The Court in the present case vigorously assails all such reasoning. It is shown that the only additional direct authority relied on in the *Pyle* and similar cases is *Menar v. Sanders* (1916), 169 Ky. 285, 183 S. W. 949. But that case is supported in its opinion only by the cases cited in 37 L. R. A. (N. S.) 1097, which deal with the debt limitation, all supporting the proposition set forth in the *Conner* case, which is included.

The Court in the principal case goes on to point out, in relation to R. S. Mo. (1929), sec. 1233, that there is no mention of tort judgment creditors, all judgments standing on the same footing. In support of its contention, the Court refers to the general legal principle that a cause of action is merged in the judgment. But assuming a contrary Legislative intent, it would have violated the constitution, for Art. 10, sec. 11 cannot be abridged by any state agency. It stands as a guaranty to the property owner that his tax bill will not exceed a certain limit. A reading of the section inevitably leads to the same conclusion, and it is well that the Court has finally repudiated its contrary position.

W. H. M. '36.

RAILROADS—ABOLITION AND SEPARATION OF GRADE CROSSINGS—APPORTIONMENT OF COST.—Under a Tennessee statute the Commissioner of Highways ordered a railroad to construct a viaduct over a proposed state highway and to pay half the cost. The railroad appealed the order as unreasonable and arbitrary. The trial court set aside the order, but the state supreme court reinstated it, refusing to consider the special facts which the railroad had offered and upon which the trial court had found the order unreasonable. *Held:* that the Tennessee Supreme Court erred in refusing to consider the facts offered by the railroad in passing on the reasonableness of the Commissioner's order. *Nashville, Chattanooga, & St. Louis R. Co. v. Walters.* (1935) 55 S. Ct. 486.

The power of the state to compel the elimination of grade crossings at the expense of the railroads in the interest of public safety is well settled. The early statutes placed the whole expense of separating grades on the railroads, and these were upheld in *New York & N. E. R. Co. v. City of Bristol,* (1889) 151 U. S. 556. Present legislation in thirty states divides the cost equally between railroad and public. A few states authorize the Commission to apportion costs equitably. R. S. Mo. (1929) Sec. 5171. Cahill's Rev. Stat. Ill. (1931), Chap. 111a, p. 77, sec. 58. Following the Bristol decision, these statutes have been invariably upheld. *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914) 232 U. S. 430; *Erie R. Co. v. Board of Pub. U. Comm.* (1921) 254 U. S. 430; *Lehigh Valley R. v. Bd. of P. U. Comm.* (1928) 278 U. S. 24, 62 A. L. R. 805; *State ex rel. Wabash Ry. Co. v. Pub. Serv. Comm.* (1924) 306 Mo. 149, 267 S. W. 103; *City of Chicago v. Ill. Commerce Comm.* (1934) 356 Ill 501, 190 N. E. 896.

Orders of state commissions imposing such obligations on railroads are reviewable by the courts to determine whether they are arbitrary or unreasonable under the particular circumstances and whether the commission's findings have foundation in the evidence. *Chicago & N. W. Ry. v. Ill.*

Commerce Com. (1927) 326 Ill. 625, 158 N. E. 376, 55 A. L. R. 654. There must be substantial danger to public safety in the grade crossing considering location, surrounding conditions, traffic, number of trains, incidence of accidents. *Sidney v. Wabash Ry. Co.* (1928) 333 Ill. 126, 164 N. E. 201; *Sarpy v. Omaha & S. I. R. Co.* (1928) 116 Neb. 516, 218 N. W. 403. The cost imposed on the railroad must be reasonable. *Lehigh Valley R. Co. v. Bd. of P. U. Comm., supra.* Courts have not indicated what the appropriate considerations on this question are; in fact, no case has been found where, if the public-safety interest was adequate, an order was set aside simply for unreasonableness.

The railroad in the present case, to sustain its burden of proving the order unreasonable, offered the following facts which the trial court found to be true: 1) The state highway development is not an exercise of police power but a program of internal improvement; 2) The highway system is national and financially aided by the federal government; 3) The railroad has ceased to be the major cause of grade crossing hazard, the main purpose of separating grades being to further rapid and uninterrupted motor movement; 4) Highways no longer complement the railroads but rather accommodate motor competition, which partly accounts for a decrease in annual rail revenue in the last decade; 5) The particular crossing has light traffic, adequate safeguards, no accident record; 6) While the railroad would bear half the cost under the order, the chief beneficiaries, the motorists, make only an indirect contribution. The Tennessee Supreme Court's treatment of these considerations was in line with contemporary state authority. *Nashville, C. & St. L. R. Co. v. Baker* (1934) 167 Tenn. 470, 71 S. W. (2d.) 678. Compare: *Chicago, R. I. & St. P. Ry. Co. v. Pub. Serv. Comm.* (1926) 315 Mo. 1108, 287 S. W. 617; *State ex rel. Alton R. Co. v. Pub. Serv. Comm.* (1933) 334 Mo. 832, 68 S. W. (2d.) 691. *Chicago, N. S. & Mil. R. Co. v. Commerce Comm.* (1934) 354 Ill. 58, 188 N. E. 177; *New Orleans & N. E. R. Co. v. Miss. Highway Comm.* (1932) 164 Miss. 343, 144 So. 558. *Durham v. Southern Ry. Co.* (1923) 185 N. C. 240, 117 S. E. 17, 35 A. L. R. 1313.

The instant case indicates a new disposition in the Supreme Court, for like the state courts, it has hitherto been unsympathetic with pleas of railroads against grade separation orders. The financial argument has frequently been urged by the railroads and has never prevailed. In *Erie R. Co. v. Bod. of P. U. Comm., supra,* the Court said that even prospective insolvency did not affect the state's fundamental power in the premises. See *New O. & N. E. R. Co. v. Miss. High. Comm.,* supra; *State ex rel. Alton R. v. Pub. Serv. Comm., supra; State ex rel. Alton R. v. Pub. Serv. Comm.* (1934) 334 Mo. 985, 992, 995, 1001, 70 S. W. (2d.) 52, 55, 57, 61. Nor has the benefit argument appealed to the courts, though they have not always been sure of their rationale. The Missouri cases are particularly uncertain on this point. *Chicago, R. I & St. P. Ry. v. Pub. Serv. Comm., supra; State ex rel. Kan. City So. Ry Co. v. Pub. Serv. Comm.* (1930) 325 Mo. 862, 30 S. W. (2d.) 112; The Alton R. Case (Mo. 1933) 68 S. W. (2d.) 691. They have concluded that "the true basis of apportioning the cost (is) the extent to which the presence of the railroad enhances the cost of the improvement." The Alton R. Case (Mo. 1934) 70 S. W. (2d.) 57. This

reasoning has been practically invincible against the railroads' attempts to upset it. Sole encouragement for the benefit argument has been found in obvious cases where the sole beneficiary was a private landowner (*Chicago, M. & St. P. Ry. v. Holmberg* (1930) 282 U. S. 162) and in dissents (*Chicago, B. & Q. Ry. v. Grimwood* (1906) 200 U. S. 561). The effect of federal legislation on the question has often been raised by the railroads. The Transportation Act of 1920 has been held to have no application. *Lehigh Valley R. C. v. Bd. P. U. Comm., supra; Chicago & N. W. Ry. v. Ill. Comm. Comm., supra; Golf, C & S. R. Co. v. La. Pub. Serv. Comm.* (1922) 151 La. 635, 92 So. 143. Federal aid to state highways had been held previously to have no relevance to allocation of costs by these orders. *Chicago, R. I. & St. P. Ry. v. Pub. Serv. Comm., supra.*

The Nashville Railroad in the present case synthesized these specific contentions into a general plea of "changed conditions." The reaction of the Supreme Court evinces a sound appreciation of modern railway economics. The case suggests the last step in the progression from absolute, to equally divided, to equitably distributed liability on the part of the railroads, for the cost of abolishing and separating grade crossings in the interest of public safety.

C. M. W. '36.

TAXATION—GOVERNMENT CORPORATIONS—THE RECONSTRUCTION FINANCE CORPORATION.—The Reconstruction Finance Corporation, as the holder of shares of preferred stock of Kentucky state banks and national banks located in Kentucky was *held* not subject to the annual tax imposed upon shares of stock of state banks and of national banks doing business in the state. *United States and Reconstruction Finance Corporation v. Lewis et al.* (D. C., W. D. Ky. April 8, 1935); U. S. Law Weekly, April 16, 1935, p. 8.

The Law Weekly digest of the case indicates the basis of the court's decision to be that the property of the Corporation is in reality the property of the Federal Government and hence governed by the rule that the property of the United States Government is not subject to State taxation, (it being admitted that the tax is one against the owner of the shares of stock and not against the bank itself. *Bank Tax Cases* (1866) 3 Wall. 573).

It has been long established that an instrumentality of the Federal Government is not subject to taxation by a state. *McCullock v. Maryland* (1819) 4 Wheat. 316. Generally, however, this exemption extends only in so far as such taxation may impair the efficiency of such federal agencies in performing their governmental functions. Accordingly state non-discriminatory taxes on the property of these agencies, as distinguished from a tax on their privileges, has been upheld. *Thomson v. Union Pacific R. R.* (1869) 9 Wall. 579, *Railroad v. Peniston* (1873) 18 Wall 5. But when the property of the federal agency is entirely owned by the Federal Government state taxation is not possible. *Van Brocklin v. Anderson* (1885) 117 U. S. 151. Likewise property owned by a corporation is equally exempt when all the stock in the corporation is owned by the United States. *King County v.*