would be the same as those of any similar proprietor, and no greater, unless enlarged by legislative grant.

§ 110 (74). **Powers of Municipality.** — Except as mentioned in the last section, all of the *powers of a municipality* in respect to wharves and docks must, like all its other powers, be derived from the legislature.[1] Where *streets terminating or fronting on navigable*

boats and vessels; and that on the facts of the case the city was not liable to the plaintiff, the owner of the wharves, for erecting drains and sewers on the city's own land at the foot of the street, for the preservation of the health of the city. Commonwealth *v.* Roxbury, 9 Gray, 514, 519, and note ; Railroad Co. *v.* Ellerman, 105 U. S. 166. *Bona fide* purchaser of a wharf in the city of Baltimore, erected under contract with the city, and in which the city had certain rights, held affected with notice of those rights. Baltimore *v.* White, 2 Gill (Md.), 444. A city, authorized by its charter to build wharves on its own property, and to obtain by contract or purchase the title or the control of other wharves in the city, and to raise a revenue therefrom by establishing and collecting a rate of dockage and wharfage, had no power to take a lease of a wharf containing a provision that it should be kept as a *free wharf*. Mobile *v.* Mood, 53 Ala. 561. *Wharves, whether terminating streets or not, are not streets* ; if owned by the city they may be leased to private persons. In such case the title is not a public easement, but proprietary. Horn *v.* People, 26 Mich. 221; and see Scott *v.* Layng, 59 Mich. 43; *supra*, sec. 103, note; *infra*, sec. 110, note ; sec. 114, note, as to ferry landing at foot of street. "Within the corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage, and administer the use of the river banks for the public convenience and utility ; to establish wharves and landings ; to erect works and provide facilities for the use of vessels and water craft; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a proper subject for judicial control or interference. Whatever incidental damage may result to proprietors from the exercise of these unquestionable corporate rights, it is *damnum absque injuria.*" *Per Fenner*, J., in Watson *v.* Turnbull, 34 La. An. 856.

[1] Snyder *v.* Rockport, 6 Ind. (Porter) 237 (1855); Railroad Co. *v.* Winthrop, 5 La. An. 36; State *v.* Jersey City, 34 N. J. L. 31 ; Mayor of St. Martinsville *v.* Steamer Mary Lewis, 32 La. An. 1293. As the municipality derives such powers from the legislature, the legislature may repeal or revoke them at pleasure, if it does not deprive the municipality of property acquired by it under the legislative grant. Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881). Under the charter of a city providing that the city "*shall have control of the landings of the Mississippi River, and the right to build wharves and regulate the landing, wharfage, and docking of boats,*" it may establish and construct wharves, and collect a reasonable compensation for their use. Muscatine *v.* Keokuk, &c. Packet Co., 45 Iowa, 185 (1876); *post*, sec. 112. While a city may be enjoined, at the instance of a taxpayer, from raising taxes or appropriating money for the unauthorized construction of a wharf, it will not be restrained from exercising a clear power to grade streets, merely because, by such grading, a wharf at the river end of the street will incidentally result. Snyder *v.* Rockport, above cited. The city of Dubuque, under its charter, was held to have power to prohibit all persons, including riparian owners, from using any place but the public wharf

waters have been established, whether by condemnation or dedication, and whether the fee is in the municipality or in the adjoining proprietor, the municipality, under legislative authority to establish and regulate wharves, may cause public wharves to be constructed at the ends or in front of such streets and receive the wharfage from the same ; and this is no invasion of the rights of the owner of private property abutting on such streets, or of the rights of the adjoining riparian proprietor.[1] In regard to *private wharves* lawfully

without paying wharfage. Dubuque *v.* Stout, 32 Iowa, 80 ; s. c. 7 Am. Rep. 171; *post*, sec. 112, note. As to the use, under municipal authority, of streets bordering on a navigable river for structures for the accommodation of passengers and the storage of freights, &c., see Barney *v.* Keokuk, 94 U. S. 324 (1876); s. c. below, 4 Dillon, 593 ; Ill. &c. Co. *v.* St. Louis, 2 Dillon, 70.

[1] McMurray *v.* Mayor, &c. of Baltimore, 54 Md. 104 (1880); Dugan *v.* Mayor, 5 Gill & Johns. 375 ; Haight *v.* Keokuk, 4 Iowa, 199 ; Barney *v.* Keokuk, 94 U. S. 324 ; Rowans' Ex'rs *v.* Portland, 8 B. Monroe, 253 ; Newport *v.* Taylor's Ex'rs, 16 B. Monroe, 700 ; Barney *v.* Mayor, 1 Hughes (C. C.) 118 ; Potomac Steamboat Co. *v.* Upper Potomac, &c. Co., 109 U. S. 672 (1883), and cases cited by *Matthews*, J., on pp. 682, 683. The general ground of the doctrine is that streets terminating or fronting on the water may be legitimately used for wharf purposes ; and the cases show that there is a very general legislative recognition of this right and usage. In accordance therewith, it was held in the Chicago Lake Front case by the United States Circuit Court (*Harlan* and *Blodgett*, JJ.), 33 Fed. Rep. 730 (1888), that the city of Chicago, as the riparian owner of ground on the shore of the lake, having, also, under its charter, power to maintain wharves and slips at the ends of streets, and to maintain a breakwater to protect the shore, could delegate the power to construct such breakwater to a railroad company as consideration for allowing the road to enter the city ; and that upon the erection of the breakwater and the filling in of the space between the breakwater and the shore line, the land thus reclaimed belonged to the city, — *Blodgett*, J., dissenting on this point. It was decided in City of Baltimore *v.* White, 2 Gill (Md.), 444 (1845), that under an act of the legislature prohibiting any person from making or extending any wharf in Baltimore, without the city's consent to the plan thereof first obtained, the city may refuse its assent to the erection of a wharf except upon the condition that its exterior margin shall constitute a public wharf. If private persons accept or act upon the city's assent thus conditioned, and thereupon build the wharves, they consent to the dedication of its exterior margin for that purpose ; and in the absence of a contract or legislative provision as to who is entitled to the wharfage at such a wharf, it was held under the circumstances to belong to the city, and not to the riparian proprietor who constructed the same. In Newport, &c. *v.* Taylor's Ex'rs, 16 B. Monroe, 699, 804 (1855), it was decided that where a proprietor of lands laid out a town on a navigable river and dedicated the land along it to be a *common*, that such dedication conferred upon the public authorities of the town the right to build wharves. s. p. as to lands dedicated as a street on the river bank of a town. Rowan's Executors *v.* Portland, 8 B. Mon. 232, cited with approval by *Matthews*, J., in Potomac Steamboat Co. *v.* Upper Potomac &c. Co., 109 U. S. 686, 687; Louisville *v.* Bank, 3 B. Mon. 144 ; Kennedy *v.* Covington, 8 Dana, 61. A city in *Alabama* constructed a wharf at the end of a dedicated street leading to the water ; held that the adjoining proprietor was not the owner of the wharf, and could not eject the city therefrom. Doe *v.* Jones, 11 Ala. 63 (1847). In *Michigan*, a dedicated street terminating upon a navigable water gives to the city, having power to erect and regulate public wharves and docks at the

erected, the municipal authorities have only such powers of local regulation and government as their charters or constituent acts, in general or special terms, confer upon them.[1] *Their own right* to erect wharves may be express or implied. The power, even when conferred in terms, is, like other powers, to be *construed somewhat strictly when it affects private rights*, but not so strictly as to defeat

ends of streets, the right, as against a proprietor whose property fronts on the street and the navigable water, to erect a wharf for public purposes, and this irrespective of whether the city holds the fee of the street or not. Backus *v.* City of Detroit, 49 Mich. 110 (1882). In this case *Cooley*, J., said: "The dedication passed [by the statute] the *fee in all streets* marked upon it to the county in which the city was situated. But this was only in trust for street purposes. We attach no special importance to the fact that the title passed instead of a mere easement. The purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage, to which the land might be devoted." The *city of Detroit* is, by its charter, authorized "to erect, repair, and regulate 'public wharves' and docks at *the ends of streets*, and on the property of the corporation, and to fix lines beyond which private docks shall not extend, and to lease wharf and wharfage privileges at the ends of streets," &c. This gives the power to the city to authorize a wharf to be built at the end of a street terminating on the navigable water. It was held in Horn *v.* People, 26 Mich. 222, that wharves constructed by the city under this power, whether at the end of highways or on its property, are the property of the city, and may be leased as such. *Campbell*, J., thus defines the words "public wharf," as used in the charter (*Ib.* p. 224): "There is no instance in which the term 'public wharf' has been used in our legislation to indicate anything analogous to a dedication to any public use, like that of highways. Such a public right is unknown to the common law. Wharfage involves exclusive use, for longer or shorter periods, by each vessel, depending on the nature of its business, and the extent of its cargo. All that is meant in the charter by a 'public wharf' is a wharf belonging to the city, and to be used like any other wharf property. The term is applied as well to wharves on city property away from streets, as to wharves at the end of streets." See also, Scott *v.* Layng, 59 Mich. 43, 49 (1886). See *post*, chap. on Dedication.

[1] Grant *v.* Davenport, 18 Iowa, 179 (1865). Where the charter of a city authorizes it "to regulate the erection and repair of *private* wharves and the rates of wharfage thereat, the city," says *Wright*, C. J., "may *regulate*, but not destroy; may exercise control, as over other private property within its limits, but not to the extent of appropriating the use and enjoyment thereof to the public without compensation." *Ib. Liability of city corporation* for an injury to a private wharf, caused by diverting streams of water to a point near the wharf, thereby causing a great deposit of sand and earth, which lessened the depth of water at the wharf and impaired its value. Barron *v.* Baltimore, 2 Am. Jurist, 203, cited and approved in Stetson *v.* Faxon, 19 Pick. 147 (1858); and see, also, Thayer *v.* Boston, 19 Pick. 510. If the *deposits from sewers* constructed by the city cause a peculiar injury to the wharf owner, the *city is liable* to the latter in damages. Franklin Wharf Co. *v.* Portland, 67 Me. 46 (1877); s. c. 24 Am. Rep. 1, and Mr. Thompson's note; Haskell *v.* New Bedford, 108 Mass. 208; Brayton *v.* Fall River, 113 Mass. 218; s. c. 18 Am. Rep. 470; *post*, chap. xxiii. Power to erect public wharves and to condemn private property therefor includes the *power to extend a wharf* already established, and compulsorily to appropriate the necessary land for that purpose, on making compensation to the owner. Hannibal *v.* Winchell, 54 Mo. 172 (1873).

the purpose of the grant.[1] Thus, although the corporate boundaries may by the charter be extended to low-water mark, and the corporation has express power "to regulate the erection and occupation of *all* wharves or levees within the corporate limits," this does not give the corporation, as against the riparian proprietor (whose right was construed to extend to low-water mark), the power to control the river bank so as to require such proprietor or his lessee to take out a license for his wharf-boat, fastened to the shore of his own land, and used for business purposes.[2]

§ 111 (75). **Scope of Municipal Power.** — So where a riparian proprietor had constructed a wharf which extended to, but did not encroach upon the navigable part of the river, and which was not shown to be a nuisance in fact, it was held by the Supreme Court of the United States that the city within which the wharf was situated could not, under the *charter power to establish dock and wharf lines and restrain and prevent encroachments upon the river and obstructions thereto*, pass an ordinance declaring the wharf to be an obstruction to navigation, and a nuisance, and ordering it to be summarily abated.[3]

[1] As to *the extent of municipal power over public and private wharves and the respective rights of the riparian owner and municipal authorities, concerning wharves and wharfage:* Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881); Grant *v.* Davenport, 18 Iowa, 179 (1865); Cincinnati *v.* Walls, 1 Ohio St. 222; Muscatine *v.* Hershey, 18 Iowa, 39; Galveston *v.* Menard, 23 Tex. 348; Baltimore *v.* White, 2 Gill (Md.), 444 (1845); Furman *v.* New York, 5 Sandf. S. C. 16; affirmed, 10 N. Y. 567; Dugan *v.* Baltimore, 5 Gill & Johns. (Md.) 357 (1833); reversing s. c. 3 Bland, Ch. 361; Wilson *v.* Inloes, 11 Gill & Johns. (Md.) 358; Shepherd *v.* Municipality, 6 Rob. (La.) 349; Columbus *v.* Grey, 2 Bush (Ky.), 476; Kennedy *v.* Covington, 17 B. Mon. 567; Memphis, &c. Packet Co. *v.* Grey, 9 Bush (Ky.), 137 (1872); Comm'rs *v.* Neil, 3 Yeates (Pa.), 54; Richardson *v.* Boston, 24 How. (U. S.) 188; s. c. 19 How. 263; 17 How. 426; Newport *v.* Taylor, 16 B. Mon. 699 (1855); Commonwealth *v.* Roxbury, 9 Gray, 514, 519, and note by Mr. (now Justice) *Gray;* Trowbridge *v.* Mayor (right of Albany under Dongan charter), 7 Hill (N. Y.). 429; s. c. 5 Hill, 71; Hart *v.* Mayor, 9 Wend. 571; Lansing *v.* Smith, 4 Wend. 4; Thompson *v.* Mayor, 11 N. Y. 115; Marshall *v.* Guion, *Ib.* 461; Corporation *v.* Scott, 1 Caines, 543; Mayor, &c. *v.* Hart, 95 N. Y. 443 (1884); Langdon *v.* Mayor, &c. N. Y. 93 N. Y. 129, and cases cited; Potomac S. B. Co. *v.* Upper Potomac, &c. Co., 109 U. S. 672 (1883). Principles of construction, *ante*, sec. 89, and notes; *post*, 113, note.

The charter powers of a municipality in respect to wharfage are subject to the unlimited control of the legislature, except so far as the rights of creditors may be impaired. St. Louis *v.* Shields, 52 Mo. 361 (1873); Railroad Co. *v.* Ellerman, 105 U. S. 166 (1881); *ante*, sec. 69.

[2] McLaughlin *v.* Stevens, 18 Ohio. 94, (1849); Blanchard *v.* Porter (extent of riparian right), 11 Ohio, 138, 144; Muscatine *v.* Hershey, 18 Iowa, 39; Martin *v.* Evansville, 32 Ind. 85 (1869).

[3] Yates *v.* Milwaukee, 10 Wall. 497 (1870). Yates *v.* Milwaukee was approved and applied in the Chicago Lake Front case by *Harlan* and *Blodgett*, JJ., in State of Illinois *v.* Illinois Central R.

§ 112 (76). **Tolls and Wharfage.** — If the right to impose wharfage is given to a municipality, but not limited, the question of the *amount* which the municipal authorities may exact is confided to their discretion, and is one with which the courts cannot interfere,[1] unless, perhaps, in a case where the by-law imposing it is plainly unreasonable.[2] But the amount of tolls or wharfage may, of course, be regulated by the legislature.[3]

§ 113 (77). **Duties and Liability of Municipality.** — The interests of commerce imperatively require that *public wharves should be in a*

R. Co., 33 Fed. Rep. 730 (1888). Approved and distinguished, Weber *v.* Harbor Comm'rs (San Francisco), 18 Wall. 57 (1873). See *supra*, sec. 107, note.

[1] Municipality *v.* Pease, 2 La. An. 538 (1847); Muscatine *v.* Hershey, 18 Iowa, 39, 42 (1864), *per Wright*, J.; Coal Float *v.* Jeffersonville, 112 Ind. 15 (1887). The erection of a wharf by a city was presumed to be for the benefit of the public, and in the *absence of an ordinance* fixing the wharfage dues or providing for the payment of a compensation for the use of its wharves, it was held that such compensation could not be collected by the city. Muscatine *v.* Keokuk, &c. Packet Co., 45 Iowa, 185 (1876). A city may *prescribe by ordinance the fees* which shall be paid for the use of the wharves within its limits, and this power is impliedly subject only to the limitation that such fees shall be reasonable. Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa, 196 (1876). As to right of a city to charge wharfage fees when vessels or boats are moored at places where *no* wharves have been founded. *Ib.;* Dubuque *v.* Stout, 32 Iowa, 80; s. c. 7 Am. Rep. 171.

Voluntary Payment. Where the owners of boats have paid wharfage fees under protest, which were demanded and collected in the absence of authority to make the demand, they cannot recover them back in an action against the city. Muscatine *v.* Keokuk, &c. Packet Co., 45 Iowa, 185 (1876). The mere danger that an action at law will be commenced to enforce payment does not make the payment of a demand unjustly and illegally made a compulsory payment. *Ib.* See cases on the subject of voluntary and compulsory payment, cited at large, *post*, chap. xxiii. Packet Co. *v.* St. Louis, 4 Dillon, 10 (1876); *ante*, secs. 94, 95.

[2] See *ante*, sec. 94 and note, as to when and how far discretionary powers are subject to judicial cognizance. As to reasonableness of wharfage charges: *supra*, sec. 103 note. Coal Float *v.* Jeffersonville, 112 Ind. 15 (1887). As to general requirement of law that all ordinances or by-laws must be reasonable, see *infra*, chap. xii. Municipal Ordinances and By-Laws.

[3] Baltimore *v.* White, 2 Gill (Md.), 444 (1845); Murphy *v.* City Council, 11 Ala. 586 (1847): Munn *v.* Illinois, 94 U. S. 113. Authority to a city "*to erect, repair, and regulate wharves and the rates of wharfage*," authorizes it *to collect wharfage* upon goods landed on the bank, the space in front of the city being dedicated to the public, although no artificial wharf was erected. Sacramento *v.* Steamer, 4 Cal. 41. This subject is discussed by *Wright*, J., in Muscatine *v.* Hershey, 18 Iowa, 39, but the point is not decided by the court. See Dubuque *v.* Stout, 32 Iowa, 47, 80 (1871); s. c. 7 Am. Rep. 171. In *Kentucky*, however, it is held that the owner of the land must build wharves, or improve the shore, or make some preparation for the reception or delivery of goods, or accommodation of vessels, before he is entitled to collect tolls or wharfage. Columbus *v.* Grey, 2 Bush (Ky.), 476. See *supra*, sec. 103, note. If he permits the municipal authorities so to improve the wharves, he will only be entitled to reasonable compensation for the use of the river bank. *Ib.* The word "quay" defined by *McLean*, J., in New Orleans *v.* United States, 10 Pet. 661, 715.

safe condition; and if a municipal corporation is in possession of such a wharf and exercises control over it, and receives tolls for its use, it owes a duty to the public to keep it in proper and secure condition for use, *and it is liable,* without statutory enactment to that effect, to an action for any special injuries to boats and vessels caused by its failure to discharge this duty. In such a case it is not material whether the city had adopted ordinances for the regulation of the wharf, or, having such, neglected to enforce them, as in either event the responsibility is the same.[1]

§ 114 (78). **Ferries; Nature of Ferry Grant to a Municipality.** — It is not unusual for the legislature to make to a municipal corporation a more or less extensive grant respecting *ferries and ferry franchises.* Such a grant is not, unless otherwise expressed, a compact which cannot be impaired, but in the nature of a public law, subject to be repealed or changed, as the public interests may demand.[2] If the legislature has conferred, as in some of the ancient

[1] Pittsburgh *v.* Grier, 22 Pa. St. 54 (1853). "This case," says *Perley*, C. J., in Eastman *v.* Meredith, 36 N. H. 284, 295, "is put distinctly upon the ground that the public duty, which was the foundation of the action, arose out of the control which the city exercised over the wharf, and the income received for the use of it." That the right to collect wharfage by the city imposes the duty to keep in repair, and a correlative liability, has been often determined. City not liable for filling up slip from a sewer. Reed *v.* Lynn, 126 Mass. 367; Shinkle *v.* Covington, 1 Bush (Ky.), 617, where there was a failure to provide proper fastenings for boats. Allegheny *v.* Campbell, 107 Pa. St. 530; Willey *v.* Allegheny, 118 Pa. St. 490; *supra*, sec. 105, and note. People *v.* Albany, 11 Wend. 539, 543; Buckbee *v.* Brown, 21 Wend. 110; Mersey Dock Trustees *v.* Gibbs, Law R. 1 H. L. 93. *Lessee of city* is under like liability. Radway *v.* Briggs, 37 N. Y. 256 (1867). In form, the action in such a case against the city may be either *case* or *assumpsit*. Pittsburgh *v.* Grier, 22 Pa. St. 54 (1853). But it is no defence to an action by a city for wharfage that the wharf was not well built and needed further improvement or repairs. Prescott *v.* Duquesne, 48 Pa. St. 118; Jeffersonville *v.* Ferry Co., 27 Ind. 100; s. c. 35 Ind. 19 (1870); Winpenny *v.* Philadelphia, 65 Pa. St. 135 (1870). Where it was rendered unsafe by acts of others, notice, express or implied, is an element necessary to liability, the same as in the case of defective highways. Seaman *v.* New York, 3 Daly (N. Y.), 147; *post*, chap. xxiii., where the subject and the ground of the *liability of the corporation for torts* is considered at large.

The *duty* of those having control of a *harbor* is, so long as it is open to the public, to have it *reasonably safe for the public use, and this whether tolls are collected or not for the use of it.* Parnaby *v.* Lancashire Canal Co., 11 A. & E. 223; Metcalfe *v.* Hetherington, 11 Ex. 257; s. c. 5 H. & N. 719; Gibbs *v.* Liverpool Docks, 3 H. & N. 164; s. c. L. R. 1 H. L. C. 93, 104, 122; Longmore *v.* Great Western Railway Co., 35 L. J. C. P. 135; Francis *v.* Cockrell, L. R. 5 Q. B. 184; Webb *v.* Port Bruce Harbor Co., 19 Upper Can. Q. B. 626; Coe *v.* Wise, L. R. 1 Q. B. 711; Winch *v.* Conservators of the Thames, L. R. 7 C. P. 471; see Sweeney *v.* Port Burwell Harbor Co., 17 Upper Can. C. P. 574; reversed, 19 Upper Can. C. P. 376; Berryman *v.* Port Burwell Harbor Co., 24 Upper Can. Q. B. 34.

[2] East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511 (1850); Roper *v.* McWhorter, 77 Va. 214; *ante*, sec.

charters in England and in this country, upon a municipal corporation *its whole power* to establish and regulate ferries within the corporate limits, the corporation thus representing the sovereign power may make an *exclusive* grant.[1] But such a corporation has not an *exclusive* power over the subject, unless, by express words or necessary inference, it be plainly given to it by the legislature. Hence, power to a municipality *to establish and regulate ferries* within its limits *does not give it an exclusive power*, and consequently does not authorize it to confer an exclusive privilege upon others to establish a ferry.[2]

68. As to extinguishment of ferry franchise by a subsequent legislative grant to build a bridge at the site of the ferry, and take tolls, see the famous case of Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420 (1837). The dissenting opinion of Mr. Justice *Story*, on the important constitutional question involved in this case, is referred to by Mr. *Webster*, in a letter to Judge *Story*, as "the ablest and best written opinion I ever heard you deliver; it is close, searching, and scrutinizing; the opposite opinion has not a foot nor an inch of ground to stand on." 2 Story, Life and Letters, 268. Chancellor *Kent* expressed the same opinion. *Ib.* 270. But fifty years' subsequent experience has vindicated the judgment of the court and placed it upon an immovable and unquestioned foundation. *Construction of special grant.* Hartford Bridge Co. *v.* Ferry Co., 29 Conn. 210, where a ferry had been maintained by a city for a time beyond the memory of living men, it was held, in the absence of other evidence, that its *franchise was established by prescription;* and also, that while the State could divest the city of the franchise, its purpose and intent to do so must clearly appear, and cannot be left to implication. City of Laredo *v.* Martin, 52 Tex. 548 (1880). As to *corporations by prescription*, see *ante*, secs. 32, 37.

[1] Costar *v.* Brush, 25 Wend. 628 (1841). See also Mayor, &c. of New York *v.* Starin, 106 N. Y. 1; Mayor, &c. of New York *v.* New York & N. J. S. N. Co., 106 N. Y. 28.

[2] Minturn *v.* Larue, 23 How. (U. S.) 435 (1859); Harrison *v.* State, 9 Mo. 526 (1845); McEwen *v.* Taylor, 4 G. Greene (Iowa), 532; *ante* secs. 89–91, and cases in notes. While the exclusive power conferred by the legislature upon a city to grant a ferry license does not authorize it to grant *an exclusive* license, yet the power to grant an exclusive license is conferred when the city is authorized "to grant or *refuse* a license." B. & H. Ferry Co. *v.* Davis, 48 Iowa, 133 (1878). The power to refuse gives the power to limit the issue of licenses; if it can limit, there is no reason why it cannot bind itself to issue no other; but the power to license, or to license and regulate certain occupations, does not, it seems, include the power to *create a monopoly*. Chicago *v.* Rumph, 45 Ill. 90; Logan *v.* Pyne, 43 Iowa, 524; B. & H. Ferry Co. *v.* Davis, 48 Iowa, 133. But "the grant of exclusive ferry licenses rests upon peculiar grounds. It is in some sense an extension of a public road. The objection to the creation of a monopoly is overcome in the matter of a few by the consideration of the public necessity or advantage." *Ib., per Adams*, J. The question whether the grant of a ferry to individuals by the legislature deprives a municipal corporation possessing the usual powers to provide for the convenience and prosperity of its citizens, of the right to establish a competing ferry, discussed but not decided, in Gibbes *v.* Beaufort, 20 S. C. 213. A city owning a ferry must *administer the public trust* thus imposed as the public interest may require. Waterbury *v.* Laredo, 68 Tex. 565 (a contract by which a city gave to an attorney one third of the rents of a ferry, and bound itself not to make any engagement which would interfere with its terms, held void as being against public policy). Whether the *dedication of land for a highway or street terminating on a river* will authorize the use of the same *for a ferry landing*, that is, for fastening boats and receiving and discharging freights and passengers, without the consent of the abutting owner, see Prosser *v.* Wappello County, 18 Iowa, 327, and cases cited; also 4 Am. Law Reg. (N. S.) 519 (1865); *supra*, sec. 103, note; sec. 109, note.

[1] Chilvers *v.* People, 11 Mich. 43 (1862). As to distinction between a license fee and a tax, see Ash *v.* People, 11 Mich. 347; Flanagan *v.* Plainfield, 44 N. J. L. 118, and the chapters on Ordinances and Taxation. *Post*, secs. 357, 768. Amount of license city may exact, the State law on the subject being held to affect the city. Reddick *v.* Amelia, 1 Mo. 5 (1821).

[2] Fay, *In re*, 15 Pick. (Mass.) 243 (1834). The court will not try on *certiorari* the conflicting titles of parties to a ferry franchise. *Ib.; ante*, chap. v. sec. 97. *Rights of municipal corporations in connection with ferries, and extent of legislative control.* See Fanning *v.* Gregoire *et al.*, 16 How. (U. S.) 524 (1853); East Hartford *v.* Hartford Bridge Co., 10 How.

§ 115 (79). **License Fee and Tax; Construction of Special Grant.** — By its charter a city was empowered "*to license, continue, and regulate*" *as many ferries* within its limits, to the opposite shore of a river bounding it, as the public good required, and the common council were further authorized "to direct the manner of *issuing and registering the licenses*, and to prescribe the *sum of money to be paid therefor* into the treasury of the corporation." Under this, an ordinance prohibiting all persons from ferrying, without a license from the mayor, and authorizing this officer to grant licenses to any person upon payment into the treasury of the city of the sum of fifty dollars, was sustained against the objections that there was no power to *prohibit* ferrying without a license, and that the license fee was a *tax*. The words of the charter, "To prescribe the sum of money to be paid into the treasury of the corporation," were regarded by the court as showing a clear intent to make licenses a source of revenue to the city; and the court added that the amount charged as a license fee did not appear to be unreasonable.[1]

§ 116 (80). **Power to Lease, Covenant, etc.** — If a municipal corporation, seized of a ferry, *lease the same*, through the agency of the mayor and aldermen, *with a covenant for quiet enjoyment*, this covenant will not restrain the mayor and aldermen from exercising the powers vested in them by statute, to license another ferry over the same waters, if in their judgment (which cannot be reviewed by the courts) the public necessity and convenience require it. On such a covenant the city may be liable to the covenantees; but the powers vested in the *city officers as trustees for the public cannot be thus abrogated*. If, however, the city in its corporate capacity is the legal owner of an *exclusive* franchise, its grantees or lessees would hold it, notwithstanding any license to others, whether granted by the mayor and aldermen or any other tribunal.[2]

§ 117 (81). **Borrowing Money; concerning Implied Power to borrow Money.** — We shall hereafter treat of the *implied power* of municipal corporations *to issue negotiable securities*. But this is a different question from *the power to borrow money*. The power to borrow may be given in express language, in which case the terms and purpose of the grant will, of course, measure its extent. But suppose the power is not expressly conferred, *does it exist by implication?* It is perhaps settled law in this country that private corporations, organized for pecuniary profit, have, in the absence of special limitation or restriction, an implied or incidental authority to borrow money for their legitimate purposes, and to give negotiable obligations for its repayment.[1] The question of the *incidental authority of municipal corporations to borrow money* has not been so thoroughly considered and so often decided as to be entirely closed to controversy. In view of the legislative practice to confer, in terms, all powers so important as this, the dangerous nature of this power, by reason of the temptation it holds out to incur needless debts and to make extravagant expenditures, and the facilities it

511; affirming s. c. 16 Conn. 149; 17 Conn. 80, 96; Chilvers *v.* People, 11 Mich. 43; O'Neill *v.* Police Jury, 21 La. An. 586; Aikin *v.* Railroad Co., 20 N. Y. 370 (1859), relating to the ferry rights of the city of Albany; Benson *v.* Mayor, &c. of New York, 10 Barb. 223; Harris *v.* Nesbit, 24 Ala. 398; United States *v.* Fanning, Morris (Iowa), 348; Conner *v.* New Albany, 1 Blackf. (Ind.) 43; City *v.* Ferry Co., 27 Ind. 100; Shallcross *v.* Jeffersonville, 26 Ind. 193. The right of a city, given by charter, *to license and tax ferries*, is not, unless so expressed, exclusive of a like right in the State or county. Harrison *v.* State, 9 Mo. 526 (1845). "Power to *regulate* ferries," given to municipal corporations in general incorporation act, construed. Duckwall *v.* New Albany, 25 Ind. 283. When equity will annul lease. Phillips *v.* Bloomington, 1 G. Greene (Iowa), 498. A power conferred upon a city to establish ferries and to fix the rates, fees, and rents, authorizes it to *rent* the ferry, but it *cannot surrender its control and supervision* wholly to another. Macdonell *v.* International & G. N. Ry. Co., 60 Tex. 590. See *supra*, secs. 96, 97. In Virginia it was held that a county and a city, being joint grantees of ferry franchises, had no power to lease the ferries to private persons, the franchise being a public trust which they could not, without legislative sanction, dispose of or delegate. Roper *v.* McWhorter, 77 Va. 214. Upon *division of an old town* owning ferry franchise, the *new town* owns no interest therein except so far as conferred by the legislature. Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; *post*, chaps. vii., viii.

[1] Stratton *v.* Allen, 16 N. J. Eq. 229; see *ante*, sec. 50, and chapter on Contracts, *post*, sec. 488. Lucas *v.* Pitney, 3 Dutch. (N. J.) 221; Hackettstown *v.* Swackhamer, 8 Vroom (37 N. J. L.), 191; construction of specific grant, Mayor, &c. *v.* Bailey, 8 Vroom (37 N. J. L.), 519. But see observations of *Byles*, J., in Bateman *v.* Mid-Wales Railway Co., L. R. 1 C. P. 510 (1866), as to powers of common-law corporations in England in respect to drawing, accepting, or indorsing negotiable securities. The court in this case deny (in the absence of express legislative authority conferring the power) that it is competent to a company incorporated in the usual way for the formation and working of a railway to draw, accept, or indorse bills of exchange. *Infra*, sec. 125.

offers for frauds, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants,[1] the author, where the legislative will is wholly silent, is strongly inclined *to deny the existence of a general implied* or *incidental power* to borrow money. But it must be admitted that down to the present time a majority of the express adjudications on the subject favor the contrary opinion.[2]

§ 118 (82). **The Subject considered in Ohio and elsewhere.** — The question arose *in Ohio*, in 1836, and was fully argued and considered. The town of Chillicothe possessed authority to purchase real estate, erect public buildings, repair streets, and the usual municipal powers. The right to borrow money was *not expressly* granted, and the only question in the case (an action upon the bonds of the town given for borrowed money) was, whether it was granted by implication. The case was regarded as of the first impression, no authorities in point being produced. The *court distinctly decided* that in carrying out the express powers, or in effecting any legitimate municipal object, the corporation possessed the *incidental* or *implied* right to borrow money.[3] Subsequently the Supreme Court of Wisconsin affirmed the implied authority of a municipal corporation, as incidental to the execution of the general powers granted by its charter, and in the absence of a special restriction, to borrow money and issue its bonds therefor, it appearing that the proceeds thereof went into the treasury of the city and were expended by it.[4] "The charter," says the court, stating its reasons, "does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would

[1] *Ante*, secs. 90, 91.

[2] Text cited Robertson *v.* Breedlove, 61 Tex. 316; Richmond *v.* McGirr, 78 Ind. 192.

[3] Bank *v.* Chillicothe, 7 Ohio, Part II. p. 31 (1836).

[4] Mills *v.* Gleason, 11 Wis. 470 (1860); s. c. 8 Am. Law Reg. 692; State *v.* Madison, 7 Wis. 688; Clark *v.* Janesville, 10 Wis. 136; Clarke *v.* School District, 3 R. I. 199 (1855), in which it is held that when money is borrowed to pay a lawful debt of a corporation, and it is so applied, the corporation is liable on the notes given for the money borrowed; it is not held that notes so given under the incidental power to provide for the payment of debts have all the qualities of commercial paper. In State, *ex rel. v.* Babcock, 22 Neb. 614 (1888), it was held that a power to make regulations to secure the general health of a city and to construct sewers and to regulate their use, conferred necessarily the power to provide money for the construction of a sewer for the purpose of draining its principal street, by issuing bonds therefor. See *infra*, secs. 120, 125, 126.