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THE APPORTIONMENT OF COST OF RAILROAD HIGHWAY CROSSING IMPROVEMENTS IN ILLINOIS

History and Development of the Law in Illinois Prior to the Passage of the Public Utilities Act in 1913

HAMILTON TREADWAY

The treatment of the subject of apportionment of the cost of constructing, protecting or eliminating railroad crossings at grade with other public highways, as it has developed in Illinois, naturally divides itself into two categories: first, that dealing with the history and development of the law during the period prior to the passage of the Public Utilities Act in 1913, and, second, that dealing with the subject under the provisions of the Public Utilities Act. The division is appropriate for two obvious reasons: first, because the regulation of railroad-highway grade crossings was shifted in 1913, by the legislature in the enactment of the Public Utilities Act, from the cities and local highway authorities to the Public Utilities Commission (predecessor of the Illinois Commerce Commission), and, second, because roughly speaking, the great changes in the character and nature of highway traffic that have taken place since 1913. The present article will deal with the first of these categories, namely, the history and development of the law prior to the passage of the Public Utilities Act in 1913.

The law of apportionment of cost of the construction and protection of grade crossings in Illinois has developed over a period of approximately eighty years. A broad outline of the changes in the character of both highway and railroad transportation during this period is essential to a discussion of the evolution of the law. This article will attempt to cover both of these fields.

Both the railroad and the public streets and ways are public highways.1 In order that confusion may not arise

1Chicago & Northwestern R. Co. v. City of Chicago 140 Ill. 309, 29 N.E. 1109 (1892); Galena and Chicago Union R. Co. v. Dill, 22 Ill. 264 (1859).
over the use of the expression "public highway" in this discussion where that term appears hereinafter it will be used in the restricted sense of a public street, road, or way. The term will not be used to include railroads. The railroads will always be referred to as such. Hence, the use of the term "grade crossing" herein will always refer to the crossing of a railroad by a public street, road, etc., and will not include the crossing of one railroad by another.  

When the railroads began operating trains in the United States in 1829, the practice of crossing highways at grade was inaugurated. There was no particular objection to such a plan as the number of such crossings was comparatively few and the travel, both on the railroads and the highways, was not extensive. Consequently in the early days of the railroads the question of protecting railroad crossings was apparently given very little consideration. Obviously protecting crossings eighty or ninety years ago was not the important problem that it is today. Nor were the needs and the reasons for requiring protection the same. In that day the train movements were slow in comparison with those of today; the locomotives and cars weighed only a fraction of what modern equipment does; the trains were short; and, the railroad grades were heavy and augmented by many curves. On the other hand, the public highways were few and the number of crossings with railroads was not large. Too, in that early day the character of the highway traffic was far different. When railroad building became extensive in the middle west, during the decade prior to the Civil War, the highway user often traveled on foot or by horse. Ox carts and slow moving wagons were the first vehicles. The roads during much of the year were impassable. The horse-drawn  

2 However, the fact that the railroads are public highways must be kept in mind throughout the entire discussion of the grade crossing problem. This concept is an important one and where the broad meaning of the term is intended and such is necessary to an understanding of the discussion that use will be so indicated.  

3 Railroad locomotives have increased in weight from between 10 and 25 tons to between 80 and 300 tons. Freight cars have correspondingly increased in weight from cars of 10 to 15 tons capacity to cars of 40 to 100 tons capacity. In the early day of the railroad, trains of 10 cars were the exception. Today 100 car trains are common. From average speeds under 25 miles per hour a half a century ago, safety devices and improved roadbeds, as well as improved rolling stock, have made possible increased average speed to well above 50 miles per hour.
RAILROAD HIGHWAY CROSSING IMPROVEMENTS

vehicle was not yet common. With conditions on the early railroads and highways as they were, the ordinary crossing sign with the well-known legend, "Look Out For The Cars," protected the crossing fully as well as the various modern devices accomplish the same purpose under the changed conditions of traffic on both the railroads and highways of today.

Prior to 1850 most of the prairie land of Illinois remained unturned sod. The construction of railroads with public aid, during the decade preceding the Civil War, was followed by a great wave of migration to these virgin farm lands. Many hundreds of local roads were constructed to supplement the transportation system of the railroads. With the construction of each mile of new highway and new railroad the number of grade crossings increased rapidly.

The close of the Civil War was followed by a period of farm prosperity, a rapid expansion of industry, and another wave of migration and immigration, accompanied, as before, by an enormous growth in the transportation facilities in the state. With the rapid expansion in both the number of miles of railroad and of highway the number of grade crossings increased proportionately. The growing importance of the city of Chicago as a center of trade with its consequent enormous increase in size further contributed to the number of such crossings. The substantial growth of many other municipalities in the state during the last quar-

4 The use of the horse-drawn vehicles increased rapidly after 1870. From that time until the advent of modern roads after 1913 when the automobile supplanted the horse and buggy we have a period of nearly half a century during which only slight changes took place in the character of highway traffic.


6 During this period, competition between the railroad companies and the builders of planked highways was keen. By the middle of 1851 some 600 miles of plank roads had been constructed. Arthur Charles Cole, op. cit. (n. 5), p. 28.

7 The number of miles of railroad increased from 2790 miles in 1860 to 10,213 miles in 1890. More than a third of this increase was completed in the short period following the Civil War and ending with 1871. E. L. Bogart and C. M. Thompson, op. cit., (n. 5) p. 501.
ter of the nineteenth century must not be overlooked. While the character of the highway traffic during this period remained essentially the same, the speed and frequency of the train movements changed considerably. Straightening of curves, improvement of grades, and faster and heavier equipment increased the speed. Public demand for transportation increased the length of trains as well as the frequency of movements. The net effect of these changes was an ever increasing exposure of the public to the hazards existing at unprotected grade crossings. The consequent death rate from grade crossing collisions was appalling. The public attention

8 The population of the city of Chicago increased from 298,977 in 1870 to 1,698,575 by 1900, an increase of 1,379,598. The urban population of the remainder of the state, during the same period, showed an increase of 640,746. At the same time, there was an increase in the rural population of 261,333. Data taken from the U. S. Census. There is very little information available on the number of grade crossings in Illinois during the period prior to 1891. In the latter year the Railroad and Warehouse Commission of Illinois printed for the first time statistics in its annual report showing the number of grade crossings in the state at that time. Data from the annual reports of the Railroad & Warehouse Commission are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Highway Grade Crossings</th>
<th>Grade Separations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1891</td>
<td>11,089</td>
<td>321</td>
</tr>
<tr>
<td>1896</td>
<td>11,401</td>
<td>340</td>
</tr>
<tr>
<td>1901</td>
<td>14,053</td>
<td>923</td>
</tr>
<tr>
<td>1906</td>
<td>15,270</td>
<td>No Data</td>
</tr>
<tr>
<td>1911</td>
<td>16,101</td>
<td>1,486</td>
</tr>
</tbody>
</table>

The accuracy of much of this data may well be doubted. Extra-polation however indicates there was an increase of approximately 8000 grade crossings in Illinois during the period from 1860 to 1890.

9 Data on the number of grade crossing accidents in Illinois appeared for the first time in the 1890 Annual Report of the Railroad & Warehouse Commission. That Commission's data reveals:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. Killed</th>
<th>No. Injured</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890</td>
<td>53</td>
<td>70</td>
</tr>
<tr>
<td>1891</td>
<td>95</td>
<td>93</td>
</tr>
<tr>
<td>1892</td>
<td>97</td>
<td>130</td>
</tr>
<tr>
<td>1893</td>
<td>94</td>
<td>147</td>
</tr>
<tr>
<td>1894</td>
<td>80</td>
<td>113</td>
</tr>
<tr>
<td>1895</td>
<td>86</td>
<td>102</td>
</tr>
<tr>
<td>1896</td>
<td>78</td>
<td>103</td>
</tr>
<tr>
<td>1897</td>
<td>85</td>
<td>83</td>
</tr>
<tr>
<td>1898</td>
<td>99</td>
<td>114</td>
</tr>
<tr>
<td>1899</td>
<td>92</td>
<td>107</td>
</tr>
<tr>
<td>1900</td>
<td>105</td>
<td>135</td>
</tr>
<tr>
<td>1901</td>
<td>102</td>
<td>87</td>
</tr>
<tr>
<td>1902</td>
<td>112</td>
<td>189</td>
</tr>
<tr>
<td>1903</td>
<td>112</td>
<td>144</td>
</tr>
<tr>
<td>1904</td>
<td>114</td>
<td>141</td>
</tr>
<tr>
<td>1905</td>
<td>123</td>
<td>130</td>
</tr>
</tbody>
</table>

Like the data on the number of grade crossings, the accuracy of these statistics may well be questioned. This is particularly true for the years prior to
thus became focused on the hazardous nature of the grade crossing. Public demand forced many of the cities of the state to undertake broad programs of protecting or eliminating such crossings.\(^\text{10}\) The cities, through self-interest, sought to place the burden of the costs of these necessary improvements on the railroad. The pursuance of this policy led to considerable litigation in the courts and was also accompanied by several acts of the legislature. A study of the law as it developed in Illinois after 1870 will reveal the effect of these factors.

It came to be regarded as the duty of the government to provide and preserve safe and convenient public highways. From this duty results the right of public control over public highways.\(^{11}\) Public crossings necessarily require the adjustment of two conflicting interests — that of the public using the highways, and that of the railroads and the public using them.\(^{12}\)

At the common law the railroads owed a duty to the public using the highways to exercise a reasonable degree of care for the safety of the public using the highways, 1900. No doubt many accidents occurred at grade crossings which were never reported to the Commission. However, these data demonstrate a problem of sufficient magnitude, having in mind the nature and extent of highway traffic, to require public attention.

\(^{10}\) An example of the activities of the cities may be found in the experience of the railroads in the city of Chicago. The city of Chicago entered its first track elevation ordinance, May 23, 1892, against the Illinois Central Railroad. (E. A. Pratt, American Railways, Macmillan and Co., 1903.) At that time there were 371 grade crossings in the city. By 1899 only two of these remained. The railroads had elevated some 53.65 miles of line, including approaches. This involved the construction of 278 subways or viaducts, according to the exigencies of the particular situation. On its part the city vacated the remaining 91 crossings. (Annual Report of the R. R. & W. Comm., 1899, pages xlii-xlvi.) In his book Pratt shows somewhat different figures. During the ten-year period from 1892 to 1902 he shows that ordinances were passed by the city of Chicago, requiring the elevation of some 811.45 miles of track and the construction of 513 subways, and involving the expenditure of some $33,500,000. By 1902 Pratt says that 251 of the subways had been completed by the elevation of 405.52 miles of track and involving the expenditure of $22,080,000. The extreme difference in the miles of track, as shown by Pratt and the Railroad & Warehouse Comm., is partially explained by the fact that the Commission's figure relates to the number of miles of line and includes therein one track or ten tracks, as the case may be. Pratt refers to miles of single track.

\(^{11}\) See footnote 1 supra. Here the term public highway is used in its broad sense.

\(^{12}\) Erie R. Co. v. Board of Public Utility Com’rs., 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); The Commerce Commission v. The Cleveland, Cincinnati, Chicago and St. Louis R. Co., 309 Ill. 165, 140 N.E. 868 (1923); Galena and Chicago Union R. Co. v. Dill, 22 Ill. 264 (1859).
consistent with the needs of the public and the circumstances of the particular situation. Likewise it was the duty of the public using the highways to exercise due care and diligence when approaching and crossing a railroad at grade. Legislative enactments requiring installation of protective devices have not altered these duties, and irrespective of whether warning signals or other protections have been prescribed by the legislature the railroad still owes a duty to protect the public according to the exigencies of the particular situation.\(^\text{13}\)

But at common law the crossing of a new way with one already in use must be made with the least possible injury to the old way, and whatever structures are necessary must be erected and maintained at the expense of the party making the new way, and if the old way cannot be crossed without damage the damage must be ascertained and paid.\(^\text{14}\)

Thus the common law required the railroad to provide and maintain an adequate crossing at any point where it cut through an existing highway. In an early Illinois case\(^\text{15}\) the city of Bloomington had constructed a viaduct or bridge across the railroad tracks, eliminating a dangerous grade crossing. The viaduct had fallen into a state of disrepair and the city sought to compel the railroad to reconstruct and thereafter maintain the structure. The company argued that the viaduct was a new crossing and that the duty of the company to provide a safe and adequate crossing extended only

\(^{13}\) Wagner v. Toledo, Peoria, & Western R. Co., 352 Ill. 85, 185 N.E. 236 (1933). In this case the company contended it was not required to maintain warning signs at crossings except where required by the Commission and that the record failed to show any order requiring warning signs at this crossing. The court said at page 90: “But regardless of the situation produced by the failure to prove an order of the commission, there is a common-law duty devolving upon railroads to exercise such care and use such precautions as will enable the traveler on the highway, if he exercises ordinary care, to ascertain in the nighttime the approach of a train over a street crossing such as the testimony shows this one to have been. Special conditions creating special hazards at crossings require a watchman, gates, or other warning to travelers.” Opp v. Pryor, 294 Ill. 538, 541, 128 N.E. 580 (1920); Chicago & Alton R. Co. v. Dillon, 123 Ill. 570, 15 N.E. 181 (1888); Licha v. Northern Pacific R. Co., 201 Minn. 427, 276 N.W. 813 (1937). For a discussion of the respective duties of the railroad and the public see also Toledo, Wabash & Western R. Co. v. City of Jacksonville, 67 Ill. 37 (1873); Galena and Chicago Union R. Co. v. Dill, 22 Ill. 264 (1859); note, 71 U. of Pa. L. Rev. 153 (1923).


\(^{15}\) The People ex rel. v. Chicago & Alton R. Co., 67 Ill. 118 (1873). This case will be referred to as the first Bloomington case.
to the original grade crossing. The following discussion at page 119 of the opinion of the court is pertinent:

It is a well settled principle of the common law, resting upon the most obvious considerations of justice, that any person or corporation that cuts through a highway for the benefit of such person or corporation, must furnish to the public a proper crossing, even though acting under a license from the proper authorities. We refer, of course, to cases where the legislative power has not, in terms, relieved the person or company that interferes with a highway, from the necessity of removing any obstructions they may create. In the absence of such an express provision, it is palpable that a railway company is under obligation to leave every highway that it crosses in a safe condition for the use of the public.\[^{16}\]

In an earlier Illinois\[^{17}\] case the court held that where the railroad had cut through a highway and the peril of the crossing could have been avoided by the railway going under the highway, if the highway could be restored in a manner not to impair its usefulness only in that way, it was the duty of the railroad to carry the highway over the railway by means of a viaduct. In this case the railroad ran through a deep cut between two hills. The highway came down to the tracks on either side through cuts in the hill. The railroad ran down grade toward the west in the vicinity of the crossing. These physical surroundings obstructed the view of approaching trains and permitted trains to glide noiselessly down the grade from the east without warning to the highway user. The court held that a failure of the railroad to construct an overhead bridge in this situation was a breach of its duty to restore the highway in such manner as to furnish a proper crossing.

The court never extended the common law rule beyond the limitations imposed by these two early cases. By 1876 it was searching for other reasons for limiting the duty of the railroads. In *Illinois Central Railroad Company v. The City of Bloomington*\[^{18}\] the city sought to compel the railroad to

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\[^{16}\] Ibid. With reference to the contention of the railroad that the viaduct was a new crossing and thus fell within the common-law rule, the court held that the viaduct was but the substitution of one type of crossing for another. Since this had been done with the full concurrence of the railroad, the new crossing, so far as concerned its liability, stood in the place of the old.

\[^{17}\] Chicago, Burlington & Quincy R. Co. v. Payne, Adm’r, 59 Ill. 534 (1871), This case will be referred to as the Payne case.

\[^{18}\] 76 Ill. 447 (1875). This case will be referred to as the second Bloomington case.
pay for the construction of a new grade crossing formed by
the extension of a new street over the railroad’s right-of-way. The court held that such burden could not be imposed on the railroad. This conclusion of the court was based on the theory that the corporation was an artificial person and could be subjected to no greater burden than could be imposed on a natural person. The court drew the following analogy:

Suppose a natural person had the right of way across his neighbor’s grounds, and afterwards the city were to locate and open a street across his right of way, does any one suppose the owner of the right of way could be compelled, by legislative enactment, or an ordinance in pursuance thereto, to construct the crossing of the street at his own expense, even if his use of the right of way would render the use of the street impracticable or dangerous until the approaches should be constructed? We presume no one would contend for the power in that case. And why? Because it would impose an unequal and unjust burden on the owner of the right of way that, in spirit, would be the taking of private property for public use without just compensation, which must be paid under the constitution.

Thus we see that the court was not only unwilling to extend the common law doctrine beyond those crossings which were formed by the intersection of the railroad with highways existing at the time of the laying out and construction of the railroad but that it sought to find a constitutional reason to justify its position. The court recognized that the legislature could, by general law, require all railroads constructed subsequent to such enactment to construct and maintain crossings at all highways thereafter laid out and opened across its line. But the court in the second Bloomington case did not conceive that the legislative power extended to

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19 The charter of the city of Bloomington gave the city the power to require railroad companies to construct and maintain grade crossings of streets within the city limits. Pursuant to this power the city enacted an ordinance requiring the construction of the crossing in question.


21 Ibid., at page 449 it was said: “And it is equally true that, if their charters were to contain a provision that they should so construct crossings over roads and streets subsequently located and opened, such a provision would be binding. And if the General Assembly were to provide, by general law, that railroad companies should make and keep up such structures at crossings when the road is built, as well as those that might be thereafter laid out and opened, all railroads subsequently constructed would be compelled to conform to the requirement unless exempted by their charters.”
an imposition of this burden on those railroads constructed prior to the exercise of the legislative will.

The illustration used by the court as an analogy is inept and fails to recognize the principle that the railroads as well as the public roads and streets are public highways, while a private right of way across private lands is but a private way. This illustration also fails to recognize the reciprocal relation existing at public crossings between the public using the highway and the railroads and the public using them. The railroad has the same but no better right to cross a public highway with their trains, at the point of intersection with their road, than the highway user has to cross their tracks at the same place. These rights are mutual and coextensive. This illustration further fails to recognize that where the use of the railroad renders the use of the crossing by the general public inherently dangerous the former must yield to regulation in the interest of the latter. Yet four years earlier the court said:

The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent amongst the rights reserved, and which must inhere in the state, is the power to regulate the approaches to and the crossings of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community.

A year later the court said:

There can be no question that railway corporations are subject to police regulations as well as private citizens. The general assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. This power is inherent in the State, and it can not part irrevocably with its control over that which is for the health, safety and welfare of society.

In the same opinion it was urged that it was the railroad's work which rendered the public crossings dangerous, and hence it was they who might "be compelled to

22 This principle was recognized and discussed in the early case of Galena and Chicago Union R. Co. v. Dill, 22 Ill. 264 (1859).
23 Ibid.
24 Toledo, Peoria and Warsaw R. Co. v. Deacon, 63 Ill. 91, 93 (1872).
25 Toledo, Wabash & Western R. Co. v. City of Jacksonville, 67 Ill. 37, 40 (1873).
bear the expenses of such measures as may be adopted to secure the lives and property of those who have an equal right with them to the use of the crossing on the highway."

It is difficult to reconcile these cases with the views expressed by the court in the second Bloomington case. Perhaps the groping of the court during this early period can be partially explained by a review of the legislative history of the problem. The present Constitution, adopted in 1870, requires all corporations to be chartered under a general act of incorporation and condemns acts chartering individual corporations, as being special legislation. This was not true of the Constitution of 1848. Because of the nature of the interests involved, most of the early railroads were organized under special charters. A general act for the incorporation of railroads was enacted in 1849 only after some considerable opposition. Among the powers granted to the corporations organized under this act the following are significant:

Section 21. Every such corporation shall possess the general powers, and be subject to the general liabilities and restrictions expressed in the special powers following.

5. To construct their road upon or across any stream of water, water course, road, highway, railroad, or canal, which the route of its road shall intersect; but the corporation shall restore the road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness.

The general railroad incorporation act of 1871 repeated this provision and added that the railroad shall "keep such crossing in repair."

The acts of 1849 and 1871 provided further that "all existing railroad corporations within this State shall respectively have and possess all the powers and privileges, and be subject to the duties and liabilities and provisions contained in this act. . . ." In an early case the court con-

28 Ibid., p. 42.
27 Arthur Charles Cole, op. cit., (n. 5), Ch. II.
28 Laws, 1849, 16th General Assembly, 2nd session, p. 20.
29 Laws, 1871, p. 631.
31 Galena & Chicago Union R. Co. v. Loomis, 13 Ill. 548 (1852).
strued this act as applicable to a railroad created by special
charter as well as those companies organized thereunder.\(^{32}\)

The act of 1849 also provided that “whenever the track
of said railroad shall cross a road or highway, such road or
highway may be carried under or over the track, as may be
found most expedient. . . \(^{33}\)

These acts were in effect at the time of the decisions in
the Bloomington and Payne cases. Although not cited by
the court the rules laid down in these cases are so similar
to the statute that the conclusion cannot escape us but that
this statute influenced these opinions.

In 1869 the legislature passed an act “to protect lives
and property of persons at railway crossings of the public
highways.” Section 1 of this act provided that,

at all the railroad crossings of the public highways of this state outside the corporate limits of the cities and villages, the several railroad companies of this state shall erect, construct and maintain the same, and the approaches thereto within their respective rights of way, so that at all times they shall be safe as to lives of persons and property.\(^{34}\)

It is plain that this act confined the obligation to construct and maintain new crossings to those outside of the limits of cities and villages. Presumably those crossings inside such limits were to be constructed and maintained by the municipal authorities.\(^{35}\) This statute may have had some bearing on the decision in the second Bloomington case.

In 1874 the legislature imposed on the railroads an act in relation to fencing and operating railroads which among other things required that

at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and main-

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\(^{32}\) In the introduction to J. H. Gordon’s paper on “Illinois Railway Legislation and Commission Control Since 1870,” Prof. M. B. Hammond says: “In spite of the fact that a general incorporation act was passed by the Legislature in 1849, the practice of granting special charters continued, and no road was actually incorporated under a general law until after 1870. The reason for neglecting to take advantage of the general incorporation act of 1849 seems to have been that any road organized under its provisions must still obtain from the legislature specific permission to condemn land, thus necessitating a special act for each road.” University of Illinois Studies I, 209, 220.


\(^{34}\) Laws of Illinois, 1869, p. 312.

\(^{35}\) Chicago & North Western R. Co. v. City of Chicago, 140 Ill. 309, 320, 29 N.E. 1109 (1892).
tain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property.\footnote{36} This act was nothing more than an exercise of the police power of the state. Public security, both as to persons and to property, was its object. It was so recognized by the courts.

In Illinois Central Railroad Company v. Willenborg\footnote{37} it was said:

This point is made, however, that these provisions are not obligatory on this corporation, because they were enacted many years since it received its charter from the State. This is a misapprehension of the law. The regulations . . . are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as those to be thereafter constructed.

In Chicago and Northwestern Railway Company v. City of Chicago,\footnote{38} the city sought to open a new street across the railroad's right of way. In the condemnation proceeding the railroad contended this act did not compel the railroad to construct and maintain new crossings and sought damages for the construction of the crossing, and approaches thereto, and for the maintenance of a watchman to operate the necessary gates. It was not contended by the railroad that the city lacked the power to open said crossing\footnote{39} but only that the railroad should not be required to bear the burden of constructing and maintaining the crossing.

With reference to the contention that the act did not require the railroad to construct new crossings it was held that the word "construct" involved the idea of building for the first time. It was said that an existing crossing could be

\footnote{36} Although on the statute books at the time of the decision in the second Bloomington case this act was enacted after the case arose and therefore could not have been considered in the decision of the court. Ill. Rev. Stat., 1939, Ch. 114, § 62.
\footnote{37} 117 Ill. 203, 208, 7 N.E. 698 (1886).
\footnote{38} See Note 35, supra.
\footnote{39} A railroad takes its right of way subject to the right of the public to extend public highways and streets across such right of way. In Chicago & Alton R. Co. v. Joliet, Lockport & Aurora R. Co., 105 Ill. 388, 401 (1883), it was said: "Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude." This right is independent of whether the railroad owns the fee or merely holds an easement. Chicago & Alton R. Co. v. City of Pontiac, 169 Ill. 155, 48 N.E. 485 (1897).
maintained, but that it was an inaccuracy to speak of constructing that which was already constructed. The court said:

There is no reason for supposing, that the legislature intended to refer exclusively to a railroad crossing, created by running a new railroad across an existing street. The language includes also a railroad crossing, created by running a new street across an existing railroad. Thus construed the act was in derogation of the common law rule to which the court had previously adhered.

The end sought to be attained by an exercise of the police power must be reasonable and have some rational relation to the evil sought to be eradicated. If the exercise of the police power is reasonable, neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a regulation thus designed to secure the common welfare. This proposition is well settled and requires no array of authority to establish its soundness. It is equally true that uncompensated obedience to a regulation enacted for the public safety under the police power is not a taking of property without just compensation.

These principles were recognized by the court and it held that the items of expense for which the railroad sought compensation from the city of Chicago were only such as are involved in complying with a police regulation of the statute. The court held: "It is proper, that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road."

In a later case the court affirmed its holding and was affirmed on an appeal taken to the United States Supreme Court. That court said in part:

We concur in these views. The expenses that will be incurred by the

40 See note 35, supra, p. 320.
42 "The frequency with which trains pass and repass at such places renders the dangers to be apprehended constantly imminent, and the legislature may so declare and make it obligatory on the company to adopt measures to secure the public safety. The rights of the company and the public to the use of the crossing are mutual, but it is the duty of the company to provide the proper safeguards, and the degree of diligence must be in proportion to the hazard." Toledo, Wabash & Western R. Co. v. City of Jacksonville, 67 Ill. 37, 41 (1873).
43 Chicago, Burlington & Quincy R. Co. v. City of Chicago, 149 Ill. 457, 37 N.E. 78 (1894).
railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required,—necessarily result from the maintenance of a public highway, under legislative sanction and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police power of the State.  

While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people.  

It is difficult to reconcile this doctrine with that advanced in the earlier cases, particularly the second Bloomington case. The great changes in the nature and volume of the railroad traffic, the increasing importance of the public highways to the prosperity and growth of the state, the consequent increase in grade crossing accidents, followed as they were by a focusing of the public attention on the problems involved, doubtless influenced the court, for there is little difference between the language of the charter of the city of Bloomington under which it attempted to require the railroad to bear the burden of the construction of a crossing of a street newly laid out across its right of way and the language of the act of 1874 under which the city of Chicago was held to have such power. The decisions in other jurisdictions no doubt carried their weight.  

46 The provisions of this charter are summarized in note 19, supra. Sec. 1, par. 26 of Art. V of the Cities and Villages Act of 1872 also provided: "To require railroad companies . . . to construct . . . crossings of streets and public roads, and keep the same in repair. . . ."  
47 Thorpe v. The Rutland & Burlington R. Co., 27 Vt. 140 (1854); People v. Boston & Albany R. Co., 70 N. Y. 569 (1877); Boston & Maine R. Co. v. County of York, 79 Me. 386, 10 A. 113 (1887).  

Much of the confusion found in the early decisions of the courts in this country may be traced to the early decision in the Old Colony and Fall River R. Co. v. County of Plymouth, 14 Gray 155 (Mass., 1859). In this case, without mentioning the common-law rule, the court held the railroad entitled to damages for the expenses of erecting and maintaining signs, as required by law at the crossings, for making and maintaining cattle guards, and for planking and maintaining the roadway over the crossing, but denied items of increased liability from personal injury actions and expenses attendant on the ringing of bells, as required by law. At the time of this case, but not cited by the court, the statutes of that state provided:  

"If, after the laying out and making of a railroad, the public convenience and
The doctrine of uncompensated obedience to the police power thus developed in Illinois was a rule of apportionment of cost. It soon found expression in a majority of the jurisdictions in this country.\textsuperscript{48} It applied with equal force to the construction of subways or viaducts as to the construction of grade crossings. True it is that the Illinois cases cited relate only to the construction and protection of grade crossings. However, it is but a step from requiring a railroad to furnish flagmen, gates, and warning signs and signals, all of which are in the nature of protection, to requiring the railroad to build a subway or viaduct. A viaduct or subway is but a safety device made necessary by the exigencies of the situation.\textsuperscript{49}

The act of 1874 did not limit the word "crossing" to those necessity require a turnpike road or other way to be laid out across it, such road or way may be so laid out and established when the county commissioners so authorize and direct, and all expenses of, and incident to, constructing and maintaining the road or way at such crossing, shall be borne by the county, city, town or corporation owning the same."

The decision in the Old Colony case was not a well reasoned opinion and but for the existence of this statute would be difficult to explain, although the court in the Cambridge case, supra, attempts to do so on the basis of the English common-law rule. A careful consideration of the history of the common-law rule and the nature of the growth of the common law as a system as well as the background of the Old Colony case might have led the judges to a different result. However, it was not until many years later that such an analysis was made by the court in Minnesota. See: State ex rel. v. St. Paul, Minneapolis & Manitoba R. Co., 98 Minn. 380, 108 N.W. 261 (1906).

The Old Colony case was relied on by counsel in the early Illinois cases but the existence of the Massachusetts statute was never pointed out. No doubt the case had some effect on the decisions although not cited by the court.

The reader may find of interest the fact that the theory of deodands, which required forfeiture to the king of the thing causing the death of a person, was abolished by act of Parliament in England in 1846. This was about the time that the railroad was becoming common in that country.

\textsuperscript{48} Lake Erie & Western R. Co. v. Shelley, 163 Ind. 36, 71 N.E. 151 (1904); Illinois Central R. Co. v. Copiah County, 81 Miss. 685, 33 So. 502 (1903); State v. Chicago, Burlington & Quincy R. Co., 29 Neb. 412, 45 N.W. 469 (1889); Chicago, Milwaukee & St. Paul R. Co. v. City of Milwaukee, 97 Wis. 418, 72 N.W. 1118 (1897).


In Kansas the court later held that this decision was no longer controlling because of legislative enactments. State Highway Com'n. v. Panhandle Eastern Pipe Line Co., 139 Kan. 185, 29 P. (2d) 1104 (1934). The Massachusetts rule is explained by the statute quoted in note 47, supra. The Michigan case recognized a distinction between those expenses made necessary by the highway construction and those required to comply with police regulations. Where the division is to be made is not clear.

\textsuperscript{49} State ex rel. v. St. Paul, Minneapolis & Manitoba R. Co., n. 47, supra.
at grade, and, unless the term were so limited, the act would apply with equal force to crossings by viaduct or subway if the exigencies of the case required.

That the state in the exercise of the police power could require the railroad to build subways or viaducts was shortly recognized by the Supreme Court of the United States.\textsuperscript{50} Thereafter it was never questioned in Illinois.\textsuperscript{51} This perhaps may be traced to the fact that the companies had themselves come to realize that they could not possibly continue to operate their systems in a way which involved a very great risk to the public as well as a substantial interference with their own operations. The elevation of tracks, particularly in the cities permitted the speeding up of traffic, a much demanded improvement of the time. Certainly the elimination of these crossings had some effect on the death rate at grade crossings in the state although the number of deaths continued to increase.\textsuperscript{52} The general effect of crossing elevations on the welfare of the community was expressed by the Illinois court in \textit{Summerfield v. Chicago},\textsuperscript{53} as follows:

The great advantage to the public to be attained by the elevation of the tracks of railroads at street intersections of a city is too manifest to be questioned. Not only public convenience and the business of the community are advanced by the elevation of the tracks, but that

\textsuperscript{50} New York \& New England R. Co. v. Town of Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269 (1894). This case has been followed in a long line of authorities.

\textsuperscript{51} Several cases have been decided on collateral issues where the power of the city to compel the construction of viaducts or subways has been recognized. See particularly the following:

\textit{Summerfield v. City of Chicago}, 197 Ill. 270, 64 N.E. 490 (1902); \textit{People ex rel. v. Atchison, Topeka \& Santa Fé R. Co.}, 217 Ill. 594, 75 N.E. 573 (1905); \textit{Weage v. Chicago \& Western Indiana R. Co.}, 227 Ill. 421, 81 N.E. 424 (1907); \textit{People ex rel. v. Grand Trunk Western R. Co.}, 232 Ill. 292, 83 N.E. 839 (1908); \textit{City of Chicago v. Pittsburgh, Cincinnati, Chicago \& St. Louis R. Co.}, 244 Ill. 220, 91 N.E. 422 (1910); \textit{Murphy v. Chicago, Rock Island \& Pacific R. Co.}, 247 Ill. 614, 93 N.E. 381 (1910).

\textsuperscript{52} See note 9, supra. The accuracy of the data available is so questionable as to render any calculation of the death rate per thousand grade crossings of doubtful value. However, combining the data in notes 8 and 9, supra, indicates that there were 8.57 deaths per 1,000 grade crossings in Illinois in 1891. By 1896 the figure had decreased to 6.84. In 1901 it was up to 7.26. With a drop in the number of fatalities to 98 in 1906 the deaths per thousand grade crossings fell to 6.42. The death per thousand grade crossings is not of course a proper criterion of the effectiveness of grade crossing protection and elimination. A more accurate index would be the deaths per thousand vehicle crossings, including therein the number of vehicle crossings made at grade and by viaduct or subway. Data to determine this factor is not, and may never be, available.

\textsuperscript{53} 197 Ill. 270, 272, 64 N.E. 490 (1902).
which is by far the more important, the citizen is secured from the many dangers which imperil life and limb where trains of railroad cars cross street intersections at grade.

The act of 1874 has been superseded by Section 58 of the Public Utilities Acts of 1913 and 1921. The latter acts transferred to the Illinois Commerce Commission, and its predecessors, the power of the cities and local authorities over the crossings formed by the intersection of the railroads with streets and highways. This act delegated to the Commission the power to apportion between the railroads and public authorities the cost of improving and protecting crossings of the railroads with the public streets and highways. The power thus granted is an exercise of the police power of the state. No criterion is prescribed by the legislature for the exercise by the Commission of this power. It is therefore subject only to the limitations imposed by law, including the constitution, statutes, and the common law.

This article has been devoted to tracing the history and evolution of the law prior to 1913. It can be fairly said that the only criterion which the rules developed during this period leave the Commission is that the apportionment shall not be arbitrary and unreasonable, that is, shall have some reasonable relation to the evil sought to be eradicated, and that in a proper case, where the exigencies require, railroad property may be subjected to uncompensated obedience to regulations imposed in the interest of the public safety. These standards are abstract and difficult of application. They leave the Commission with a problem made more intricate by the changes of time. The investigation of the manner in which this problem has been met by the Commission must be the subject of another article.

54 Wagner v. Toledo, Peoria & Western R. Co., 352 Ill. 85, 185 N.E. 236 (1933).
56 Ibid.