

NOTES

Eminent Domain—Rights and Remedies of an Uncompensated Landowner

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.¹

Chief Justice Marshall uttered these words in the oft cited case of *Fletcher v. Peck*,² and the principle for which they stand is imbedded in our constitutional system. The fifth amendment to the United States Constitution reads in part: “[N]or shall private property be taken for public use, without just compensation.”³ This principle has not only been incorporated into the Bill of Rights, but exists in one form or another in almost every state constitution.⁴ Story in his commentaries on the Constitution says of the phrase of the fifth amendment:

It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers.⁵

The right to just compensation, in short, is one of the fundamental principles of democracy.

It is commonly believed that the power of eminent domain, or the power of governmental entities and quasi-public corporations to take property for public use, is inherent in a sovereign state.⁶ But, as the

1. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

2. This case is normally cited as the first case in which the United States Supreme Court held a state statute to be in conflict with the United States Constitution.

3. U. S. CONST. amend. V.

4. Every state with the exceptions of New Hampshire and North Carolina provides for compensation. See note 139 *infra*.

5. 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1790 (5th ed. 1891).

6. *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *United States v. 8,557.16 Acres of Land*, 11 F. Supp. 311 (N.D. W.Va. 1935); *Town of Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

first paragraph shows, it is subject to the right to compensation, which forms the subject matter of this note. The problem is what remedy or remedies has the owner when a body having the power of eminent domain takes property but fails to compensate the owner or to institute proceedings to compensate him? In discussing this problem it will be assumed that there has been a taking for a public purpose, which causes compensable damage to the landowner. It will also be assumed either that the law requires compensation before the taking, or, in states without this requirement, that a payment must be made a reasonable time after taking and that this time has elapsed before the action is brought. It is also assumed that the defendant has the power of eminent domain. In states that have constitutional provisions prohibiting the damaging as well as the taking of the property, cases of damage will be considered as the principles that apply to damaged property in these jurisdictions will likewise apply to property taken.

Before discussing various remedies available to a property owner, a close look at a recent case will indicate more clearly the problem facing the uncompensated landowner. In *Barber v. School Dist. Number 51*,⁷ a school district in Missouri constructed a filter type septic tank for disposal of water and sewage. Water from the tank flowed onto the land of Barber, an adjacent farmer, severely restricting his access to two or three acres of land. Barber sought to enjoin the school district from disposing of water and sewage on his land. In denying the injunction, the court recognized that damage had been done to Barber's land, but held that granting an injunction would cause greater harm to the community since it might necessitate the closing of the school. Although the reasoning of the court is understandable, Barber has been damaged and has been denied the relief he sought without being given any indication of how his loss might be remedied. The appropriate remedies for a property owner in situations similar to Barber's is the concern of this note.

I. INJUNCTION

If one's land is taken without compensation, perhaps the most natural reaction of the owner is to seek to restrain the taker. The landowner's most direct remedy is to enjoin the taking in equity. Injunctions have often been granted when the defendant has eminent domain power which would sustain the taking, but has failed to use it.⁸ The most serious objection to the use of injunction in such cases

7. 335 S.W.2d 527 (Mo. Ct. App. 1960).

8. *Kincaid v. United States*, 37 F.2d 602 (W.D. La. 1929); *Dancy v. Alabama Power Co.*, 198 Ala. 504, 73 So. 901 (1916); *Tombigbee Valley R.R. v. Loper*, 184 Ala. 343, 63 So. 1006 (1913); *Birmingham Traction Co. v. Birmingham Ry. &*

is that abatement of public improvements can cause harm to the public.⁹ Nonetheless a Virginia court has stated: "Injunction is the proper remedy to prevent the taking or damaging of private property

Elec. Co., 119 Ala. 129, 24 So. 368 (1898); *Organ v. Memphis & L.R. R.R.*, 51 Ark. 235, 11 S.W. 96 (1888); *Beals v. City of Los Angeles*, 23 Cal. 2d 381, 144 P.2d 839 (1943); *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles*, 60 Cal. App. 2d 478, 141 P.2d 46 (1943); *R. G. Foster & Co. v. Fountain*, 216 Ga. 113, 114 S.E.2d 863 (1960); *Harrison v. City of E. Point*, 208 Ga. 692, 69 S.E.2d 85 (1952); *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Rock Island & Pac. Ry. v. Johnson*, 204 Ill. 488, 68 N.E. 549 (1903); *Lowery v. City of Pekin*, 186 Ill. 387, 57 N.E. 1062 (1900); *O'Connell v. Chicago Terminal Transfer R.R.*, 184 Ill. 308, 56 N.E. 355 (1900); *Town of Hardinsburg v. Cravens*, 148 Ind. 1, 47 N.E. 153 (1897); *Department of Highways v. McKinney*, 291 Ky. 1, 162 S.W.2d 179 (1942); *Anderson v. State Highway Comm'n*, 252 Ky. 696, 68 S.W.2d 5 (1934); *Bickham v. City of Shreveport*, 156 La. 648, 101 So. 8 (1924); *Brown v. Inhabitants of Peabody*, 228 Mass. 52, 116 N.E. 958 (1917); *Dunnebacke v. Detroit G.H. & M. Ry.*, 248 Mich. 450, 227 N.W. 811 (1929); *Carpenter v. City of St. Joseph*, 263 Mo. 705, 174 S.W. 53 (1915); *Spurlock v. Dornan*, 182 Mo. 242, 81 S.W. 412 (1904); *Gunn v. City of Versailles*, 330 S.W.2d 257 (Mo. Ct. App. 1959); *Rubinstein v. City of Salem*, 210 S.W.2d 382 (Mo. Ct. App. 1948); *Ates v. Wills*, 243 S.W. 187 (Mo. Ct. App. 1922); *Kime v. Cass County*, 71 Neb. 677, 99 N.W. 546 (1904); *Gray v. Manhattan Ry.*, 128 N.Y. 499, 28 N.E. 498 (1891); *Emigrant Mission Comm. v. Brooklyn Elevated R.R.*, 20 App. Div. 596, 47 N.Y. Supp. 344 (1897); *McMillian v. Lauer*, 24 N.Y. Supp. 951 (Sup. Ct. 1893); *Poovey v. City of Hickory*, 210 N.C. 630, 188 S.E. 78 (1936); *Ohio Bell Tel. Co. v. Watson Co.*, 112 Ohio St. 500, 147 N.E. 907 (1925); *Canada v. City of Shawnee*, 179 Okla. 53, 64 P.2d 694 (1936); *Bogue v. Clay County*, 75 S.D. 140, 60 N.W.2d 218 (1953); *Horstad v. City of Bryant*, 50 S.D. 199, 208 N.W. 980 (1926); *Peterson v. Bean*, 22 Utah 43, 61 Pac. 213 (1900); *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953); *State ex rel. Fortney Lumber & Hardware Co. v. Baltimore & O. R.R.*, 73 W.Va. 1, 79 S.E. 834 (1913). See also *Colorado ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953); *Grafton v. Baltimore & O. R.R.*, 21 Fed. 309 (C.C.S.D. Ohio 1884); *Newberry v. Evans*, 97 Cal. App. 120, 275 Pac. 465 (1929); *Stuart v. Colorado E. R.R.*, 61 Colo. 58, 156 Pac. 152 (1916); *State Rd. Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941); *Baya v. Town of Lake City*, 44 Fla. 491, 33 So. 400 (1902); *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070 (1909); *Illinois Cities Water Co. v. City of Mount Vernon*, 11 Ill. 2d 547, 144 N.E.2d 729 (1957); *Mitchell v. Chicago, B. & Q. Ry.*, 265 Ill. 300, 106 N.E. 833 (1914); *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Midland Ry. v. Smith*, 113 Ind. 233, 15 N.E. 256 (1888); *McGinnis v. Wabash R.R.*, 114 N.W. 1039 (Iowa 1908); *Clark v. Wabash R.R.*, 132 Iowa 11, 109 N.W. 309 (1906); *Bushart v. County of Fulton*, 183 Ky. 471, 209 S.W. 499 (1919); *Dunne v. State*, 162 Md. 274, 159 Atl. 751 (Ct. App. 1932); *Beetschen v. Shell Pipe Line Corp.*, 248 S.W.2d 66 (Mo. Ct. App. 1952); *Bridge v. City of Lincoln*, 138 Neb. 461, 293 N.W. 375 (1940); *Menge v. Morris & E. R.R.*, 73 N.J. Eq. 177, 67 Atl. 1028 (1907); *Sammons v. City of Gloversville*, 34 Misc. 459, 70 N.Y. Supp. 284 (Sup. Ct. 1901); *Knoxville Ry. & Light Co. v. O'Fallen*, 130 Tenn. 270, 170 S.W. 55 (1914); *Hjorth v. Whittenburg*, 121 Utah 324, 241 P.2d 907 (1952); *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445 (1909).

9. See note 29 *infra*.

for a public use without just compensation by one who is invested with the power of eminent domain,"¹⁰ and such injunctions have been granted in many jurisdictions.¹¹ This remedy has been held proper against both governmental¹² and quasi-public corporations.¹³

The theory for granting an injunction differs among the jurisdictions. Some courts grant an injunction theoretically to restrain a tortious taking,¹⁴ while others seem to be enforcing constitutional provisions by use of the injunction.¹⁵ The underlying ground on which

10. *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 146, 77 S.E.2d 461, 466 (1953).

11. Note 8 *supra*.

12. *Beals v. City of Los Angeles*, 23 Cal. 2d 381, 144 P.2d 839 (1943); *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles*, 60 Cal. App. 2d 478, 141 P.2d 46 (1943); *Harrison v. City of E. Point*, 208 Ga. 692, 69 S.E.2d 85 (1952); *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Lowery v. City of Pekin*, 186 Ill. 387, 57 N.E. 1062 (1900); *Town of Hardinsburg v. Cravens*, 148 Ind. 1, 47 N.E. 153 (1897); *Department of Highways v. McKinney*, 291 Ky. 1, 162 S.W.2d 179 (1942); *Anderson v. State Highway Comm'n*, 252 Ky. 696, 68 S.W.2d 5 (1934); *Brown v. Inhabitants of Peabody*, 228 Mass. 52, 116 N.E. 958 (1917); *Carpenter v. City of St. Joseph*, 263 Mo. 705, 174 S.W. 53 (1915); *Spurlock v. Dornan*, 182 Mo. 242, 81 S.W. 412, (1904); *Gunn v. City of Versailles*, 330 S.W.2d 257 (Mo. Ct. App. 1959); *Rubinstein v. City of Salem*, 210 S.W.2d 382 (Mo. Ct. App. 1948); *Ates v. Wills*, 243 S.W. 187 (Mo. Ct. App. 1922); *Poovey v. City of Hickory*, 210 N.C. 630, 188 S.E. 78 (1936); *Bogue v. Clay County*, 75 S.D. 140, 60 N.W.2d 218 (1953); *Horstad v. City of Bryant*, 50 S.D. 199, 208 N.W. 980 (1926); *Yates v. West Grafton*, 33 W.Va. 507, 11 S.E. 8 (1890).

13. *Dancy v. Alabama Power Co.*, 198 Ala. 504, 73 So. 901 (1916); *Tombigbee Valley R.R. v. Loper*, 184 Ala. 343, 63 So. 1006 (1913); *Birmingham Traction Co., v. Birmingham Ry. & Elec. Co.*, 119 Ala. 129, 24 So. 368 (1898); *Rock Island & Pac. Ry. v. Johnson*, 204 Ill. 483, 68 N.E. 549 (1903); *O'Connell v. Chicago Terminal Transfer R.R.*, 184 Ill. 308, 56 N.E. 355 (1900); *Dunnebacke v. Detroit G. H. & M. Ry.*, 248 Mich. 450, 227 N.W. 811 (1929); *Emigrant Mission Comm. v. Brooklyn Elevated R.R.*, 20 App. Div. 596, 47 N.Y. Supp. 344 (1897); *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953); *State ex rel. Fortney Lumber & Hardware Co. v. Baltimore & O. R.R.*, 73 W.Va. 1, 79 S.E. 834 (1913).

14. *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Town of Hardinsburg v. Cravens*, 148 Ind. 1, 47 N.E. 153 (1897); *Brown v. Inhabitants of Peabody*, 228 Mass. 52, 116 N.E. 958 (1917); *cf. Harrison v. City of E. Point*, 208 Ga. 692, 69 S.E.2d 85 (1952). See also *Newberry v. Evans*, 97 Cal. App. 120, 275 Pac. 465 (1929); *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070 (1909); *McGinnis v. Wabash R.R.*, 114 N.W. 1039 (Iowa 1908); *Clark v. Wabash R.R.*, 132 Iowa 11, 109 N.W. 309 (1906).

15. *Birmingham Traction Co v. Birmingham Ry. & Elec. Co.*, 119 Ala. 129, 24 So. 368 (1898); *Beals v. City of Los Angeles*, 23 Cal. 2d 381, 144 P.2d 839 (1943); *Dunnebacke v. Detroit G.H. & M. Ry.*, 248 Mich. 450, 227 N.W. 811 (1929); *Ates v. Wills*, 243 S.W. 187 (Mo. Ct. App. 1922); *cf. Harrison v. City of E. Point*, *supra* note 14. See also *Ferry-Leary Land Co. v. Holt & Jefferey*, 53 Wash. 584, 102 Pac. 445 (1909). For a more comprehensive discussion on constitutional provisions, see text accompanying notes 132-48 *infra*.

it is justified, however, seems to make no difference in the administration of the remedy.

Many jurisdictions have refused to grant an injunction to restrain such a taking or to enforce a constitutional provision¹⁶ for one of two major reasons. One is that there may be another adequate remedy.¹⁷

16. *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Connor v. South Carolina Pub. Serv. Authority*, 91 F. Supp. 262 (E.D.S.C. 1950); *Cubbins v. Mississippi River Comm'n*, 204 Fed. 299 (E.D. Ark. 1913); *McCullough v. City of Denver*, 39 Fed. 307 (C.C.D. Colo. 1889); *Riggs v. Hill*, 201 Ark. 206, 144 S.W.2d 26 (1940); *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P.2d 681 (1938); *Conaway v. Yolo Water & Power Co.*, 304 Cal. 125, 266 Pac. 944 (1928); *Stanton v. Morgan*, 127 Fla. 34, 172 So. 485 (1937); *East Fla. Tel. Co. v. Seaboard Air Line Ry.*, 85 Fla. 378, 96 So. 95 (1923); *Florida So. Ry. v. Hill*, 40 Fla. 1, 23 So. 566 (1898); *Posinski v. Chicago, M. St. P. & Pac. R.R.*, 376 Ill. 346, 33 N.E.2d 869 (1941); *Brookings v. Riverside Drainage Dist.*, 135 Kan. 234, 9 P.2d 656 (1932); *Keck v. Hafley*, 237 S.W.2d 527 (Ky. 1951); *Kentucky Game & Fish Comm'n v. Burnette*, 290 Ky. 786, 163 S.W.2d 50 (1942); *Schneidau v. Highway Comm'n*, 206 La. 754, 20 So. 2d 14 (1944); *Dynes v. Town of Kilkenny*, 153 Minn. 11, 189 N.W. 439 (1922); *Barber v. School Dist. Number 51*, 335 S.W.2d 527 (Mo. Ct. App. 1960); *Lewis v. City of Potosi*, 317 S.W.2d 623 (Mo. Ct. App. 1958); *Bohannon v. Camden Bend Drainage Dist.*, 240 Mo. App. 492, 208 S.W.2d 794 (1948); *Johnson v. Independent School Dist. Number 1*, 239 Mo. App. 749, 199 S.W.2d 421 (1947); *Meyer v. City of Alma*, 117 Neb. 511, 221 N.W. 438 (1928); *Barney v. Board of Rapid Transit R.R. Comm'rs*, 38 Misc. 549, 77 N.Y. Supp. 1083 (Sup. Ct. 1902); *Caruthers v. Peoples Natural Gas Co.*, 155 Pa. Super. 332, 38 A.2d 713 (1944); *Hyde v. Minnesota, D. & P. Ry.*, 24 S.D. 386, 123 N.W. 849 (1909); *Tennessee Coal, Iron & R.R. v. Paint Rock Flume & Transp. Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *City of Dallas v. Megginson*, 222 S.W.2d 349 (Tex. Civ. App. 1949); *Webb v. Dameron*, 219 S.W.2d 581 (Tex. Civ. App. 1949); *Hogue v. City of Bowie*, 209 S.W.2d 807 (Tex. Civ. App. 1948); *Henderson v. City of Longview*, 111 S.W.2d 740 (Tex. Civ. App. 1937); *City of Jasper v. Brown*, 39 S.W.2d 112 (Tex. Civ. App. 1931); *City of Wylie v. Stone*, 16 S.W.2d 862 (Tex. Civ. App. 1929); *Fry v. Jackson*, 264 S.W. 612 (Tex. Civ. App. 1924); *Kahn v. City of Houston*, 48 S.W.2d 595 (Tex. Com. App. 1932); *Barboglio v. Gibson*, 61 Utah 314, 213 Pac. 385 (1923); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919); *Irwin v. J.K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918). See also *Kelliher v. Stone & Webster, Inc.*, 75 F.2d 331 (5th Cir. 1935); *Archer v. Board of Levee Inspectors*, 128 Fed. 125 (E.D. Ark. 1904); *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles*, 60 Cal. App. 2d 478, 141 P.2d 46 (1943); *Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737, 216 Pac. 66 (1923).

17. *Hurley v. Kincaid*, *supra* note 16; *Connor v. South Carolina Pub. Serv. Authority*, *supra* note 16; *McCullough v. City of Denver*, *supra* note 16; *Hillside Water Co. v. City of Los Angeles*, *supra* note 16; *Stanton v. Morgan*, *supra* note 16; *East Fla. Tel. Co. v. Seaboard Air Line Ry.*, *supra* note 16; *Posinski v. Chicago, M. St. P. & Pac. R.R.*, *supra* note 16; *Brookings v. Riverside Drainage Dist.*, *supra* note 16; *Kentucky Game & Fish Comm'n v. Burnette*, *supra* note 16; *Town of Kilkenny*, *supra* note 16; *Johnson v. Independent School Dist. Number 1*, *supra* note 16; *Meyer v. City of Alma*, *supra* note 16; *Caruthers v. Peoples Natural Gas Co.*, *supra* note 16; *Hyde v. Minnesota, D. & P. Ry.*, *supra* note 16; *City of Dallas v. Megginson*, *supra* note 16; *Hogue v. City of Bowie*, *supra* note

As Professor McClintock has said: "If plaintiff is permitted by the common law rule in the jurisdiction to recover at law the permanent damages he will sustain because of the public use, the injunction will be refused because the remedy at law is adequate."¹⁸ A great variety of other types of relief have been found to be adequate remedies: implied contract,¹⁹ ejectment,²⁰ damages,²¹ common law relief,²² and an action in the nature of inverse condemnation.²³ The denial of injunction has even been based upon the availability of the extraordinary writ of mandamus,²⁴ and upon an equitable lien.²⁵ In some cases, injunctive relief has been granted because the court was unable to find an adequate remedy at law,²⁶ while other cases have held that injunction is a proper remedy even if there are other modes of relief.²⁷ An Illinois court stated:

16; *Henderson v. City of Longview*, *supra* note 16; *City of Jasper v. Brown*, *supra* note 16; *City of Wylie v. Stone*, *supra* note 16; *Fry v. Jackson*, *supra* note 16; *Kahn v. City of Houston*, *supra* note 16; *Barboglio v. Gibson*, *supra* note 16; *Virginia Hot Springs Co. v. Lowman*, *supra* note 16; *Irwin v. J.K. Lumber Co.*, *supra* note 16.

18. McCLINTOCK, EQUITY § 147, at 394 (2d ed. 1948).

19. *Hurley v. Kincaid*, 285 U.S. 95 (1932). See also *Connor v. South Carolina Pub. Serv. Authority*, 91 F. Supp. 262 (E.D.S.C. 1950); *Stanton v. Morgan*, 127 Fla. 34, 172 So. 485 (1937).

20. *Hyde v. Minnesota, D. & P. Ry.*, 24 S.D. 386, 123 N.W. 849 (1909).

21. *McCullough v. City of Denver*, 39 Fed. 307 (C.C.D. Colo. 1889); *Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737, 216 Pac. 66 (1923); *East Fla. Tel. Co. v. Seaboard Air Line Ry.*, 85 Fla. 378, 96 So. 95 (1923); *Kentucky Game & Fish Comm'n v. Burnette*, 290 Ky. 786, 163 S.W.2d 50 (1942); *Dynes v. Town of Kilkenny*, 153 Minn. 11, 189 N.W. 439 (1922); *Johnson v. Independent School Dist. Number 1*, 239 Mo. App. 749, 199 S.W.2d 421 (1947); *Caruthers v. Peoples Natural Gas Co.*, 155 Pa. Super. 332, 38 A.2d 713 (1944); *Hyde v. Minnesota, D. & P. Ry.*, *supra* note 20; *City of Dallas v. Megginson*, 222 S.W.2d 349 (Tex. Civ. App. 1949); *Henderson v. City of Longview*, 111 S.W. 2d 740 (Tex. Civ. App. 1937); *City of Jasper v. Brown*, 39 S.W.2d 112 (Tex. Civ. App. 1931); *Fry v. Jackson*, 264 S.W. 612 (Tex. Civ. App. 1924); *Kahn v. City of Houston*, 48 S.W.2d 595 (Tex. Com. App. 1932); *Barboglio v. Gibson*, 61 Utah 314, 213 Pac. 385 (1923); *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918).

22. *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919).

23. *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P.2d 681 (1938).

24. *Posinski v. Chicago M. St. P. & Pac. R.R.*, 376 Ill. 346, 33 N.E.2d 869 (1941).

25. *Stanton v. Morgan*, 127 Fla. 34, 172 So. 485 (1937).

26. *Gunn v. City of Versailles*, 330 S.W.2d 257 (Mo. Ct. App. 1959); *Ates v. Wills*, 243 S.W. 187 (Mo. Ct. App. 1922).

27. *Dancy v. Alabama Power Co.*, 198 Ala. 504, 73 So. 901 (1916); *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.*, 119 Ala. 129, 24 So. 368 (1898); *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Dunnebacke v. Detroit G. H. & M. Ry.*, 248 Mich. 450, 227 N.W. 811 (1929); *Carpenter v. City of St. Joseph*, 263 Mo. 705, 174 S.W. 53 (1915). See also *Grafton v. B. & O. R.R.*,

Injunction is a proper remedy of the owner when an unlawful appropriation of his land is attempted for the use of a public corporation which has not acquired the right of such appropriation by condemnation or otherwise. In such cases courts of equity act upon broader principles than in ordinary cases and have granted equitable relief without regard to the existence of legal remedies, irreparable injury or other equitable considerations.²⁸

The other major reason for denying an injunction is the probable resulting injury to the entity taking the land. The courts weigh, balance or compare the relative injuries to the parties, and often deny an injunction because the "balance" favors the body taking the land.²⁹ The denial of an injunction is characterized by such phrases as "doctrine of comparative injuries,"³⁰ "balancing of interests or equities,"³¹ and "necessary public improvement."³² In the *Barber* case³³ plaintiff was denied relief because of the probable injury to a school if it had to discontinue use of a septic tank for disposal of

21 Fed. 309 (C.C.S.D. Ohio 1884); *Newberry v. Evans*, 97 Cal. App. 120, 275 Pac. 465 (1929); *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070 (1909); *McGinnis v. Wabash R.R.*, 114 N.W. 1039 (Iowa 1908); *Clark v. Wabash R.R.*, 132 Iowa 11, 109 N.W. 309 (1906); *Gunn v. City of Versailles*, *supra* note 26; *Beetschen v. Shell Pipe Line Corp.*, 248 S.W.2d 66 (Mo. Ct. App. 1952). See *Tombigbee Valley Ry. v. Loper*, 184 Ala. 343, 63 So. 1006 (1913); *R.G. Foster & Co. v. Fountain*, 216 Ga. 113, 114 S.E.2d 863 (1960); *Department of Highways v. McKinney*, 291 Ky. 1, 162 S.W.2d 179 (1942); *Poovey v. City of Hickory*, 210 N.C. 630, 188 S.E. 78 (1936); *Bogue v. Clay County*, 75 S.D. 140, 60 N.W.2d 218 (1953); *Peterson v. Bean*, 22 Utah 43, 61 Pac. 213 (1900).

28. *Springer v. City of Chicago*, *supra* note 27, at 364, 139 N.E. at 418.

29. *Cubbins v. Mississippi River Comm'n*, 204 Fed. 299 (E.D. Ark. 1913); *McCullough v. City of Denver*, 39 Fed. 307 (C.C.D. Colo. 1889); *Dynes v. Town of Kilkenny*, 153 Minn. 11, 189 N.W. 439 (1922); *Barber v. School Dist. Number 51*, 335 S.W.2d 527 (Mo. Ct. App. 1960); *Johnson v. Independent School Dist. Number 1*, 239 Mo. App. 749, 199 S.W.2d 421 (1947); *Barney v. Board of Rapid Transit R.R. Comm'rs*, 38 Misc. 549, 77 N.Y. Supp. 1083 (Sup. Ct. 1902); *Tennessee Coal, Iron & R. R. v. Paint Rock Flume & Transp. Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *City of Dallas v. Megginson*, 222 S.W.2d 349 (Tex. Civ. App. 1949); *Hogue v. City of Bowie*, 209 S.W.2d 807 (Tex. Civ. App. 1948); *Henderson v. City of Longview*, 111 S.W.2d 740 (Tex. Civ. App. 1937); *City of Wylie v. Stone*, 16 S.W.2d 862 (Tex. Civ. App. 1929); *Irwin v. J.K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918). See also *Archer v. Board of Levee Inspectors*, 128 Fed. 125 (E.D. Ark. 1904).

30. *Cubbins v. Mississippi River Comm'n*, *supra* note 29; *Johnson v. Independent School Dist. Number 1*, *supra* note 29. See also *Rubinstein v. City of Salem*, 210 S.W.2d 382 (Mo. Ct. App. 1948).

31. *Hogue v. City of Bowie*, 209 S.W.2d 807 (Tex. Civ. App. 1948); *City of Wylie v. Stone*, 16 S.W.2d 862 (Tex. Civ. App. 1929). See also *Rubinstein v. City of Salem*, *supra* note 30.

32. *Archer v. Board of Levee Inspectors*, 128 Fed. 125 (E.D. Ark. 1904); *Dynes v. Town of Kilkenny*, 153 Minn. 11, 189 N.W. 439 (1922).

33. *Barber v. School Dist. Number 51*, 335 S.W.2d 527 (Mo. Ct. App. 1960).

water and sewage. In *City of Dallas v. Megginson*³⁴ the court held that the discharge of waters from a sewer into a creek was a public improvement, and that the general welfare should not be subordinated to the protection of private property. But balancing of the general welfare against the injury to private property does not automatically preclude a court from granting an injunction, for in a given case a court could determine that the private injury was greater than the resulting injury to the general welfare, or that the public improvement was not essential or important to the well-being of the community.³⁵ Such determinations would not be inconsistent with cases in the same jurisdiction which deny injunctive relief because of harm to the community. Thus, the Missouri court in *Rubinstein v. City of Salem*³⁶ enjoined the city from destroying a sidewalk, and was in fact following the same general rule in the *Barber* case,³⁷ even though it reached the opposite result. The court, when granting the injunction in the *Rubinstein* case, said :

Courts in applying the rules of equity are always anxious to work out the equities and justice of the cause. The extraordinary nature of the remedy by injunction calls for a particular and careful application of this guiding principle. In suits for such relief injunctions are rarely refused where their refusal would operate contrary to the real justice of the case and produce inequitable results. The relative convenience and inconvenience and the comparative injuries to the parties and to the public should be considered in granting or refusing an injunction. Each case rests upon its own facts upon which the chancellor must apply the rule of relative or comparative injury.³⁸

But in *Cubbins v. Mississippi River Comm'n*,³⁹ when private land was flooded as a result of the Commission's maintaining and repairing levees, the court denied an injunction because of the public interest involved, stating :

Injunctions are not matters of right, and while they are issued, not in the arbitrary or whimsical will, but in the judicial discretion of the court, guided by the established principles, rules, and practice in equity, regard must be had for the comparative injury which will be sustained if the injunction were granted or refused. If it appears that the granting of the injunction, although plaintiff may be ordinarily entitled to it, would inflict such great

34. 222 S.W.2d 349 (Tex. Civ. App. 1949).

35. *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles*, 60 Cal. App. 2d 478, 141 P.2d 46 (1943); *Rubinstein v. City of Salem*, 210 S.W.2d 382 (Mo. Ct. App. 1948).

36. 210 S.W.2d 382 (Mo. Ct. App. 1948).

37. *Barber v. School Dist. Number 51*, 335 S.W.2d 527 (Mo. Ct. App. 1960).

38. *Rubinstein v. City of Salem*, 210 S.W.2d 382, 386 (Mo. Ct. App. 1948).

39. 204 Fed. 299 (E.D. Ark. 1913).

damage on the defendants or the public that that suffered by the plaintiff, if the injunction is refused, will be relatively insignificant, an injunction must be refused.⁴⁰

Some jurisdictions use a combination of the adequate legal remedy and the public welfare in denying injunctive relief,⁴¹ while others use only one.⁴²

II. QUALIFIED INJUNCTION

A conditional or qualified injunction is sometimes granted.⁴³ A qualified injunction differs from a permanent injunction in that it does not take effect *unless* or *until* the body taking the land fails to compensate the landowner. Under the threat of injunction, the entity taking the land is forced to compensate the landowner.⁴⁴ Since the

40. *Id.* at 307.

41. *McCullough v. City of Denver*, 39 Fed. 307 (C.C.D. Colo. 1889); *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P.2d 681 (1938); *Dynes v. Town of Kilkenny*, 153 Minn. 11, 189 N.W. 439 (1922); *Johnson v. Independent School Dist. Number 1*, 239 Mo. App. 749, 199 S.W.2d 421 (1947); *City of Dallas v. Megginson*, 222 S.W.2d 349 (Tex. Civ. App. 1949); *Webb v. Dameron*, 219 S.W.2d 581 (Tex. Civ. App. 1949); *Henderson v. City of Longview*, 111 S.W.2d 740 (Tex. Civ. App. 1937); *City of Wylie v. Stone*, 16 S.W.2d 862 (Tex. Civ. App. 1929); *Irwin v. J.K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918).

42. See notes 17 and 29 *supra*.

43. This type of injunction is variously called, "conditional," "qualified," "temporary," and "alternative."

44. *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334 (1933); *Kincaid v. United States*, 37 F.2d 602 (W.D. La. 1929); *Tombigbee Valley R.R. v. Loper*, 184 Ala. 343, 63 So. 1006 (1913); *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.*, 119 Ala. 129, 24 So. 368 (1898); *Organ v. Memphis & L.R. R.R.*, 51 Ark. 235, 11 S.W. 96 (1889); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 P.2d 486 (1935); *State Rd. Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941); *Rock Island & Peoria Ry. v. Johnson*, 204 Ill. 488, 68 N.E. 549 (1903); *Carpenter v. City of St. Joseph*, 263 Mo. 705, 174 S.W. 53 (1915); *Bridge v. City of Lincoln*, 138 Neb. 461, 293 N.W. 375 (1940); *Kime v. Cass County*, 71 Neb. 677, 99 N.W. 546 (1904); *Grey ex rel. Simmons v. Mayor*, 60 N.J. Eq. 385, 45 Atl. 995 (Ct. Err. & App. 1900); *Menge v. Morris & E. R.R.*, 73 N.J. Eq. 177, 67 Atl. 1028 (Ch. 1907); *Gray v. Manhattan Ry.*, 128 N.Y. 499, 28 N.E. 498 (1891); *Canada v. City of Shawnee*, 179 Okla. 53, 64 P.2d 694 (1936); *Yates v. Town of West Grafton*, 33 W.Va. 507, 11 S.E. 8 (1890). See also *Colorado ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953); *Grafton v. B. & O. R.R.*, 21 Fed. 309 (C.C.S.D. Ohio 1884); *City of Birmingham v. Alabama Home Bldg. & Loan Ass'n*, 231 Ala. 558, 165 So. 817 (1936); *State Highway Comm'n v. Bush*, 195 Ark. 920, 114 S.W.2d 1061 (1938); *State Highway Comm'n v. Kincannon*, 193 Ark. 450, 100 S.W.2d 969 (1937); *Felton Water Co. v. Superior Court*, 83 Cal. App. 382, 256 Pac. 255 (1927); *Dunne v. State*, 162 Md. 274, 159 Atl. 751 (Ct. App. 1932); *O'Reilly v. New York Elevated R.R.*, 148 N.Y. 347, 42 N.E. 1063 (1896); *Flynn v. New York W. & B. Ry.*, 139 App. Div. 199, 123 N.Y. Supp. 759 (1910); *Knoxville Ry. & Light Co. v. O'Fallen*, 130 Tenn. 270, 170 S.W. 55 (1914); *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445 (1909).

body taking the land is allowed to keep the property it has taken, public improvements need not be abated when the qualified injunction is used. At the same time, private rights are not abused since the landowner will be compensated as a result of agreement between the parties or as a result of condemnation proceedings which the qualified injunction forces the taking party to institute. The theory underlying the qualified injunction is similar to the theory behind the absolute injunction. Both types of injunction have been used by courts to protect a constitutional⁴⁵ right and to enjoin a trespass.⁴⁶ Since a qualified injunction has the effect of forcing eminent domain proceedings, it is similar in this respect to a writ of mandamus.⁴⁷

The qualified injunction has been applied in two distinct ways. Under one method it does not take effect *unless* the taking party fails to institute condemnation proceedings.⁴⁸ In jurisdictions where an injunction will not be granted *unless* there is a failure to institute proceedings, there may be a time limit within which the proceedings must be brought.⁴⁹ If the proceedings are not brought within the specified time period, an injunction will be granted. The other viewpoint is that the qualified injunction takes effect at once and binds the defendant *until* compensation is paid.⁵⁰ This distinction is not without significance. In its first form the qualified injunction denies the landowner relief for a considerable period of time. In its second form, however, the injunction provides relief immediately.

45. Birmingham Traction Co. v. Birmingham Ry. & Elec. Co., *supra* note 44. See Colorado *ex rel.* Watrous v. District Court, *supra* note 44; Ferry-Leary Land Co. v. Holt & Jeffery, *supra* note 44.

46. Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933); Carpenter v. City of St. Joseph, 263 Mo. 705, 174 S.W. 53 (1915); Menge v. Morris & E. R.R., 73 N.J. Eq. 177, 67 Atl. 1028 (Ch. 1907).

47. See text accompanying notes 60-73 *supra*.

48. Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933); Gunn v. City of Versailles, 330 S.W.2d 257 (Mo. Ct. App. 1959); Kime v. Cass County, 71 Neb. 677, 99 N.W. 546 (1904); Menge v. Morris & E. R.R., 73 N.J. Eq. 177, 67 Atl. 1028 (Ch. 1907).

49. Menge v. Morris & E. R.R., *supra* note 48. Although many cases do not set forth a time period in which the eminent domain proceedings must be brought, it can probably be inferred that the outside limit is the prescriptive period by which the taking body would acquire a prescriptive right. See Kime v. Cass County, *supra* note 48.

50. Kincaid v. United States, 37 F.2d 602 (W.D. La. 1929); Birmingham Traction Co. v. Birmingham Ry. & Elec. Co., 119 Ala. 129, 24 So. 368 (1898); Organ v. Memphis & L.R. R.R., 51 Ark. 235, 11 S.W. 96 (1889); Rock Island & Peoria Ry. v. Johnson, 204 Ill. 488, 68 N.E. 549 (1903); Carpenter v. City of St. Joseph, 263 Mo. 705, 174 S.W. 53 (1915); Bridge v. City of Lincoln, 138 Neb. 461, 293 N.W. 375 (1940); Yates v. Town of W. Grafton, 33 W.Va. 507, 11 S.E. 8 (1890).

III. OTHER EQUITABLE RELIEF

Courts of equity have, although infrequently, granted two other types of relief to the landowner. In some cases the court has granted an equitable lien on the appropriated property,⁵¹ and the Supreme Court of Alabama has indicated that an uncompensated landowner's mode of relief is to receive damages in equity.⁵²

In the cases in which an equitable lien is granted, the courts term it a vendor's lien. It has been held that the lien is granted as a result of an implied contract.⁵³ In *Stanton v. Morgan*,⁵⁴ the court granted an equitable lien on property which a county took to build a road. "[T]he law will imply a promise and obligation on the part of the defendants to pay the plaintiff a reasonable purchase price therefor, and that plaintiff has a vendor's lien on said street and property, as security for the same, and that said lien is foreclosable."⁵⁵ If such a case should be pressed to foreclosure, it seems that the interference with the public use would be as drastic as would follow from any injunction. On the other hand, the plaintiff in foreclosure could hardly hope to sell a road, and would probably be reduced to taking it back.

Damages are granted in equity occasionally in lieu of an injunction,⁵⁶ more commonly in addition to one.⁵⁷ Thus, when an injunction is granted courts will often also award damages for past injuries. Courts in Alabama differ from the normal rule, as they have asserted that the court of equity should award damages even though no other type of relief is sought. An Alabama court⁵⁸ stated:

If the county through its duly constituted authorities without the consent of the landowner whose title and possession is not

51. *Organ v. Memphis & L.R. R.R.*, 51 Ark. 235, 11 S.W. 96 (1889); *Rosenbaum v. State Rd. Dep't*, 129 Fla. 723, 177 So. 220 (1937); *Stanton v. Morgan*, 127 Fla. 34, 172 So. 485 (1937); *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393 (1932); *Florida So. Ry. v. Hill*, 40 Fla. 1, 23 So. 566 (1898). See also *State ex rel. Roberts v. Eicher*, 178 S.W. 171 (Mo. 1915).

52. *Benson v. Pickens County*, 253 Ala. 134, 43 So. 2d 113 (1949); *Middleton v. St. Louis & S.F. Ry.*, 228 Ala. 323, 153 So. 256 (1934).

53. *Stanton v. Morgan*, 127 Fla. 34, 172 So. 485 (1937); *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393 (1932); *Florida So. Ry. v. Hill*, 40 Fla. 1, 23 So. 566 (1898).

54. 127 Fla. 34, 172 So. 485 (1937).

55. *Id.* at 38, 172 So. at 487.

56. *McCLINTOCK*, EQUITY § 52, at 121 (2d ed. 1948).

57. See note 36 *supra*.

58. *Benson v. Pickens County*, 253 Ala. 134, 43 So. 2d 113 (1949).

disputed takes or undertakes to appropriate private property for public use, a court of equity will intervene and require just compensation to be made.⁵⁹

The Alabama courts do not seem to realize how unusual their practice is.

IV. MANDAMUS

The extraordinary writ of mandamus lies to compel public officers and corporations to obey and execute the laws. In several jurisdictions mandamus has been held to be the proper remedy to compel state and local officials to institute condemnation proceedings.⁶⁰ Normally, however, the writ is not granted unless there is no other effectual remedy available.⁶¹

Since mandamus does not lie to enforce discretionary duties, courts

59. *Id.* at 137-38, 43 So. 2d at 116.

60. *People ex rel. Haynes v. Rosenstone*, 16 Ill. 2d 513, 158 N.E.2d 577 (1959); *Grunewald v. City of Chicago*, 371 Ill. 528, 21 N.E.2d 739 (1939); *Anderlik v. State Highway Comm'n*, 240 Iowa 919, 38 N.W.2d 605 (1949); *Baird v. Johnston*, 230 Iowa 161, 297 N.W. 315 (1941); *State v. Anderson*, 220 Minn. 139, 19 N.W.2d 70 (1945); *Brown v. Murphy*, 134 N.J.L. 318, 47 A.2d 595 (Sup. Ct. 1946); *Rice v. Murphy*, 47 A.2d 597 (N.J. 1946); *Empire Trust Co. v. Board of Commerce & Nav.*, 124 N.J.L. 406, 11 A.2d 752 (Sup. Ct. 1940); *Thomson v. State Highway Comm'n*, 10 N.J. Misc. 877, 161 Atl. 192 (Sup. Ct. 1932); *Klaus v. Mayor of Jersey City*, 69 N.J.L. 127, 54 Atl. 220 (Sup. Ct. 1903); *Brown v. Murphy*, 136 N.J.L. 183, 54 A.2d 763 (Ct. Err. & App. 1947); *Mount Vernon Realty Corp. v. City of Mount Vernon*, 241 App. Div. 882, 271 N.Y. Supp. 742 (1934); *Star Sand & Gravel Corp. v. Marsh*, 133 Misc. 388, 232 N.Y. Supp. 235 (Sup. Ct. 1929); *McDowell v. City of Asheville*, 112 N.C. 747, 17 S.E. 537 (1893); *Bland v. City Council*, 203 S.C. 392, 27 S.E.2d 498 (1943); *Gibson v. City Council*, 64 S.C. 455, 42 S.E. 206 (1902); *Hicks v. Anderson*, 182 Va. 195, 28 S.E.2d 629 (1944); *Appalachian Elec. Power Co. v. Sawyers*, 141 W.Va. 769, 93 S.E.2d 25 (1956); *Stephenson v. Cavendish*, 132 W.Va. 361, 59 S.E.2d 459 (1950); *Riggs v. State Rd. Comm'r*, 120 W.Va. 298, 197 S.E. 813 (1938); *State ex rel. Smith v. Board of Supervisors*, 68 Wis. 502, 32 N.W. 228 (1887); *State ex rel. Smith v. Board of Supervisors*, 66 Wis. 199, 28 N.W. 140 (1886). See also *Pacific Nat'l Fire Ins. Co. v. T.V.A.*, 89 F. Supp. 978 (W.D. Va. 1950); *Folmar v. Brantley*, 238 Ala. 681, 193 So. 122 (1939); *Stuart v. Colorado E. R.R.*, 61 Colo. 58, 156 Pac. 152 (1916); *Posinski v. Chicago, M. St. P. & P. R.R.*, 376 Ill. 346, 33 N.E.2d 869 (1941); *People ex rel. Kochersperger v. Sass*, 171 Ill. 357, 49 N.E. 501 (1898); *State v. Owen*, 23 N.J. Misc. 123, 41 A.2d 809 (Sup. Ct. 1945); *Haycock v. Jannarone*, 99 N.J.L. 183, 122 Atl. 805 (Ct. Err. & App. 1923); *Wilson v. City of Cincinnati*, 172 Ohio St. 303, 175 N.E.2d 725 (1961); *Parrish v. Town of Yorkville*, 96 S.C. 24, 79 S.E. 635 (1913); *Garraux v. City Council*, 53 S.C. 575, 31 S.E. 597 (1898); *Haase v. City of Memphis*, 149 Tenn. 235, 259 S.W. 545 (1924); *State v. District Court*, 98 Utah 348, 78 P.2d 502 (1937); *Hardy v. Simpson*, 118 W.Va. 440, 190 S.E. 680 (1937); *Olen v. Waupaca County*, 238 Wis. 442, 300 N.W. 178 (1941); *cf. Wolfram v. State*, 246 Minn. 264, 74 N.W.2d 510 (1956).

61. 6 NICHOLS, EMINENT DOMAIN § 28.21, at 372 (3d ed. 1953).

granting mandamus in land-appropriation cases are necessarily holding that the duty is ministerial.⁶² As one court has put it:

The city had the discretion to acquire an airport or not to acquire it, to take this or that land or not to take it. It did not have the discretion to take land without paying for it. After the taking the duty to condemn became ministerial.⁶³

A public body is often vested with statutory power to institute a condemnation proceeding. Even though the appropriating body has the sole power to institute the proceeding, some jurisdictions have issued mandamus to enforce the statute in favor of the landowner.⁶⁴ The effect of the issuance of the writ is to give the landowner as well as the taking body the right to enforce the statute.

Since, historically, mandamus does not lie unless all other remedies fail,⁶⁵ the writ has often been denied in land appropriation cases because other remedies were available.⁶⁶ The Washington court in *State ex rel. Whitten v. City of Spokane*,⁶⁷ stated: "Having a plain, speedy and adequate remedy at law, this proceeding cannot be maintained, for it is a well established rule that mandamus will not lie where there is an adequate remedy at law."⁶⁸ Other courts, however, have granted mandamus even though another remedy is available.⁶⁹

62. *State v. Anderson*, 220 Minn. 139, 19 N.W.2d 70 (1945); *Brown v. Murphy*, 134 N.J.L. 318, 47 A.2d 595 (Sup. Ct. 1946); *Empire Trust Co. v. Board of Commerce & Nav.*, 124 N.J.L. 406, 11 A.2d 752 (Sup. Ct. 1940); *Bland v. City Council*, 203 S.C. 392, 27 S.E.2d 498 (1943); *Parrish v. Town of Yorkville*, 96 S.C. 24, 79 S.E. 635 (1913); *Gibson v. City Council*, 64 S.C. 455, 42 S.E. 206 (1902); *Hicks v. Anderson*, 182 Va. 195, 28 S.E.2d 629 (1944).

63. *Brown v. Murphy*, *supra* note 62, at 321, 47 A.2d at 597.

64. *State v. Owen*, 23 N.J. Misc. 123, 41 A.2d 809 (Sup. Ct. 1945); *Haycock v. Jannarone*, 99 N.J.L. 183, 122 Atl. 805 (Ct. Err. & App. 1923); *Bland v. City Council*, 203 S.C. 392, 27 S.E.2d 498 (1943); *Parrish v. Town of Yorkville*, 96 S.C. 24, 79 S.E. 635 (1913); *Garraux v. City Council*, 53 S.C. 575, 31 S.E. 597 (1898).

65. *Rex v. Wheeler*, Cun. 155, 94 Eng. Rep. 1123 (K.B. 1766); *Rex v. Barker*, 3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762).

66. See note 201, *supra*. See also *Colorado ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953); *Bryant v. State Highway Comm'n*, 342 S.W.2d 415 (Ark. 1961); *Atchison v. State Highway Comm'n*, 161 Kan. 661, 171 P.2d 287 (1946); *Brewitz v. City of St. Paul*, 256 Minn. 225, 99 N.W.2d. 456 (1956); *People ex rel. Melenbacker v. Harrison*, 123 App. Div. 914, 108 N.Y. Supp. 1144 (1908); *Farr v. Steele*, 128 S.C. 293, 121 S.E. 792 (1924); *Fritts v. Leech*, 201 Tenn. 18, 296 S.W.2d 834 (1956); *Phillips v. Marion County*, 166 Tenn. 83, 59 S.W.2d 507 (1933); *State ex rel. Whitten v. City of Spokane*, 92 Wash. 667, 159 Pac. 805 (1916).

67. 92 Wash. 667, 159 Pac. 805 (1916).

68. *Id.* at 668, 159 Pac. at 805.

69. *Folmar v. Brantley*, 238 Ala. 681, 193 So. 122 (1939); *Grunewald v. City of Chicago*, 371 Ill. 528, 21 N.E.2d 739 (1939); *cf. Pacific Nat'l Fire Ins. Co. v. T.V.A.*, 89 F. Supp. 978 (W.D. Va. 1950).

In these jurisdictions the landowner has a right to elect the remedy he thinks is best suited to his particular situation.

Mandamus was denied in *Colorado ex rel. Watrous v. District Court*,⁷⁰ by the use of rather unusual reasoning. Colorado sought and was granted a writ of prohibition to prohibit the District Court from granting mandamus to force the State Highway Commission to bring condemnation proceedings. The court held mandamus would not lie against the state. Under Colorado law, the state can not take land without compensation. Therefore, the court reasons, when land is taken by a state agency without compensating the landowner, the taking is unlawful and not the act of the state. The court's logic is somewhat unique and reminds one of the old adage that the king can do no wrong. The following quotation from the court's opinion provides a sample of the reasoning:

It follows that when a state agency enters upon land or injures land within the meaning of Section 15, Article II of the Colorado Constitution, without paying just compensation therefor, or without having commenced condemnation proceedings to ascertain the compensation due for the taking or injury, the act of the state agency is unauthorized and unlawful and is not the act of the State of Colorado.⁷¹

A *qualified* mandamus has been granted in one case. In *Haase v. City of Memphis*,⁷² the court held that it would issue mandamus to compel institution of proceedings if the city did not bring a condemnation suit within thirty days. This remedy is very similar to the qualified injunction previously discussed.⁷³

V. EJECTMENT

The landowner's suit in ejectment closely resembles the injunction in ultimate effect. In neither action is the landowner given compensation; the appropriating body is simply prohibited from maintaining possession. If the public is benefiting from a particular use of property, ejectment, like an injunction, would cause that use to discontinue with possible harm to the public. Although such relief is sometimes granted,⁷⁴ it is more often denied,⁷⁵ usually because of the pos-

70. 207 F.2d 50 (10th Cir. 1953).

71. *Id.* at 57.

72. 149 Tenn. 235, 259 S.W. 545 (1924).

73. See text accompanying notes 43-50 *supra*.

74. *Green v. City of Tacoma*, 51 Fed. 622 (C.C.W.D. Wash. 1892); *Mitchell v. Chicago, B. & Q. Ry.*, 265 Ill. 300, 106 N.E. 833 (1914); *Daniels v. Chicago & N.W. Ry.*, 35 Iowa 129 (1872); *Weyler v. Gibson*, 110 Md. 636, 73 Atl. 261 (Ct. App. 1909); *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W.2d 371 (1937); *Connellsville Gas Coal Co. v. Baltimore & O. R.R.*, 216 Pa. 309, 65 Atl. 669 (1907). See also *Stuart v. Colorado E. Ry.*, 61 Colo. 58, 156 Pac. 152 (1916); *Clark v.*

sible harmful effect upon the public welfare.⁷⁶ Ejectment also has been denied because a landowner has other remedies available.⁷⁷ Some states have an exclusive statutory remedy which prohibits an action in ejectment and all other forms of relief not expressly granted.⁷⁸ In a few jurisdictions, ejectment has been allowed even when there were other remedies available.⁷⁹

A small number of cases have either granted or said they were willing to grant a "qualified" ejectment.⁸⁰ The effect would be almost identical to that of a "qualified" injunction. It might be argued that any injunction or judgment in ejectment in these cases is qualified, because theoretically, after the relief is given, the taking body can

Wabash Ry., 132 Iowa 11, 109 N.W. 309 (1906); McGinnis v. Wabash Ry., 114 N.W. 1039 (Iowa 1908); Beetschen v. Shell Pipe Line Corp., 248 S.W.2d 66 (Mo. 1952); State *ex rel.* Roberts v. Eicher, 178 S.W. 171 (Mo. 1915); Menge v. Morris & E. Ry., 73 N.J. Eq. 177, 67 Atl. 1028 (Ch. 1907); Hyde v. Minnesota D. & P. Ry., 24 S.D. 386, 123 N.W. 849 (1909).

75. Cairo & Fulton R.R. v. Turner, 31 Ark. 494 (1876); Strickler v. Midland Ry., 125 Ind. 412, 25 N.E. 455 (1890); Louisville N.A. & C. Ry. v. Soltveddle, 116 Ind. 257, 19 N.E. 111 (1888); St. Louis & S.F. Ry. v. Yount, 67 Kan. 396, 73 Pac. 63 (1903); Thomson v. State Highway Comm'r, 10 N.J. Misc. 377, 161 Atl. 192 (Sup. Ct. 1932); Beasley v. Aberdeen & R.R., 147 N.C. 362, 61 S.E. 453 (1908); Saunders v. Memphis & R.S. Ry., 101 Tenn. 206, 47 S.W. 155 (1898); Carter v. Mayor of City of Chattanooga, 48 S.W. 117 (Tenn. Ct. App. 1897). See also Dunnebacke v. Detroit G.H. & M. Ry., 248 Mich. 450, 227 N.W. 811 (1929); Empire Trust Co. v. Board of Commerce & Nav., 124 N.J.L. 406, 11 A.2d 752 (Sup. Ct. 1940); McDowell v. City of Asheville, 112 N.C. 747, 17 S.E. 537 (1893); Belton v. Wateree Power Co., 123 S.C. 291, 115 S.E. 587 (1922); Cayce Land Co. v. Southern Ry., 111 S.C. 115, 96 S.E. 725 (1918); Knoxville Ry. & Light Co. v. O'Fallen, 130 Tenn. 270, 170 S.W. 55 (1914); Tennessee Coal, Iron & R.R. v. Paint Rock Flume & Transp. Co., 128 Tenn. 277, 160 S.E. 522 (1913).

76. Strickler v. Midland Ry., *supra* note 75; St. Louis & S.F. Ry. v. Yount, *supra* note 75; Empire Trust Co. v. Board of Commerce & Nav., *supra* note 75.

77. McKennon v. St. Louis, I.M. & S. Ry., 69 Ark. 104, 61 S.W. 383 (1901); Cairo & F. R.R. v. Turner, 31 Ark. 494 (1876); Beasley v. Aberdeen & R. R.R., 147 N.C. 362, 61 S.E. 453 (1908); Doty v. American Tel. & Tel. Co., 123 Tenn. 329, 130 S.W. 1053 (1910); Saunders v. Memphis & R.S. Ry., 101 Tenn. 206, 47 S.W. 155 (1898).

78. McKennon v. St. Louis I.M. & S. Ry., *supra* note 77; Cairo & F. R.R. v. Turner, *supra* note 77; Doty v. American Tel. & Tel. Co., *supra* note 77.

79. Mitchell v. Chicago, B. & Q. Ry., 265 Ill. 300, 106 N.E. 833 (1914); McGinnis v. Wabash R.R., 114 N.W. 1039 (Iowa 1908); Clark v. Wabash R.R., 132 Iowa 11, 109 N.W. 309 (1906); Daniels v. Chicago & N.W. Ry., 35 Iowa 129 (1872); Beetschen v. Shell Pipe Line Corp., 248 S.W.2d 66 (Mo. Ct. App. 1952); Menge v. Morris & E. R.R., 73 N.J. Eq. 177, 67 Atl. 1028 (Ch. 1907); Hyde v. Minnesota D. & P. Ry., 24 S.D. 386, 123 N.W. 849 (1909).

80. Stuart v. Colorado E. R.R., 61 Colo. 58, 156 Pac. 152 (1916); Weyler v. Gibson, 110 Md. 636, 73 Atl. 261 (Ct. App. 1909); Connellsville Gas Coal Co., v. Baltimore & O. R.R., 216 Pa. 309, 65 Atl. 669 (1907); Caruthers v. Peoples Natural Gas Co., 155 Pa. Super. 332, 38 A.2d 713 (1944).

condemn the property as it should have done in the first place. But there might be some question whether an *unqualified* injunction or ejection precluded the appropriating body from later condemning the property. The court that grants *qualified* relief definitely leaves the door open for the taking body to institute proper proceedings.

VI. TORT

When a landowner brings a suit to obtain monetary relief against a body taking his land, it is not always an easy matter to analyze the suit and determine whether it sounds in tort. Many of the cases cited within this section of the note as sounding in tort may not so appear to the reader. On the other hand, perhaps other cases should have been cited. The problem is caused to some extent by the modern tendency not to differentiate among civil actions.⁸¹ Outside observers are not alone in their confusion. Decisions and opinions indicate that the courts have the same difficulty.⁸² Some courts avoid the problem by simply awarding "common law" relief (whatever that may be).⁸³ Other courts appear to grant damages on a combined analysis of "just compensation" (whatever that may be) and tort.⁸⁴ Relief based

81. The following cases indicate the problem of analyzing cases: *Perkerson v. State Highway Bd.*, 56 Ga. App. 316, 192 S.E. 475 (1937), *rev'd on other grounds*, 185 Ga. 617, 196 S.E. 42 (1938); *Prickett v. Belvue Drainage Dist.*, 159 Kan. 136, 152 P.2d 870 (1944); *State Park Comm'n v. Wilder*, 260 Ky. 190, 84 S.W.2d 38 (Ct. App. 1935); *Bernard v. State Dept. of Pub. Works*, 127 So. 2d 774 (La. Ct. App. 1961); *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (Mo. Ct. App. 1935); *Summerford v. Board of Comm'rs*, 35 N.M. 374, 298 Pac. 410 (1931); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955); *Moore v. Carolina Power & Light Co.*, 163 N.C. 300, 79 S.E. 596 (1913); *Beck v. Lane County*, 141 Ore. 580, 18 P.2d 594 (1933); *Moseley v. Highway Dep't*, 236 S.C. 499, 115 S.E.2d 172 (1960); *Chick Springs Water Co. v. Highway Dep't*, 159 S.C. 481, 157 S.E. 842 (1931); *Cayce Land Co. v. Southern Ry.*, 111 S.C. 115, 96 S.E. 725 (1918); *Piercy v. Johnson City*, 130 Tenn. 231, 169 S.W. 765 (1914); *Frater v. Hamilton County*, 90 Tenn. 661, 19 S.W. 233 (1891); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919); *Great No. Ry. v. State*, 102 Wash. 348, 173 Pac. 40 (1918).

82. *Isham v. Board of Comm'rs*, 126 Kan. 6, 266 Pac. 655 (1928); *Harlan County v. Cole*, 218 Ky. 819, 292 S.W. 501 (1927); *Summerford v. Board of Comm'rs*, *supra* note 81; *Moore v. Carolina Power & Light Co.*, *supra* note 81; *Moseley v. Highway Dep't*, *supra* note 81.

83. *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (Mo. Ct. App. 1935); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Chick Springs Water Co. v. State Highway Dep't*, 159 S.C. 481, 157 S.E. 842 (1931); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919). See text accompanying notes 149-62 *infra*.

84. *Bernard v. State Dep't of Pub. Works*, 127 So. 2d 774 (La. Ct. App. 1961); *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955); *Sale v. State High-*

upon an action for "just compensation" includes many cases and is sufficiently different from tort to warrant its discussion in another category of remedies.⁸⁵

An action sounding in tort may appear to be the most logical remedy for a property owner. This is particularly true if it is the uncompensated *taking* of the land that is deemed the wrong.⁸⁶ If the taking is the basis of the suit, then it logically follows that permanent damages should be given for the tort. For most takings, trespass is the appropriate theory,⁸⁷ though nuisance seems an equally valid

way & Pub. Works Comm'n, *supra* note 83; *Frater v. Hamilton County*, 90 Tenn. 661, 19 S.W. 233 (1891); and see text accompanying notes 149-62 *infra*.

85. See text accompanying note 129 *infra*.

86. *Archer v. Board of Levee Inspectors*, 128 Fed. 125 (C.C.E.D. Ark. 1904); *McCullough v. City of Denver*, 39 Fed. 307 (C.C.D. Colo. 1889); *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232 (1948); *Hunter v. City of Mobile*, 244 Ala. 318, 13 So. 2d 656 (1943); *Hogge v. Drainage Dist. Number 7*, 181 Ark. 564, 26 S.W.2d 887 (1930); *Newberry v. Evans*, 97 Cal. App. 120, 275 Pac. 465 (1929); *Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737, 216 Pac. 66 (1923); *East Fla. Tel. Co. v. Seaboard Air Line Ry.*, 85 Fla. 373, 96 So. 95 (1923); *Grunewald v. City of Chicago*, 371 Ill. 528, 21 N.E.2d 739 (1939); *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Strickler v. Midland Ry.*, 125 Ind. 412, 25 N.E. 455 (1890); *Bernard v. State Dep't of Pub. Works*, 127 So. 2d 774 (La. Ct. App. 1961); *Adams v. Town of Ruston*, 9 La. App. 603, 121 So. 768 (1928); *Pratt v. Saline Valley Ry.*, 130 Mo. App. 175, 108 S.W. 1099 (1908); *Bridge v. City of Lincoln*, 138 Neb. 461, 293 N.W. 375 (1940); *Country of Douglas v. Taylor*, 50 Neb. 535, 70 N.W. 27 (1897); *Spencer v. Connecticut River Power Co.*, 78 N.H. 468, 101 Atl. 528 (1917); *Erie County v. Friedenber*, 96 Misc. 222, 159 N.Y. Supp. 913 (Sup. Ct. 1916); *Westphal v. City of New York*, 34 Misc. 684, 70 N.Y. Supp. 1021 (Sup. Ct. 1901); *McMahan v. Black Mountain Ry.*, 170 N.C. 456, 87 S.E. 237 (1915); *Beck v. Lane County*, 141 Ore. 580, 18 P.2d 594 (1933); *Kerns v. Couch*, 141 Ore. 147, 12 P.2d 1011 (1932); *Theiler v. Tillamook County*, 75 Ore. 214, 146 Pac. 823 (1915); *Cochran Coal Co. v. Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955); *Hardin v. City of Greenville*, 161 S.C. 53, 159 S.E. 465 (1931); *Farr v. Steele*, 128 S.C. 293, 121 S.E. 792 (1924); *Belton v. Wateree Power Co.*, 123 S.C. 291, 115 S.E. 587 (1922); *Cayce Land Co. v. Southern Ry.*, 111 S.C. 115, 96 S.E. 725 (1918); *Hyde v. Minnesota D. & P. Ry.*, 24 S.D. 386, 123 N.W. 849 (1909); *Tennessee Coal, Iron & R.R. v. Paint Rock Flume & Transp. Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *Saunders v. Memphis & R.S.Ry.*, 101 Tenn. 206, 47 S.W. 155 (1898); *Carter v. Mayor of City of Chattanooga*, 48 S.W. 117 (Tenn. Ch. 1897); *Henderson v. City of Longview*, 111 S.W.2d 740 (Tex. Civ. App. 1937); *Peterson v. Bean*, 22 Utah 43, 61 Pac. 213 (1900); *Griswold v. Town School Dis't*, 117 Vt. 224, 88 A.2d 829 (1952); *Nelson County v. Loving*, 126 Va. 283, 101 S.E. 406 (1919); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919); *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918).

87. *Newberry v. Evans*, *supra* note 86; *Erie County v. Friedenber*, *supra* note 86; *Theiler v. Tillamook County*, *supra* note 86; *Cochran Coal Co. v. Municipal Management Co.*, *supra* note 86; *Belton v. Wateree Power Co.*, *supra* note 86; *Peterson v. Bean*, *supra* note 86.

basis for an action.⁸⁸ Many courts adopt either the trespass or nuisance theory and award damages for a wrongful taking.⁸⁹ When the landowner has received damages, he has in effect ratified the taking, and the appropriating body is then allowed to retain use and possession of the property.⁹⁰ In some cases, although relief in tort is not in fact granted, courts have indicated that under proper circumstances an action sounding in tort could be maintained.⁹¹

88. See *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (Mo. Ct. App. 1935).

89. *Archer v. Board of Levee Inspectors*, 128 Fed. 125 (C.C.E.D. Ark. 1904); *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232 (1948); *Hogge v. Drainage Dist. Number 7*, 181 Ark. 564, 26 S.W.2d 887 (1930); *Newberry v. Evans*, 97 Cal. App. 120, 275 Pac. 465 (1929); *Pratt v. Saline Valley Ry.*, 130 Mo. App. 175, 108 S.W. 1099 (1908); *Erie County v. Friedenber*, 96 Misc. 222, 159 N.Y. Supp. 913 (Sup. Ct. 1916); *Westphal v. City of New York*, 34 Misc. 684, 70 N.Y. Supp. 1021 (Sup. Ct. 1901); *McMahan v. Black Mountain Ry.*, 170 N.C. 456, 87 S.E. 237 (1915); *Theiler v. Tillamook County*, 75 Ore. 214, 146 Pac. 828 (1915); *Cochran Coal Co. v. Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955); *Hardin v. City of Greenville*, 161 S.C. 53, 159 S.E. 465 (1931); *Peterson v. Bean*, 22 Utah 43, 61 Pac. 213 (1900); *Griswold v. Town School Dis't*, 117 Vt. 224, 88 A.2d 829 (1952).

90. *Newberry v. Evans*, *supra* note 89.

91. *Snowden v. Fort Lyon Canal Co.*, 238 Fed. 495 (8th Cir. 1916); *Chilcutt v. United States*, 64 F. Supp. 38 (E.D. Ky. 1946); *McCullough v. City of Denver*, 39 Fed. 307 (C.C.D. Colo. 1889); *Hunter v. City of Mobile*, 244 Ala. 318, 13 So. 2d 656 (1943); *Cannon v. Felsenthal*, 180 Ark. 1075, 24 S.W.2d 856 (1930); *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S.W. 910 (1913); *Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737, 216 Pac. 66 (1923); *East Fla. Tel. Co. v. Seaboard Air Line Ry.*, 85 Fla. 378, 96 So. 95 (1923); *Grunewald v. City of Chicago*, 371 Ill. 528, 21 N.E.2d 739 (1939); *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Strickler v. Midland Ry.*, 125 Ind. 412, 25 N.E. 455 (1890); *Clark v. Wabash R.R.*, 132 Iowa 11, 109 N.W. 309 (1906); *Bushart v. County of Fulton*, 183 Ky. 471, 209 S.W. 499 (1919); *Bernard v. State Dep't of Pub. Works*, 127 So. 2d 774 (La. Ct. App. 1961); *Adams v. Town of Ruston*, 9 La. App. 603, 121 So. 768 (1928); *Preston v. City of Newton*, 213 Mass. 483, 100 N.E. 641 (1913); *Thompson v. City of Winona*, 96 Miss. 591, 51 So. 129 (1910); *Beetschen v. Shell Pipe Line Corp.*, 248 S.W.2d 66 (Mo. Ct. App. 1952); *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (Mo. Ct. App. 1935); *Bridge v. City of Lincoln*, 138 Neb. 461, 293 N.W. 375 (1940); *Spencer v. Connecticut River Power Co.*, 78 N.H. 468, 101 Atl. 528 (1917); *Blackwell, Enid & S.W. Ry. v. Bebout*, 19 Okla. 63, 91 Pac. 877 (1907); *Beck v. Lane County*, 141 Ore. 580, 18 P.2d 594 (1933); *Kerns v. Couch*, 141 Ore. 147, 12 P.2d 1011 (1932); *Moseley v. Highway Dep't*, 236 S.C. 499, 115 S.E.2d 172 (1960); *Farr v. Steele*, 128 S.C. 293, 121 S.E. 792 (1924); *Belton v. Wateree Power Co.*, 123 S.C. 291, 115 S.E. 587 (1922); *Cayce Land Co. v. Southern Ry.*, 111 S.C. 115, 96 S.E. 725 (1918); *Hyde v. Minnesota, D. & P. Ry.*, 24 S.D. 386, 123 N.W. 849 (1909); *Tennessee Coal, Iron & R.R. v. Paint Rock Flume & Transp. Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *Saunders v. Memphis & R.S. Ry.*, 101 Tenn. 206, 47 S.W. 155 (1898); *Frater v. Hamilton County*, 90 Tenn. 661, 19 S.W. 233 (1891); *Carter v. Mayor of City of Chattanooga*, 48 S.W. 117 (Tenn. Ch. App. 1897); *Kahn v. City of Houston*, 121 Tex. 293, 48 S.W.2d

The tort theory of recovery often has been held to be inappropriate.⁹² In many cases the wrongful act is held to be the failure to compensate rather than the taking itself,⁹³ and courts in these cases

595 (1932); *Henderson v. City of Longview*, 111 S.W.2d 740 (Tex. Civ. App. 1937); *Barboglio v. Gibson*, 61 Utah 314, 213 Pac. 385 (1923); *Salt Lake Inv. Co. v. Oregon Short Line R.R.*, 46 Utah 203, 148 Pac. 439 (1914); *Nelson County v. Loving*, 126 Va. 283, 101 S.E. 406 (1919); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919); *Soko v. Department of Labor and Indus.*, 181 Wash. 153, 45 P.2d 30 (1935); *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918); *State ex rel. Whitten v. City of Spokane*, 92 Wash. 667, 159 Pac. 805 (1916).

92. *Klebe v. United States*, 263 U.S. 188 (1923); *Pacific Nat'l Fire Ins. Co. v. T.V.A.*, 89 F. Supp. 978 (W.D. Va. 1950); *State v. Colorado Postal Tel.-Cable Co.*, 104 Colo. 436, 91 P.2d 481 (1939); *Brown v. Davis County*, 196 Iowa 1341, 195 N.W. 363 (1923); *Isham v. Board of Comm'rs*, 126 Kan. 6, 266 Pac. 655 (1928); *City of Hazard v. Eversole*, 237 Ky. 242, 35 S.W.2d 313 (1931); *Glickman v. Commonwealth*, 244 Mass. 148, 138 N.E. 252 (1923); *Haycock v. Jannarone*, 99 N.J.L. 183, 122 Atl. 805 (Ct. Err. & App. 1923); *Moore v. Clark*, 235 N.C. 364, 70 S.E.2d 182 (1952); *McKinney v. State Highway Comm'n*, 192 N.C. 670, 135 S.E. 772 (1926); *Mayer v. Studer & Manion Co.*, 66 N.D. 190, 262 N.W. 925 (1935); *Kunkle v. Borough of Ford City*, 305 Pa. 416, 158 Atl. 159 (1931); *Garraux v. City Council*, 53 S.C. 575, 31 S.E. 597 (1898); *Phillips v. Marion County*, 166 Tenn. 83, 59 S.W.2d 507 (1933); *Bexar Metropolitan Water Dist. v. Kuntscher*, 274 S.W.2d 121 (Tex. Civ. App. 1954); *Benka v. Consolidated Water Power Co.*, 198 Wis. 472, 224 N.W. 718 (1929).

See 28 U.S.C. § 1491 (1948) originally enacted as the TUCKER ACT, 24 STAT. 505 (1887). See also *Connell v. Algonquin Gas Transmission Co.*, 174 F. Supp. 453 (D.R.I. 1959); *Coates v. United States*, 117 Ct. Cl. 795, 93 F. Supp. 637 (1950); *Merriam v. United States*, 29 Ct. Cl. 250 (1894); *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943); *Holt v. County of Cook*, 284 Ill. App. 48, 1 N.E.2d 264 (1936); *Prickett v. Belvue Drainage Dist.*, 159 Kan. 136, 152 P.2d 870 (1944); *State Highway Comm'n v. Puskarich*, 148 Kan. 388, 83 P.2d 132 (1938); *Webb v. Board of Comm'rs*, 127 Kan. 547, 274 Pac. 249 (1929); *Harlan County v. Cole*, 218 Ky. 819, 292 S.W. 501 (1927); *Turner v. Missouri Pac. Ry.*, 130 Mo. App. 535, 109 S.W. 101 (1908); *Thomson v. State Highway Comm'n*, 10 N.J. Misc. 877, 161 Atl. 192 (Sup. Ct. 1932); *Brown v. Murphy*, 136 N.J.L. 183, 54 A.2d 764 (Ct. Err. & App. 1947); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955); *Beasley v. Aberdeen & Rockfish R.R.*, 147 N.C. 362, 61 S.E. 453 (1908); *Jacobson v. State*, 68 N.D. 259, 278 N.W. 652 (1938); *City of Okla. v. Daly*, 316 P.2d 129 (Okla. 1957); *Oklahoma City v. Wells*, 185 Okla. 369, 91 P.2d 1077 (1939); *Parish v. Town of Yorkville*, 96 S.C. 24, 79 S.E. 635 (1913); *State v. Malone*, 168 S.W.2d 292 (Tex. Civ. App. 1943); *City of Jasper v. Brown*, 39 S.W.2d 112 (Tex. Civ. App. 1931); *Great No. Ry. v. State*, 102 Wash. 348, 173 Pac. 40 (1918); *Lambert v. County Court*, 103 W. Va. 37, 136 S.E. 507 (1927); *Cronin v. Janesville Traction Co.*, 163 Wis. 436, 158 N.W. 254 (1916).

93. *Coates v. United States*, *supra* note 92; *Merriam v. United States*, *supra* note 92; *Bacich v. Board of Control*, *supra* note 92; *State Highway Comm'n v. Puskarich*, *supra* note 92; *Webb v. Board of Comm'rs*, *supra* note 92; *City of Hazard v. Eversole*, *supra* note 92; *Turner v. Missouri Pac. Ry.*, *supra* note 92; *Eller v. Board of Educ.*, *supra* note 92; *Moore v. Clark*, *supra* note 92; *Jacobson v.*

stress that the landowner should seek compensation rather than damages. Since the appropriating body has the power of eminent domain and presumably has taken the land without malice and for the good of the public, the only wrongful act is the failure to compensate. The landowner's remedy is therefore logically not in tort, but rather in an action to recover compensation.

Tort relief is often denied for other than theoretical reasons. When the landowner has a statutory remedy, courts often hold that the relief in tort is excluded.⁹⁴ The general rule that governmental entities are immune from suits sounding in tort⁹⁵ is followed in many of the land appropriation cases.⁹⁶ However, when property is taken without compensation, many jurisdictions will not allow the defense of governmental immunity.⁹⁷ Constitutional provisions that prohibit

State, *supra* note 92; Mayer v. Studer & Manion Co., *supra* note 92; City of Okla. City v. Daly, *supra* note 92; Parish v. Town of Yorkville, *supra* note 92; State v. Malone, *supra* note 92; Great No. Ry. v. State, *supra* note 92; Cronin v. Janesville Traction Co., *supra* note 92; Kuhl v. Chicago N.W. Ry., 101 Wis. 42, 77 N.W. 155 (1898).

94. Connell v. Algonquin Gas Transmission Co., 174 F. Supp. 453 (D.R.I. 1959); Preston v. City of Newton, 213 Mass. 483, 100 N.E. 641 (1913); Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952); McKinney v. State Highway Comm'n, 192 N.C. 670, 135 S.E. 772 (1926); Beasley v. Aberdeen & Rockfish R.R., 147 N.C. 362, 61 S.E. 453 (1908); Kunkle v. Borough of Ford City, 305 Pa. 416, 158 Atl. 159 (1931); Garraux v. City Council, 53 S.C. 575, 31 S.E. 597 (1898); Benka v. Consol. Water Power Co., 198 Wis. 472, 224 N.W. 718 (1929); Cronin v. Janesville Traction Co., 163 Wis. 436, 158 N.W. 254 (1916). *Contra*, Pratt v. Saline Valley Ry., 130 Mo. App. 175, 108 S.W. 1099 (1908); McMahan v. Black Mountain Ry., 170 N.C. 456, 87 S.E. 237 (1915); Cochran Coal Co. v. Municipal Management Co., 380 Pa. 397, 110 A.2d 345 (1955).

95. 52 AM. JUR. *Torts* § 100 (1944).

96. Colorado *ex rel.* Watrous v. District Court, 207 F.2d 50 (10th Cir. 1953); Bryant v. State Highway Comm'n, 342 S.W.2d 415 (Ark. 1961); State v. Colorado Postal Tel.-Cable Co., 104 Colo. 436, 91 P.2d 481 (1939); Holt v. County of Cook, 284 Ill. App. 48, 1 N.E.2d 264 (1936); Brown v. Davis County, 196 Iowa 1341, 195 N.W. 363 (1923); Isham v. Board of Comm'rs, 126 Kan. 6, 266 Pac. 655 (1928); Mayer v. Studer & Manion Co., 66 N.D. 190, 262 N.W. 925 (1935); Parish v. Town of Yorkville, 96 S.C. 24, 79 S.E. 635 (1913); Phillips v. Marion County, 166 Tenn. 83, 59 S.W.2d 507 (1933); Bexar Metropolitan Water Dist. v. Kuntscher, 274 S.W.2d 121 (Tex. Civ. App. 1954); Lambert v. McDowell County Court, 103 W. Va. 37, 136 S.E. 507 (1927).

97. Hunter v. City of Mobile, 244 Ala. 318, 13 So. 2d 656 (1943); Hogge v. Drainage Dist. Number 7, 181 Ark. 564, 26 S.W.2d 887 (1930); Perkerson v. State Highway Bd., 56 Ga. App. 316, 192 S.E. 475 (1937), *rev'd on other grounds*, 185 Ga. 617, 196 S.E. 42 (1938); Douglas County v. Taylor, 50 Neb. 535, 70 N.W. 27 (1897); County of Erie v. Friedenbergs, 96 Misc. 222, 159 N.Y. Supp. 913 (Sup. Ct. 1916); Theiler v. Tillamook County, 75 Ore. 214, 146 Pac. 828 (1915); Cochran Coal Co. v. Municipal Management Co., 380 Pa. 397, 110 A.2d 345 (1955); Moseley v. Highway Dep't, 236 S.C. 499, 115 S.E.2d 172 (1960); Chick Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1930); Griswold v.

the taking of property without compensation can also serve as a basis for a waiver of immunity.⁹⁸

Most actions against the federal government for property taken without compensation are founded upon the Tucker Act.⁹⁹ Such claims are based either upon a constitutional right or an implied contract.¹⁰⁰ In *Merriam v. United States*,¹⁰¹ the court held that a contract can be implied whenever the government acknowledges either explicitly or tacitly that it is taking private property without claim of title. Since the United States can take land under its inherent power of eminent domain,¹⁰² the court reasoned that there had been no wrongful taking, and therefore no tort. Some fifty-four years later, in a fact situation almost identical to the *Merriam* case (erection of dam by government caused flooding of private property), the court held that the action did sound in tort,¹⁰³ and granted relief under the Tucker Act even though the Act excluded relief for actions in tort,¹⁰⁴ on the ground that the claim was based upon the constitution. However, most cases against the government are based upon contract rather than tort.¹⁰⁵

VII. IMPLIED CONTRACT¹⁰⁶

A form of relief used in a few jurisdictions is based upon contract. There is, of course, no express contract when an appropriating body takes property without compensating the owner. However, some courts imply a contract on the basis of the constitutional¹⁰⁷ or statu-

Town School Dist. 117 Vt. 224, 88 A.2d 829 (1952); *State ex rel. Slade v. Jones*, 182 Wash. 94, 45 P.2d 30 (1935).

98. *Hunter v. City of Mobile*, *supra* note 97; *Hogge v. Drainage Dist. Number 7*, *supra* note 97; *Perkerson v. State Highway Bd.*, *supra* note 97; *Douglas County v. Taylor*, 50 Neb. 535, 70 N.W. 27 (1897); *Moseley v. Highway Dep't*, *supra* note 97; *Chick Springs Water Co. v. State Highway Dep't*, *supra* note 97; *Griswold v. Town School Dist.*, *supra* note 97.

99. 28 U.S.C. § 1491 (1948).

100. See text accompanying notes 163-81 *infra*.

101. 29 Ct. Cl. 250 (1894).

102. *Id.* at 257. See also *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *United States v. 8,557.16 Acres of Land*, 11 F. Supp. 311 (N.D. W.Va. 1935).

103. *Cotton Land Co. v. United States*, 109 Ct. Cl. 816 (1948).

104. 28 U.S.C. § 1491 (1948).

105. See text accompanying notes 163-81 *infra*.

106. The term implied contract as used in this note refers to an implied in law rather than an implied in fact contract.

107. *Hunter v. City of Mobile*, 244 Ala. 318, 13 So. 2d 656 (1943); *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941); *County of Hillsborough v. Kensett*, 107 Fla. 237, 144 So. 393 (1932); *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070 (1909); *Mayer v. Studer & Manion Co.*, 66 N.D. 190, 262 N.W. 925 (1935); *City of Okla. City v. Daly*, 316 P.2d 129 (Okla. 1957); *Kuhl v. Chicago & N.W. Ry.*, 101 Wis. 42, 77 N.W. 155 (1898).

tory¹⁰⁸ requirements of paying just compensation for expropriated property. In an action sounding in contract, the failure to compensate is the wrong rather than the taking itself. The emphasis the implied contract theory places on the failure to compensate is evident in *Jacobson v. State*,¹⁰⁹ where the court stated:

Plaintiff does not claim the defendants had no right to change the grade. When they did so the result cannot be said to be a trespass, even though injury is done to the property. It becomes, if anything, a taking or appropriation of property for public use, and the State or a municipality, in taking private property for public use, acts in its sovereign capacity, and not as a trespasser. What is recovered is "compensation," which presupposes a contract, expressed or implied. It is not damages in the strict sense of the word.¹¹⁰

Federal decisions which will be shown in greater detail later in this note, rely heavily on the implied contract theory.¹¹¹ Only a few state jurisdictions have used it as a basis for allowing recovery.¹¹² It has the advantage over the tort theories in that in some states it circumvents the state's immunity from suit for torts.¹¹³ The extent to

108. *Boise Valley Constr. Co. v. Kroeger*, *supra* note 107; *Mayer v. Studer & Manion Co.*, *supra* note 107; *Kuhl v. Chicago & N.W. Ry.*, *supra* note 107.

109. 68 N.D. 259, 278 N.W. 652 (1938).

110. *Id.* at 262, 278 N.W. at 653.

111. See text accompanying notes 163-81 *infra*.

112. *State Road Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941); *Housing Authority v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954); *Dugger v. State Highway Comm'n*, 185 Kan. 317, 342 P.2d 186 (1959); *Webb v. Board of County Comm'rs*, 127 Kan. 547, 274 Pac. 249 (1929); *Jacobson v. State*, 68 N.D. 259, 278 N.W. 652 (1938); *City of Okla. City v. Daly*, 316 P.2d 129 (Okla. 1957); *Kerns v. Couch*, 141 Ore. 147, 12 P.2d 1011 (1932). See also *Hunter v. City of Mobile*, 244 Ala. 318, 13 So. 2d 656 (1943); *Stanton v. Morgan*, 127 Fla. 34, 172 So. 485 (1937); *County of Hillsborough v. Kensett*, 107 Fla. 237, 144 So. 393 (1932); *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070 (1909); *Holt v. County of Cook*, 284 Ill. App. 48, 1 N.E.2d 264 (1936); *Atchison v. State Highway Comm'n*, 161 Kan. 661, 171 P.2d 287 (1946); *State Highway Comm'n v. Puskarich*, 148 Kan. 388, 83 P.2d 132 (1938); *Mayer v. Studer & Manion Co.*, 66 N.D. 190, 262 N.W. 925 (1935); *Nelson County v. Loving*, 126 Va. 283, 101 S.E. 406 (1919); *Peters v. Chicago & N.W. Ry.*, 165 Wis. 529, 162 N.W. 916 (1917); *Pabst Brewing Co. v. City of Milwaukee*, 157 Wis. 158, 147 N.W. 46 (1914); *Kuhl v. Chicago & N.W. Ry.*, 101 Wis. 42, 77 N.W. 155 (1898). See *contra*, other courts that seem to deny contract as a theory for granting relief, *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955) and cases cited under inverse condemnation. See 2 NICHOLS, EMINENT DOMAIN § 468, at 1237 (2d ed. 1917) where he indicates by the following quote that implied contract will not lie. "A common law action of *indebitatus assumpsit* for the value of the land taken will not lie, for there is no implied contract to pay for it except in the manner provided by statute."

113. *Holt v. County of Cook*, *supra* note 112; *Webb v. Board of County Comm'rs*, *supra* note 112; *Mayer v. Studer & Manion Co.*, *supra* note 112. See *contra*, *State v. Colorado Postal Tel.-Cable Co.*, 104 Colo. 436, 91 P.2d 481 (1939).

which this theory influences the courts may be greater than appears on the face of the reports, for there is an unjust enrichment in the land appropriation cases. It may well be that the notion of an implied contract underlies the theory of many courts that say they are giving common law relief.¹¹⁴

VIII. INVERSE CONDEMNATION

A proceeding in inverse condemnation, or reverse condemnation as it is sometimes called, bears no theoretical similarity to any of the common law actions. It is not based on contract¹¹⁵ or tort.¹¹⁶ Since a condemnation proceeding is not technically a civil action and is not a suit at law or in equity, it logically follows that an inverse condemnation suit is also not a civil action and not a suit at law or in equity. An inverse condemnation suit like a normal condemnation suit is a special proceeding.

The inverse condemnation procedure is a basis for relief in many jurisdictions.¹¹⁷ The theory is that since the taking body has failed to

114. See text accompanying notes 149-62 *infra*.

115. *State v. Leeson*, 84 Ariz. 44, 323 P.2d 692 (1958); *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1944); *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950); *Ferrell v. State Highway Comm'n*, 252 N.C. 830, 115 S.E.2d 34 (1960); *Oklahoma City v. Wells*, 185 Okla. 369, 91 P.2d 1077 (1939); *Cronin v. Janesville Traction Co.*, 163 Wis. 436, 158 N.W. 254 (1916).

116. *State v. Leeson*, *supra* note 115; *Bacich v. Board of Control*, *supra* note 115; *Ferrell v. State Highway Comm'n*, *supra* note 115. See *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942).

117. *Pima County v. Bilby*, 87 Ariz. 366, 351 P.2d 647 (1960); *State v. Leeson*, *supra* note 115; *Bellman v. County of Contra Costa*, 54 Cal. 2d 363, 353 P.2d 300 (1960); *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1 (1955); *Bacich v. Board of Control*, *supra* note 115; *Rose v. State*, *supra* note 116; *Podesta v. Linden Irr. Dist.*, 141 Cal. App. 2d 38, 296 P.2d 401 (1956); *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Vandalia Coal Co. v. Indianapolis & L. Ry.*, 168 Ind. 144, 79 N.E. 1082 (1907); *Keck v. Hafley*, 237 S.W.2d 527 (Ky. 1951); *Leslie County v. Davidson*, 270 Ky. 705, 110 S.W.2d 652 (1937); *Moore v. Clark*, 235 N.C. 364, 70 S.E.2d 182 (1952); *Incorporated Town of Pittsburgh v. Cochran*, 200 Okla. 497, 197 P.2d 287 (1948); *Oklahoma City v. Local Fed. Sav. & Loan Ass'n*, 192 Okla. 188, 134 P.2d 565 (1943); *Oklahoma City v. Wells*, 184 Okla. 369, 91 P.2d 1077 (1939); *Konrad v. State*, 4 Wis. 2d 532, 91 N.W.2d 203 (1958); *Peterson v. Lake Superior Dist. Power Co.*, 255 Wis. 584, 39 N.W.2d 706 (1949). See also cases in which inverse condemnation is indicated as valid relief. *Maricopa County Municipal Water Conser. Dist. Number 1 v. Warford*, 69 Ariz. 1, 206 P.2d 1168 (1949); *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17 (1949); *City of Los Angeles v. City of Glendale*, 23 Cal. 2d 68, 142 P.2d 289 (1943); *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P.2d 681 (1938); *Churchill v. Kellstrom*, 58 Cal. App. 2d 84, 136 P.2d 602 (1943); *Strickler v. Midland Ry.*, 125 Ind. 412, 25 N.E. 455 (1890); *McGinnis v. Wabash R.R.*, 114 N.W. 1039 (Iowa 1908); *Clark v. Wabash R.R.*, 132 Iowa 11, 109 N.W. 309 (1906); *V.T.C. Lines v. City of Harlan*, 313 S.W.2d 573 (Ky. 1957); *O'Reilly v.*

institute condemnation proceedings, an action that has the effect of instituting the proceedings is just. The result is that the landowner receives the same amount of compensation as he would have received if the appropriating body had instituted the proceedings. Although inverse condemnation has the same effect as mandamus,¹¹⁸ the use of it eliminates the need for the extraordinary writ.

Several jurisdictions have statutes setting forth the right of inverse condemnation.¹¹⁹ In some states the statutes grant this right generally.¹²⁰ In these jurisdictions the uncompensated property owner may

New York Elevated R.R., 148 N.Y. 347, 42 N.E. 1063 (1896); *Ferrell v. State Highway Comm'n*, *supra* note 115; *Williams v. State Highway Comm'n*, 252 N.C. 772, 114 S.E.2d 782 (1960); *Proctor v. State Highway & Pub. Works Comm'n*, 280 N.C. 687, 55 S.E.2d 479 (1949); *Long v. City of Randleman*, 199 N.C. 344, 154 S.E. 317 (1930); *McKinney v. State Highway Comm'n*, 192 N.C. 670, 135 S.E. 772 (1926); *Bost v. Cabarrus County*, 152 N.C. 531, 67 S.E. 1066 (1910); *Gibbs v. Oklahoma Turnpike Authority*, 285 P.2d 190 (Okla. 1955); *Morton v. Okmulgee Producers & Mfrs. Gas Co.*, 207 Okla. 201, 248 P.2d 1028 (1952); *Blackwell, E. & S.W. Ry. v. Bebout*, 19 Okla. 63, 91 Pac. 877 (1907); *State Highway Comm'n v. Stumbo*, 222 Ore. 62, 352 P.2d 478 (1960); *Coos Bay Oyster Co-op. v. State Highway Comm'n*, 219 Ore. 588, 348 P.2d 39 (1959); *Fritts v. Leech*, 201 Tenn. 18, 296 S.W.2d 834 (1956); *Knoxville Ry. & Light Co. v. O'Fallen*, 130 Tenn. 270, 170 S.W. 55 (1914); *Saunders v. Memphis & R.S. Ry.*, 101 Tenn. 206, 47 S.W. 155 (1898); *Peterson v. Wisconsin River Power Co.*, 264 Wis. 84, 58 N.W.2d 287 (1953); *Olen v. Waupaca County*, 238 Wis. 442, 300 N.W. 178 (1941); *Benka v. Consolidated Water Power Co.*, 198 Wis. 472, 224 N.W. 718 (1929); *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928); *Cronin v. Janesville Traction Co.*, 163 Wis. 436, 158 N.W. 254 (1916). Other cases, although not termed inverse by the courts, are in their nature inverse and have the same effect. *Stuart v. Colorado E.R.R.*, 61 Colo. 58, 156 Pac. 152 (1916); *Kentucky & West Va. Power Co. v. Vanhooose*, 295 Ky. 339, 174 S.W.2d 538 (1943); *City of Hazard v. Eversole*, 237 Ky. 242, 35 S.W.2d 313 (1931); *Harlan County v. Cole*, 218 Ky. 819, 292 S.W. 501 (1927); *McDonald v. Powell County*, 199 Ky. 300, 250 S.W. 1007 (1923); *Klein v. Commonwealth*, 318 Mass. 592, 63 N.E.2d 360 (1945); *Flint v. Town of Wilmington*, 310 Mass. 66, 36 N.E.2d 905 (1941); *Broderick v. Department of Mental Diseases*, 263 Mass. 124, 160 N.E. 404 (1928); *Hafey v. Commonwealth*, 189 Mass. 540, 76 N.E. 208 (1905); *State v. Messenger*, 27 Minn. 119, 6 N.W. 457 (1880); *Lewis v. City of Potosi*, 317 S.W.2d 623, (Mo. Ct. App. 1958); *Richardson v. Board of Mississippi Levee Comm'rs*, 77 Miss. 518, 26 So. 963 (1899); *Jewell v. City of Rochester*, 68 N.H. 603, 44 Atl. 134 (1895); *Lucas v. Carney*, 167 Ohio St. 416, 149 N.E.2d 238 (1958); *Frater v. Hamilton County*, 90 Tenn. 661, 19 S.W. 233 (1891); *State ex rel. Smith v. Board of Supervisors*, 68 Wis. 502, 32 N.E. 228 (1887).

118. See text accompanying note 60-73 *supra*.

119. No attempt has been made to collect special statutes.

120. Wisconsin has an inverse statute which, although not necessarily typical, will be cited in part. WISC. STAT. ANN. § 32.10 (Supp. 1961) provides:

Whenever any property has been occupied by a body possessing the power of condemnation but where such body has not exercised said power, the owner, if he desires to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situ-

institute proceedings under the state statute whenever the appropriating body fails to do so if his property is taken without notice or without his consent. Under such statutes, many cases hold that other forms of relief are excluded.¹²¹ Some jurisdictions allow inverse proceedings only against private corporations.¹²²

The theory of awarding compensation in an action of inverse condemnation is applied even in some states that do not have applicable statutes.¹²³ California has consistently followed the policy of granting inverse relief.¹²⁴ In *Bacich v. Board of Control*¹²⁵ the court held:

ated asking that such proceedings be commenced. . . . [T]he matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the board, commission or corporation as defendant.

See the following statutes which also provide for inverse relief. IND. ANN. STAT. § 3-1711 (1933); KAN. GEN. STAT. ANN. § 66-56 (1949); N. M. STAT. ANN. § 22-9-22 (1953); N.C. GEN. STAT. § 40-12 (1950), N.C. GEN. STAT. § 136-19 (1958); OKLA. STAT. tit. 66, § 57 (1949); TENN. CODE ANN. § 23-1423 (1956). Even though Oklahoma has a statute setting forth the inverse procedure, the court has stated that the statute does not apply to cases of indirect takings. See *State ex rel. Dep't of Highways v. Keen*, 354 P.2d 396 (Okla. 1960).

121. *Ferrell v. State Highway Comm'n*, 252 N.C. 830, 115 S.E.2d 34 (1960); *Williams v. State Highway Comm'n*, 252 N.C. 772, 114 S.E.2d 782 (1960); *Moore v. Clark*, 235 N.C. 364, 70 S.E.2d 182 (1952); *Long v. City of Randleman*, 199 N.C. 344, 154 S.E. 317 (1930); *McKinney v. State Highway Comm'n*, 192 N.C. 670, 135 S.E. 772 (1926); *Bost v. Cabarrus County*, 152 N.C. 531, 67 S.E. 1066 (1910); *Morton v. Okmulgee Producers & Mfrs. Gas Co.*, 207 Okla. 201, 248 P.2d 1028 (1952); *Oklahoma City v. Wells*, 185 Okla. 369, 91 P.2d 1077 (1939); *Peterson v. Lake Superior Dist. Power Co.*, 255 Wis. 584, 39 N.W.2d 706 (1949); *Benka v. Consolidated Water Power Co.*, 198 Wis. 472, 224 N.W. 718 (1929); *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928). See also *Connell v. Algonquin Gas Transmission Co.*, 174 F. Supp. 453 (D.R.I. 1959); *Cairo & F.R.R. v. Turner*, 31 Ark. 494 (1876); *Davis v. East Contra Costa Irr. Dist.*, 19 Cal. 2d 140, 119 P.2d 727 (1941); *Powers Farms, Inc. v. Consolidated Irr. Dist.*, 110 P.2d 112 (Cal. Dist. Ct. App. 1941); *Klein v. Commonwealth*, 318 Mass. 592, 63 N.E.2d 360 (1945); *Kunkle v. Borough of Ford City*, 305 Pa. 416, 158 Atl. 159 (1931); *Doty v. American Tel. & Tel. Co.*, 123 Tenn. 329, 130 S.W. 1053 (1910). *Contra*, *Housing Authority v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954); *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Strickler v. Midland Ry.*, 125 Ind. 412, 25 N.E. 455 (1890); *Blackwell, E. & S. Ry. v. Bebout*, 19 Okla. 63, 91 Pac. 877 (1907).

122. ARK. STAT. § 35-101 (1947); OHIO REV. CODE ANN. § 2709.39 (Baldwin 1961).

123. *Pima County v. Bilby*, 87 Ariz. 366, 351 P.2d 647 (1960); *State v. Leeson*, 84 Ariz. 44, 323 P.2d 692 (1958); *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950); *Leslie County v. Davidson*, 270 Ky. 705, 110 S.W.2d 652 (1937); *McDonald v. Powell County*, 199 Ky. 300, 250 S.W. 1007 (1923); *Lucas v. Carney*, 167 Ohio St. 416, 149 N.E.2d 238 (1958). See also *Maricopa County Municipal Water Conservation Dist. Number 1 v. Warford*, 69 Ariz. 1, 206 P.2d 1168 (1949); *V.T.C. Lines, Inc. v. City of Harlan*, 313 S.W.2d 573 (Ky. 1957); *O'Reilly v. New York Elevated R.R.*, 148 N.Y. 347, 42 N.E. 1063 (1896); *State Highway Comm'n v. Stumbo*, 222 Ore. 62, 352 P.2d 478 (1960); *Coos Bay Oyster Co-op. v. State Highway Comm'n*, 219 Ore. 588, 348 P.2d 39 (1959).

The claim here involved is one based upon the liability incurred when the State exercises its power of eminent domain without pursuing the customary procedure therefor. In such a case the cause of action is inverse condemnation and is not founded either upon express contract or negligence.¹²⁶

In many states that do not have applicable statutes, the underlying basis for granting inverse condemnation is the state constitutional provision that guarantees just compensation.¹²⁷

Some states have developed a curious variety of inverse condemnation. As an appeal from a condemnation award is normally allowed, the landowner, when no proceedings are brought, can treat the failure to institute proceedings as an award of no damages and can ask for a trial by jury.¹²⁸

Many actions are in effect inverse in nature even though the courts do not use this term. Suits for "just compensation" often appear not to be founded upon any common law action, but rather upon a right to recover the compensation that would be awarded if there were a condemnation proceeding.¹²⁹ Although actions for "just compensation" could be based upon tort, contract or some other convenient theory, many are very similar to an inverse action and could be so classified.

One unusual type of inverse condemnation statute forces the landowner to act within a specified period. If the property owner does not institute proceedings within this time, his right is waived.¹³⁰

124. *Youngblood v. Los Angeles County Flood Control Dist.*, 15 Cal. Rptr. 904, 364 P.2d 840 (1961); *Bellman v. County of Contra Costa*, 54 Cal. 2d 363, 5 Cal. Rptr. 692, 353 P.2d 300 (1960); *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1 (1955); *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17 (1949); *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943); *City of Los Angeles v. City of Glendale*, 23 Cal. 2d 68, 142 P.2d 289 (1943); *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942); *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P.2d 681 (1938); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 P.2d 486 (1935); *Podesta v. Linden Irr. Dist.*, 141 Cal. App. 2d 38, 296 P.2d 401 (1956); *Churchill v. Kellstrom*, 58 Cal. App. 2d 84, 136 P.2d 602 (1943).

125. 23 Cal. 2d 343, 144 P.2d 818 (1943).

126. *Bacich v. Board of Control*, *supra* note 125, at 347, 144 P.2d at 821.

127. *Pima County v. Bilby*, 87 Ariz. 366, 351 P.2d 647 (1960); *State v. Leeson*, 84 Ariz. 44, 323 P.2d 692 (1958); *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950); *Lucas v. Carney*, 167 Ohio St. 416, 149 N.E.2d 238 (1958).

128. *Kentucky & W.Va. Power Co. v. Vanhoose*, 295 Ky. 339, 174 S.W.2d 538 (1943); *Broderick v. Dep't of Mental Diseases*, 263 Mass. 124, 160 N.E. 404 (1928); *Hafey v. Commonwealth*, 189 Mass. 540, 76 N.E. 208 (1905).

129. *Stuart v. Colorado E. Ry.*, 61 Colo. 58, 156 Pac. 153 (1916); *City of Hazard v. Eversole*, 237 Ky. 242, 35 S.W.2d 313 (1931); *McDonald v. Powell County*, 199 Ky. 300, 250 S.W. 1007 (1923); *Lewis v. City of Potosi*, 317 S.W.2d 623 (Mo. Ct. App. 1958); *Frater v. Hamilton County*, 90 Tenn. 661, 19 S.W. 233 (1891).

130. *State v. Messenger*, 27 Minn. 119, 6 N.W. 457 (1880) (overruled by *Electric Short Line Terminal Co. v. City of Minneapolis*, 242 Minn. 1, 64 N.W.2d

These statutes differ from most provisions for condemnation, which confer the power on the taking body; they differ also from inverse statutes which allow both the taking body and the landowner to institute the proceedings. Statutes that allow only the owner to institute proceedings and force him to do so within a certain time period have generally been struck down as unconstitutional.¹³¹

IX. STATE CONSTITUTIONAL PROVISIONS

The effect of state constitutional provisions upon the landowner's right to compensation has been previously mentioned in this note. This section is devoted to a more detailed discussion of the effect of these provisions. The applicable sections of the federal constitution (*i.e.*, the fifth and fourteenth amendments) will be discussed in another section.

The state constitutional provisions are restrictions on the state's inherent right of eminent domain.¹³² New Hampshire and North Carolina are the only states not explicitly requiring compensation for a taking of private property for public use. New Hampshire's provision states that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."¹³³ North Carolina has the following general provision: "No person ought to be . . . in any manner deprived of his life, liberty or property, but by the law of the land."¹³⁴ At first the North Carolina courts said that this provision did not provide for just compensation. However, the courts stated that just compensation was a part of the fundamental law of North Carolina.¹³⁵ In *Parks v. Board of County Comm'rs*,¹³⁶ a North Carolina court reasoned:

149 (1954), insofar as the *Messenger* case held that constructive notice provided by the legislative enactment was sufficient to start the time period running, within which the landowner must act or waive his right.)

131. *Electric Short Line Terminal Co. v. City of Minneapolis*, *supra* note 130; *Board of Levee Comm'rs v. Dancy*, 65 Miss. 335, 3 So. 568 (1887); *Eby v. City of Lewistown*, 55 Mont. 113, 173 Pac. 1163 (1918); *Kime v. Cass County*, 71 Neb. 680, 101 N.W. 2 (1904), *upholding on rehearing* 71 Neb. 677, 99 N.W. 546 (1904).

132. *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *United States v. 8,557.16 Acres of Land*, 11 F. Supp. 311 (N.D. W.Va. 1935); *Town of Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

133. N.H. CONST. Part I, art. XII.

134. N.C. CONST. art. I, § 17.

135. *Proctor v. State Highway & Pub. Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949); *Yancey v. State Highway & Pub. Works Comm'n*, 222 N.C. 106, 22 S.E.2d 256 (1942); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88 (1939); *Parks v. Board of County Comm'rs*, 186 N.C. 490, 120 S.E. 46 (1923).

136. 186 N.C. 490, 120 S.E. 46 (1923).

Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the state, . . . yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina.¹³⁷

More recently, Article I, Section 17 has been interpreted as providing for just compensation, and the courts have held that the provision is self-executing.¹³⁸

The other forty-eight states all provide for compensation to the property owner when land is taken by a body having the power of eminent domain.¹³⁹ Many states enforce the constitutional provision by making it self-enforcing or self-executing,¹⁴⁰ and award damages or

137. *Id.* at 499, 120 S.E. at 51.

138. *Braswell v. State Highway & Pub. Works Comm'n*, 250 N.C. 508, 108 S.E.2d 912 (1959); *Debruhl v. State Highway & Pub. Works Comm'n*, 247 N.C. 671, 102 S.E.2d 229 (1958); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955); *McKinney v. Deneen*, 231 N.C. 540, 58 S.E.2d 107 (1950).

139. ALA. CONST. art. I, § 23; ALASKA CONST. art. I, § 18; ARK. CONST. art. II, § 22; ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 14; COLO. CONST. art. II, § 15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. DECLARATION OF RIGHTS § 12; GA. CONST. art. II, § 301; HAWAII CONST. art. I, § 18; IDAHO CONST. art. I, § 14; ILL. CONST. art. II, § 13; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KY. BILL OF RIGHTS § 13; LA. CONST. art. I, § 2; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MASS. CONST. Part I, art. 10; MICH. CONST. art. XIII, § 1; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. I, § 21; NEV. CONST. art. VIII, § 7; N.J. CONST. art. I, § 20; N.M. CONST. art. II, § 20; N.Y. CONST. art. I, § 7; N.D. CONST. art. I, § 14; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, § 24; ORE. CONST. art. I, § 18; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 17; S.D. CONST. art. VI, § 13; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VT. CONST. ch. I, art. 2; VA. CONST. § 58; WASH. CONST. art. I, § 13; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, §§ 32, 33. The Kansas Constitution provides for compensation only when the taking is by a private corporation. KAN. CONST. art. XII, § 4.

140. *Dallas County v. Dillard*, 156 Ala. 354, 47 So. 135 (1908); *Pima County v. Bilby*, 87 Ariz. 366, 351 P.2d 647 (1960); *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942); *Podesta v. Linden Irr. Dist.*, 141 Cal. App. 2d 38, 296 P.2d 401 (1956); *Board of Comm'rs v. Adler*, 69 Colo. 290, 194 Pac. 621 (1920); *Waters v. De Kalb County*, 208 Ga. 741, 69 S.E.2d 274 (1952); *Smith v. Floyd County*, 85 Ga. 420, 11 S.E. 850 (1890); *Habersham County v. Knight*, 63 Ga. App. 720, 12 S.E.2d 129 (1940); *Fender v. Lee County*, 31 Ga. App. 604, 121 S.E. 843 (1924); *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950); *Roe v. Cook County*, 358 Ill. 568, 193 N.E. 472 (1934); *De Moss v. Police Jury*, 167 La. 83, 118 So. 700 (1928); *State Highway Comm'n v. Mason*, 192 Miss. 576, 6 So. 2d 468 (1942); *Thompson v. City of Winona*, 96 Miss. 591, 51 So. 129 (1910); *Tremayne v. City of St. Louis*, 320 Mo. 120, 6 S.W.2d 935 (1928); *Hickman v. City of Kansas*, 120

compensation to the landowner simply on the basis of the constitutional provision without statutory justification. The search for the theory underlying the self-executing provision is not made easier by courts that indicate that the remedy in the absence of a statutory provision is based upon common law,¹⁴¹ for the question still remains what this "common law" remedy might be.¹⁴² The Oregon court in *Tomasek v. State Highway Comm'n*¹⁴³ made the following comment which is typical of many opinions.

The constitutional right and protection given the owner of property . . . is unquestionably self-executing. It is an absolute

Mo. 110, 25 S.W. 225 (1894); *Bohannon v. Camden Bend Drainage Dist.*, 240 Mo. App. 492, 208 S.W.2d 794 (1948); *Lewis v. City of Springfield*, 142 Mo. App. 84, 125 S.W. 824 (1910); *Less v. City of Butte*, 28 Mont. 27, 72 Pac. 140 (1903); *County of Douglas v. Taylor*, 50 Neb. 535, 70 N.W. 27 (1897); *Braswell v. State Highway & Pub. Works Comm'n*, 250 N.C. 508, 108 S.E.2d 912 (1959); *De Bruhl v. State Highway & Pub. Works Comm'n*, 247 N.C. 671, 102 S.E.2d 229 (1958); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Eller v. Board of Educ.* 242 N.C. 584, 89 S.E.2d 144 (1955); *McKinney v. Deneen*, 231 N.C. 540, 58 S.E.2d 107 (1950); *Tomasek v. State Highway Comm'n*, 196 Ore. 120, 248 P.2d 703 (1952); *Morrison v. Clackamas County*, 141 Ore. 564, 18 P.2d 814 (1933); *Derby Heights, Inc. v. Gantt Water & Sewer Dist.*, 237 S.C. 144, 116 S.E.2d 13 (1960); *Moseley v. State Highway Dep't*, 236 S.C. 499, 115 S.E.2d 172 (1960); *Clarke v. City of Greer*, 231 S.C. 327, 98 S.E.2d 751 (1957); *Smith v. City of Greenville*, 229 S.C. 252, 92 S.E.2d 639 (1956); *Milhou v. State Highway Dep't*, 194 S.C. 33, 8 S.E.2d 852 (1940); *Chick Springs Water Co. v. State Highway Dep't*, 159 S.C. 481, 157 S.E. 842 (1931); *State v. Malone*, 168 S.W.2d 292 (Tex. Civ. App. 1943); *Nelson County v. Loving*, 126 Va. 283, 101 S.E. 406 (1919); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919); *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S.E. 821 (1906); *Morgan v. City of Logan*, 125 W. Va. 445, 24 S.E.2d 760 (1943). See also *Blanchard v. City of Kansas* 16 Fed. 444 (W.D. Mo. 1883); *State Park Comm'n v. Wilder*, 260 Ky. 190, 84 S.W.2d 38 (1935); *Dynes v. Town of Kilkenny*, 153 Minn. 11, 189 N.W. 439 (1922); *State ex rel. City of St. Louis v. O'Malley*, 343 Mo. 658, 122 S.W.2d 940 (1938); *McGrew v. Granite Bituminous Paving Co.*, 247 Mo. 549, 155 S.W. 411 (1912); *King v. City of Rolla*, 234 Mo. App. 16, 130 S.W.2d 697 (1939); *Greenwell v. A. V. Wills & Sons*, 239 S.W. 578 (Mo. Ct. App. 1922); *Donaldson v. City of Bismarck*, 71 N.D. 592, 3 N.W.2d 808 (1942); *Darnall v. State*, 108 N.W.2d 201 (S.D. 1961); *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731 (1941); *City of Houston v. Anderson*, 115 S.W.2d 732 (Tex. Civ. App. 1938); *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 84 S.E.2d 511 (1954). *Contra*, *Board of Comm'rs v. Blue Ribbon Ice Cream & Milk Corp.*, 231 Ind. 436, 109 N.E.2d 88 (1952).

141. *Rose v. State*, *supra* note 140; *State ex rel. City of St. Louis v. O'Malley*, *supra* note 140; *McGrew v. Granite Bituminous Paving Co.*, *supra* note 140; *Tomasek v. State*, *supra* note 140; *Chick Springs Water Co. v. State Highway Dep't*, *supra* note 140; *Heldt v. Elizabeth River Tunnel Dist.*, *supra* note 140; *Virginia Hot Springs Co. v. Lowman*, *supra* note 140.

142. See text accompanying notes 149-62 *infra*.

143. 196 Ore. 120, 248 P.2d 703 (1952).

right, and, for its violation, the injured person may have his remedy in a common-law action in the absence of statutory provision therefor.¹⁴⁴

Many of the constitutional provisions serve as the basis for granting relief on other theories such as implied contract¹⁴⁵ or inverse condemnation.¹⁴⁶ The state constitutional provisions also are used by some courts as a ground for waiving the state's immunity from suit.¹⁴⁷

The importance of the state constitutional provisions should not be minimized, for without them the landowner may have no right to compensation.¹⁴⁸ In many states they not only create the right, but also provide the theory of relief.

X. COMMON LAW RELIEF

Throughout the course of this note, cases have been cited that grant relief in one form or another without specifying the theoretical basis for granting the relief. Courts that speak in terms of "just compensation"¹⁴⁹ and "self-enforcing constitutional provisions"¹⁵⁰ give no indication of the nature or basis of recovery. Many cases have indicated that the relief is based on common law actions.¹⁵¹ Typical court comments include the following: South Carolina: "Where a statute or the Constitution creates a right, but is silent as to the remedy, the party entitled to the right may resort to any common law action which will

144. *Id.* at 143, 248 P.2d at 713.

145. See note 107 *supra*.

146. See note 127 *supra*.

147. *Smith v. Floyd County*, 85 Ga. 420, 11 S.E. 850 (1890); *Fender v. Lee County*, 31 Ga. App. 604, 121 S.E. 843 (1924); *Kentucky Bell Corp. v. Commonwealth*, 295 Ky. 21, 172 S.W.2d 661 (1943); *Bernard v. State Dep't of Pub. Works*, 127 So. 2d 774 (La. Ct. App. 1961); *Moseley v. State Highway Dep't*, 236 S.C. 499, 115 S.E.2d 172 (1960); *Chick Springs Water Co. v. State Highway Dep't*, 159 S.C. 481, 157 S.E. 842 (1931); *State v. Hale*, 136 Tex. 29, 146 S.W.2d 781 (1941); *Morgan v. City of Logan*, 125 W. Va. 445, 24 S.E.2d 760 (1943).

148. See text accompanying notes 182-95 *infra*.

149. See note 129 *supra*.

150. See note 140 *supra*.

151. *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942); *Housing Authority v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954); *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070 (1909); *State ex rel. City of St. Louis v. O'Malley*, 343 Mo. 658, 122 S.W.2d 940 (1938); *McGrew v. Granite Bituminous Paving Co.*, 247 Mo. 549, 155 S.W. 411 (1912); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Tomasek v. State Highway Comm'n*, 196 Ore. 120, 248 P.2d 703 (1952); *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946); *Chick Springs Water Co. v. State Highway Dep't*, 159 S.C. 481, 157 S.E. 842 (1931); *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 84 S.E.2d 511 (1954). See also *Anderson Cattle Co. v. Kansas Turnpike Authority*, 180 Kan. 749, 308 P.2d 172 (1957).

give him adequate redress."¹⁵² Idaho: "And for any taking or injury for which the statute does not provide a remedy, the landowner may sue at common law."¹⁵³ Missouri: "It is also well settled law that this article of the Constitution gives an absolute right and is self-enforcing, . . . resort may be had by the party entitled to the right to any common law action which will afford him adequate and appropriate means of redress."¹⁵⁴ Virginia: "[L]andowner may enforce his constitutional right to compensation in a common law action."¹⁵⁵ Oregon: "[T]he injured person may have his remedy in a common law action in the absence of statutory provision therefor."¹⁵⁶

The question raised previously in this note still looms beneath the surface of the court's language. What is the common law action to which the courts refer?

In most of these cases the landowner is seeking monetary relief. Therefore, writs of entry (ejectment) and injunction are eliminated from consideration as the basis for common law recovery. Since the relief sought is either for just compensation or for damages, it could be implied that the actions are founded either in assumpsit or trespass. Following this reasoning, the underlying common law basis for these actions would be either *ex delicto* or *ex contractu*. From the prior discussion of both tort and implied contractual relief, it would appear that these are the bases of the "common law" remedy. An Illinois court¹⁵⁷ indicated that either tort or contract was the theory on which it awarded a common law recovery based upon a constitutional guaranty. The court said, "It is . . . immaterial whether the declaration be considered as one in tort or in assumpsit. . . ."¹⁵⁸

Either an action in tort or contract "clearly" seems, then, to be the basis for allowing recovery based upon a common law action. But this conclusion was "clearly" eliminated, at least as far as North Carolina is concerned by a decision of that state in 1955. In *Sale v. State Highway and Public Works Comm'n*,¹⁵⁹ the North Carolina court main-

152. Chick Springs Water Co. v. State Highway Dep't, *supra* note 151, at 494, 157 S.E. at 847.

153. Boise Valley Constr. Co. v. Kroeger, 17 Idaho 384, 395, 105 Pac. 1070, 1073 (1909), citing 2 [*sic* 3] ELLIOTT, RAILROADS § 1048 (1st ed. 1897).

154. McGrew v. Granite Bituminous Paving Co., 247 Mo. 549, 564, 155 S.W. 411, 415 (1912).

155. Heldt v. Elizabeth River Tunnel Dist., 196 Va. 477, 482, 84 S.E.2d 511, 515 (1954).

156. Tomasek v. State Highway Comm'n, 196 Ore. 120, 143, 248 P.2d 703, 713 (1952).

157. Roe v. Cook County, 358 Ill. 568, 193 N.E. 472 (1934).

158. *Id.* at 575, 193 N.E. at 475.

159. 242 N.C. 612, 89 S.E.2d 290 (1955).

tained that in the absence of statutory relief an action for damages could be founded on a common law action. The court stated:

[W]hen the fundamental law of this State, based on natural justice and equity, prohibits the taking or acquisition of private property for public use without the payment of just compensation, or its equivalent, and the North Carolina Constitution points out no remedy, and if no statute affords an adequate remedy for the depriving an owner of private property for public use without just compensation, under a particular fact situation, the common law which provides a remedy for every wrong will furnish the appropriate action for the adequate redress of such grievance.¹⁶⁰

There is nothing shocking or unusual in the above quote. The court has merely followed the frequent practice of granting relief based on a common law remedy without indicating the action. But the significant and perhaps shocking fact about the decision is that the court went on to point out that the common law basis was not tort or contract. Thus, at least in North Carolina, the previous conclusion that tort or contract underlies common law recovery is shattered. Assuming that tort or contract does not serve as the basis for awarding relief based on common law, the court's decision again leaves an unanswered question. What is "common law" relief?

The North Carolina case and others based on a common law remedy differ from the cases that award damages or compensation without attempting to give the theory. In the latter, there are no attempts to provide a historical basis for granting relief, whereas in the former there are efforts to connect the relief given at common law. *Stuart v. Colorado E.R.R.*¹⁶¹ provides an example of a remedy granted without an attempt to define the type of relief that was sought. The court points out that in various states an action to recover compensation is designated by such names as ejectment, injunction, or trespass. "But," the court states, "the form or name of the action is immaterial. Such actions are all akin to condemnation suits, and are to compel condemnation and payment for the right of way taken, and the damages occasioned by the taking."¹⁶² When a court makes such a statement, it is recognizing that the action to recover compensation is not similar to any normal type of civil action. Since condemnation is a special proceeding, the court feels that an action to recover compensation because of a failure to institute the proceedings should also be classified as a special action. There is no attempt to link the special action to any common law proceeding. Perhaps this approach is more intellectually honest than the approach that attempts to connect the recovery to the common law. But whether or not the common law

160. *Id.* at 618, 89 S.E.2d at 296.

161. 61 Colo. 58, 156 Pac. 152 (1916).

162. *Id.* at 69, 156 Pac. at 156.

approach is disliked, it must be considered as a major basis for granting relief to a landowner who has been deprived of his property without just compensation.

XI. RELIEF AGAINST THE FEDERAL GOVERNMENT¹⁶³

The fifth amendment of the United States Constitution contains the prohibition, "[N]or shall private property be taken for public use without just compensation." Without this protective right, Justice Story states, "all other rights would become utterly worthless. . . ."¹⁶⁴

Normally a federal agency that appropriates private property for public use follows proper condemnation procedure. However, if the federal government does not give compensation to the landowner, he has an effective remedy.¹⁶⁵ Acts of Congress, such as the Tucker Act, provide that the property owner may proceed either in the Court of Claims or the district courts to recover upon claims founded upon the Constitution or upon contract either express or implied.¹⁶⁶

There is no clear indication of the theory underlying the suits for compensation against the federal government. Are they based upon an implied contract theory or are they based upon the Constitution? Claims founded on either come within the statutory provisions. In some cases the claim has been held to be based upon the fifth amendment,¹⁶⁷ in others upon an implied contract,¹⁶⁸ while several courts

163. Implied contract refers to *implied in law* rather than *implied in fact* contract.

164. 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1790 (5th ed. 1891).

165. *Jacobs v. United States*, 290 U.S. 13 (1933); *Phelps v. United States*, 274 U.S. 341 (1927); *United States v. North American Co.*, 253 U.S. 330 (1920); *United States v. Lynah*, 188 U.S. 445 (1903); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954); *Thibodo v. United States*, 187 F.2d 249 (9th Cir. 1951); *Goodman v. United States*, 113 F.2d 914 (8th Cir. 1940); *Sponenbarger v. United States*, 101 F.2d 506 (8th Cir. 1939); *Gulf & S.I.R.R. v. Duckworth*, 286 Fed. 645 (5th Cir. 1923); *Snowden v. Ft. Lyon Canal Co.*, 238 Fed. 495 (8th Cir. 1916); *Connor v. South Carolina Pub. Serv. Authority*, 91 F. Supp. 262 (E.D.S.C. 1950); *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *Tilden v. United States*, 10 F. Supp. 377 (W.D. La. 1934); *Clement v. United States*, 134 Ct. Cl. 466, 140 F. Supp. 573 (1956); *Coates v. United States*, 117 Ct. Cl. 795, 93 F. Supp. 637 (1950); *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232 (1948); *Forest of Dean Iron Ore Co. v. United States*, 106 Ct. Cl. 250, 65 F. Supp. 585 (1946); *Causby v. United States*, 104 Ct. Cl. 342, 60 F. Supp. 751 (1945); *Boush Creek Land Corp. v. United States*, 68 Ct. Cl. 56 (1929); *Booth & Co. v. United States*, 62 Ct. Cl. 288 (1926); *Hood v. United States*, 46 Ct. Cl. 30 (1910); *Tompkins v. United States*, 45 Ct. Cl. 66 (1910); *Morris v. United States*, 30 Ct. Cl. 162 (1895); *Merriam v. United States*, 29 Ct. Cl. 250 (1894).

166. 28 U.S.C. §§ 1346, 1491 (1948).

167. *Jacobs v. United States*, 290 U.S. 13 (1933); *United States v. Lynah*, 188 U.S. 445 (1903); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871);

have indicated that the suit may be based on a combination of the two theories.¹⁶⁹ In one of the earliest cases in which the United States Supreme Court considered the right to compensation, *Pumpelly v. Green Bay Co.*,¹⁷⁰ the court held that the landowner was entitled to compensation on the basis of the constitutional provision. The Eighth Circuit later held that relief was based upon the fifth amendment¹⁷¹ without need for an implementing statute or a promise to pay. It said that when a constitutional right is deemed to have been infringed, relief may be granted even though the case sounds in tort against a normally immune governmental body.¹⁷²

Other courts, however, indicate that jurisdiction results from an implied contract between the property owner and the federal government. In *United States v. Great Falls Mfg. Co.*,¹⁷³ decided in 1884, the United States Supreme Court affirmed an award of compensation made by the Court of Claims, holding that the law will imply a promise to compensate when private property is taken for public use. Although the court recognized that the obligation arose as a result of the fifth amendment, it based jurisdiction on the implied contract between Great Falls and the United States. Basing jurisdiction upon the portion of the statute (Tucker Act) that allows federal suits to be founded "upon any contract, express or implied, with the government of the United States," the court stated that the present cause of ac-

Sponenbarger v. United States, 101 F.2d 506 (8th Cir. 1939); *Gulf & S.I.R.R. v. Duckworth*, 286 Fed. 645 (5th Cir. 1923); *Clement v. United States*, 134 Ct. Cl. 466, 140 F. Supp. 573 (1956); *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232 (1948); *Causby v. United States*, 104 Ct. Cl. 342, 60 F. Supp. 751 (1945); *Hamburg-Am. Co. v. United States*, 74 Ct. Cl. 360 (1932).

168. *Phelps v. United States*, 274 U.S. 341 (1927); *United States v. North American Co.*, 253 U.S. 330 (1920); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954); *Thibodo v. United States*, 187 F.2d 249 (9th Cir. 1951); *Snowden v. Ft. Lyon Canal Co.*, 238 Fed. 495 (8th Cir. 1916); *Connor v. South Carolina Pub. Serv. Authority*, 91 F. Supp. 262 (E.D.S.C. 1950); *Forest of Dean Iron Ore Co. v. United States*, 106 Ct. Cl. 250, 65 F. Supp. 585 (1946); *Boush Creek Land Corp. v. United States*, 68 Ct. Cl. 56 (1929); *Hood v. United States*, 46 Ct. Cl. 30 (1910); *Tompkins v. United States*, 45 Ct. Cl. 66 (1910); *Morris v. United States*, 30 Ct. Cl. 162 (1895); *Merriam v. United States*, 29 Ct. Cl. 250 (1894). See also *Hurely v. Kincaid*, 285 U.S. 95 (1932); *Chilcutt v. United States*, 64 F. Supp. 38 (E.D. Ky. 1946); *Klebe v. United States*, 57 Ct. Cl. 160 (1922), *aff'd*, 263 U.S. 188 (1923).

169. *United States v. Dickinson*, 331 U.S. 745 (1947); *Goodman v. United States*, 113 F.2d 914 (8th Cir. 1940); *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *Tilden v. United States*, 10 F. Supp. 377 (W.D. La. 1934); *Coates v. United States*, 117 Ct. Cl. 795, 93 F. Supp. 637 (1950); *Booth & Co. v. United States*, 62 Ct. Cl. 288 (1926).

170. 80 U.S. (13 Wall.) 166 (1871).

171. *Sponenbarger v. United States*, 101 F.2d 506 (8th Cir. 1939).

172. *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232 (1948).

173. 112 U.S. 645 (1884).

tion "is one that arises out of implied contract. . . ." ¹⁷⁴ The implied contract theory was more explicitly set forth in *United States v. North American Co.* ¹⁷⁵ in which the court stated, "The right to bring this suit against the United States in the Court of Claims is not founded upon the fifth amendment . . . but upon the existence of an implied contract entered into by the United States." ¹⁷⁶

Many cases indicate that the action is really based partly on the constitution and partly on an implied contract. ¹⁷⁷ However, an implied contract only arises because of the constitutional guaranty. Thus, whether the court uses the Constitution or an implied contract as the theory of recovery, the action can be traced back to the fifth amendment. In *Coates v. United States*, ¹⁷⁸ the court granted compensation stating, "there is an implied promise to pay just compensation as required by the fifth amendment." ¹⁷⁹ If it were not for the fifth amendment, there would be no obligation and no implied contract. As the Supreme Court in *United States v. Dickerson* ¹⁸⁰ stated:

[W]hether the theory of these suits be that there was a taking under the fifth amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the fifth amendment. . . . ¹⁸¹

Since the property owner recovers compensation regardless of the theory that the court adopts, the choice may very well be immaterial. Nevertheless, it is interesting to note how the courts vacillate between the two theories.

XII. FOURTEENTH AMENDMENT

If there is no state remedy available to compensate a landowner for property taken from him, would the landowner have any right to seek relief in a federal court? The answer to the question is yes. A refusal by a state court to grant compensation to a landowner whose property has been taken constitutes a taking of property without due process of law and hence violates the fourteenth amendment.

Before the passage of the fourteenth amendment an attempt was made to apply the fifth amendment, which provides that private prop-

174. *Id.* at 657.

175. 253 U.S. 330 (1920).

176. *Id.* at 335.

177. Cases cited note 169 *supra*.

178. 117 Ct. Cl. 795, 93 F. Supp. 637 (1950).

179. *Id.* at 798, 93 F. Supp. at 639.

180. 331 U.S. 745 (1947).

181. *Id.* at 748.

erty shall not be taken for public use without compensation,¹⁸² to the states. But in 1833, in the famous case of *Barron v. Mayor of Baltimore*,¹⁸³ the City of Baltimore was charged with taking private property for public use without giving just compensation, and the court held that there was no ground for federal jurisdiction, since the fifth amendment does not protect citizens from action taken by state or local governments. This decision has been reaffirmed in many cases.¹⁸⁴ Although there is currently a theory that the first ten amendments apply to the states as well as the federal government,¹⁸⁵ it is safe to conclude that the fifth amendment, as far as the courts are concerned, does not apply to the states.

When the fourteenth amendment was adopted in 1868,¹⁸⁶ the phrase of the fifth amendment that prohibits private property from being taken for public use without just compensation to the owner was not included. The fourteenth amendment does, however, prohibit the taking of life, liberty, or property without due process of law. Whether this general prohibition requires appropriating bodies to give just compensation to private landowners thus becomes a matter of interpretation. In 1877, soon after passage of the fourteenth amendment, the United States Supreme Court held that the due process clause of the fourteenth amendment did not require that just compensation be made to the property owner.¹⁸⁷ The Court, relying heavily on the exclusion of the phrase dealing with compensation, stated:

If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken.¹⁸⁸

In 1897, the Supreme Court expounded a contrary opinion in *Chicago, B. & Q.R.R. v. Chicago*.¹⁸⁹ The court held that a denial of compensation by a state court was an act of the state that constituted a denial of due process of law as provided in the fourteenth amendment:

182. U.S. CONST. amend. V.

183. 32 U.S. (7 Peters) 243 (1833).

184. *E.g.*, *Cairo & F. R.R. v. Turner*, 31 Ark. 494 (1876); *Goolsby v. Board of Drainage Comm'rs*, 156 Ga. 213, 119 S.E. 644 (1923); *Capital Water Co. v. Public Util. Comm'n*, 44 Idaho 1, 262 Pac. 863 (1926); *Wright v. House*, 188 Ind. 247, 121 N.E. 433 (1919); *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902); *Smith v. Cameron*, 106 Ore. 1, 210 Pac. 716 (1922).

185. 2 CROSSKEY, *POLITICS AND THE CONSTITUTION* 1056-82 (1953).

186. U.S. CONST. amend. XIV.

187. *Davidson v. New Orleans*, 96 U.S. 97 (1877).

188. *Id.* at 105.

189. 166 U.S. 226 (1897).

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.¹⁹⁰

Since the above decision, statutes that deny or impede the acquiring of compensation for property taken for public use have been struck down as unconstitutional.¹⁹¹ Many cases have asserted that the fourteenth amendment requires just compensation for private property taken for public use.¹⁹²

Martin v. Creasy,¹⁹³ a fairly recent Supreme Court case, denied both injunctive relief and a declaratory judgment on the validity of a state statute (the Pennsylvania limited access highway law). The Court indicated that an uncompensated landowner can raise the federal question only after he has exhausted all his remedies in the state courts. Denying federal jurisdiction, the Court asserted that the fourteenth amendment right can be raised only after the landowner has tried and failed to obtain state relief: "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here."¹⁹⁴ In a dissenting opinion, Justice Douglas strongly argued that the federal court should grant jurisdiction whenever a determination of what constitutes a deprivation of property is needed. He justified allowing a declaratory judgment in the land appropriation cases on the basis of a fundamental right imbedded in the Bill of Rights.¹⁹⁵

190. *Id.* at 241.

191. *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W.2d 371 (1937); *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951). See note 130 *supra*.

192. *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897); *Colorado ex rel. Watrous v. District Court*, 207 F.2d 50 (10th Cir. 1953); *Capital Water Co. v. Public Util. Comm'n*, 44 Idaho 1, 262 Pac. 863 (1926); *Wright v. House*, 188 Ind. 247, 121 N.E. 433 (1919); *Weyler v. Gibson*, 110 Md. 636, 73 Atl. 261 (Ct. App. 1909); *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902); *McKinney v. Deneen*, 231 N.C. 540, 58 S.E.2d 107 (1950); *De Bruhl v. State Highway & Pub. Works Comm'n*, 247 N.C. 671, 102 S.E.2d 229 (1958); *Blackman v. City of Cincinnati*, 66 Ohio App. 495, 35 N.E.2d 164 (1941); *Miller v. City of Beaver Falls*, *supra* note 191; *Brooksbank v. Leech*, 206 Tenn. 176, 332 S.W.2d 210 (1959). See also *Smith v. Cameron*, 106 Ore. 1, 210 Pac. 716 (1922).

193. 360 U.S. 219 (1959).

194. *Id.* at 225.

195. *Id.* at 226-27.

Thus, subject to the rule that state remedies must first be exhausted, it seems clear that the landowner, under the fourteenth amendment, can ultimately obtain relief in the Supreme Court of the United States.

CONCLUSION

An uncompensated property owner has rights under the fifth and fourteenth amendments of the federal constitution, and under state constitutional provisions, to recover for property taken without compensation. These provisions probably guarantee a remedy, although under the fourteenth amendment eventual relief depends upon prior exhaustion of state remedies. The purpose of this conclusion is to compare the various remedies that a property owner might have. The remedies may be divided, for convenience, into those that give monetary relief to the landowner and those that give another form of relief. The remedies that provide for other than monetary relief are ejectment and injunction. Qualified injunction, mandamus, and equitable lien are remedies that indirectly lead to monetary relief. Remedies that give direct monetary relief include implied contract, actions sounding in tort, actions based on self-enforcing constitutional provisions, inverse condemnation, and those based on common law relief. Also included within the latter category are the rare instances in which an equity court will grant damages to provide relief.

The remedies of ejectment and injunction, although giving adequate relief to the property owner, have the disadvantage of risking harm to the public, as the taking body may be forced to stop its operations or be evicted from the public use of land. The remedies that award monetary relief, either directly or indirectly, are more appealing, since the property owner is compensated for his loss and at the same time the public does not suffer any harm. However, the qualified injunction and equitable lien may ultimately have the same possible disadvantage of ejectment and injunction and for that reason are not the most desirable of remedies. Mandamus indirectly gives monetary relief and forces a condemnation proceeding, but, being an extraordinary writ, has the disadvantage of being difficult to obtain unless there is no other remedy available.

Of those remedies that award direct monetary relief, self-enforcing constitutional provisions and common law relief are adequate, but are confusing since the courts that grant them have not adequately explained the underlying theory of relief. A comparison of two other theories granting direct monetary relief indicates that an action based on implied contract is much sounder than an action in tort, even though few courts are willing to imply such a contract. A tort action seems to put too much emphasis upon the allegation of a wrongful taking, which is minor when the defendant has the power of eminent

domain and hence the right to take property. An action based on an implied contract does not assume a wrongful taking, but rather seeks compensation for the property owner whose right to it is implied from the taking.

The most appealing relief for an uncompensated property owner is inverse condemnation. This is particularly true when there is a statute to enforce the right. The inverse procedure supplies relief which puts the parties in their respective places, as if there had been no wrong. It has the same effect as a normal condemnation proceeding in that the appropriating body is allowed to keep the land. No advantage is given the taking body due to its failure to institute proceedings, while the only disadvantage caused to the landowner is that he must affirmatively institute proceedings himself. The taking is not the wrongful act, but rather the failure to make just compensation or institute proceedings, and this is rectified by the inverse action. The absence of an underlying common law theory for the inverse action should not cause any concern. Inverse, like normal condemnation, is a special statutory proceeding¹⁹⁶ that needs no common law basis.

The survey of the remedies granted and denied in various jurisdictions shows that immense amounts of money and labor have been spent in the effort to secure relief for what seems obviously to be a wrong. The inverse condemnation provisions suggest that all the trouble could have been saved, and that much more may be avoided, by adding an amendment to the eminent domain statutes permitting the action to be brought either by the landowner or the taking body.

196. This seems to be the preferable interpretation. See the division of authorities in 6 NICHOLS, EMINENT DOMAIN § 24.1 (3rd ed. 1953).