A CRITICISM OF THE RAILROAD CORPORATION LAW OF PENNSYLVANIA.

(Continued from the September Number.)

III. THE DEVELOPMENT OF THE RAILROAD

We have now come to the final phase of our examination of railroad legislation in Pennsylvania, i.e., the development of the railroad. The Acts may be divided into two classes, those which treat of the financial, and those which treat of the physical, growth of the company. Of the first class, are the statutes concerning the increase and decrease of capital stock and debts, the extension of the company's corporate existence, its acquisition or guaranty of the stock and bonds of other corporations, its consolidation or merger with other corporations or its purchase or lease of their property or the sale or lease to them of its own property. Of the second class, are the statutes concerning the widening, extending or improving of the road, the construction of branches and extensions and the connection of one road with other roads.

The statutes which give railroad companies the right to increase their stock and bonds have been considered in most of their aspects when we discussed the right to issue stock and bonds. The amount to which stock and bonds might be issued and on what terms, and the penalty for issuing them illegally, already have been referred to, and perhaps the only matter which we need to touch on here is the procedure provided. The Act of 1868 was the first to prescribe on what terms an increase of stock would be authorized, no procedure being indicated in the earliest Act permitting an increase. Under the Act of 1868, the increase must be recommended by the directors of the company, approved by a majority of

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its stockholders, and a certificate of the amount of the increase filed with the Secretary of the Commonwealth. The Constitution of 1874, Art. XVI, Sec. 7, forbade the increase of stock "without the consent of the persons holding the larger amount in value of the stock," and a general Act to carry its provisions into effect was passed 18 April, 1874, P. L. 61. The Act of 1874 does not refer specifically to railroads, but in so far as the Act of 1868 permits the increase of stock by the vote of a majority of the stockholders, it must be considered repealed by the Act of 1874,45 which, accordant to the Constitution, requires the vote of the holders of a majority of the stock, although there are intimations to the effect that the Act of 1868 still is in force.46 The Act of 9 February, 1901, P. L., 3, provides an even more elaborate procedure than the Act of 1874, but does not change any material part of the earlier method.

The legislation on the subject of decreasing capital stock is not very important in Pennsylvania, where there is no annual tax imposed dependent in amount on the nominal capitalization. It is sufficient to say that the Act of 8 June, 1893, P. L. 351, furnishes a careful system for the reduction of the capital stock of all classes of corporations, including railroads, to an amount "not below the amount of capital stock required by law for the formation of such company."

Of course there is no question of more vital importance to a railroad company than that of its right to alter or amend its charter if experience proves that more favorable provisions could be adopted, but there is no legislation at all permitting any change in the articles of association or charter of a railroad company, although there is an elaborate act permitting the improvement, amendment or alteration of the articles of association and charter of corporations organized under the General Corporation Act of 29 April, 1874.47 So, too, while Section 40 of the

Act of 1874 prescribes a careful and orderly way for a corporation organized under its provisions, whose term of existence is about to expire, to renew its charter, the only legislation conferring on railroads this valuable privilege is the Act of 16 June, 1891, P. L. 301, which permits a railroad completed and in operation for not less than 10 years, at any time before the expiration of its corporate existence, to file with the Secretary of the Commonwealth a certificate under its common seal, attested by the signature of its presiding officer, stating for how long it desires to have its corporate existence extended, and thereupon its existence shall be so extended. Such an extension is practically the creation of a new corporation, and the writer has very serious doubts whether it should be permitted except by the unanimous consent of the stockholders. Certainly it should be required that a majority of them favor it, as prescribed by the Act of 1874, and to permit or to attempt to permit this important step to be taken by the filing of a paper simply signed by the president, but which need never have been presented to the stockholders, is to our mind of doubtful legality. Not only is the Act of 1891 improper from the standpoint of the stockholders of the corporation, but it is utterly inconsistent with the principle so stoutly upheld, whether wisely or not, in this State, that a corporation can not be created without the consent of the Governor. The Act of 1874 provides for this approval, after requiring the presentation of a statement showing the financial condition of the company, and thus affording to the Governor some evidence of what the corporation has done, and enabling him to deduce therefrom an opinion as to whether the renewal of its existence is likely to be of benefit to the State. Some such requirement should appear in the Act of 1891.

Our corporation now has perfected its internal condition, and seeks to enlarge its scope. It desires to buy the stock of other companies, or perhaps to lease or buy them

or to merge and consolidate them. In each case, its rights and powers are only such as legislation confers. In the absence of that, it may not buy or guaranty the stock or bonds of another corporation or lease its road and franchises or merge its road or franchises into or consolidate them with those of any other corporation. Let us then take up the statutes on each of these subjects, leaving, however, temporarily, the question of the protection which they afford to minority stockholders, and the question of their constitutionality.

The first Act permitting a railroad company to buy and hold the stock and bonds of other railroad companies, is the Act of 23 April, 1861, P.L. 410, which permits the purchase and holding of the stock and bonds only of railroads chartered by, or authorized to extend into, Pennsylvania. The Act of 31 March, 1868, P.L.50, did not mention railroads, but as it permitted any corporation to invest in the stocks and bonds of any other corporation, railroads were clearly included. The Act of 17 March, 1869, P.L.ii, amplified the Act of 1861 by permitting the guaranty of bonds, as well as their purchase and holding, and by including within its terms railroads neither chartered in Pennsylvania nor authorized to extend their road therein. The Act of 15 April, 1869, P.L. 31, is very broad: it authorizes railroad companies to buy and guaranty the stock and bonds of "corporations authorized by law to develop the coal, iron, lumber and other material interests of this Commonwealth." Quite outside of any constitutional question, the impolicy of an Act like this seems to us evident. It attempts to permit the diversion of capital contributed for the purpose of constructing or maintaining and

operating railroads, to the promotion of that vastly indefinite class of enterprises included within the term "corporations...to develop...the material interests of this Commonwealth," and renders the investor in a railroad company a remediless, however reluctant, speculator in a mining venture at the option of a majority of those with whom he thought that he was associating to engage in railroading. The Act of 14 April, 1870, P.L. 75, seems as to this subject quite unnecessary in view of the broad language of the Act of 1869, for the latter Act probably gave the power specifically conferred by the former, to buy and hold the stock and bonds of canal and navigation companies. With the Constitution of 1874 came a reaction against the liberal permission granted to one corporation to buy the stock and bonds of another, expressed in the General Corporation Act of 29 April 1874, P. L. 73, section 12 of which forbade companies organized under its provisions—which of course did not include railroads—from buying or holding the stock of any other corporation except as collateral security for a debt. The railroad Acts, however, were not amended. Until the Act of 4 April, 1901 P.L. 62 (amended 23 April, 1903, P.L.280), there was no additional legislation on the subject of the purchase or holding by a railroad company of the stocks or bonds of other companies. That Act permitted the purchase and guaranty of the stock and bonds of any corporation "engaged in the business of transportation, either on land or water, and also of any warehouse, storage, elevator or terminal company, whose business is incidental to the business of transportation in which the purchasing or guarantying corporation shall be authorized to engage." This indicated the tendency toward a broader view, and the Act of 2 July, 1901, P.L.603, brought the legislation back to the conditions obtaining when the Act of 31 March, 1868, was in force, by giving all corporations organized for profit the right to buy and guaranty the stock and bonds of any domestic or foreign corporation. This certainly should have been broad enough to include the purchase and
guaranty of the stock and bonds of water companies, by railroad companies, but for some unknown reason such purchases were authorized specifically by the Act of 22 April, 1905, P.L.264. This concludes the review of statutes enabling railroad companies to buy or guaranty the stock or bonds of other corporations, except that the Consolidation Act of 29 May, 1901, P.L.349, confers power to buy and own stock, but inasmuch as the title as well as the body of the Act deals only with the question of merger, the power conferred must be considered as conferred merely for the purpose of merger. Here are nine statutes all in force, dealing with practically the same subject. Could a stronger argument for codification be found?

The lease by one railroad of another was permitted first by the Act of 13 March, 1847, P.L.337, as explained by the Act of 29 March, 1859, P.L.290. No procedure is fixed and the only limitation imposed is that the companies concerned must own "connecting railroads in the State of Pennsylvania." The Act of 23 April, 1861, P.L.410, repeated in almost identical terms the words of the Act of 1859, on the subject of leases, except that it provided that the roads concerned might connect either directly or by means of intervening railroads. That the Act of 1861 was not intended to repeal the Act of 1859 is evident from the fact that a supplement to the latter Act was passed 1 May, 1861, P.L.485. Now comes the Act of 17 February, 1870, P.L.31, which permitted the assignment of railroad leases, and added to the requirement that the roads of the company concerned should connect, the words "thus forming a continuous route or routes for the transportation of persons and property." Just what the Act of 1870 accomplishes, is not clear. It has been suggested that it was to overcome the decision that railroads to be connecting under the Act of 23 April, 1861, need not be so related to each other as to permit of the continuous movement of trains over their tracks,\(^4\)

but if this were the object of the Act it is doubtful whether the mere addition of the words "thus forming a continuous route" is verbally sufficient to effect it, and if it is, inasmuch as the Act of 1870 did not repeal the Act of 1861, railroads still could enter into leases under the latter Act, anyway. Again, it has been suggested, and by so eminent an authority as Judge Sharswood, that "the Act of 17 February, 1870 was evidently intended merely to extend the privilege granted by the Act of 1861, so as to include the lease of a road beyond the limits of the Commonwealth." This probably was the intention of the Act, but there is nothing in it which permits the lease of a road beyond the limits of the Commonwealth unless these words do: "Whether the road or roads embraced in such lease, assignment, or contract may be within the limits of this State, or created by or existing under the laws of any other State or States." The Act of 1861 had contained this alternative: "Any railroad company or companies, chartered by or of which the road or roads is or are authorized to extend into this Commonwealth." Since the road of a company created under the laws of another State might be authorized to extend into Pennsylvania, it is open to question if the latter branch of the alternative in the Act of 1870 refers to roads outside of Pennsylvania, and does not refer merely to foreign corporations authorized to construct or operate roads in Pennsylvania. The Act of 14 April, 1870, P.L.75, permits a railroad company to lease the canal, navigation and property of a canal or navigation company under the same conditions as it could lease the road of another railroad company, and the Act of 5 July, 1883, P.L.176, requires that the leased rolling stock of a railroad shall be marked with the name of the lessor, followed by the word "lessor."

There are but two acts enabling a railroad to buy an-

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56Hampe v. Pittsburg etc. Traction Co., supra.
other railroad," one, the Act of 21 June, 1865, P.L. 852, permitting the purchase of a road sold and conveyed by virtue of any mortgage or deed of trust, or of any process of decree of a state or federal court, by a company "of which the road connects therewith," and the other, the Act of 22 March, 1901, P.L. 53, permitting "any railroad corporation of this Commonwealth, having a railroad connecting with that of any other like corporation, and owning at least two-thirds of the capital stock of the latter, to acquire . . . and thereafter be possessed of, own, hold, exercise and enjoy, all the franchises, corporate property, rights and credits then possessed, owned, held or exercised, by said last-mentioned vendor corporation."

There is prescribed an elaborate mode of procedure, which does not seem open to other criticism than that a copy of the agreement of sale and of the certificate of its adoption ought to be recorded not only in the office of the Secretary of the Commonwealth, but also in the counties in which the roads concerned are operated.

The legislation on consolidation and merger is fuller. The first enabling act is that of May 16, 1861, P.L. 702, which has served as a model for similar statutes down to this time. It permitted any "railroad company chartered by this Commonwealth to merge its corporate rights, powers and privileges, into any other railroad company so chartered, connecting therewith, so that by virtue of this Act such companies may be consolidated."

For the adoption of the agreement of consolidation and merger, there is needed only a majority of the votes cast at the stockholders' meetings of each corporation. One serious objection to the Act is that a small number of stockholders representing an unimportant stockholding interest may cause a consolidation to be effected. The Constitution of 1874 provides (Art. XVI, Sec. 7) that a corporation may not increase its stock or indebtedness

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Unless, indeed, the so-called merger provided for by the Act of 16 May, 1861, P.L. 702, hereinafter discussed, really amounts to a sale by the road said to merge, to the road into which the merger is said to be made.
except with the consent of "the persons holding the larger amount in value of the stock." Consolidation is a much more serious matter, and a majority of the small number of stockholders which constitutes a quorum, stockholders who may hold an infinitesimal amount in value of the stock, should not be given the power to force consolidation. We do not desire to exaggerate the defects of the Act of 1861, and fairness compels us to suggest that this bad feature of the Act is counteracted to some extent by the requirement that the directors of the company also shall approve the agreement of merger. Supplements of 27 April, 1864, P.L.617, and of 23 March, 1865, P.L.41, respectively, permit the company into which merger is made to increase its stock to an amount expedient to effect the merger, but not in excess of the stock—issued or authorized?—of the merged company, and to issue mortgage bonds for the debts of the merged company, but not in excess of the amount of such debts.

The very day after the second supplement to the Act of 1861 was approved, an entirely new consolidation act, the Act of 24 March, 1865, P.L. 49, also was approved. This new act was passed at the instance of the Atlantic and Great Western Railway Company, and was "the subject of an unpleasant investigation which has cast a shade of suspicion over it." The Act of 1861 permitted the consolidation only of two Pennsylvania corporations: the Act of 1865 permitted a Pennsylvania corporation to consolidate with any other railroad company "of this or any other State, whenever the two, or more, railroads of the companies, or corporations, so to be consolidated, shall, or may, form a continuous line of railroad, with each other, or by means of any intervening railroad." The procedure prescribed is about the same as that in the Act of 1861, but there are two improvements made: in the first place, notice of the meeting to act on the agreement of consolidation must be mailed to each stockholder, instead of merely being published in

newspapers, and in the second place, the agreement to be adopted must be approved by "two-thirds of all the votes of all the stockholders," which is much better than the requirement of the Act of 1861, of a majority of those voting at the meeting, although not yet fair to stockholders who, although less than one-third in number, may own much more than the larger amount in value of the stock, although the Act possibly might be construed to require two-thirds in amount of the stock. There is one glaring omission of words in the most important sentence of the Act, which has never been corrected, although as pointed out forty years ago, it "makes nonsense of the Act;" viz., the Act permits any railroad company of this Commonwealth "to merge and consolidate its capital stock, franchises and property of any railroad company, or companies, or corporations organized and operated under the laws of this, or any other State," etc. Does the Act of 1865 repeal the Act of 1861? At first sight one would say that, being later legislation on the same subject, it does, but that it was not intended to is evident from the fact that subsequent to the passage of the Act of 1865, the Legislature passed a most ridiculous Act, hereafter discussed, which it called a supplement to the Act of 1861. By implication the present Attorney-General has decided the matter in the same way, in a recent case. On principle, the same conclusion must be reached, because, despite first appearance the two Acts do not relate to the same subject-matter. The Act of 1861 is predicated of two railroad companies, A and B, one of which is to merge into the other, as A into B. The Act of 1865 concerns a case where both go out of existence by forming a new corporation, C. This would explain the otherwise mysterious failure to incorporate into the Act of 1865 the excellent provisions of the Acts of 27 April, 1864, P.L. 617, and 23 March, 1865, P.L. 41, for if the result of

60 Ibid.
61 10 April 1869, P. L. 24.
the Act of 1865 is to create a new corporation, provisions for an increase of stock or debts would be unnecessary. The fact that the agreement between the directors of the two companies is to specify "the name of the new corporation . . . , the manner of converting the capital stock of each of said companies into that of the new corporation" and other provisions appropriate to the formation of a new company, also lead to the conclusion that the Act of 1865 was designed to effect a termination of the existence of both constituent companies, instead of only one as the Act of 1861 was. What the advantages of the one operation are over the other, is not apparent, and why the provisions for each are different seems without much reason.

The Act of 10 April, 1869, P.L.24, before referred to, purports to authorize companies merging under the Act of 1861 to provide "what corporate rights, powers, obligations, duties and franchises created by the charter, or existing under or in pursuance of or by force of any Act of Assembly relating to either of said companies, shall be transferred to or become vested in, or shall continue in the company into which said merger is made; and the said consolidated company shall be subject to and be regulated and governed only by the corporate rights, powers, duties, obligations and franchises so specified in and vested by said agreement." Taken literally, the Act would seem to authorize a railroad company to free itself from all the obligations and yet retain all the privileges of the merging and of the surviving company, but this is so inconceivable a conclusion that the Act can not be interpreted literally. The meaning, wretchedly expressed, probably is, that if the merged company had been chartered to build from M to P, fifty miles, it might abandon its franchise or obligation to build from M to P, and build only from M to N, twenty five-miles, a right which, except for the Act of 1869, it would not have had. The Act of 14 April, 1870, P.L.75, extended the provisions of

43A similar right is given to all railroads, in certain cases, by the Act of 1 June 1883, P.L.57.
the Acts providing for the merger and consolidation of railroad companies, to the merger and consolidation of a railroad with a canal or navigation company.

The Act of 26 April, 1870, P.L.1274, evidently intended as a supplement to the Act of 1865, permits the consolidation of companies which have not yet constructed their roads. The previous acts applied only to completed roads. It also permits the consolidation to be made under the statutes of other States, not inconsistent with the legislation of Pennsylvania. The Act of 13 May, 1889, P.L.205, carefully prescribes the maximum amount of stock and bonds which may be issued by companies consolidating or merging. Last to be considered is the Act of 29 May, 1901, P.L.349, which is entitled "An Act supplementary to an act entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved 29 April, 1874, providing for the merger and consolidation of certain corporations." Every person familiar with the corporation laws of Pennsylvania knows that the Act of 1874 has nothing to do with railroads, and it is extremely doubtful whether the title of the Act indicates its intention to affect railroads sufficiently to make the Act, as to them, constitutional. That the Act was meant to provide a method for the consolidation of railroads as well as of other corporations, is evident from its proviso, that "nothing in this Act shall be construed so as to permit railroad, canal or telegraph companies, which own, operate or in any way control parallel or competing roads, canals or lines, to merge or combine." If the implication be that railroad companies can merge as long as they do not control parallel or competing lines, the Act is a wide departure from the prior legislation, none of which permitted any but connecting roads to combine. It differs from the former Acts in two other important respects: in the first place, it very properly requires for the approval of the consoli-
dation agreement, the consent of "a majority in amount of the entire capital stock of each of said corporations;" and in the second place, inasmuch as it contemplates, like the Act of 1865, the creation of a new corporation, consistently with the policy adopted in the incorporation of railroads, it provides (Section 3) that "such merger or consolidation shall not be complete... until it shall have first obtained from the Governor of the Commonwealth new Letters-Patent." Nothing is said about the conditions on which the Governor shall grant Letters-Patent, and it looks very much as if he is given an in-controllable and unrestricted discretion in the matter, a situation, to our mind, as bad as when charters could be granted by special legislation. It has been decided, although on what ground the writer does not see, that the Act of 1901 does not repeal the Act of 1865, and the situation accordingly is as follows: One railroad company can be merged into another with the consent of the majority of a quorum of the stockholders; they may consolidate and form a new corporation either by the consent of two-thirds of all the stockholders or of more than one-half in amount of the stock, but if they choose the latter means they must secure the approval of the Governor. Extra-state roads and roads not constructed can consolidate only to form a new corporation, and for such consolidation they must have the consent of two-thirds of the stockholders or of more than a majority in value of the stock; while infra-state roads and roads constructed need only a majority of a quorum. The condition of the legislation on the subject of merger and consolidation alone would be a sufficient reason for a revision of the railroad corporation law.

66 16 May, 1861, P.L. 702.
67 24 March, 1865, P. L. 49.
68 29 May, 1901, P.L. 349.
69 24 March, 1865, P.L. 49.
70 26 April, 1870, P.L. 1274.
71 16 May, 1861, P.L. 702.
What provision is made for dissenting stockholders? The law on this subject of course is, that when a corporation has been incorporated without the power of lease, sale or consolidation, such power can be conferred on it only if it preserves to stockholders opposed to the exercise of the power, the right to withdraw from the corporation in cash the value of their interest, the theory being that an introduction into the contract between the stockholders of so material an alteration as the privilege of changing or abandoning the corporate enterprise by means of a sale, lease or consolidation, is an impairment of the obligation of that contract as to those not assenting. The question has little practical importance now, however, for the reason that these powers were conferred long before most of the existing railroads were incorporated, and they therefore formed a part of the original contract between the corporators. Inasmuch as the Legislature evidently has intended to give to dissatisfied stockholders the right to which the Lauman case said that they were entitled, namely, the right in case of a fundamental change in the corporate enterprise to withdraw the value of their interest in cash, it is fair to show how far it has fallen short of an accomplishment of its intention. The Acts which permit one road to buy all the stock and bonds of another, or to sell to another all its stock and bonds, as well as the Acts enabling roads to become the lessors of their own, or the lessees of another company's property and franchises, make no provision at all for dissenting stockholders, although those acts effect just as material a change in the corporate enterprise as a purchase, sale or consolidation does. Stranger still, the Act of 22 March, 1901, P.L. 53, enabling one road to buy another, considers the transaction such

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73 23 April, 1861, P.L. 410; 31 March, 1868, P.L. 50; 17 March, 1869, P.L. 11; 15 April, 1869, P.L. 31; 14 April, 1870, P.L. 75; 2 July, 1901, P.L. 603; 4 April, 1901, P.L. 62; (amended 23 April, 1903, P.L. 280); 22 April, 1905, P.L. 264.
74 13 March, 1847, P.L. 337 (as explained by 29 March, 1859, P.L. 290), 23 April, 1861, P.L. 410; 17 Feb., 1870, P.L. 31; 14 April, 1870, P.L. 75.
an alteration in the enterprise of the corporation selling, that its dissenting stockholders are provided for elaborately, but the same transaction is considered so unimportant to the buying corporation that its dissenting stockholders are not even mentioned. But even where dissenting stockholders are provided for,\(^7\) the corporation is given the option of paying them what their interest was worth independently of the act complained of, or else of paying them the difference between what their interest was worth independently of the act complained of, and what it was worth in consequence thereof. In other words, if the consolidation does not affect the value of the stock of the constituent companies, a constituent company need pay a dissenting stockholder nothing, but he must accept stock in the new company or else be left entirely, a result certainly not contemplated by the Lauman case.

The question of the constitutionality of the Acts permitting the purchase and guaranty of stock and bonds, and the lease, purchase and merger and consolidation of property and franchises, depends upon the following provisions of the Constitution of 1874: Art. XVII, Sec. 4: “No railroad, canal, or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease, or purchase the works or franchise of, or in any way control any other railroad or canal corporation owning or having the control of a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury, as in other civil issues.” Art. XVII, Sec. 5: “No incorporated company doing the business of a common carrier shall, . . . directly or indirectly, engage in any other business than that of common carriers, or hold or acquire

\(^7\) 16 May, 1861, P.L. 702; 24 March, 1865, P.L. 49; 26 April, 1870, P.L. 1274; 29 May, 1901, P. L. 349.
lands . . . except such as shall be necessary for carrying on its business."

The Constitution specifically prescribes as subject to its provisions that the roads or canals concerned be not parallel or competing, purchases, leases and consolidations, but it does not speak of the purchase or guaranty by one railroad of the stock or bonds of another, so an initial question is, does the purchase by a railroad company of the majority of stock of a parallel or competing railroad or canal company, if permitted by statute, violate Sec. 4, or the purchase by a railroad company of a majority of the stock of a mining company, if permitted by statute, violate Sec. 5? Except for certain decisions hereinafter referred to, one would be inclined without hesitation to say that the purchase of a majority of the stock of a parallel or competing company clearly amounts to a "control" by the one road of a parallel or competing road or canal, and that the purchase of a majority of the stock of a mining company was an engagement in a business not that of a common carrier. A doubt arose as to the first point, however, from the case of Pullman Car Company v. Missouri Pacific Railroad Company, 115 U.S. 597, 1885, where the Court held that the purchase of a majority of the stock of a railroad company did not amount to the acquisition of control of the road, on the ground that the corporation controls the road, and the stockholders control the corporation, and only through the corporation do they control the road, a distinction so narrow that one cannot believe that it will be followed except in cases like the Pullman Car Company case where it arose only in the construction of a private contract, and not in cases where the element of public policy is involved."

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18 The encouragement of the competition of a railroad with a canal was as much in the minds of the framers of the Constitution as that of a railroad with another railroad. See Act of 24 June, 1895, P. L, 221, Sec. 22.

17 Cf. Northern Securities Co. v. U. S., 193 U. S. 197, 1904 at 328. Per Harlan, J., "The Circuit Court was undoubtedly right when it said that the combination referred to 'led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both corporations.'"
sides which, as pointed out by Judge McPherson, in Com. v. Beech Creek, Clearfield, etc. Railroad Company, 1 Pa.C.C.223, 1886, that case admits that the purchase of a majority of the stock gives the control of the corporation, and our Constitutional provision prohibits exactly that. Accordingly the only Supreme Court case on the subject in Pennsylvania holds that the purchase by one railroad of a majority of the stock of a parallel or competing road does constitute the control by the former, of the latter road. On the other hand it was decided that the ownership by a railroad company of all of the stock of a mining company which owned mineral land, did not subject such land to escheat by the Commonwealth, but this decision did not touch the question whether such ownership violated Section 5 above quoted, because, as the Court expressly stated, even if it did violate that provision, inasmuch as no legislation had been adopted for enforcing it, the extraordinary remedy of escheat could not be given. On the authority of this case, however, the Secretary of Internal Affairs refused to certify to the Attorney-General for action, the case of a railroad company which bought all the stock of a mining company and for that reason was complained of as indirectly engaging in a business not that of a common carrier, on the ground that Com. v. N. Y. etc. R. R. Co., supra, necessarily led to the conclusion that such a purchase was not an engagement in business. That the case cited justified the decision we do not believe, nor do we think that the decision can, or should be, sustained on any other reasoning. It is true that when a manufacturer buys a share of the stock of the Federal Mining Company, he does not become engaged in the business of mining, but it is equally true that the corporation, the Federal Mining Company, is engaged in that business, and when a capitalist buys a majority of its stock, he does become engaged indirectly, to wit through his ownership

Com. v. N. Y., Lake Erie & Western R. R. Co., 132 Pa. 591, 1890.
Hartwell v. Buffalo, etc. R. R. Co., 6 Dist. 212, 1897.
of the body directly engaged in the business of mining. In cases where a similar question arises between private parties, as, for instance, where a man agrees not directly or indirectly to engage in a certain business during a given period, his purchase of a majority of the stock of a corporation engaged in that business would be enjoined. Should not the construction of such language be much stricter against a railroad, where the interests of the public are involved?

With the thought, then, that the purchase by a railroad of a majority of the capital stock of a parallel or competing railroad or canal, or of a corporation not engaged in the business of a common carrier, is as much in violation of the Constitution as the purchase or lease of, or consolidation with, such a railroad or canal or other corporation, let us see what restrictions are placed by the enabling statutes as to the corporations a majority of whose stock may be bought, or whose road or franchises may be sold to, leased by, or consolidated with, a railroad. Not one of the statutes permitting the purchase of stock contains any restriction at all either as to the proportion of stock to be bought or as to the relation between the roads of the company buying and the company issuing the stock. The statutes as to leases provide that the companies contracting must own "connecting railroads," or that their roads "shall be directly or by means of intervening railroads, connected with each other" or that the roads "shall be connected directly or by means of intervening line... thus forming a continuous route for the transportation of persons and property." In the case of sales the railroads

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83 29 March, 1859, P.L. 290.
84 23 April, 1861, P.L. 410.
must be connecting roads. Consolidation is permitted when roads connect or form "a continuous line of railroad with each other, or by means of intervening roads," or will form such a continuous line when constructed, or when the roads are not parallel or competing. Except the last-mentioned Act, none of the Acts cited are in the words of the Constitution. Are they in synonymous words, or, to put the question more definitely, does permission to connecting roads to enter into leases, sales or consolidations, forbid parallel or competing roads to enter into such relations? Giving to the words underlined their natural meaning, they do not seem to be antithetical: roads may connect and yet be parallel, as if the roads were in the shape of an H, that is, parallel roads connected by means of intervening railroads, and certainly roads may connect and yet be competing. It is stated, however, in a standard work, that where statutes provide for the lease of roads having a connecting, continuous or intersecting line, "this by implication is held to prohibit a lease to a parallel or competing line." The case stated in support of this principle does not justify the statement at all, and the only words which we have been able to find in any way confirming the declaration were the merest dicta. Against this view, on the other hand, is the very careful definition of "connecting railroads" given by the Supreme Court of Pennsylvania in construing the Act of 23 April, 1861, P.L. 410, above referred to, namely, "such a union of tracks as to admit the passage of cars from one road to the other, or such intersection of roads as to admit the convenient inter-

87 16 May, 1861, P.L. 702.  
86 24 March, 1865, P.L. 49.  
85 26 April, 1870, P.L. 1274.  
84 29 May, 1901, P.L. 349.  
92 Eel River R. R. Co. v. State, 155 Ind. 433, 1900.  
change of freight and passengers at the point of intersection." No suggestion that connecting roads could not be competing; indeed in the very case in which this definition was given, the roads said to connect, three times were spoken of as "rival corporations." If further evidence be needed in support of the contention that roads may connect and yet compete, it is found in the Constitution of 1874, Art. XVII, Section 1, which gives every railroad "the right with its road to . . . connect with . . . any other railroad," a provision whose purpose is "obviously to compel roads, coming together at any point, to allow a connection, if desired by either." This would not be necessary had it not been in the mind of the framers of the Constitution that roads might come together, and yet be so far hostile, because of competition, that the right of connection must be granted expressly. Or, to reason in another way, can we say that connecting roads can not be parallel or competing, when the Constitution provides that any roads may connect?

Even admitting that we are correct in regarding the statutes just considered, as not sufficiently restrictive to meet the Constitutional requirement, it, of course, does not follow that they are entirely unconstitutional. In so far as they apply to connecting roads which are not parallel or competing they are valid, and it is only as to connecting roads which are parallel or competing, that they are illegal. It needs no argument, however, to show that the amendments necessary to render these acts entirely constitutional should be made.

So much for the statutes concerning the relations between railroads. Let us consider now those treating of the relation between a railroad and other corporations. These are four in number, and authorize the purchase and guaranty by a railroad company of the stock and bonds of "corporations authorized by law to develop the coal, iron, lumber and other material interests of this Com-

of corporations "engaged in the business of transportation, either on land or water, or owning an actual majority of the stock entitled to vote of any corporation so engaged, and also of any warehouse, storage, elevator or terminal company, whose business is incidental to the business of transportation in which the purchasing or guaranteeing corporation shall be authorized to engage,"97 of "any other corporations,"98 and of water companies.99 None of these statutes limits the proportion of the stock of the companies indicated which a railroad company can buy, and if we are correct in our view that the purchase of the majority of the stock of a corporation is an indirect engagement in the business in which the corporation is engaged, it is submitted that all of these Acts are unconstitutional, with the possible exception of the Act of 4 April, 1901. The reason why that Act may be valid, although the Act of 22 April, 1905, is not, is, that the former Act permits the indirect engagement in the business only when incidental to the business of the railroad, while the latter Act would allow a railroad company whose road was not within 500 miles of a certain district to be engaged indirectly in the business of a water company incorporated with the privilege of operating in that district and therein only.

This brings us to the last phase of our discussion: What is the penalty for a violation of the constitutional provisions? As to the prohibition against engaging in any business other than that of common carriers, there has not been the slightest attempt to provide for its enforcement, although the Court has called attention directly to the necessity of legislation.100 As to the prohibition against buying, leasing, merging with or controlling parallel or competing railroads, an Act was passed in 1901 101

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96 15 April, 1869, P. L. 31.
97 4 April, 1901, P. L. 62 (as amended 23 April, 1903, P. L. 280).
98 2 July, 1901, P. L. 603.
99 22 April, 1905, P. L. 264.
100 Commonwealth v. N. Y. etc. R. R. Co., 132 Pa. 591, 1890, at 596.
101 4 April, 1901, P.L. 61.
which purported to enforce Art. XVII. Sec. 4, but which is so defective that only the presumption of sincerity brings one to admit that it really may have been intended to effect its expressed purpose. The prohibition of the Constitution was against the combination of a railroad with any parallel or competing roads, but the Act gratuitously qualified the prohibition by limiting it to the combination of a railroad with “any other railroad or canal corporation, organized under the laws of this State, owning or having under its control within this State a parallel or competing line.” In other words, parallel and competing roads may combine, as far as the Act of 1901 goes, if one of them happens to be organized under the laws of any other State than Pennsylvania—a condition not at all unlikely to exist in view of the statutes permitting Pennsylvania railroad corporations to consolidate with corporations of other states, owning or operating connecting roads—or if one of them owns or has under its control a line parallel or competing, but not in this State. For instance roads paralleling each other at a distance of five miles may combine if one road is just south of the boundary line between Pennsylvania and New York, and one just north of that line, although they may not if one road is just south of the Pennsylvania-New York line and the other just north of the Pennsylvania-Maryland line. The Act of 1901 contains, too, a remarkable proviso, excepting from its rigors cases where “a railroad corporation has furthered or shall further the construction of a line parallel and competing with its own, by subscribing to a majority of the stock of a corporation organized for that purpose.” Here is a paradox: a company itself to build and operate a competing road! If competition implies anything, it implies a negation of common ownership. Was there ever a corporation which would finance its rival? Or can a railroad compete with itself? Unless these questions be answered in the affirmative, it is submitted that the proviso of the Act of 1901 has no meaning. And now let us consider the penalty provided for a violation of
the Act. It "may be attacked or restrained by appropriate proceedings at law or in equity, at the instance of the Commonwealth, acting through the Attorney-General, and any such violation shall also constitute a misdemeanor, for which the offending corporation, as well as the president and members of the Board of Directors participating therein, may be indicted and punished, separately or collectively." A completed violation of the Act may be attacked, but with what result? The corporation may be indicted, and punished, but with what punishment? And the officers—shall they be fined or imprisoned? Compare this emasculated legislation with the Act of 24 June, 1895, P.L. 221, sec. 22, designed to prevent the combination of canals and parallel or competing railroads or canals. That act gives the complainant a right to a jury trial on the question whether "any such control as is hereby prohibited has been established, directly or indirectly"—an inestimably valuable privilege. If the Act has been violated the officers participant are fined $100.00 "for each day that such prohibited consolidation, lease, purchase or control, is in force or effect," and if the offence be repeated "all shares of such corporation by the ownership of which such prohibited consolidation, lease, purchase or control, is effected or maintained shall be forfeited to the State," and the control of the corporate property entrusted to those, if any, who protested against the unlawful act. With the Act of 1895 available, the framers of the Act of 1901 ought not to have gone astray so deplorably, had they desired to imitate that excellent model.

So much for the so-to-speak external development of our road. What of its internal development? Suppose that at first, uncertain of success, we had deemed it unwise to condemn and thereby become liable to pay for the sixty feet which the Act of 1868 would have permitted us to take for our right of way, and had taken only forty feet. Our venture has prospered and we must lay additional tracks, for which our forty feet right of way is too narrow. We can not condemn twenty feet more under
the Act of 1868, for the first taking exhausted the right given by the Act of 1868. To remedy such a predicament, the Act of 17 March, 1869, P.L. 12, was passed, conferring on railroad companies the right to straighten, widen and otherwise improve their lines, and for that purpose to purchase or appropriate land or materials, making compensation therefor in the manner provided by the Act of 1849. The Act does not expressly except any class of property from liability to condemnation, and the Supreme Court has decided that a railroad could condemn, for the purpose of widening its road, even a dwelling-house occupied by its owner, although such a house could not be taken, under the Act of 1849, for the purpose of constructing the road. In favor of this decision one can say almost anything except that it carried out the probable intention of the Legislature. Certainly there is at least as much reason why an inconveniently-located house should not be permitted to obstruct the construction of a road as its widening, and it seems scarcely conceivable that after passing the Railroad Act of 1868 which embodies the exemption of dwelling-houses from liability to condemnation for the purpose of building the road, the Legislature the next year should pass an Act intended to repeal the exemption in the case of proceedings to widen. The truth of the matter is, that the Court disapproved of the exemption in both cases, and took advantage of the careless wording of the Act of 1869 to correct in part the unwise of the Act of 1868.

The Act of 1869 does not confer the right to build branches or extensions. An examination of the entire body of our railroad legislation shows that this important

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104 Cf. Bubeneser v. P., B. & W. R. R. Co., 61 Atlantic, 270 (Del. 1905); where practically the same question arose, and was decided in favor of the owner of the house. The Dryden case is discussed and disapproved.
right derives a tenuous existence solely from Section 9 of the Act of 1868, P.L. 62, which authorizes any company incorporated under it "to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public." Next to the provisions concerning location, there is no part of our railroad legislation so defective as that concerning branches and extensions. The only legislation on the subject except Section 9 before quoted, is the Act of 22 April, 1863, P. L. 532, enabling railroads authorized to build branches, specially to mortgage the same, and to issue bonds up to $15,000 per mile. With this scant assistance from the statutes, we must determine the rights and liabilities of railroad companies as to branching. The decisions show that the provisions of other sections of the Act of 1868 imposing on the company restrictions as to its road, are not applicable to its branches. For instance there must be at least $10,000 of capital per mile of road but not a cent per mile of branch, so that a five-mile road may have two branches each ten miles long—for a branch may be longer than the main line—and still require a capital of only $50,000, being $10,000 for each mile of main line, but only $2,000 for each mile of main line and branches. Again, the main line of a road must be built within five years after the company is incorporated, but there is no time within which a branch must be constructed even after its location by the company. One is thus brought to the conclusion that because Section 9 of the Act of 1868 does not state that the provisions restricting a company as to its main line shall apply also to its branches, the company is not so restricted. But it is to be observed

106 Companies organized to build roads less than 15 miles long, are given the right to build extensions by the Act of 21 May, 1881, P.L. 27. The Act places no restriction on the length or direction of the extension, and under its benignant terms a 15-mile road may become a great trunk line.

107 Volmer's App., 115 Pa. 166, 1886.

that if Section 9 does not expressly extend to branches the *restrictions* of the Act, neither does it extend to them its *benefits*. The same section of the Act of 1868 which requires companies to build their roads within five years from their organization, gives them the right of eminent domain, and if the former part of the section does not apply to branches, why should the latter part? Whence, it is seriously asked, do railroads derive the power to condemn land for the purpose of building branches? It is not given in terms, and it scarcely will be claimed that the authority to build branches by necessary implication includes the power to condemn land for that purpose, in view of the fact that the framers of the Act of 1849 evidently thought it necessary expressly to grant that power even for the purpose of the building of the main line, and that the framers of the Act of 1869 after authorizing railroads to straighten, widen or otherwise improve their lines, deemed it necessary expressly to empower them "for such purposes to purchase, hold and use, or enter upon, take and appropriate, land and material." If, however, it be held that the right of eminent domain as given by the Act of 1849 does extend to the taking of land for branches, the condition still is very bad. We have attempted before to show the extreme impropriety of permitting a railroad company to condemn private property by the mere secret location of a route. But there are at least two safeguards in the case of the main line—its construction must be begun within two years, and, its termini and length being known, its general direction can be approximated. Even these safeguards do not exist in the case of branches—no time is limited for the beginning of their construction, and they may be of any desired length and go from any desired point of the main line, in any desired direction.¹⁰⁹ A radical change is needed in this part of our railroad law, in line with the improvement made on the same subject in the Street Railway Act, 3 May, 1905, P.L.368, Sec. 4, which requires the

filing with the Secretary of the Commonwealth of a copy of the resolution providing for the branch or extension, containing a detailed description of its route, the approval thereof by the Governor if he thinks it within the general scope of the original charter and not violative of any existing rights, and the recording of a certificate of authority to build the branch or extension, in the county or counties where the branch or extension lies.

The last subject upon which we desire to touch is the question of the right of railroads to connect with each other. So advantageous to the Commonwealth was it considered that there should be continuous passage of cars and engines over long lines of road, thus avoiding the delay and inconvenience of changing cars, that such early legislation as the Act of 13 March, 1847, P.L. 337, authorized connecting railroads to run their cars and engines over each other’s tracks by mutual agreement. The Act of 4 April, 1868, P.L. 62, went still further, and provided (Sec. 11) that a railroad company should have the right to connect its road with the road of any other railroad company in the Commonwealth, and if the latter company would not agree to conditions of connection, the same should be determined by a jury appointed by the Court. The first section of Art. XVII of the Constitution of 1874 emphatically declared “every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad; and shall receive and transport each the other’s passengers, tonnage and cars, loaded or empty, without delay or discrimination.” Further “to facilitate the movement of traffic and the interchange of cars,” the Act of 23 April, 1903, P.L. 280, establishes a standard gauge, and requires that all tracks shall be laid of that gauge. In the face of these clear expressions in favor of a policy of through traffic, come the Acts of 7 June, 1901, P.L. 514 and 7 June, 1901, P.L. 523, the former forbidding (Sec. 8) street railways to connect their tracks with railroad companies allowed to carry both passengers and freight, and declaring unlawful “the interchange of cars and continuous movement thereof between and over
the tracks of such street passenger railway company and
such railroad company," and the latter containing similar
prohibitions (Sec. 2) in the case of elevated and under-
ground passenger railways. The constitutionality of
Section 8 of the Act of 7 June, 1901, P.L. 514, perhaps
is open to question because the title of the Act, while
specifically mentioning the subject-matter of every other
section of the Act, contains no reference at all to the con-
tents of Section 8. Aside from this, however, the effect of
the Acts is this:

An underground and elevated passenger railway com-
pany builds its road from the heart to the edge of a great
city. A railroad company builds its road, of the same
gauge, operated by the same motive power, employing
the same kind of cars, from without the city to its border.
Thanks to the Acts of 1901, it may bring its tracks to
within a few inches of, but may not connect with, the
tracks of the passenger railway, and passengers must get
off the railroad cars and be loaded into the railway cars,
although both railroad and railway company may desire
the connection of tracks and continuous movement of cars,
and although such connection and movement may be en-
tirely feasible. The legislation is anomalous and its
enactment undoubtedly was due to the fear that with-
out it railway companies might become, contrary to their
charters, carriers of freight. That such legislation was
apparently not required until 1901 is strong evidence that
this fear was not well grounded, but admitting its reason-
ableness, it did not justify a prohibition which prevents
the continuous movement of passenger trains, which most
of the suburban trains are. Under no view of the subject
should anything but the running of the railroad's freight
cars over the railway company's tracks be forbidden.

But, finis sit of criticism, even with such tempting
morsels as the Act forbidding the giving of passes, adopted, as Buckalew says, in contempt of the Consti-

110 15 June, 1874, P. L. 289.
tution, as the Act to prevent discrimination and the Act to prohibit officers of railroads from being interested in contracts made by their railroads, because the writer feels that if even a small part of the criticism which he has directed at our railroad law, be warranted, the whole code surely will be examined and corrected.

Morris Wolf.

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111 Cons. of Pa., p. 271.
112 4 June, 1883, P.L. 72, Sec. 1 and 2.
113 4 June, 1883, P.L. 72, Sec. 3.