Eminent Domain—Compensation for Cost of Preventing Future Damage to Land Not Condemned—[Federal].—The United States constructed a dam across the Mississippi River. The dam caused the river to flood a strip of land comprising twenty-four acres of the railroad's right of way. At maximum depth the water would stand against the embankment which carried the railroad tracks for a distance of four miles. In an action by the United States to condemn a flood way easement over the twenty-four acres, the district court measured compensation by the value of the flooded land plus those expenses necessarily incurred by the railroad to protect its embankment from effects of the resultant saturation and erosion. The government appealed on the ground that compensation should be limited to the value of the twenty-four acres actually flooded. *Held*, affirmed. *U.S. v. Chicago, Burlington & Quincy R.R. Co.*, 82 F. (2d) 131 (C.C.A. 8th 1936).

Authority adequately supports allowance of damages in addition to the value of the land actually "taken." *Bauman v. Ross*, 167 U.S. 548 (1897); *Spokane Falls Ry. Co. v. Zeigler*, 167 U.S. 65 (1897); *U.S. v. Grizzard*, 219 U.S. 180 (1911); Lewis, Eminent Domain §§ 686, 710 (3d ed. 1909); see 30 Ill. L. Rev. 1063 (1936). However, the court's general conclusion that, by judicial construction, the words "or damaged" have been added to "taken" in the provision of the Fifth Amendment that no property shall be taken for public purposes without just compensation must be viewed with some skepticism. The words "taken" and "property" are not clear concepts. See Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221 (1931); *Eaton v. Boston C. & M. R.R. Co.*, 51 N.H. 504 (1872). At present the federal courts seem to be in the process of relaxing the degree of relation to a tangible *res* necessary to bring rights within their notions of "property" for which compensation must be given. The early requirement was that a tangible *res* be actually "taken" in the sense of a continuous dispossession of the owner. Sedgwick, Statutory and Constitutional Law 519 (1857). Complete destruction of utility accompanied by physical occupation in some manner came to be recognized as a dispossession. *Pumpelly v. Green Bay Co.*, 13 Wall. (U.S.) 166 (1871); *U.S. v. Lynah*, 188 U.S. 445 (1903). More recently a partial reduction of value caused by intermittent flooding has been held a "taking." *U.S. v. Cress*, 243 U.S. 316 (1917). When part of the land is "taken" in accordance with the above standards, just compensation includes the value of the intangible rights attached to it. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); *U.S. v. Welch*, 217 U.S. 333 (1910); see *U.S. v. Wheeler Twp.*, 66 F. (2d) 977 (C.C.A. 8th 1933). Dispossession of a part of the same parcel of land was excuse for allowing recovery for damage to the remaining part not taken. *Bauman v. Ross*, 167 U.S. 548 (1897); *Spokane Falls Ry. Co. v. Ziegler*, 167 U.S. 65 (1897); *U.S. v. Grizzard*, 219 U.S. 180 (1911). The Supreme Court has been reluctant to permit recovery for intangible property rights which have been destroyed when no part of the tangible property was taken or invaded. *Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Gibson v. U.S.*, 166 U.S. 269 (1897); *Scranton v. Wheeler*, 179 U.S. 141 (1900). Two more recent cases have found a taking when the surface of the property was invaded by an element which did not injure the land but did interfere with intangible rights. *U.S. v. Cress*, 243 U.S. 316, 330 (1917) (increased height of water in creek not overflowing the banks, but eliminating the drop from a mill dam necessary to obtain power); *Portsmouth Harbor Co. v. U.S.*, 260 U.S. 327 (1922) (occasional gunfire over the land). Nevertheless the courts have preserved a distinction between a taking and mere consequential damages for which no

compensation is required. *Sharp v. U.S.*, 191 U.S. 341 (1903); *Bedford v. U.S.*, 192 U.S. 217 (1904); *Christman v. U.S.*, 74 F. (2d) 112 (C.C.A. 7th 1934) (criticized in the instant case). See *Manigault v. Springs*, 199 U.S. 473, 484 (1905); *Sanguinetti v. U.S.*, 264 U.S. 146 (1924). The ambiguity of these terms is reflected in their uncertain application. See 32 Yale L. J. 725 (1923).

Policy and necessity require that the government be free to act without being liable for the remote and unintended effects of its acts. *Horstman Co. v. U.S.*, 257 U.S. 138 (1921); *Jackson v. U.S.*, 230 U.S. 1 (1913). But further relaxation of the requirements would seem proper and not unreasonably burdensome. See Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 259 (1931). The principal case by allowing recovery of the costs of preventing future damage has taken the natural step beyond those decisions which permit recovery for the damage to the part remaining caused by the use of the part taken. In a very recent decision, the Court of Appeals, of the Seventh Circuit followed the instant case when apparently the physical taking was much more limited. *U.S. v. Wabasha-Nelson Bridge Co.* (C.C.A. 7th, April 7, 1936, not yet reported).

It might be inferred from the instant case that the rule of damages in actions against the United States by property owners is different from that used in direct condemnation proceedings brought by the government. Such a belief is unjustified. *Jacobs v. U.S.*, 290 U.S. 13 (1933); *Hurley v. Kincaid*, 285 U.S. 95 (1932). As the source of the right to compensation in either case is the fifth amendment, the damages should not vary as a consequence of failure of the government to institute condemnation proceedings.

However, the right to sue the United States has been conferred and limited by the Tucker Act, which gives federal courts jurisdiction ". . . . of all claims . . . . founded upon the Constitution of the United States or any law of Congress . . . . or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort. . . . ." 24 Stat. 505 (1887), 28 U. S. C. A. § 41 (1927). Thus, when the taking of land is regarded as tortious, recovery is denied. *U.S. v. North American Co.*, 253 U.S. 330 (1920); *Langford v. U.S.*, 101 U.S. 341 (1879). When government officials are properly authorized to appropriate land to which the government asserts no title, the government is said to promise impliedly to pay therefor and recovery is permitted. *U.S. v. North American Co.*, 253 U.S. 330 (1920); *U.S. v. Buffalo Pitts Co.*, 234 U.S. 228 (1914); *U.S. v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884). Assertion of an implied promise seems a mere statement of the conclusion that the government must pay. The courts have insisted that under the Tucker Act no recovery on quasi-contractual grounds is permitted. *Harley v. U.S.*, 198 U.S. 229 (1905). Nevertheless in most cases of this type it is impossible to find the elements of a consensual contract. *Cf.* 36 Harv. L. Rev. 866 (1923). Thus liability exists even though the legislation which results in the taking makes no provision for instituting condemnation proceedings. *U.S. v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *U.S. v. Lynah*, 188 U.S. 445, 465 (1903). The owner may recover in a later action despite his failure to consent at the time of the taking. *Hersch v. U.S.*, 15 Ct. Cl. 385 (1879); see concurring opinion of Justice Brown in *U.S. v. Lynah*, 188 U.S. 445, 476 (1903). Likewise where the taking was properly authorized, the failure of the government agents to intend that compensation should be made does not alter the liability. *Portsmouth Harbor Co. v. U.S.*, 260 U.S. 327 (1922). Reliance by the courts upon the implied contract theory has led to a denial of recovery where the

authorized act of taking was accompanied by a mistaken assertion of a paramount right in the government. *Tempel v. U.S.*, 248 U.S. 121 (1918); *Hill v. U.S.*, 149 U.S. 593 (1893). This unfortunate result would have been avoided if the courts had recognized "claims founded upon the Constitution of the United States" as a separate category under the Tucker Act. See minority opinions in *Hill v. U.S.*, 149 U.S. 593, 600 (1893), and *U.S. v. Lynah*, 188 U.S. 445, 474 (1903).

Extradition—Immunity of American Citizens under Treaty with France—[Federal]. —The relators, citizens of the United States, had fled from Paris to the United States to avoid arrest in connection with allegedly illegal financial operations. Upon the request of the French authorities, they were taken into custody by the respondent, a United States commissioner. The case came before the Circuit Court of Appeals on appeal from a ruling of the district court dismissing writs of *habeas corpus*. Article 5 of the treaty with France declares: "Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this covenant." 37 Stat. 1530 (1911). *Held*, this treaty does not give the Secretary of State authority to deliver up an American citizen to France. Judgment of the district court reversed. *United States ex rel. Neidecker v. Valentine*, 81 F. (2d) 32 (C.C.A. 2d 1936).

When an extradition treaty exists with a foreign country, and upon complaint by the proper foreign authority, any United States commissioner is empowered under the United States Code of Criminal Procedure (31 Stat. 656 (1900), 18 U.S.C.A. §651 (1927)) to arrest and conduct hearings for persons charged with crime in the foreign country and, upon deeming the evidence sufficient to sustain the charge, to certify the case to the Secretary of State for a surrender to be made according to the terms of the treaty. The sole question presented in the principal case was whether the treaty with France authorized the Secretary of State, under any circumstances, to surrender American citizens who have been charged with extraditable crimes in France and have taken refuge in the United States. The factor which appears to have been chiefly instrumental in this decision is the persistent refusal of the French government to surrender its nationals to the United States under the same treaty. France has considered that she is doing her part by prosecuting her nationals for crimes committed abroad. This procedure is not possible under the Anglo-American territorial concept of legal jurisdiction. 1 Bishop, Criminal Law § 109 (9th ed. 1923). Therefore, the question of reciprocity seems to have been given much more weight by the court than a rational consideration of the merits of the case would warrant. After an attempt to justify its decision on the basis of the existing authority, *i.e.*, chiefly, the opinions of two secretaries of state and the district court case of *Ex parte McCabe* (46 Fed. 363 (D.C.Tex. 1891)) which involved a similar treaty with Mexico, the court proceeded to reveal the true basis of its decision in these words: ". . . . nationalism is not dead, and most nations have shown a persistent repugnance to submit their citizens to foreign courts. We have indeed an honorable record; but it is uncertain how far our diplomacy is prepared to give where it does not receive." Unfortunately it is true that most nations have adopted this attitude. 93 Just. P. 822 (1929). It is even less justifiable in the case of the United States, which does not punish its citizens for crimes committed abroad. In the only Supreme Court decision on the subject it was held that a refusal by Italy to deliver up her citizens under a treaty not excepting nationals, although ground for a