CITY OF MEMPHIS *v.* THE MEMPHIS WATER COMPANY.

1. MUNICIPAL CORPORATIONS. *Powers and franchises amendable and revocable.* The powers and grants of franchises to municipal corporations are always subject to legislative control, and are amendable and revocable.

2. SAME. *Water Works.* The erection of water works is one of the ordinary powers of a municipal corporation, and needs no enabling act to authorize the corporation to exercise the right within their charter limits; but it is one of the powers subject to amendment and the control of the Legislature.

3. SAME. *Modified expressly or by implication.* The modification, repeal or revocation of the powers of a municipal corporation may be effected either expressly or by necessary implication of subsequent legislation.

4. SAME. *Contracts irrevocable.* The granting of the privilege formerly enjoyed by a municipal corporation, by legislative enactment, to a private corporation for its exclusive use for a term of years, is not unconstitutional, and having been granted is, during the term, a contract beyond the reach of subsequent legislative interference.

5. SAME. *Exclusive privilege no monopoly.* The Constitution forbids "*perpetuities* and *monopolies*." An exclusive privilege to a city to erect water works is no monopoly. Granting the same exclusive privilege for a term of years to a private company does not render it a monopoly.

6. SAME. *No constitutional limitation on legislative discretion.* The Legislalature "consulting the public good" in the creation of private corporations under the Constitution of 1834, was not restricted in the exercise of its legislative powers.

7. SAME. *No compensation for use of the streets.* The streets, alleys and pavements of a municipal corporation are public easements, and the Legislature may grant to a private company for a term of years the exclusive use of them for the erection of water works along these streets and alleys, and by doing so the legal effect of such grant is to revoke the power of the city to so use them. Neither the city nor the owners of lots bordering the streets so used by the private company, would be entitled to demand any compensation for such use of the streets by the private company under the powers of its charter.

8. SAME. The conclusion is, the Water Works Company of Memphis has for thirty years the exclusive right to supply the citizens of that place with water by means of water works carried along its streets, and the

City of Memphis *v.* The Memphis Water Company.

City of Memphis has no right to erect rival and interfering water works during this term.

FROM SHELBY.

Agreed case from the First Circuit of Shelby county. C. W. HEISKELL, J.

WM. M. RANDOLPH, for city of Memphis, insisted: The questions involved in this case arise upon s. 4 of c. 67 of the Acts of 1869–70, which is as follows:

An act to incorporate the Memphis Water Company.

* * * * * * * * *

SEC. 4. *Be it further enacted,* That said company shall be, and it is hereby, authorized to establish and construct water works in and adjacent to the city of Memphis in this State, and to supply the said city and the inhabitants thereof with a plentiful supply of water; and, for this purpose, they are hereby authorized, empowered, and invested with the exclusive privilege to lay down pipes and to extend aqueducts and conductors through all or any of the streets, lanes, and alleys of the city of Memphis, and supply to the inhabitants of said city water by public works. And for the purpose of laying down such pipes, aqueducts, and conductors may take up the pavements or sidewalks upon such streets, *provided* that said pavements and sidewalks shall be taken up in such manner as to give the least inconvenience to the inhabitants of said city, and that the same shall be replaced with all convenient speed by and at the expense of said

company. The privilege hereby granted to be exclusive for thirty years only, after which it is not to be exclusive.

This act was passed on the 28th day of February, 1870.

I claim, first, that this section is void, so far as it undertakes to confer upon the defendant the *exclusive* privilege to lay down pipes, and to extend acqueducts and conductors through all or any of the streets, lanes, and alleys of the city of Memphis, and to supply the inhabitants of the city with water by public works, because it violates s. 22 of art. 1 (the declaration of rights) of the Constitution, which is as follows: "That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."

Citing and commenting on the following authorities: Hallam's Constitutional History of England, c. 5, pp. 153-4, (Harper's Ed., 1862); 1 Russell on Crimes, 173; 4 Blackstone's Com., 159; 3 Kent's Com., 458, 459; per Totten, J., in *Hazen* v. *Union Bank of Tennessee*, 1 Sneed R., 115, 119, 120.; see *Tuckahoe Canal Co.* v. *Tuckahoe Railroad Co.*, 11 Leigh's R., 425; *Enfield Toll Bridge Co.* v. *Hartford & N. H. R. Co.*, 17 Connect., 454; *Blair* v. *Carmichael*, 2 Yerg. R., 306–9; *Memphis* v. *Overton*, 3 Yerg. R., 387–92; *Allen* v. *Farnsworth*, 5 Yerg., 189, 191; *Nashville Bridge Co.* v. *Shelby*, 10 Yerg. R., 281; *Proprietors of Bridges* v. *Hoboken Land Co.*, 2 Beasley's Ch. R., 535, etc.; 1 Sneed R., 120, 121; *Reed* v. *Ingham*, 3 Ellis & Blackburn, Q. B., 889; *Memphis Gas Light Co.* v. *County Commissioners*,

6 Col., 310; Angel & Ames on Corporations, ss. 31, 32, 33, 34, 35.

But suppose I abandon, for the purpose of the argument, the position that the grant to the Water Company is a monopoly, then I insist that the grant of the exclusive privileges is a violation of s. 7, art. 11, which declares:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual, or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law: Provided always, the Legislature shall have the power to grant such charters of incorporation as they may deem expedient for the public good."

It can not be doubted that the act chartering the Memphis Water Company does attempt to grant to it "rights, privileges, immunities and exemptions," which are not "by the same law," or by any other law, "extended to any other member of the community," who may have been able, or may be able, "to bring himself within the provisions of such law."

It is useless to argue this proposition, for the claim by the defendant to the exclusive privileges that its charter purports to grant, admits its correctness: Angell & Ames on Corporations, ss. 1–10, 110–113; Judge Reese, in *Budd* v. *The State*, 3 Hum., 490, 491.

There is another mode of presenting this subject that deserves consideration.

The power to create corporations was conferred upon the Legislature, to be exercised, as the Constitution declares "in such cases as it may deem expedient for the public good."

The discretion vested in the Legislature by the Constitution it was intended should be exercised in each particular case in which the Legislature might be called upon to create a corporation. And the discretion it was contemplated, would extend as well to the powers and privileges to be granted to corporations, as to the propriety or impropriety of making a grant of a charter.

In other language, the creating of a corporation, and the granting of rights, privileges, and immunities to it, is a lesiglative power, belonging to every Legislature, and each Legislature possesses it as fully as any of its predecessors. But to no greater extent than its successors.

Now every act of the Legislature which undertakes to grant "a right, privilege or exemption" to a corporation, to be exercised or enjoyed by it, to the exclusion of every other corporation or person, is an attempt to place the "right, privilege, immunity or exemption," which is granted, beyond the control of the Legislature. And to the extent that it does operate to place it beyond the control of the Legislature, it is an abridgment or surrender of legislative power. Such an act is an attempt of one Legislature to tie the hands of the Legislatures that come after it, and

which, but for the attempted exclusive grant, would unquestionably possess the very same powers that it possesses. It is saying to subsequent Legislatures, while you have, by the Constitution, the right to create such corporations "as you may deem expedient for the public good," and to confer such rights, privileges, etc., upon them as you may choose, you shall not deem the grant of any "right, privilege, immunity, or exemption," which we have declared shall be confined to a particular corporation, to be "for the public good." In such cases, you shall make no grants.

Such a principle of legislation would lead to consequences of the most baneful character. Soon legislative power or sovereign power, in respect to the creation of corporations, would be bartered away, and the State could legislate upon nothing that it might be to the interest of any corporation to own or control exclusively. The principle would put the Legislature above the Constitution, by allowing it to divest itself of the legislative authority, with which the Constitution has vested it.

Again, I insist that there is nothing in the charter of the Water Company that takes from the city of Memphis its right to erect and maintain water works for the supply of itself and its inhabitants with water, as given it by the city charter.

As we have seen, the charter was reduced into one act, at the same session of the Legislature which charterd the Water Company, and that act expressly conferred upon the city the power to construct water works.

This duty was imposed (if I may use the expression in reference to a discretionary power) to be exercised for the public benefit. It was not intended it should be exclusively for the emolument of the city.

It is true it was expected to be a source of profit. But, it was principally in view of the public advantages to result from a plentiful supply of pure water to the inhabitants of the city, that the provision for water works was embodied in the charter. The improved facilities for the convenient and cheap supply of water for the extinguishment of fires, and for other public purposes, was an important consideration also in authorizing the city to build water works. In other large cities, without exception almost, water works are owned and maintained by the municipality. If originally built by private persons, or corporations, eventually they have almost invariably passed to the city in some way. And universal experience teaches that the agents of the public are the only proper persons to control them.

It ought not, therefore, without the plainest necessity, to be held that the Legislature intended to take from the city of Memphis the prerogative or privilege of furnishing water for itself, and for its inhabitants. There is no express repeal of the city charter, or any part of it, by the act chartering the Water Company.

The 12th section, which is the only one of the charter of the Water Company that contains a repealing clause, merely repeals "all acts in conflict with" the act chartering the Water Company.

I can not see that there is any necessary conflict between the power given the city in reference to water works, and the charter of the Water Company.

It is true there may be an apparent conflict. But the rule is this: "Private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication:" Parson's Ch. J., in *Cooley* v. *Williams*, 4 Mass. R., 140. See also, as illustrating the same rule: *Dyer* v. *Tuscaloosa Bridge Co.*, 2 Porters, Ala., 296; *Sprague* v. *Birdsall*, 2 Cowen, 419; *Cayuga Bridge Co.*, v. *Magee*, 2 Paige, 116; 6 Wendell, 85; *The People* v. *Lambier*, 5 Denio R., 9; Cooley's Con. Lim., pp. 393, 396.

At page 393 Judge Cooley says:

"The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons, or classes, are still more so, and as a rule of construction, are always to be leaned against as probably not contemplated or designed."

At page 394, he says:

"Grants which confer upon a few persons what can not be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that

charters of incorporation are to be construed strictly against the corporators."

This rule is also illustrated in *McCallie* v. *M. & A. of Chattanooga*, 3 Head R., 317. At page 321, Judge McKinney says, speaking of the power of taxation:

"But the surrender of this, or any of the rightful powers of government, is *not* to be presumed; nor is the bestowal of a privilege for a limited time, and without consideration, to be taken as obligatory upon the Legislature in a case like the present:" See also *Talmadge* v. *The N. A. Coal and Transportation Co.*, 3 Head R., 337, 343.

In *Pennsylvania R. R. Co.*, v. *Canal Commissioners*, 21 Penn. St. R., 22, the Supreme Court of Pennsylvania said: "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the corporation would be increased by extending [its privileges] let the Legislature see to it, but remember that nothing but plain English words will do it:" See also *Bradley* v. *N. Y. & N. H. R. R. Co.*, 21 Conn. R., 306.

It may be seen that by the acts of 1855–6, c. 139 (private), a company was chartered having for its object the supplying of the inhabitants of the city of Memphis with water. The provisions of the charter are very similar to those of the charter of defendant, except that the privileges granted were not declared to be exclusive.

Now, does not the repealing clause in the charter of the Water Company already referred to, find ample

room for operation in the act chartering the former company, which was styled "An act to Charter the Memphis Water Works Company," etc.?

Is there any real necessity for holding it to affect the powers given by the city charter? And when the principles that have been cited are considered, do they not show that a construction ought to be given which will not interfere with the city?

Suppose the city of Memphis, as the agent of the public, is allowed in its governmental capacity to build water works to supply water to the public, is it not acting clearly within the scope of its legitimate powers? It is required to provide and maintain public highways, to light the city, to prevent and remove nuisances, to take care of the public health and morals—all of which duties are certainly public or municipal. Why, then, is not the right or duty to furnish water, of the same character? And how can it be said that the city, in performing this public duty, is infringing a right of the defendant under its charter?

In *Nichol* v. *The Mayor and Aldermen of Nashville*, 9 Hum., 252, 268, Judge Turley says that the supplying a town with water is a direct corporate purpose.

It seems to me that if private corporations and individuals are excluded from the privileges which are conferred upon the defendant, leaving the city to exercise its functions as a government, that the defendant has all it can justly claim and all that the Legislature intended it should have. Any other construction would suppose the Legislature intended water should be made a subject of purchase and sale, and

that the public authorities should not be allowed to furnish it to the inhabitants free of cost, if they desired to do so.

Repeals by implication are never favored, and, especially, I submit, repeals by the same Legislature at the same session.

The grant to the city of the power to erect and maintain water works had just been made when the charter of the Water Company was passed. The fact could not have been forgotten by the Legislators. They knew it, and they passed the charter of the Water Company in view of it. They did not consider there was any conflict between the two, and hence the charter of the Water Company makes no mention of the grant to the city. If it had been intended to revoke that, or to take from the city its power to build water works, is it at all likely the Legislature would have failed to say so? Sedgwick on Statutory and Constitutional Law, 126, 127, etc.; *Anderson* v. *Weakley*, Cooke's Rep., 410.

Repeals by implication are always matters of intention.

And before the Courts can decide an act is repealed, it must be plain the Legislature intended it should be repealed: *Smith* v. *Hickman*, Cooke's R., 330; *Hockaday* v. *Wilson*, 1 Head R., 114; *Cate* v. *The State*, 3 Sneed R., 120.

I insist, therefore, that whatever may be the defendant's rights, they are not of a character to preclude the city of Memphis from building water works.

It seems to me this view is supported by the *Red*

River Bridge Co. v. *the M. & A. of Clarksville,* 1 Sneed R., 176.

There the Court held that although the Bridge Company had the exclusive right to build and maintain the bridge and to collect the tolls, yet the town of Clarksville had the right to build another bridge in violation of the exclusive right of the Bridge Company, and that the Bridge Company had no right to enjoin its doing so, but had only the right to compensation for being deprived of the use or profits of its bridge.

If a literal construction had been given to the charter of the Bridge Company, and such as is contended for here on behalf of the Water Company, then the town of Clarksville would have been prevented altogether from building its bridge. Again, it might be asked, why may not Memphis absorb the Water Company and its franchises, just in the same manner that Clarksville did the Bridge Company and its bridge?

This position is supported also by the principle that "all grants of privilege are to be liberally construed in favor of the public, and against the grantees of the monopoly, franchise or charter, are to be strictly interpreted:" Sedgwick on Stat. and Const. Law, 338, 339, etc.; and see cases cited in note † to p. 340.

In Tennessee, the case of the *State* v. *the Clarksville and Russellville Turnpike Company,* 2 Sneed R., 88, holds that where there is a grant of certain franchises to a private corporation in which the public is concerned, the rule is that the grant is to be construed more strongly against the grantee, who takes nothing

by implication, on the ground that the public welfare demands that monopolies and exclusive privileges in the nature of monopolies shall be restrained within the strictest limits.

See also *Talmadge* v. *North American Coal Company*, 3 Head R., 337, already cited.

I insist that the provision of the charter of the Water Company, which attempts to confer upon it the power "to take up the pavements and sidewalks, and to use all or any of the streets, lanes or alleys of the city of Memphis, for the purpose of laying down its pipes and extending its aqueducts or conductors," independent of the municipal government of the city and of the citizens, and without making compensation to either, is a violation of section 8 and section 21 of the Bill of Rights.

Section 8 is as follows: "No freeman shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

Section 21: "No man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

It is, probably, not material to inquire whether the public highways of the city of Memphis belong in fee to the city, technically, as well as beneficially, or belong to the owners of the soil adjacent to the highway in fee, for the benefit of the public. There is some

difference of opinion on this question in the United States, though, at common law, the fee was held to be in the adjacent owners, subject, however, to the easement in the public: See *Dovaston* v. *Payne*, 2 Smith's Leading Cases, 199, 227; see also *Drake* v. *H. R. R. Co.*, 7 Barber, 508; 3 Barber, 459; *The State* v. *The City of New York*, 3 Duer R., 119; *Williams* v. *The Railroad*, 18 Barber, 222; *Wager* v. *Troy Union Railroad*, 25 New York R., 526 and cases cited.

Judge Catron says: "The corporation insists the usufructus is in it, and the naked fee in the petitioners [the original proprietors] who hold in trust for the town. To most purposes this is true; the streets, the promenade, and this public landing, and all easements for the use of the town, just as the public highway to it, is an easement:" *Corporation of Memphis* v. *Overton*, 3 Yerg., 387–391.

In *The Mayor and Aldermen of Memphis* v. *Wright*, 6 Yerg., 497, 499, 500, Judge Green says: "The public property belongs to the corporators, and may be appropriated by them to any use they may think proper. The Mayor and Aldermen are the representatives of these corporators, and have vested in them all the right to dispose of, or apply to any use they may think proper, the public promenade, public squares, etc., which existed in the original proprietors. If this were not so, a thriving town would be exceedingly crippled in the exercise of its corporate rights." * * * "It must therefore be among the powers of a corporate town, having by its charter a right 'to do all things necessary to be done by corporations,' to lay off

new streets, squares, lanes and alleys, and to construct wharves, and other conveniences, for the trade and comfort of the citizens, and by ordinances to regulate the manner in which they shall be used. These powers are 'necessary to be done,' that the prosperity of the town may be promoted, and that its peace and order may be preserved."

One fact is certain, that the fee, as well as the right to the beneficial enjoyment of the public streets, lanes and alleys of the city of Memphis, is in the city as the representative of the inhabitants, or else, is in the owners of the lots abutting the highways, subject to the public easement. No matter who owns the fee, the uses to which the soil of the highways can be appropriated are such as are authorized by the representatives of the public, and such as are consistent with the enjoyment of the highways as avenues of public travel.

I admit that modern habit has settled that the laying of water pipes, beneath the surface of the public highways of a city, for the purpose of supplying the city and its inhabitants with water, when done by the authority of the city itself, is a proper use of those highways: Angell on Highways, ss. 25, 241, 312; *Gardner* v. *Newburg*, 2 Johns. Ch., 162; *Reddall* v. *Bryan*, 14 Maryland, 444; *Kane* v. *Baltimore*, 15 Maryland, 240.

But the use of the public highways for the laying of water pipes can be authorized only by the municipal government of a city, which is the representative of the public. It is possible the consent of the State

Legislature is necessary also to give effect to the grant of the city. But without the authority of the city, no pipes can be laid, even under the sanction of the Legislature, unless it is done under an exercise of the right of eminent domain, in which case, compensation must be provided and made: Angell on Highways, ss. 88, 91, 91*a*, and cases cited; *Williams* v. *N. Y. Central R. R. Co.*, 16 New York R., 97; Cooley's Con. Lim., 530–536; *Wager* v. *Troy Union R. R. Co.*, 25 N. Y. R., 526; *Thatcher* v. *Dartmouth Bridge*, 18 Pick. R., 501.

A part of the agreed case is that the Water Company does not propose to make compensation for the use of the streets to lay down its pipes, aqueducts and conductors. It stands, for its right to the exclusive use of the highways of the city, solely upon the grant in its charter from the State, and undertakes to exercise that right without the consent, and in opposition to the will of the General Council of the city.

The Legislature can make no disposition of the property of individuals, or of corporations, unless it does so in some mode permitted by the Constitution.

Hence, I contend that it had no more power to grant the streets, lanes and alleys of the city of Memphis for the purposes of the Water Company, than it had to grant the private property of any citizen of the city for the like purposes: Story, J., in *Dartmouth College* v. *Woodward*, 4 Wheaton, 694, 695, 698; Washington, J., in same case, p. 663; *Terrett* v. *Taylor*, 9 Cranch, 43; *Town of Pawlet* v. *Clark*, 9 Cranch, 292; Cooley's Const. Lim., 238, and cases cited.

I will not discuss the power of the Legislature to authorize the establishing of a railway, or any other mode of public travel, upon the streets of the city without the consent of the General Council of the city. Nor will I discuss the power of the city to authorize railways, or the like, upon the streets, without a previous grant by the State of the privilege.

Neither question is involved in this case, nor has the use of the streets for the operating of a railway any similarity to the use of them for the laying down the pipes, etc., necessary to the construction of water works.

But the policy of the State to give to municipalities the control of their domestic or local affairs, and to prohibit partial or local legislation, can not be without its effect upon the decision of such questions.

In the second place, the taking of property for the construction of water works of the Memphis Water Company is the taking of it for a private use, and not for a public use, or else, is the taking of it for a public convenience, and not for a public use.

In either case, the taking is unlawful.

What is a public and what a private use, and what is a public use, as distinguished from a public convenience, it is not always easy to determine.

But I submit that the authorities which I cite below settle the question as to the Water Company.

If that Company uses the streets, it will be for its own private purposes. Its use will be similar to the use of a gas company, or any similar manufactory, would make of the streets. The pipes, aqueducts and

conductors will be its private property, and will be subject to its exclusive dominion. The tolls to be received are to be fixed by it, and will go exclusively to the Water Company. The water furnished by means of the pipes will belong to the Company until it is sold to its customers. It is true the public may buy the water, and after buying it, may use it. And the public may be benefitted, incidentally, because the water is furnished more conveniently by the Water Company than it could procure it elsewhere. But I can see no difference in principle between the Water Company and any other manufactory, and it certainly occupies the place any individual would who might attempt, under a like authority, to do what it is authorized by its charter to do.

In *Bayley* v. *The Mayor of New York*, 3 Hill R., already referred to, it was held that the works by which the city of New York is supplied with water, although they belong to the city, are not public. It seems to follow that the taking of private property for the building of those works would be the taking of private property for private use, and not the taking of it for public use.

But suppose it is otherwise, and that the Legislature has the power to exercise the right of eminent domain for the purpose of erecting or assisting in the erection of water works to supply a city with water. In appropriating the streets, lanes and alleys of the city of Memphis to the Memphis Water Company, it has not attempted to exercise any such right in favor of the Water Company.

What it might do, therefore, is immaterial.

But the use of the streets for building water works is a public use only when the water works are owned and controlled by the public. And when Judge Turley, in *Nichol* v. *the M. & A. of Nashville*, 9 Hum., 268, recognizes the fact that the building of water works is among the direct powers of a municipal corporation, for which it may levy taxes, he meant only the building of water works by the corporation itself. He did not mean that the building of water works by a private person or a private corporation is a proper exercise of a corporate power, or that taxes might be collected for that purpose, or appropriated in that way. And he could not have intended to be understood that public property might be used by a private person or corporation for any such purpose.

This question was before this Court in the case of the *Memphis Freight Company* v. *The Mayor and Aldermen of Memphis*, 4 Col., 419.

The charter of the Memphis Freight Company authorized it to load and unload freight, goods, cotton, etc., on or from steamboats, or other water craft that might touch at the port of Memphis; and for the purpose of carrying on the said business, the company was granted the right or privilege of erecting upon the east bank of the Mississippi, in the city of Memphis, between certain streets, such sheds, railroad tracks, engines, and other equipments as might be necessary for the prosecution of the business of hauling freight. It was also granted the right to lay down railroad

tracks from the sheds to the margin of the river under certain restrictions.

The ground attempted to be appropriated was public ground in the city of Memphis, dedicated for public use by the original proprietors, and known as the "Promenade."

Power to condemn private property upon making compensation for it was granted the company.

The petition was filed to have set apart to the company a portion of the public ground for the purposes of their charter, and it proposed to have a jury assess the damages to be sustained, though the charter made no provision for compensation.

The principal question in the case was whether the charter of the Memphis Freight Company was a proper exercise by the Legislature of the power to take private property upon compensation. See p. 423.

The benefit to the public was to be in the additional facilities afforded for the loading and unloading of boats. The enterprise was purely private, while it unquestionably would have greatly promoted the convenience of the public.

The Court said, to authorize the taking of private property, it must be for a *public use,* citing the *West River Bridge Company* v. *Dick and others,* 6 Howard R., 547, and other authorities. It then took a distinction between public use and public convenience.

The Court said: "The use must be for the people at large—must be compulsory by them, and not optional with the corporators—must be a right by the people, and not a favor—must be under public regu-

lations as to tolls, etc., etc. But where it is a public convenience, not a necessity, the right to take private property does not exist." Illustrations of public convenience as distinguished from public uses are then given. See page 425.

The principle announced is then applied to the case, the Court saying, p. 427: "The erection of these sheds and railroad tracks have no public character, but are wholly for the use of the petitioners. It is an attempt to grant to an incorporated company for individual purposes, private property dedicated for the use of the citizens of Memphis."

The question is then taken up, whether it is the exclusive province of the Legislature to determine whether the purpose or object for which the property is taken, is a public use? The difficulty of the question is admitted, and the general rule that the Legislature is the judge is announced. But it is said, quoting Chancellor Kent: "If the Legislature should take property for a purpose not of a public nature, as if it should take the property of A and give it to B, or should vacate a grant of property, or of a franchise, under pretext of some public use or service, such a case would be a gross abuse of legislative discretion, and a fraudulent attack upon private right, and the law would clearly be unconstitutional and void."

The Court further says: "The right of private property is under the protection of the Constitution, and the Legislature has no power to take it for any private purpose, or to transfer it to another, whether indemnity be provided or not: p. 427–529.

The Court then further says: "The Legislature has not fixed the rate of charges the company is to receive, as tolls for hauling freight upon its railroad, for storing it in their sheds, or loading and unloading boats."

"It is simply an act incorporating certain citizens a body politic and corporate, with the power to sue and be sued, have succession fifty years, and the property designated is appropriated for their use. There is nothing in the charter showing it to be for a public use; there is no restriction on their charges for services; no duties are defined; no penalties for a violation of their duties; no regulation of tolls. They are left free to act as private persons in any manner that will best promote their interests."

"The act giving the corporation the right to appropriate the lands between Poplar and Beal streets, in the city of Memphis, for the purpose of erecting their sheds, is void; it is an attempt to take private property not for public use, but for private purposes; and we are satisfied, upon principle and authority, this attempt by the Legislature to exercise the right of eminent domain, by giving this property to this corporation, was not warranted by the Constitution, and falls within that class of cases referred to by Mr. Kent:" pp. 429, 430.

Angell on Highways, s. 87, is to the same effect. See also Cooley's Const. Lim., p. 530 and following.

I submit that all the objections which are urged against the Memphis Freight Company are equally valid against the Water Company.

The case of *Harding* v. *Goodlett*, 3 Yer. R., 39, 51–54, is applicable. It takes the distinction between a public use, for which property may be taken in the exercise of the right of eminent domain, and a private use, for which it may not be taken at all.

In *Clack* v. *White*, 2 Swan R., 540, 548–550, the distinction between a public use and a private use, and also the distinction between a public use and a public convenience, are taken. It holds that a private right of way can not be granted under the act of 1811, c. 60, to one man through the land of another, even though compensation is provided.

Judge Totten says: "The Legislature has no power to take, or invade the right of, private property for any mere private purpose, or to transfer it from one person to another against the will of the owner, whether indemnity be provided for it or not. The will of the owner is in this respect stronger than the legislative power, and if he refuse to grant the right of private way, we are not aware of any power by which he may be enforced to grant it. If it could be held a valid power in the present instance, so it could be held in many others, under the pretext of necessity, policy, or convenience. On the contrary, we consider it a settled doctrine, that a law which is intended to have the effect to transfer the private property of one man to another against his will, is powerless and void, no matter under what pretext of policy it may be made: pp. 548, 549.

Judge Totten further says: "Nor can the power insisted on in the present case be found in the right

of eminent domain. This right, inherent in the State, can only be exercised for the public advantage, and not for that of any mere private person. The right of eminent domain, or inherent sovereign power, says Mr. Kent, gives to the Legislature the control of private property for public uses, and for public uses only."

The case of *The M. C. R. R. Co.* v. *M. & A. of Memphis and others,* 4 Col., 406, decides only that the city of Memphis had no authority to make an exclusive grant of the right to lay down a street railway in the streets of the city. See pp. 406, 414, 415.

It is true the act of the Legislature chartering the Memphis City Railroad Company was involved in the same case and was sustained. But that act did not undertake to grant the use of the streets absolutely. It only authorized the use of the streets by the Company upon such terms and conditions as might be agreed upon between it and the city of Memphis.

The city's right to direct and control the streets was recognized by the act, and preserved, and the Memphis City Railroad Company actually contracted with the city in reference to the use of the streets for the laying down of its railway.

The importance of this case to the city of Memphis is my excuse for taxing so heavily the time and patience of the Court.

B. C. BROWN and J. O. PIERCE, for Water Company, contended:

1. Does sec. 4 of the defendant's charter create a

monopoly? To establish this proposition, plaintiff must show and establish an entirely new definition of the word "monopoly." Its meaning has long been well and clearly settled and defined. It is a Graeco-Latin word, derived from two Greek words signifying "to sell" and "alone," and means "the sole right, power or privilege of sale." This definition has passed into established usage in the law books: 2 Burrill's Law Dict., 208; 2 Bouvier's Law Dict., 186; 4 Steph. Com., 291.

Blackstone says, under the title of "Offenses against public trade": "Monopolies are much the same offense in other branches of trade that engrossing is in provisions, being a license or privilege allowed by the King for the sole buying and selling, making, working or using of any thing whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before: 4 Blackstone's Com., 159.

"A monopoly is described by my Lord Coke to be an institution or allowance by the King by his grant, commission or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade:" 7 Bacon's Abr., 22.

In the light of these definitions let us examine the section of the charter in question. What exclusive privilege of buying, selling or manufacturing any thing is pretended to be conferred by it? None at all.

It grants "the exclusive privilege to lay down pipes and to extend aqueducts and conductors through all or any of the streets, lanes and alleys of the city of Memphis, and to supply to the inhabitants of said city water by public works." This for a great public benefit and for a limited time.

On the one hand, it confers no exclusive privilege to the defendant to manufacture, vend or use water, or any other commodity or thing. On the other, it infringes in no manner on the previously existing right of any person to manufacture, buy, sell or use water, or any other commodity or thing. But that as to which the exclusive privilege is conferred, was never a matter of common right, nor is public trade nor private traffic affected in the slightest degree by the grants of this charter.

So the term "monopoly" is a palpable misnomer as applied to this charter, and the plaintiff in error must look beyond sec. 22 of the bill of rights for a clause of the Constitution with which this charter conflicts.

2. Does this charter impair the obligation of a contract? or has the city under any of its charters a vested right, or a contract with the State, the obligation of which is impaired by this charter?

To establish this proposition, as claimed by the city, it will not suffice to cite authorities showing that a charter of a private corporation creates vested rights and becomes a contract, for there is a marked difference between such a charter and a municipality like the city of Memphis.

Municipal corporations are but branches of the governmental power of the State.

The object of creating municipal corporations is, for the public convenience, to decentralize the government, and confide to localities a portion of the general governmental power: *Trigalley* v. *Memphis*, 6 Col., 389.

The opinion of Smith, J., in the last cited case, is a clear exposition of the purpose and character of municipal corporations, viz.:

"The fundamental and distinctive principle of English and American government is, to decentralize administrative and legislative power. To the general or central government is bestowed the enactment and execution of laws which concern the people generally of the whole State, and which are properly and beneficially applicable to the whole people. To the local and small sub-divisions and districts and communities of the people, are confided the exercise of the powers of administration and legislation, suitable to the peculiar needs and purposes of these small localities. Government organized upon this principle is supposed to be more consonant with the freedom of the people, and better adapted to promote the safety and prosperity of the people, than where the legislation and administration are remote, and concentrated in the hands of the central authorities."

The object of creating municipal corporations, and the full power of the legislature over them, are further illustrated in Angell & Ames on Corp., ss. 14, 18, 23, 24, 31, 32; 2 Kent's Com., 275, 305–306. And it is well settled in Tennessee, that the Legislature has the

full power of disposal of the charters of municipalities by repeal or otherwise: *Daniel* v. *Memphis*, 11 Hum., 582; *Nichol* v. *Nashville*, 9 Hum., 261–263; *Governor* v. *McEwen*, 5 Hum., 287; *Norris* v. *Smithville*, 1 Swan, 164. Necessarily, therefore, the Legislature must have full power and control over the public streets of a city.

It is equally well settled that so far as the question of "vested rights" is concerned, public corporations are plainly and broadly distinguished from private ones; and that the inviolability attributed to the franchises of the latter does not appertain at all to the powers or franchises conferred upon public corporations: *Dartmouth Coll.* v. *Woodward*, 4 Wheat., 629, 630, 636, 637, 638, 640, 644; *Terrett* v. *Taylor*, 9 Cranch, 51, 52; *Trus. Vincennes Univ.* v. *Indiana*, 14 How., 276, 281; *State Bank Ohio* v. *Knoop*, 16 How., 380, 381; *Louisville* v. *University*, 15 B. Mon., 542; *Woodfork* v. *Union Bank*, 3 Col., 499, 500.

The distinction in this respect between public and private corporations is thus forcibly expressed by a text writer, treating of "vested rights": "A distinction has been taken between private corporations and public, such as counties, cities, towns and parishes, which, existing for public purposes only, the Legislature has, under proper limitations, a right to change, modify, enlarge or restrain, *securing, however, the property to the use of those for whom it was purchased:*" Angell & Ames. on Corp., s. 767.

And the passage in italics illustrates the only contingency in which a public corporation is held to have vested rights, and its charter to be a contract within

the meaning of art. 1, sec. 20 of the Constitution, *i. e.*, when in some manner rights of property have become so vested in the corporation that to annul or impair their charter would operate a destruction or loss of such property.

This is explained and illustrated in the 15 B Monroe case and others which might be cited. And this distinction will be noted in every case that can be cited where a public corporation has been held to have acquired "vested rights" under its charter.

But no such principle enters into the case at bar. The city has acquired no property under the powers granted to it to construct water works; no property will be sacrificed, nor any pecuniary benefit lost. On the contrary, not only is it true that by committing the enterprize into private hands, onerous taxes will be avoided, and thus a pecuniary benefit secured to the tax-paying corporators of the city; but it is manifest that the Legislature never intended the construction of water works to be of pecuniary advantage to the citizens at large, but committed to the municipal corporation as a governmental duty. That duty not having been performed, has now been taken from the city and committed to other hands.

But even if the exclusive privilege of constructing water works had been granted to the city, and the city had exercised it (neither of which is the fact), it is still clear that no inviolable franchise would have enured to the city, and that the Legislature might have revoked such action at any time.

Where by statute a certain forfeiture in money was

secured to a certain county in case of the failure of a Railroad Company to locate its road through such county—and the road was not so located—and subsequently the statute was repealed and the forfeitures remitted, whereupon the county complained of an infringement of its "vested rights:" *Held*, that there was no inviolable franchise to the county, nor any contract, the impairment of whose obligation would be unconstitutional: *Maryland* v. *B. & O. R. R. Co.*, 3 How., 534.

So, where a ferry franchise was granted by the Legislature to a town, with an exclusive privilege, and after many years enjoyment of it by the town, it was taken away, and a bridge franchise was granted by the Legislature to a private corporation: *Held*, that the town had no inviolable franchise, because it had been the recipient only of a share of governmental power, and that the later act was not unconstitutional: *E. Hartford* v. *Hart. Bridge Co.*, 10 How, 511.

These leading authorities must be conclusive of the present case; for there is nothing in the Tennessee decisions in conflict with them, and so far as this Court has treated of this subject, its conclusions are in harmony with them, as the following cases will show:

Public corporations are created for public convenience, and the Legislature, in interfering with them, does not violate the obligation of contracts: *Governor* v. *McEwen*, 5 Hum., 281–3–8–9.

An exemption from a certain tax, granted by the Legislature to the inhabitants of a corporate town, as such, does not amount to a contract. and may be revoked: *McCallie* v. *Chattanooga*, 3 Head, 317.

There can be no doubt, therefore, of the full power and authority of the General Assembly over the municipal corporation of Memphis, to alter, amend or revoke its charter, so far as the construction of water works is concerned, without infringing vested rights or impairing the obligation of a contract.

And as the defendant's charter is not open to either of the objections urged against it by the city, this honorable Court is confidently asked to affirm the judgment of the Court below.

NICHOLSON, C. J., delivered the opinion of the Court.

The facts in this case agreed upon by the parties, and necessary to be noticed in determining the questions raised, are as follows:

The city of Memphis has been for many years a municipal corporation, regularly chartered and organized. On the 18th of December, 1866, the Mayor and Aldermen passed an ordinance to create a board of commissioners for the erection, care, and maintenance of the Memphis water works. The commissioners were appointed and organized, and entered on the discharge of their duties, and made reports from time to time to the Mayor and Aldermen, the last of which was made in April, 1869, when a plan of constructing water works was reported and adopted by the Board of Mayor and Aldermen. The commissioners caused surveys, maps, drawings, measurements, and estimates to be made, preparatory to commencing the actual construction of the water works. In these prepara-

tory steps, the city of Memphis expended $30,000 prior to the 28th of February, 1870, at which time the city had not commenced the actual construction of water works. No contracts, as contemplated by reports of the commissioners, were made or entered into, and no advertisement for proposals had been made as contemplated by said reports. The want of available means by the city and the financial distress and disturbed condition of the country were the causes of the non-prosecution of the building of water works by the city.

On the 28th of February, 1870, the Legislature granted a charter of incorporation to the Memphis Water Company for the purpose of supplying water to the city of Memphis and the inhabitants thereof by means of public works. The water company, claiming the right to do so under its charter, immediately on its organization expended sums of money in and about the construction of its water works in the city of Memphis, and proceeded to take up the pavements and sidewalks, and to use the streets, lanes, and alleys of the city for the purpose of laying down its pipes, aqueducts, and conductors, and constructing its water works under its charter, without the consent and in opposition to the will of the General Council of the city of Memphis, and without making compensation therefor to the city, or to the adjacent property owners.

After the Water Company entered upon the construction of its water works under its charter, the city of Memphis commenced to erect water works for the

purpose of supplying the city and its inhabitants with water, and proceeded to erect the same on its own account, in violation of the provisions of the charter of the Water Company, which declares that the privileges granted it are exclusive for the period of thirty years, claiming that the city has the right to do so under the city charter, which the Water Company, on its part, denies, and insists that the action of the city is an invasion of its rights under its charter.

These are the material facts, agreed on and submitted to the Court below for adjudication. The Court below decided the case against the city of Memphis, and it appeals to this Court.

We have devoted as much time to the investigation of the important legal questions involved in this case as was practicable, in view of the heavy pressure of business now upon us. But our labor has been so materially aided and lessened by the elaborate and exhaustive printed arguments on both sides, that we are enabled to announce the results to which we have arrived. We have not the time, however, to discuss the several questions so ably and ingeniously argued, but must be content to state the several propositions of law which are decisive of the case.

1. The city of Memphis is a municipal or public corporation. As contra-distinguished from a private corporation, municipal or public grants of franchises are always subject to the control of the legislative power for the purpose of amendment, modification, or entire revocation; 5 Hum., 241; 3 Head, 317; Cooley's Const. Lim., 192.

2. The erection of water works, to supply a city and its inhabitants with water, falls naturally and legitimately within the ordinary powers of its charter of incorporation; and the exercise of this power within the limits of its charter, needs no enabling act by the Legislature. It is, therefore, one of the powers of the corporation subject to amendment, modification, limitation, or revocation by the Legislature. To what extent, if at all, the Legislature can interfere with interests acquired and vested in the due exercise of its corporate powers by a public corporation, presents a question not now necessary to be examined or determined: 9 Hum., 268; 11 Hum., 582.

3. The repeal, or revocation, or modification of the powers of a municipal corporation may be effected, either expressly or by necessary implication, by subsequent legislation. Hence, if the act of 28th February, 1870, incorporating the Memphis Water Company, with exclusive powers to erect water works in Memphis, and supply the city and its inhabitants with water, was a valid and constitutional exercise of legislative power, it operated, by necessary implication, as a revocation of the power of the city corporation to erect water works for the same purposes.

4. The Memphis Water Works Company is a private corporation, and upon the acceptance of its char ter by the corporators and their organization under it, a contract was thereby consummated between the State and the corporators which was beyond the reach of subsequent legislative interference. It is conceded that by its express terms, the privilege granted to the

Memphis Water Company for thirty years is exclusive. What provision of the Constitution forbids the granting of a charter with an exclusive privilege? The Legislature has the right to do whatever is not expressly, or by necessary implication, forbidden by the Constitution: 8 Hum., 1; Cooley's Const. Lim., 87–158–173.

5. By sec. 22, art. 1, Constitution of 1834, "perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed." The charter of the Memphis Water Company limits the duration of the corporation to ninety-nine years, with exclusive privilege for thirty years. It does not, therefore, create a perpetuity. Does it create a monopoly by securing to the company the exclusive privilege of supplying the city with water by means of water works?

We know of no better definition of a monopoly, than that given by Lord Coke, and adopted by the Supreme Court in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 707: "A monopoly is an exclusive right granted to a few, of something which was before of common right—so that it is not a case of monopoly, if the subject had not the common right or liberty before, to do the act, or possess or enjoy the privilege or franchise granted as a common right."

The question then is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water works in Memphis, to take up pavements, occupy the streets and do

such things as were necessary and proper, in completing their water works? It is clear that none had the right to do these things except the city of Memphis, by virtue of its corporate powers; and this right, on the part of the city, was exclusive until it was taken away by the Legislature and transferred to the Memphis Water Company. It is no more a monopoly when conferred on the water company, than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city, but it was not a monopoly. It is an exclusive privelege in the Memphis Water Company, but not a monopoly: 4 Blachs., 159; 31 Maryl. R., 346.

6. Is the exclusive privilege granted by its charter to the Memphis Water Company forbidden by sec. 7, art. 11, of the Constitution? It would be difficult to show that the privileges secured to the Water Company are not embraced within the prohibitions of this section—but it is even more clear, that the power to grant an act of incorporation is forbidden by the language of the body of this section. The *proviso* to the section, however, gives the power to grant charters of incorporation, and for the purpose of enabling the Legislature thereby to grant exclusive privileges, which, but for the *proviso*, would be prohibited by the body of the section. In this grant of power to create corporations, there is no limitation on its powers, at least, as curtailed by the general terms of the section. The Legislature is required to consult "the public good" in granting charters: 1 Sneed, 115; 4 Col. 414; Cooley's Con. Lim., 281.

7. The streets, alleys, and pavements of the city of Memphis, had been dedicated to the public as easements, and placed by the charter of the city under the control and management of the city authorities. If the city had gone on to erect water works, and supply the inhabitants with water by means of pipes and aqueducts and conductors, they would have had the right to use the streets, pavements and alleys for the purposes of supplying the water, and no owner of abutting lots could have objected because no compensation was paid. It would have been such appropriations of the easements for the benefit of the inhabitants, as was authorized and contemplated by the municipal corporation. The legal effect of the act incorporating the Memphis Water Company, was to revoke this power, as to the city corporation, and to vest it in the Water Company. The easements are alike subject to appropriation for the purposes of the privilege, without compensation, whether the privilege be exercised by the city or by the Water Company. Angel on Highways, 25, 312; 9 Hum., 268.

Our conclusion is, that upon the facts agreed upon, the Memphis Water Company has the exclusive privilege of supplying the city of Memphis and its inhabitants with water by means of the water works erected in pursuance of their charter. Such was the judgment of the Court below and we affirm it.