A CRITICISM OF THE RAILROAD CORPORATION LAW OF PENNSYLVANIA.

"Laws," says Voltaire, "are made spasmodically, haphazard, unmethodically, just as cities are built. Take the market-places and the wharves, the narrow streets and the crooked alleys of Paris, and compare them with the Louvre and the Tuileries: that is what our laws look like... The burning of London was what made her a great city. If you want good laws, burn yours and make new ones."

Radical advice this; and yet an examination of our Pennsylvania legislation will show that any attempt at systematic constructive work must be preceded by an apparently destructive attack upon our statutes. Within recent years there has been throughout the United States a general tendency toward the revision and codification of legislation, and Pennsylvania owes to this tendency such valuable acts as the "Service Act," the "Bills and Notes Act," and the "Mechanics' Lien Law," and soon will have it to thank for a comprehensible code of divorce law.

The importance of these reforms is unmeasurable, and
yet the necessity for none of them was equal to the present necessity for a reform of our corporation law. Statistics need not be quoted to demonstrate the sudden and immense development of this phase of industrial activity. The laws passed when corporations were in their infancy were found poorly to fit them in their healthy maturity, and in most of the States the legislators have been busy altering the statutes which could be adapted to the new conditions, and casting aside those so inadequate as to be not worth fixing up. Particularly has this been true in the States nearest to us: New Jersey, which we usually consider ultra-conservative, revised her corporation law in 1896, and the last Legislature constituted a commission to present as soon as possible a more up-to-date code. Delaware codified her corporation law in 1901, New York in 1892, West Virginia in 1899, Maine in 1904, Massachusetts in 1903, Connecticut in 1903 and Ohio in 1905.

Pennsylvania, on the other hand, has not made a single attempt to review her corporation law since the General Corporation Act of 1874 was passed. It is not that the subject is of less moment here than in other States. During the last administration, that of Governor Stone, there were granted 5,030 charters, not including those granted by the Courts. Nor has the disrepair of this branch of our law escaped notice. In his message to the Legislature of 1905, Governor Pennypacker wrote, "There are many incongruities in our laws with regard to corporations, due largely to the fact that the legislation has often been enacted without sufficiently considering its relation to the general system, and they ought to be corrected. Probably the best method would be to provide for a commission of expert lawyers, to be appointed by the Governor, who could go over the whole subject carefully and report a code or what changes may be necessary." A bill was introduced to carry this recommendation into effect, but it did not survive the introduction.

It is proposed in this paper to consider only the corporation law bearing on railroads, and even that part of our
The legislation is so voluminous that it can be discussed only incompletely, our thought being that if we can show even a few serious defects, others will apply themselves to the study of the questions involved, will discover the many faults which we may have failed to notice, and will take steps for their correction.¹

When we recollect that the capitalization of our railroads exceeds the assessed value of all of our taxable real estate, we can realize the gravity of the reproach that "legislation is scandalously loose in Pennsylvania touching railroads,"² but when we remember that this legislation began in 1823 and has gone on with fits and starts to the present time, we appreciate that it could not be expected to be either accurate or consistent. The Secretary of Internal Affairs, who has general supervision over railroads, complains that the Act of 14 May,

¹The word "railroads" unless otherwise indicated, is intended to designate railroads authorized to carry freight. Formerly railroads were classified as "steam railroads" and "street passenger railways," but now that the Supreme Court has decided that "steam railroads" may use electricity as a motive power: Howley v. Central Valley R. R. Co., 213 Pa. 36 (1905), the former term has become inaccurate, and since elevated and underground passenger railways may be formed under the Act of 7 June, 1901, P. L. 523, under entirely different conditions and with entirely different powers than "street passenger railways," the latter term, too, no longer is appropriate. The latest legislation drawing a distinction between railroads, divides them into "railroad companies" and "passenger railway companies." Act of 5 March, 1903, P. L. 13, but inasmuch as a railroad certainly is a passenger railway, this terminology is extremely artificial. Before the Act of 7 June, 1901, before mentioned, it would have been correct to distinguish between railroad companies possessing, and railroad companies not possessing, the right of eminent domain, but that Act, bestowing the right of eminent domain on so-called passenger railways, made this test insufficient. If the Legislature give to companies incorporated under the "Street Passenger Railway Act" of 14 May, 1889, P. L. 211, and under the "Elevated and Underground Passenger Railway Act" of 7 June, 1901, P. L. 523, the right to carry freight, as it seems inclined to do, it will be impossible to differentiate the various kinds of railroads except by speaking of them as incorporated under the respective acts of which they availed themselves. Some day there will be one act governing all railroads, as there was from the time the Act of 19 February, 1849, P. L. 79, was passed, until the Act of 4 April, 1868, P. L. 62, was adopted, and we shall be as much ridiculed for speaking of a "street passenger railway," as distinct from a "steam railroad," as we ridicule those who spent their days in debating whether an action sounded in debt or in covenant.

1889, P. L. 211, providing for the incorporation and regulation of street passenger railways, already is antiquated and in need of revision. It can be imagined how much more in need of revision is the law for the incorporation of railroads, twenty years older than that Act, and the law for their government, forty years older.

First to be considered are the Acts for—

I. THE INCORPORATION AND ORGANIZATION OF RAILROAD COMPANIES.

Prior to the Constitution of 1874, the creation of corporations by special act of the Legislature was not only a permissible, but in most cases the only possible method of incorporation. General acts did not exist except for few kinds of corporations. Among these were railroads. As early as the Act of 19 February, 1849, P. L. 79, it had been provided that all railroad companies incorporated under special acts should have the same specified rights and privileges except as otherwise stated in the act of incorporation. The Act of 4 April, 1868, P. L. 62, permitted any persons who should comply with its formal requisites, to form a railroad company, and to build or operate a railroad on the terms prescribed by the Act of 1849 for specially incorporated railroads. There was from 1868 until 1874 nothing to prevent the Legislature from chartering railroad companies specially, and confering privileges not granted either by the Act of 1849 or by that of 1868, and many railroads were so chartered after the latter Act went into force, up to 1874.

The Act of 1868 authorized the formation of companies "for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and op-

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4 The Lateral Railroad Act of 5 May, 1832, P.L.501, has not been overlooked, but it is not relevant to this article, because it contemplates the construction of railroads, not by corporations, but by individuals. It constitutes probably the only legislation in Pennsylvania granting to unincorporated individuals the right of eminent domain.
erating any unincorporated railroad already constructed for like public use." This of course was broad enough to include railroads of any length or gauge, but in 1871 an Act was passed providing for the formation of companies to construct, maintain and operate railroads for public use, not over five miles long, and giving to them all the powers granted in the Act of 1868: Act of 28 April, 1871, P. L. 246. Sec. 2 of the Act permits any corporation formed under the Act of 1868, and electing to organize under the provisions of the Act of 1871, to do so, if a majority of its stock so determines, upon filing with the Secretary of the Commonwealth a certificate of its action and a copy of its articles of association, "and any corporation failing, refusing or neglecting so to do, shall be subject to a fine of $50.00."

The Act of 1871, it is submitted, is, and always was, absolutely useless and unnecessary. The Act of 1868 had fixed no maximum or minimum length of road to be built by a company incorporated under it: the only reference in the entire Act to the subject of length, consists in the requirement that the articles of association shall state "the length of said road as near as may be," and it has been decided expressly that roads less than five miles long could be built under the provisions of the Act of 1868.6 Admitting that a company to construct a road less than five miles long could have been formed under the Act of 1868, one naturally would suppose that the Act of 1871 was passed either to encourage by greater liberality, or to discourage by greater strictness, the building of these short roads. The last sentence of the Act, providing that companies formed under the Act of 1868, which had not built more than five miles of road, might organize under the Act of 1871, if they elected to, and imposing a fine if they did not (evidently, did not file a certificate when they had elected to organize under the Act), would lead one to suppose that the intention was to impose harder conditions on companies organized under the Act of

But there is nothing in the Act which indicates what the harder conditions there are, and indeed inasmuch as the Act of 1871 in no way prohibits companies proposing to build railroads under five miles, to organize under the Act of 1868, one can not suppose that the Act of 1871 was intended to provide a stricter method of incorporation. On the other hand does the Act of 1871 make it easier to form companies to build these short roads, than the Act of 1868 did? The only difference between the two Acts is, that three persons may form a company under the Act of 1871, whereas it required not less than nine to incorporate under the Act of 1868. But this it is submitted is a very unsubstantial advantage, because the other provisions of the Act of 1868 apply, which means that the same amount of capital must be subscribed and paid in per mile, and that there must be a president and not less than six directors (Sec. 7 of Act 1868). Again, the incorporators under the Act of 1868 not having to be subscribers, and those under the Act of 1871 being required to be subscribers, the advantage if any would seem to be with the Act of 1868. Even granting, however, that two less persons are required to incorporate under the Act of 1871 than under that of 1868, and conceding that this is an important benefit, the question arises, why should a company already incorporated under the Act of 1868, and therefore not in any way handicapped by the provision of the Act of 1868 requiring nine incorporators, organize under the Act of 1871, a course of action evidently contemplated by Sec. 2 of the latter Act? The writer has found no answer to this question.

In 1875 the Narrow-gauge Railroad Act was passed, to provide for the formation of companies to construct, maintain and operate railroads having a gauge not exceeding three feet. The Act was not passed because of

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6 The Act of 10 April, 1901, P. L. 80 providing that all corporations may have a Board of Directors consisting of three or more persons, probably repeals Section 7 of the Act of 1868. In criticising legislation, however, it must be considered with reference to the law as it was when the legislation under consideration was enacted.

7 18 March, 1875, P. L. 28.
any doubt as to whether narrow-gauge roads could be constructed under the Act of 1868, for the Act of 11 April, 1853, P. L. 366, had given railroad companies authority to build their roads of any desired gauge, but a substantial benefit is conferred on persons organizing under the Act of 1853, for they may capitalize their road at $6,000.00 per mile, instead of $10,000.00 per mile, as required by the Act of 1868, and only $3,000.00 per mile need be subscribed before the recording of the articles of association, while $5,000.00 must be subscribed in the case of standard-gauge roads: Act of 8 June, 1874, P. L. 277.

The third class of railroads whose incorporation is provided for specially is that of railroads not over 15 miles long. This was effected by the Act of 13 May 1876, P. L. 157, which permitted the incorporation of such roads when only $2,000.00 per mile had been subscribed. Nothing was said as to the capitalization of the roads, and if the thought of the legislature in this act was that so short a road would require less capital proportionately than a longer road, the Act should have reduced not only the amount necessary to be subscribed, but also the required capital, as it had done in the case of narrow-gauge roads. But there are two other regards in which the legislation concerning roads not over fifteen miles long is more imperfect. The Act of 5 May, 1876, P. L. 116, permits such roads to charge for passengers' fare up to five cents a mile. Longer roads may not charge more than three and a half cents. Of course the right to charge the higher rate is extremely valuable, and it was perceived by the legislature that long railroads would lease the shorter roads, and attempt to operate them as part of a great system, at the same time charging the five cents permitted by the Act of 5 May, 1876. Ac-

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8 The advantage of being permitted to place the authorized capital stock at a lower figure is that the bonus to be paid upon incorporation thereby is lessened, that bonus being one-third of one per cent. on the authorized capital of the company: Act of 3 May, 1899, P. L. 189.

Accordingly the following proviso was inserted in that Act: "The provisions of this Act shall not apply to railroads leased and operated by a railroad company whose main line is more than fifteen miles in length." This is manifestly incomplete, for it does not prohibit the control of the shorter by the longer road except through a lease, which it is well known is but one of many methods by which such control could be exerted. For instance, the obvious courses left open to the longer road are to consolidate with, or acquire a majority of the stock of, the shorter road. It thus could make of the shorter road an integral part of its system, and still be able to take advantage of the higher rate permitted to the short road. Again, there is no prohibition against the lease of one fifteen-mile road to another, or its purchase by, or consolidation with, another, and while a trip over one thirty-mile road cannot cost over $1.05, a trip over two connecting fifteen-mile roads may cost up to $1.50. The second anomaly in the legislation governing fifteen-mile roads was indicated by Governor Pennypacker in his message to the Legislature of 1905, before referred to. The Act of 21 May, 1881, P. L. 27, is the offender. Its intention was to provide for the extension of the lines of railroads not over fifteen miles long, by the filing of supplemental articles of association. No limit is placed by the Act upon the length of the extension, so the road may become as long as the road of any company originally incorporated under the Act of 1868, but while the latter class of roads must have a capital stock of $10,000.00 a mile, short roads extending under the Act of 1881 need have only $5,000.00 of capital stock a mile. On the other hand, under the Act of 1868, companies could incorporate when only one half of the required capital was subscribed, while under the Act of 1881 apparently all of the required capital had to be subscribed. We need not discuss the question whether $10,000.00 a mile is a proper amount of stock to require, or whether it is good policy to permit incorporation before all of the stock is subscribed, but it seems incontestable that if $10,000.00 a mile be a proper amount
of stock to require, and one half thereof a proper subscribed amount to require, in the case of a road originally 20 miles long, they are equally proper amounts in the case of a road originally ten miles long, but subsequently extended to 20 miles. Moreover, nine or more citizens of Pennsylvania must associate to form a company under the Act of 1868, but three persons, of whom not one need be a citizen of Pennsylvania, may associate to build a road under the Act of 28 April, 1871, P.L. 246, before referred to, less than three miles long, and then thanks to the Act of 1881 the same three men may extend their road to 500 miles. If there be any real object in requiring nine Pennsylvania incorporators, the Act of 1881 affords a convenient way to evade its accomplishment.

This completes our consideration of the statutes bearing upon the kinds of railroads for whose incorporation special provision is made. The next question is, who may secure the benefit of the acts? The Act of 1868, the Narrow-gauge Railroad Act of 1875 and the Fifteen-mile Railroad Act of 1876, all require nine or more citizens of Pennsylvania to form a company, but the Act none of 1871 permits the incorporation of three persons, of whom need be even resident in the Commonwealth, to build a road not over five miles long. No matter what theory one may support as to the number or domicile of incorporators, one cannot reconcile to it both the Act of 1868 and that of 1871. Our own view is, that to grant railroad charters only to companies composed entirely of Pennsylvanians is unwise, because it will increase beyond already excessive bounds the practice of having “dummy incorporators,” or else it will act as a Chinese wall, excluding outside capital from the State, but that to permit the incorporation of railroad companies without any citizen of Pennsylvania is scarcely conservative or prudent. We should permit non-residents to be among the incorporators of a company, but should require some if not a majority of the incorporators to be residents. Under the General Corporation Law there
must be three associates, of whom one at least must be a citizen of Pennsylvania. 10

The inconsistency of our legislation concerning the amount of capital stock required to be stated in the articles of association and the amount which must be subscribed, already has been referred to. Presumably the purpose in fixing a minimum authorized capitalization and a minimum subscription, is to insure the financial backing necessary for the construction of the road, but when one considers that the same amounts are provided for a railroad like the tunnel railroad under the Delaware River, discussed in *Sparks v. Philadelphia & Camden Railroad*, the estimated cost of which is about $2,500,000.00 per mile, as for an ordinary railroad in level country, which can be built for $4,000.00 a mile, the difficulty of finding a figure equally fair for the two cases is almost insurmountable.

It has been the policy of the Legislature to require as an evidence of good faith, that 10% of the amount which must be subscribed, be paid in cash to the directors of the proposed company before it can be incorporated. The object of this provision undoubtedly is good, and it may to some extent prevent the taking of charters merely for speculation. It is submitted, however, that the provision is not stringent enough to meet the necessities of the case, and that it would be much better to require the deposit of the 10% paid in with the Secretary of the Commonwealth or with some other body less likely to make the payment of the 10% a mere matter of book-keeping, not involving any actual transfer of money. This is the method used in New Jersey, and the provision of that law that proportionate parts of the deposit shall be returned to the incorporators when they have built parts of their road, is a powerful incentive to go ahead with the work, while the fact that until the charter is surrendered the money will not be returned,

10 Act of May 29, 1901, P. L. 326.

11 212 Pa. 105, 1905.
but will be kept without allowance of interest, acts as a strong deterrent against the obtaining of "paper charters."

Having decided what kind of a road is to be built and having associated the requisite number of incorporators and obtained the necessary amount of subscriptions, articles of association are to be adopted. Their contents are prescribed by the Act of 1868. They resemble agreements of partnership, and set out, as such agreements would, the name of the association, its period of existence, its capital, its method of government, etc. One criticism to be made on the requirements of the Act is, it seems to the writer, that the route of the road need not be indicated at all, and its termini need not be fixed more definitely than as "the places from and to which the road is to be constructed or maintained and operated," the word "place" not meaning anything less broad than "some location, as a city, town or village." It is conceded that it would be difficult exactly to describe the route of the road in advance, but it is fair to say that persons should not be given a charter until they have in their minds a more definite idea of where they intend to go than that they will construct a railroad from Philadelphia to Pittsburg. The provision that the articles of association shall name the persons "who shall manage the affairs of the company for the first year," also is objectionable. It has been decided, and with undoubted correctness, that the associates before they have incorporated can not choose officers for the corporation, any more than they could make contracts for it, and the loose wording of the Act, which implies a contrary principle, should be amended. Modern ideas tend to disapprove the granting of perpetual franchises, which the Act of 1868 allows. "The mountains' shall sink into the sea," says Governor Pennypacker, "in time the sun shall disappear from the heavens, and no charter should purport to endure forever."

12 Per Snodgrass, Deputy Attorney-General, Re Pittsburg Transfer Company., 1 Pa. C. C. 411 (1886).
13 Com. v. Holmes, 20 Phila, 190, 1890.
The articles are executed in the proper manner, and then forwarded to the Secretary of the Commonwealth, together with an affidavit that the amount which must be subscribed has been subscribed, that 10% has been paid in good faith in cash to the directors, and that it is proposed to construct the road for which a charter is asked.

With the filing of these articles of association and their recording, the incorporation of the Company would be complete in most States. But by one familiar with our general corporation law, two more steps would be expected: the advertisement of notice of the intention to apply for a charter, and the Governor's approval of the articles of association and his direction that letters patent issue, creating the associates a corporation.

The advertising of charter notices is, according to Governor Pennypacker,\(^{14}\) for the purpose of giving any persons who might be interested adversely in the granting of the proposed charter by the Governor, an opportunity to protest against its approval. As a practical matter, the only persons who legitimately could have such an interest would be stockholders in a corporation with a name so like that of the applicants that confusion would result from the similarity, and as to them the interest of the public authorities in preventing mis-delivery of mail, confusion in assessment of taxes, etc., is a much greater protection than an advertisement which may not even be in a newspaper in their county, and which is not likely to be seen by them if it is. But whether the public derives much benefit from advertising or not, Governor Pennypacker certainly is correct in saying, "All corporations before they can be chartered, are required to give notice by advertisement of their applications, except railroad and street railway companies. It would seem to be specially important that these companies should give such notice." In the case of street railways, this anomaly was cured by the Act of 3 May, 1905, P. L. 368, Section 1, so that railroads are the only

\(^{14}\) Donora Light, Heat and Power Company, 12 Dist. 115, 1903.
important class of corporations which can be chartered in Pennsylvania without notice of the intention to apply for a charter.  

Few provisions of the corporation law of Pennsylvania need revision so badly as do those which concern the Governor's part in the incorporating of persons. In the original Railroad Act of 1868 no mention whatever was made of the Governor. The associates were required to make and execute articles of association and then to file them in the office of the Secretary of the Commonwealth, "who shall endorse thereon the day on which they were filed and record the same in a book to be provided by him for that purpose; and thereupon the said articles of association shall become and be a charter for the said company, and the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company shall be a corporation by the name specified in such articles of association or charter, and shall possess the powers and privileges following, to wit: to have succession by its corporate name," etc. That is to say, the incorporation is complete when the articles of association are filed with the Secretary of the Commonwealth. This is the rule prevailing in all but three or four of the States, and it seems to have proven satisfactory in the case of railroads in Pennsylvania until the Act of 8 June, 1874, P. L. 277 was passed. Section 3 of this Act provided, "On filing of the articles of association . . . the Governor shall issue his letters patent creating the association aforesaid a body corporate, with power to use and enjoy all the powers and privileges conferred by the Act aforesaid (of 1868), and the several supplements thereto." This provision interposes between the association and the corporation, the Governor. It seems scarcely possible that the Act of 8 June, 1874, did not repeal the provision of the Act of 1868 that the articles of association should be the charter of the company and that the association

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15 Ship Canal companies, whose incorporation is provided for by Act of 24 June, 1895, P. L. 221, apparently do not have to advertise.
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should become a corporation upon filing them, for this provision seems entirely inconsistent with the requirement of the issue of a charter by the Governor and the creation of the corporation by his act. The Act of 21 May, 1881, P. L. 27, however, which provides for the extension of roads not over fifteen miles long, makes the whole question of when the incorporation is complete, doubtful, by providing in Section 1 that when the amended articles of association are filed with the Secretary of the Commonwealth they shall become a charter for the company, and the stockholders shall be a corporation, etc. (almost in the words of the Act of 1868), and providing in Section 2 that on filing the articles the Governor shall issue his letters patent, etc. (almost in the words of the Act of 8 June, 1874). If the associates become a corporation upon filing their articles, one scarcely sees what additional advantage they gain from the governor's act, and if the two provisions can stand together in one act, as the Act of 1881 indicates that they can, the Act of June 8, 1874, probably did not repeal the quoted sentences of the Act of 1868 and railroads become incorporated by filing their articles of association with the Secretary of the Commonwealth and without any action on the part of the Governor. The Act of 8 June, 1874, probably was enacted in imitation of Section 3 of the General Corporation Act of 29 April, 1874, P. L. 73, which reads as follows: "The said certificate (of incorporation), accompanied with proof of publication of notice as hereinbefore provided, shall then be produced to the Governor of this Commonwealth; who shall examine the same, and if he finds it to be in proper form and within the purposes named in the second class, specified in the foregoing section, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue in the usual form, incorporating the subscribers," etc. Strangely enough it never has been decided judicially whether this provision enabled an applicant to mandamus the governor to approve articles of association if they were "in proper form and within the purposes named in the
second class” of the Act of 1874. Attorney-General Carson in an elaborate argument published in his report for 1903-4 maintains that the Governor can not be mandamused to approve articles of association,—firstly, because of his position as head of the Executive Department of the government, and secondly, because such approval is a discretionary and not a ministerial act. In support of this second contention, Mr. Carson relies largely on Governor Pennypacker’s opinion in the case of the Donora Light, Heat and Power Company, in which the following language is used: “The question turns upon the meaning of the words ‘in proper form’ and ‘approve.’ The Act does not say that he shall certify that the forms have been faithfully followed, but that he shall approve of the incorporation. At the time of the passage of the Act of April 29, 1874, the word ‘approve’ had a certain precise historical meaning. Up to that time, for a long series of years, charters had been granted by special acts of assembly, which only became laws by the assent of the Governor, and that assent was shown by the use of the word ‘approved.’ When the Legislature used the word ‘approve’ they must have been aware of its special significance.” With this argument in mind, let us look at the Act of 8 June, 1874, admitting that it repealed as to the completion of incorporation, the Act of 1886. Not a word about “proper form” or “approve” on filing the articles of association, “the Governor shall issue his letters patent.” Could there be a more mandatory sentence framed than this? However correct Mr. Carson may be in claiming that the Governor’s action under the Act of 29 April, 1874, is discretionary, it is submitted that an application of his reasoning in support of that claim to the Act of 8 June, 1874, shows that the Legislature intended to give the governor no discretion in the granting of railroad charters. If now Mr. Carson’s first argument be admitted, that the performance even of a

16 Page 359 et seq.
17 12 Dist. 115, 1903.
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Ministerial act by the Governor can not be enforced by the Courts, is there not a radical defect in the laws? To provide that the Governor is to act as a mere clerk in the issue of a charter, and at the same time to hold that by reason of his lofty office no compulsory process can be used to enforce such issue, is a state of affairs which cries out for correction.

The correction may be in one of three ways—either the action of the Governor may be dispensed with altogether, as it was in the Ship-Canal Corporation Act of 24 June, 1895, P. L. 221, or the Governor may be made amenable to mandamus proceedings by Act of Assembly, if such an Act would be enforcible, or else the Governor or a commission should be given a discretion in the granting of railroad charters. In the writer's opinion, the establishment of a commission which should pass on application for railroad charters, would be an excellent thing. It would be in line with legislation in such important states as New York, Massachusetts and Illinois, which legislation is based on the theory that the right of eminent domain is of so high a nature that it ought not be granted in any case except to a company whose purposes had been investigated and found to be of public benefit and advantage. Even in Pennsylvania the correctness of this principle has been recognized in the establishment by the Act of 20 June, 1901, P. L. 577, of a board which must approve the incorporation of an elevated underground and elevated passenger railway, before it can secure a charter.

This completes our consideration of the incorporation of railroad companies, except that it may be remarked that for no apparent reason this class of corporations alone has been relieved of the necessity of causing its articles of association to be recorded in the county or counties in which its operations are carried on. There is no reason for this omission, and it should not be permitted to continue.

Our company being incorporated and organized, let us take up the statutes which deal with—
II. THE BUILDING OF THE ROAD.

The first step in building the road is the raising of money. This can be done either by issuing stock or by borrowing, and borrowing, as a practical matter, means borrowing on bonds secured by mortgage, although of course money may be borrowed on open account or on notes. The public has a very deep interest in the amount of stock and bonds which a railroad has outstanding, for students of transportation charges tell us that rates are regulated by railroad companies much more with reference to the quantity of stock and bonds to pay dividends and interest on which money must be earned, than with reference to anything else. If then we desire low fares, we must see to it that stock and bonds are not issued except for a consideration which will increase the earning power of the road to an amount at least equal to the added burden of dividends and interest assumed by the issue.\(^\text{18}\)

The legislation prescribing a minimum capitalization already has been discussed. The maximum capitalization of railroads at first was unlimited: Act of 24 March, 1865, P. L. 43, then it was fixed by Section 6 of the Act of 1868 at $60,000 per mile, increased by the Act of 4 June, 1883, P. L. 67, to $150,000 per mile, and all limitation as to amount again removed by the Act of 9 February, 1901, P. L. 3.

The amount of stock issued is not nearly so material as is the consideration for its issue. The Constitution of 1874 provided (Art. XVI. Sec. 7), "No corporation shall issue stock or bonds, except for money, labor done, or money or property actually received." The section is not self-executing, but no attempt was made to carry it into effect until the Act of 7 May, 1887, P. L. 94, was passed. Section 1 provides that if stock is to

\(^{18}\) So important has the prevention of over-capitalization been deemed, that in two states, Massachusetts and Texas, no stock or bonds may be issued without the approval of the railroad commissions of those States, and a similar requirement has been inserted in the proposed draft for a national railroad corporation act:—v. Congressional Record of 15 May, 1906, p. 7104.
be paid for in money, an amount of money equal to the
par value of the stock actually must be paid into the
treasury of the company before the stock is issued, and
adequate penalties are imposed for a violation of the
mandate. Section 2 provides that if stock is to be issued
as the price of property or labor, the price paid in stock
shall not be in excess of the price for which the prop-
erty could be bought in money. In other words, $50.00
in cash, or property or labor which could be bought for
$50.00 in cash, must be paid for $50.00 of stock, not
stock having a *market value* of $50.00, but stock having
a *face value* of $50.00. As long as stock is worth par,
these provisions are adequate, but just as soon as the
stock becomes worth less than par the Act becomes im-
practical, and when it becomes worth more than par the
Act becomes ineffective. Suppose, for instance, that
one-fifth of the company’s property is destroyed, so that
the actual value of its stock drops to $40.00 a share, and
the company desires to replace the property destroyed,
paying therefor by issuing new stock or treasury stock.
If it can give only $50.00 of stock (actual value $40.00)
for property which sells for $50.00 cash, who will sell to
the company? Or suppose the franchise proves valuable
and the stock rises to $75.00 a share, market value. If
now the company can give $50.00 of stock (actual value
$75.00) for $50.00 worth of property, how is the public
protected against the issue of stock upon inadequate
consideration? The difficulty with the Act is that it
attempts to legislate an impossibility, namely, that stock
always shall be worth par. Railroad companies should
be allowed to sell their stock for cash or for property or
labor at a rate which will give the company and the
public the benefit of the fair market value of the stock,
as they are, by the same Act, given the benefit of the
fair market value of the company’s bonds.

In discussing the question of borrowing, we shall con-
sider only the particular method of borrowing, which is on

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20 Page 25, infra.
bonds secured by mortgage, because this is by far the most frequently used method. Even without statutory authority a railroad company could issue stock, but its power to mortgage, if not its road alone, at least its road and franchises, depends entirely on legislative permission. Section 2 of the Act of 1849 conferred on railroad companies an unrestricted right to mortgage all their "goods, chattels and estate, real and personal, of what kind and nature soever." The act of 8 April, 1861, P. L. 259, providing for the formation of a new company by those for whose account a road sold at sheriff's sale is bought, permits the issue of bonds bearing interest at not more than 7%, up to the amount of capital stock, which probably means capital stock paid in, and not, as the wording would indicate, capital stock authorized, secured by mortgage on the real and personal property of the road, and also on its franchises. Section 8 of the Act of 1868 amended the Act of 1849 by including in the property which could be mortgaged, the franchises of the company, and by providing that the bonds should not exceed double the amount of the paid-up stock. The maximum interest was fixed at 7% and maturity of the bonds could not be postponed more than fifty years.

The next Act is that of 13 March, 1873, P. L. 45, entitled "An Act to authorize railroad corporations to secure the payment of their bonds and obligations by a mortgage upon their property, rights and franchises." The issue of bonds bearing not over 7% interest, secured by mortgage of the road and franchises, is authorized. This was almost exactly what the Act of 1868 had provided and one must look very closely to see what object the Act of 1873 was passed to accomplish. It contains a proviso, "This act shall not be construed to empower any railroad company to issue bonds in excess of the capital stock actually paid in." If this Act was intended to amend the Act of 1868, which permits the issue of bonds to twice

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the capital stock paid in, its infelicitous wording defeats the accomplishment of that intention, for instead of pro-

viding that bonds shall not be issued to an amount exceeding the paid-in capital stock, it simply says that the Act shall not be construed to permit the issue of a greater amount. Railroads which could take advantage of the Act of 1868 could issue bonds up to twice their paid-in capital under that Act, and, since they had no need at all for the Act of 1873, they were not affected by its proviso. The difference between the Act of 1868 and that of 1873, is that Section 8 of the Act of 1868 applied only to railroads incorporated under that Act, while the Act of 1873 applied to "any railroad corporation of this Commonwealth." After the passage of the Act of 1873, rail-
road companies incorporated under the Act of 1868 could create twice as big a bonded indebtedness as other rail-
road companies, although no apparent reason suggests itself for such a distinction. It has been impliedly sug-

gested that the difference between the two acts was, that the Act of 1868 permitted the issue of bonds only for the construction and equipment of the road, while the Act of 1873 contained no such restriction.\textsuperscript{23} It is difficult, however, to see just what legitimate use of the proceeds of bonds is not permitted by the earlier act, unless, perhaps, their use for the operation of the road. Why com-
panies should be allowed to issue bonds to twice their paid up capital stock to construct and equip their road, and to only half that amount for other purposes, is not apparent.

The Act of 8 May, 1876, P. L. 135, should have sent cold shivers down the backs of those interested in narrow-
gauge roads. It confers on narrow-gauge railroad com-
panies with roads not over 50 miles long and having a subcribed capital stock of not more than $500,000.00 the right to issue mortgage bonds, in exactly the language used in Section 8 of the Act of 1868. The importance of this grant of power lies in the implication that narrow-

\textsuperscript{23} Fidelity Co. v. West Pa. R. R. Co. 138 Pa. 494, 1890, at 498.
gauge roads would not have possessed, without further legislation, the rights and privileges of the Act of 1868. What rights and privileges have they then? The act of 18 March, 1875, P. L. 28, under which they are incorporated, does not contain any grant of powers, and none has been made by subsequent legislation except this power conferred by the Act of 1876 to issue mortgage bonds. Whence do they derive the right to construct branches, whence the right to increase their capital stock, whence the right of eminent domain even? Except for the Act of 1876, no one would think to question the existence of these rights, for they would assume that narrow-gauge railroad companies, incorporated, as the Act of 18 March, 1875, states, "under the provisions of the Act approved April 4, 1868," would have the same rights, powers and privileges and be subject to the same restrictions and liabilities as companies organized under the Act of 1868. Either the Act of 1876 was superfluous or else many more acts are needed to give narrow-gauge railroad companies the powers which they should have.

The Act of 12 June, 1878, P. L. 183, recites that doubts had arisen whether the Act of 13 March 1873 enabled a railroad company to mortgage its rolling stock and other personal property. This somewhat unreasonable doubt is settled in favor of the power, and the Act proceeds to provide that "such mortgage shall not be valid against persons not parties thereto, unless recorded in every county in which the mortgaged property is situated," and that cars and engines mortgaged shall be marked in some conspicuous place with the name of the trustee in said mortgage. There is much in these provisions which invites criticism. In the first place to render unrecorded mortgages invalid as against "persons not parties thereto," without excluding persons who have actual notice, is scarcely consistent with the purpose of the recording acts, which is only to provide a substitute for actual notice. If the penalty for failure to record the mortgage is too heavy, this is compensated by the fact that there is no

24 Covey v. Pittsburg, etc. R. R. Co., 3 Phila. 173, 1858.
penalty at all for failure to mark the cars and engines. In the second place it is difficult to tell just where the mortgage is to be recorded, for the county in which cars and engines are situated is not easily determinable. They are almost like running water in that they have no fixed or permanent abode. Finally, if the second proviso was intended to brand the mortgaged rolling stock with the evidence of its subjection, there should have been a requirement that it be marked with the name of the mortgagee in cases where there was no trustee, and that the word "trustee" or "mortgagee" should follow the name, as it must in the case of a lease.

The almost special Act of 22 April, 1879, P. L. 31, permits railroad companies the time for the completion of whose railroads is about to expire, and which have not completed their railroads "for the purpose of continuing and completing the construction thereof, to borrow, on mortgage of their property and franchises, or otherwise, such sum or sums of money as may be necessary, at any rate of interest not exceeding 7% per annum." The importance of this Act consists in the fact that it does not limit the amount of bonds which may be issued, by the amount of stock paid up.

The Act of 4 June, 1883, P. L. 67, simply provides that railroad companies shall not issue over $150,000 of stock and $150,000 of bonds per mile. We can not refrain from complaining of the use of the word "mile" in this indefinite way. Does it mean per mile authorized or per mile constructed? If it be against the policy of the law "to permit bonds to be issued upon the security of mere moonshine," as Mr. Justice Clark declares in Philadelphia v. Ridge Avenue Railway Company, 102 Pa. 190, 1883, certainly the amount of bonds should depend upon the constructed mileage of the road, and yet, in view of the fact that this provision is in context with capital stock, the amount of which both initially and subsequently is fixed by the authorized mileage, the question becomes very doubtful. Again, does the word mean per mile of track.

25 5 July 1883, P. L. 176.
or per mile of length of road? The latter is the more natural meaning, and yet it seems unfair that a four-track trunk-line should have no greater borrowing capacity than a single-track branch line. The Act, to our minds, does not destroy the ratio between the stock and bonds, as fixed by the Acts of 1868 and 1873: it remains true that railroads incorporated under the Act of 1868 may issue bonds to twice the amount of the paid-in capital stock, and that other roads may issue them to an equal amount, only a maximum of $150,000.00 per mile is fixed.

We have considered before the effect of the Act of 7 May, 1887, P. L. 94, so far as it concerns the consideration for which stock may be issued. On the question of bonds, it provides that none may be issued until the full amount subscribed of stock is fully paid for, nor may they ever exceed in amount the capital stock paid for, nor shall they be issued for less than their fair market value. The prohibition against the issue of bonds until all of the subscribed stock is paid for, is entirely new, but the provision that there shall not be more bonds than paid-up stock is in accord with the Act of 1873, and undoubtedly repeals Section 8 of the Act of 1868 in so far as it permits the issue of bonds to double the amount of paid-up stock. The effect of the simple statement that the bonds shall be issued for not less than their fair market value is, we think, to overthrow the theory which had caused the insertion in almost all of the Acts so far considered on the subject of the issue of bonds, of a limitation on the rate of interest to be paid. Railroads, in their inception, naturally were considered highly speculative investments, and they could not have borrowed money, particularly in the middle of the nineteenth century, when money commanded high premiums, unless they were permitted to enter into valid contracts to pay over 6% interest. Accordingly, the Act of 26 July, 1842, P. L. 430, Section 11, as explained by the Act of 25 February, 1856, P. L. 61, sanctioned the issue of bonds at prices so much below par that legal interest on

26 Page 20, supra.
the face of the bonds would yield much more than legal interest on the price paid for them. The later statutes provided that the bonds should bear interest at not over 7%, but whether this meant that they could not be sold below par any more so as to yield over 7% on the selling price, is not clear, although if the Acts were construed so as to permit this, the limitation of 7% expressed would be done away with entirely. The Act of 1887, however, settled the question in a sensible way, by permitting the sale at the fair market value of the bonds, whether at that value they yielded 7% or more. The only criticism that the Act of 1887 seems to call for is, that in cases where bonds are issued for property or labor, no schedule of the property or labor acquired and price paid therefor is required to be filed, as, under Section 2, it is in the case of stock paid for in property or labor.

An exception to the law that bonds can be issued only up to the amount of capital paid in, and not in excess of $150,000.00 a mile, is made by the Act of 31 May, 1887, P. L. 275, which permits railroads elevating or depressing their tracks in cities, peculiarly expensive work, to borrow, on bond and mortgage, "such amount of money per mile of elevated or depressed railroad as may be necessary to pay for the construction thereof, together also with such damages, direct and consequential, as may result therefrom."

Finally comes the Act of 9 February, 1901, P. L. 3, which authorizes all corporations, including railroad companies, to increase their stock and indebtedness to such an amount as they may deem necessary to accomplish and carry on and enlarge the business and purposes of the corporation. This Act does not seem to have any other effect on railroads than to remove the limit of $150,000.00 of bonds per mile fixed by the Act of 4 June, 1883, P. L. 67, if it has even that effect; it does not seem to change the salutary provision of the Act of 7 May, 1887, forbidding the issue of bonds in excess of the paid-up stock. Is this true also of the

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Act of 22 April, 1905, P. L. 280, which amends the Act of 9 February, 1901, by providing that the stock or indebtedness of corporations may be increased to any amount deemed necessary, "without regard to the amount of the other, regardless of any limitation upon the amount of either prescribed in any general or special law regulating any such corporation"? Does this mean that railroad companies may issue mortgage bonds whether their subscribed stock is paid for or not, to an amount exceeding their paid-up stock? The presumption that it was intended by the Act of 1905 thus radically to change a policy adhered to for so many years, should not be indulged in: rather should it be taken that the intention was to change only such of the earlier Acts as can not possibly stand with it. In the first place, nothing is said in the Act of 1905 as to when the debt may be increased, so there is no reason to consider the Act of 1887 repealed as to its provision that bonds may not be issued until the subscribed stock is paid for. Again, the Act of 1905 speaks of "indebtedness," while the Act of 1887 speaks of corporate bonds, "or other certificates of indebtedness," and it may well be that the two could stand together, so that while bonds or notes could not be issued to more than the paid-up stock, debts might be incurred in other ways, to an unlimited amount. In view of the fact that one object of the Act of 1887 was to protect investors from being tempted to buy corporate obligations which had no real security, this distinction would be very reasonable, for there would be no danger of investors buying un-substantial book accounts against railroad companies. In the third place, the Act of 1905 provides simply that the indebtedness may be increased, while the Act of 1887 provides that bonds or other certificates shall not be issued in excess of the paid-up stock. Is there anything contradictory here? Railroad companies may authorize a bond issue of $1,000,000.00 even if their capital be only $50,000.00 but if only $25,000.00 of the capital be paid up, bonds can be issued only to that amount. Of course on this theory the Act of 1905
would have no practical effect as to railroads, for a corporation does not desire to have bonds which it can not issue, but this is not fatal to the construction.

Admitting that there still is a limit on the time when, and the amounts in which, stock and bonds may be issued, the question remains, what is the penalty for issuing them at forbidden times or in forbidden amounts? Until the Act of 7 May, 1887, P. L. 94, was passed there was no penalty. If bonds were issued to an amount many times in excess of the paid-in capital, there was no punishment provided for those responsible for the unloading of these insecurities on the public, and so flagrant were the frauds perpetrated that Judge Williams in the Western Pennsylvania R. R. case strongly advocated the imposition of a punishment. The Act of 1887 attempted to supply the deficiency. Stock issued without full consideration, and bonds issued before the subscribed amount of stock was fully paid for, or in excess of it or not at their fair market value, were declared void, and the officers of the company assenting to the illegal issue were declared guilty of a misdemeanor punishable by a fine of not over $5,000.00. The declaration that stock and bonds are void does not seem to have much force, for as against bona fide purchasers for value, they are just as good as if issued lawfully, and even purchasers with notice of their invalidity, are protected at least to the extent of the money actually paid for them. The penal clause fails to include one class of persons to which Judge Williams thought that it should apply, namely, the financial agents who negotiate the bonds, and a minimum as well as a maximum fine should have been fixed.

Here are fourteen Acts relating to the question of the issue of stock and bonds by a railroad company. Could a stronger argument be made for the necessity of a revision than the mere statement of this fact?

Let us assume that our company safely has threaded

30 *Shellenberger v. Altoona, etc., R. R. Co.*, 212 Pa. 413, 1905.
the maze of the preceding Acts, and finds itself armed
with legal authority and with financial ability to construct
its road. It now will undertake the choice of a route,
and the actual construction of its road thereon.

In considering the legislation of which it must avail
itself, we shall find ourselves principally dealing with the
Act of February 19, 1849, P. L. 79, for after almost sixty
years, it is to this Act, passed when railroads as we know
them now were undreamt of, that we must go to find the
most important power of railroads, to wit, the right of
eminent domain. Let us examine Section io of the Act,
which confers that right. First, what help does it give us
in choosing our route? It permits the president and
directors to survey and ascertain, then to "locate, fix, mark
and determine," such route as they deem expedient, not
passing through any burying ground, or place of public
worship, or any dwelling-house in the occupancy of the
owner or owners thereof, without his, her or their consent,
and to construct a railroad on such route. This sketchy
treatment of the method of exercising the right of eminent
domain is one of the gravest defects of the Railroad Act.
When we think that this right entitles its possessors to
take property against the will of the owners thereof, we
should expect to see all reasonable restrictions placed
upon it. But look at the exact wording of the Act: "The
president and directors of such company shall have power
and authority by themselves, their engineers, superinten-
dents, agents, artisans and workmen, to survey, ascertain,
locate, fix, mark and determine such route for a railroad as
they may deem expedient, not however," etc. The power
of location here given is a power to preëempt land, a kind of
notice that the company proposes to condemn the land.
From the time the road is located over a man's property he
ceases to have a clear title to it, and no other company
can condemn it, and whenever the company decides
to condemn it, it may. Indeed, if the company does not

31 Johnson v. Callery, 184 Pa. 146, 1898.
407, 1891.
use a part of the land condemned, and in no way shows that it has condemned it, even after 20 years adverse possession of such part of the land, the company can reclaim it from a remote vendee of the owner at the time of the location, although neither the owner nor any subsequent vendee ever knew or could have learned of the location. To equalize this condition, the owner after the road has been located over his property, may begin proceedings to compel the company to pay for it. Considering the important effect of the act of location one would look for numerous formalities surrounding its exercise, chiefly one would look for some requirement which would give the person whose land is included in the location, notice of that fact, so that he might begin the proceedings to which he is entitled, and for some requirement which would enable another railroad company intending to build a road in the same region, to determine what land had been preempted. But we find none of that: according to the act, it seems clear to the writer that the location may be made by an engineer, superintendent, agent, artisan or workman as well as by the president and directors, for those subordinates are given just as much right to locate the route as they are given to survey or mark it, and as it never has been supposed that it required the president and directors to survey or mark the route, it is not very easy to see why it should be held that they alone can locate it. It has been so held, however. But how do the president and directors locate the route? Simply by meeting and passing a resolution that "such and such be and it hereby is adopted as the location of the railroad of the X Company." The resolution need not be published or recorded anywhere or at any time. In no place in the world, it is submitted, is there displayed such carelessness and indifference to the legalized confiscation of private property. Nine men may agree to form a railroad company, without advertisement of notice of their intention to apply

34 Williamsport & North Branch R. R. v. P. & E. R. R., supra
for a charter; they may become incorporated, without recording their charter in the district where they intend to build their road; they may organize their corporation, without any hint or warning or notice to you or to any one else; they may meet and decide to locate their railroad through your land, and thereupon, unknown to you, your land is doomed. Not even then are you told your fate. For weeks and months you may hear nothing of the company, you may sell your land even. Then suddenly, a year after the road was located over your property, perhaps months after you have sold it, the company may inform you or your vendee that the land was appropriated a year ago, and you are liable to your vendee for breach of your covenant against incumbrances. Or you may be a financier, who has discovered a rich field for a railroad, apparently theretofore undiscovered. You may spend time and money in surveying a route through virgin woods, in planning to construct a road in a district where no man ever thought to build, you may locate your route and be about to enter upon the work of construction, when the A. R. R. Co., of which no one ever heard, turns up, and informs you that two days before you located your route, it had held a meeting of its directors and fixed upon the same route. The temptation for fraud which exists where the stake is so rich and the means of attaining it so easy, is tremendous. The production of a book in which is written that on a certain date, a majority of the directors being present, it was resolved to build a road on the route marked "A" is a matter of so little difficulty, that it is only remarkable that it does not occur oftener. Were the condition irremediable, it would be difficult to reconcile ourselves to it, but in view of the fact that all that is necessary absolutely to end it, is to provide that no location shall be complete until a map and description of the route located on be lodged for record with the Secretary of the Commonwealth and until written notice be given to the owner of each property included within the location, the condition becomes inexcusable.
After thus criticising the Railroad Law for its failure to impose strict enough conditions upon the exercise of the right of eminent domain, it seems strange to complain that it is not broad enough in its grant of that right in other respects. It prohibits the location of railroads through cemeteries, places of public worship and dwelling-houses occupied by their owners, without the consent of such owners or upon streets, lanes or alleys in incorporated cities. The first class of exceptions, of course, is not based on any abstract principle of policy, but on a sentimental idea which, while it is in the abstract laudable, should not be permitted to hinder the accomplishment of a great public work. Mr. Justice Dean, in speaking of the exceptions of the Act of 1849, says, "It may be doubted whether if the exigencies and necessities of the future had been foreseen as they are now known, the Legislature would, fifty years ago, have imposed even such a restriction. A restriction of this kind does hamper, and does in many cases obstruct great public improvements." Particularly in the case of dwelling-houses has it been usual to "hold up" the company. To project a line in such a way that it will dodge all the homes, is not possible, and experience has shown that the Act of 1849 has caused occupants of dwellings which railroads require, to assume an attitude of devoted attachment to their homesteads very suggestive of that religious scruple of the Boers which, according to Max O'Rell, leads them to refuse to hire out their halls for dancing, except at double the ordinary rental. The unwisdom of the Act of 1849 in regard to dwelling-houses has been demonstrated so clearly that their exemption from condemnation has not been allowed in the Underground and Elevated Passenger Railway Act of 7 June, 1901, P. L., 523, Sec. 8, although the exemption of cemeteries and places of worship is repeated. We shall see later how even these favored spots have been

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35 Act of 1849.
36 Act of 4 April, 1868, P. L. 62, Sec. 12.
sacrificed not, in the writer's opinion, by the Legislature, but by the Supreme Court, to economic demands.\textsuperscript{38}

The question of the wisdom of requiring municipal consent for the occupation of streets, is a very debatable one, and as the legislation in Pennsylvania adequately carries out the present policy of this State on that subject, it is perhaps not within the scope of this article to criticise it. And yet the writer can not refrain from saying that in his opinion the policy is wrong. A railroad corporation of course is a creation of the State; so is a municipal corporation; and why one creature of the State should be thus entirely at the mercy of another, is not perceived. The same theory which subordinates to the carrying out of a great public improvement, the private property of one man or of a collection of men in any other part of the State, should subordinate thereto the common property of men in an incorporated city.

Let us see what the situation in Pennsylvania is. Section 12 of the Act of April 4, 1868, P. L. 62, provides that the act shall not be construed "to authorize any corporation, formed under this Act, to enter upon and occupy any street, lane or alley in any incorporated city in this Commonwealth without the consent of such city having been first obtained." The wording of the Act is not very broad, and it seems very reasonable to suppose that the mere crossing of a street would not be within the prohibition of the Act. But that has been decided to the contrary.\textsuperscript{39} It would have been even more reasonable to suppose that the Act did not prevent companies from running their roads over or under streets, for it is well settled that the land under a street and the space above it is not affected at all by the opening of a street, but is just as much private and just as little public property, as the land under or space over a cornfield in the farming-districts of an unsettled county. Why it should be any

\textsuperscript{38} It is curious to notice that in the Act of 10 July, 1901, P. L. 632, authorizing certain schools to condemn land for the extension of their grounds, there is no restriction at all on the kind of property which may be condemned; even cemeteries and churches are not exempted.

more sacred is inconceivable, and yet the Court has decided that even to cross a street above grade requires municipal consent. In other words, since there is no municipality without streets, our legislation puts it absolutely within the power of a city to interrupt a work for the good of the whole State. In the case of street passenger railways it is proper that the municipality should have the right to admit or exclude them, for inasmuch as the benefit to be derived is local only, the local authorities should be entitled to decide whether the disadvantages exceed the benefit. But since a railroad confers a benefit on the entire State, no municipality should have the right to block it simply because of local inconveniences. These are the words of Chief Justice Gibson in the earliest important case wherein the right of a railroad company to occupy city streets, was considered: "Were it not for the universality of the public sovereignty, the public lines of communication, by railroads and canals, might be cut by the authority of every petty borough through which they pass; a doctrine to which Pennsylvania can not submit, and which it would be dangerous to urge."—but which, substituting the word "incorporated city" for "borough" it now has adopted. And yet even the writer realizes that some restriction should be placed on the occupancy of public streets by railroads. In his opinion, however, that restriction should be imposed before incorporation rather than after. If a body of men desires to form a company which shall have the right to occupy the streets of a city, its application for a charter should indicate that, and before its charter is granted, a competent commission should decide whether or not this right of occupation should be given, and on what terms. Thus the proposed incorporators will know from the beginning whether they will be able to build their road as they plan, and will not have to go to the expense of incorporating, surveying their

41 P. & Trenton R. R. Co.'s Case, 6 Whart. 25, 1840.
route and making all plans, in doubt as to what will happen when they reach the doors of a municipality.

We are not concerned with the procedure in cases of the taking of property under the right of eminent domain, that being a question of practice rather than of substantive law. We may remark, however, that the provisions of the Act of 1849 on this subject are as loose and as incomplete as they are on the subject of location. No appeal was given from the report of the viewers when confirmed by the Court of Common Pleas, so that a jury trial was not permitted to either party. This was remedied, however, by the Act of 9 April, 1856, P. L. 288. The proviso to Section 10 of the Act of 1849 required the company to make ample compensation, or tender adequate security for land or materials to be taken, before their taking, but Section 11, although presumably intended to specify the procedure, does not require the payment of compensation or the tender of security before entry.

There is one matter in this regard to which attention must be called, and that is, the elements to be considered by the viewers in estimating the damages to be awarded to the owners of land taken by a railroad company. These are particularized in Section 11 of the Act of 1849, and subsequent legislation has not added a word to that section or taken one away; indeed the Act of 4 May, 1905, P. L. 380, providing a system by which railroad companies may change the location of bridges, repeats verbatim the following provision of Section 11: "The said viewers... shall estimate and determine the quantity, quality and value of said lands so taken and occupied, or so to be taken or occupied, or the materials so used or taken away, as the case may be, and having a due regard to and making just allowance for the advantages which may have resulted, or which may seem likely to result, to the owner or owners of said land or materials, in consequence of the opening of said railroad, and of the construction of works connected therewith; and, after having made a fair and just comparison of said advantages and disadvantages, they shall estimate and determine whether any, and if any,
what amount of damages has been or may be sustained and to whom payable, and make a report thereof to the said court." Exactly what facts are the viewers to consider? Just two, it is submitted,—first "the quantity, quality and value of said lands so taken and occupied," and second, the advantages likely to result to the owners thereof in consequence of the opening of the road and the construction of its works. Our contention is that the provision is plainly violative of Article XVI, Section 8 of the Constitution of 1874, which requires corporations exercising the right of eminent domain to pay for property taken, injured or destroyed. The Act of 1849 provides only for compensation for property taken, because the Constitution of 1838 then in force (Art. VIII, Sec. 4) did not require payment except for property taken. When the Constitution of 1874 was passed to correct the injustice resulting from the old Constitution, the Act of 1849 should have been changed to conform to the new requirements, but it never was, and in condemnation cases it is usual to allow damages measured not merely by the value of the property taken but also by the amount injured or destroyed, and to assume that this is according to the Act of 1849.

A very important practical question which arises is, when must the building of the road be begun and when must it be finished? Upon this question, the legislation is extremely unsatisfactory, Section 5 of the Act of 1868 providing as follows: "The said company shall commence the proposed road, if not more than fifty miles in length, with at least one track, within two years from their organization as aforesaid, and prosecute the work on the same with due diligence, and open and complete the same within five years, and shall have an additional six months [changed to one year by the Act of 8 June, 1874, P. L. 277] to complete their road for each twenty-five miles more than the fifty miles aforesaid: Provided, the road shall be opened for use in all cases when fifty miles in length of track are laid." Let us divide this Act into provisions as to beginning the road, and provisions as to
completing it. The company is to commence the road, if not over fifty miles long, with at least one track, within two years from its organization. In the first place, this clause apparently does not provide when roads over fifty miles long must be commenced, and as to the beginning of such roads there is therefore no provision. In the second place, the words "commence the proposed road . . . with at least one track" have not, it seems to us, any intelligible meaning. If they mean that the proposed road must be commenced by the construction of one track, the important question left open is, how much track must be constructed? Surely the Act can not have meant that the whole fifty miles of road must be tracked in two years, and the road completed in five, for it is well known that the laying of the track is about the last step in the construction of a road, and if the track were laid in two years, the road easily could be completed in one year more. There are not any decisions throwing light on the meaning of this clause, and all that can be said safely is, that fifty miles of road must be completed within five years after the company is organized. Even to this provision there is the objection that it does not except time during which the company, through no fault of its own, is prevented from going ahead with its work. Suppose, for instance, that its right to take property is resisted on the ground that it is not a railroad within the meaning of the Act of 1868, as in the Sparks case, and an injunction is asked to prevent the condemnation of a right of way, the litigation consequent on such a case might take several years, and the end of the time given the company to build might expire, before it would have been legally possible for the company to commence building. Or again, part of its route might be in an incorporated city, and the negotiations to secure municipal consent to the entrance therein might consume years, as, for instance, the negotiations of the Pennsylvania Railroad Company to build under certain parts of New York City have. The legislation as to the time of beginning and completing work

should be reduced to practical form, and should include provisions whereby delays not the fault of the company should be excepted in computing the time allowed.\footnote{The Street Railway Act of 14 May, 1889, P. L. 211, Section 16, requires construction to be begun within one year "after the consent of the proper local authorities * * * shall have been obtained, and shall be completed within two years thereafter."}

We now have considered at length, yet not exhaustively by any means, the legislation under which the road is built, from the raising of money to actual construction. There remain only the Acts dealing with the development of the railroad.

(To be concluded in the October number.)