IN THE

Supreme Court of the United States

No. 237.

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.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

As has heretofore been stated, the record in this case embraces two separate appeals, being two separate condemnation actions, No. B-43572 and No. B-59443, respectively (Tr., Vol. I, Fols. 1-119 and 553-577). Both of these cases were by stipulation of the

parties and by order of the court tried at the same time, but not consolidated. (Tr., Vol. I, Fol. 642.)

Another case, No. 65893, is referred to in the stipulation, but was decided in favor of these plaintiffs in error and need not be further considered.

In the court of first instance the plaintiffs in error raised the question of the constitutionality of Section 1241 of the California Code of Civil Procedure, which section is set out in full at pages 66-68 of the opening brief of plaintiffs in error. That question was raised by a special defense in the amended answer of May K. Rindge, which special defense alleged in substance that the proposed roads were located entirely upon private property, were not a public necessity, and that the condemnation would be for private purposes and in contravention of the provisions of the Constitution of the United States and particularly in violation of the Fourteenth Amendment to the Constitution of the United States and would be void and without due process of law and would constitute a denial to the defendants of the equal protection of the laws. (Tr., Vol. I, Fols. 303-315.) The same defense was alleged in the amended answer of the Rindge Company. The County of Los Angeles, the original plaintiff and the present defendant in error, moved to strike out this special defense "upon the grounds and for the reason that all of the matter asked to be stricken out and each of the separate matters, is irrelevant and immaterial and constitutes mere surplusage and conclusions of law of the pleader and none of the matters asked to be stricken out, are matters of fact, ultimate or otherwise, nor are any of them allegations upon which the court would have the right or the power to receive evidence." These motions of the plaintiff were

granted and the special defenses referred to stricken out (Tr., Vol. I, Fols. 654-660). The action of the court of first instance in so striking out these special defenses was affirmed by the District Court of Appeal, Second Appellate District, Division One (Tr., Vol. III, Fols. 4282-4289).

It is of the utmost importance, for a full understanding by the court of the facts involved in these cases, that the situation of the property involved and something of its previous history should be clearly set out. The property through which condemnation is sought to be made is that known as the Malibu Ranch, which is an oblong shaped piece of ground along the shore of the Pacific Ocean, approximately twenty-two miles in length and varying in width from one-half mile to one and one-half miles. In this vicinity the line of the coast runs almost exactly east and west, not north and south. The road sought to be condemned in the "Main Road" case runs directly through this long and narrow strip of land and ends at the county line where Los Angeles County stops and Ventura County begins. It is admitted that there is no connection in the way of a public road or highway at present in Ventura County and it is not claimed in the record that any such road is contemplated. The road sought to be condemned in the "Alisos Canyon Road" case is a branch from the so-called "Main Road" running in a general northerly direction to the boundary line of the ranch on the north, and there is no connection by public road or highway with the said proposed Alisos Canyon road at that point or at any point near the end of the said road. The evidence of these conditions is scattered throughout the entire record, but it is not considered necessary to refer to

the many instances where the evidence is set out because, as heretofore stated, these facts are not disputed by the defendant in error.

Having in mind the location and general nature of the ranch property and the location of the roads proposed to be built on that property, it is interesting to note that the present litigation is only a part of a long series. The present litigation may be said to have had its inception with the passage of the resolutions by the Board of Supervisors of Los Angeles County, which resolutions are referred to in the record. (Tr., Vol. I, Fols. 9-48.) These resolutions were passed on August 26, 1916. The condemnation proceedings themselves were begun by the filing of the Complaint, October 18, 1916.

On December 3, 1907, there had been instituted in the District Court of the United States for the Southern District of the State of California, Southern Division, Case No. 1379, entitled, "United States of America vs. M. K. Rindge as the executrix of the estate of Frederick H. Rindge, deceased, *et al.*" The object of that suit, as stated by the district judge in his opinion, was to obtain a decree enjoining and restraining the defendant from maintaining certain fences or obstructions, on the grounds (1) that the Beach Road and the roads used by the settlers up the various canyons are public highways and necessary for access to government lands; (2) that at the time the defendants obtained title to the ranch property there was reserved by implication title to the government and its grantees a right of way over the defendant's land; (3) that the construction and maintenance of the fences in question, though on the defendant's own land, constituted an unlawful en-

closure of public lands within the meaning of the Act of Congress of February 5, 1885. (Tr., Vol. I, Fols. 772-774.) A restraining order was issued December 4, 1907, and was continued in force until final decision of the case, which decision was made October 27, 1913, resulting in a decree dismissing the Bill of Complaint after an opinion of the court sustaining all the contentions of the defendants and overruling those of the government.

On December 16, 1907, there was instituted in the Superior Court of the State of California in and for the County of Los Angeles, a suit entitled, The People of the State of California vs. Mary K. Rindge, testatrix (executrix) of the estate of Frederick H. Rindge, deceased, *et al.* (Tr., Vol. II, Fols. 2747-2748.) That cause came on for trial October 6, 1908, and resulted in a finding in favor of the people and the existence of a certain public road or highway in the County of Los Angeles extending from the city of Santa Monica in a northwesterly direction, along the shore of the Pacific Ocean, to the Ventura County line. May 2, 1910, a decree was signed which embodied the findings above set out. (Tr., Vol. II, Fols. 2754-56.) This decree contained an injunction restraining the defendants and all persons claiming under them from asserting or claiming any right, title and interest in the road adverse to the people of the State of California. An appeal was taken by the defendants to the Supreme Court of California, and on April 7, 1917, that Court rendered an order reversing the order of the lower court which denied a new trial. The injunction had remained in force from May 2, 1910, to April 7, 1917. (Tr., Vol. II, Fols. 2757-61.)

ARGUMENT.

The facts being as above set out and being in each instance undisputed, it is now necessary to take up in order the points relied upon by the defendant in error, which are four in number:

"First: That this court is without jurisdiction.

Second: That the 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.

Third: Plaintiffs in error were not denied 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."

There is a clear-cut issue in this court on each one of the foregoing propositions and the plaintiffs in error will now present their reply to the contentions of the County of Los Angeles as set out in its brief.

FIRST.

THIS COURT HAS JURISDICTION.

At the outset it is well to state fully what occurred in the court of first instance with regard to its holding concerning the amendment of 1913 to Section 1241. The defendant in error states on page 10 of its Brief:

"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 pro-

ceeded as though the amendment had never been enacted.''

It is submitted that the record does not justify the statement that the court "proceeded as though the amendment had never been enacted." A reference to the opinion of the judge of the court of first instance (Tr., Vol. III, Fols. 4032-4039) will show that so far from ignoring the statute and proceeding as if it had never existed, the judge specifically held that the matters which the statute declared in plain terms should be conclusive evidence were, in his view, to be given the force only of *prima facie* evidence.

The defendant in error then proceeds to quote at considerable length from the opinion of the District Court of Appeal, which quotation shows the view of the court to be that even though the lower court struck out as immaterial and irrelevant the pleadings which plaintiffs in error offered as a basis for their proof, nevertheless, because the court later heard evidence tending to substantiate the portions of the pleadings stricken out as immaterial, consequently the error, if any was committed, was thereby cured. In other words, the contention of the defendant in error is that the court may state in advance that evidence of a certain class is irrelevant, immaterial and surplusage and that if later the court receives such evidence the error of striking out the offer to produce such evidence is cured. It appears to us that the mere statement of this position is enough to demonstrate its illogical, inconsistent, unfair and arbitrary character. It is submitted that the lower court must take one ground or the other. It must hold the pleadings to be surplusage and the matter and offer immaterial

and irrelevant and consequently exclude any evidence thereunder or it must allow such pleadings to remain in the record and then receive evidence tending to prove the same.

If, however, evidence was received by the court without restriction, the only logical inference which can possibly be drawn is that it did not receive the slightest consideration when it was offered and admitted, because the court had previously stated in the plainest terms that it would regard such evidence as irrelevant and immaterial. It is obvious, consequently, that it could not give it any consideration when it was received, and it is to be presumed that it did not give it any consideration. If it had intended to give it any consideration it would have allowed the pleadings to remain in the record.

The defendant in error states again, on page 14 of its brief, that the statute in question was construed by the trial court as unconstitutional and void. It is submitted, as heretofore set out, that such was not the case. The Court gave the statute a strained construction in the apparent effort to sustain it as constitutional. The court then proceeded, under the statute, and received as evidence the resolution of the Board of Supervisors as to which the statute in question spoke, but instead of holding that the statute meant what it said and that those resolutions were conclusive evidence of the facts therein set out, the court held that they were *prima facie* evidence of the facts therein set out. In other words, the court left the statute as it found it and proceeded under it, save and except only that it changed the word "conclusive" to the words "*prima facie.*" If the court had found the statute in question to be void, unconstitu-

tional and of no effect, the natural and only course for the court to take would be to hold that no proceedings whatever that were begun under the statute could have any effect and the court would have consequently ignored its existence altogether. The opinion of the trial court heretofore referred to shows conclusively that such was not the course it took.

The defendant in error devotes the remainder of its discussion of this point, to attempting to show that the Federal question, if any, in the present case is overshadowed by certain alleged matters of local law and consequently this court cannot take jurisdiction. The plaintiffs in error do not dispute the general propositions laid down by the defendant in error with regard to this branch of the case, but we do respectfully and earnestly submit that those general principles have no application to the present case. The Federal question in this case was urged at the outset in the trial court and was relied upon in the Court of Appeal. There has never been a time since these condemnation proceedings started when the plaintiffs in error have neglected a single opportunity to urge the existence of the Federal question and to urge that they were being deprived of their rights without due process of law and in violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

On page 16 of the brief of the defendant in error appears the statement that this court is without jurisdiction to review 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. We submit that nowhere in its brief has the defendant in error pointed out that other and distinct ground on which the judgment can be sus-

tained. The cases cited by defendant in error in support of its propositions show clearly enough the limitation of the principles stated. A brief consideration of the cases cited on page 16 of the brief of defendant in error will be helpful.

In Kennebeck and P. R. Co. v. Portland & K. R. Co. (1871), 81 U. S., 14 Wall. 23, 20 L. Ed. 850, the Federal question was not raised by the pleadings nor in any of the proceedings, but only appeared in the opinion of the state court. The appellant claimed that a certain foreclosure which it was attacking was void, because that foreclosure was under an Act which violated the freedom of contract, but the Supreme Judicial Court of Maine held the foreclosure was good, without any reference to the Act which was being attacked, but under an earlier Act which was not the subject of attack.

Rector vs. Ashley (1867), 73 U. S., 6 Wall. 142, 18 L. Ed. 733, was decided in the lower court on the ground that limitations had run against the plaintiff and that consequently the Federal question was of no importance.

In Gibson v. Choteau (1868), 75 U. S., 8 Wall. 314, 19 L. Ed. 317, the attempt was made to bring in a Federal question for the first time on an argument filed in support of a motion for a rehearing in the Supreme Court of Missouri, and the Federal Supreme Court refused to hold that that argument was the point on which the state court decided the question.

Klinger vs. Missouri (1871), 80 U. S., 13 Wall. 257, 20 L. Ed. 635. By the Missouri constitution of 1865 a test oath was prescribed to be taken by public officers, jurors, etc., which oath the Federal Supreme Court declared to be unconstitutional. A juror in a

trial for murder in Missouri refused to take the oath, but upon being asked why he refused, he stated not only that he had sympathies with the South during the rebellion and therefore could not take the oath truthfully, but that those were his feelings still, and stronger than ever. He was then discharged from service and the defendant excepted. It was held that his avowed disloyalty to the government was a sufficient cause in itself for discharge, irrespective of his refusal to take the oath, and as it did not appear that he was discharged for his refusal to take the oath, the Federal Supreme Court refused to take jurisdiction in the case.

In Detroit City Railway Co. v. Guthard (1884), 114 U. S. 133, 29 L. Ed. 118, the Federal question relied upon in the Supreme Court of the United States, was not raised at all in the lower courts, though it might have been raised there at any time.

In Hale v. Lewis (1900), 181 U. S. 473, 45 L. Ed. 959, the Wisconsin statute required building and loan associations to deposit with the state treasurer security to a certain amount to be held in trust for the benefit of local creditors. The receiver of a Minnesota building and loan association, which corporation had made the deposit required by the Wisconsin statute by a resolution of its Board of Directors directing such deposit and compliance with the Wisconsin law, prayed that such securities might be turned over to him and the proceeds distributed among *all* shareholders, on the ground that such pledge was a preference of Wisconsin creditors and was in violation of the contract clause of the Federal Constitution. It was held that the contract clause could not be invoked to release these securities from the operation of the

statute, because the stockholders had waived their right to insist upon the constitutional objection by the voluntary act of the Board of Directors in making the deposit with the state treasurer.

In New York Central Railroad Co. v. New York (1901), 186 U. S. 269, 46 L. Ed. 1158, no Federal right was claimed to be violated in the original pleadings and no attempt was made to raise a Federal question until it reached the Court of Appeals, where it was, for the first time mentioned in a brief and not passed on by the Court. The case was decided in the Court of Appeals upon the ground that the charter of the city forbade the raising of the question of benefits to property in a court and the lower courts decided the case on the same ground.

Mobile, etc., Co. vs. Mississippi (1907), 210 U. S. 187, 52 L. Ed. 1016. The following quotation from the opinion will suffice:

> "In the assignment of error in this court the plaintiffs in error have for the first time invoked the Fourteenth Amendment to the Constitution of the United States."

Defendant in error also refers, on page 15 of his brief, to Brooks vs. Missouri (1887), 124 U. S. 394, 31 L. Ed. 454. It is only necessary to say that this court granted a motion to dismiss an appeal in that case because the defendant had not made his motion for a new trial in the lower court within the time allowed by the statute and consequently the Federal question was not an issue.

Garr, Scott & Co. vs. Shannon, 223 U. S. 468:

This was a case to recover a "franchise tax imposed by a State statute."

In addition to the Federal question involved, the decision of the State Court was based upon the *entirely independent* and conclusive local question "that the tax was voluntarily paid."

That case and this are in no sense analogous. Here the Appellate decision was based solely upon the Federal questions involved. All else that was said—*nothing else was decided*—related solely to the effect of the decision of the Federal questions. It did not concern and did not decide any other independent question which, aside from the Federal questions, would, in and of itself, have been conclusive of the controversy, or, for that matter, any other question whatever, its decision of the Federal questions being completely conclusive of the controversy.

This, with one exception, disposes seriatim of all of the cases cited and relied upon by defendant in error in this behalf.

That single exception is the case of Baltimore Traction Company vs. B. Belt R. Co., 151 U. S. 137, cited to the effect "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." (Brief of Defendant in Error, p. 14.)

The syllabus of that case upon which the above quoted statement is founded is as follows:

> "When it was objected that a statute of Maryland as to condemnation of lands, violated the U. S. Constitution in that an owner of land could be deprived thereunder of his property without due process of law because the statute did not provide for any notice to him, *and the court of appeals of that state had decided that the statute, properly construed,* required notice, held, that this court is bound by the state decision, and the want of requirement of notice did not exist, and no Federal question is involved."

It is submitted that the foregoing analysis shows clearly the distinction between the case at bar and those cited by the defendant in error in support of its proposition. Upon their behalf, although the plaintiffs in error have no doubt of the jurisdiction of this court, we wish to direct the court's attention to the case of Backus vs. Fort Street Union Depot Company (1898), 169 U. S. 567, 42 L. Ed. 853, where the following language is used in regard to the question of jurisdiction:

> "Inasmuch as the respondents, both in the trial of the Circuit Court and in the subsequent proceedings on the certiorari in the Supreme Court, specifically set up and claim rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. They again and again insisted that certain provisions of the Federal Constitution, which they named, stood in the way of any further proceedings against them."

The foregoing quotation is from one of the cases principally relied upon and most often cited by the defendant in error and appears to be conclusive on the question of jurisdiction.

The defendant in error refers to Murdock vs. City of Memphis (1874), 87 U. S. 590, 20 Wall. 591, 22 L. Ed. 429. The plaintiffs in error also refer to this case for a careful discussion of the question of jurisdiction and we claim that under the test there applied no doubt remains as to the court's jurisdiction in the present case. Among other things the court says in its opinion in the Murdock case:

> "Or it may be that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.
>
> It may also be found that, notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.
>
> In the two latter instances there can be no doubt that the judgment of the state court must be reversed and under the new Act (Act of 1867) this Court can either render the final judgment or decree here, or remand the case to the state court for that purpose."

In Myles Salt Company vs. Iberia Drainage District, 239 U. S. 478, 60 L. Ed. 392, the appellee claimed that the judgment of the Supreme Court of Louisiana rested entirely upon an independent question of pleadings under the laws of Louisiana and decided no Federal question. This was a case where under certain state statutes there was a formation by a police jury of a drainage district which included the land of the plaintiffs, whereas the land of the plaintiffs was not where it could by any possibility be benefited by the improvements in jetties which the legislation author-

ized. It was held by the court that there was a Federal question, in that the administration and interpretation of a state act was attacked, though the act itself was not attacked, and further, that the formation of the district for drainage, under the circumstances above stated, was wholly an arbitrary act and not within the powers of the state, because of the Fourteenth Amendment.

We wish once more to emphasize that the record in this case shows a reliance by the plaintiffs in error upon the Federal Constitution, particularly the Fourteenth Amendment thereto, from the very inception of these proceedings and that those provisions have been urged by the plaintiffs in error at every stage of the proceedings, that their rights have been saved by proper exceptions when their contentions were overruled and that in spite of undue consideration given by the lower courts to other aspects of the case, the Federal questions raised by the plaintiffs in error, at the outset, have been and are the controlling and only real questions in the entire record.

SECOND.

CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 1241, AS AMENDED IN 1913, IS REPUGNANT TO THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

That portion of the statute which is attacked is as follows:

> "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; 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; (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 the territorial limit thereof." (California Statutes, 1913, page 549.)

As pointed out in the opening brief of the plaintiffs-in-error, it was contended at the trial that if the road laws of California contemplated the institution of condemnation proceedings by such an ex parte resolution of the Board of Supervisors as that which formed the sole basis of these condemnation proceedings and further contended that if the foregoing proviso applied to such a resolution, then the proviso would be unconstitutional as attempting to authorize the taking of property without due process of law, no hearing of

any kind being provided for or accorded to the property owners.

Thus all the vital questions essential to the taking of private property for public use, except only the one question of the amount of damages, could be conclusively determined, and might be arbitrarily determined, by a two-thirds vote of the supervisors, without any notice at all to the land owner and with no opportunity whatever on his part to be heard. The trial court held that the proviso would be unconstitutional if it were given the construction which its language indicates, but then the trial court went out of its way to hold that the resolutions would, without any other proof whatever, establish *prima facie* the facts required to be found by Section 1241. (Tr., Vol. III, Fols. 4032-4039.) But when the case reached the District Court of Appeals, Second Appellate District, that court decided that the statute meant what it said, and when it said "conclusive evidence," it meant conclusive evidence, and not *prima facie* evidence (Tr., Vol. III, Fols. 4287-4289), and the Court of Appeals specifically refused to review the evidence introduced in pursuance of the ruling of the trial court on the question of necessity. (Tr., Vol. III, Fols. 4266-4282.)

There is no question, and it is not denied by the defendant in error, that prior to the amendment of Section 1241, C. C. P., Subdivision 2, by statutes of 1913, page 549, the necessity or expediency of taking private property for a public use was in California subject to judicial inquiry. (See the cases cited page 38 opening brief of plaintiffs in error.)

As we have pointed out heretofore and as defendant in error has not disputed, the express terms of Sec. 1241 state that before property can be taken "it must appear."

The defendant in error has cited a large number of cases supporting, as it claims, the constitutionality of statutes by which the legislature itself, or a subordinate tribunal, conclusively determines the matters enumerated in Sec. 1241 of the California Code of Civil Procedure. While there is authority for the view that the questions of necessity and expediency are exclusively for the legislature, the rulings on this subject are by no means universal and as heretofore pointed out, in California, before the amendment of 1913, and since then to the present case, the law was settled that the question of necessity and expediency was for the court, not for the legislature. Section 1241 itself indicates very clearly that the legislature contemplated that the court should pass upon these matters before the amendment of 1913 went into effect.

It has been pointed out by the plaintiffs in error in their opening brief, and has not been denied by the defendant in error, that in the opinion filed by a judge of the Circuit Court of Appeals, namely in Ennis-Brown vs. Central Pacific Railway Co., *et al.*, 235 Federal 825, the view is taken that the court must determine in condemnation cases whether the use to which it is sought to subject the property is one authorized by law and whether the taking is necessary to such use.

In Ryerson vs. Brown (1877), 35 Mich. 333, 24 Am. Rep. 564, there was before the court a Michigan statute (Laws of 1873, Vol. I, pages 486, 495), which provided for proceedings to obtain a right to flow the land of others for water power mill purposes. That statute was held by Mr. Chief Justice Cooley to be unconstitutional and void, for the reason that there is no such requirement of either general or local public interest

or public policy to be subserved, and no such *public necessity* for the taking of private property as ought to exist to justify the exercise of right of eminent domain. It will thus be seen that when faced with the practical question in a case coming before him for decision this eminent jurist and text writer did not hesitate to decide in his judicial capacity a question of necessity in an eminent domain proceeding.

In Widow Lecoul vs. the Police Jury (1868), 20 La. Ann. 308, the widow applied for an injunction to prevent the county from putting a road across her land. She claimed there was another road in existence connecting the same two points sought to be connected by the road across her property, but that the county had neglected it and had let it get out of repair. Her application for an injunction was denied in the lower court. That decision was, however, reversed in the Supreme Court, the court saying:

> "The projected road would sever the plaintiff's plantation, which would necessarily prove very injurious to her, but this consideration would not have the weight of a feather in the scale if the road through her land was really necessary for public purposes. This we do not consider it to be, whilst there is a state road that could be made passable at all times at less cost than would be incurred in providing the new road."

The similarity of the statement in the case just quoted with the situation disclosed by the record to exist in the case now before the court, is very striking indeed. A careful study of the record brought up by these appeals shows all the circumstances mentioned in the above quotation to exist in the present case. It

appears to be a precedent completely on all fours with the present case, except that it is not complicated by the construction of a lower court that a statute meant something other than what its plain terms state.

If, however, for the sake of argument, it be admitted that the question of necessity is one for the legislature, the position of the defendant in error is in no wise improved. It has cited on pages 28-30 of its brief thirty cases as supporting the constitutionality of statutes by which the legislature itself, or a subordinate tribunal, conclusively determines the matters enumerated in Section 1241 of the California Code of Civil Procedure. It states that those cases are all directly in point. It must be kept in mind that the language of the statute now before the court is that certain resolutions passed by certain bodies in a certain way, shall be "conclusive evidence" of certain things therein contained. It is that statute, so framed and in the language above set out, which must be sustained. The language of that statute indicates very clearly, as we have hertofore demonstrated, that the statute itself contemplates, or did contemplate before 1913, a judicial determination of the questions there raised. Even including the amendment of 1913 the language shows that the legislature contemplated a court proceeding. It is respectfully and earnestly contended that the Legislature has in terms told the court in advance how it must decide a certain class of cases, and it would be hard to imagine any clearer interference by one branch of the Government with the duties of another than such a course as this. All the statutes which were considered by the various courts in the thirty cases referred to by the defendant in error are entirely different from the one now before the court.

In the vast majority of those cases, as careful examination of them will show, the general scheme of the statute was this: That the legislature, or some subordinate local body, or some public service corporation, or some commission, might take certain property for a certain specified public use; that if it were possible to do so, the legislature, the subordinate local body, or the commission, or the officials of the public service corporation should agree with the owner of the property taken as to the price to be paid therefor; that if it was impossible to come to such an agreement then the owner, or the commission, or the officials of the public service corporation might apply to a court which would either itself fix upon the amount of the compensation to be paid, or would appoint a jury, or commissioners, or other officials to determine the amount of compensation to be paid for the property so to be taken.

In no single one of the cases cited by the defendant in error did the statute provide that the court should be conclusively bound by any resolution or act. In other words, adopting the view of the defendant in error, the legislature, in the cases referred to, assumed that the question of necessity was a legislative and not a judicial question and that consequently the court had nothing whatever to do with that branch of the case; but the Legislature of California, in Section 1241, has made or attempted to make, the court subservient to the will of the legislature and to make the judicial function a mere mockery. It has seriously told the court that it shall try a certain question,—not that it has nothing to do with a certain question, and that that certain question is outside of its jurisdiction entirely,—but that it shall take up and consider a cer-

tain question and that it shall decide that question in one way only, namely, the way in which the legislature directs it to decide in the statute. It might be seriously argued that the statute in question was constitutional if it in express terms declared that the legislature or the subordinate body having determined what lands should be taken, the court should decide simply the amount of compensation and whether its use was public. It is not reasonable, it is not consonant with American ideas of constitutional government, and it is not due process of law, or any process of law at all, for the legislature to put into the hands of the court any particular question and then to tell the court in advance how it shall decide the same.

The courts in many jurisdictions have considered in many bearings how far the legislature may go in making any fact or set of facts conclusive evidence of any other fact. We have already referred, in our opening brief, to the article at 10 Ruling Case Law 864 and to the case there cited, namely, Board of Commissioners of Excise v. Merchant, 106 N. Y. 143, 8 N. E. 484. In that case the court had before it Section 12 of the Excise Act of New York (Chapter 628, laws of New York, 1857). In the course of its opinion the court made this important observation:

> "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law."

In Howard v. Moot, 64 N. Y. 262, New York Court of Appeals states:

> "It may be conceded for all the purposes of this power that the law which should make evidence conclusive which was not so necessarily in and of itself and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights."

We quoted in our opening brief from Missouri, etc., Railway Company v. Simonson, 64 Kansas 802, 91 A. S. R. 248, and wish now to quote still further from that opinion as follows:

> "The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case, conclusive upon the parties and which precludes inquiry into the meritorious issues of a controversy is an invasion of the judicial process and a denial of due process of law. The legislature may regulate the form and the manner of use of the instruments of evidence—media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry.
>
> If such statutes can be upheld, there is then little use for courts, and small room indeed for the exercise of their functions."

In a note to People v. Cannon (139 N. Y. 32, 1893), 36 A. S. R. 668, the writer states at page 686:

> "Statutes have also frequently been enacted purporting to make one fact conclusive evidence of another, when as a matter of fact the existence of the former is not necessarily connected with the existence of the latter. The effect of such a statute, if constitutional, is to create a liability or cause of action, or of defense where the presumed fact but for the existence of the statutes might be disproved. If, therefore, the fact is one which, in the nature of things, is an essential part of the cause of action or of the right claimed the statute must be unconstitutional, otherwise the power of the legislature to dispense with an essential fact and to create a cause of action where none otherwise exists, must be void, and to affirm this would be to place the rights of all persons within the absolute control of the legislature."

It is contended that the effect of Section 1241 is exactly what is set out in the above quotation, namely, while proceeding under the guise of a judicial inquiry, it places the rights of all persons within the absolute control of the legislature, conditioned only upon the action of two-thirds of the members of the local body in an entirely ex parte proceeding. It is submitted that the mere statement of this situation will indicate a lack of due process of law.

Vega Steamship Co. v. Consolidated Elevator Company, 75 Min. 308, 74 A. S. R. 484. The Minnesota Statute (Section 7675 of the general statutes of 1894), provided that the State Weighmaster's certificate as to weight of grain "shall be conclusive upon all parties, either in interest or otherwise, as to matters contained in said certificate." This statute was held void by the Supreme Court of Minnesota, and the following appears in the opinion at 74 A. S. R. 487:

> "Under the statute, the party running the elevator has no option as to whether or not the State Weighmaster shall weigh the grain; and, in our opinion, the State cannot force an umpire upon such party against his will and then close his mouth so that he cannot show the umpire has made a substantial mistake whether that mistake is the result of fraud, or bad faith or merely of negligence."

In the instant case, the property owner has no right to be heard before the board. The board is made an umpire, but the property owner's mouth is closed when he and the board are before the Court and he is not allowed to state or to prove anything whatever in regard to the action of the board, as evidenced by the resolutions by it passed. It seems that any further comment on this situation is almost superfluous, but there are many other instances, as will appear hereafter, where the courts have made the same or similar statements.

In People vs. Rose, 207 Ill. 352, 69 N. E. 762, the court had before it a statute of Illinois which made certain facts *prima facie* evidence of the loss of corporate powers by Illinois corporations. In holding that such a statute was constitutional the court observed:

> "It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary."

Citing Corbin v. Hill, 21 Ia. 70; White v. Flynn, 23 Ind. 46; U. S. v. Klein, 13 Wall. 128; Missouri, etc., Railway Co. v. Simonson, 64 Kans. 802, 91 A. S. R. 248.

In Otis Elevator Company v. The Industrial Commission, 302 Ill. 90, 134 N. E. 19, the court had before it the Workmen's Compensation Law of Illinois as amended by laws of Illinois, 1921, page 446, which provided that in a review by the Circuit Court of the findings of the Industrial Commission, findings of fact made by the Commission shall not be set aside unless contrary to the manifest weight of the evidence. That section was held void as usurping judicial power in attempting to prescribe the rule governing judicial action and determination. The court in that case remarked:

> "Due process of law requires submission to a judicial tribunal for determination upon its own independent judgment as to both law and facts";

citing Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. Ed. 908.

It will be observed that the California Statute which is the subject of this discussion submits certain questions to a judicial tribunal for determination and then in the same clause proceeds to tell the judicial tribunal how it shall decide both the law and the facts.

The case of Ohio Valley Water Co. v. Ben Avon Borough, referred to, was in error from this court to the Supreme Court of the State of Pennsylvania to review a judgment which, in reversing the decree of the superior court, reinstated a rate-making order of the State Public Service Commission. The Company maintained that the rates which were fixed by the rate-making commission were confiscatory and deprived it of its property without due process of law. The superior court unheld the contention of the company and directed that different rates be prescribed. The

Supreme Court of Pennsylvania, however, reversed that judgment and directed that the original rates fixed by the commission should stand. This court at page 289 states:

> "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue for determination upon its own independent judgment as to both law and facts, otherwise the order is void because in conflict with the due process of law clause, 14th amendment. Missouri Pacific Railway Co. v. Tucker 230 U. S. 340, 347, 57 L. Ed 1507; 1509; Wadley v. Southern Railway Co. of Georgia, 235 U. S. 651, 660, 661, 59 NE 405, 411; Missouri v. Chicago B. & Q. R. Co. 241 U. S. 533, 538, 60 L. Ed. 1148, 1154; Oklahoma Operating Co. v. Love 252 U. S. 331, 64 L. Ed. 596."

U. S. v. Klein, 13 Wall. 80 U. S. 128, 20 L. Ed. 519.

A rider on the legislative, executive and judicial appropriation Act for the year ending June 30, 1871 (16 Stats. 235) provided that when any person has accepted a pardon under the terms of certain amnesty proclamations, such acceptance should be taken and deemed in certain suits in the Court of Claims for the recovery of property or its value "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion," and that on proof of such pardon the jurisdiction of the Court of Claims should cease. In disposing of the constitutionality of that statute this court stated, 20 L. Ed. 526:

> "The legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and

to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.''

The statute now before the court certainly impairs the judicial authority and directs the court itself to be instrumental to that end.

State v. Schlenker, 112 Ind. 642, 84 A. S. R. 360 holds that a legislature may define what is adulteration of milk, and observes:

> ''No doubt the legislature cannot indirectly dispose of a cause by prescribing conclusive rules of evidence and it has no power to direct the judiciary in the interpretation of existing statutes; Groesbeck v. Seeley, 13 Mich. 329; Johns v. State, 55 Md. 362; Reiser v. William Tell, etc., Association, 39 Pa. St. 137; Salters v. Tobias, 3 Paige 338.''

Meyer v. Berlandi, 39 Min. 438, 12 A. S. R. 663, the Supreme Court of Minnesota considered the Minnesota Mechanics Lien Law (Laws of 1887 C. 170 Sec. 5); that statute provided that the fact that the person performing labor or furnishing material in the building of a house was not enjoined by law from performing labor or furnishing material, by the person in whom the title was vested at the time, shall, be conclusive evidence that such labor was performed, or material furnished, with and by the owner's consent. The Minnesota court states in 12 A. S. R. 667:

> ''A man cannot thus be deprived of his property without his consent. The legislature may doubtless

establish rules of evidence, but to enact a law making evidence conclusive, which is not so necessarily in and of itself and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law.''

In a California case, which was an appeal from Los Angeles County, Ramish v. Hartwell, 126 Calif. 443, (1899) 58 Pac. 920, the California Supreme Court considered the act of February 27, 1893 (California Statutes 1893, page 33, sec. 4) which provided that a city assessment should be a first lien upon the property affected thereby and that the bonds issued therefor should be conclusive evidence of the validity of the said lien. This section was held to be unconstitutional, the court saying at 58 Pac. 922:

> ''It may be regarded as settled that the legislature may make a tax deed conclusive evidence of compliance with all provisions of the statutes which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are judicial in their nature and without which the powers of taxation cannot be called into exercise such as the listing or assessment of the property, a levy of the tax, some notice of its delinquency and that the property will be sold therefor—the legislature cannot deprive the owner of the right to show want of compliance.''

citing Cooley, Constitutional Limitations, page 452.

In Peterslie v. McLachlin, 80 Kans., 176, 101 Pac. 1014 (1909) The Kansas Court considered Section 3

C. 373, page 540 of the laws of 1907. That section made the posting in the office of the county clerk of a copy of a notice of forfeiture of school lands conclusive evidence of proper service of such notice. The court states 101 Pac. 1015:

> "This is a legislative declaration of the truth of facts and an invasion of the province of the judicial department of the Government to which alone belongs the power to inquire whether facts upon which rights exist are true or false. It must be held unconstitutional because it denies to the holder of the original certificate due process of law, and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence * * *; where the legislature attempts to make these evidential things conclusive, it passes the bounds of legislative power and invades the province of the court, and in the language of the court in Railway Co. v. Simonson, *supra*, precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry."

This discussion might be continued almost indefinitely, but the cases heretofore referred to indicate with sufficient clearness the view of practically all courts on the matter of the legislature attempting to make certain facts conclusive evidence and thus precluding the court from exercising its usual and constitutional functions. Reference is, however, made to the following cases which are in the same line and to the same effect as those above stated:

Wilson v. Wood, 10 Okla. 279, 61 Pac. 1045;
White v. Flynn, 23 Ind. 46;
Wantland v. White, 19 Ind. 471;

Corbin v. Hill, 21 Ia. 70;
Martin v. Cole, 38 Ia. 141;
Johns v. The State, 55 Md. 350;
Quinlon v. Rogers, 12 Mich. R. 168;
Matter of Stickney, 110 App. Div. (N. Y.) 294;

It will be observed that even in those newer commonwealths where the power of the legislature is for many reasons looked upon with more favor and given greater scope than in the older states of the East and South, the tendency and the universal view seem to be that the legislature may not interfere with the judicial functions of the court by assigning to it a question for determination, and at the same time telling it in advance how that question shall be decided.

As indicating the intention of the Legislature of California that the court should have the right and the duty to inquire into all questions provided for in the original Section 1241, reference is made to the text of Section 1245, California Code of Civil Procedure, being in the same chapter with Section 1241 (Deering 1915 page 577, Kerr page 2745):

> "The clerk must issue a summons which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought and a reference to the complaint and descriptions of the respective parcels and a notice to the defendant to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner."

Considerable emphasis is placed by the defendant in error upon the fact that the amendment of November

5, 1918, to the California Constitution was adopted after these proceedings had been begun and while they were still pending. The attention of the court is, however, called particularly to that amendment, which is set out in full at pages 56 to 57 of the opening brief of plaintiffs in error, as indicating beyond any shadow of doubt that the sovereign people of the State of California, not its agents the legislature, but the people themselves, intended and contemplated that the question of necessity in condemnation proceedings should be in the hands of their agents the courts and not in the hands of their agents the legislature. Observations of counsel for defendant in error as to what that amendment may mean but does not say appear to be based on a somewhat weak foundation.

In so elementary a portion of the law as a constitutional amendment it must be assumed that if the people meant their language to have the limitations which counsel for defendant in error place upon it, the people themselves would have made it perfectly plain that when they said "including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law," they, the people, would have expressly limited the application of the provision just quoted to the state of facts to which counsel endeavors to limit it in the brief for defendant in error.

At pages 39-41 of the brief for defendant in error, counsel quote at considerable length from the case of Backus v. Ft. Street Union Depot Co., (1893) 169 U. S. 557, 42 L. Ed. 853, with the apparent intention of proving thereby that the legislature of California had the right to treat property owners, who happen to fall into several different classes, in several different

and wholly arbitrary ways in regard to the conduct of condemnation proceedings regarding their property. It need only be pointed out, we submit, that in the Backus case the party who considered himself aggrieved relied upon the fact that his hearing was being conducted before a common law judge and jury, instead of before simply a jury of inquest. In other words, he was in that case objecting because he was receiving greater safeguards than he had received under the old laws. In this case the plaintiffs in error are contending and have contended throughout that the safeguards allowed them under the old laws of California were deliberately and arbitrarily withdrawn from them, and that they are receiving not only less consideration, but no due process of law under the present system to which they are being unwillingly subjected. It is to be noted that counsel at page 37 of the brief for defendant in error have been forced into the position, by the previous holdings of the California courts, of saying that even though the California courts may have uniformly held in the past that necessity was a question for the court it can make no difference in this case and to the plaintiffs in error, because, forsooth, the District Court of Appeal in California decided that in this particular case it was a question for the legislature and not for the courts. As has been indicated heretofore and as will be pointed out in greater detail in a subsequent section of this brief, this is only one instance in which it appears that this case was treated and considered by the California courts in a manner entirely different from its previously established practice in other cases.

The phrase "due process of law," as used in the Federal Constitution, is the equivalent of the "law of the land."

Murray's Lessee v. Hoboken, 18 How. 272, 278;
Davidson v. New Orleans, 96 U. S. 97, 101;
Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512, 519;
Scott v. City of Toledo, 36 Fed. Rep. 385, 393;
Cooley's Constitutional Limitations, 432.

The words "due process of law" have the same meaning in the Fifth as in the Fourteenth Amendment to the Federal Constitution.

Hurtado v. California, 110 U. S. 516.

"Due process of law, within the meaning of the amendment" (the Fourteenth Amendment being here considered) "is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Giozza v. Tiernan, 148 U. S. 657;
Hurtado v. California, 110 U. S. 516, 535;
Caldwell v. Texas, 137 U. S. 692, 697;
Leeper v. Texas, 139 U. S. 462.

"Purely arbitrary decrees or enactments of the Legislature directed against individuals or classes are held not to be "the law of the land" or to conform to "due process of law."

McGehee on Due Process of Law, p. 60.

A classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560;

Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 165;
Cotting v. Goddard, 183 U. S. 79.

We will close this branch of the discussion by the following quotation from the Supreme Court of Oklahoma in Board of Education of City of Stillwater v. Aldridge, 13 Okla. 205, 73 Pac. 1104:

> "When the legislature prescribes the mode by which property may be taken for public use, notice of the proceedings for condemnation must be provided for, to be given to the party whose property is taken or injuriously affected, in order that he may have an opportunity to be present and protect his rights at some stage of the proceedings, and in order to ascertain the proper measure of compensation to which he is entitled. If such notice is not provided for, the law is void."

THIRD.

PLAINTIFFS IN ERROR WERE DENIED THE EQUAL PROTECTION OF THE LAW.

As was pointed out at pages 92 and 93 of the opening brief of plaintiffs in error, in California the question of what lands are necessary to be taken in the exercise of the right of eminent domain is expressly made a judicial question, not only by the Code sections cited, but also by the amendment of November 5, 1918, to Article 1, Section 14 of the California Constitution, which amendment has been referred to in this brief and which is set out in full in the opening brief for plaintiffs in error at pages 56-57. As pointed out by us at page 93 of our opening brief, the legislature, when it attempted to make the ex parte resolutions of a political sub-division conclusive evidence as to these essential facts, without any hearing whatever being provided for, had the effect of depriving

plaintiffs in error of their property without due process of law and denying to them the equal protection of the law, since by well settled practice all judicial questions must be determined by the courts upon competent evidence and without a previous direction of the legislature as to what particular form of evidence should not be in any wise disputed.

It is interesting to note that the lower court held that the resolutions referred to were only *prima facie* evidence, it not being possible, apparently, for the judge of that court to go the length which the legislature had gone and to deny to the plaintiffs in error any hearing whatever upon these questions. The action of the lower court in so holding does not strengthen in the slightest, we submit, the position of the defendant in error, for what the lower court did was a matter of grace and not a matter of right. Consequently the ultimate decision rested upon the effect given to the resolutions, heretofore referred to, by the District Court of Appeals. The Court of Appeals, unlike the judge in the trial court, was prepared to go the full length which the legislature had gone and to hold that the statute meant exactly what it said and consequently, in spite of the apparent desire of that court to escape a direct decision upon the constitutional question involved, the question is nevertheless raised and is before this court, and the decision of the Court of Appeals had the undoubted effect of denying to the plaintiffs in error the equal protection of the law.

As has heretofore often been held and as is substantiated by the authorities cited by us at pages 94-95 of our opening brief, it is not enough that the owners may by chance or by favor have a hearing, the law must require notice to them and give the right to a hearing. And as to the question of constitutionality,

it makes no difference that a hearing of some sort was granted by the lower court as a matter of grace upon the question of necessity, when as a matter of fact the law provided for no such hearing. In other words, it is the law itself which is the subject of investigation, not the interpretation, however unreasonable, which may have been placed upon the law by a court which did not feel justified in giving the law its actual and apparent force and effect. Reference is again made to Stuart v. Palmer, 74 N. Y. 183; Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 768.

The State of California itself had repeatedly decided, as pointed out by us in the authorities cited at pages 95-97 of our opening brief, that the invidious distinctions and the character of the proviso of Section 1241 were unconstitutional. The reference of counsel for defendant to this fact appears to be an attempted plea in confession and avoidance. He admits that such was the law in California but states that the Court of Appeals decided otherwise in this case. This is merely another instance of the peculiar necessity which the Court of Appeals appeared to feel to overrule this and other practices in California theretofore long established, in order to place the decision of this case upon grounds other than a consideration of the Federal questions involved.

In view of the fact that the distinctions between the various classes of property owners considered in Section 1241 appear to counsel for defendant in error to be so utterly harmless, it is well to restate here what we stated in the opening brief.

The Section singles out the landowner who owns land in a certain locality when the resolutions of a certain political sub-division of the state is adopted by a two-thirds vote of its governing body and denies

to such land-owner any hearing whatever upon the vital facts catalogued in the said section, whereas to all other persons whose land may be condemned for public purposes there is accorded a hearing by the court without any presumptions whatever against them. "They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute." Gulf, etc. Ry. Co. v. Ellis, 165, U. S. 170, 41 L. Ed. 666.

It is to be noted that counsel for defendant in error do not, apparently dispute the application of the authorities which we cited in our opening brief on this particular question, but they simply collect other authorities, which, we submit, will be found, upon inspection, to be of no application to the case at present before the court.

Our contention in this behalf is strongly exemplified and supported by some of the authorities cited and quoted in the brief of defendant in error. This we will illustrate by a few excerpts:

> *"The protection which the organic law affords a citizen against arbitrary discrimination in favor of other citizens, 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."*
>
> Southern Railway Co. v. Memphis, 126 Tenn. 267. (Brief of Defendant in Error.)

This is precisely what we contend, and is the precise principle which the obnoxious proviso violates.

In Cincinnati Street R. Co. vs. Snell, 193 U. S. 30 (cited by defendant in error at pages 52 and 53 of its

brief), the objection was that "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.*"

Here certain classes are accorded a hearing before a competent *judicial* forum, while the class to which the *proviso* in question relegates the Plaintiffs in Error is denied any hearing of any kind or before *any forum whatever.* In the one instance the property *if taken* (which the Court must determine) is taken *judicially,* in the other, without any determination of any judicial body whatever or any hearing of any kind or character, it is taken *arbitrarily.*

In the same case it was emphasized that the situation presented "*a condition where fundamental rights are equally protected and preserved,*" although "protected and preserved" in different forums.

Here in certain classes fundamental rights of the property owners are protected and preserved by the safe bulwark of a judicial hearing; in another class—unfortunately ours—there is no protection or preservation of any rights by any kind or character of hearing whatever.

Then, again, in that case it was said: "It is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best *to provide for a trial in one forum or another.*"

Here it is palpably obvious that our rights were not thus or at all protected or preserved because as to us the State provided for no trial of any kind in any forum.

Finally, this Court quoting from one of its earlier decisions, the quotation by Defendant in Error, from the opinion in question concludes: "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."

We think it equally clear that the 14th Amendment to the Constitution of the United States does undertake to control the power of a state when such state fails as to one class to provide any process by which "legal rights may be asserted or legal obligations be enforced," and fails to adopt any method of procedure which "gives reasonable notice and affords fair opportunity to be heard before the issues are decided," while as to other classes, not differently situated in any real or fundamental sense, it does afford all of these constitutional rights and legal protections.

In Pittsburgh, etc. R. Co. v. Backus, 154 U. S. 421 (cited and quoted at pages 53, 54 and 55 of brief of Defendant in Error), this Court said: "*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.*"

With this we have, and we could not legitimately have, any quarrel. One full, fair hearing is all that anyone can legitimately demand. But the Plaintiffs in Error here, accidentally falling into the two-thirds vote class of the pernicious *proviso* in question, were not even accorded—and according to the California District Court of Appeals were not even entitled to—"a single hearing."

True the *lower Court,* with an eminent sense of justice (limited herein by its views as to the *prima facie* effect of the resolution of intention) did attempt to accord the plaintiffs in error a sort of burden-bearing hearing, but even this was, in actual legal effect, disregarded by the Appellate Court and swept aside by that Court as "immaterial."

So in Kentucky R. R. Tax Cases, 115 U. S. 321 (cited and quoted from at pages 55 to 59 of brief of Defendant in Error) it is said: "*The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.*"

Here (and this we submit with the utmost confidence of its unquestionable soundness) all *owners of propcrty* which is sought to be condemned for a given public use stand in exactly the same "similar circumstances" before the law; the vote of one supervisor or other member of a municipal body upon the necessity of taking private property for a public use does not and cannot alter or change the legal status of any such property owner. Therefore, as all such property

owners are naturally and irrefutably in the same class as to their property rights and their rights to protect their property rights, the *proviso* which we are considering most emphatically does not "operate equally and uniformly upon all persons in similar circumstances."

And in an early and well considered case the Supreme Court of California held a statute to be unconstitutional which imposed different precedent conditions upon the cities of the fifth and sixth classes, before the right to condemn property for certain purposes could be exercised, on this point saying:

> "It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth class to make an effort to agree, while all other persons are exempt from such condition, is in plain and direct conflict with both of these constitutional inhibitions. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination." City of Pasadena v. Stimson, 91 Cal. 238, 28 Pac. 604.

This case sustains in principle the contention of plaintiffs in error now under consideration, for if the invidious limitation upon the right to take property rendered that statute void, a fortiori should the more important and invidious distinction made in the proviso to section 1241 C. C. P. render that statute void, when challenged by the owner whose property is being taken. In other words, the courts should be at least as

diligent in protecting private property from an illegal taking as in promoting the taking of private property for public purposes.

It seems unnecessary further to pursue this subject; for nothing could possibly be more unjust, unequal, unreasonable or a greater denial of equal justice than the denial to one set of persons of a right to *any hearing* upon a vital question of property rights while according to other sets of persons *similarly situated in every respect* the right to a full *judicial hearing upon the same identical questions.*

This goes much further than the possible right (which we do not concede) to deprive *all equally situated* of a hearing; for that is not the case.

We feel apologetic for thus restating and thus further urging so plain a consequence.

The Legislature of California Has Entrusted the Matter of Condemnation to Its Judiciary.

According to the decision of the District Court of Appeal in these cases, the Legislature of California has provided at least two distinct methods of procedure for acquiring private property *by a county* for public road purposes, viz: One by what is commonly known as the "viewer" method, where the property owner is accorded a full opportunity to be heard before the Board of Supervisors; and the other initiated by a direct *ex parte* resolution of that Board.

Upon this matter, the District Court of Appeals in deciding these cases said:

"Appellants insist that such rulings constituted fatal error for the reason that the powers conferred by law upon the board of supervisors to establish public highways are those *only* embodied in sections of the Political Code numbered 2681 to 2689, inclusive, which procedure therein prescribed is designated the "viewer" method and not infrequently adopted by counties in acquiring lands for highways; hence the resolutions of the board of supervisors authorizing the condemnation suits were not sufficient to confer jurisdiction upon the trial court, from which fact it follows that all proceedings had pursuant to such resolutions were void, including the commencement of the actions and the judgments and orders appealed from. It is unnecessary to enter upon an extended discussion of appellant's voluminous brief and argument in support of this point. Suffice it to say the identical question, involved in the case of *Adamson v. County of Los Angeles*, reported in volume 34, California Appellate Decisions, page 888, was decided adversely to appellants by the District Court of Appeals for the First District, and a transfer of the case denied by the Supreme Court. In that action Adamson, as a taxpayer, set forth in his complaint the proceedings had and taken by the board of supervisors in the acquisition of the property in question, and, insisting the entire proceedings for condemning the same were unauthorized and void, sought to have the county enjoined from proceeding with construction work in the 'Main Road' case. In deciding the case the court said: '*The provisions of article VI of chapter 2 of title VI of the Political Code, comprising sections 2681 to 2698 thereof*, do not purport to be exclusive, and may not be held to be so in view of the express grant of power *embodied in sub-division 4 of section 2643 above quoted*, and of the even more comprehensive enumeration of the gen-

eral permanent powers of boards of supervisors *contained in section 4041 of the Political Code by which* such boards are expressly authorized 'to acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways and so forth.' The contention of appellant in the Adamson case was identical with that here urged; the argument of appellant there was identical with the argument made in the instant cases; and the adverse decision of the court in that case must be deemed determinative of the same question presented in these appeals.'' (Trans., pp. 1422-4.)

In other words, the proceedings in the cases at bar were taken under the authority held to have been conferred upon Boards of Supervisors by Sub-division 4 of Sections 2643 and 4041 of the Political Code, which, as also held by the State Appellate Court, contemplated and authorized a procedure different from and independent of the ''viewer'' method prescribed by Article VI of Chapter II, Title VI of that Code.

So much of Section 2643 of the Political Code of California as is pertinent here, is as follows:

> ''The boards of supervisors of the several counties of the state shall have general supervision over the roads within their respective counties. They must by proper order: * * *
>
> ''4. *Acquire the right of way over private property for the use of public highways*, and for that purpose require the district attorney to institute proceedings, under title 7, part 3, of the Code of Civil Procedure, and to pay therefor from the general road fund or the district road fund of the county.''

So much of Section 4041 of said Political Code, as is pertinent here, is as follows:

> "The boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * *
>
> "4. BUILD ROADS. To acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways, boulevards, turnpikes, and other public ways, and to lay out, maintain, control, construct, repair, and manage public roads, boulevards, highways, turnpikes and other public ways, and to incur a bonded indebtedness for any such purposes; * * *".

Both of the Sections quoted in this behalf contemplate the acquisition of the property sought by "*condemnation*"—Section 2643 expressly by "proceedings under Title 7, Part 3 of the Code of Civil Procedure," and Section 4041 inferentially by similar proceedings, as the portions of the Code of Civil Procedure referred to constitute the only provisions in the laws of California for "condemnation" proceedings.

Title 7, Part 3 of the California Code of Civil Procedure embraces Sections 1237 to 1264 of that Code, both inclusive, and including, of course, Section 1241 and its specific and questionable *proviso* in Sub-division 2 thereof; and prescribes a *purely judicial* procedure for determining the various issues involved in any proceeding for the condemnation of private property for public use.

Therefore, the proviso added to Sub-division 2 of Section 1241 of the Code of Civil Procedure in 1913, should not be construed as an enactment into the *judicial* proceeding of an arbitrary *legislative* mode of

taking private property for a public use, but as an attempted injection into the *judicial* proceeding provided *of a rule of evidence* to be applied, under the discriminatory circumstances prescribed, in the *judicial* consideration by the Court of the issues entrusted to it by the Legislature.

Thus construed, according to its clear intent, as exemplified by the history of condemnation procedure in California, it is demonstrably unconstitutional under the authorities cited and discussed at length at pages 38, *et seq.*, of our opening brief. No repetition of those authorities, nor the citation of any additional ones to the same effect is necessary. They are clear, convincing and conclusive.

The California Code provisions prescribing the *judicial* procedure in eminent domain, *to which all statutory provisions of this state concerning the acquisition of private property for public use lead, and which must be ultimately conformed to before any private property can be condemned for public use,* with the exception of the indefensible *proviso* of 1913, have been substantially the same since their original enactment.

Section 1241 of the California Code of Civil Procedure, as enacted in 1872, when the California Codes were adopted, reads as follows:

> "FACTS NECESSARY TO BE FOUND BY COURT BEFORE CONDEMNATION. 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;
> 3. If already appropriated to some public use,

> that the public use to which it is to be applied is a more necessary public use.''

Sub-divisions I and II remained as enacted, without amendment until 1913, when the offensive *proviso* was added attempting to *prescribe a rule of evidence* FOR THE COURT in its *judicial* consideration and determination of *the necessity for the taking.*

That is, practically from the beginning of things in California, *even before the adoption of the present California Constitution of 1879,* the Legislature entrusted *to the Courts,* and has ever since *left with the Courts,* the power *judicially* to determine this vital question and the issues bearing upon it.

The only effect of the *proviso* of 1913 was not to deprive the Court of its *jurisdiction* in this behalf, but merely to prescribe—or attempt to prescribe—for it a *rule of evidence* to be followed in determining the questions entrusted to it under the certain peculiar segregated circumstances mentioned in the *proviso.* Except in this particular *restricted instance* named in this *proviso,* the unlimited and unrestricted power to judicially hear and determine all of these issues remains with the Court.

The Constitution of 1879 continued in force ''until altered or repealed by the Legislature'' all laws ''not inconsistent therewith.'' (Sec. I, Art. 22, California Constitution.)

Thus this *judicial* power conferred by the Legislature upon the Courts in matters of eminent domain was continued in force by that Constitution.

It therefore became and is fundamentally embedded in the laws of this State pertaining to the taking of private property for public use; and its continued ex-

istence was and is recognized by and definitely embedded in the California Constitution by the Amendment of November 5, 1918 (Sec 14 of Art. I of that document) which expressly provides for security against damages for the taking of property for a public use when there is "an *adjudication* that there is no necessity for taking the property."

It is true that this Amendment was adopted after the commencement of this action, which was commenced on October 14, 1916 (Trans. Fol. Page 44), but it was adopted before the commencement of the trial of these cases and was in full force at the time of their trial, and irrespective of the date of its adoption it is a constitutional recognition by the people of the State of California of the *judicial* nature of the condemnation proceedings confided by the Legislature throughout the legal history of California to the Courts.

FOURTH.

THE STRIKING OUT OF THE SPECIAL DEFENSES PREVENTED THE 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 theory upon which the Defendant in Error builds its argument upon this branch of the case appears to be this: The Plaintiffs in Error were allowed to introduce evidence bearing on the question of public necessity for the projected public improvement; therefore,—regardless of what else may have taken place at the trial, regardless of what rulings may have been

made upon the pleadings,—because Plaintiffs in Error were allowed to introduce the evidence above referred to, they were accorded every right to which they are entitled. It might be well to look again to the record upon this point. At the very outset of the proceedings Plaintiff in Error, May K. Rindge, set up as a separate defense matter which alleged in substance that the road sought to be condemned is isolated; that it is wholly within the boundaries of what is practically one property; that it is not necessary for the use of, nor desired by, but strenuously opposed by the owners of such property and that "IT COULD AND WOULD AFFORD NO REAL OR GENUINE SERVICE TO ANY PART OF THE PUBLIC FOR ROAD PURPOSES IN ANY TRUE SENSE OF SUCH PURPOSES and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel; that the condemnation would be for private purposes and in contravention of the provisions of the Constitution of the United States and particularly in violation of the Fourteenth Amendment to said Constitution and would be void and without due process of law and would constitute a denial to the defendants of the equal protection of the law." (Tr., Vol. I, Fols. 303-315.)

Upon motion of the Defendant in Error the Court struck out these defenses, upon the ground that all of the matter asked to be stricken out, and each of the separate matters, are irrelevant and immaterial and constitute mere surplusage and conclusions of law of the pleader and none of the matters asked to be stricken out are matters of fact, ultimate or otherwise, nor are any of them allegations upon which the Court would have the right or the power to admit or receive evi-

dence. (Tr., Vol. I, Fols. 653-56; Tr., Vol. I. Fols. 303-315.)

Counsel for Defendant in Error state on page 69 of their brief that Plaintiffs in Error do not claim that the evidence demonstrates that the proposed under-taking was for a private use, nor that Plaintiffs in Error 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. Counsel then go on to state that because Plaintiffs in Error were given every latitude in an attempt to prove that the use was private, consequently Plaintiffs in Error are in no position to complain merely because their attempt was unsuccessful. At this point there is a sharp feature of the case which appears to overshadow nearly all the others. Counsel for Defendant in Error seem to lose sight of the fact that the Court, before any evidence was admitted on the question raised by the special defenses stricken out, had stated in advance that any such evidence was immaterial and irrelevant. Can it be seriously contended for a moment that the mere introduction of evidence, after such a ruling as that, which was early made in the case, could by any possibility accord to the Plaintiffs in Error the rights to which they are entitled? The Defendant in Error is obliged to take one side or the other of this position. It cannot occupy both sides. If the special defenses were in fact immaterial and irrelevant, then no evidence whatever should have been received under them. If the special defenses did contain matter which was relevant and material then they should have remained in the record. But it is not and cannot be, and, we submit, never has been due process of law, or at all consonant with the Anglo-Saxon system of jurisprudence, that the Court should state in advance that

certain evidence would not be considered, should later receive that evidence without changing its form or ruling in any respect and then be allowed to take the position and maintain it that its action in receiving the evidence accorded to the party originally setting up the pleading, which was stricken out, every right to which he was entitled.

On page 70 of their brief counsel quote from the opinion of the District Court of Appeals a portion which states that every material issue tendered by the so-called separate defense was raised by the pleadings which remained in the record and that in the trial defendant (Plaintiffs in Error) were accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleadings so stricken out by order of the Court. Counsel then proceed as follows:

> "The state court having found the fact to be as stated in this quotation, this court will accept such statement as true."

We submit that a careful study or even a single reading of the opinion of the Court of Appeals will indicate not that the Court of Appeals found the facts above stated to be true but simply that the Court of Appeals, because it held that Section 1241 meant what it said and that the resolutions were conclusive evidence, merely and explicitly refused to review the evidence introduced in pursuance of the rulings of the trial Court on the question of necessity. (Tr., Vol. 3, Fols. 4266-4282.)

Defendant in error goes on to state that the questions of necessity and of public use were issues under paragraphs three and four of the Complaint, paragraph

three of the amended answers of May K. Rindge and Rindge Company and the special defense which remained in the pleadings.

In this connection it has been thought advisable to set out in full the issue which was framed and upon which the hearing proceeded and also the issue which was offered and refused.

Reference is made to Transcript, volume 1, folios 48-50, 288-291, 324-327, 301-302, 337-338.

THE ISSUE FRAMED.

Complaint.	*Answer.*
III.	III.
That it is necessary for county purposes, and the public interest, convenience and necessity requires the acquisition of an easement in and over the properties hereinabove particularly described for the establishment and maintenance of a public highway as prayed herein.	That she denies that it is necessary for county purposes or purposes whatever, or at all, or that the public or any interest or convenience or necessity or either requires the acquisition of an or any easement in or over the properties, or any part or portion thereof, described in paragraph II of the said complaint for the establishment of a public or any highway either as prayed for in said complaint, or otherwise at all.
	Separate Answer and Defense.
	IX.
	That she is informed and believes, and upon her in-

formation and belief alleges, that there has been no consideration nor determination by the Board of Supervisors of the County of Los Angeles, State of California, of any of the matters or things alleged in the complaint herein as amended, and particularly of the matters and things alleged in paragraph II of said complaint as amended, and that the said alleged resolutions, referred to in paragraph II of the said complaint as amended, were arbitrarily adopted by the said Board of Supervisors of Los Angeles County, without any consideration of the matters or things therein contained, and without the exercise of any discretion therein, and well knowing that there was no room for the exercise of any discretion therein, but on the contrary knowing full well that all of the property proposed to be taken for a public road and highway and to be condemned as said resolution set forth and as in said complaint as amended alleged was not, and could not be, necessary for any public use of any kind or char-

acter whatever and particularly in this, that it is located wholly and solely upon and within the confines of private property and cannot under any circumstances afford any accommodation of any kind or character to the travelling public, or any part or portion thereof, and that, therefore, the taking of the same for any alleged highway purposes would be without due process of law and in violation of the provisions of the Fourteenth Amendment of the Consitution of the United States, and that the taking of said property under said resolutions for a public highway or other purposes would be void, and would be a denial to this defendant and the ultimate owners of said property sought to be condemned of equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth Amendment to the said Constitution of the United States.

THE ISSUE OFFERED AND REFUSED.

VI. of the further and separate answer and defense: That there was not at the commencement of this action, and is not now, any public road or way of any kind or character either upon that portion of said Malibu Ranch located in Los Angeles County or upon that extension of the same in Ventura County; and that the said proposed road or highway sought to be condemned and taken would be located wholly and solely upon that portion of said Malibu Ranch situated in Los Angeles County, would end and terminate upon the private property of defendant Rindge Co. at the Ventura County Line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely, and give access wholly and solely to the private ranch property the defendants May K. Rindge and Rindge Co.; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

It will be seen that a definite specific issue was tendered and refused as to the real character of the use of this road and that the court, by its ruling, took the ground that no evidence under that issue would have any effect upon the court's decision. It will be observed that there was not left anywhere in the record any issue as to the road in question being located wholly upon one property and that there is left nowhere in the record an issue as to whether the alleged road would or could furnish any way of necessity or convenience to the general public or for public use or travel.

Paragraph 14 of the amended answer and separate defense, which was allowed to remain in the record, does not make an issue upon this point but only upon whether or not the Board of Supervisors had any knowledge of the facts therein set out.

It is, of course, elementary that there must be a clear record in all proceedings and it is one of the elements of due process of law that such a record be had. There is a doctrine long embedded in Anglo-Saxon jurisprudence, called the Doctrine of the Prescriptive Constitution, to the effect that there can be but one record of a proceeding; that that record is jurisdictional and that if the record is not the right record jurisdiction has failed entirely. As has several times before been stated by us in our brief, there is no record hereunder which the court would be under the slightest duty or have any right to enter into consideration of any evidence upon the issue of whether this road was not in fact a public road, or to give any judgment thereon. The fact that evidence was heard, we submit, does not cure the error, since the court had in advance declared that such evidence

would be immaterial and irrelvant and that consequently the court must be assumed to have considered such evidence when it was introduced.

Counsel for the defendant in error, with apparent earnestness, refer to Section 1238 of the Code of Civil Procedure of California, as indicating that the power of eminent domain may be exercised in behalf of the following public uses: * * * Highways. There is not and cannot be any dispute as to that, but there has been throughout this case, in every court in which this case has been heard, a very clearly cut dispute as to whether this particular road was a highway. It has been throughout the contention of the plaintiffs in error that it was not a highway, that it was not a public utility, but that it was a private utility. Courts are a part of our political organization for certain specific purposes. One of the purposes of their existence is the determination of just such a question as this. The court of first instance in California declined to have any issue upon this matter, denied the plaintiffs in error not only due process of law, but any process whatever in regard to that particular and most important question. A history of this entire matter, as set forth in the record, and particularly as referred to in the statement of the case of this reply brief, shows beyond any doubt what the situation was and is in regard to the Malibu Ranch. The County, State and Federal authorities have been endeavoring since December 3, 1907, to accomplish one object, namely, a road from Santa Monica, which is near the eastern boundary of the Malibu Ranch, into, through and over the said Ranch to the Ventura County Line, where the road will terminate in a private property, being property of plaintiffs in error in Ventura County. Two separate suits were brought by the state authori-

ties and by the Federal authorities, respectively. Each of these suits terminated, after long litigation, in favor of the plaintiffs in error, one in 1913, one in 1917. Yet before the suit in the state court was terminated by a decision in favor of the plaintiffs in error on April 7, 1917, the County of Los Angeles had started these condemnation proceedings, in pursuance of the *ex parte* resolutions passed in August, 1916. Particular and earnest reference is made by the plaintiffs in error to the opinion of the state court in People v. Rindge (Tr., vol. Fols. 837-903) and to the opinion of the United States District Court in U. S. v. Rindge (Tr., Vol. I, Fols. 759-837).

It is claimed by the plaintiffs in error and is not disputed that those few persons who now occupy lands in the mountains to the north of the Malibu Ranch and to the west of the Malibu Ranch, took up those lands in the interval between 1905 and 1917 and proceeded through and across the Malibu Ranch to reach those lands, at a time when it was impossible for the owners of the Malibu Ranch to prevent such passing across their property, because either the state court or the Federal court, or both courts, had injunctions in force against the plaintiffs in error which made it absolutely necessary for them to allow such persons to come and go across the Ranch property (Tr., Vol. I, Fols. 741). The true nature of this entire proceeding can best be understood by a careful reading of the opinion of the court of first instance on the question of necessity (Tr., Vol. III, Fols. 426-472). Special attention is directed to Folios 4065-4067:

> "If for no other purpose than to afford outdoor life and recreation to the people of Los Angeles

County by a scenic highway we believe the proposed Malibu road to be a public necessity. As proposed said road traverses a stretch of land the natural beauty of which is unique and diverse. To the south can be seen the broad Pacific, with its variegated waters and many shaped islands, while immediately to the north stand the majestic Santa Monica mountains; up hill and down dale the road winds its way through wooded canyons and across verdant mesas, ever revealing to the traveller a panorama of rare charms. It is easy to conceive the pleasure of recreation and the incalculable benefit that will be afforded the public by the building of this main Malibu Road. A public necessity for a road may exist although the road may serve no purpose of business or duty. It is sufficient that it is an exigency for the exercise of a lawful public right, although it be only for the purpose of amusement and recreation, as a way for travel to a public park or common, to a place of historic interest or remarkable or pleasing and natural scenery.''

This is in the face of the fact that there is not a line of testimony in the entire record showing, or claiming or indicating that the purpose of the county in condemning this road was to make accessible to the population scenic beauties. It seems to follow as a necessary conclusion, from the opinion of the court of first instance, and from the entire record, that this road is being condemned over the Malibu Ranch, not for the purposes of serving the public or for any purposes of travel or for connecting with any other roads, but simply to have a drive into the Ranch and a drive out. In other words, it is making the Ranch a park without paying for it as a park. It is taking property of the plaintiffs in error for park purposes, under the guise of taking only a portion for highway purposes,

and it is taking the property of the owners of the Ranch without any process of law whatever.

Pleadings are the judicial means of investing a court with jurisdiction of a subject-matter to adjudicate it. The elemental foundation is stated in the ancient maxim of the Roman law, "*De non apparentibus et non existentibus eadem est ratio.*" (What is not juridically presented cannot be judicially considered, decided or adjudged.) The application of these principles to the present case will demonstrate that the court of first instance, as appears from the record and the pleadings, and particularly from the quotations from the pleadings hereinabove set out, never had before it for decision the question which we are now discussing, namely, whether or not the so-called road or highway was in fact a road or highway, or merely a sham and a pretense. There is in the record at the present time merely an allegation by the county, and a denial by the property owner that the public interest, convenience and necessity require the acquisition of an easement over certain named property. The pleadings which were set up by the plaintiffs in error and which were stricken from the record by the court set out in detail facts, not conclusions of law, which facts, if true, would have constituted a demonstration that the alleged road was not in fact a road but only a sham and pretense. It cannot be too strictly emphasized that the action of the court in striking out those pleadings left no issue on the most important question in the case. Consequently the court had no jurisdiction whatever to give any decision upon that question for the pleadings are jurisdictional and the observations off and outside the record, which any court may choose to make, are not effectual as binding

the parties to the suit. The only issue left in the pleadings when the court had disposed of the motion to strike out, was the one which might have been satisfied by proving that the proposed improvement was a highway because the legislature called it such, but there was not left in the pleadings, the mandatory record, anything which the court could use as a basis for the determination of the question which it later undertook to decide, namely, that the road planned to be built across the owners' property would and could furnish any way of necessity or convenience to the general public or for public use or travel, because that issue was tendered by the plaintiffs in error and was deliberately refused by the court when it granted the motion of the defendant in error to strike that defense from the pleadings.

> "Due process of law is the exercise of administrative power, according to certain fixed and fundamental principles. Due process of law in judicial procedure is the establishment of judgments and orders in proceedings conducted upon fundamental principles of procedure, these proceedings being properly evidenced by the right of record." Equity in Procedure, William T. Hughes, 1911, p. 35.

Citing Windsor v. McVeigh, 3 Gr. & Rud; 93 U. S. 274; Rushton v. Aspinwall, 1 Smith's Leading Cases (Edition of 1885), 1445; Doug. 679, 99 Eng. Reprint 430; Nalle v. Oyster, 230 U. S. 165, 57 L. Ed. 1439.

In Clark v. Dillon, 97 N. Y. 370 (1884), the complaint alleged in substance that the defendants excavated a pit in a city street and left the same unguarded, by reason of which the plaintiff's wife fell in and was injured. The answer contained three de-

fenses: First, contributory negligence; second, settlement and compromise; third, a denial of each and every other allegation in the complaint not before specifically "admitted, qualified, or denied." It was held that the answer did not raise an issue on the allegations of the complaint that defendants made the excavation which caused the injury and that the same was in a public street, and consequently plaintiff was not required to prove them at the trial. See Equity in Procedure, Wm. T. Hughes, 1911, pages 35-52; esp. p. 35; Nalle v. Oyster, 230 U. S. 5, 57 L. Ed. 1439; Windsor v. McVeigh, 3 Gr. & Rud. 93 U. S. 247.

Taking, for a moment, the theory of the defendant in error, that only the question of the nature of the use is a question for the court, it is apparent from an inspection of the statutes that if the work for which the property is proposed to be taken is not a public utility or a public improvement, is not a public use at all, then the later provisions of Section 1241 have no application. Consequently the land owner had a right to have this question determined by the court itself upon the court's own findings of fact. The court could not determine whether the use was one authorized by law, namely, a public use, until it had been informed of the facts surrounding and affecting the question. It was not enough that the work was called a highway. It was not enough that the work was a road over which the public could have a theoretical right to travel. If in truth and in fact it was a mere guise of the parties for taking the landowner's property against his will, then the first condition of the statute had not been complied with. This is exactly what the landowner pleaded and offered to prove, but was refused the right of having an issue thereon.

The finding of the legislative body had nothing to do with that question, assuming for the moment that it had full power to decide the questions of necessity and location, because the time had not come when the legislative body could act. The legislature could not take from the court the right to determine for itself whether the proposed work was in its nature a public utility, and in order to determine whether it was in its nature a public utility or only a sham and pretense under the name of a public utility, the court had a right to determine the facts as well as the law, in so far as necessary in order to determine whether the first condition had been complied with, namely, whether the use is a public use, or in the words of Section 1241, "A use authorized by law," a use for which one's property may be taken from him against his will.

It is not enough, we repeat, that the thing for which the property is to be taken is *called* a highway. Highways, as such, belong to the class of works of which it may be said that taking land for its use is taking land for a use authorized by law. But if an owner can prove that the thing called a highway is not such in fact but only in name, should he not be allowed to do so? We submit that it is not enough to constitute a road or a highway, that the public have a right to travel over it. It is not possible that the city or the county may turn the private driveway in a private estate into a public highway and justify it on the sole ground that the public may use it if they wish to,— even though its use would be of no convenience to the public unless it were to gratify their curiosity. We submit that it is not a use authorized by law for which the land of the owner may be taken against his will,

that a road be laid out into a private estate, merely to enable curious individuals to drive in and drive out and see what kind of a place the owner has.

We submit that one of the most important questions presented by this record is the one discussed under the final heading of this brief. We feel that in the time at our disposal for oral argument it is almost impossible to present adequately anything more than the most striking features of these appeals. Still the crux and the elements of the entire case can be understood and appreciated by a single reading of the four opinions, which combined do not make more pages than are often used in disposing of a single one of the more important cases which come before this Court. To the property owner as well as to the County of Los Angeles, this case is of the utmost and vital importance. The four opinions to which we refer are as follows:

(1) Opinion of R. S. Bean, District Judge, in U. S. of America v. Rindge, *et al.* (Tr. Vol. 1, Fols. 759-837.)

(2) Opinion of Justice Henshaw, in People of the State of California v. May K. Rindge, *et al.* (Tr., Vol. I, Fols. 837-903.)

(3) Decision of the Superior Court of the State of California in and for the County of Los Angeles, on Questions of Necessity. (Tr., Vol. 3, Fols. 425-472.)

(4) Opinion of the District Court of Appeals, Second Appellate District, State of California, Division One, in the present proceedings. (Tr., Vol. 3, Fols. 4243-4294.) Printed as an appendix to this brief p. 68, for the convenience of the Court, this opinion being challenged by the writ of error herein.

CONCLUSION.

We are unable to conclude this brief without noticing the remark of counsel for Defendant in Error to the effect that this is one of the many cases which should never have come before this Court. We respectfully submit that those portions of the record which we have particularly pointed out, and particularly and especially the opinion of the District Court of Appeals, furnish every reason and every justification for bringing these cases before this Court. Our contention is that one of the greatest functions of the Supreme Court of the United States is the protection of the private citizen from the informal and shifting kind of proceedings which this record discloses, and from the systematic attack upon his rights which is also disclosed by this record. We can easily see that the Defendant in Error would prefer that these cases should not have been brought to the attention of this Court, but we feel that our clients have only exercised their rights in bringing them there, where, at last, they may be assured of a review of all former proceedings and a test thereof, guided and controlled by those ancient principles upon which our form of Government was founded, but which appear at times to have been overlooked or forgotten by the tribunals from whose rulings we have appealed.

To summarize our arguments:

I.

This Court has jurisdiction for the reason that the Federal question involved was presented at the outset, insisted upon throughout all the proceedings and that

it controls and overshadows all other elements in the case.

II.

California Code of Civil Procedure, Section 1241, is repugnant to the due process clause of the Fourteenth Amendment, because it takes property without due process of law, because it denies to the property owner the equal protection of the law, and because it undertakes to make the Court a mere registering agent of the will of the legislature.

III.

Plaintiffs in Error were denied the equal protection of the law for the reason that the classification made by Section 1241 is wholly arbitrary and unreasonable.

IV.

The striking out of the special separate defenses was not cured by the introduction of testimony to prove that the use was not public and the Court, by striking out the special separate defenses, deprived itself of jurisdiction to decide the issue of whether the so-called public utility was in fact a public utility or only a sham and a pretense.

For the above reasons Plantiffs in Error pray that the judgment in each case should be reversed.

Respectfully submitted,

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APPENDIX.

OPINION OF THE DISTRICT COURT OF APPEAL.

The above-entitled actions were instituted by the county of Los Angeles to condemn certain lands described in the complaints therein for use as highways. In each case an interlocutory judgment as prayed for was rendered for the plaintiff, followed by a final order of condemnation, from which judgment and order so rendered in each case the defendants therein have appealed.

In the first above entitled case, and which appellants designate the "Main Road" case, the action was to condemn a strip of land from a public highway at a point on the southeasterly boundry line of the Malibu ranch, and through said ranch for a distance of some twenty miles or more to the easterly boundary line of Ventura county, at which point the proposed road terminated upon private land. In the other action, No. 3533½, it was sought to condemn land for a lateral highway beginning at a point on the proposed "Main Road" and running thence easterly to the east boundary line of the Malibu ranch and terminating likewise upon private lands owned by one Decker, which highway appellants designate as the "Alisos Canyon Road." The questions involved in each case are the same and the grounds upon which appellants base their claim for a reversal are identical.

In both cases the proceedings were instituted by a resolution adopted *ex parte* and without a hearing accorded defendants by the board of supervisors of Los Angeles county. Omitting the description, the resolution initiating the proceeding as to the "Main Road"

case (that adopted in the other being of like form and effect) is as follows:

"Whereas, the public necessity and interest of the people of the county of Los Angeles do require that a certain highway be constructed in said county over and across those certain parcels of real property hereinafter described, and for that purpose and for such public use it is necessary that those certain pieces or parcels of real property hereinafter described be acquired by said county by condemnation namely: the following described property located in the county of Los Angeles, state of California, to-wit:

"(Description of forty-foot right of way strip, and also of some 146 side parcels.) * * * excepting so much of said land as is now included within any public highway, alley or lane.

"Further reference is hereby made to said county surveyor's map No. 8070, on which the location of all parcels of land herein described is accurately shown.

"Now, therefore, be it resolved, and it is the finding and determination of this board, that the public interest and necessity require the acquisition by the county of Los Angeles of those certain pieces or parcels of land hereinbefore described for a public purpose, namely: for public highway purposes, and for the construction and completion of a public highway thereover; and

"Be it further resolved, that those certain pieces or parcels of land herinabove described be condemned for a public purpose, namely for a public highway and the construction and completion thereof, and the county counsel of the county of Los Angeles is hereby directed to institute proceedings in the Superior Court of the

state of California in and for the county of Los Angeles for the condemnation of those certain pieces or parcels of real property hereinabove described for public highway purposes and to take all steps necessary for the condemnation of said pieces or parcels of land in the name of said county;''
in accordance with which the county counsel instituted the actions for the condemnation of the parcels of real estate described therein.

Demurrers interposed by the defendants to the complaints were overruled. Appellants insist that such rulings constituted fatal error for the reason that the powers conferred by law upon the board of supervisors to establish public highways are those *only* embodied in sections of the Political Code numbered 2681 to 2698, inclusive, which procedure therein prescribed is designated the ''viewer'' method and not infrequently adopted by counties in acquiring lands for highways; hence the resolutions of the board of supervisors authorizing the condemnation suits were not sufficient to confer jurisdiction upon the trial court, from which fact it follows that all proceedings had pursuant to such resolutions were void, including the commencement of the actions and the judgments and orders appealed from. It is unnecessary to enter upon an extended discussion of appellants' voluminous brief and argument in support of this point. Suffice it to say the identical question, involved in the case of *Adamson v. County of Los Angeles*, reported in volume 34, California Appellate Decisions, page 888, was decided adversely to appellants by the District Court of Appeal for the First District, and a transfer of the case denied by the Supreme Court. In that action Adamson, as a

taxpayer, set forth in his complaint the proceedings had and taken by the Board of Supervisors in the acquisition of the property in question, and, insisting the entire proceedings for condemning the same were unauthorized and void, sought to have the county enjoined from proceeding with construction work in the "Main Road" case. In deciding the case the court said: "The provisions of article VI of chapter 2 of title VI of the Political Code, comprising sections 2681 to 2698 thereof, do not purport to be exclusive, and may not be held to be so in view of the express grant of power embodied in sub-division 4 of section 2643 above quoted, and of the even more comprehensive enumeration of the general permanent powers of boards of supervisors contained in section 4041 of the Political Code by which such boards are expressly authorized 'to acquire and take by purchase, *condemnation* or otherwise land for the uses and purposes of public roads, highways and so forth'." The contention of appellant in the Adamson case was identical with that here urged; the argument of appellant there was identical with the argument made in the instant cases; and the adverse decision of the court in that case must be deemed determinative of the same question presented in these appeals.

Another alleged erroneous ruling upon which appellants claim a reversal is that the court, upon defendants' motion for a new trial, denied it upon terms, the effect of which was an exercise by the court of the functions of the jury, by reason of which defendants were deprived of the constitutional right of having a vital element of damage determined by the jury. It appears that, among other things, the jury found it would require 29 miles of fencing to fence the Rindge Company's land along the roadway and that the cost

per mile would be $650, aggregating the sum of $18,850. On motion for new trial one of the specifications of error was that the jury improperly determined the number of miles of fencing which would be required, and it being made to appear to the court that, instead of 29 miles as found by the jury, it would require 31½ miles, the cost of which would be $1,625 more than that found by the jury, the court, as a condition of its order denying the motion for a new trial, made an order requiring that plaintiff consent to the increase in the judgment; whereupon counsel for plaintiff filed a written stipulation consenting to such increase in the amount of defendants' compensation, and thereupon the court made its order denying the motion for new trial. Upon the same contention, based upon the same facts and supported by the same argument made by the same attorneys, the court in the Adamson case, *supra*, held that in an action by a county for the condemnation of land for a public highway the county counsel, as attorney representing the county, has authority on a motion for a new trial to consent to an order increasing the amount of compensation awarded to the defendant by the verdict of the jury due to an error in computing the amount of required fencing of defendant's land along the roadway.

In support of its case plaintiff introduced in evidence the resolution, copy of which is hereinbefore set out, together with a minute entry of the board showing that it was adopted by a vote of more than two-thirds of the members thereof. Thereupon plaintiff rested and defendants moved for a nonsuit. The motion was denied, and the ruling is assigned as error.

Section 1241, Code of Civil Procedure, provides that

before property can be taken by condemnation 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; provided, when the legislative body of a county * * * 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 required the acquisition, * * * by such county * * * of 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 improvement; (b) that such property is necessary therefor, and (c) that such proposed * * * public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

Since the resolution declaring the land necessary for the proposed highway was adopted by a two-thirds vote of the members of the board of supervisors, it must, as provided by the statute, be accepted as conclusive evidence of the necessity for taking the property, unless, as claimed by appellants, that as so construed it is unconstitutional. This contention is based upon the claim that the determination of the facts so found by the resolution were in their nature judicial, and since the action of the board in adopting the resolution was had *ex parte* and without notice or hearing given to appellants, the effect of the judgment based thereon was to deprive them of their property without due process of law. That the purpose for which the property was sought to be condemned is a public use, admits of no question. (Sec. 1238, Code Civ. Proc.)

When the use is public, the necessity of appropriating any particular property therefor is not a subject of judicial cognizance, but one which appertains to the legislative branch of the government, and the right to so appropriate may be exercised by the state or such subordinate bodies to which by legislative grant the power is entrusted. See Lewis on Eminent Domain (3rd ed.), Secs. 369, 595 and 596; Cooley on Constitutional Limitations, p. 777; *Secombe v. R. R. Co.*, 90 U. S. 108; *Miss. etc. Boom Co. v. Patterson*, 98 U. S. 403; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Lamb v. Schottler*, 54 Cal. 319; *Wulzen v. Board of Supervisors*, 101 Cal. 15, and *People v. Smith*, 21 N. Y. 595; all of which are authorities in support of the proposition that, in the absence of constitutional provisions so requiring it—and there are none in this state—the Legislature may delegate to the boards of supervisors of the counties of the state the power to determine *ex parte* by resolution, as in the instant cases, the necessity for taking property for public use and make such resolution conclusive evidence of the facts enumerated in section 1241, Code of Civil Procedure. In Cooley's Constitutional Limitations, page 760, it is said that "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 or adjudication can be essential, unless the Constitution of the state has expressly required it." And at page 777 of the same work it is said that, while the question of necessity may be referred to a local tribunal or submitted to a jury to decide upon evidence, "the parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly

recognizes and provides for it." *People v. Smith, supra,* is authority for the statement that the Legislature "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." In the case of *Board of Water Commissioners v. Johnson,* 84 Atl. 727, the court said: "But the respondents urge that they have never had the opportunity to be heard upon the question of necessity, and that for that reason there has not been due process of law. They were not entitled to such opportunity. It is well settled that, as related to the exercise of the power of eminent domain, all questions which are political in their nature and lie within the legislative province may be determined without notice to the owner of the property affected, and * * * the owner is not entitled to a hearing upon it as a matter of right." In *Wulzen v. Board of Supervisors, supra.* it is said: "The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one. Its determination rests exclusively with the Legislature, or with such subordinate legislative bodies as it may be properly devolved upon, and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern." Property is held in private owner-

ship subject to the right of the state in its sovereign capacity to take it for public use; the only restriction upon such right being that it "shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." (Sec. 14, art. I, Const.) Hence, where the owner of the land sought to be condemned by the state for a use declared by law to be a public use is accorded his constitutional right to compensation for the taking he cannot question the procedure or instrumentalities which the Legislature has provided as a means for acquiring the property. Its motives or reasons for declaring that it is necessary to take the land are no concern of his. In our opinion, the provision of section 1241, Code of Civil Procedure, making the determination of the board of supervisors of the county conclusive evidence of the necessity for taking the land for a public highway, is not obnoxious to any provision of the State or Federal Constitution.

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 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 circumstance, 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 non-suit 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; *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 573.) 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.

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 twenty years, with 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 irrelevant, 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 impossibe to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof.

It appears that while the eastern terminus of the main road connected with a public highway, the western terminus thereof was at the boundary line separating Los Angeles county from Ventura county, at which point it connected with no road extending into or connecting with roads in said last-named county, and that the Alisos Canyon road, likewise extending from the proposed main road to the boundary line common to the Malibu ranch and the lands of one Decker, was not connected with a highway; and basing their contention upon these facts, appellants insist that the board of supervisors had no power to lay out highways terminating at county lines or points on private lands which did not connect with or intersect other highways affording means of continuous travel. There is no merit in contention. No such restrictions upon the power of

counties to establish highways are imposed by statute, and to hold that a county could not condemn lands for a highway to the line of another county unless there existed an established highway in such latter county with which to connect its proposed road would obvivously lead to embarrassment and difficulty in establishing highways from one county to another. (*Rice v. Rindge*, 53 N. H. 530.)

The use for which the property was sought to be condemned is declared by section 1239, Code of Civil Procedure, to be a public use. The resolution adopted by a vote of two-thirds of the members of the board of supervisors not only vested the court with jurisdiction of the proceedings for condemnation, but when received in evidence the finding and determination of the board as therein expressed, to the effect that the taking of the parcel of land described in the complaint was necessary for such public use and the proposed improvement located in the manner most compatible with the greatest public good and least private injury, was conclusive evidence of such facts; hence, while not prejudicial, any evidence touching such issue of necessity or hearings had before the board of supervisors other than the resolution, was immaterial. In no event, and from whatever angle the facts are viewed, are we able to perceive how defendants' substantial rights were prejudiced by any ruling of the court during the trial.

The judgments and orders are affirmed.

SHAW, *J.*

Rindge Co v. Los Angeles County, 262 U.S. 700 (1923). Reply Brief. 16 Apr. 1923. The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832â 1978, link.gale.com/apps/doc/DW0105485960/SCRB?u=cowmsl&sid=bookmark-SCRB&pg=1. Accessed 11 June 2023.