is a franchise which can be granted only by the legislature, or some local or municipal authority empowered to confer it.[1] Where the grantee of such a franchise has performed the public service imposed as a condition of the grant, the franchise is *a contract*, which falls within the provision of the Constitution of the United States forbidding the States to pass laws impairing the obligation of contracts.[2] But in making an *exclusive grant* of the right to supply gas to a city and its inhabitants, the legislature does not part with its police power and duty regarding public health, morals and safety, as they may be affected by the exercise of the franchise.[3]

[1] State *v.* Cinc. Gasl. & C. Co., 18 Ohio St. 262. As to power of municipalities to grant permission to lay down *gas pipes* in the streets, see also Milhau *v.* Sharp, 15 Barb. 210, *per Edwards*, P. J.; Norwich Gasl. Co. *v.* Norwich City Gas Co., 25 Conn. 19 (1856); Smith *v.* Metrop. Gasl. Co., 12 How. (N. Y.) Pr. 187 (1855); People *v.* Benson, 30 Barb. 24. *Gas pipes* cannot be laid down in *country highway* without the consent of the owner of the fee or compensation to him. It is an additional servitude. Bloomfield & R. N. Gasl. Co. *v.* Calkins, 62 N. Y. 386 (1875). The laying and maintaining, by a company organized for supplying natural gas, of a pipe-line under a country roadway, is an additional servitude on the land for which the owner is, under the Constitution of Pennsylvania, entitled to compensation (Art. 16, sec. 8), and until made may have an injunction to restrain the laying of the line. Sterling's Appeal, 111 Pa. St. 35. But as to streets in cities, *quære*. *Ib.* It seems to us clear that in cities the use of the streets under legislative or municipal sanction, for the purpose of laying down gas or other pipes to supply the city and its inhabitants with light, is a legitimate use of the street, for which the abutting owner is not entitled to compensation. Such, so far as the author knows, is the general understanding of the public and of the profession. Power to *light streets* construed. Nelson *v.* La Porte, 33 Ind. 258; Richmond County Gasl. Co. *v.* Middletown, 59 N. Y. 228 (1874); New Orleans *v.* Clark, 95 U. S. 644 (1877). In *California* the right of laying gas and water pipes in streets is controlled by the Constitution adopted in 1879. See People *v.* Stephens, 62 Cal. 209.

It is obvious that the supplying of a city with light as well as water, through a *distributing plant located in the streets*, is essentially a monopoly, and that effective competition is almost impossible. It is practicable to have competition in the manufacture of gas and supply of water, but not if the company exclusively owns and controls its own distributiug plant. If this is owned or controlled by the municipality, competition would be, to some extent at least, practicable. It has been strongly urged that it is the part of true wisdom and sound policy that cities should own their own gas and water works. This policy largely obtains in Europe. Comparatively few cities — a dozen or so — in the United States own their own gas-works, but in the United Kingdom there are 552 gas plants, of which 168 belong to cities. In Germany, out of 667 gas plants, 338 belong to municipalities. In Saxony, every gas-making plant belongs to the city in which it is located, private ownership of gas plants being unknown. Forum Mag. vol. viii. p. 286. See Index, title *Monopoly; infra*, sec. 697, and notes.

[2] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650. To same effect, Louisville Gas Co. *v.* Citizens' Gas Co., *Ib.* 683; see also New Orleans Water Works Co. *v.* Rivers, *Ib.* 674, to same effect as applied to water-works.

[3] New Orleans Gas Co. *v.* Louisiana Light Co., *supra*. Same ruling as to water companies. Stein *v.* Bienville Water Supply Co., 34 Fed. Rep. 145 and note; National Water Works Co. *v.* Kansas City, 28 Fed. Rep. 921.

§ 692 (547). **A City cannot, without express Legislative Authority, grant Exclusive Rights.** — A *general grant*, while it carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the authority expressly conferred, such as using the streets for the mains and for placing lamp posts, and making contracts or adopting ordinances proper to the execution of the power, does not authorize the city council to grant to any person or corporation an *exclusive right to use the streets* of the city for the purpose of laying down gas pipes for a term of years, and thereafter, until the works shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority to make such use exclusive for a determinate future period.[1]

[1] State *v.* Cinc. Gasl. & C. Co., 18 Ohio St. 262 (1868); Indianapolis *v.* Indianapolis Gasl. & C. Co., 66 Ind. 396, citing and approving text; Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435 (1887).

In Richmond County Gasl. Co. *v.* Middletown, 59 N. Y. 228 (1874), the board of the town corporation was authorized to cause the streets to be lighted with gas whenever they deemed it necessary, and the act required the board, whenever they deemed it necessary to have the streets so lighted, to contract with the plaintiff company to furnish and lay down gas pipes, and to furnish lamp-posts and lamps, and to supply the same with gas. This was held by a majority of the Court of Appeals not to confer the power on the board to make a contract which should be absolutely binding on the town for a fixed term of years. It was also held that the contract was terminated by a repeal of the act under which the contract was made. *Grover*, J., says: "The power conferred [on the town] was like the other powers conferred upon the officers of this and the other towns of the State, subject to modification or repeal by subsequent legislation; and the board of town auditors could not, by any contract, prevent or at all control the action of the legislature in this respect. . . . The contract became void, for want of authority, when the power to light the streets was taken away by the repeal of the act. . . . If the town could deprive the legislature of this power for five years by entering into a contract with the plaintiff for that time, it might for one hundred years, by contracting for that period. . . . The act shows that it was intended to vest a discretion at all times in the board, whether any and which of the streets should be lighted with gas. The board could, therefore, contract for a supply only during its pleasure." *Ante*, sec. 97.

Authority to light the public streets, and to levy and collect a tax for that purpose, gives the power to the municipality to do this either by the construction of gas-works of its own, or by a valid contract with others, acting within the scope of its authority. Garrison *v.* Chicago, 7 Biss. 480 (1877), *per Drummond*, J.

The validity of an ordinance giving to a company the exclusive privilege for a term of years of laying water-pipes in the streets, &c., *may be contested by another company or individual* afterward claiming such right, but not in a suit by taxpayers. Grant *v.* The City of Davenport, 36 Iowa, 396 (1873). See, *post*, sec. 917 *et seq.* Text approved. Grand Rapids Electric &c. Co. *v.* Grand Rapids Edison, &c. Co., 33 Fed. Rep. 659 (the rule applied to *electric light* companies); see also, New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650. A gas company already having the use of streets for its pipes has the right to question the validity of an

§ 693 (548). **Municipal Grant of Exclusive Rights to lay down Gas Pipes; Connecticut Decision.** — In the Norwich Gaslight Company *v.* The Norwich City Gas Company the plaintiff *claimed to have the exclusive right* to the use of the streets and public places of the city of Norwich for the purpose of *laying down gas pipes* and distributing gas therein, and sought an injunction to restrain the defendant, a rival company, from using the streets for a similar purpose. Plaintiff's claim to an exclusive right to the use of the streets was based upon *an act of the city council*, in terms giving such exclusive privilege. It appeared that the city did not own the soil or fee of the streets, but that this was in the adjoining proprietor, as in case of ordinary highways, subject to the public right of way, and to the right of the city to regulate their use, by making by-laws "relative to the streets and highways of the city, . . . relative to public lights and lamps," &c. The court decided that while the act of the city council was a license which would protect the plaintiffs from a prosecution for a public nuisance for digging up the streets in order to lay down their pipes, it was inoperative (from want of power in the city) to confer upon them an exclusive right to the use of the streets for this purpose.[1]

§ 694 (549). **Same subject.** — The plaintiff's claim to an exclusive use of the streets was further based upon *an act of the legislature*, which gave them a right (but did not oblige them to exercise it) to use the streets of the city of Norwich to lay down gas pipes, &c., which right was declared to be exclusive "against any and all persons or corporations," &c., with an exception not material to be noticed. When this act was passed, the defendant's works were far advanced. The court was of opinion that the act gave the plaintiffs *no interest in the streets*, and that they could only sustain their bill for an injunction upon the idea that they have

ordinance granting the same right to a rival company; so also has the owner of the soil in the street. People's Gas Light Co. *v.* Jersey City, 46 N. J. L. (17 Vroom) 297.

[1] Norwich Gasl. Co. *v.* Norwich City Gas Co., 25 Conn. 19 (1856). This case is distinguished, and the power of the legislature to grant an *exclusive* right to a company to manufacture and sell gas is affirmed, in the State *v.* Milwaukee Gasl. Co., 29 Wis. 454 (1872); s. c. 9 Am. Rep. 598; *supra*, sec. 691, note. See and compare Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, noticed *infra*. As to the test propounded by the Supreme Court of *Alabama* in respect of conferring franchises on particular individuals. Horst *v.* Moses, 48 Ala. 129 (1872). Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396, citing and approving text. A municipal corporation has no power, under the statutes of *Indiana*, to grant exclusive privileges to a *natural gas* company in using the streets. Citizens' Gas & M. Co. *v.* Elwood, 114 Ind. 332 (1887).

an interest in the street that is being interfered with, or threatened to be, by the defendants. The court was further of the opinion, and so held, that the act giving the plaintiffs the exclusive use of the streets was a restriction upon the free manufacture and sale of gas, was a monopoly, and unconstitutional and void. The court distinguished this from the grants of ferry and bridge franchises, which are founded upon an adequate consideration, in the obligation to accommodate the public, keep in repair, &c. But, remarks the court, "The grant to the plaintiffs appears to have been made without any consideration whatever for it. The plaintiffs are under no obligation to make gas, or suffer the gas they make to be used.[1] As there was no consideration, public or private, reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade, in respect to which the government has no exclusive prerogative, we think that, so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by the means of pipes can be fairly viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."[2]

[1] A gas company is not, upon the general principles of the law, bound, in the absence of an express statute or contract, to furnish gas to all buildings on the lines of their main pipes, upon being tendered the fixed price or a reasonable compensation. Paterson Gasl. Co. *v.* Brady, 27 N. J. L. 245 (1858). But *quære*.

A gas company chartered by the legislature, with authority to manufacture and sell gas to private consumers and for lighting the public streets on such terms as may be agreed upon, although of a public character, is not necessarily a public corporation, at least in such a sense as to exempt it from the exercise, in respect of land held by it not then in use, of the power of eminent domain conferred in general terms upon a railway company. New York Central & H. R. R. R. Co. *v.* Metrop. Gasl. Co., 63 N. Y. 326 (1875); Rochester Water Co., *In re*, 66 N. Y. 413 (1876). Under general power to construct its railway between specified termini, a railway company cannot locate its road through land acquired by a city for a reservoir. State *v.* Montclair Ry. Co., 35 N. J. L. 328; compare with Lake Pleasanton Water Co. *v.* Contra Costa Water Co., 67 Cal. 659, and Rochester Water Co., *In re*, 66 N. Y. 413; Lewis Em. Dom. sec. 273; *ante*, sec. 588.

A gas company empowered to lay its pipes in the streets of a city, takes the risk of their location, and may be required to make such changes as public convenience or security requires, at its own expense. Matter of Deering, 93 N. Y. 361.

[2] Compare with Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, and cases cited *infra*. For construction of constitutional prohibition against

§ 695 (550). **Same subject. Connecticut Decision commented on and criticised.** — With reference to this decision, it may be remarked that in order to induce the investment of capital in such enterprises, it is quite usual for the legislature, or city council by legislative authority, to grant exclusive privileges for a limited time.[1] Whether the principles of this decision would be extended to such cases, or to cases where a consideration was received for the grant, or whether, without regard to these circumstances, the restriction on the power of the legislature therein declared will be followed elsewhere, may be doubted. Since all persons cannot have a grant of the right to use streets for such a purpose, and since the grant of such a right to one on proper conditions may be for the public good, and since the essence of the franchise is not the exclusive right to manufacture and supply gas or light, but only the right to lay down pipes in the street (which in the nature of the case all persons cannot have), the Supreme Court of the United States have sustained the validity of such an exclusive legislative grant when not in conflict with some special provision of the Constitution of the State. And similar legislation has been elsewhere upheld, though it has been sometimes denied or doubted.[2] However it may be as respects the *power of the legislature*, in a particular State, to make the grant *exclusive*, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least reasonable, implication.[3]

"granting any exclusive privilege, immunity, or franchise whatever," see case of Union Ferry Co., 98 N. Y. 139. This decision confines the prohibition within narrower limits than had been generally supposed, and it may be open to further consideration whether the views expressed in the opinion give full effect to the purpose intended by the constitutional amendment. See *supra*, sec. 691, and note, as to power of *legislature* to grant exclusive rights. *Ante*, sec. 443. See Index, title *Monopolies*.

[1] In Citizens' Street Ry. Co. *v.* Jones, 34 Fed. Rep. 579, the city charter authorized it to grant to street railways "for the time which may be agreed upon, the exclusive privilege of using the streets and alleys," and it was held that such a grant must be strictly construed and that the exclusive right began only when the actual use of the streets began.

[2] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; reversing s. c. 81 Ky. 263; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674; State *v.* Milwaukee Gasl. Co., 29 Wis. 454 (1872); s. c. 9 Am. Rep. 598; Newport *v.* Newport Light Co., 84 Ky. 167; Atlantic City Water Works *v.* Atlantic City, 39 N. J. Eq. 367; *ante*, sec. 443; *supra*, sec. 691, and note. See and compare with Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, cited *infra*, and see Index, title *Monopolies*. 2 Hare Am. Const. Law, 781, 782; State *v.* Cincinnati Gaslight & C. Co., 18 Ohio St. 262 (1868); Indianapolis *v.* Indianapolis Gas. Co., 66 Ind. 396.

[3] People *v.* Benson, 30 Barb. 24; *ante*, sec. 362; State *v.* Cinc. Gaslight & C. Co., *supra*; *ante*, sec. 443; Davenport *v.* Kleinschmidt, 6 Mont. 502; Stein *v.* Bienville Water-Supply Co., 34 Fed. Rep. 145, and note. The legislature in granting an exclusive franchise to a water company does not relinquish its police power, or duty as to the public health. *Ibid.* Power in a city "to cause the streets to be lighted" and to make "reasonable regulations" therefor, does not authorize a grant of an exclusive right to furnish gas for fifty years. Saginaw Gasl. Co. *v.* Saginaw, 28 Fed. Rep. 529.

A provision in a municipal charter giving the council power to make "ordinances, rules, regulations, and by-laws for lighting the streets and public buildings of the city, and to supply the city with water," does not authorize the city to grant an exclusive privilege to lay pipes and mains in the streets of the city in order to supply it and its inhabitants with water. In a case where the charter of a water company did not expressly grant an exclusive franchise, and there was no provision in the city's charter authorizing it to grant exclusive franchises or rights to lay pipes and mains in the streets, the court held that such an exclusive right could not, consistently with the rules for the construction of such grants and contracts, be held to exist. The court strongly expressed the opinion that public policy does not permit the inference of authority in a municipality to make contracts inconsistent with the continuous duty to adopt such by-laws and regulations as the public interest and welfare require. It was also held that a reservation of the right of the city after twenty years to purchase the property and franchises of the company, or to take them sooner if it failed to supply water, did not impose on the city any legal duty which disabled it from using other means of water supply. Syracuse Water Co. *v.* Syracuse, N. Y. Court of Appeals, MSS., October, 1889; 26 N. Y. State Rep. 364; 40 Alb. Law J. 473. An ordinance granting to a water company the exclusive right to furnish water to the inhabitants, held to be void as creating a monopoly. Brenham *v.* Brenham Water Co., 67 Tex. 542; *supra*, sec. 692, note.

As to the power of the *State legislatures*, under the amendments to the Federal Constitution, to grant monopolies, see the "Slaughter House Cases," 16 Wall. 36 (1872). Judge *Hare's* review of the cases and discussion of the subject is instructive. 2 Am. Const. Law, 778–782.

The grant of a franchise by the legislature may constitute an *irrevocable contract*, the obligation of which cannot be destroyed or impaired by subsequent legislation. Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, and cases cited by appellant. In this case a grant by a city to a water company of the exclusive right to lay pipes, &c., so long as a full supply of pure water should be furnished, which was ratified by the legislature, was sustained, and a later act granting a similar right to another company was held to be beyond the power of the legislature. See also, Newport *v.* Newport Light Co., 84 Ky. 167, where it was held that if a city has power to maintain gas-works it may grant exclusive use of its streets for a term of years. A grant of an *exclusive right* to supply gas to a city and its inhabitants, upon condition of the performance of the service by the grantee, is not an infringement of the clause in the Bill of Rights of *Kentucky* 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." Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, *reversing* Citizens' Gas Light Co. *v.* Louisville Gas Co., 81 Ky. 263. In a case where a city, having only a general power to light streets, adopted an ordinance granting to an *Electric Light Company* the *exclusive* right to use the streets for fifteen years, the ordinance was declared *ultra vires*. The court in an opinion of marked force and ability says: "We have endeavored to show, upon principle and adjudged cases, that the authority of a municipality to grant *exclusive* privileges in its streets involves the exercise of the *whole* sovereign power over such highways; that nothing short of *exclusive* power and control will sustain the grant of exclusive rights. . . . If the power rests in the city council to grant an

§ 696. **Same subject.** — That a city acting under its general authority has given to a gas company the exclusive right to lay

pipes through its streets and light the same for a specified compensation, does not deprive it of the right to grant to another company, before the first franchise shall have expired, similar rights and privileges. The fact that a contract was created by the first ordinance does not destroy its legislative character.[1]

§ 697 (551). **Water Pipes; Use of Streets therefor.** — The use of streets for the purpose of laying down *water pipes* stands upon the same principles as their use for sewers and gas-pipes. Where the charter gives to the city, in terms, the power to supply, or authorize the inhabitants to be supplied with water, the municipal council may use, or, as an incidental power, may permit the contractor to use, the streets for this purpose, and the adjoining owner, although he holds the fee to the centre of the street, is not entitled to compensation as for a new servitude; for it is not such, but only a proper or necessary use incident to a street in a populous place.[2]

exclusive privilege for fifteen years, I cannot understand why the grant may not, under the same authority, be conferred for any longer period that may be determined on. The *power* requisite to confer an exclusive *sovereign franchise* for fifteen years involves the exercise and operation of the same sovereign power which could make the grant for one hundred or one thousand years, or in perpetuity. If the authority does not exist to make the grant for the longer period, it does not exist to confer it for the shorter; for it requires the possession of the *whole exclusive* power and control to grant either the one or the other." *Jackson*, J., Grand Rapids Electric, &c. Co. *v.* Grands Rapids Edison, &c. Co., 33 Fed. Rep. 659, distinguishing Atlantic City Water Works *v.* Atlantic City, 39 N. J. Eq. 367, which see noted *infra*; State *v.* Newark, 44 N. J. L. 344 (denying power of city council). S. P. as to grant of exclusive use of streets for gas pipes for thirty years. Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435 (1887), where it was also held that the grant of an exclusive privilege of lighting a city with gas does not affect the right of the city to make a contract with an electric light company for lighting it with electric lights.

[1] Des Moines Gas Co. *v.* Des Moines, 44 Iowa, 508 (1876).

[2] Angell on Highways, secs. 25, 312; Milhau *v.* Sharp, 15 Barb. (N. Y.) 210, *per Edwards*, P. J.; Kelsey *v.* King, 32 Barb. (N. Y.) 410; Crooke *v.* Flatbush Water Co., 27 Hun (N. Y.), 72; Same *v.* Same, 29 Hun (N. Y.), 245. Water works for a given town or place is public use. Wayland *v.* Middlesex Co. Comm'rs, 4 Gray (Mass.), 500; *ante*, chap. on Em. Dom. A city as *riparian proprietor* merely has only such rights as other like proprietors, and cannot, as of right, take water from the stream or pond to supply the city with water. Stein *v.* Burden, 24 Ala. 130; s. c. 27 Ala. 104; 29 Ala. 127; Stein *v.* Ashby, 30 Ala. 363; Lewis Em. Dom. sec. 62, and cases; Wood *v.* National Water Works Co., 33 Kan. 590; Quincy *v.* Bull, 106 Ill. 337, holding also that an express power given to a city to supply or to authorize its inhabitants to be supplied with water, includes as a necessary incident the power to contract for the use of the streets for that purpose. Water company compelled to lower pipes laid in a street by legislative sanction, so as to conform to a new grade established by municipal authority. Water pipes in a country highway where the fee is in the adjoining proprietor entitles him to compensation. Johnson *v.* Jaqui, 27 N. J. Eq. 552 (1876). But this principle, it is believed, does not apply to streets in a city or incorporated place. Jersey City Water Comm'rs *v.* Hudson, 13 N. J. Eq. 420; *ante*, secs. 598, 691, note; *post*, sec. 701, *et seq.* Power to "provide a supply of water" held to have been fully executed by the execution of a contract by which a proper supply was obtained, and the city enjoined from granting to other persons the right to lay pipes for furnishing water. Atlantic City Water Works *v* Atlantic City, 39 N. J. Eq. 367; distinguished, Grand Rapids Electric L. & P. Co. *v.* Grand Rapids Edison, &c. Co., 33 Fed. Rep. 659; *supra*, sec. 695, note.

A legislative grant of an *exclusive* right to supply a city and its inhabitants with water, upon condition of the performance of the service, is the grant of a franchise, in consideration of such performance of a public service, and after service performed, is a contract within the meaning of the United States Constitution forbidding the States to make laws impairing the obligation of contracts. New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674, where a grant by the city to an individual of the right to lay pipes to supply his premises with water was held to violate an exclusive franchise previously granted to a water company. The same point had been previously decided otherwise in the case of the New Orleans Water Company *v.* Louisiana Sugar Refinery Co., 35 La. An. 1111, in which it was held that the city of New Orleans might permit the laying of water pipes in public streets by private parties for their own use, notwithstanding the Water Works Company has the *exclusive* privilege of supplying the city and its inhabitants with water, the court construing this privilege to extend only to the selling of water. As to grants of exclusive rights, *supra*, sec. 691 *et seq.*; Index, tit. *Monopolies*. *Water company's liability* for negligent escape of water from pipes. Blyth *v.* Birmingham Water Works, 11 Exch. (Hurl. & G.) 781. A city owning water works not liable beyond loss of water rents for defective supply to private consumer. Smith *v.* Philadelphia, 81 Pa. St. 38 (1876); s. c. 22 Am. Rep. 731; see Tainter *v.* Worcester, 123 Mass. 311 (1877); s. c. 25 Am. Rep. 90. The erection of a water tank in the centre of a street, occupying one half of the width thereof, and the erection and operation of a steam-engine in connection therewith, even for the purpose of supplying the city and residents thereof with water, is not one of the uses of a street as such, for which the ground may be appropriately used under a dedication thereof as a street. The owner of a lot adjoining a street does not take the same, subject to any such easement, and he may therefore maintain an action for damage done to his property in consequence of such use. Morrison *v.* Hinkson, 87 Ill. 587; *supra*, secs. 690, 691.

In granting to a *water company* the right to lay its pipes in the streets, a *city does not part with any power relating to the public health*, and may construct a sewer wherever the public interest requires, without becoming liable to the water company for the expense attending the removal of its pipes to make room for the sewer. National Water Works Co. *v.* Kansas City, 28 Fed. Rep. 921. A city in *Iowa*, held to have the power to contract with a foreign corporation for the construction of water-works, and to grant to it the use of the streets for its pipes, Dodge *v.* Davenport, 57 Iowa, 560.

[1] Manhattan Co. *Ex parte*, 22 Wend. 653; Morrison *v.* Hinkson, 87 Ill. 587.

General authority to construct water-works will not authorize a municipality to occupy part of the surface of a street with a reservoir or tank.[1]

§ 698 (552). **Telegraph Poles in Streets and Highways.** — Legislative sanction directly given, or mediately conferred through proper municipal action, is necessary to authorize the use of streets for the posts and wires of a telegraph or telephone company. If such posts be erected within the limits of a street or highway without such

sanction, they are nuisances; but if the erection be thus authorized, they are not.[1] Whatever power the municipality has on this subject must be granted to it by the legislature.

§ 698 *a*. **Same subject. Right of Abutter to Compensation.** — Whether the legislature can authorize the placing of poles and lines of wires on highways or streets by telegraph or telephone companies without compensation to the abutting owner has been variously decided. That such a use is a public use authorizing the exercise

1 Commonwealth *v.* Boston, 97 Mass. 555; Regina *v.* United Kingdom El. Tel. Co., 9 Cox Cr. Cas. 174, cited in Redfield on Carriers, sec. 574, and note, where leading opinion of *Crompton*, J., is given. Young *v.* Yarmouth, 9 Gray (Mass.), 386, construing the statute of *Massachusetts;* Domestic Tel. & Teleph. Co. *v.* Newark, 49 N. J. L. 344. *Post*, sec. 1037, note. Text cited and approved: Irwin *v.* Great So. Teleph. Co., 37 La. An. 63; Julia Building Assoc. *v.* Bell Teleph. Co., 88 Mo. 258. Where city authorities have designated streets upon which a telegraph company may erect poles, and the company has expended money in erecting them, the permission cannot be revoked. Hudson Teleph. Co. *v.* Jersey City, 49 N. J. L. 303.

The *Telegraph Act of Congress* of July 24, 1866 (U. S. Rev. Stats. sec. 5263 *et seq.*), is valid as a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to execute the powers of Congress over the postal service; and it is not limited in its operation to such military and post roads as are upon the public domain. A foreign telegraph company which has accepted and complied with the terms of that act and which has secured a right of way, cannot be prevented from constructing and operating a telegraph line by a State. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1 (1877). In the Circuit Court of the United States, Southern District of New York, *Wallace*, Circuit J., decided that an act of the State legislature requiring all electric wires in any city having a population of half a million or more to be placed under the surface of the streets, was valid as a police regulation, even as respects a telegraph company which had accepted the provisions of the above-mentioned act of Congress. Western Union Tel. Co. *v.* New York, 38 Fed. Rep. 552.

"Notwithstanding telegraph lines may be an instrument of commerce, a municipal corporation has the right to determine how, in what manner, and upon what condition a telegraph company shall enter and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph, one with another." *Per Drummond*, J., Mut. Union Tel. Co. *v.* Chicago, 16 Fed. Rep. 309. See *post*, sec. 704, note.

A city may in virtue of its police power and as a police regulation supervise and control by ordinance the erection upon its streets of telegraph poles and the stringing of wires thereon, and, as incidental to this power, it was held by the Supreme Court of Pennsylvania that a license fee — in this case a license fee of five dollars for each telegraph pole, and a yearly license fee of one dollar per pole and two dollars and fifty cents per mile of wire — could be sustained as a police regulation, although it would not be valid if considered as a tax. Western Union Tel. Co. *v.* Philadelphia, 22 Weekly Notes of Cases, 39; 21 Am. & Eng. Corp. Cases, 40 (1888), and see note to that case for citation of authorities on the subject of the relative rights and duties of municipalities and telegraph and telephone companies, and the power to charge license fees. In St. Louis *v.* Western Union Tel. Co., 39 Fed. Rep. 59 (1889), United States Circuit Court, Missouri, *Thayer*, Circuit J., held a similar ordinance to be void, regarding it as a privilege or license tax, and one not authorized by the city's power "to regulate telegraph companies." See Ratterman *v.* Western Union Tel. Co., 127 U. S. 411. *Post*, secs. 744, 745, and notes.

of the right of eminent domain is not questioned;[1] but the point of controversy is whether such use under legislative sanction is an additional servitude upon the street or highway.[2] Some of the cases have made this question depend upon whether the fee in the street is in the public in trust for street uses, or in the abutter. It may be doubted, for reasons elsewhere stated, how far, if at all, this distinction is sound.[3] The author considers the true doctrine to be that the rights of the abutter, as between him and the public, are substantially the same whether the fee is in him subject to the public use, or is in the city in trust for street uses proper. On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be especially in cities with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof.

§ 699 (553). **Openings in Sidewalks; Vaults under Sidewalks and Streets.** — In many cities lot proprietors upon streets are permitted or not forbidden to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar. It is also the usage that owners of buildings may make openings *under* the sidewalk or street to obtain additional cellar room. If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot-owner has, it seems clear, no absolute right, as against the public or the municipality charged with the control of the streets, to appropriate them to this use. And in our judgment the lot-owner's right is not substantially greater even if he has the fee in the street. In either case, to recognize such a *right* except subject to municipal regulation would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate street uses and servitudes required, or which may be required, for the public benefit and convenience. The lot-

1 Trenton & N. B. Turnp. Co. *v.* Am. & Eur. Com. News Co., 43 N. J. L. 381; Mills Em. Dom. sec. 21; Pierce *v.* Drew, 136 Mass. 75, and see cases cited in next note.

2 Pierce *v.* Drew, 136 Mass. 75; Julia Building Assoc. *v.* Bell Teleph. Co., 88 Mo. 258; Gay *v.* Mut. Union Tel. Co., 12 Mo. App. 485, 494; New Orleans M. & T. R. R. Co. *v.* Southern & Atl. Tel. Co., 53 Ala. 211; Irwin *v.* Gt. So. Tel. Co., 37 La. An. 63; Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507; Broome *v.* N. Y. & N. J. Tel. Co., 42 N. J. Eq. 141; Roake *v.* Am. Tel. & T. Co., 41 N. J. Eq. 35; Dusenbury *v.* Mut. Union Tel. Co., 11 Abb. New Cases (N. Y.), 440; Lewis Em. Dom. secs. 131, 226, and cases.

3 *Ante*, secs. 656 *a*, 656 *b*; *post*, secs. 723 *a*–723 *d*; also note at end of chapter.