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.

OPENING BRIEF OF PLAINTIFF IN ERROR.

J. A. ANDERSON,
W. H. ANDERSON,
NATHAN NEWBY,
GRANT JACKSON,
Attorneys for Plaintiffs in Error.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles

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No. 668.

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.

APPELLANTS' OPENING BRIEF.

The transcript in this case embraces two separate appeals, involving two separate condemnation actions numbered B 43572 and B 59443, respectively [Tr. fols. 1-119 and 553-571] which by stipulation of the parties and

order of court were tried at the same time, though not consolidated. [Tr. fol. 642.] The other case No. 65893, referred to in the stipulation, was decided in favor of the defendants and need not be further considered.

In the transcript and in the opinion of the District Court of Appeal, Second Appellate District, Division One, Action No. B 43572 is referred to as the "Main Road" case, and No. B 59443 as the "Alisos Canyon Road" case, and for the sake of conformity and clearness, we will adopt the same terminology in this brief. It was stipulated that all descriptions of the property sought to be condemned might be omitted in the printed transcript [Tr. fol. 633] and that only one bill of exceptions should be prepared and settled for both appeals. [Tr. fol. 638.] It was also stipulated that only one record need be printed and filed for hearing of the writs of error in said actions. [Tr. fol. 4439.]

On motion of the defendant in error, the trial court struck out from the amended answer of May K. Rindge the special defense which, in substance, alleged 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 particu-

larly in violation of the Fourteenth Amendment to said Constitution, and would be void and without due process of law, and constitute a denial to the defendants of the equal protection of the laws. [Tr. fols. 303-315.] The same defense was alleged in the amended answer of the Rindge Company and stricken out by the trial court, all of which was affirmed by the Appellate Court. In support of its case (No. B 43572), the defendant in error offered in evidence the resolution appearing in the complaint [Tr. fols. 9-48] in the Main Road case; and a similar resolution in the Alisos Canyon road case was introduced in evidence, identical in form to the one set out in the complaint in Action No. B 43572, referred to above. [Tr. fol. 679.]

The defendant in error thereupon rested, without any other evidence having been offered, and the plaintiffs in error made a motion for a nonsuit in each case on the ground that the defendant in error had failed to prove the facts which by section 1241 of the California Code of Civil Procedure must be made to appear before the defendant in error could condemn the property in question, and particularly upon the following four specific grounds, to-wit:

"First: That they have failed to prove that the taking is necessary to the use in question, namely, highway purposes;

Second: That they have failed to prove the public necessity of such proposed public utility or public improvement;

Third: That they have failed to prove that such property which it is proposed to be taken is necessary therefor;

Fourth: That they have failed to prove that such public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good and the least private injury." [Tr. fols. 681-3.]

Section 1241 of the California Code of Civil Procedure referred to in the motion for a nonsuit, then in force, was and is in words and figures 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, and

(c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof.

"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, provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of a county, city and county, or any incorporated city or town, or the use thereof by a county, city and county, or any incorporated city or town, or a municipal water district for the same purposes to which it has been appropriated, or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a county, city and county, or any incorporated city or town or by a municipal water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or the inhabitants thereof, or for the purpose of supplying any other public utility,

or for any other public use. Any such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use that may have been theretofore provided for or that may thereafter be provided for in so supplying or providing for such county, city and county, or incorporated city or town, or municipal water district or the inhabitants thereof; or in conjunction with any other supply or with any other public utility or other public use that may have been theretofore determined upon or that may thereafter be determined upon in accordance with law by the people of any such county, city and county, incorporated city or town or municipal water district. Nothing herein contained shall be construed as in any way limiting such rights as may be given by any other law of this state to counties, cities and counties, incorporated cities or towns or municipal water districts. But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, while such property is so appropriated and used for the public purposes for which it has been so appropriated."

The motions for a nonsuit were denied and this ruling of the trial court was affirmed by the Appellate Court. The trial court held that under section 1241 of the Code of Civil Pro-

cedure the resolutions were *prima facie* evidence of all the facts required by that section to *be* found, but the Appellate Court held that the trial court was mistaken in this view, holding that the section was *conclusive* evidence of those requisite facts, and hence that the trial court erred in favor of the plaintiffs in error, in holding that the resolutions were only *prima facie* evidence of the necessary facts recited in section 1241, C. C. P. [Tr. fols. 4277-8.]

The judgments of condemnation appealed from by the plaintiffs in error were affirmed by the District Court of Appeal, Second Appellate District, state of California, Division One, on June 11, 1921, and a petition by plaintiffs in error for a hearing by the Supreme Court of the state of California was denied on the 8th day of August, 1921 [Tr. fols. 4294-6], and final judgment by the said District Court of appeal was filed August 11, 1921, and the remittitur filed August 13, 1921. [Tr. fols. 4299-4302.] Thereupon the petition for a writ of error in the Main Road case was presented on October 5, 1921, and allowed on the same day, together with the assignment of errors and prayer for reversal. [Tr. fols. 4303-4361.]

The same procedure was followed with reference to the Alisos Canyon Road case, and substantially the same questions are involved. [Tr. fols. 4385-4432.] It will be noted that

the Main Road case is numbered 3533 in the said District Court of Appeal, and the Alisos Canyon Road case is numbered 3533½. [Tr. fols. 4243-4247.] The record herein referred to involves the following questions:

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

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

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

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

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

Specifications of Errors Relied Upon.

The plaintiffs in error rely upon the following errors as set forth in their assignment of errors heretofore filed in Action No. 3533 [Tr. fols. 4311-4359] as follows, to-wit:

"I.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding against the contention of the plaintiffs in error that the taking of the property involved in said suit for an alleged public road and highway and sought therein to be condemned for such purposes was necessary for a public use, and that it could under any circumstances afford any accommodation of any kind or character to the traveling public or any part or portion of such traveling public, or that, therefore, the taking of the same for highway purposes would not be without due process of law and would not be in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that the taking of said property under the resolution in said suit for public highway or other purposes would not be void and would not be a denial to the plaintiffs in error of equal protection of the laws under the Constitution of the United States and would not

contravene the Fourteenth Amendment to the said Constitution of the United States.

II.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court in striking out the second, further and separate answer and defense of the defendant, May K. Rindge, in her amended answer in the above-entitled cause, which was and is in the words and figures following, to-wit:

'And for another and further and separate answer and defense this defendant alleges:

I.

That all of the properties described in paragraphs II and VI of the complaint and in any way involved in this action are entirely upon and within the boundaries of that certain ranch situate in the county of Los Angeles, state of California, commonly known as the Malibu Ranch.

II.

That while a portion of said Malibu Ranch is owned by the defendant, May K. Rindge, and the remaining portion thereof by the defendant Rindge Company, the said ranch as a whole is now, and was at the commencement of this action, and for more than twenty years prior thereto had been treated, operated, managed and controlled as a single ranch under one joint management and control; and has at no time ever been severed or segregated into parts or parcels or treated or handled or managed by the owners thereof as other than a single ranch and holding.

III.

That said method of holding, managing and controlling said ranch by its said two owners has at all times been known to the plaintiff and to the public in general.

IV.

That said Malibu Ranch as such and under that name and designation and as embraced in the original purchase of the same by the defendant, May K. Rindge; and the predecessor in interest of the defendant, Rindge Company, at the point where the proposed road sought to be condemned herein terminates, at the westerly end of said road, ends at and upon the boundary line between the counties of Los Angeles and Ventura, state of California; but that the defendant, Rindge Company, is the owner and in the possession of, and was at the date of the commencement of this action, the owner and in the possession of property immediately adjacent thereto in the said county of Ventura and forming a continuation into said county of Ventura for a distance of about 1¾ miles of the said ranch under the said joint management and control of the said defendants, May K. Rindge and Rindge Company.

V.

That there was not at the commencement of this action and is not now in the said county of Ventura at any point either contiguous to or upon any part or portion of said property of the Rindge Company or within ten miles of the western, that is to say, the Ventura county, end of said ranch, any public road of any kind or character whatever; and that said ranch can be reached from said end only and wholly by private trails and ways.

VI.

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 pro-

posed road or highway sought to be condemned and taken in this action would, if condemned and taken, be located wholly and solely upon that portion of the Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant, Rindge Company, at the Ventura county line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely upon, and give access wholly and solely to, the private ranch property of the defendants, May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

VII.

That neither of said defendants, owners of and jointly managing and controlling, said Malibu Ranch as a whole, has any need or desire for said or any public road upon said ranch or upon any part or portion thereof; but that, on the contrary, any such public road would be a constant and continuous menace and damage to their said ranch property, and would largely destroy its value as a unit for ranch purposes; and would be and constitute a continual nuisance; and expense to the said defendants.

VIII.

That by reason of the premises the taking of any part or portion of said property as contemplated by the plaintiff and as prayed for in the complaint for road or highway purposes would be without necessity of any kind or right, 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 constitute a denial to the defendants, May K. Rindge and

the Rindge Company, of the equal protection of the laws under the Constitution of the United States, and would contravene the said Fourteenth Amendment to said Constitution.'

III.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court in striking out the third separate answer and defense of the defendant, Rindge Company, in the above entitled cause, which was and is in the words and figures following, to-wit:

'I.

That all of the properties described in paragraphs II and VI of the complaint and in any way involved in this action are entirely upon and within the boundaries of that certain ranch situate in the county of Los Angeles, state of California, commonly known as the Malibu Ranch.

II.

That while a portion of said Malibu Ranch is owned by the defendant, May K. Rindge, and the remaining portion thereof by the defendant Rindge Company, the said ranch as a whole is now, and was at the commencement of this action, and for more than twenty years prior thereto had been, treated, operated, managed and controlled as a single ranch under one joint management and control; and has at no time ever been severed or segregated into parts or parcels or treated or handled or managed by the owners thereof as other than a single ranch and holding.

III.

That said method of holding, managing and controlling said ranch by its said two owners has at all times been known to the plaintiff and to the public in general.

IV.

That said Malibu Ranch as such and under that name and designation and as embraced in the original purchase of the same by the defendant May K. Rindge, and the predecessor in interest of the defendant Rindge Company, at the point where the proposed road sought to be condemned herein terminates at the westerly end of said road, ends at and upon the boundary line between the counties of Los Angeles and Ventura, state of California; but that the defendant Rindge Company is the owner and in the possession of, and was at the date of the commencement of this action, the owner and in the possession of property immediately adjacent thereto in the said county of Ventura, and forming a continuation into said county of Ventura for a distance of about 1¾ miles of the said ranch under the said joint management and control of the said defendants, May K. Rindge and Rindge Company.

V.

That there was not at the commencement of this action and is not now in the said county of Ventura at any point either contiguous to or upon any part or portion of said property of the Rindge Company, or within ten miles of the western, that is to say, the Ventura county, end of said ranch any public road of any kind or character whatever; and the said ranch can be reached from said end only and wholly by private trails and ways.

VI.

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 said ranch in Ventura county; and that the said proposed road or highway sought to be

condemned and taken in this action would, if condemned and taken 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 the defendant Rindge Company at the Ventura county line; would have no laterals or outlets or feeders of any kind or character; would be located wholly and solely upon and give access wholly and solely to, the private ranch property of the defendants May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel.

VII.

That neither of said defendants owners of and jointly managing and controlling said Malibu Ranch as a whole, has any need or desire for said or any public road upon said ranch or upon any part or portion thereof; but that, on the contrary, any such public road would be a constant and continuous menace and damage to their said ranch property, and would largely destroy its value as a unit for ranch purposes; and would be and constitute a continual nuisance and expense to the said defendants.

VIII.

That by reason of the premises the taking of any part or portion of said property as contemplated by the plaintiff and as prayed for in the complaint for road or highway purposes would be without necessity of any kind or right, 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 constitute a denial to the defendants May K. Rindge and Rindge Company of the equal pro-

tection of the laws under the Constitution of the United States, and would contravene the said Fourteenth Amendment to said Constitution.'

IV.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the ruling of the lower court against the said above-quoted third and separate answer and defense of the defendant Rindge Company in the above-entitled cause.

V.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding that the following provisions of Sec. 1241 of the Code of Civil Procedure of the state of California, in force at all times during the pendency of the proceedings involved in the above-entitled cause, to-wit:

'Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury'

were and are constitutional, and were not in violation of the provisions of the Federal Constitution prohibiting the taking of property without due process of law, and were not violative of the Fourteenth Amendment to the Constitution of the United States, and were not obnoxious to any provision of the state or federal Constitution, and in particular that portion thereof which prescribes that such resolution referred to in said Sec. 1241 of the said Code of Civil Procedure if passed by a vote of two-thirds of all of the members of any such legislative body shall be conclusive evidence of the various matters and things set forth and prescribed in said section as necessary to appear before property can be taken by condemnation.

VI.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deprive these plaintiffs in error of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, the defendant in error, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deny to these plaintiffs in error the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VIII.

That the said District Court of Appeal ot the state of California, Second Appellate District, Division One, erred in holding and deciding that the property of these plaintiffs in error was not in and by the necessary force, and effect of the judgment of the Superior Court of the state of California in said cause taken for public use without due process of law contrary to the provisions of the Constitution of the United States, and particularly to the provisions of the Fourteenth Amendment thereto.

IX.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following finding of fact by the lower court in the above-entitled cause:

'That it is necessary for highway purposes and the public interest, convenience and necessity require, the acquisition of an easement in and over the properties particularly described in paragraph II of the said complaint for the construction, establishment and maintenance of a public highway, as prayed in said complaint, and that the use to which the property sought to be taken is to be applied, is a use authorized by law.'

X.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following finding of fact by the lower court in the above-entitled cause:

'That it is not true that there has been no consideration or determination of the Board of Supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint, and particularly of the matters or

things alleged in said complaint, and particularly of the matters or things alleged in paragraph II of said complaint, nor is it true that the resolution referred to in paragraph II of said complaint was arbitrarily adopted by said Board of Supervisors, without any consideration of the matters or things therein contained or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all, nor is it true that said resolution was adopted by said Board of Supervisors knowing full well, or otherwise, that all, or that any of the property proposed to be taken for public road and highway, and to be condemned as in said resolution set forth and as in the complaint alleged, was not, and could not be necessary for any public use of any kind or character whatever and cannot under any circumstances, afford any accommodation of any kind or character to the traveling public, or any part or portion thereof, and that the taking of same for said highway purposes would be without due process of law or in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or that the taking of said property under said resolution for public highway or other purposes, would be void, or would be a denial to the defendants, or to any or either of them, of the equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth, or any amendment to said Constitution, and in this behalf the court finds that it is true that the property proposed to be taken for public road and highway, and sought to be condemned herein, is located wholly and solely upon and within the confines of private property, except that the easterly end of the strip of land sought to be

taken terminates at, and will be in continuation of, a public highway now, and prior to the commencement of this action, existing; and the court further finds that the highway sought to be established and maintained over and upon the land sought to be taken, and for the purpose of which the taking is sought, will afford accommodation to the traveling public.'

XI.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause:

'That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the property particularly described in the amended complaint in paragraph number II thereof, for the construction, establishment and maintenance of a public highway.'

XII.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause.

'That the use to which the property sought to be taken is to be applied, is a use, authorized by law.'

XIII.

That the property of the plaintiffs in error sought to be condemned in this action and included in the judgment of condemnation for alleged highway purposes consists of a strip of land forty feet in width running for a length of about twenty-one miles into and exclusively upon the real property in Los Angeles county, California, owned and operated in common by the Rindge Company, a corporation, and May K. Rindge, two of the above named petitioners,

and one hundred and forty-nine additional parcels adjoining and contiguous to said forty-foot strip and all upon and within the exterior boundaries of said lands of said petitioners, Rindge Company and May K. Rindge.

The plaintiffs in error also rely upon the following errors as set forth in their assignment of errors heretofore filed in action No. 3533½ [Tr. fols. 4392-4412] as follows:

I.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the finding in the above entitled cause that the following allegation of paragraph II of the complaint in said cause was true, to-wit:

'That the public interest and necessity require the construction of a public highway over the property hereinafter described,' namely: the property described in said complaint and condemned in said action.

II.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the finding in the above entitled cause that the following allegation of paragraph II of the complaint in said cause was true, to-wit:

'That for the purpose of constructing a public highway the acquisition of said property is necessary, namely: that certain parcel of land situate in the county of Los Angeles, and described as being,' describing the property condemned in said action.

III.

That said District Court of Appeal of the state of California, Second Appellate District, Division, One, erred in sustaining the follow-

ing finding of the trial court in the above-entitled cause, to-wit:

'That it is not true that there has been no consideration or determination by the Board of Supervisors of the county of Los Angeles of any of the matters or things alleged in said complaint, and particularly of the matters or things alleged in paragraph IV of said complaint, nor is it true that the resolution referred to in paragraph IV of said complaint was arbitrarily adopted by said Board of Supervisors, without any consideration of the matters or things therein contained, or without the exercise of any discretion therein, or well knowing that there was no room for the exercise of any discretion therein, or that it was arbitrarily adopted at all, nor is it true that said resolution was adopted by said Board of Supervisors knowing full well, or otherwise, or at all, that any of the property proposed to be taken for a public road and highway, and to be condemned, as in said resolution set forth and as in complaint alleged, was not, and could not be necessary for any public use of any kind or character whatever, and cannot, under any circumstances, afford any accommodation of any kind or character to the traveling public, or any part or portion thereof, and that the taking of same for said highway purposes would be without due process of law or in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or that the taking of said property under said resolution for public highway or other purposes, would be void, or would be a denial to the defendant, of the equal protection of the laws under the Constitution of the United States, and would contravene the Fourteenth or any amendment to said Constitution, and in this behalf the court finds; that it is true that

the property proposed to be taken for a public road and highway, and sought to be condemned herein, is located wholly and solely upon and within the confines of private property, except that the southerly end of the strip of land sought to be taken terminates at, and will connect with, another strip of land sought to be acquired by the plaintiff in another action (which other action was tried at the same time as, and with this action, and before the same court and jury) brought for the purpose of condemning said last mentioned strip of land for public highway purposes, and the court further finds that the highways sought to be established and maintained over and upon the land sought in this action to be taken and for the purpose of which the taking is sought, will afford accommodation to the traveling public.'

IV.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause, to-wit:

'That it is necessary for highway purposes, and the public interest, convenience and necessity require, the acquisition of an easement in and over the property particularly described in the amended complaint in paragraph number II thereof, for the construction, establishment and maintenance of a public highway.'

V.

That said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in sustaining the following conclusion of law in the above-entitled cause, to-wit:

'That the use to which the property sought to be taken is to be applied, is a use authorized by law.'

VI.

That the District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding that the following provisions of Sec. 1241 of the Code of Civil Procedure of the state of California, in force at all times during the pendency of the proceedings involved in the above-entitled cause, to-wit:

'Provided, when the legislative body of a county, city and county or an incorporated city or town, shall by resolution or ordinance, adoptèd by vote of two-thirds of all its members have found and determined that the public interests and necessity require the acquisition, construction or completion, by such county, city and county or incorporated city or town, any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance shall be conclusive evidence: (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury,' were and are constitutional, and were not in violation of the provisions of the Federal Constitution prohibiting the taking of property without due process of law, and were not violative of the Fourteenth Amendment to the Constitution of the United States, and were not obnoxious to any provision of the State or Federal Constitution, and in particular that portion thereof which prescribes that such resolution referred to in said Sec. 1241 of the said Code of Civil Procedure if passed by a vote of two-thirds of all of the members of such a legislative body shall be conclusive evidence

of the various matters and things set forth and prescribed in said action as necessary to appear before property can be taken by condemnation.

VII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deprive these plaintiffs in error of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VIII.

Said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the county of Los Angeles, the defendant in error, was not permitted to and did not in and by the necessary force and effect of the judgment of the Superior Court in this cause deny to these plaintiffs in error the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

IX.

That the said District Court of Appeal of the state of California, Second Appellate District, Division One, erred in holding and deciding that the property of these plaintiffs in error was not in and by necessary force and effect of the judgment of the Superior Court of the state of California in said cause taken for public use without due process of law contrary to the provisions of the Constitution of the United States, and particularly to the provisions of the Fourteenth Amendment thereto."

ARGUMENT.

I.

The Special Defenses Stricken Out Raised the Question Whether the Land Sought to Be Condemned Was Being Taken for a Public Use, Authorized by Law.

The first two questions stated as being involved upon this appeal are raised by the order of the court striking out the special defenses in the amended answers of the defendants, May K. Rindge, and the Rindge Company. That portion of the amended answer of May K. Rindge, stricken out, appears in the statement, *supra.*

The amended answer of the Rindge Company contained a special defense "in the same identical words and figures" as the above, and it was also stricken out by the court on motion of the defendant in error. [Tr. fols. 642-658.]

This special defense was pleaded upon the theory that an isolated road, wholly within the boundaries of what is practically one property, which is not necessary for the use of, and not only not desired by but strenuously opposed by, the owners of such property, and that 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, could

not possibly be a public necessity for which condemnation would lie.

It is our firm belief that this defense, if substantiated (and for the purpose of the motion to strike, it had to be accepted as true), would justify the application of the sound doctrine, well recognized but seldom invoked, that private property cannot be taken under the guise or upon pretence of necessity for a public use where demonstrably it would not and could not subserve any such use. Under such circumstances the taking of such property would not constitute "the exercise of 'legal legislative [or judicial] discretion;'" for the fact of the impossibility of its being necessary for a public use under the established conditions would leave no room for the exercise of any discretion, and therefore such taking would merely be power "arbitrarily exerted."

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 485, 60 L. Ed. 392 citing—

Houck v. Little River Drainage Dist., 239 U. S. 254, 60 L. Ed. 266;

Norwood v. Baker; 172 U. S. 269, 43 L. Ed. 269.

In Myles v. Drainage Dist., *supra*, an assessment district for drainage purposes and to prevent lands from being overflowed was formed, embracing a tract of land owned by the plain-

tiff, which was elevated property. It was land situated above the overflow of waters, and was not susceptible of being drained by any plan of improvement which was formed and adopted, nor by any plan which might have been adopted.

There the proceedings were clothed with all of the forms of law, hearings were provided for, and it was proposed to assess only lands which were susceptible of being drained or prevented from being overflowed, or otherwise improved by the plan or scheme of improvement, and yet the result of the proceedings was that elevated lands of the plaintiff, situated in altitude high above the water and not susceptible of being drained and prevented from being overflowed and lands of high value, were assessed according to their value for the sole benefit of other owners, whose lands were in fact overflowed or damaged by waters.

The Supreme Court said:

> "It is said that 'under the law of Louisiana the action of the legislative body (the Police Jury), in the exercise of its discretion in a drainage district, will not be inquired into by the court, except upon a special averment of fraud which is not pleaded.' And such decision, it is further contended, was a decision upon the state law and presents no federal question, the statute of the state not being attacked.
>
> "We cannot concur in the contention. It is true the law of the state as written is not attacked, but the law as administered

and justified by the Supreme Court of the state is attacked and it asserted to be a violation of the Constitution of the United States. The question presented is federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question.

"The charge is the plaintiff's property was included in the district not in the exercise of 'legal legislative discretion,' not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined 'purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit' to plaintiff 'or its property whatever,' present or prospective.

"Nothing could be more arbitrary if drainage alone be regarded."

(Op., p. 484.)

And again:

"We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others — power, therefore, arbitrarily exerted imposing a burden without a compensating advantage of any kind."

(Op., p. 485.)

So here, if the allegations of these special defenses were true, and for the purpose of the

motion they were true, there would be no possible room for the exercise of legislative or judicial discretion in the premises; for the contemplated road could serve no useful or necessary purpose to any part of the public whatever.

Even the fact that it might be scenically desirable (and there is no evidence in the record to support that presumption) presents no ground for striking out this defense. That contention might have been urged and attempted proof of its scenic value might have been offered in rebuttal of this defense, and an issue upon it thus have been raised. But the lower court had no legal right to arbitrarily assume upon the motion to strike that any such answer to the special defense pleaded would be urged or could have been successfully proven.

In other words, our special defenses tendered the issue that there was no public necessity to be served by reason of the special facts pleaded; and the trial court arbitrarily decided, in effect that, even if the facts pleaded showed the absolute want of any public necessity, and therefore eliminated any possible exercise of discretion as to that vital matter, nevertheless such demonstrated want of necessity was no defense to the action.

In the case of Kansas City v. Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766, the court said:

> "To the City Council the state has delegated the power to condemn land for a public use, it has no power to condemn for a private use; 'public' in that connection means everybody; if the use is not for everybody, it is a private use; if to an individual, or to any number of individuals, is given the right to use the property in such manner as will practically exclude the general public, it is a giving of the property to private use and a destruction of its public service character."

The special defenses stricken out show that the roads condemned ~~were~~ entirely upon private property and terminated upon the private property of certain of the plaintiffs in error with no contiguous roads of any kind whatsoever; that the Malibu Ranch where the road terminated at the westerly end "can be reached from said end only and wholly by private trails and ways"; that the said "proposed road or highway sought to be condemned and taken in this action would if condemned and taken, be located wholly and solely upon that portion of the said Malibu Ranch situated in Los Angeles county, would end and terminate upon the private property of the defendant, Rindge Company, at the Ventura county line; would have no laterals or outlets or feeders of any

kind or character; would be located wholly and solely upon, and give access wholly and solely to, the private ranch property of the defendants, May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel."

This portion of the special defense brings the case at bar within the principle announced in the quotation from the case last cited, for certainly the general public will be *"practically excluded" from a highway which commences and ends upon private property, without "laterals or outlets or feeders of any kind or character."*

We submit, therefore, that the two first questions stated in our brief should be answered in the negative, and if so, the judgments of condemnation should be reversed.

II.

The Amendment of 1913 to Section 1241 of the California Code of Civil Procedure, Declaring Certain Resolutions to Be Conclusive Evidence of the Facts Stated, Was and Is Unconstitutional and Void.

The third question involves the validity of the proviso to subdivision 2 of section 1241 of the California Code of Civil Procedure, and the

effect of said section in a condemnation proceeding.

There are certain matters which the law requires the county to establish—which "must appear"—"before property can be taken."

These are enumerated in section 1241 of the Code of Civil Procedure. They are:

> "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," which involves,
> "(a) 'The public necessity' of the proposed improvement;
> "(b) That the property sought to be taken is necessary therefor'; and
> "(c) That the improvement is planned or located in the manner which will be the most compatible with the greatest public good and the least private injury.
> "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.'"

The following proviso was incorporated in section 1241, C. C. P., by an amendment of 1913:

> "Provided, when the legislative body of a county, city and county, or 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 said county, city and county, or incorporated city or town, of any proposed public utility or of a public improvement,

and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence:

"(a) Of the public necessity of such proposed public utility or public improvement;

"(b) That such property is necessary therefor; and

"(c) That such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest good and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof."

California Stats. 1913, p. 549.

Section 1242 of the California Code of Civil Procedure then and now reads as follows:

> "In all cases where land is required for public use, the state, or its agents, in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantoness, or malice."

We contended, at the trial, that if the road laws of this state contemplated the institution of condemnation proceedings by any such *ex parte* resolution of the board of supervisors as that which forms the sole basis of this action, 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 sort being provided for or accorded to the property owners in the premises.

Under such circumstances, all of the vital questions essential to the taking of private property for public use, except only the one question of the amount of damages to be awarded for such taking, could be arbitrarily and conclusively determined by a two-thirds vote of the supervisors without any notice whatever to the land owner and without any opportunity whatever on his part to be heard.

The trial court sustained the contention of plaintiffs in error that this proviso would be unconstitutional if given the construction its language imports, but also reached the unwarranted conclusion that the resolutions did, without other proof, establish *prima facie* the facts required to be found by said section 1241. But the Appellate Court, as we have pointed out, disagreed with the trial court on this point, and

held that the Code section meant what it said and was valid; and for that reason, refused to review the evidence introduced in pursuance of the ruling of the trial court on the question of necessity. [Tr. fols. 4266-4282.]

The validity of the Amendment of 1913 to this code section 1241, therefore, is clearly presented by the record in the case at bar, and we will now discuss it. The proviso appearing in subdivision 2 of section 1241, C. C. P., was an amendment enacted by the Legislature in the year 1913. (California Statutes and Amendments 1913, p. 549.)

Prior to the amendment of section 1241 C. C. P., Subd. 2, by Statutes of 1913, page 549 (effective August 10th, 1913, the necessity or expediency of taking private property for a public use was subject to judicial inquiry.

Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 676, etc.;
Lindsay I. Co. v. Mehrtens, 97 Cal. 676;
Vallejo etc. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 561;

Assuming, therefore, that prior to 1913, the court was authorized to inquire into the question of whether or not the taking was necessary to such public use, what effect did the amendment to subdivision 2 (adding the proviso) have? This proviso reads as above indicated.

Section 1 of article VI of the California Constitution reads as follows:

> "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, Superior Courts and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county."

By the express terms of section 1241 C. C. P., it is made necessary for the facts therein recited to appear "before property can be taken." Must appear to whom? Obviously to the court in which the condemnation suit is being tried. But this amendment assumes to deprive the court of the judicial function of determining these necessary facts, upon evidence admitted upon the trial, of the character and weight sufficient to satisfy the judicial mind, by declaring that if the legislative body referred to adopts the resolution in a certain manner, the production of the resolution shall be conclusive evidence of the said necessary facts.

As was said in Bacon v. Bacon, 150 Cal. 477, at page 484:

> "The Legislature does not possess power to divest the court of its constitutional jurisdiction. It may change the practice or procedure, the mere method by which the jurisdiction is exercised * * * but it cannot take away the jurisdiction entirely, nor substantially impair it."

In San Jose Ranch Co. v. San Jose etc. Co., 126 Cal. 322, the court, at page 326, said:

> "It is the right of every person, before he can be deprived of his property, to have a trial according to law, to have the same character of trial, governed *by the same established rules of evidence and procedure* as are applied in other cases under similar conditions." (Italics ours.)

By the proviso now under discussion the Legislature attempted to deprive the appellants and all other defendants in similar condemnation suits of this valuable right, by declaring that the courts *must hold* that the mere production of a resolution adopted by the body corporate, seeking the condemnation of certain property, is conclusive evidence of the essential facts that must appear before the "property can be taken." It seems to us that the mere statement of this proposition is sufficient to demonstrate its unconstitutionality, for as was again said in the case last cited:

> "Uniformity in the administration of justice is a fundamental right, and every litigant may demand that his case shall be tried, so far as practicable, by the same established rules of procedure and evidence as well as upon the same principles which are applied to other like controversies."

In the case of Ennis-Brown v. Central Pac. Ry. Co. *et al.*, 235 Fed. 825, Judge Ross, in de-

livering the opinion of the Circuit Court of Appeals, said:

> "The court in such a case *must determine* whether the use to which it is sought to subject the property is one authorized by law and *that the taking is necessary to such use* (C. C. P., Sec. 1241), *which essentially includes the right to determine to what extent the proposed taking is necessary*—the precise question which plaintiff presents by the present bill." (Italics ours.)

It will be noted that both of these opinions were filed after the amendment to Sec. 1241 C. C. P. in the year 1913, and the inference is that the learned judges who delivered those opinions were of the opinion that the necessity for the taking of private property for a public use is still a judicial question to be determined by the court upon the evidence introduced in each particular case. We contend that any law that would prevent a party from showing that his property was being taken without necessity and for a private purpose would be equivalent to legislative confiscation and void. It is not competent for the Legislature to make certain acts conclusive evidence when the ultimate result would be to take property of a citizen without necessity and without any opportunity to be heard.

In R. C. L., Vol. 10, page 864, the author says:

> "But a law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would be substantially to deprive him of due process of law."

In Board of Com. etc. of Auburn v. Merchant, 106 N. Y. 143, 57 Am. Rep. 705, the court upheld a law declaring certain facts to be *prima facie* evidence of the violation of a criminal statute and in the course of the opinion points out the difference between such a law and one declaring certain facts to be *conclusive evidence,* thereby depriving a party of the right to be heard. The court said:

> "The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are, at all times, subject to modification and control by the Legislature * * *. It may be conceded, for all the purposes of this appeal, that a law that 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. But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence."

It has been held that the Legislature has no power to make tax deeds *conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of property for the nonpayment of taxes.*

10 R. C. L. p. 867, sections 8-9;
Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 A. S. R. 595.

In the last case cited the court said:

> "The constitution of this state has not committed to the Legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale divesting the title of the citizens' property for the nonpayment of taxes. Such determination belongs to the judiciary."

In a note to People v. Cannon (139 N. Y. 32), 36 Am. St. Rep. 668, the author, at page 683, says:

> "It may be conceded for all the purposes of this power *that a law that 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.*"

And this note furnishes many illustrations showing that it is only competent for the Legislature to declare a tax deed conclusive evidence

of unessential procedure which might have been dispensed with, originally, but not of an essential fact so indispensable "that without its performance no tax can be raised." In such a case that fact can not be dispensed with by legislative fiat so as to prevent the owner from showing the truth.

In Allen v. Armstrong, 16 Iowa 513, the rule as quoted in the note referred to is stated as follows:

> "The true rule on the subject seems to be that the Legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all nonessentials or matters of routine which rest in mere expediency—acts which need not have been required in the first place, as an affidavit of the sheriff to the delinquent list—and which the Legislature may, by a curative act, excuse when omitted. But the owner of property can not be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, or levy of the taxes thereon and sale thereof on that account. As to the performance of these acts and the facts necessary to constitute them, the deed can only be made *prima facie* evidence."

Again it is said at page 689 of the note:

> "In civil cases, though we have met no direct adjudication on the subject, we think it safe to assert that where a party would be able to establish his cause of action and

of defense, were he permitted to prove the truth, and such cause or defense does not consist of a mere irregularity or technicality, *he cannot be precluded from offering such proof by a statute creating a conclusive presumption against him.*"

In the case of L. R. etc. R. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55, the court said:

> "It is not within the province of the Legislature to divest rights by prescribing to the courts what should be conclusive evidence. This matter was fully considered by this court in the case of Cairo v. Fulton R. R. Co. v. Parks, 32 Ark. 131, which arose under a statute, which endeavored to make a county clerk's deed of lands, sold for taxes, conclusive of its recitals against the true owner. Justice Walker, in delivering the opinion, remarked: 'The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property.' Railroad companies have the right to run their trains, and the consequent right of being protected in doing so, unless damage to others should result from some negligence, want of due care, or culpable neglect of reasonable precautions, imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power."

In Hammond v. State of Ohio, 84 N. E. 416, 125 A. S. R. 684, 15 L. R. A. (N. S.) 906, the same principle was applied to a criminal case.

In a note to the same case appearing in Ann. Cases, Vol. 14, page 734, it is said:

> "There is, of course, a vast difference between the power of the Legislature to declare that proof of certain facts shall constitute *prima facie* evidence and *its power to declare that certain evidence shall be conclusive.* It should be observed, however, that, as recognized by Mr. Wigmore, statutes which make certain evidence conclusive, generally change, not the rules of evidence, but the substantive law * * *. It has been said that closing the mouth of a person when he comes into court has the same effect as depriving him of his day in court to vindicate his rights. A statutory provision to the effect that the certificate of the state weighmaster as to the weight of grain shall be conclusive upon all the parties has accordingly been held to be unconstitutional. (Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 309, 77 N. W. 973, 74 Am. St. Rep. 484.) Language to the effect that a statute providing that certain evidence shall be conclusive is unconstitutional, may also be found in a number of cases. (See State v. Thomas, 144 Ala. 77, 6 Ann. Cas. 744, 40 So. 271; Jacques etc. Co. v. Carstarphen Warehouse Co., 131 Ga. 1, 62 S. E. 82; Pittsfield etc. R. Co. v. Harrison, 16 Ill. 81; People v. Rose, 207 Ill. 361, 69 N. E. 762; Wantlan v. White, 19 Ind. 470; Voght v. State, 124 Ind. 358, 24 N. E. 680; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145,

36 L. R. A. 179; Allen v. Armstrong, 16 Ia. 508; Howard v. Moot, 64 N. Y. 262.) And it has been held that the legislature has no power to provide that the fact in issue may be conclusively proved by the oath of the complainant. (Savannah etc. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697; Ely v. Thompson, 3 A. K. Marsh (Ky.) 73.)"

The rule is thus stated by the author of Cyc., Vol. 8, pages 820-1:

> "The Legislature has power to give greater effect to evidence than it possesses at common law and in both civil and criminal proceedings it may declare what shall be *prima facie* evidence. *On the other hand it cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary.*"

After quoting the rule the court in State v. Jim Thomas, 144 Ala. 77, 6 Ann. Cases, 745, says:

> "This seems to be a rule of well nigh, if not universal recognition."

In 2 Wigmore on Ev., Sec. 1353, page 1666, that learned author states the rule and the reason for it as follows:

> "To this question the answer can hardly be doubtful. It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the judiciary to be forbidden alto-

gether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province."

He cites in the note, J. Nisbet, in Bordsong v. Brooks, 7 Ga. 88, 92, who said:

"The Legislature has no power to legislate the truth of facts, whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the government."

In applying this principle to tax deeds the U. S. Supreme Court, in Marx v. Hanthorne, 148 U. S. 172, 37 L. Ed. 410, said:

"Without going at length into the discussion of a subject so often considered, we think the conclusion reached by the courts generally may be stated as follows: 'It is competent for the Legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the Legislature cannot deprive one of his property by making his adversary claim to it, whatever that claim may be, conclusive of its own valid-

> ity, and it cannot, therefore, make the tax deed *conclusive* evidence of the holder's title to the land.' "

The same distinction between the power of the Legislature to declare certain facts to be *prima facie* evidence of an ultimate fact or conclusion and to make the same facts conclusive evidence, is noted in the California cases.

See:

Clarke v. Mead, 102 Cal. 516, 519.

The defendants were brought into court by the county of Los Angeles in an action seeking to condemn their property, and these defendants, the plaintiffs in error herein, were entitled to prove any facts tending to show that, under existing law, the county was not entitled to the relief sought. The law did not provide for any hearing before the Board of Supervisors on these vital questions, and it was not competent for the California Legislature to say that the resolutions adopted *ex parte*, and without any opportunity to be heard, should, when the defendants appeared in court, also prevent them from disproving the allegations of the complaint.

In Larson v. Dickey, 39 Neb. 463, 42 A. S. Rep. 595, 606, this principle was clearly stated as follows:

"Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property: Wright v. Cradlebaugh, 3 Nev. 341. There are fixed bounds to the power of the Legislature over the subject of evidence, which must not be exceeded. As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights: Cooley's Constitutional Limitations, 4th Ed. 457. While the courts should treat with great respect the enactments of the legislative department of the government, yet the courts, which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even a legislature cannot do."

The same principle is clearly and forcibly stated in Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, in the following language:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an oppor-

tunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard; and when he has appeared, saying: vour appearance shall not be recóg-nized and you shall not be heard. In the present case, the district court not only in effect said this, but immediatély added a decree of condemnation, reciting that the default of all persons had been duly en-tered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

The above language is quoted with approval in Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, and many authorities cited on the subject, the court saying:

> "This language but expresses the most elementary conception of the judicial function."

And yet the California Legislature, in effect, said, by the amendment to section 1241 C. C. P., to the plaintiffs in error, you are called into court for the purpose of forcing you to part with the title to your property, but you shall not be permitted to speak, or introduce any evidence as to the facts which are required by law to

be found before the property can be condemned. Under such circumstances is it not true, as was said by the court in Windsor v. McVeigh, *supra,* that a

> "decrée thus rendered" * * * "was, in effect, a mere arbitrary edict, clothed in the form of a judicial sentence."

In Missouri etc. Ry. Co. v. Simonson, 64 Kan. 802, 91 Am. St. Rep. 248, the rule now being considered was stated in the following language:

> "Is it in the power of the Legislature thus to create a conclusive presumption in a matter of private contract? We are constrained to believe that it is not. Every suitor is entitled to his day in court and to have his case determined on such evidence as legal policy will allow. It is doubtless competent for the Legislature to prescribe many of the rules of evidence. The subjects of the competency of witnesses, the order of trials, the burden of proof, the effect of public records, the certification of copies of official documents, the *prima facie* character of certain evidence, and other like matters which pertain to the practice rather than the right of proving causes are lawfully within the sphere of legislative regulation; but it is not within the power of the Legislature to exclude from the courts that which proves the truth of a case, nor, on the other hand, to compel them to receive that which is false in character * * *. In Cooley on Constitutional Limitations, fifth edition, 453, it is said: 'But there are fixed bounds

to the power of the Legislature over this subject which cannot be exceeded. As to what shall be in evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial, if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law."

Then, after citing a number of authorities, including Chicago etc. Ry. Co. v. Minnesota, 134 U. S. 418, the Kansas court said:

> "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 the controversy, is an invasion of the judicial province and a denial of due process of law. The Legislature may regulate the form and the manner of use of the instruments of evidence—the 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."

The condemnation of the amendment to section 1241 of the California Code of Civil Procedure could not be more accurately or strongly stated than in this opinion, and we respectfully submit that it is unconstitutional and void for the reasons therein stated.

See also:

12 Corpus Juris, pp. 823, 824, Sec. 285.

In the opinion of the District Court of Appeal it is said:

> "This contention (that the proviso is unconstitutional) is based upon the claim that the determination of the facts so found by the resolution were in their na-

ture 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 * * *. When the use is public, the necessity of appropriating any particular property therefor is not a subject of judicial cognizance, but 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."* (Italics ours.)

As an abstract proposition this quotation may be conceded to be a correct statement of the law (for the purposes of this argument) and yet its fallacy, as applied to the case at bar, lies in the unwarranted assumption that the state of California has delegated the power "to so appropriate" the land of its citizens to any "subordinate" body—or in this case to the Board of Supervisors. On the contrary, as we have just attempted to show, and, we think, successfully, the state of California, by section 1241 C. C. P. and the whole chapter on Eminent Domain (C. C. P. sections 1237-1264) *has expressly required the courts to ascertain and find those essential facts* of the public use, the public necessity, and the proper location of the proposed improvement "before condemnation"

(California C. C. P. sections 1241, 1242), and hence the whole reasoning of the appellate court proceeds from a false premise, and necessarily results in an incorrect conclusion, insofar as the instant case is concerned.

On November 5, 1918, an amendment to section 14, article I of the California Constitution was adopted by a vote of the people. The section as amended reads as follows:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law [provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use, whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the

way of money deposits *as the court in which such proceedings are pending may direct,* and in such amounts *as the court may determine* to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, *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.* The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.] [The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier."

(NOTE: The only changes in the section effected by the said amendment are enclosed in brackets and the portions to which we call special attention are italicised.)

It will be observed that if any of the public agencies described in the amendment choose to ask possession of the property sought to be condemned, pending the litigation, they are required to deposit money in such amounts

> "as the court in which such proceedings are pending may direct * * * to secure to the owner of the property to be taken im-

mediate payment of just compensation for such taking and any damage incident thereto, *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'." (Italics ours.)

If it be true that the "legislative" fiat of the Board of Supervisors was conclusive evidence of the "necessity for taking the property," *how could there ever be "an adjudication that there is no necessity for taking the property"?*

The language of this constitutional amendment is utterly inconsistent with the conclusion of the appellate court on this question, and amounts to a constitutional declaration, insofar as California is concerned (whatever may be the rule elsewhere), that the question of the necessity for taking an owner's property for an alleged public use, in this state, is a judicial question, which must be "adjudicated" by a "court of competent jurisdiction" and by the orderly procedure, provided in such cases; and that such court can not be controlled in its decision upon the essential facts, required to be found "before condemnation," by a resolution of any of the political subdivisions, described in said constitutional amendment quoted *supra.*

In Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78, while the court sustained a statute of Mississippi declaring that

proof of injury inflicted by the running of trains was *prima facie* evidence of negligence, yet the principles therein announced would seem to indicate the soundness of the contention of plaintiffs in error with reference to the unconstitutionality of that portion of section 1241 of the California Code of Civil Procedure now being discussed. In that case the court said:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Tested by the principles announced in this quotation is not the said portion of section 1241 now being discussed unconstitutional?

First, because no provision is made whatever for any hearing before any tribunal, as to the "(a) public necessity of such proposed public utility, or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury"; and

Second, because the section in question makes an arbitrary distinction when the resolution is adopted by a vote of two-thirds of all the members of the legislative body, and by a less number; and also when the land sought to be condemned is "located outside of the territorial limits" of the county, city or town, seeking to condemn the property.

In other words this law, in effect, provides that the legislative body of either of the political subdivisions, described in this section, may, by resolution, resolve to take certain property, and, provided two-thirds of its members vote for it, the owner shall not be heard to question the propriety of the taking; but if two-thirds of the members of such legislative body do not vote for the resolution, but only a majority do so, then he may be heard on all of the questions stated in the section.

Again, the same inconsistency and inequality in the law is shown by the last proviso of sub-

division two of section 1241 C. C. P. to the effect that the conclusive presumption does not apply, if the land sought to be condemned "lies outside the territorial limits" of the city, county or town, seeking to condemn. Why should a landowner *within* such territorial limits be subjected to burdens not imposed upon landowners *outside* the territorial limits of the political subdivision seeking to condemn? Is not this distinction "so unreasonable as to be a purely arbitrary mandate," as described in the opinion of the United States Supreme Court last cited? (Mobile etc. R. R. Co. v. Turnipseed, 219 U. S. Rep. 35.)

And does not the other distinction fall within the same classification, to-wit: when the resolution is passed by a vote of two-thirds of the members of the legislative body and when not? We think so, for it should make no real legal difference whether the resolution is adopted by a majority, or a two-thirds vote of its members, but the difference expressed in the law is fundamental. In the one case the landowner has guaranteed all the rights of a judicial investigation as to the public use, the necessity of taking the land therefor, and whether or not the improvement is located in a manner "most compatible with the greatest public good and the least private injury"; while, in the other, all of these questions are foreclosed by the adoption

of an *ex parte* resolution by a two-thirds vote, without any opportunity to be heard, either before the board, adopting the resolution, or by a court, upon a subsequent trial as to compensation. In effect, the law says: if the resolution is adopted by a two-thirds vote, all of the above questions of public use, necessity and location of the improvement are legislative, or political questions, upon which the landowner involved shall not be heard; but if the resolution is adopted by less than a two-thirds vote, or if the land is outside of the territorial limits of the county, city or town, then those questions are judicial in character and the landowner shall be heard in court, upon all of them.

It requires but a plain statement of the proposition involved to see that these distinctions created by the law in question are unreasonable and arbitrary, and sustain no rational connection "between the fact proved and the ultimate fact presumed." In the case at bar the only fact proved or required to be proved on these issues was the adoption of the resolutions by a two-thirds vote of all the members of the Board of Supervisors of Los Angeles county, and from this fact all of the issues, except as to compensation, were conclusively presumed in favor of the county.

If it be granted for the sake of the argument that the Legislature had the right to

"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 uses," as was said in the opinion of the District Court of Appeal, yet it does not follow that it had the right to delegate such power to the boards of supervisors when two-thirds of their respective numbers should vote for the resolution, and withhold that power when the resolution is adopted by only a majority vote; because the effect would be, as we have seen, to make it a legislative question in the one case, and a judicial question in the other; dependent upon the size of the vote and also the location of the land sought to be condemned, to-wit: within or without the territorial limits of the county seeking to condemn.

It would be difficult to conceive of a more unequal application of the laws than would be not only possible, but probable under said section 1241, or a more flagrant denial of due process of law, where the land owners involved, as in the case at bar, happened to own the land within the territorial limits of the county, seeking to condemn, and the resolutions were adopted by a vote of more than two-thirds of the members of the Board of Supervisors of Los Angeles county.

In Luria v. United States, 231 U. S. 25, 58 L. Ed. 101, it was held that it was competent for Congress to declare that taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship, shall be considered *prima facie* evidence of the lack of intention of becoming a permanent citizen of the United States, at the time of the application for citizenship. In discussing the question the court said:

> "It will be observed that this provision prescribes a rule of evidence, not of substantial right. *It goes no further than to establish a rebuttable presumption which the possessor of the certificate is free to overcome.*" (Italics ours.)

The case of Mobile etc. v. Turnipseed, 219 U. S. 35 (cited *supra*) is quoted from at length in support of this proposition.

It is quite apparent from the reasoning in this case that the law would have been declared unconstitutional if, as in the case at bar, the fact had been declared, not *prima facie,* but conclusive evidence of the lack of intention to become a citizen.

It is plain to see that in the case at bar the legislative presumption declared by section 1241 was not merely a rule of evidence, creating a rebuttable presumption, but the provision in question created a conclusive presumption affecting a substantive right—the ownership and

continued possession of a strip of land about twenty-two miles in length, bisecting the Malibu Ranch, in a manner that inflicted upon the owners an irreparable injury.

In Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70, the court said:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or * * * *notice to the owner at some stage of the proceedings is essential.*" (Italics ours.)

And the author of the article on this subject, in Ruling Case Law, stated the proposition as follows:

> "The due process clause, in addition to its requirement of public use and just compensation, protects the land owner from the adoption of any form of procedure in eminent domain cases, which deprives him of a reasonable opportunity to be heard, and so to present such objections and claims as he is entitled to make." (10 R. C. L. p. 17, Sec. 14.)

As we have seen, the law in question deprives the landowner of all opportunity to be heard on any of the fundamental questions recited in said section 1241, provided the resolution is adopted by a two-thirds vote of the members

of the city, county or town, and it clearly falls within the inhibition of the Federal Constitution, as construed in the authorities cited.

The different treatment accorded to the four classes described in said section 1241, namely: when the resolution is adopted by a two-thirds vote, and when not; and when the land sought to be condemned is within the territorial limits of the political subdivision seeking to condemn and when not, is not based upon any "consideration of difference" growing out of this classification, and hence is as purely mechanical or arbitrary as the ordinance condemned in the case of Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523.

We fail to see any rational basis for a classification which gives to one landowner a judicial hearing, if his land is sought to be condemned, provided the resolution is adopted by only a majority vote, or is located outside the county, city or town; while another landowner is denied this right, and his land may be taken without any opportunity to be heard on any issue, except compensation, if, forsooth, the resolution happens to have been adopted by a two-thirds vote, and his land is located within the territorial limits of the political subdivision seeking to condemn.

In Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569, the court said:

> "By 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, *it must give them an opportunity to be heard respecting the justice of the judgment sought.* * * *
>
> "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportuinty to be heard; *so also where title or possession of property is involved.*" (Italics ours.)

And the court then points out the difference between the requirements, where a general tax is involved, and the title or possession of specific property is in question, in order to satisfy the provisions of the due process article of the Federal Constitution, holding, of course, that the procedure for the assessment and collection of general taxes is necessarily very much less formal than in the other cases mentioned, and therefore the constitutional requirement is more easily satisfied.

It was said in King Tonopah Mining Co. v. Lynch, 232 Fed. 483, 494, that

> "we have no precise definition for due process of law. Its fundamental requisites, however, *are notice and the opportunity to be heard.*" (Italics ours.)

Citing in support thereof the following authorities:

Hovey v. Elliott, 167 U. S. 409, 418, 17 Sup. Ct. 841, 42 L. Ed. 215;
Louisville & Nashville R. Co. v. Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620, 44 L. Ed. 747;
Simons v. Craft, 182 U. S. 427, 437, 21 Sup. Ct. 836, 45 L. Ed. 1165;
Twining v. New Jersey, 211 U. S. 78, 110, 29 Sup. Ct. 14, 53 L. Ed. 97.

This "fundamental requisite" was necessarily denied to the plaintiffs in error, because the *ex parte* resolutions, adopted by the Board of Supervisors, were under section 1241 C. C. P., and the opinion of the District Court of Appeal, *conclusive evidence* of all the issues involved, except the compensation to which they were entitled, after being assessed by the jury. They were denied the right to contest the necessity of taking the land for the proposed highway; or that it had been located in such a manner as to best serve the public interest, with the least private injury to them, and having been denied these fundamental rights, by express command of the section in question, it is difficult to see how it can be successfully contended that plaintiffs in error have not been deprived of their property without due process of law.

The only alternative to this conclusion is, that the state has the power, by legislative fiat, to determine that it will take certain property of its citizens for an alleged public use, without any hearing, except upon the issue of compensation, and if this is the law (which we deny) then there is no difference in the quality of such tyranny, and that asserted by the kings and queens formerly exercising rulership over us, against which tyranny our forefathers successfully waged battle in revolutionary days.

Our contention, therefore, leads us to this summary:

The law of California expressly provides that the public uses for which land may be condemned, as well as the necessity for the taking, and the location of the proposed improvement, are judicial questions; and being judicial questions, it was not lawful for the Legislature to declare that a resolution adopted by a board of supervisors by a certain vote, should be conclusive evidence of the fundamental issues involved, and thereby deprive plaintiffs in error of a hearing on these issues. Such a law, held to be valid by the District Court of Appeal of California (and approved by the Supreme Court of this state), has had the effect of depriving plaintiffs in error of their property without due process of law, and has caused them to be de-

nied the equal protection of the laws, in the particulars hereinbefore enumerated.

That the District Court of Appeal was in error in holding these questions to be legislative or political, and not judicial, is clear.

In Hairston v. Danville etc. R. Co., 208 U. S. 598, 52 L. Ed. 637, 641, the court said:

> "But when we come to inquire what are public uses for which the rights of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. *The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a Judicial question.*" (Italics ours.)

It necessarily follows that if it is a judicial question, the judicial mind may not legally be controlled by the legislative declaration to the effect that upon certain contingencies named, a resolution adopted shall be conclusive evidence of all the facts upon which the judicial conclusion must rest.

To give this effect to such a provision would be to convert our judges into rubber-stamps, compelling certain findings, however obnoxious, in particular cases, those findings might be to the conscientious judge, and however contrary to his sense of justice. And even the U. S. Supreme Court cases (cited in the opinion of

the District Court of Appeal in support of its conclusion) do not go to the extent indicated. In Secombe v. Milwaukee & St. Paul Railway Co., 90 U. S. 108, 23 L. Ed. 67, the court said:

> "The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction."

It is true that a general rule is announced in this opinion for which it was doubtless cited, but the real decision is embodied in the above quotation.

In Miss. & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the court explained, in effect, the respective functions of the legislative and judicial departments of government in the condemnation of land for public purposes. The court said:

> "The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been

observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, the owners of the land on the one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state."

That is exactly what the plaintiffs in error claim, namely, that the state of California has attached certain conditions to the right of any county to exercise the power of eminent domain and expressly declares that those "conditions" shall be found to exist before condemnation. In other words, "whether the conditions have been observed is a proper matter for judicial cognizance."

Because the Legislature also illegally attempted to control this judicial investigation by declaring a certain resolution to be conclusive evidence of the observance of these conditions, does not alter the fact, that the Legislature did delegate to the courts the power and the duty of ascertaining and finding the facts, necessary to be found, before the land involved in any condemnation suit could be condemned.

In the last analysis, therefore, the above authorities cited, in the opinion of the District Court of Appeal, do not sustain the broad conclusions therein reached, as applied to the case

at bar, but in principle sustain the contention of plaintiffs in error.

It follows that the conclusion of the appellate court was erroneous because it is based entirely upon the incorrect premise that in California the question of necessity for taking property under the power of eminent domain is exclusively a political or legislative question, and not a judicial one, and the premise being erroneous, the conclusion is equally erroneous.

And we could not more fittingly close the discussion on this branch of the subject than by a quotation from the opinion of Chief Justice Murray in the early case of Burgoyne v. Board of Supervisors of the county of San Francisco, 5 Cal. 9, found at page 20 of the opinion. He said:

> "The history of almost every nation is replete with struggles between the judicial, the executive, and legislative branches of government for unlimited supremacy, and demonstrates, that unless curbed by wholesome constitutional restrictions, each department will, in its turn, encroach upon and interfere with the functions of other co-ordinate branches of government. This spirit of usurpation and encroachment has been more frequently directed towards the judiciary than any other department. In England, it was only determined by resort to civil war, which resulted in the establishment of the entire independence of the judiciary, as well as the commons, while in this country, it has been avoided by the

enlightened wisdom and experience of the framers of our Federal and State Constitutions."

III.

The Holding of the Trial Court That the Resolutions Were Only Prima Facie Evidence of the Facts Recited Instead of Conclusive, Did Not Cure the Error, or Make the Amendment in Question Void as to Plaintiffs in Error.

The appellate court also holds that the plaintiffs in error were not injured because the trial court held that the resolutions offered in evidence were not conclusive, but only *prima facie* evidence of the truth of the essential facts, described in said section 1241 of the California C. C. P. [Tr. fols. 4278-4284]; but this argument we respectfully submit begs the question involved on this point.

The obvious answer to this contention is, that the resolutions in question were either conclusive evidence of the facts stated, or no evidence at all, because to hold otherwise would be in direct violation of the express terms of the code section involved herein. The authorities cited in discussing the next preceding question also support our argument on this, for the language of the section being clear, certain, and without ambiguity, cannot be modified or changed by

construction. In fact, there is no room for interpretation or for any conclusion except, that, upon the conditions named therein, the Legislature intended to make the resolutions conclusive evidence of the facts recited; and to arrive at the intention of the Legislature, is the cardinal rule for the construction of statutes.

Smith v. Randall, 6 Cal. 47.

And this intent must be found in the statute itself.

In Tynon v. Walker, 35 Cal. 634, the court, at page 642 of the opinion, said:

> "It is a universal principle of construction that courts must find the intent of the Legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto."

When the trial court held that the resolutions in the case at bar were at least *prima facie* evidence of the recited facts when the statute says they were conclusive evidence of such facts, it violated the rule of statutory construction above stated, by arbitrarily "subtracting from or adding to" the statute in question.

It is obvious that the intent of the trial court to thus limit the effect of section 1241 C. C. P. was to avoid the constitutional objections to

the validity of that section, as heretofore discussed, and it was for this reason that the trial judge adopted this construction, he frankly expressing the opinion that the statute would be unconstitutional in a case where the landowner was not given a previous opportunity to be heard before the board of supervisors, when his land was about to be condemned for highway purposes, as by the regular viewer method. [Tr. fols. 683-685 and 4029-4037.] But our contention is that it is not permissible to violate the plain and unambiguous terms of a statute in order to remove the objection of unconstitutionality. It is only when the language is doubtful, and one construction will lead to the conclusion that it is constitutional, and the other to the conclusion that it is unconstitutional, that it is permissible to resolve the doubt in favor of the construction showing the statute to be constitutional. But this is the limit of the rule as appears from its statement in the case of San Francisco v. Insurance Co., 74 Cal. 113, where at page 120 the court said:

> "Laws are not to be declared unconstitutional unless clearly so; and if two constructions are possible, and according to one the law must be held unconstitutional, and under the other construction it can be sustained, that construction must be adopted which will sustain the law. The principle is not disputed, and it is often of great value, but it must not be pressed so far as

> to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that a law is beyond the power of the Legislature, we must so declare."

See also:

Burns v. Superior Court, 140 Cal. 1, 8.

If, therefore, as appellants contend, section 1241 was and is unconstitutional, if applied to the so-called direct method of commencing proceedings for condemnation of land for highway purposes, this result can not be changed by an arbitrary construction, doing violence to the express terms of the statute.

In the Mills Estate, 137 Cal. 298, 303, it was held:

> "Where the law makes a certain fact a 'conclusive presumption' *evidence cannot be received to the contrary.*" (Italics ours.)

And if the court erred in holding that the presentation of the resolutions created a *prima facie* presumption of the truth of the facts necessary to be found by the court before property can be taken (C. C. P., Sec. 1241), which the defendants were required to rebut by "clear and convincing proof to the contrary" [Tr. fol. 4037]; then the motion for a nonsuit should have been granted.

Assuming, however, for the purposes of this branch of the argument, and in considering

the error in denying the motion for a non-suit, that the resolution which purports to authorize the bringing of this action is one that the supervisors had jurisdiction to pass, then, as it was purely e*x parte,* without notice or hearing of any kind, we maintain that it had no greater or other effect (if it had any effect at all) than to merely pass on to the Superior Court the determination of *all of the* questions which the law requires the county to establish —which "must appear" — "before property" sought to be condemned "can be taken."

Sec. 1241, C. C. P.

Further, if these matters (and we have already enumerated them) "must appear" as a condition precedent to the taking of the property, then the burden of proving each and every one of them *to the court* by a preponderance of the evidence rested upon the plaintiff, and the court erred in shifting to the defendants (*without taking any evidence concerning them*) the burden of disproving them.

The record proceedings in this regard are as follows:

"Mr. Burnell: Then, if Your Honor please, we will offer certain resolutions; we desire to offer in evidence a resolution found on page 344, volume 17, road book of Los Angeles county, the same being a resolution which is set forth in the complaint in the main or Malibu

road case (No. B-43572). The resolution being one that purports to have been adopted at a meeting of the board of supervisors of Los Angeles county held on the 26th day of August, 1916, and the record shows on the face of it that the resolution was carried by a vote of all the supervisors, the notation being as follows: 'On motion of Supervisor Hinshaw, duly seconded and carried by the following vote, ayes, Hamilton, Norton, Woodley, Hinshaw and Pridham—noes, none. It is ordered that the following resolution be and is hereby adopted.' Then follows the resolution.

"Mr. Anderson: We waive the reading of the resolution." [Tr. fols. 667-669.]

This was the resolution in the "Main Road" case.

Continuing:

"The next offer, if the court please, is the resolution of the board of supervisors, passed on the 3rd day of December, 1917, being at a regular meeting of the board of supervisors, of Los Angeles county, held on that date, being found in road book No. 19, commencing on page 77, being the resolution authorizing the condemnation of land for the right-of-way for the road we have referred to as the Los Alisos road (in case No. B-59443).

"Mr. Anderson: We have no objection to it being deemed read, we only object to his saying that it was 'Authorizing.' We will substitute for that, 'Purporting to authorize.'

"Mr. Burnell: I am reading the title out of the book.

"Mr. Anderson: They may be deemed admitted on the same objection, as we made to the resolution in the main case.

"Mr. Burnell: It is the original resolution of condemnation and we desire at this time in connection with that to read this part: 'On motion of Supervisor McClellan, duly seconded and carried by the following vote, ayes, Woodley, McClellan, Dodge and Hamilton; noes, none; it is ordered that the following resolution be and the same is hereby adopted.' And then follows the resolution as set forth in the complaint in the Los Alisos Canon case." [Tr. fols. 676-678.]

This was the entire evidence in chief of the plaintiff.

Continuing:

"Mr. Anderson: Have you rested?
"Mr. Burnell: Yes, we have rested.
"Mr. Anderson: If the court please, we wish to move for a non-suit on the ground that the plaintiff in this action has failed to prove the facts which section 1241 of the Code of Civil Procedure must be made to appear before the plaintiff can condemn the property.

"*First*—That they have failed to prove that the taking is necessary to the use in question, namely: highway purposes.

"*Second*—That they have failed to prove the public necessity of such proposed public utility or public improvement.

"*Third*—That they have failed to prove that such property which it is proposed to be taken is necessary therefor.

"*Fourth*—That they have failed to prove that such public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good and the least private injury.

"Without arguing the matter, I will simply state that our position is simply this: That if

the proviso in section 1241 (C. C. P.) is, as we contend and as Your Honor has in a sense held, unconstitutional, there is nothing else in the statute which makes the resolution on which they rely—makes it *prima facie* evidence. In other words, the statute seems to contemplate that while the resolution can be adopted, the matters to be determined that I have just enumerated, are to be determined by the court, and there is nothing which makes the resolution itself, so far as I can find in the law, *prima facie* evidence. In other words, eliminating that proviso, the law simply stands that the burden is on the plaintiff to make these facts appear before condemnation can be had.

"The Court: The motion for judgment of non-suit will be denied." [Tr. fols. 681-685.]

This situation thus disclosed speaks for itself.

Without any authority of which we are aware to support its ruling, the court accepted these *ex parte* resolutions as not only *prima facie* evidence of the alleged *facts which they recite,* but as *prima facie* evidence that the Board of Supervisors *had considered,* and, at least *prima facie* determined, other of the necessary vital and fundamental facts required by law to be established, *but upon which the resolution itself is silent.*

The effect of this ruling was to hold that the proviso adopted by the Legislature did not mean what it said, and yet that the resolutions, while not conclusive of the facts, did in effect *prima facie* establish all the material allegations of the complaint, and shifted the burden

of disproving the presumption raised thereby to the plaintiffs in error.

And the appellate court, while holding that the trial court was in error in its ruling that the resolutions were only *prima facie* evidence of the facts specified, in section 1241 C. C. P., instead of conclusive evidence of those facts, held that the defendants in that case, plaintiffs in error herein, were not prejudiced by the ruling because the parties were permitted to introduce evidence on the issue of necessity. But the error in denying the motion for a nonsuit, based upon the fundamental objection to the effect given to these resolutions, adopted by the Board of Supervisors of Los Angeles county, was not cured by the subsequent introduction of testimony.

It is conceded that if a motion for a nonsuit is erroneously denied, and thereafter during the trial the defects are supplied by evidence introduced by either party that the error committed in overruling the motion is waived (Lowe v. S. F. etc. Ry. Co., 154 Cal. 573, 576, and cases cited), but the error committed by the trial court on this question went beyond the overruling of appellants' motion for a nonsuit. The trial judge held, as we have seen, that the resolutions when introduced in evidence created a presumption of the truth of the facts necessary for the court to find before the land of

appellants could be taken, which presumption could be "overthrown only by clear and convincing proof to the contrary" [Tr. fol. 4037], introduced by the defendants, thereby reversing the usual rule that the burden of proof is and was upon the plaintiff to establish all the facts necessary to entitle plaintiff to the relief sought. This error was not waived by the production of evidence by either party upon the issues prescribed by section 1241 C. C. P., because the reason for the waiver would not apply to such a situation. When defects in the proof existing at the time a motion for a nonsuit is made are subsequently supplied, it is quite plain that it would be a highly technical rule to hold that the first error in overruling the motion for a nonsuit was not cured by the evidence thereafter admitted; but, in the case at bar, the error of which appellants complain persisted to the end of the trial because the trial judge not only denied the motion for a nonsuit, but based his decision of the public necessity, etc., for the road, at least in part upon the consideration that the appellants had not met the "burden of overthrowing and removing the presumption" created by the introduction of the resolutions in evidence, "by clear and convincing proof to the contrary." [Tr. fols. 4036-4037.] If we are correct in our contention that no such presumption existed in the case at bar, for the reasons

stated, it follows that an attempt by appellants to meet the burden of proof imposed by the court by this ruling, did not constitute a waiver of such error.

See:

Koyer v. Willmon, 12 Cal. App. 87.

It appearing in the record that the court did shift the burden of proof from the plaintiff to the defendants, we have the right to assume that the findings as to public necessity and location of the roads in question would have been different but for the constant pressure of this erroneous ruling, imposing the burden upon the defendants to rebut the *prima facie* case alleged to have been proven upon the production of the resolutions adopted by the Board of Supervisors of Los Angeles county. In other words, the resolutions were either conclusive evidence of the facts stated in section 1241 C. C. P. or were no evidence at all, and the ruling of the court that they established a *prima facie* case for plaintiff, which shifted the burden of proof upon those issues to the defendants, was wholly unwarranted by the section in question, or by any principle of law, and was and is prejudicial error, even though evidence was subsequently offered by plaintiff and defendants on those issues, upon which the court was expressly required by law to make findings. *Non constat*

but for this erroneous ruling as to the burden of proof, the findings on such issues would have been in favor of appellants as to all of the proposed roads, instead of in favor of respondent.

This error was very prejudicial to the plaintiffs in error.

In Spring Valley Water Co. v. Drinkhouse, 92 Cal. 528, 532, the court said:

> "There is no doubt of the proposition, that before land can be taken for a public use it must appear that the taking is necessary for such use. This is a question of fact to be determined by the court or jury in view of all the evidence in the case, and the burden of proof is upon the plaintiff."

In the case of City of Santa Ana v. Gildmacher, 133 Cal. 395, the court said:

> "In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined by the jury, in view of all the evidence in the case. (Spring Valley Water Works v. Drinkhouse, 92 Cal. 528.) The evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. (Spring Valley Water Works v. Drinkhouse, 92 Cal. 528.) I think that the court invaded the functions of the jury in directly a verdict for the defendant. The court took from the jury the principal issue of fact in the case, and in so doing made all other issues immaterial. The court charged the jury

in respect of matters of fact, in the sense of the constitutional prohibition. If there had been no evidence tending to show a reasonable necessity for taking defendant's property, it would not have been prejudicial error for the court to grant a nonsuit (*In re* Spencer, 96 Cal. 448); or if the evidence had been such as that a verdict for plaintiff would have been contrary to the evidence, the error would be regarded as immaterial (Levitzky v. Canning, 33 Cal. 299); but we think there was evidence of a substantial character bearing directly on the issue of fact,—namely, the necessity for taking the property,—and as this issue was for the jury, it ought to have been left for them to decide * * *. The question of public necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions to be determined, and these questions are for the jury, in passing on the question of necessity. The jury may as safely be trusted to rightly solve these questions as the court, and whether so or not, our system of jurisprudence requires that they shall first be submitted to the jury."

Another patent error resulting from this ruling of the trial judge, approved by the appellate court, was that while the trial judge held that the questions of necessity and proper location of the proposed highways were in this case judicial questions, *yet he gave to the resolutions the effect which they could only have had,*

if those questions were in fact held to be legislative or political in character. To make this point clear, we quote an excerpt from the decision of the trial court on the question of necessity:

"The county of Los Angeles instituted the above numbered three separate special proceedings to condemn for public use, to-wit, for road purposes, certain property of the defendants aforesaid. The property sought to be condemned lies entirely within the Rancho Malibu, is situated in the county of Los Angeles, state of California, and consists of three strips of land each forty feet in width, and sufficient contiguous parcels of land at the sides of said strips to build three roads, each to grade twenty-two feet wide. The proceedings, while not consolidated, were, by agreement of the parties, tried simultaneously. For convenience they have been called throughout the trial, 'The Main Malibu Road Case,' 'The Los Alisos Road Case' and 'The Beach Road Case,' respectively. A jury was regularly impaneled and in each case the issues of compensation for the taking of said property have been determined by said jury by special findings made and filed herein. There remain three questions for decision by the court. These questions are: First, whether there existed public necessity for the proposed roads at the respective times when the Board of Supervisors regularly passed resolutions of necessity and directed the county counsel to begin condemnation proceedings; second, whether the proposed roads are planned or located in the manner which will be most compatible with the greatest public good and the least private injury.

"These questions usually in eminent domain proceedings are determined by the legislative branch of government and when regularly determined by it, are not thereafter subject to judicial inquiry or review; but inasmuch as it is conceded that the Board of Supervisors in each of these cases have failed to pursue the course required by sections 2681 and 2698 inclusive of the Political Code, which is the usual method adopted by counties in laying out new roads and taking property necessary therefor, *we have held during the trial that they become judicial questions in each of these cases.*" (Italics ours.)

If the trial court was correct in holding that the questions stated were judicial in character, then it was wholly inconsistent with this ruling to hold that the resolutions introduced in evidence proved anything, except, perhaps, that the condemnation proceedings were duly authorized by the Board of Supervisors, and that they contained a description of the land sought to be condemned. Having held the stated questions to be judicial, the facts were required to be proven as other facts, in trials of causes, and not by a resolution adopted by a political subdivision of the state. This distinction was pointed out in the case of Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 674-5, in which case the court held that where the special procedure for establishing highways is followed (Cal. Pol. Code, Sec. 2681 *et seq.*) jurisdiction is acquired to determine these ques-

tions, and they are not subject to judicial review, *but where the special procedure is not followed, and the condemnation proceedings are prosecuted under general laws, then all the questions necessary to be determined are judicial, and the facts must be established in the well recognized way.*

One of the cases cited in the opinion last cited is Wulzen v. Board of Supervisors, 101 Cal. 15, which case is also cited by the District Court of Appeal, in support of the decision in the instant case, but, when rightly considered, it supports the contention of plaintiffs in error; for it held that the Board of Supervisors of San Francisco exceeded its powers in the resolution of intention for the condemnation of land to open Market street, because it encroached upon the judicial functions of the court, and the judgment of the lower court, upon the application for a writ of review, sustaining the action of the said board, was reversed by the Supreme Court of the state of California.

The conclusion inevitably follows that the trial court correctly decided that the questions of necessity, etc. (quoted *supra*) were judicial questions, under the California law, and the District Court of Appeal erroneously decided to the contrary; and the trial court having correctly held the said questions to be judicial, in-

correctly gave the same effect to the resolutions adopted by the Board of Supervisors, as if the questions quoted were legislative, or political in character, by declaring them *prima facie* proof of the facts required to be found, and shifting the burden of rebutting the presumption raised thereby to the plaintiffs in error.

That the citizen should not be compelled to give up his property, even though compensated therefor, except where the public necessity requires it, is elementary and in California this question must be determined by the courts, upon competent evidence, and not by resolutions adopted by boards of supervisors. This right is clearly set forth in the case of Commonwealth v. Sawin, 2 Pick. (Mass.) 547, as follows:

> "Every citizen through whose land the road may pass, and who therefore may be subjected to the inconvenience of having his farm, house, lot or garden spot taken from him for this purpose, has a right to require that he be not disturbed in these enjoyments, except the public common convenience or necessity require it. It is true he may be compensated in money for his loss of the pecuniary value of his property; but by the principles of our government, no man's property can be taken from him, even if he is paid for it, without his consent, except it is actually wanted for public use. It often happens that there is a value, in the owner's eye, of particular spots of ground, which no compensation in money

> will be deemed an equivalent for. Where the public necessity or convenience demands, he must surrender his favorite field or flower-garden for its value in other men's eyes, but until then he has a right to cherish his prejudices, and even his whims, in relation to his property. So that even if the town and the individuals who want a road through it should concur in this application to the Court of Sessions, he ought not to be disturbed, unless it can be honestly adjudged that the public interest demands the sacrifice. (Op. pp. 547-548.)"

The courts (Superior and Appellate) permitted the judgment of the Board of Supervisors to be substituted for their judgment on this fundamental question and did not actually adjudicate that the "public interest demands the sacrifice" of this property by the plaintiffs in error.

We conclude, therefore, that the trial court was not justified in holding that the resolutions were *prima facie* evidence of the facts required to be found in condemnation proceedings, and that the fourth question should be answered in the negative.

IV.

Plaintiffs in Error Have Been Deprived of Their Property Without Due Process of Law and Have Been Denied the Equal Protection of the Laws, in Violation of the Fourteenth Amendment to the Federal Constitution.

The fifth question has already been answered, for if the preceding argument is sound and supported by the authorities cited, it follows that the owners of the property involved in these condemnation suits have been deprived of their property without due process of law, and have been denied the equal protection of the laws, as guaranteed by the fourteenth amendment to the Federal Constitution.

In the opinion of the District Court of Appeal, excerpts from the opinions in Board of Water Commissioners v. Johnson, 84 Atl. 727, and Wulzen v. Board of Supervisors, 101 Cal. 15, are quoted, to the effect that the determination of the question of whether or not the right of eminent domain should be exercised, and what lands are necessary to be taken, in the exercise of that right, is a political and legislative question and not a judicial one, and that therefore owners of such property are not denied due process of law because no hearing on these questions has been provided for. But the

fallacy of this argument as applied to the case at bar, as we have attempted heretofore to demonstrate, is, that in California, these essential questions are expressly made judicial questions, not only by the code sections cited (C. C. P. 1241 *et seq.*), but also by the amendment of 1918 to article I, section 14 of the California Constitution (quoted *supra*). And, having made these questions judicial, by these statutory and constitutional provisions, the Legislature, in its attempt to make the *ex parte* resolutions of a political subdivision of the state conclusive evidence as to these essential facts, without any hearing at all being provided for, did have the effect of depriving plaintiffs in error of their property without due process of law, and denying to them the equal protection of the laws; because by well settled practice, all judicial questions must be determined by the courts, upon competent evidence, and with the untrammeled power to hear and determine the law and the facts, without dictation by the legislative department of government.

And the fact that the trial court, from an innate sense of justice, felt compelled to accord to the plaintiffs in error a hearing on the question of necessity, does not answer our contention that they were deprived of their rights guaranteed by the Federal Constitution. For what was granted was, according to the ap-

pellate court, a matter of grace and not of right, and hence the ultimate decision rested upon the effect given to the *ex parte* resolutions of the Board of Supervisors of Los Angeles county. In other words, the question here being discussed must be determined upon the effect of the proviso to section 1241 of the California Code of Civil Procedure, as it reads and as construed by the District Court of Appeal, rather than by the attempt of the trial judge to "temper the wind to the shorn lamb," by permitting, *ex gratia,* evidence as to the necessity for taking the land described in the complaints, for the proposed roads, upon the theory that the resolutions were only *prima facie* evidence of the facts required to be found, because there had been no previous hearing of any kind given to the owners of the land on these vital questions.

As was said by Judge Earle in Stuart v. Palmer, 74 N. Y. 183, (cited with approval by Mr. Justice Matthews in Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 768):

"It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly

> apportioned. The constitutional validity of law is to be tested, *not by what has been done under it, but by what may by its authority be done.* The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." (Italics ours.)

See also the following authorities to the same effect:

> Matter of Lambert, 134 Cal. 626, 634, and cases cited.

The proviso to section 1241 of the California Code of Civil Procedure, as we have already pointed out, imposes special rules of evidence affecting substantive rights upon defendants, in condemnation cases, when the land is located within the territorial limits of the political subdivision seeking to condemn, and the resolution is adopted by a vote of two-thirds of its members radically different from the conditions imposed when the land is located outside of said territorial limits, and the resolution is adopted by less than two-thirds of the members of the governing body of said political subdivision.

It has been decided many times in California that such invidious distinctions are unconstitutional and we cite by way of illustration some of these authorities.

In City of Pasadena v. Stimson, 91 Cal. 238, the court held that a law requiring cities of the

sixth class to make an effort to agree with the owner for the purchase of his land as a condition of commencing a condemnation suit was unconstitutional, because it did not impose a similar condition upon other cities or persons who were authorized to acquire land, by condemnation, for a public use. And the conclusion was stated as follows:

> "The conclusion is, that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

In Builders Supply Depot v. O'Connor, 150 Cal. 265, the court held that a California statute allowing an attorney's fee to the plaintiff in a mechanic's lien suit, but none to the defendant, even though successful, was a violation of the state constitution as well as the fourteenth amendment to the Federal Constitution quoting from the case of Gulf etc. Ry. Co. v. Ellis, 165 U. S. 170 (41 L. Ed. 666), as follows:

> "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals

> are thus punished, and not other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor they recover "no attorneys' fees." It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. 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."

And many other cases are reviewed in the opinion last cited, showing many types of discrimination declared to be unconstitutional, and the principle decided, and the cases cited, in the opinion, are conclusive in the case at bar.

Apply these principles to section 1241 of the California Code of Civil Procedure, and we at once see that it is subject to the same criticisms. This section singles out the landowner who owns land in a certain locality, and when the resolution of a certain political subdivision of the

state is adopted by a two-thirds vote of its governing body, and denies to such landowner any hearing whatever upon the vital facts catalogued in the said section, whereas, as to all other persons whose land may be condemned for public purposes, they are accorded a hearing by the court without any presumptions whatever against them. In the language of the Supreme Court of the United States in the case last cited,

> *"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."* (Italics ours.)

In *Ex parte* Sohncke, 148 Cal. 262, 113 Am. St. Rep. 236, the court held that a law fixing rates of interest and charges on chattel mortgages secured by certain specified kinds of personal property, and prescribing penalties for a violation thereof, was a violation of the California Constitution as well as the Federal Constitution; citing in support thereof:

> Connolly v. Union Sewer Pipe Co., 184 U. S. 563, 46 L. Ed. 679,

which very clearly enunciates principles and reviews authorities which, when applied to the case at bar show that the amendment of 1913 to section 1241 was and is in contravention of the Fourteenth Amendment to the Federal Constitution in that it denies to plaintiffs in error

and others in like position the equal protection of the laws.

It also follows from this conclusion that the judgments of condemnation entered in the case at bar should be reversed, for the judgment of the Appellate Court, affirming these judgments of the trial court, was predicated upon the validity of this amendment to said section 1241, C. C. P. That section, before the Amendment of 1913, required the court to find as a fact before it could condemn land: "(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." And section 1242 of the California Code of Civil Procedure also required that the state and its agents who may exercise the right of eminent domain shall locate the improvement "in the manner which will be most compatible with the greatest public good and the least private injury," which, of course, was another issue of fact upon which the landowners had the right to be heard before the enactment of the amendment of 1913 to section 1241, which denied them that right, by declaring the *ex parte* resolutions of the agent seeking to condemn, *conclusive evidence* upon all of those fundamental and essential questions of law and fact, which the court was required to find "before condemnation."

The result, therefore, is as we contend, that the amendment in question is unconstitutional and void, and the section, as it existed before the amendment is the law which should have been applied to the case at bar, and not having been done, the judgments should be reversed.

Conclusion.

In conclusion the plaintiffs in error most respectfully contend that their rights of property, guaranteed to them by the Constitution of the state and the Nation, have been violated, and their property taken without due process of law, and that they have been denied the equal protection of the laws as herein specifically set forth. Their property has been taken without due process of law:

1. Because no hearing was provided by law before the Board of Supervisors, on the questions of the public use; the necessity for taking the property for that use, and whether or not the proposed highways were located in the manner most compatible with the greatest public good and the least private injury;

2. Because they were also deprived of any hearing on these vital issues, before the court by the amendment of 1913 to section 1241 of the California Code of Civil Procedure, which declared the *ex parte* resolutions of the Board

of Supervisors (if adopted by a two-thirds vote) conclusive evidence of the essential facts involved.

3. Because the issues required to be determined before the land of plaintiffs in error could be taken, were and are judicial questions, under the Constitution and laws of California, and the amendment in question, sought to, and did, control the judicial discretion by the illegal and unwarranted declaration as to the effect of the resolutions adopted by the Board of Supervisors, thereby in effect taking their property by legislative decree, rather than by the judgment of a court, as required by the law of California, before the adoption of the amendment, and since, by the Constitutional Amendment of 1918.

4. Because it affirmatively appears from the record that the proposed roads were not required for a public use, or authorized by law, in that they were located exclusively upon private property "without outlets or feeders of any kind or character," and were located "wholly and solely upon and give access wholly and solely to the private ranch property of the defendants May K. Rindge and Rindge Company; and would not and could not furnish any way of necessity or convenience to the general public or for public use or travel." [Tr. fols. 311-312.]

5. And the plaintiffs in error were and are denied the equal protection of the law in that if any of the agents of the state sought to condemn land outside of the territorial limits of the particular political subdivision seeking to condemn, or, if the resolutions of condemnation were passed by less than a two-thirds vote, then all of the issues referred to in section 1241, C. C. P., would be judicial questions and determined upon evidence duly offered upon the trial; while all landowners (including plaintiffs in error herein) not within the specified classes, would have their rights conclusively adjudicated by the adoption of the *ex parte* resolutions, without any hearing, either before the said political subdivision (Board of Supervisors in the instant case) or the court having jurisdiction of the case.

Unless we are to adopt the maxim that the Legislature (as the supposed representative of the people) can do no wrong (after we have repudiated the outworn maxim of royalty that the king can do no wrong) it seems to us that this amendment of 1913 to section 1241 is a plain usurpation of authority, which had the effect of causing an arbitrary decree to be entered, depriving plaintiffs in error of their property without due process of law, and denying to them the equal protection of the law guaranteed by the Fourteenth Amendment to the

Federal Constitution. And for these manifest errors, plaintiffs in error respectfully request that the judgments of condemnation entered in the two cases involved herein, be reversed, and that all proceedings taken thereunder be declared null and void.

Respectfully submitted,

J. A. ANDERSON,
W. H. ANDERSON,
NATHAN NEWBY,
GRANT JACKSON,
Attorneys for Plaintiffs in Error.

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