No. [illegible]

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Rindge Company, a Corporation; May K. Rindge, Hueneme, Malibu & Southern Railway, a Corporation, and Hueneme, Malibu & Port Los Angeles Railway, a Corporation,

Plaintiffs in Error,

vs.

County of Los Angeles,

Defendant in Error.

Rindge Company, a Corporation,

Plaintiff in Error,

vs.

County of Los Angeles,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

Plaintiffs in error, Rindge Company and May K. Rindge, are the owners of an oblong tract of land, known as the Rancho Topango Malibu

Sequit, lying along the Pacific Ocean in the county of Los Angeles, California, about twenty-two miles in length along the ocean shore and varying from one-half to one and one-half miles in width.

On the 26th day of August, 1916, the Board of Supervisors of defendant in error, County of Los Angeles (the governing body of the county), without notice to or hearing given plaintiffs in error, by unanimous vote duly and regularly adopted a resolution determining that the public interest and necessity required the acquisition by the county of Los Angeles of a strip of land forty feet in width, running longitudinally through the above tract of land, for public highway purposes and for the construction and completion of a public highway thereover, determining that the strip of land therein described be condemned for such purposes and directing the county counsel of the county of Los Angeles to institute proceedings accordingly. [Tr. Vol. I, fols. 667-676.]

On the 3d day of December, 1917, the same Board of Supervisors, without notice to or hearing given plaintiffs in error, by four-fifths vote duly and regularly adopted a similar resolution as to a strip of land forty feet in width, running latitudinally through the same land, approximately at right angles from and to the

strip described in the first resolution. [Tr. Vol. I, fols. 676-679.]

Actions in eminent domain were duly instituted for the condemnation of the strips of land described in the resolutions. These actions were tried at the same time, though not consolidated. [Tr. Vol. I, fol. 642.] The compensation to be paid to the owner was determined by a jury and paid into court for the owners. [Tr. Vol. I, fols. 485-487, 621-622.] Verdicts were rendered and judgments entered condemning the land described in the resolutions. [Tr. Vol. I, fols. 370, 585, 412, 485, 606, 621.] The owners of the land condemned duly appealed from the judgments. The judgments were affirmed by the District Court of Appeal of the state of California. (County of Los Angeles v. Rindge Company ... Cal. App. ..., 200 Pac. 27.) [Tr. Vol. III, fols. 4243-4295.] A hearing of the causes by the Supreme Court of California was denied by that court. [Tr. Vol. III, fols. 4295-4297.] The causes were heard on one record by the District Court of Appeal and are before this court by writ of error on one record, by stipulation. The same questions are involved in the two cases.

At the trial of the actions defendant in error first offered in evidence the two resolutions above referred to. [Tr. Vol. I, fols. 667-679.]

Thereupon it rested and plaintiffs in error moved for a nonsuit. The motion was denied.

The basis of the motion for a nonsuit was that defendant in error had failed to prove (a) that the taking is necessary to the use in question, namely, highway purposes (b) the public necessity of such proposed public utility or public improvement, (c) that such property which it is proposed shall be taken is necessary therefor, and (d) that such public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good and the least private injury. [Tr. Vol. I, fols. 681-683.]

The trial court held that the resolutions were *prima facie* evidence and the District Court of Appeal that they were conclusive evidence of such facts. The holding of the District Court of Appeal was predicated on the provisions of section 1241 of the Code of Civil Procedure of California.

That section in its pertinent parts, prior to the year 1913 read:

> "Before property can be taken, it must appear:
>
> "1. That the use to which it is to be applied is a use authorized by law;
>
> "2. That the taking is necessary to such use."

In 1913 the Legislature of California amended subdivision 2 of section 1241 to read as follows:

> "That the taking is necessary to such use; *provided,* when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; *provided,* that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof." (Calif. Stats. 1913, p. 549.)

It is the contention of plaintiffs in error in this court that the Amendment of 1913 is unconstitutional and void for the reason that it is repugnant to the Fourteenth Amendment to the Federal Constitution.

They say:

"The record herein referred to involves the following questions:

1. Was the property sought to be condemned for a use authorized by law, and was the taking necessary to such use?

2. Was there any public necessity for the proposed highways, in view of the fact that they were located exclusively on private property?

3. Were the resolutions adopted by the Board of Supervisors of Los Angeles county conclusive evidence of the facts required to be found by section 1241 of the California Code of Civil Procedure before a citizen's property may be condemned, and is the proviso of that section constitutional?

4. Was the trial court justified in holding that the resolutions adopted by the Board of Supervisors of Los Angeles county were only *prima facie* evidence of the facts required to be found by section 1241 of California Code of Civil Procedure, and that the burden was cast upon plaintiffs in error to negative this *prima facie* showing by clear and convincing evidence?

5. Were plaintiffs in error deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, or have they or either of them been denied the equal protection of the laws, in violation of the said amendment?"

After setting forth that the record involves the above enumerated questions, plaintiffs in error, in their argument, discuss the following:

"(1) The special defenses stricken out raised the question whether the land sought to be condemned was being taken for a public use authorized by law.

(2) The Amendment of 1913 to section 1241 of the California Code of Civil Procedure, declaring certain resolutions to be conclusive evidence of the facts stated, was and is unconstitutional and void.

(3) The holding of the trial court that the resolutions were only *prima facie* evidence of the facts recited instead of conclusive, did not cure the error, or make the amendment in question valid as to plaintiffs in error.

(4) Plaintiffs in error have been deprived of their property without due process of law and have been denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution."

We proceed with the argument.

POINTS AND AUTHORITIES.

FIRST.

This Court Is Without Jurisdiction.

The decision of the state court was put on the ground that plaintiffs in error were accorded every right claimed by them under the Federal Constitution and for that reason were not in a position to complain of the alleged unconstitutionality of section 1241 of the California Code of Civil Procedure. It is true

that the court held section 1241 valid and constitutional but it also held that if it were conceded that section 1241 was unconstitutional, plaintiffs in error were not prejudiced because of the fact that they were accorded every right claimed by them under the Federal Constitution. [Tr. Vol. III, fols. 4243-4294.]

Plaintiffs in error claim that the Amendment of 1913 to section 1241 is unconstitutional and void. The same claim was made in the trial court and that court agreed with them and proceeded as though the amendment had never been enacted. They contend that the striking out of their special separate defenses prevented them from showing that the purpose for which their property was to be taken was not a public one. Under the allegations of the complaint, the answers and special separate defenses remaining after the striking out of the one referred to, they were afforded and took advantage of the opportunity of showing that the use was not public.

The learned District Court of Appeal said:

> "As a separate defense the defendants May K. Rindge and Rindge Company alleged that all of the property which plaintiff sought to condemn was within the boundaries of the Malibu ranch in Los Angeles county; that while the ranch was owned in severalty by May K. Rindge and the Rindge Company, it was, and had been

for more than 20 years, with the knowledge of plaintiff, operated as a single ranch under one management and control; that the westerly end of said proposed highway terminates at and upon the boundary line between Los Angeles county and Ventura county upon the Malibu ranch, which, as owned by defendants, extends into Ventura county for a distance of —— miles, all of which is managed, operated and controlled by said defendants with the lands of said ranch so located in Los Angeles county; that there is no public road of any kind or character whatever within ——miles of the Ventura county end of said ranch, and the only means of egress and ingress to the westerly terminus of said proposed road is by private trails and ways; that said proposed road or highway, if condemned, would be located wholly and solely upon that part of the Malibu ranch situated in Los Angeles county, and would end and terminate upon private property of the Rindge Company at the Ventura county line, and as constructed would give access wholly and solely to the private ranch property of defendants May K. Rindge and Rindge Company, and could not furnish any way of necessity or convenience to the general public; that the owners of said ranch have no need or desire for a public road thereon, which, if constructed, would be a constant menace and damage to their ranch property; by reason of which facts it is alleged the taking of said property for the purpose contemplated would be without necessity of any kind or right. Upon the grounds and for the reason that all of the matter so alleged as a separate defense was irrele-

vant, immaterial, surplusage, and conclusions of law, plaintiff moved to strike the same from the answer. This motion was granted, and appellants assign the ruling as error. Counsel for appellants insist the special defense so pleaded was upon the theory that an isolated road within the boundaries of what is practically one property and not desired by the owners thereof, and which could afford no real service to any part of the public as a road, could not possibly be a public necessity for which condemnation would lie. While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error in the ruling, but, conceding as much, it is impossible to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof." (200 Pac. 27, at p. 31.)

After the introduction in evidence of the resolutions of the Board of Supervisors which the trial court held were *prima facie* evidence of the facts enumerated in the *proviso*, plaintiffs in error introduced testimony for the pur-

pose of overcoming the *prima facie* effect of the resolutions. Defendant in error then introduced testimony tending to show the necessity for the highway, the necessity for the particular land sought to be taken and that it was located in the manner most compatible with the greatest public good and the least private injury.

The District Court of Appeal said:

> "However this may be, and contrary to the views herein expressed, the trial court agreed with defendants' contention that the resolution was not conclusive evidence of the facts so found, but did admit it as a sufficient *prima facie* showing of such facts, and upon this theory denied the motion for nonsuit. Thereupon, and after the denial of their motion, defendants were given the widest latitude in offering a mass of evidence for the purpose of showing there was no necessity for the proposed highway, followed by plaintiff, which in rebuttal, introduced a vast deal of evidence, likewise touching the question of necessity for the improvement. Indeed, it appears from the voluminous record that no restrictions whatsoever were imposed upon either party in the introduction of evidence touching the question. Under these circumstances, and assuming the court erred in accepting the resolution even as *prima facie* evidence, nevertheless we cannot perceive how defendants were prejudiced by the circumstances, since the testimony which, according to appellants' theory, should have been produced during

plaintiff's presentation of its case in chief was later in the trial supplied. The error is predicated solely upon the order in which the evidence touching the question was admitted.

"'It is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if upon the trial the defect is overcome by evidence subsequently introduced.' Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400; Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 98 Pac. 678.

"'Since both parties were permitted, after the ruling upon the motion, to introduce evidence, without restriction, touching the question of necessity, defendants could in no event have been prejudiced by the ruling.'" (P. 31.)

The rule applicable here is found in *Baltimore Traction Co. v. B. Belt R. Co.* (1893). 151 U. S. 137, 14 S. Ct. 294, 38 L. Ed. 102, in which it is held that where a statute providing for condemnation proceedings has been construed by the state courts as requiring notice no federal question with respect to due process of law can be based upon the objection that such statute allows condemnation without notice.

The statute in question was construed by the trial court as unconstitutional and void and it was held that the issues of necessity for the highway, necessity for the particular land con-

demned for the highway and the proper location thereof were before the trial court for hearing and determination after notice to plaintiffs in error. There can, therefore, be no question with respect to due process of law based upon the objection that the statute allows the determination of these matters without notice.

The decision of the federal questions was rendered unnecessary by the view taken of the case by the District Court of Appeal as quoted above. If the decision of a federal question by a state court is rendered unnecessary by the view the court properly takes of the case within the scope of the pleadings, the judgment is not open for review in the United States Supreme Court. (*Chapman v. Goodnow* (1887), 123 U. S. 540, 8 S. Ct. 211, 31 L. Ed. 235; *Wells v. Crane* (1893), 150 U. S. 84, 14 S. Ct. 22, 37 L. Ed. 1007.)

Under these circumstances this court will affirm the judgment. (*Murdock v. City of Memphis* (1874), 87 U. S. 590, 20 Wall 591, 22 L. Ed. 429.)

Where a state decision of an alleged federal question was not necessary to its judgment, but the court also puts its decision upon another ground not repugnant to the Federal Constitution, the United States Supreme Court has no jurisdiction. (*Brooks v. Missouri* (1887), 124 U. S. 394, 31 L. Ed. 454.)

This court will not entertain jurisdiction of state judgments where, beside the federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained. (*Kennebeck & P. R. Co. v. Portland & K. R. Co.* (1871), 81 U. S. 14 Wall. 23, 20 L. Ed. 850; *Rector v. Ashley* (1867), 73 U. S. 6 Wall. 142, 18 L. Ed. 733; *Gibson v. Choteau* (1868), 75 U. S. 8 Wall. 314, 19 L. Ed. 317; *Klinger v. Missouri* (1871), 80 U. S. 13 Wall. 257, 20 L. Ed. 635; *Detroit City R. Co. v. Guthard* (1884), 114 U. S. 133, 29 L. Ed. 118; *New York etc. Co. v. New York* (1901), 186 U. S. 269, 22 S. Ct. 916, 46 L. Ed. 1158; *Hale v. Lewis* (1900), 181 U. S. 473, 21 S. Ct. 677, 45 L. Ed. 959; *Mobile etc. Co. v. Miss* (1907), 210 U. S. 187, 28 S. Ct. 650, 52 L. Ed. 1016; *Gaar etc. Co. v. Shannon* (1911), 223 U. S. 468, 32 S. Ct. 236, 56 L. Ed. 510.)

And this is true even though the Supreme Court of the United States may think the position of the state court is an unsound one. (*Klinger v. Missouri* (1871), 80 U. S. 13 Wall. 257, 20 L. Ed. 635; *DeSaussure v. Gaillard* (1887), 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125.)

It must appear that the case could not have been decided without deciding the federal question. (*Brown v. Atwell* (1875), 92 U. S. 327,

23 L. Ed. 511; *DeSaussure v. Gaillerd* (1887), 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125.)

For this reason it is respectfully submitted that this court is without jurisdiction and that the judgment should be affirmed on this ground. However, out of an overabundance of precaution we will discuss the alleged federal constitutional questions raised by plaintiffs in error.

SECOND.

California Code of Civil Procedure, Section 1241, as Amended in 1913, Is Not Repugnant to the Due Process of Law Clause of the Federal Constitution.

The right of eminent domain is an attribute of sovereignty. It is inherent in the state and exists independent of the Constitution. All private property is held subject to this right in the state. The nature of the right contemplates that private property is to be taken for public use. Conversely, private property may not be taken by the state unless the purpose for which it is taken is a public one. Other than this limitation inwrought in the right itself, the only restriction on the power of the state is that to be found in the Constitution of the United States and of California,—that compensation shall be paid or tendered to the own-

er. (Constitution United States, Fourteenth Amendment; California Constitution, Art. I, Sec. 14.) In all other respects the state, acting through the Legislature, is unfettered in exercising this sovereign power.

When the state or one of its agencies exercises this sovereign right two separate functions of government are set in action. First, the legislative function determining the necessity for the exercise of the power, the necessity for taking the particular property, the quantity to be taken and the location of the public improvement. Second, the judicial function, determining whether the purpose for which the property is to be taken is public, and the compensation to be paid the property owner.

The legislative function is not subject to any limitation or restriction of the Federal Constitution. The Legislature may, by direct statutory enactment, take any particular property or it may delegate that power to a subordinate tribunal to be exercised in any manner prescribed by the Legislature.

The judicial function is subject to the due process of law clause of the Fourteenth Amendment. Property may not be taken for a private use and it may not be taken without compensating the owner.

Here we are concerned with the legislative function only. The *proviso* inserted in section

1241 of the California Code of Civil Procedure by the Amendment of 1913 concerns only (a) the necessity for the proposed improvement (b) the necessity of the particular property therefor, and (c) the location of the proposed improvement. It is the determination of these questions only which is made conclusive on the property owner without notice or hearing. He is not entitled to notice or hearing on the determination of these questions.

The judicial function remains to be exercised upon notice and hearing in the judicial proceeding. By subdivision 1 of section 1241, to which the *proviso* does not relate, the court must determine whether the taking is for a public use. Compensation is determined as provided elsewhere. Constitutionally this is all the property owner is entitled to—a judicial determination of whether the use is public, and compensation.

The Fourteenth Amendment to the Federal Constitution does not require that a property owner shall be given notice of or accorded a hearing on the consideration or determination of the questions of (a) the public necessity of the proposed public improvement (b) the necessity of the particular property for such public improvement, and (c) the location of such public improvement.

We approach a consideration of the authorities among which there is no conflict supporting the argument and statements set forth above. These authorities hold that a Legislature may determine the matters enumerated in the *proviso* to section 1241 by direct legislative enactment or through a subordinate tribunal in any manner it may prescribe, without notice or hearing given the property owner, without violating the Fourteenth Amendment.

In the late case of *Bragg v. Weaver* (1919), 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135, the facts are stated in the opinion as follows:

> "By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will be attended by the least expense, and has the express sanction of a statute of the state. Pollard's Code 1904, Sec. 944a, clauses 21 and 22. Whether the statute denies to the owner the due process of law guaranteed by the 14th Amendment is the federal question in the case. It was duly presented in the state court, and, while no opinion was delivered, the record makes it plain that, by the judgment rendered, the court resolved the question in favor of the validity of the statute.
>
> "It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no dis-

cussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid." (P. 58.)

The court said:

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. Ed. 206, 207; A. Backus, Jr., & Sons v. Fort Street Union Depot Co., 169 U. S. 557-568, 42 L. Ed. 853, 858, 18 Sup. Ct. Rep. 445; Adirondack R. Co. v. New York, 176 U. S. 335, 349, 44 L. Ed. 492, 499, 20 Sup. Ct. Rep. 460; Sears v. Akron, 246 U. S. 242, 251, 62 L. Ed. 688, 698, 38 Sup. Ct. Rep. 245." (P. 58.)

The court states the facts in *Sears v. Akron* (1917), 246 U. S. 242, 38 S. Ct. 245, 62 L. Ed. 688, as follows:

"Akron, Ohio, lies on Little Cuyahoga River a short distance above its confluence with the Big Cuyahoga. In May, 1911, the legislature of Ohio granted to the city, by special act, 'the right to divert and use forever' for the purposes of its water supply 'the Tuscarawas River, the Big Cuya-

hoga and Little Cuyahoga Rivers and the tributaries thereto, now wholly or partly owned or controlled by the state.' The city already possessed, under the General Laws of Ohio, power to appropriate for this purpose, by condemnation proceedings, the property of any private corporation. Acting specifically in exercise of the power conferred by the special act and of every other power thereunto enabling, the city, by resolution of its council, passed May 27, 1912, declared its intention to appropriate all the waters, above a point fixed, of the Cuyahoga River and tributaries; and by an ordinance passed August 26, 1912, it appropriated the same, directed its solicitor to apply to the courts to assess the compensation to be paid, and provided for the payment of 'the costs and expenses of said appropriation' out of an issue of bonds theretofore authorized. The city then constructed a dam and reservoir at the place specified and announced its intention of diverting the water before or by August 1, 1915." (Pp. 243-5.)

This suit was in the federal District Court for an injunction restraining the construction of the dam and the diversion of the water.

The court held:

> "Fourth: Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both article 1, section 10, of the Federal Constitution, and the 14th Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners hav-

ing an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas Rivers; and furthermore, that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial (Hairston v. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, 28 Sup. Ct. Rep, 331, 13 Ann. Cas. 1008), the necessity and the proper extent of a taking is a legislative question (Shoemaker v. United States, 147 U. S. 282, 298, 37 L. Ed. 170, 184, 13 Sup. Ct. Rep. 361; United States v. Gettysburg Electric R. Co., 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 65, 57 L. Ed. 1003, 1076, 33 Sup. Ct. Rep. 667). The legislature may refer such issues, if controverted, to the court for decision (Pittsburg, C. C. & St. L. R. Co. v. Greenville, 69 Ohio St. 487, 69 N. E. 976)."
(P. 251.)

In *Secombe v. R. R. Co.* (1874), 90 U. S. 108, 23 Wall. 108, 23 L. Ed. 67, this court declared:

> "It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the Legislature. There is no limitation upon the power of the Legislature in this respect, if the purpose be a public

> one, and just compensation be paid or tendered to the owner for the property taken." (Pp. 117-118.)

Thus there is no limitation in the Constitution of the United States upon the power of the Legislature of California to enact the *proviso* found in section 1241 of the Code of Civil Procedure, as the only restraint upon the power of the Legislature was that requiring that the purpose be a public one and that compensation be made.

The above case is followed by the leading case of *Boom v. Patterson* (1878), 98 U. S. 403, 25 L. Ed. 206, where the question is more fully discussed. This court, in part, said:

> "The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. *When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.* * * *

> The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner v. Halloran,* 11 Minn. 253. The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value." (Italics ours.) (Pp. 406, 407.)

If the purpose be public, the taking may be outright, provided reasonable, certain and adequate provision is made at the time of appropriation to ascertain and secure the compensation to be made to the owner. (*Madisonville Traction Co. v. St. Bernard Min. Co.* (1904), 196 U. S. 239, 49 L. Ed. 462.) The quantity which should be taken is a legislative question. (*U. S. v. Gettysburg Electric R. Co.* (1895), 160 U. S. 668, 680, 40 L. Ed. 576.)

Lewis, in his work on Eminent Domain, 3d edition, Vol. 1, section 255, says:

> "The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government."

The same learned author, 3d edition, Vol. II, section 453, says:

> "How much may be taken. It has been held to be within the province of the Legislature, in the absence of constitutional provisions on the subject, to determine the quantity, as well as the estate, which may be taken for public use."

Cooley, in his work on Constitutional Limitations, 7th edition, page 760, says:

> "Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land,' and no further finding of adjudication can be essential, unless the Constitution of the state has expressly required it."

Again, at page 777, this learned author says:

> "The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the state itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional

right to be heard upon the question, unless the State Constitution clearly and expressly recognizes and provides for it."

See also:

Hays v. Seattle (1919), 251 U. S. 233, 40 S. Ct. 125, 64 L. Ed. 243;

O'Neil v. Leamer (1915), 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249;

U. S. v. Chandler-Dunbar Water Power Co. (1912), 229 U. S. 53, 65, 33 S. Ct. 667, 57 L. Ed. 1063;

Appleby v. Buffalo (1910), 221 U. S. 524, 31 S. Ct. 699, 55 L. Ed. 838;

Adirondack R. Co. v. N. Y. (1900), 176 U. S. 335, 349, 20 S. Ct. 460, 44 L. Ed. 492;

Backus v. Fort Street Union Depot Co. (1898), 169 U. S. 557, 568, 18 S. Ct. 445, 42 L. Ed. 853;

Chicago etc. Co. v. Chicago (1896), 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979;

Monongahela Nav. Co. v. U. S. (1892), 148 U. S. 312, 327, 13 S. Ct. 622, 37 L. Ed. 463;

Shoemaker v. U. S. (1892), 147 U. S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170;

Pearson v. Yewdall (1877), 95 U. S. 294, 24 L. Ed. 436;

In re Condemnations, etc. (1920), 266 Fed. 105;

Cuyahoga River Power Co. v. City of Akron (1913), 210 Fed. 524;

Kaw etc. District v. Metropolitan Water Co. (1911), 186 Fed. 315, 319, 108 C. C. A. 393;

Chappell v. U. S. (1897), 81 Fed. 765, 26 C. C. A. 600;

In re Rugheimer (1888), 36 Fed. 371.

The books are replete with cases supporting the constitutionality of statutes by which the Legislature itself, or a subordinate tribunal conclusively determine the matters enumerated in section 1241 of the California Code of Civil Procedure. The following from the Appellate Courts of the various states are directly in point:

Kramer v. Cleveland and Pitts. R. R. Co. (1855), 5 Ohio St. 140, 146;

People v. Smith (1860), 21 N. Y. 595, 597;

Water Commissioners v. Johnson (1912), 86 Conn. 151, 84 Atl. 727;

County Court of St. Louis Co. v. Griswold (1874), 58 Mo. 175;

Water Works Co. v. Burkhart (1872), 41 Ind. 364;

Aldridge v. R. R. Co. (1832), 2 Stew. & Port. (Ala.), 199, 23 Am. Dec. 307;

Varick v. Smith (1835), 5 Paige Ch. (N. Y.) 137, 28 Am. Dec. 417;

Matter of Fowler (1873), 53 N. Y. 60, 62;

Zimmerman v. Canfield (1885), 42 Ohio St. 463;

Matter of Union Ferry Co. (1885), 98 N. Y. 140, 153;

Tait's Exec. v. Central Lunatic Asylum (1888), 84 Va. 271, 4 S. E. 697;

Sholl v. German Coal Co. (1887), 118 Ill. 427, 10 N. E. 199;

Moore v. Sanford (1890), 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151;

Fairchild v. City of St. Paul (1891), 46 Minn. 540, 49 N. W. 325;

Barrett v. Kemp (1894), 91 Ia. 296, 59 N. W. 76;

Paxton etc. Co. v. Farmers etc. Co. (1895), 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 592;

Richland School Tp. v. Overmyer (1905), 164 Ind. 382, 73 N. E. 811;

Hayford v. Municipal Officers of Bangor (1907), 102 Me. 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940;

So. Park Commissioners v. Montgomery Ward & Co. (1910), 248 Ill. 299, 93 N. E. 910, 21 Ann. Cas. 127,

Westport Stone Co. v. Thomas (1911), 175 Ind. 319, 94 N. E. 406, 35 L. R. A. (N. S.) 646;

Bd. Water Commissioners v. Manchester (1915), 89 Conn. 671, 96 Atl. 182, affirmed in *Manchester v. Board of Water Commissioners* (1915), 241 U. S. 649, 36 S. Ct. 552;

Dist. of Columbia v. Washington S. & O. (1915), 43 App. Cas. 433;

Tracy v. Elizabethtown (1882), 80 Ky. 259, 265;

Smeaton v. Martin (1883), 57 Wis. 364, 371, 15 N. W. 403;

Boston v. Talbot (1910), 206 Mass. 82, 91 N. E. 1014;

Ford v. Chicago (1861), 14 Wis. 663;

Iron Railroad Co. v. City of Irontown (1869), 19 Ohio St. 299, 304;

Wisconsin Water Company v. Winans (1893), 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813;

City of Philadelphia v. Ward (1896), 174 Pa. St. 45, 34 Atl. 458;

Chicago etc. Co. v. Mason (1909), 23 S. Dak. 564;

See note Ann. Cas. 1913a, p. 1256.

The constitutional principles governing the exercise of the right of eminent domain are

learnedly and elaborately stated in *People v. Smith* (1860), 21 N. Y. 595, 597, where the court says:

> "The question then is, whether the state, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether under the circumstances of a particular case the property required for the purpose shall be taken or not; and I am of opinion that the state is not under any obligation to make provision for a judicial contest upon that question. The only part of the Constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. *The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the Legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated*

and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority.

"The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the Legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not

be said to be taken for a public use. (*The People v. The Mayor of Brooklyn,* 4 Comst. 419; *Taylor v. Porter,* 4 Hill 140; *Wynehamer v. The People,* 3 Kern. 378.)

"*It follows from these views that it is not necessary for the Legislature in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceeding with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall in its discretion prescribe.*" (Italics ours.) (Pp. 597-599.)

The only cases in which it has been held that the property owner may question the necessity of taking any or all of the property sought to be taken are cases where the State Constitution required the question to be submitted to a court or jury or are cases where the Legislature has authorized only the taking of such property as is necessary. It has never been held that the property owner may question the necessity of taking any or all of the property sought to be condemned in a case where the

Legislature itself has determined the necessity or has delegated that power to an inferior tribunal. An examination of those decisions from which it might appear upon cursory reading that it was held that the question of necessity was a judicial one will disclose that the question in reality considered and discussed was whether or not the use for which the property was sought to be taken was in fact a public one, or will disclose that the Legislature had expressly made the determination of the question itself a judicial one to be determined by the court.

The fear of counsel, expressed several times in their brief, in substance that the effect of the *proviso* of section 1241 of the California Code of Civil Procedure is to substitute the arbitrary and capricious action of a board of supervisors for a judicial investigation, should at least be somewhat allayed by the language of this court in *Kentucky R. R. Tax Cases* (1885), 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414, where it is said:

> "But the same suppositions may be indulged in, in opposition to all contrary presumptions, with reference to the final action of any tribunal appointed to determine the matter, however carefully constituted, and however carefully guarded in its procedure, and whether judicial or administrative. Such possibilities are but the necessary imperfections of all human institu-

tions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections." (P. 335.)

The Amendment of 1918 to the California Constitution.

Counsel quote an amendment to the California Constitution adopted by a vote of the people November 5, 1918, and argue therefrom that under the California Constitution the determination of the matters enumerated in the *proviso* to section 1241 is a judicial question.

We are at a loss to understand what this amendment has to do with this case in this court, particularly in view of the fact that it was adopted after this case had been on trial for over a month. [Tr. Vol. I, fol. 640 and Vol. III, fol. 3259.]

Whether the statute in question violates any provision of the Constitution of California does not concern this court. The state court's construction of its own Constitution is accepted by this court. Nothing appears in the opinion of the District Court of Appeal herein indicating that that court considered section 1241 repugnant to the State Constitution. Further, as the constitutional provision became effective after the resolutions had served their purpose

as evidence, it could have no bearing on the value of such resolutions as evidence. Upon a reading of the amendment it is at once apparent that the words "an adjudication that there is no necessity for taking the property" refer to those cases in which, under section 1241, there may be an adjudication that there is no necessity for taking the property. Under section 1241, if the legislative body of the county, city and county, or incorporated city or town does not determine the necessity for taking the property by a two-thirds vote, such necessity must be determined by the court. Also, when the property to be taken lies outside of the territorial limits of the public corporation, or when a drainage, irrigation, levee or reclamation district, mentioned in the Constitution, seeks to condemn, the necessity for the taking must be determined by the court. It is clear that it is to a taking in these cases that the provision of the Constitution refers.

However, this discussion is of no interest to this court for, as already pointed out, the District Court of Appeal in this case held that under the Constiution and laws of California a determination of the matters enumerated in the *proviso* of section 1241 is a legislative function. This court, as it has repeatedly held, will accept the state court's construction of the State Constitution and statute so long as there is no

conflict with the Federal Constitution. That there is no such conflict and that a determination of the matters enumerated in the *proviso* by the Legislature or by a subordinate tribunal does not violate the Federal Constitution is amply sustained by the authorities already referred to. (*Bragg v. Weaver* (1919), 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135.)

The Holding That the Resolutions Were Prima Facie Evidence.

Neither is there any merit in the argument of counsel that the ruling of the trial court holding the resolutions of the Board of Supervisors *prima facie* evidence of the necessity deprived their clients of their property without due process. That a statute or decision declaring certain facts *prima facie* evidence of other facts does not violate the Federal Constitution is apparent from the many decisions referred to in the brief of plaintiffs in error. (Brief, Plaintiffs in Error, pp. 42-65.)

The Legislative Body Does Not Determine That the Use Is Public.

Throughout the brief of plaintiffs in error the assertion is made that under the *proviso* the legislative body conclusively determines that property is taken for a public use. Counsel are in error. A cursory reading of the section will

convince the court that subdivision 1 provides for the determination by the court of whether the use is public and that the *proviso* does not in any manner concern itself with this question. Assuming, as they do, that the *proviso* authorizes the conclusive determination by the legislative body, of whether the use is public, counsel erect a structure of argument apparently convincing to themselves that the *proviso* operates to deprive their clients of due process of law. The fact that the *proviso* does not authorize the legislative body to determine conclusively, or at all, the question of public use makes manifest the falsity of the argument.

The Holding That the Determination of Necessity Is a Legislative Function.

Counsel argue that under the California law prior to this case the decision of the matters enumerated in the *proviso* of section 1241 was a judicial function; that the court in this case held it to be a legislative one; that therefore, by some mental complex, unexplained and unexplainable, plaintiffs in error are deprived of their property without due process of law. That the California courts did not for the first time in this case hold that the decision of these questions is a legislative function is apparent from *Wulzen v. Board of Supervisors* (1894), 101 Cal. 15, 35 Pac. 353, 4 Am. St. R. 17,

quoted from by the District Court of Appeal. [Tr. Vol. III, fols. 4274-4275.] However this may be, the only matter of importance to this court in this behalf is that it was held to be a legislative function in this case, for it is the settled rule of this court in cases of this kind to accept the construction placed by the courts of the state upon their own Constitution and statutes. (*Backus v. Fort Street Union Depot Co.* (1898), 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853.) The language of the court in the Backus case is peculiarly applicable to counsel's contention that the Appellate Court in this case held that the decision of the matters enumerated in the *proviso* was a legislative function, contrary to the previous decisions of the California courts, and that thereby plaintiffs in error were denied due process of law. The court declared:

> "His contention, however, is that the true construction of the Constitution and laws of the state, as settled by repeated decisions of its Supreme Court, was wholly disregarded in this case, and that by reason thereof the respondents were denied that equal protection of the laws which is guaranteed by the 14th Amendment to the Federal Constitution. * * *
>
> "But it is insisted that those proceedings were not so warranted; that the settled, uniform, and unreversed construction thereof by the Supreme Court of the state

theretofore forbade them, and hence there was a discrimination against the respondents, and they were denied that equal protection of the laws which the Federal Constitution guarantees. Thus, for instance, it is insisted that the previous rulings of the courts, both trial and supreme, had been to the effect that a jury called under these condemnation statutes was a jury of inquest and not a trial jury, whereas in this case the ruling was practically to the contrary, and the respondents were compelled to submit their rights to a trial jury subject to the control of the presiding judge, as in ordinary common-law cases. We deem it unnecessary to review the many authorities from the Supreme Court of Michigan cited by counsel, or determine whether the ruling in this case as to the methods of procedure and the true construction of the statute is or is not in harmony with prior decisions of that court. Accepting the contention of counsel, that in this case the Supreme Court of the state has put a different construction on the state statutes from that therefore given, and has sustained modes of procedure different from those which had previously obtained, still it does not follow that this court has a right to interfere and say that the present ruling is erroneous and the prior construction correct, or that the change of construction works a denial of any fundamental rights. There is no vested right in a mode of procedure. Each succeeding Legislature may establish a different one, providing only that in each is preserved the essential elements of protection. The fact that one construction has been placed upon a statute by the highest court of the

state does not make that construction beyond change. Suppose it were true, in the fullest sense of counsel's contention, that for a series of years the courts had ruled that the jury in condemnation cases was a jury of inquest, or in the nature of a sheriff's jury—one determining for itself all matters of law and fact, and that in this case, for the first time, they held otherwise, and that such jury was a common-law jury, subject to be controlled by the presiding judge, whose duty it was to determine all questions of law, and still, whatever might be thought of the propriety of such a change of construction, there is in it nothing to justify this court in reversing the judgment of the state court and denying the correctness or validity of this last ruling. We fail to see why the presence of the judge with this jury, his assumption of power to control its proceedings, his instructions to it on questions of law, necessarily vitiated the proceedings. Grant that such a course had never been taken before; grant that it had never been held to be a proper proceeding; grant that it was unexpected by counsel,—and yet if the judge's rulings and instructions were in themselves correct, and the propriety of his presence and control be held by the Supreme Court of the state warranted by the statutes, we do not perceive that any right possessed under the Constitution of the United States has been violated." (Pp. 566, 569-571.)

The only conclusion that can be drawn from the foregoing is that section 1241 of the California Code of Civil Procedure, as amended, is valid and constitutional and applicable to the

case at bar, wherein the property owners were not accorded any notice or hearing by the Board of Supervisors on the determination of the matters enumerated in the proviso of that section.

THIRD.

Plaintiffs in Error Were Not Denied the Equal Protection of the Law.

It is argued that "the different treatment accorded to the four classes described in said section 1241, namely: When the resolution is adopted by a two-thirds vote, and when not; and when the land sought to be condemned is within the territorial limits of the political subdivision seeking to condemn, and when not" denies plaintiffs in error the equal protection of the law. (Brief, Plaintiffs in Error, p. 66.)

The Power Exercised in Enacting This Statute Is Not Controlled by the Fourteenth Amendment.

The obvious answer to this contention of plaintiffs in error is that the property owner has no interest or right whatever in how, or in what manner the necessity for the improvement, the land necessary therefor, or its location are determined. If the Legislature may designate by statute the property to be appropriated or may delegate that power to a subordinate tri-

bunal, as it has been repeatedly held it may do, without notice or hearing to the land owner, the property owner is not denied the equal protection of the law if his property is selected in a manner different from that by which his neighbor's is selected. (*Bragg v. Weaver* (1919), 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135; *Secombe v. R. R. Co.* (1874), 90 U. S. 108, 117, 23 Wall. 108, 23 L. Ed. 67; *Boom v. Patterson* (1878), 98 U. S. 403, 25 L. Ed. 206.) He is denied nothing. On the contrary, he is given privileges he does not otherwise have, if the Legislature says, as it has done in California, the necessity for taking property must be determined by two-thirds vote of the legislative body seeking to condemn. The power to select necessarily includes the lesser power of determining the mode of selection.

There is no limitation on the power of the Legislature as to the mode of exercising the right of eminent domain if the purpose be a public one and just compensation be paid or tendered to the owner. (*Secombe v. Milwaukee Etc. R. Co.* (1874), 90 U. S. 108, 117, 23 Wall. 108, 23 L. Ed. 67.)

Mr. Cooley, in his work on Constitutional Limitations, 7th Ed., p. 555, says:

"The Legislature may therefore prescribe or authorize different laws of police, *allow the right of eminent domain to be exercised*

in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the state Constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle." (Italics ours.)

And at page 777 Mr. Cooley says:

"The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the state itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly recognizes and provides for it. On general principles, the final decision rests with the legislative department of the state; and if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The state is not under any obligation to make provision for a judicial contest upon that question. And where the case is such that it is proper to delegate to

individuals or to a corporation (a) the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for the taking."

The conclusive reply to this contention of plaintiffs in error is set forth in *Southern R. Co. v. Memphis* (1912), 126 Tenn. 267, 148 S. W. 662, Ann. Cas. 1913 E. 153, 41 L. R. A. (N. S.) 828, in the following statement:

> "But all other incidents of the taking are political questions, for the determination of the sovereign, and not judicial questions, for the determination of the courts. Selecting the property to be taken, as contradistinguished from similar property in the same locality, determining its suitableness for the use to which it is proposed to put it, as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take. This power would be a vain and empty thing, if the owner could contest the advisability of taking his property rather than his neighbor's, or if he could interpose as a defense to the taking that other property could be found which would suit the public purposes better, or that he, the owner, was of opinion and could prove that the public needed more or less than the quantity proposed to be taken. The power to take would be of small value, if the thing to be taken, in its quantity, quality, and locality, could be determined by another and adverse interest. The authorities seem to be in harmony, some of which are: Anderson v. Turbeville, *supra;* Shoemaker v. United States, 147 U. S. 282, 13 S. Ct.

361, 37 U. S. (L. ed.) 170; Boom Co. v. Patterson, 98 U. S. 406, 25 U. S. (L. ed.) 206; United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 16 S. Ct. 427, 40 U. S. (L. ed.) 576; Kohl v. United States, 91 U. S. 367, 23 U. S. (L. ed.) 449; United States v. Fox, 94 U. S. 320, 24 U. S. (L. ed.) 192; 10 Am. & Eng. Enc. of Law (2d ed.) 1069; Illinois Cent. R. Co. v. Chicago, 141 Ill. 602, 30 N. E. 1044, 17 L. R. A. 530.

"Hence, it has been held that a particular property belonging to a particular citizen can be selected directly for the public use by legislative enactment. Anderson v. Turbeville, *supra;* Shoemaker v. United States, *supra;* Memphis State Line R. Co. v. Forest Hill Cemetery Co., *supra.* Public parks are for the benefit of the public, and property taken for such uses falls within a proper exercise of the power of eminent domain. Memphis v. Hastings, *supra;* Shoemaker v. United States, *supra;* United States v. Gettysburg Electric Ry. Co., *supra.*

"The Southern Railway's terminals and switch-yards are now devoted to a public use, so selected and set apart by proper legislative authority; and it is well settled that, before such property can be taken for another and inconsistent public use, there must be express or plainly implied legislative warrant for so doing. Memphis State Line R. Co. v. Forest Hill Cemetery Co., *supra;* 1 Lewis on Em. Dom. arts. 266, 269, 276; 15 Cyc. 612, 614. But the Legislature must have known that all of the property of the Southern Railway Company, including its switchyards in the city of Memphis, which is employed in commercial transportation, is devoted to a public use inconsist-

ent with the use of the same property for a public park; and therefore, when by the act in question, it authorized the city to acquire these yards for parks, it expressly authorized the taking for the other and inconsistent use. So we have a legislative selection of this particular property, already devoted to another and inconsistent public use, directly made by special enactment, which necessarily includes express authority to take it and devote it to the other and inconsistent use.

"That such a selection is not condemned by section 8 of article 1, section 21 of article 1, of the Fourteenth Amendment to the Constitution of the United States, follows naturally from what has been said heretofore respecting the origin, extent, and nature of the power of eminent domain. It exists outside and independent of the Constitution.

"The reasons which support such an act upon the part of the sovereign power are wholly dissimilar to the reasons which strike down arbitrary selections and classifications as between citizens. It does not require a reason for the selection of property for public uses other than the judgment of the sovereign power expressed in the legislative enactment which directs the taking. A law authorizing a particular person to borrow money at a rate of interest forbidden by law to all others, as in McKinney v. Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104; a law applying to a particular class of minors and the management of their estates, and not to others, as in Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 60, 30 Am. Dec. 430; a law singling out a particular sheriff, and requiring a duty of him under a penalty

for failure to perform it, as in Alexandria v. Dearman, 2 Sneed (Tenn.) 104; a law providing that suits in which the venue has been changed may be moved back to the courts where they were instituted upon affidavits which could only be made by 'unconditional union men,' as in Brown v. Haywood, 4 Heisk. (Tenn.) 357; a law providing that cities having a certain population and over may sue without giving bond for cost, as in Memphis v. Fisher, 9 Baxt. (Tenn.) 240; a law which deprived lunatic intestates from transmitting their property to their heirs or distributees, as in Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; a law applying to counties of a certain population by the census of 1890, as in Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589; a law which forbids a barber to keep his bathroom open on Sunday, and does not prohibit other owners of public baths from doing the same thing, as in Ragio v. State, 86 Tenn. 272, 6 S. W. 401; a law making it unlawful for a corporation to discharge an employee for voting or not voting at an election, which does not apply to any other citizen, as in State v. Nashville, C. & St. L. R. Co., 124 Tenn. 1, Ann. Cas. 1912D 805, 135 S. W. 773; a law which exempts the city of Memphis from liability for neglecting its public streets, as in Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, are each and all violative of the constitutional provisions last above referred to, and furnish typical examples of the application of those constitutional inhibitions against class legislation. The protection which the organic law affords to a citizen against arbitrary discrimination in favor of other citi-

zens, or a particular class of citizens arbitrarily selected, is the same thing in the Constitution which forbids the sovereign power to take the property of the citizen for private purposes at all, and which affords the guaranty of the equal protection of the laws. But it is obvious that the selection of a particular piece of property by the sovereign for public purposes falls within and is governed by an entirely different principle from that controlling the cases referred to. The power to take for public purposes necessarily includes the power to select that which is to be taken." (Pages 282-286.)

A pertinent case is *Kennebec Water District v. Waterville* (1902), 96 Me. 234, 52 Atl. 774, in which the court answered a contention similar to the one here made, as follows:

> "III. The third section of the act incorporating the Kennebec Water District provides, that if any person sustaining damages and said corporation shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in cases of damages by the laying out of highways. This gives to the owner of property taken the ultimate right upon appeal to have his damages assessed by a jury. Section five of the same act provides that if the trustees of the water district fail to agree with the Maine Water Company, the damages shall be assessed by appraisers to be appointed by the court upon a bill in equity to be instituted by the water district.

"It is claimed by the defense that the different tribunals thus provided for the assessment of damage is a violation of the Fourteenth Amendment of the Federal Constitution, which provides that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' In the case at bar the act of incorporation does not deny to any person, or to the Maine Water Company, the equal protection of the laws. It provides to each person who sustains damages and to the Maine Water Company just compensation. There is no discrimination or inequality in that respect. No different rule is prescribed for the estimation of just compensation in case of individuals, and in case of the Maine Water Company. The act provides for a competent and impartial tribunal in each case with the right of the property owner to appear and be heard. We think that this is all that is required by the terms of the amendment to the Federal Constitution above referred to. The only difference as to the award of compensation is one of procedure. As has already been shown the Legislature has entire discretion to designate any impartial tribunal to assess compensation, whether jury, commissioners or appraisers. We perceive no reason for precluding the Legislature from prescribing in the same act for the assessment of compensation by different tribunals for different classes of property taken, nor are we aware of any decision of any court holding that the Legislature is so precluded. Ordinarily the compensation for tangible property taken may properly be determined by a jury; but when, as in the case at bar, the property and franchises of a

large corporation are taken for public uses, and the value, not only of tangible property, but of the franchise, rights, privileges and contracts are factors in determining the amount of compensation to be paid, the Legislature may well determine that commissioners or appraisers, the members of which have peculiar skill and experience in such matters, can, better than a jury, do exact justice to the corporation whose property has been condemned and taken.

"We are of the opinion that the act here in question by prescribing a different tribunal for fixing the amount of just compensation to the Maine Water Company than that prescribed for fixing the compensation to other parties is not 'without due process of law', and does not deny to any person or to the Maine Water Company, 'the equal protection of the laws', and is not repugnant to the Fourteenth Amendment of the Federal Constitution." (Pages 251, 252.)

See also, Missouri v. Lewis, (1879) 101 U. S. 22, 25 L. Ed. 989.

So, also, and for the same reasons, the Legislature of the state of California has the undoubted power to regulate the mode of exercising the right of eminent domain. If the matters enumerated in the proviso of section 1241 are not determined by a two-thirds vote of a Board of Supervisors and a further hearing is allowed in court, this fact does not derogate in the least from the authority of a decision by a two-thirds vote made conclusive by the statute.

The reasoning of this court in *Cincinnati Street R. Co. v. Snell* (1904), 193 U. S. 30, 36, 24 S. Ct. 319, 48 L. Ed. 604, in which it was contended that the provision for a change of venue for local prejudice made by O. Rev. Stats., section 5030, where the opposite party is a corporation with more than fifty stockholders, having its principal place of business in the county in which the action is pending, without conferring an equal right on the corporation, violated the constitutional guaranty of the equal protection of the laws, is directly applicable here. The court reasoned thus:

> "The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the 14th Amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the 14th Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been de-

nied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.

"It follows that the mere direction of the state law that a cause, under given circumstances, shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guaranty of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails. In *Iowa C. R. Co. v. Iowa,* 160 U. S. 393, 40 L. Ed. 469, 16 Sup. Ct. Rep. 360, this court said:

"'But it is clear that the 14th Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another.'" (Pages 36, 37.)

The situation before this court in *Pittsburg etc. R. Co. v. Backus,* (1894), 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031, is particularly

analagous here. The facts appear in the statement of Mr. Justice Brewer as follows:

> "On March 6, 1891, the Legislature of the state of Indiana passed an act entitled 'An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency' (Laws 1891, pp. 199-291) which, expressly repealing 'all laws and parts of laws within the purview of this act,' provided in itself a complete and comprehensive system of taxation. By it all property of individuals and ordinary corporations was subject to valuation and assessment by county officers, while the assessment of railroad property was committed to a state board of tax commissioners, composed of the governor, secretary of state, auditor of state, and two appointees of the governor. To this board, in addition to the assessment of railroad property, was given the duty of equalizing the assessment of real estate throughout the state, as well as of entertaining appeals from the decisions of the several county boards." (Pages 421-2.)

The court held:

> "Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so,

and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals Act by Congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than $5000, was given but a single trial and in that court, while if the amount in dispute was over that sum the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?" (P. 427.)

In *Kentucky R. R. Tax Cases* (1885), 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414, this court was considering a Kentucky statute providing for the assessment of railroad property in a different manner from property of other corporations. In stating and denying the contention of the plaintiffs in error, it was said:

"The plaintiffs in error, however, did interpose a defense below, legitimate in itself, and arising under the Constitution of the United States, namely, that in the proceedings of the board of railroad commissioners, resulting in the valuation and assessment, under the Act of April 3, 1878, they were severally denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution. As

this defense was overruled by the Court of Appeals of Kentucky, another Federal question is presented which we are bound now to examine and decide.

"The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. These latter report to the auditor the total cash value of their property, and pay into the treasury as a tax, upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers.

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the con-

stituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose.

"So, the fact that the Legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots, in such a sense as imperatively to require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation. Calling them by the same name does not obliterate the essential differences between them, and accordingly, it is not insisted on in argument, as an objection to the system, that a railroad running through several counties is valued and taxed as a unit and by a special board organized for that purpose, while other real estate is valued in each county by assessors. The final point of objection seems to be reduced to this. In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it, without notice to the taxpayer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to fifty dollars, to the

Circuit Court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased.

"The discrimination, however, is apparent rather than real. An examination of the statutes shows, that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has authority to increase the original assessment made by the railroad commissioners, and there is, therefor, no case for an appeal similar to that of the owner of ordinary real estate.

"But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of *Missouri v. Lewis*, 101 U. S. 22, 30. It was there said by Mr. Justice Bradley, delivering the opinion of the court and speaking to this point, that, 'the last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of de-

cision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.' The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the Constitution of the state in its Legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws." (Pp. 336-339.)

See also, the very late case of *Southern Railway Co., v. Watts* (Jan. 2, 1923), U. S. Adv. Ops. 1922-23, 199 in which this court said:

"Differences in the machinery for assessment or equalization do not constitute a denial of equal protection of the laws." (P. 202.)

The right of eminent domain, as said in *People v. Smith* (1860), 21 N. Y. 595, 597, stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, and differences in the machinery for the determination of necessity do not constitute a denial of equal protection of the laws.

It has been repeatedly held by this court that the fact that one person may be prosecuted by information while another may be prosecuted by indictment does not contravene the Fourteenth Amendment. (Hurtado v. Cal. (1883), 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Maxwell v. Dow* (1899), 176 U. S. 581, 598, 20 S. Ct. 448, 44 L. Ed. 597.)

A law denying the right of an individual in all criminal cases, not capital, to have a jury composed of twelve jurors does not contravene the Fourteenth Amendment. (*Maxwell v. Dow* (1899), 176 U. S. 581, 598, 20 S. Ct. 448, 44 L. Ed. 597.) The court in this case said:

> "As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown v. New Jersey*, 175 U. S. 172, the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections." (P. 605.)

The Fourteenth Amendment did not create new legal rights. It operates on the legal rights existing at its adoption. *U. S. v. Cruickshank* (1875), 92 U. S. 542, 554, 23 L. Ed. 588. Property owners never having had the legal right

to have the necessity for taking their property determined upon notice and hearing, or in any particular manner, the fact that one class may be granted that privilege by the Legislature does not deny to a class not granted the privilege the equal protection of the law.

In *Backus v. Fort Street Union Depot Co.* (1898), 169 U. S. 557, 568, 18 S. Ct. 445, 42 L. Ed. 853, it is said:

> "Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the Legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Mississippi & Rum River Boom Co. v. Patterson,* 98 U. S. 402, 406 (25: 206, 208); *United States v. Jones,* 109 U. S. 513, (27: 1015); *Cherokee Nation v. Southern Kansas Railway Company, supra.*" (Pp. 859.)

The assertion that because when the land is within the territorial limits of the political subdivisions the legislative body may, by four-fifths vote, conclusively determine the matters enum-

erated in the *proviso*, while when the land lies outside, such matters may not be so determined, plaintiffs in error are denied the equal protection of the law is fully answered by this court in *Gardner v. Mich* (1905), 199 U. S. 325, 26 S. Ct. 106, 50 L. Ed. 212, in this language:

> "The defendant further contends, as he contended in the Supreme Court of the state, that the act of the Michigan Legislature, creating the board of jury commissioners for Wayne county, in which the present trial occurred, denies to accused persons and other litigants in that county the equal protection of the laws. The ground of this contention is, that by the general laws of the state, the officers authorized to make and return the jury list were elected by the people in their several townships and in city wards (Const., Art. 11, Sec. 1; *People ex rel. Atty. Gen. v. Detroit*, 29 Mich. 108), and required that jurors should be of those who are assessed on the assessment roll; while, by the Wayne county jury law of 1893, as amended in 1895 (Pub. Acts. 1893, p. 337; *id.* 1895, p. 69), the jury lists are made up and returned by a board of seven jury commissioners, appointed by the governor, with the consent of the senate, and the names of persons to be returned need not appear on the assessment rolls. This difference between the general law relating to jury trials and the special law relating to Wayne county, it is said, constitutes a discrimination against the people of that county, and amounts to a denial to them

of the equal protection of the law. This view does not commend itself to our judgment. It is fully met and shown not to be sound by the judgment in *Missouri v. Lewis* (*Bowman v. Lewis*), 101 U. S. 22, 31, 25 L. Ed. 989, where Mr. Justice Bradley, speaking for the court, and referring to the 14th Amendment, said:" (P. 333.)

The court then quotes at length from *Missouri v. Lewis.*

The rule that the Legislature may declare a finding of a subordinate tribunal conclusive evidence of any fact which it need not have required in the first place, recognized in the cases referred to by counsel for plaintiffs in error (Brief, Plaintiffs in Error, p. 44) is directly applicable here. The authorities already quoted demonstrate that the Legislature may conclusively determine the matters enumerated in the *proviso* of section 1241 of the California Code of Civil Procedure by statutory enactment, without notice or hearing to the property owner. It may, therefore, declare that the finding of such facts by a subordinate tribunal shall be conclusive evidence of such facts.

The necessity for a public improvement is not a matter in which the individual citizen or property owner has an interest different from or greater in degree than the public at large. Such necessity is a question of general public policy to be determined by the public's agent, the Leg-

islature, or its subordinate tribunal. It is an act of governmental administration. No authority has been produced and none can be found holding that a property owner must be given notice or hearing on whether an act of public administration shall be done. No authority can be found holding that the performance of an act of public administration in one manner under certain circumstances and in another manner under other circumstances constitutes a denial of the equal protection of the law.

The Classification Made Is Not Arbitrary or Unreasonable.

If it should be conceded, for the purpose of argument, that the Fourteenth Amendment limits the Legislature in prescribing the mode in which the matters enumerated in the *proviso* of section 1241 shall be determined, nevertheless, the statute under consideration does not deny the equal protection of the law.

It is elementary that the Fourteenth Amendment to the Constitution does not prohibit a state from classifying persons or property for purposes of legislation. A classification, to be obnoxious, must be arbitrary and destitute of reasonable basis. If any state of facts can be conceived that would sustain a classification, it is not arbitrary. It makes no difference that the facts may be disputed or their effect op-

posed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation. (*Rast v. Van Deman etc. Co.* (1916), 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679, Ann. Cas. 1917B, 421; *Lindsley v. Natural etc. Co.* (1911), 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C 160; *Heisler v. Thomas Colliery Co.* (Nov. 27, 1922), U. S. Adv. Ops. 1922-1923, p. 119.)

Testing the statute under consideration by these principles, can it be said that the classification made is arbitrary and destitute of reasonable basis, or that one class is singled out for descriminatory and hostile legislation? The Legislature says that when the necessity for the taking is so obvious as to be recognized by a two-thirds vote of the legislative body of the political subdivision, the determination of such necessity by a two-thirds vote of that body is conclusive. It also says that when the necessity for the taking is not so obvious as to be recog-

nized by two-thirds of the legislative body of the political subdivision, the necessity shall be determined in a judicial proceeding in which the property owner shall be heard. The legislative body of a political subdivision of the state is presumed to have intimate knowledge of local conditions within the subdivision. Such knowledge may be derived from the individual personal knowledge of its members, or may be derived from statements made to it or to its members, either official or unofficially. Men are elected members of such bodies because of their familiarity with the conditions and wants of the subdivision. Information possessed by one member is, of course, at the disposal of all of the others. The statute merely says that when two-thirds of the members of such a body, exercising the knowledge of local conditions which they have, say that a public improvement is needed and that certain land must be acquired for that improvement, such determination is conclusive. Who is in any better position to determine such necessity than two-thirds of such a body?

Where citizens living in some part of the political subdivision desire a public improvement in that particular section but the necessity therefor is not so apparent that two-thirds of the legislative body is satisfied of it, the Legislature says such necessity shall be determined

in a judicial proceeding and the property owner shall have an opportunity of contesting it.

Is this classification so unreasonable and arbitrary as to be obnoxious? On the contrary, is it not a most reasonable and fair mode of determining the necessity for a public improvement?

The same argument applies to a taking outside of the territorial limits of the political subdivision. In such cases the necessity is determined in a judicial proceeding, irrespective of the views of the legislative body. This, for the reason that the legislative body has no interest in, is not presumed to know, and usually does not know conditions outside of its own political subdivision. There is nothing, we submit, unreasonable or arbitarary in such classification.

Whether the statute be considered as one prescribing the mode of exercising the sovereign power of eminent domain which is not subject to any constitutional limitation except that the purpose be public and compensation be made or tendered, or whether it is necessary that the Legislature observe reasonable limitations in exercising such power, the statute does not deny to any person the equal protection of the law.

FOURTH.

The Striking Out of the Special Defenses Did Not Prevent Plaintiffs in Error From Raising the Question Whether the Land Sought to Be Condemned Was Being Taken for a Public Use Authorized by Law.

The apparent theory of plaintiffs in error in urging that the trial court erred in striking the special defense set forth in the assignment of errors is that they were thereby denied the right of proving that the taking was not for a public use.

The record clearly shows that they were not denied this right. Each and every matter alleged in this special separate defense was an issue before the court under the allegations of the complaint and the denials and separate defenses of the amended answers which remained standing after this separate special defense was stricken out. Plaintiffs in error introduced a vast mass of evidence for the purpose of proving that the use was not a public one. Defendant in error in turn introduced a vast deal of evidence for the purpose of proving that the proposed use was public. The court found that the use for which the property was to be taken was a public use and the District Court of Ap-

peal upheld this finding. The evidence referred to is scattered throughout the transcript of the record in such fashion that it is impossible to directly refer to it. In view of the fact that the District Court of Appeal made this same statement, we trust we may be pardoned in not taking up the time of the court with unlimited references to the transcript. [Tr. Vol. III, fols. 4267, 4278-4280.]

We fail to see how under this condition of the record the due process of law clause of the Fourteenth Amendment was violated by the action of the court in striking out these special defenses. Plaintiffs in error were not denied any right under the Fourteenth Amendment.

It is to be observed that counsel do not say that the evidence demonstrates that the proposed taking was for a private use, nor do they say that they were denied the right to prove that the use was not public, nor that defendant in error did not prove that the use was public. Their sole contention is that the mere striking from the pleadings of their special defenses denied their clients due process of law. Assuredly, if they were given every latitude in an attempt to prove that the use was private they are in no position to complain merely because their attempt was unsuccessful.

The District Court of Appeal, referring to these separate defenses, said:

> "While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error in the ruling, but, conceding as much, it is impossible to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof." (200 Pac., pp. 31, 32.)

The state court having found the facts to be as stated in this quotation, this court will accept such statement as true, for in cases of this kind coming from the Supreme Court of a state, questions of fact passed upon in the state court are not here open to review. (*Backus v. Fort Street Union Depot Co.* (1898), 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853.)

An examination of the special defenses stricken out will disclose that the sole issues raised by them were: The necessity for the highway; whether the purpose constituted a public use; and that the taking deprived plaintiff in error

of their property without due process of law and denied them the equal protection of the laws. Under the complaint, the answers and the separate defenses remaining after these were stricken, each of these matters was an issue before the court for hearing and determination. The questions of necessity and of public use were issues under paragraphs III and IV of the complaint, paragraph III of the amended answers of May K. Rindge and Rindge Company, and the special defense which remained in the pleadings. [Tr. Vol. I, fols. 48-50, 288-291, 324-327, 301-302, 337-338.] The issues, whether plaintiffs in error were deprived of their property without due process of law and whether they were denied the equal protection of the laws, were raised by a special defense which remained standing in the amended answers and was not stricken out. [Tr. Vol. I, fols. 302-303, 390-395, 405.]

We have demonstrated, we believe, that the striking of the special defenses set forth in the assignment of errors did not deprive plaintiffs in error of the right to show that the use for which the property was to be taken was not public, but, on the contrary, that they were accorded the widest latitude in such attempt. There is therefore no basis for their contention that they were denied due process of law in this behalf.

THE PROPERTY WAS TAKEN FOR A PUBLIC USE.

The property was taken for a public highway. It does not require statutory authority to demonstrate that a public highway is a public use. However, the Code of Civil Procedure of California, section 1238, provides,

> "Uses for which eminent domain may be exercised. Subject to the provisions of this title the right of eminent domain may be exercised in behalf of the following public uses: * * * 3. * * * roads, highways, bridges, streets and alleys, * * *."

That the taking of the particular public highway in question is for a public use cannot be seriously controverted. The trial court so found. [Tr. Vol. 1, fols. 390, 402-409, 595-603.] The District Court of Appeal upheld these findings. Under these circumstances what is the attitude of this court in determining whether the taking is for a public use? It is convincingly stated in *Hairston v. Danville & W. R. Co.* (1907), 208 U. S. 598, 28 S. Ct. 331, 52 L. Ed. 637, a proceeding by a railroad company for condemnation of land for a spur track, in this language:

> "The condemnation of land in this case has been held by the courts of Virginia to be authorized by the Constitution and laws of that state, and we have no right to review that aspect of the decision. The

law of Virginia permits no exercise of the right of eminent domain except for public uses. Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Dice v. Sherman (Va.), 59 S. E. 388. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. The plaintiff in error, however, insists that the record in this case, which includes all the evidence, shows, unmistakably, that the taking was for private uses, and that the claim by the railway company, that the spur track was designed in part for public uses, is no better than a colorable pretense. We assume that, if the condemnation was for private uses, it is forbidden by the 14th Amendment. * * * But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. Some cases illustrative of the

tendency of local conditions to affect the judgment of courts are Hays v. Risher, 32 Pa. 169; Boston & R. Mill Corp. v. Newman, 12 Pick 467, 23 Am. Dec. 622 (Conf. Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39); Turner v. Nye, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Ex parte* Bacot, 36 S. C. 125, 16 L. R. A. 586, 16 S. E. 204; Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441; Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; Strickley v. Highland Boy Gold Min. Co., *supra;* Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 50 L. Ed. 696, 26 Sup. Ct. Rep. 353. The propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Fallbrook Irrig. District v. Bradley; Clark v. Nash; and Strickley v. Highland Boy Gold Min. Co.—*ubi supra.* What was said in these cases need not be repeated here. *No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws.* In Missouri P. R. Co. v. Nebraska, *ubi supra,* it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses

for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the State Constitution, law, and court approve will be held to be forbidden by the 14th Amendment to the Constitution of the United States." (Italics ours.) (Pp. 605-607.)

In determining whether a particular use is public, this court stated the rule in *U. S. v. Gettysburg Electric R. Co.* (1895), 160 U. S. 668, 40 L. Ed. 576, as follows:

"In these Acts of Congress and the joint resolution the intended use of this land is plainly set forth. It is stated in the 2d volume of Judge Dillon's work on Municipal Corporations (4th Ed.), Sec. 600, that when the Legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one." (P. 680.)

Plaintiffs in error have presented nothing indicating that the highway in question is not a public use.

In *Shoemaker v. U. S.* (1892), 147 U. S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170, a proceeding to ascertain the compensation to be paid property owners for lands taken for a public park in the District of Columbia under an Act of Congress, this court, after citing cases said:

> "In these and many other cases it was, either directly or in effect, held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use.
>
> "In the case cited from the Missouri reports, where the Legislature had authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis county, situated in the eastern portion of the county, near to and outside of the corporate limits of the city of St. Louis, it was held that this was a public use, notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional.
>
> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the Legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is ex-

hausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." (Pp. 297-8.).

See also:

Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co. (1915), 240 U. S. 30, 32, 36 S. Ct. 234, 60 L. Ed. 507.

It is not essential that the entire community, or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use. (*Fallbrook Irrigation District v. Bradley* (1896), 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369.).

That plaintiffs in error were afforded every opportunity of showing that the property was not taken for a public use and, further, that the property was taken for a public use, has been demonstrated. There is, therefore, no basis for the contention that the use is not public or that plaintiffs in error were denied any right under the Federal Constitution by reason of the striking out of the special defenses.

Conclusion.

We cannot close this brief without remarking that these are among the many cases which should never have come before this court. If the constitutional questions raised were new and had never been before this court for adjudication there might be some justification for calling upon the time of this court for their decision but, as pointed out herein, they have been adjudicated many times by this court and by the courts of last resort of nearly all of the states adversely to the contention of plaintiffs in error. Particularly is the above true in view of the fact that the cases were tried on the theory that the statute in question was unconstitutional and void.

To recapitulate:

1. This court is without jurisdiction for the reason that a decision of the constitutional questions was rendered unnecessary by the view taken of the case by the learned District Court of Appeal.

2. California Code of Civil Procedure, section 1241, is not repugnant to the due process clause of the Fourteenth Amendment for the reason that a property owner in a proceeding to take his property for public use is not entitled to notice or hearing on the determination of (a) the necessity for the proposed improve-

ment, (b) the necessity of the particular property therefor, and (c) the location of the improvement.

3. Plaintiffs in error were not denied the equal protection of the law for the reason that (a) the mode of exercising the right of eminent domain is not subject to constitutional limitation other than that the purpose be public and compensation made or tendered, (b) the classification made by section 1241 is not arbitrary or unreasonable, (c) plaintiffs in error were accorded the privilege which they assert the statute denies, that of notice and hearing on the questions enumerated in the *proviso* of section 1241.

4. A striking out of the special separate defenses did not prevent plaintiffs in error from introducing testimony for the purpose of proving that the use was not public.

There is, therefore, no ground for reversal and the judgment in each case should be affirmed.

Most respectfully submitted,

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And

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Rindge Co v. Los Angeles County, 262 U.S. 700 (1923). Brief. 19 Mar. 1923. The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832â 1978, link.gale.com/apps/doc/DW0105448714/SCRB?u=cowmsl&sid=bookmark-SCRB&pg=1. Accessed 11 June 2023.