear that no part of such erections can be rested upon the lands of the riparian proprietor, nor can he be excluded from the use of the water, or denied other riparian rights." See People *v.* Davidson, 30 Cal. 379; Walker *v.* State Harbor Comm'rs, 17 Wall. 648 (1873); Packet Co. *v.* Atlee, 2 Dillon, 479 (1873); s. c. 21 Wall. 389. The plaintiff owned in fee, subject to the public easement of travel thereon, land to the centre of a street extending to the water line of the East River, on which he had constructed a bulkhead and wharf, and had the right to collect wharfage; the city of Brooklyn, without plaintiff's consent and wrongfully, built a pier at the end of the street, which pier was attached to the plaintiff's soil and between his land and the water line, and shut off the water from the plaintiff's wharf; and afterwards the city collected wharfage from all persons using the same. It was held that the pier in front of the plaintiff's half of the street became the property of the plaintiff by accretion, and that the plaintiff could compel the city to account by way of damages for all of the wharfage received by the city, *without allowance for any expense of collecting the same,* — which latter seems to be a very rigid rule, as it apparently goes beyond the line of compensation. Steers *v.* Brooklyn, 101 N. Y. 51 (1885).

Riparian rights such as wharfage, do not necessarily *attach to grants of land by the State under tide water below the shore line, or low-water mark.* In such case the right to wharfage depends upon the terms of the grant, or its intent as shown by its declared purpose or by fair inference from its terms and the surrounding circumstances, such as long continued prior use, &c. Weber *v.* Harbor Comm'rs, 18 Wall. 57 (1873); Potomac Steamboat Co. *v.* Upper Potomac Co., 109 U. S. 672. The principles of these cases were applied in Turner *v.* People's Ferry Co. (U. S. Cir. Court, N. Y.), 21 Fed. Rep. 90 (1884), where, *under the circumstances,* it was held that the owner or lessee of premises along the bulkhead line at the head of a slip, between two wharves owned by the city of New York, was not entitled to an injunction to restrain the erection of a ferry rack and structures under authority of the State and the city in the slip in front of his premises, which structures when erected, although they would impair, would not cut the complainant off from free and open access to his premises. The legislation of New York applicable to the question and the cases bearing upon it are clearly presented in the opinion of *Brown*, J. See great case of Langdon *v.* Mayor, &c. of New York, 93 N. Y. 129 (1883), and observations of *Earl*, J. pp. 144, 145, as to construction of water grants by the State and by the city. Hoboken *v.* Penn. R. R. Co., 124 U. S. 656, discusses the power of the legislature in respect of making grants of land under the navigable waters of the State. Gould *v.* Hudson River R. R. Co., 6 N. Y. 522; Langdon *v.* Mayor, &c. of New York, 93 N. Y. 130, 144; Mayor &c. *v.* Hart, 95 N. Y. 443 (1884); Lehigh Valley R. R. Co. *v.* Trone, 28 Pa. St. 206; Tomlin *v.* R. R. Co., 32 Iowa, 106; Ingraham *v.* R. R. Co., 34 Iowa, 249.

§ 107 (71). **Limitations on Riparian Right.** — The *rights of riparian proprietors* in respect to the erection of wharves, are subject to such *reasonable limitations and restraints* as the legislature may think it necessary and expedient to impose. Therefore it is competent for the legislature to pass acts *establishing harbor and dock lines,* and to take away the right of the proprietors to build wharves on their own land beyond the lines, even when such wharves would be no actual injury to navigation.[1] But the right of wharfage held by

[1] Commonwealth *v.* Alger, 7 Cush. 53 (1851). This subject is here very fully and learnedly discussed and examined. See also, Hart *v.* Mayor, 9 Wend. 571, valuable case, affirming 3 Paige, 213; Wetmore *v.* Brooklyn Gas Co., 42 N. Y. 384; People *v.* Vanderbilt, 26 N. Y. 287; Same *v.* Same, 28 N. Y. 396; Pollard's Lessee *v.* Hagan, 3 How. (U. S.) 212; Hagan *v.* Campbell, 8 Port. (Ala.) 9; Mobile *v.* Eslava, 9 Port. (Ala.) 577, (1839); Railroad Co. *v.* Winthrop, 5 La. An. 36. In Yates *v.* Milwaukee, 10 Wall. 497, Mr. Justice *Miller*, on behalf of the court, speaking of an existing wharf, denied that the city of Milwaukee, *under the power to establish dock and wharf lines,* could create an artificial and imaginary dock line, hundreds of feet away from the navigable part of the river, and, without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose; and said that if the city deemed the removal of the wharf in question necessary in the prosecution of any general scheme of widening the channel or improving the navigation of the river, it must first make the owner compensation for his property thus taken for the public use. As to this case, see *infra*, sec. 111. *Nature and extent of riparian rights fully considered in* Lyon *v.* Fishmongers' Co., L. R. 1 App. Cas. 662 (1876); Barney *v.* Keokuk, 94 U. S. 324 (1876). The riparian proprietor upon a navigable lake, subject to the rights of the public, has the right to build piers and wharf in aid of navigation in front of his land, not interfering with the public easement; which rights appertain to his title, and are of such a nature that the legislature cannot authorize a railway company to build in front thereof so as to cut off access to the water, without such company being liable for damages to the riparian proprietor. Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214 (1887). The judgment is largely founded on and approves the opinions in Lyon *v.* Fishmongers' Co., L. R. 1 App. Cas. 662. As to power of the legislature in respect of making grants of lands under navigable waters, see Hoboken *v.* Penn. R. R. Co., 124 U. S. 656, distinguishing Hoboken Land and Improvement Co. *v.* Hoboken, 36 N. J. Law, 540, and other cases in New Jersey. See Yates *v.* Milwaukee, 10 Wall. 497; Weber *v.* Harbor Comm'rs, 18 Wall. 57; Railway Co. *v.* Renwick, 102 U. S. 180. The leading case in New York as to construction and effect of grants of land *under water* is Langdon *v.* Mayor, &c. of New York, 93 N. Y. 129.

Referring to the conflicting cases as to the nature and extent of the rights of the riparian proprietor, *Cooley*, J., said: "In Railway Co. *v.* Renwick, 102 U. S. 180, the better and more substantial doctrine is laid down, that the land under the water in front of a riparian proprietor, though beyond the line of private ownership, cannot be taken and appropriated to a public use by a railway company under its right of eminent domain without making compensation to the riparian proprietor." Backus *v.* Detroit, 49 Mich. 110, 114 (1882). *Contra*, Langdon *v.* Mayor of New York, 93 N. Y. 129, and New York cases there cited. See interesting opinion of *Finch*, J., in Mayor *v.* Hart, 95 N. Y. 443, 457 (1884).

In the Chicago Lake Front Case, 33 Fed. Rep. 730, U. S. Cir. Court, *Harlan* and *Blodgett*, JJ. (Illinois *v.* Illinois Cent.

a grantee under a valid city grant, although it is an incorporeal right, is nevertheless property, or a property right which can only be taken away by the legislature by the exercise of the right of eminent domain, on making compensation to the owner of the wharfage right.[1]

§ 108 (72). **Right to erect Public Wharves.** — While the riparian proprietor has the right to erect wharves which are private in their nature, but which may be used by the public with the consent of the owner, express or implied, the *right to erect public wharves and to demand tolls or fixed rates of wharfage* is, according to the better view, a franchise, which must have its origin in a legislative grant.[2]

§ 109 (73). **By Municipality.** — If a *municipality* is itself a *riparian proprietor*, this will probably give to it, in the absence of any

R. R. Co.), it was held that the defendant railroad company, as the riparian owner of certain water lots in Chicago, had the right, by virtue of such ownership, to connect the shore-line by artificial construction with outside waters that were navigable in fact, in the absence of legislative or governmental direction to the contrary; although the court added, that the exercise of that right is at all times subject to such regulations — at least, those not amounting to prohibition — as the State may establish; citing text, secs. 70–77; Yates *v.* Milwaukee, 10 Wall. 397, and other cases. It was also declared in the same case that the State of Illinois had the power, by legislation, to fix pier, dock, or wharf lines, other than those erected under authority of the United States, to which riparian owners in waters navigable in point of fact must conform.

Municipal control, under legislative grant, over right of riparian owner to wharf out. Baltimore *v.* White, 2 Gill (Md.), 444 (1845); Wilson *v.* Inloes, 11 Gill & J. (Md.) 351; Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. 4 Dillon, 593; Weber *v.* Harbor Comm'rs, 18 Wall. 57 (1873). Where, under acts of the legislature, a city had the power to refuse assent to riparian owners to erect wharves, or to allow it upon such terms as they deemed beneficial to navigation and the use of the port of that city, it was held that the city might make the grant of the right to erect a wharf upon the condition that its exterior margin should constitute a *public* wharf. Baltimore *v.* White, *supra*.

[1] Langdon *v.* Mayor, &c. 93 N. Y. 129; Williams *v.* Mayor, &c. 105 N. Y. 419. For measure of compensation to the wharf proprietor in such case, see Kingsland *v.* Mayor, &c. 110 N. Y. 569.

[2] People *v.* Wharf Co., 31 Cal. 34; The Wharf Case, 3 Bland Ch. (Md.) 383; Wiswall *v.* Hall, 3 Paige Ch. 313; Houck on Rivers, sec. 282; Thompson *v.* Mayor, 11 N. Y. 115. Text approved: Christie *v.* Malden, 23 W. Va. 667; The Geneva, 16 Fed. Rep. 874. See, *as to navigator's right to moor and land*, Bainbridge *v.* Sherlock, 29 Ind. 364; modified, Sherlock *v.* Bainbridge, 41 Ind. 35 (1872); Talbot *v.* Grace, 30 Ind. 389; Jeffersonville *v.* Ferry Co., 27 Ind. 100; s. c. 35 Ind. 19 (1870); Railroad Co. *v.* Ellerman, 105 U. S. 166; New Orleans *v.* Wilmot, 31 La. An. 65. Right of city as to grant to it of land *under water*, and the construction of such grant. Langdon *v.* Mayor, &c. of New York, 93 N. Y. 129; Weber *v.* Harbor Comm'rs, 18 Wall. 57; Hoboken *v.* Pa. R. R. Co., 124 U. S. 656, distinguishing Hoboken Land Imp. Co. *v.* Hoboken, 36 N. J. L. 540; *supra*, sec. 107, note. *State courts* have jurisdiction of suits for wharfage against domestic vessels. Jeffersonville *v.* Ferry Co., 35 Ind. 19, 23; The Phebe, 1 Ware Rep. 360; Russell *v.* The Swift, Newb. R. 553; Lewis, *In re*, 2 Gallis. 483.

restrictive provision in its organic act, the implied authority to erect a wharf thereon, and it would have the incidental right, the same as a private owner, to charge compensation for its use.[1] Its rights

[1] Murphy *v.* City Council, 11 Ala. 586 (1847). The court say: "The title to the wharf is in the city, and, such being the fact, it had the same right as any other proprietor to collect wharfage from those landing goods there. This right, resulting from its proprietary interest, is not a franchise, but a right of property." *Ib.*, *per Ormond*, J., p. 558. The city of Boston has, under the laws of Massachusetts, the same rights as other littoral proprietors, and was held not to dedicate a dock, which it owned, to the public, by merely abstaining from any control over it. The court observe: "The people of Boston, who owned the land as their common and private property, acted through a corporation (the city), whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to *any other public of wider extent*. Whether it was called 'town dock' or 'public dock' which were used as synonymous terms), it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city." Boston *v.* Lecraw, 17 How. (U. S.) 426 (1854). The title and right involved in the *Lecraw case*, just cited, were before the Supreme Court of the United States three times (17 How. 426; 19 How. 263; 24 How. 188). The plaintiff was the owner of two wharves, called the Price Wharf and the Bull Wharf, which extended from high to low water mark. The City of Boston (the defendant) laid out Summer Street thirty feet in width to the water, and the lines of the street if extended into the water would separate the plaintiff's two wharves. The land under the waters within such extended space between high and low water mark belonged to the city. The action was brought by the wharf owner or his tenant against the city for nuisance, charging that the city had erected piles in the said water space, or dock, between the plaintiff's two wharves; also a drain in the dock for carrying off sewage. In the case in 17 How. 426, the Supreme Court decided that the City of Boston, as the proprietor of the land under water at the foot of Summer Street, might reclaim the land under water by filling up the space and building thereon, and thus exclude the public, including the plaintiff, from its use for navigation when covered by the tide; but that until the owner (the city) did so the public might lawfully use the same; and that such use is not adverse to the city or the owner of the land, and lays no foundation for a claim of dedication of the land to that use, since the right of navigation is the paramount right, but was a right defeasible by the exercise of the city's right to reclaim its land under water by wharfing out or making erections thereon beneficial to itself; and the court held that there was no evidence whatever that the city or the people of Boston had dedicated the slip or dock between the plaintiff's wharves to any public use, and that the city had the right to drive piles or extend its sewers in the *locus in quo* to low-water mark. In the case in 19 How. 263, the court decided that if the city had determined to reclaim this dock or land under water between the plaintiff's wharves, and had laid out and constructed a street thereon or continued the street to low-water mark, then the right to use it as a street or highway *on land* became appurtenant to the wharf property of the adjoining owners; and also that if the city in the exercise of its power to make drains under the streets should so construct them as to hinder the public in their use of the streets as streets, or to create a nuisance to the adjoining properties, it would be liable therefor, since if such a street be made the plaintiff would have a right to pass along the same as well as the public. In the case in 24 How. 188, it appeared that the space had not been reclaimed from the water, and that no street on land had been made; and the court decided that though the city was the owner of the land at the foot of the street between high and low water mark, it could not lay out a street or highway *in the water* of the ocean for