The Justiciability of Necessity in California Eminent Domain Proceedings

INTRODUCTION

The power of eminent domain by nature and function is vital to the very existence of the state. The necessity for tangible manifestations of a governing entity can be fulfilled only by the use of a power to acquire property in the name of and by virtue of the inherent powers of the state.[1] The need for such a power exists at the inception of the state even before the adoption of a constitution. As such, eminent domain is denominated a sovereign power.[2] By its nature it must be superior to the rights of the private property owner[3] where the public need exceeds the private injury involved in taking by condemnation.[4] This notion of balancing the public welfare against private injury is expressed in Cal. Code of Civ. Proc. 1241:

> Before property can be taken, it must appear:...[2 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...

When the needs of the public and the government are weighed against the interests of a single property owner, the balance will almost always favor the former.

To supplement its already considerable advantage over the condemnee (the private property owner whose land is to be condemned) the state also possesses an impressive array of procedural devices designed to protect the condemnation action from

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[1]Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1941).
[2]Gilmer v. Lime Point, 18 Cal. 224 (1861).
[3]Jacobson v. Superior Court, 192 Cal. 314, 219 P.2d 986 (1923).
[4]Sacramento v. Swanston, 29 Cal. App. 212, 155 P.101 (1915).

delay and scrutiny. Foremost among these is the non-justiciability of a determination of necessity by a condemning authority. The necessity question involves: 1) whether the proposed improvement is necessary for the public welfare; 2) whether condemnation of private property is required to facilitate the improvement; and 3) whether the particular parcel of property condemned is necessary for the project. There are also a number of ancillary considerations subsumed under these general aspects of necessity: i.e., the timing of the improvement, the necessity for the type of estate condemned and the specific methods used to condemn. The practical effect of this rule is to render impossible a challenge by the condemnee of the finding that his property is required for a public project, even if it is alleged that the condemnor acted in bad faith, in abuse of discretion, or arbitrarily, capriciously or fraudulently.[5] The foundation of this rule is Cal Code of Civ. Proc. 1241, which gives a determination of necessity by condemning body conclusive status as evidence of necessity.

> ...such resolution or ordinance shall be conclusive evidence; (a) the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefore, 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...

Until 1959, the courts had interpreted this statute as rendering the question of necessity non-justiciable *unless* fraud, bad faith, abuse of discretion or capriciousness were alleged by the condemnee.[6] In 1959, *People v. Chevalier*,[7] was decided by the California Supreme Court, which held that necessity was nonjusticiable, regardless of the allegation of fraud, abuse of discretion, or bad faith. In this case the California Highway Commission con-

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[5]People v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959). Throughout the text of this paper the phrase "in bad faith, abuse of discretion, arbitrarily, capriciously and fraudulently" appears in a somewhat loose context. Although each of these items has a distinct legal meaning, the Courts have used the entire phrase (sometimes adding or deleting items) as a unit. When a Court adjudicates the issue of whether the necessity question may be opened by the pleading of bad faith, abuse of discretion, fraud, arbitrary or capricious conduct, it will apply its decision to the entire group without distinguishing one item from another.

[6]People v. Lagiss, 160 Cal. App. 2d 28, 324 P.2d 926 (1958).

[7]People v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959).

demned the defendant's property for freeway purposes. Chevalier attacked the Commission's finding of necessity on the grounds of abuse of discretion, arbitrariness, fraud and bad faith:

> We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the legislature to the condemning body's finding of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement cannot be made justiciable issues even though fraud, bad faith or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity.

Although there are numerous instances of quasi-legislative determinations which are non-justiciable,[8] there does not appear to be any analogue for the pervasive ruling in *Chevalier*. Indeed, there is a vast body of federal and California case and statutory law which indicates that the *Chevalier* rule is wrong from the standpoint of general administrative law and in conflict with both the California and United States Constitutions. The *Chevalier* decision diverges from the mainstream of administrative law in its characterization of the pleading of bad faith, arbitrariness, capriciousness, and fraud as issues going to the substance of the necessity question, rather than the majority position that these issues are procedural. This paper is intended to point out and elucidate the arguments and authorities supporting this contention.

BACKGROUND

In order to fully understand the intricacies of the "necessity" question, some background regarding condemnation proceedings in California is required. Eminent domain is a soverign power;

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[8]For example, the determination of reasonable rates by a city or state public utilities commission is not justiciable (except when allegations of fraud or the fixing of grossly and palpably unreasonable rates is made. Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22, P. 910, 1046 (1890).

consequently, the power is not granted by the Constitution, but is limited by both the California[9] and United States[10] Constitutions.[11] In both Constitutions the limitations are identical: before private property may be taken, it must be shown to be for a *public purpose* and *just compensation* must be made to the owner.

PUBLIC USE

The determination of what constitutes a public use is made by the legislature or one of its delegatees.[12] However, since public use is a Constitutional requirement, a condemnee may attack a condemnation proceeding against his property by alleging and proving that the intended use is not in fact public.[13] The taking of private property for a non-public use would be in violation of the owner's due process rights under the 14th Amendment of the United States Constitution.[14] The second Constitutional requirement of just compensation is met, simply, when the owner is paid an amount of money sufficient to compensate him for the actual loss of the property condemned and for the damage to any remaining land sustained by the severance of the condemned parcel.[15]

DUE PROCESS

The due process clause of the 14th Amendment has been applied to condemnation proceedings so as to effectively function as a third Constitutional limitation on eminent domain.[16] If the taking is accomplished in accordance with specific statutory authority, for a public purpose, and if just compensation is paid

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[9]CAL. CONST. ART. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court, for the owner..."

[10]U.S. CONST. AMEND. V, § 1; as made applicable to the states by the 14th Amendment.

> "...Nor shall private property be taken for public use, without just compensation..."

[11]County of Los Angeles v. Rindge, 262 U.S. 700 (1922).

[12]Kern County Union High School District v. McDonald, 180 Cal. 7, 179 P. 180 (1919).

[13]People v. Nahabedian, 171 Cal. App. 2d 302, 340 P.2d, 1053 (1959).

[14]Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1846).

[15]Los Angeles v. Harper, 139 Cal. App. 331, 33 P.2d 1029 (1934).

[16]Scott v. Toledo, 30 F.385.

to the owner, there is no denial of due process rights under the 14th Amendment.[17] However, due process has been interpreted to include protection against arbitrary, capricious, fraudulent, unreasonable action by administrative officers or groups.[18] Thus, it has been repeatedly held that administrative activities which obstensibly comply with the applicable statutory standards, may nonetheless be reviewed if it is found that the motivations were fraudulent, in bad faith... and/or arbitrary and capricious.[19]

NECESSITY

The requirement that a taking be a public necessity—as distinguished from public use—is not of constitutional dimensions but, rather, has statutory origins. The California Code of Civil Procedure states:

> 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,

Public necessity refers to the need for the contemplated improvement (highway, aqueduct, etc.), the need for the land which is being condemned for that project, and the need for using the power of condemnation. Necessity is to be distinguished from public use, which applies only to the nature of the improvement (a particular use may be deemed to be a public use by the legislature and courts).[21]

The legislative origin of the necessity requirement and the overall legislative nature of and control over eminent domain renders the determination of necessity a question solely within the purview of that body.[22] (The authority to make such a deter-

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[17]Rindge v. Los Angeles, 262 U.S. 700 (1922).
[18]Barsky v. Board of Regents, 347 U.S. 442 (1953); Porter v. Investors Syndicate, 286 U.S. 461 (1931); Washington Ex. Rel. Oregon Railroad and Navigation Company v. Fairchild 224 U.S. 510 (1911); Chicago M. & St. P.R. Co. v. Minnesota, 134 U.S. 418 (1889); Butterworth v. Boyd, 12 Cal. 2d 140, 82 P.2d 434(1938).
[19]See note 18, *supra*.
[20]CAL. CODE OF CIV. PROC. § § 1241.1, 1241.2 (West 1969).
[21]Section 1238 of the CAL. CODE OF CIV. PROC. contains a compilation of a number of recognized public uses.
[22]Rindge v. Los Angeles, 262 U.S. 700 (1922); University of Southern California v. Robbins, 1 Cal. App. 2d 523, 525, 37 P.2d 163 (1934).

mination is concomitant with the power to exercise eminent domain.) Although it would have been desirable from the standpoint of the condemnee for a judicial body to determine necessity, the complex and technical quality of the determination requires that the decision be made by an administrative body possessing expertise in the subject area. Thus, for example, the legislature has delegated the power of determining necessity to the highway commission working in conjunction with the Division of Highways. The California Division of Highways performs the technical functions of planning new highways and proposing possible routes. The Highway Commission passes upon these recommendations and selects a route. Finally, the route selection is joined with a finding of necessity in a resolution which must be passed by a simple majority of the members of the Commission[23] before the condemnation proceeding may be commenced.

Similarly, the legislature, where it has granted municipal corporations and regional or county governments the power to condemn, has also permitted the governing legislative bodies representing these groups to make determinations of necessity.

In an actual condemnation proceeding, the determination of necessity will appear in the form of a resolution or ordinance by the condemning authority as provided for in Cal. Code of Civ. Proc. § 1241.[24] The recitation of necessity is conclusive evidence of the public need:

> ...When the board of directors...or the legislative body...shall, by resolution or ordinance, adopted by two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition...and that the property described in such resolution or ordinance is necessary therefor, *such resolution or ordinance shall be conclusive evidence;* (emphasis added) (a) or 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

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[23]This is in contrast to the requirement of a two-thirds majority required by the condemning authorities listed in CAL. CODE OF CIV. PROC. § 1245 (West 1969).

[24]Various authorized agencies which are not listed in CAL. CODE OF CIV. PROC. § 1241 are given authority to condemn using the same procedure in different sections of the codes. I.e., the Highway Commission derives its authority to condemn from CAL. STS. & HY. CODE § 102-3; Irrigation Districts from CAL. WAT. CODE § § 22455 et. seq.; Transit District, PUB.UTIL. CODE § § 25703, 25771.

> public improvement is planned and located in the manner which will be most compatible with the greatest public good; and the least private injury...[25]

The above quoted statute (Cal Code of Civ. Proc. § 1241) is prototypical of the necessity statutes found in the various codes applying to the authorized condemning authorities. There is some variation in the type of majority required to pass such a resolution. Generally, city, county, and district agencies and legislative bodies must pass resolutions by a two-thirds majority, while statewide authorities need only a simple majority. Cal. Code of Civ. Proc. § 124 is a general statute and the interpretation of the conclusive clause is applied by implication to the entire class of related statutes. Thus, frequently, (as in *Chevalier)* although the agency involved may be acting under the authority of one of the specific statutes (in *Chevalier*, St. & Hy. Code § 103), the Court will quote from and adjudicate the case in terms of the language and interpretation of Cal. Code of Civ. Proc. § 1241. Therefore a decision, such as *Chevalier*, will effect the entire genre of statutes although it is obstensibly confined to an interpretation of Cal. Code of Civ. Proc. § 1241.

PRE-CHEVALIER

Section 1241 of the Cal. Code of Civ. Proc. was enacted in 1872. In its original form it read:

> Before property can be taken, it must appear:
> 1. That the use to which it is to be applied is a use authorized by law;
> 2. That the taking is necessary to such use;
> 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 1913 Amendment[26] added the "conclusive" clause which has remained substantially unchanged. In 1922 the constitutionality of that clause was tested before the U.S. Supreme Court in *Rindge Co. v. L. A. County*,[27] The Supreme Court ruled that due process was not violated where the legislature chooses to render a quasi-legislative determination conclusive and not open to judicial scrutiny. The Supreme Court did not, in that case, deal

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[25]CAL. CODE OF CIV. PROC. § 1241-2 (West 1969).
[26]Ch. 293, § 1 (1913) Cal. Stats. 549.
[27]262 U.S. 200 (1922).

with the question of whether allegations of fraud, bad faith, capriciousness and arbitrariness in the making of a necessity determination presented a justiciable issue. The California courts uniformly held after *Rindge* that such allegations did present justiciable issues and that adjudication of these issues did not conflict with the decision in *Rindge* on Cal. Code of Civ. Proc. § 1241.

The pre-*Chevalier* interpretation of Cal. Code of Civ. Proc § 1241 and statutes similar to it is best exemplified by *People v. Milton.*[28]

> When the state Highway Commission, as it did in the case at bar, adopts a resolution declaring that the public interest and necessity require the acquisition of certain real property for public improvements, that resolution becomes conclusive of such facts recited therein, and the same may not be disputed *in the absence of fraud, bad faith, or abuse of discretion.* (Emphasis added.)[29]

The Court did not go on to elucidate its reasoning and merely stated the principal that fraud, bad faith and/or abuse of discretion were justiciable issues.

PEOPLE V. CHEVALIER

The last case decided in California allowing the pleading of fraud and bad faith was *People v. Lagiss*[30] (hereinafter cited *Lagiss*). *Lagiss* was decided a year before *Chevalier* and was included in a list of cases which the Supreme Court disapproved in the text of the *Chevalier* opinion. In *Lagiss*, the Highway Commission offered to condemn only part of the condemnee's property if he would agree to waive his rights to severance damages.[31] Lagiss refused to compromise and the Commission condemned his entire parcel in order to avoid severance damages. *Lagiss* was later appealed and reversed on the basis of the subsequent decision in *Chevalier.)* However, the original Appellate Court decision is useful for purposes of illustration of

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[28]35 Cal. App. 2d 549, 96 P.2d 159 (1939).

[29]*Id.* at 552, 96 P.2d at 161.

[30]160 Cal. 2d. 28, 324 P.2d 926 (1958).

[31]Severance damages are damages arising out of the division of a whole parcel, thereby causing injury to the value of the remaining parcel over and above the actual value of the condemned land alone.

the pre-*Chevalier* understanding of the necessity question.[32]

> Section 103, streets and Highways Code, declared that the Commission's Resolution declaring the public interest and necessity is *conclusive* evidence (a) of the public necessity of the proposed improvement, (b) that the property described is necessary therefor, and (c) that the proposed improvement is planned or located in a manner which is most compatible with the greatest public good and the least private injury...Nor is the truth of the findings declared in the Resolution immune from judicial inquiry if tainted by fraud, bad faith, or abuse of discretion.[33]

The statute referred to by the Court differs from Cal. Code of Civ. Proc. § 1241 only in the omission of a requirement that two-thirds of the condemning body agree to the resolution. The type of majority required to pass a necessity resolution provides no basis for distinction between the facts in *Chevalier* and *Lagiss*. Indeed, the *Chevalier* court strongly suggested that its holding was to be applied with equal force to all statutes rendering necessity a conclusive finding.

There is a clear recognition in *Lagiss* that necessity is a legislative question which is generally not justiciable. Yet the court made exception to this rule when fraud, bad faith, etc., were alleged. Prior to *Chevalier*, such allegations were thought not to go to the substance but to the procedure behind the determination of necessity. Thus, the bad faith issue did not run afoul of a rule prohibiting the adjudication of the substantive aspect of necessity. Cal. Code of Civ. Proc. § 1241 renders a finding of necessity conclusive. This finding is a substantive question involving the fact finding and judgmental prerogatives of a quasi-legislative body. It serves to prohibit layman property owners and courts from second-guessing the technical and expert judgment of the condemning authority. The procedure, as distinguished from the substance of the decision, utilized by the condemnor to perform its functions, are not matters which involve an intimate acquaintance with governmental land use planning. Fraud and related issues (bad faith, capri-

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[32]See City of La Mesa v. Tweed and Gambell, 146 Cal. App. 2d 762, 777, 304 P.2d. 803 (1954; People *ex rel.* DPW v. Schultz Co., 123 Cal. App. 2d. 925, 941, 268 P.2d. 117 (1954); People v. Thomas, 108 Cal. App. 2d. 832, 835-6, 239 P.2d. 914 (1952); County of Siskiyou v. Gamlich, 110 Cal. 94, 98, 42 P. 468 (1895).

[33]People v. Lagiss, 160 Cal. App. 2d. 28, 324 P.2d 926 (1958).

ciousness, arbitrariness) have traditionally been treated in administrative law as procedural issues. Although the courts have refused to review substantive discretionary activities of administrative agencies, an exception has always existed where fraud or related claims were alleged. The courts have historically maintained a dichotomy between the procedural and the substantive aspects of administrative decision making. This dichotomy was thought, by the California courts prior to *Chevalier*, not to have been disturbed by Cal. Code of Civ. Proc. § 1241. That statute was interpreted to preclude inquiry into the substantive fact finding functions of condemning authorities. Thus, the pre-*Chevalier* courts did not feel that the adjudication of the fraud and bad faith issues would conflict with the proscription of § 1241.

The *Chevalier* court saw nothing but an apparition where previous courts had seen well settled principles. It explains the error of the previous courts as being a result of their failure to notice that § 1241 of the Code of Civil Procedure had been amended in 1913 to make a determination of necessity conclusive.[34] There is no specific attack in *Chevalier* on the implicit reasoning that caused the pre-*Chevalier* courts to hold as they did. Initially, the *Chevalier* opinion notes that the power of eminent domain is a sovereign power and is limited by the Constitution.[35] These limitations—just compensation and public use—give rise to justiciable issues, "But all other questions involved in the taking of private property are of a legislative nature."[36] The opinion then quotes from *Rindge v. Los Angeles County*, in which the "conclusive" presumption of § 1241 was held constitutional:

> That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion...The Question is purely political, does not require a hearing, and is not the subject of judicial inquiry.[37]

The foundation having been laid, the Court concludes that because necessity is not justiciable, no allegation by the condemnee can make it justiciable.

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[34]People v. Chevalier, 52 Cal. 2d. 299, 306, 340 P.2d 598, 602 (1959).
[35]*Id.* at 304, 340 P.2d at 601.
[36]*Id.* The Court is quoting from University of Southern California v. Robbins, 1 Cal. App. 2d. 523, 525, 37 P.2d 163 (1934).
[37]People v. Chevalier, 52 Cal. 2d. 299, 304, 340 P.2d 598, 603 (1959).

RINDGE AND CAL. CODE OF CIV. PROC. § 1241

Superficially, there are several misinterpretations and gaps in logic which weaken the *Chevalier* holding. The reliance on *Rindge* is somewhat misplaced. In that case there were no allegations of fraud, bad faith, or abuse of discretion. In fact, the U.S. Supreme Court decided the case at a time (1922) when the California courts were uniformly holding that a determination of necessity was not justiciable *unless* fraud, bad faith or abuse of discretion were alleged.[38] (Note also that at that time Cal. Code of Civ. Proc. § 1241 was identical to the current version with regard to the conclusive clause). Thus, the Supreme Court in *Rindge* had no opportunity to pass on the specific question. In fact, the U.S. Supreme Court had held and continued later, in other cases, to hold that such allegations were sufficient to open the question of necessity in both federal and state eminent domain proceedings.[39] The plaintiff in *Rindge Co. v. Los Angeles County*,[40] argued that Cal. Code of Civ. Proc. § 1241 was unconstitutional because it denied him an opportunity for a hearing on the issue of necessity. In rejecting this contention, the U. S. Supreme Court held:

> And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution is adopted or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature...[41]

The Supreme Court cites and quotes as authority for the above holding a case decided by it the same day: *Joslin Mfg. Co. v. City of Providence*.[42] In *Joslin* the Court noted that an arbitrary or unreasonable determination by a condemning authority of a non-justiciable legislative question would constitute a denial of due process:

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[38]See discussion of pre-Chevalier judicial attitudes accompanying footnotes 26-30, *supra*.

[39]Citations and a complete discussion of these Federal cases accompanying footnotes 77-91, *infra*.

[40]Rindge v. Los Angeles County, 262 U.S. 700 (1922).

[41]*Id.* at 709.

[42]Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 676-7 (1922).

> ...the legislature evidently found a sufficient and proper basis for classification, and we are not prepared to say that its conclusion was so palpably arbitrary as to fall within the prohibitions of the 14th Amendment.[43]

The implication here is that had the legislative classification been so palpably arbitrary as to come within the prohibitions of the 14th Amendment, the Court would have invalidated the statute. The Supreme Court, in deciding *Rindge*, was, therefore, framing its decision with the assumption that the interpretation of Cal. Code of Civ. Proc. § 1241 by the California Courts did not intend to bar adjudication of issues of fraud, arbitrary action, and abuse of discretion. Further evidence of the Supreme Court's underlying assumption in *Rindge* is the citation of *Fallbrook Irrigation Dist. v. Bradley*,[44] a California tax assessment case. In that case the plaintiff alleged that a quasi-legislative body had made a determination fraudulently and in bad faith which resulted in the deprivation of her property without due process:

> We are of the opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question.[45]

The Supreme Court's recognition of *Fallbrook* and *Joslin* in addition to the extensive California judicial gloss on Cal. Code of Civ. Proc. § 1241 prior to Rindge clearly demonstrates that the Court did not intend its validation of Cal. Code of Civ. Proc. § 1241 to render issues of fraud, bad faith, abuse of discretion, arbitrariness and capriciousness non-justiciable. Furthermore, the citation of these two cases indicates that the Supreme Court, in deciding *Rindge*, was conspiciously aware of the due process implications of Cal. Code of Civ. Proc. § 1241 and that it relied on the then current California interpretation of that statute. Thus, the Court, in finding that the 14th Amendment was not violated by the application of Cal. Code of Civ. Proc. § 1241, did not contemplate that its ruling would foreclose the raising of bad faith and related issues as a defense, as this would be inimical to its espoused theory of administrative due process.

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[43]*Id. at 676.*
[44]Fallbrook Irrigation District v. Bradlay, 164 U.S. 155 (1846).
[45]*Id. at 168.*

RINDGE AND CHEVALIER

There is a significant conceptual gap between the opinion in *Rindge* and the conclusion in *Chevalier* which is based upon it, which was not bridged by Justice Spence's opinion. *Rindge* holds that the findings of fact by a quasi-legislative or legislative body are conclusive and non-justiciable. This is in accord with the early California cases dealing with Cal. Code of Civ. Proc. § 1241. From this position the *Chevalier* court extrapolates a principle that would shield such a finding from both an attack upon the findings of fact and the manner in which these findings were made. The abuses that are made possible under this system are numerous.

The most common abuse in this regard is the selection of routes or sites of bona fide public improvements over property of individuals whom the condemning authority has some motive for harrassing. The cases are replete with accusations that city, county and statewide agencies were using eminent domain as a weapon against private citizens. The condemnees in these situations are without remedy, if the condemnor can demonstrate a public use and payment of just compensation. As noted above, the *Rindge* holding was not intended as a bar to the pleading of defenses of this nature. It was directed at the protection of the fact finding aspect of the necessity determination. In cases in which a condemning authority has acted in bad faith, the *Chevalier* rule has shielded the wrongdoers from judicial investigation. This rule goes far beyond the *Rindge* decision in that both the substantive and procedural aspects of necessity are rendered non-justiciable.

ABSENCE OF CRITERIA V. WRONG CRITERIA

The distinction between the absence of criteria versus the wrong criteria goes to the core of § 1241 and *Chevalier*. The greatest fear of the draftsmen of § 1241 and the Court in *Chevalier* was that condemnees would fight the taking of their property by suggesting alternate sites and challenging the efficacy of the selections made by the condemning authority. The *Chevalier* Court suggests that condemnees would challenge the necessity findings when their "only real contention is that someone else's

property should be taken, rather than their own."[46] The Court quite reasonably did not want to permit condemnees to fight condemnation by litigating such questions as which route or site is more economical, more feasible from an engineering standpoint, more ecologically sound; or which of a dozen legitimate criterions should be emphasized in the calculation of necessity. The impracticability of allowing litigation involving necessity is intensified when the debate involves the expediency of the proposed project as a whole. There is no controversy that a state can legitimately protect legislative determinations from such vexatious and retrograde litigation. This end was accomplished by Cal. Code of Civ. Proc. § 1241, and its subsequent interpretation in *Rindge* which effectively eliminated the possibility of a condemnee raising an issue challenging the criteria or findings of a condemning authority:

> 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 and located in a manner which will be most compatible with the greatest public good, the least public injury...[47]

There is no indication in the statute that any action, or lack of procedure is validated. Rather, the findings of fact are made conclusive on its face. The state purports only to prohibit adjudication which would involve a factual controversy whether a given improvement is in fact necessary, whether the land to be condemned is, in fact, needed for the project.

The California courts from 1913 to 1959 interpreted the statute as prohibiting inquiry into the factual findings of the condemnor did not use a rational or legally valid criterion for arbad faith, and related issues involving the question of necessity. These courts thought that there was no conflict between Cal. Code of Civ. Proc. § 1241 (as understood by the U.S. Supreme Court in *Rindge*) and adjudication of those issues in conjunction with the necessity determination. The most probable explanation is that these courts perceived the essential difference between an attack founded upon a difference of opinion between

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[46]People v. Chevalier, 52 Cal. 2d 299, 305, 340 P.2d 528, 602 (1959).
[47]CAL. CODE OF CIV. PROC. § 1241.2 (West 1969).

the condemnor and condemnee and an allegation that the condemnor did not use a rational or legally valid criterion for arriving at determination of necessity. The court in *Chevalier* did not make this distinction, but rather closed what it thought to be the last "door to endless litigation."[48] In doing so it went far beyond anything imagined by the drafters of Cal. Code of Civ. Proc. § 1241 or any of the courts which subsequently interpreted that statute including the U.S. Supreme Court's decision in *Rindge v. L.A. County.*[49]

TAX ASSESSMENT ANALOGY

Previously, it was noted that *Chevalier* is contrary to general principles of administrative law. Yet, it is possible that the California Supreme Court might have felt that an eminent domain proceeding is sufficiently different from other administrative activities so as to justify some procedural variations. The Court's silence on this matter has left the foundation of the opinion in doubt—but, if the Court did have this in mind, then the precedents established by previous courts, including the California Supreme Court, in the field of the assessments, provides an analogue to the law of eminent domain. The assessment of taxes for local improvements is a quasi-legislative function, and a sovereign power. A conclusive determination of special benefits received by the prospective taxpayer is made by the taxing authority and is not open to judicial inquiry as to the substantive factual determination. The following excerpt from *Federal Construction Co. v. Ensign* (1922)[50] indicates the substantial similarity between tax assessment determination and the necessity problem:

> The established rule of this state is that if, from the nature of the improvement, it can be seen that the lots to be assessed are susceptible of some substantial benefit from it, the question of *the extent of the benefit received is one which, in the absence of fraud, gross injustice*... rests peculiarly in the determination of the assessing authorities and their action will not be interferred with by the courts. The right to make assessments of

[48]People v. Chevalier, 52 Cal. 2d 289, 307, 340 P.2d 598, 606 (1959).
[49]Rindge v. Los Angeles County, 262 U.S. 700 (1922).
[50]Federal Construction v. Ensign, 59 Cal. App. 200, 213-214, 210 P. 536, 557 (1922).

> this character is referrable, in a general way, to the sovereign power of tradition. But it would be inconsistant with the proper exercise of that power, and would tend to a manifest embarassment of the public in the prosecution of these public improvements, if, on each assessment, the lot owner were entitled to have the question judicially determined whether or not he would be benefited by the proposed improvement by an amount commensurate with the assessment on his lot. This doctrine is forcefully stated by the Oregon Supreme Court as follows: "... the power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact, which the legislature is always presumed to have considered and settled by the enactment...the substituted bodies possess and exercise legislative functions, and their action must be deemed as conclusive on the subject as if the legislature had exercised the authority directly.[51]

The power to levy the tax is a sovereign power which is exercised by the legislature and its delegates solely. The extent of the benefit received is a legislative determination of fact to which is appended a conclusive presumption. Once the determination has been made, the courts will not interfere unless there is evidence of fraud, gross injustice, or arbitrary or unreasonable action amounting to an abuse of discretion.[52] Finally, the envisioned consequence of permitting litigants to question the legislative (or quasi legislative) determination is identical to the opening of the floodgate eventuality seen by the *Chevalier* court. [53]

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[51]*Id.*

[52]These additional adjectives obtained from Halsted v. City of Sacramento, 243 Cal. 2d 584, 589, 52 Cal. Rptr. 637, 640 (1966). Federal Construction is cited with approval in Halsted and the holding in the latter case goes beyond Fed. Construction in allowing pleas of arbitrary or unreasonable action, and abuse of discretion to open the question of benefit received.

[53]*Id.* See also Erro v. Santa Barbara, 123 Cal. App. 508, 512 11 P.2d 667 (1932), stating:

> The case comes squarely within the rule of those cases which hold that when the assessment for a public improvement is so arbitrary and unjust as to work a confiscation of private property it is not a legal assessment, but in effect is a legal fraud upon the owners of private property which is not conclusive upon the court.

More recent cases (1966) have validated and extended the holding in Federal Construction.

It would appear that the tax cases are exact analogues of the situation presented in *Chevalier*. This is not to say that there are no distinctions between the power to tax (particularly special assessments) and the power to condemn. The differences however, do not materially effect the procedural requirements of either power.[54]

The existence of distinguishing features is sufficient to assure that the two powers will not be confused with each other; yet they are not sufficient to warrant a procedural variation such as that represented by *Chevalier*. The dissimilarities go to specific substantive aspects of the two powers. They do not affect the basic procedural parallel structures of the tax and eminent domain proceedings. The government in both cases is taking private property; to do so it is required to follow certain procedures and make particular findings of fact. In tax assessment law, the courts have found that due process requires that even a conclusive finding is attackable upon grounds of fraud or abuse of discretion. That the type of compensation, class of people involved, share of burden and range of uses is different in a condemnation proceeding, does not affect the impact of due process. None of the above mentioned four distinctions provides a justifiable foundation for the excision of a uniformly accepted set of grounds upon which any administrative decision may be judicially reviewed. If for example, eminent domain were an adjunct of the war power, it is conceivable that this basis of the power would justify the denial of certain due process administrative requirements. Absent such a difference, it would seem that where administrative proceedings spring from the same source of power (sovereignty), basically the same activity (taking and property) and require similar administrative procedures (making of conclusive findings); the procedural safeguards should also be the same.

[54]In 26 AM. JUR. 2d *Eminent Domain* § 4 (1970) four primary differences between taxation and eminent domain are noted. First, a tax is a required contribution of money from the taxpayers on the taxpayers apportioned share of the public burden. A condemnation does not involve apportionment but is the confiscation of property beyond the share of the individual. The condemnee is required to yield more than his fair share to meet a public need and is therefore compensated. Second, a tax is on a community or class of people (on property) and is apportioned; condemnation is against an individual without regard to his fair share. Third, the only compensation for payment of tax is a share of the benefit conferred by the expenditure of the tax revenue; a condemnation is directly compensated for in money. Fourth, the scope of permissible uses of tax revenues is wider than the uses allowable for condemned property.

In a case in which the plaintiff was alleging that the local governing board has acted arbitrarily and fraudulently in assessing her property the appellate court held:

> ...The language used by the California Supreme Court [55] clearly show [sic] that the determination was based upon the rule that property of the individual shall not be taken without due process of law. The purpose of the constitutional guarantee is to exclude arbitrary power from every branch of the government. It is a restrainst upon the legislative, executive, and judicial departments. ...
>
> If an appeal to the council had been made and it fraudulently or arbitrarily affirmed an erroneous assessment..., the courts would have been open for a direct attack on the action of the council...[55]

The *Hutchinson* Court above felt that if an administrative body acting in a quasi-legislative capacity, acted arbitrarily or fraudulently in a matter that resulted in the loss of property by the plaintiff, this was a denial of due process under the 14th Amendment. In this case the loss of property was due to tax assessments for local improvements. It should be noted that the Court was willing to adjudicate the matter even though the administrative determination supporting the assessment was conclusive proof of the facts asserted.

In a later California case the Supreme Court recognized the vulnerability of a conclusive quase-legislative finding to allegations of fraud, bad faith, and arbitrary action:

> As to the type of legislative activity which will be recognized as a basis for equitable relief, the courts of this State have either intimidated or directly held that conduct amounting to fraud (cites omitted), if pleaded will entitle plaintiff to relief...[57]
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> Any one of the various matters alleged (fraud, manifestly un-

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[55]The court here is referring to Spring Street v. City of Los Angeles, 170 Cal. 24, 148 P. 217 (1915).

[56]Hutchinson v. Coughlin, 42 Cal. App. 644, 109 P.2d 729 (1919).

[57]Maxwell v. City of Santa Rosa, 53 Cal. 2d 274, 277, 278, 347 P.2d 678, 680, 1 Cal. Rptr. 334, 336 (1959).

> just assessment, arbitrary and unreasonable action by the council, or abuse of discretion) will, if properly pleaded and proved, entitle them to relief.[58]

Maxwell is another of the tax assessment cases mentioned previously, in which a conclusive determination of benefit received by the assessed owner is made by a quasi-legislative body. It is one of a number of such cases drawn from a variety of administrative fields which stands for the proposition that a conclusive presumption will not deter the Court from hearing claims of abuse of discretion because of the intervening due process issued that are thereby raised.[59] This policy is summarized in 2 Cal. Jur.2d:

> ...or, on the other hand, what [quasi-legislative] functions are not judicial in nature, an area over which the courts concede that the judicial right of review is limited primarily to a determination that the agency has not acted in so arbitrary, capricious, or otherwise uncontrolled a fashion as to constitute denial of due process.[60]
>
> Even determinations subject to only limited review will be rejected for fraud, bad faith, or such arbitrary and unreasonable action in wilful disregard of the law as amounts to constructive fraud.[61]
>
> Underlying all administrative law is the constitutional precept, tenatiously guarded by the courts, that public officers must not act arbitrarily, capriciously, whimsically, unreasonably, fraudulently or dishonestly. If the courts find administrative

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[58] *Id.* at 279, 347 P.2d at 680, 1 Cal. Rptr. at 336.

[59] *E.g.*, Roberts v. Los Angeles, 7 Cal. 2d 477, 491-2, 61 P.2d 323, 332 (1936); Hannon v. Madden, 214 Cal. 251, 257, 5 P.2d 4, 7 (1931); Cutting v. Vaughn, 182 Cal. 151, 187 P. 19 (1920); Howard Park v. Los Angeles, 120 Cal. App. 2d 242, 245, 260 P.2d 981, 991 (1953); Garibaldi v. Daly City, 63 Cal. App. 2d 480, 487, 147 P.2d 122, 127 (1944); Richardson v. Redondo Beach, 132 Cal. App. 426 22 P.2d 1073 (1933); Hutchinson v. Coughlin, 42 Cal. App. 644, 109 P.2d 729 (1919); Nutting v. Los Angeles, 35 Cal. App. 519, 170 P. 680 (1917); Spring Street v. Los Angeles, 170 Cal. 24, 648 P. 217 (1915); American Toll Bridge v. Railroad Commission, 12 Cal. 2d 184, 83 P.2d 1 (1938), 199, *cert. denied*, 307 U.S. 486 (1938).

[60] 2 CAL. JUR. 2d *Administrative Law* § 42 (1964).

[61] *Id.* at 377-8; § 228.

> action to be arbitrary, oppressive or unjust, it will be struck down as contrary to due process.[62]

The weight of the foregoing case authority decisively weakens the insubstantial foundations relied upon in *Chevalier*. It is customary for a court to create a landmark case from the ruins of dying or dead legal principles. Such is the origin of the most profound and innovative legal doctrines. However, where the old doctrine is still vibrant and universally applied the result is more of a legal debacle. The *Chevalier* holding is contrary to the entire body of administrative due process law in California and is founded upon a misconstruction of *Rindge Co.* v. *Los Angeles County*, supra. The Court recited the accepted theory of the non-justiciability of the determination of necessity to which it appended a novel appendix without the benefit of supporting judicial or statutory authority. The opinion does not provide any explanation of why it fashioned the aberrant rule nor does it attempt to distinguish the circumstances in the case from the variety of factually and procedurally identical cases from other administrative areas which it had previously decided and continued to decide contrarily. Were it not for the continued adherence by California Courts to the doctrine of *Chevalier* in eminent domain cases, the decision in that case could be dismissed as an inconsequential deviation from the accepted position. Unfortunately, the passage of over a dozen years and numerous cases indicates that *Chevalier* has established a position of pre-eminence in its limited niche.

FEDERAL JURISPRUDENCE

The insensitivity of the California Courts to the due process aspect of the *Chevalier* holding stands as a roadblock against any hoped-for retreat from its extreme position. In cases decided since the 1959 decision, the plaintiffs have continued to allege fraud, abuse of discretion, arbitrary and capricious action, etc., in appropriate circumstances, and the courts have steadfastly refused to adjudicate these issues. Any serious attempt to change the *Chevalier* rule must be accomplished through the Federal Courts. To date there does not appear to be

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[62] *Id.* at 757; § 38.

any case brought before the Federal Courts from California specifically challenging the decision in *Chevalier*.[63]

The Federal government engages in condemnation in much the same way as do the states. Various departments of the executive and legislative branches have been delegated the power to condemn. The constitutional limitation found in Article 5 of the United States Constitution reads:

> "...nor shall private property be taken for public use, without just compensation."

This is essentially identical to the limitation appearing in Article 1, Sec. 14 of the California Constitution:

> "Private property shall not be taken...for public use without just compensation..."

The Constitutional development of the various principles of eminent domain has been parallel in California and the Federal government. The Federal condemning authorities are required to make a finding of necessity which is quasi-legislative and conclusive. Federal opinions dealing with the justiciability of necessity usually arise out of Federal administrative activities. Occasionally, a case involving a state condemnation suit will reach the federal courts on a due process issue. In either situation the Federal courts apply the 5th Amendment of the United States Constitution. (In state condemnation actions the 5th Amendment is made applicable by the 14th Amendment.) Thus, the Constitutional rules applies are identical [with regard to the justiciability or necessity] whether the case involves state or federal action.

At present there is no uniform federal rule regarding the extent to which the non-justiciability of the necessity determination is to be claimed. In eminent domain actions by Federal condemning authorities there is a split of authority[64] between the various circuits. This state of affairs is the result of the refusal of the U.S. Supreme Court to decide the question in *U.S. v.*

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[63]As of April 1971.

[64]Judicial notice of this situation noted in U.S. v. 113.8 Acres, etc., 24 F.R.D. 368 (N.D. Cal. 1959).

Carmack[65] which is currently the last Supreme Court treatment of the issue:

> In this case it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials has acted in bad faith or capriciously and arbitrarily that their action was without adequate determining principal or was unreasoned.[66]

The position advocated by *Chevalier* has been adopted by the Eighth Circuit Cort of Appeals in *U.S. v. Mischke:*[67]

> It is true that these are cases from which implications may be drawn that if a district court finds that the officer or agency, authorized by Congress to select lands to be taken for a public use and to determine necessity for the taking, has acted in bad faith or arbitrarily or capriciously in making the selection set it aside...[cites omitted].
>
> We cannot accept the theory that the assertion by a defendant in a condemnation proceeding that the official duty authorized by Congress to select the lands necessary to be taken for public use, has acted in bad faith and arbitrarily and capriciously in making the selection can transmute what has invariably been held to be a legislative question into a judicial one.[68]

Prior to *Mischke* there are no Federal cases which explicitly state that fraud, abuse of discretion and bad faith do not present justiciable issues on the question of necessity. (It is also interesting to note that *Mischke* postdates *Chevalier*, thus possibly indicating that *Mischke* resulted from the position adopted by the California Supreme Court.) The treatment of the *Mischke* case since it was handed down has been ambivalent and in some instances negative. Of eleven cases citing *Mischke*, four did not specifically deal with the justiciability of abuse of dis-

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[65]U.S. v. Carmack, 329 U.S. 230 (1946).
[66]*Id.* at 243-244.
[67]U.S. v. Mischke, 285 F.2d 628 (8th Cir. 1961).
[68]*Id.* at 631.

cretion, fraud, and bad faith.[69] Six later cases citing *Mischke* have specifically held that a court *can* adjudicate the question of necessity when allegations of bad faith and related isses are made.[70] Typical of these decisions is *Southern Pacific Land Co. v. U.S.*[71] in which the court mentions the *Mischke* theory and then proceeds to state its own view:

> But the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious or in bad faith. *U.S.* v. *Carmack*, 329 U.S. 230, 243-244, 67 S. Ct. 252, 91 L.Ed. 209 (1946). And various courts of appeal including this one, have said that any exception to the judicial non-reviewability exists in some circumstances. ...Moreover, limited judicial review of administrative exercise of condemning authority may well be required by Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.[72]

Little more than three months after handing down its decision in *Mischke* the Eighth Circuit Court modified, if not reversed itself in *Goldberg* v. *Wade Lahr.*[73] This case dealt with the interpretation and application of the Fair Labor Standards Act of 1938. The Court found an opportunity to mention its own decision in *Mischke:*

> I. We are not concerned with an issue comparable to that of the validity of government taking as to which the cases (including our own *U.S.* v. *Mischke*, 8 Cir. 285 F.2d 628, 631) hold that, at least in the absence of arbitrariness, wisdom of decision is a legislative matter not subject to judicial review.[74]

It would seem that even within the Eighth Circuit Court, there

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[69]Duba v. Schuetzle, 303 F.2d 570 (8th Cir. 1962); U.S. v. Pyramid Life Ins. Co., 382 F.2d 804 (8th Cir. 1969); U.S. v. 442.94 Acres, 264 F. Supp. 506 (S.D. Iowa 1966); U.S. v. 544 Acres, 314 F. Supp. 273 (E.D. Tenn. 1969).

[70]Goldberg v. Wade Lahr, 290 F.2d 408, 419 (8th Cir. 1961); U.S. v. Agee, 322 F.2d 139, 142 (6th Cir. 1963); Southern Pacific Land Co. v. U.S., 367 F.2d 161, 162 (9th Cir. 1966); U.S. v. 2,606 Acres, 432 F.2d 1286, 1290 (5th Cir. 1970); U.S. v. 620 Acres, 255 F. Supp. 427, 430 (W.D. Ark. 1966); U.S. v. 929 Acres, 205 F. Supp. 456, 459 (S.D. Cent. Div. 1962).

[71]Southern Pacific Land Co. v. U.S., 367 F.2d 161, 162, (9th Cir. 1966).

[72]*Id.*

[73]Goldberg v. Wade Lahr, 290 F.2d 408, 419 (8th Cir. 1961).

[74]*Id.*

is doubt as to the validity of the *Mischke* decision. Whether the Eighth Circuit will maintain the position it adopted the *Mischke* is not clear at this time. The sole decision which appears to support *Mischke* appears in a federal rules decision[75] which was later reinterpreted by the Second Circuit Court[76] on appeal. Standing in opposition to the rule delineated in *Mischke* are the majority of the Circuit Courts.[77] *U.S. v. 43,355 square feet of land in King County Washington,*[78] is typical of the cases contrary to *Mischke:*

> ...When the government department through its officials such as the War Department in good faith determines and finds necessary that the government acquire by condemnation a certain piece of property owned by a citizen, that such determination is binding on this court...But in my opinion it is required that the government proceed in good faith, constructive good faith as well as good faith in fact, and that the proceeding be not arbitrary or capricious.[79]
>
> ...the court is of the opinion, and finds and concludes, that such action of the government in this particular case, in light of all the evidence...is capricious and arbitrary and therefore the court declines to enter an order granting to the government leave to take possession of this property as requested by the government.[80]

The conflict illustrated here is somewhat clearer than the situation created in California by the *Chevalier* decision. A minority of Federal Circuit Courts have adopted the position that there can be no denial of due process arising out of a determination which the courts believe to be totally beyond the jurisdiction of the judiciary. Perhaps because of the equal status of the Courts involved, none have specifically analyzed the conflicting holdings of the other Circuits. However, the focus of the dispute

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[75]U.S. v. Certain Property, 32 F.R.D. 48 (S.D. N.Y. 1962).
[76]U.S. v. Certain Property, 374 F.2d 138 (2nd Cir. 1967).
[77]The 2nd, 3rd, 4th, 6th, 7th, and 9th expressly allow adjudication of the question, according to the court in Southern Pacific Land Co. v. U.S. 367 F.2d 161, 162 (9th Cir. 1966).
[78]U.S. v. 43,355 Square Feet in King County, Washington, 51 F. Supp. 905 (N.D. Wash. 1943).
[79]*Id.* at 906.

seems to be the effect attributed to the allegation of fraud, bad faith, and abuse of discretion by a condemnee. The *Mischke* interpretation necessarily implies that such allegations go to the substantive aspect of a determination of necessity. Thus, the Court views such an attack as being directed at the factual determination and at the criteria employed by the condemning authority to arrive at its conclusions in its quasi legislative role. Such a determination is universally held to be conclusive and non-justiciable.

Because of the uncommunicative nature of the *Chevalier* opinion, it is impossible to know for certain the unarticulated premises of that California decision. The similarity of the Constitutional limitations and judicial development of eminent domain in California and the Federal government suggests that the *Chevalier* case is founded upon the same consideration held by the minority of Federal Courts following *Mischke.* If this is so, *Chevalier* is vulnerable to the same due process infirmities to which *Mischke* is.

The Federal Courts maintaining the traditional doctrine interpret the allegation as going to the procedure, and the lack of criteria involved in making the determination of necessity. The result is the absence of any legally recognizable determination. They would argue that although necessity is not justiciable, it is still required that the condemning authority follow the steps required by the 14th Amendment in all administrative actions of this nature in making the determination.[81] The failure of the administrative body to comply with the due process requirement renders its action void. Thus, it can be said that where there had been fraud, arbitrariness or bad faith in the proceeding, a valid decision-making process never began, and the allegations of a condemnee plaintiff would not attack the substantive aspect of the necessity determination.[82]

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[80] *Id.* at 909.

[81] This is not to infer that the right to a hearing is also required, but rather, only those elements applicable to administrative decision making where the subject matter is not justiciable. *I.E.*, reasonableness, good faith, *etc.*

[82] Some hint that this is the theory underlying the holdings by those courts is provided by the court in U.S. v. Bodie Island, 114 F. Supp. 427, 429-30 (E.D. N.C. 1953) in which it was said:

> In the absence of bad faith and non-public use, it would seem that the wisdom of a governmental officer authorized to commence condemnation proceedings does not present a judicial question and is not subject to judicial review; ... Hence it is this opinion and not the opinion of the

FACT V. PROCEDURE

The disagreement over the effect on an allegation of fraud, bad faith, or arbitrariness does not arise from a pristine abstract doctrinal debate. If it did, the question would boil down to whether *facts themselves* can be fraudulent, in bad faith and arbitrary, or whether the *procedure* by which these facts are "found" and molded into a factual determination can be so characterized. Cal. Code of Civ. Proc. § 1241 states that the necessity determination of the condemnor is conclusive evidence of necessity. The fair impact of these words is that the facts found by the condemnor and the conclusion based upon these facts are conclusive. No Court, California or Federal, would disagree with the assertion that a condemnor cannot be second-guessed by the condemnee as to the former's finding of facts and conclusions. The extension of immunity to the *procedure* used to find these facts and draw conclusions does not, however, follow from the basic principle of the immunity of the *factual* determinations of the condemnor. This theory would require the obliteration of the distinction between the methods used to achieve the end product and the end product itself (that is, the merger of substance and procedure).

In addition to extinguishing the distinction between substance and procedure, it would also be necessary to characterize *factual* determinations as being intrinsically fraudulent, arbitrary and in bad faith. The immunity from judicial review, provided by Cal. Code of Civ. Proc. 1241 and judicial decision in the Federal system, is granted for *substantive* determination of necessity. There is no California or Federal statute which explicitly indicates that procedure utilized in making a necessity determination is to be shielded from judicial scrutiny. Therefore, for the *Mischke-Chevalier* theory to stand, allegations of fraud, abuse of discretion or arbitrariness must go to the substantive (the factual determination) aspect of necessity. If this were the case, then a Court would have to assert that those issues cannot be heard under the prohibition of § 1241 and simi-

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court that is controlling *the question of bad faith as distinguished from bad judgement* is not here presented.

The implication here is that the allegation of the condemnee are not an attack on the judgement of the condemning authority, and thus not involving the factual determination which presents a non-justiciable issue.

lar Federal enactments. The basic premise here is untenable. A finding or conclusion cannot itself be fraudulent. Only the procedure used to arrive at a determination or finding of facts can be so characterized. For example, a condemnor may in good faith make a determination which is erroneous and based on incorrect data. This would not be fraud, bad faith or capriciousness. However, if the same condemnor in identical circumstances arrived at the same conclusion, but did so in awareness of his error, add intentionally, this would be fraudulent, in bad faith, and perhaps arbitrary and capricious. The determination is not itself susceptible of characterization, unlike the procedure used by the condemnor. Thus, the *Mischke-Chevalier* rule did not evolve from a logical construction of § 1241 or similar Federal statutes.

The true rationale for *Chevalier* and similar opinions is buried in the Courts' apprehension of the practical effects of allowing adjudication of the procedural aspects of necessity. Theory aside, a successful attack on the procedure used by a condemnor to determine necessity will, in practice, have the same result as an attack upon the substantive determination of the condemnor. If a condemnee pleads and proves fraud or bad faith, he will have thwarted the condemnation proceeding just as effectively as could be accomplished by an attack upon the substantive aspect of necessity. The Courts may be sensitive to the theoretical distinction between substance and procedure, but they seem to have determined that achievement of practical results requires the erasure of that distinction.

The California Supreme Court reveals this viewpoint in *Chevalier:*

> ...implying such an exception (to 1241 allowing bad faith, fraud, etc. to be alleged) would allow public improvements to be unduly impeded by frequent and prolonged litigation by persons whose only real contention is that someone else's property should be taken rather than their own.[83]

The Court here has minimized the importance of the motives of the condemnor to the extent that it views allegations of fraud, bad faith and capriciousness as being mere makeweights in the

[83]People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 602 (1959).

condemnee's defense against the condemnation. Perhaps the Court feels that since § 1241 (and similar Federal statutory and Federal common law rules) shields an erroneous determination of necessity from judicial scrutiny, there is no sense in opening the same question to adjudication merely because bad motives are alleged by the condemnee. The condemnee who loses his property as a result of a fraudulent finding of necessity suffers no more damage than the condemnee who is victimized by an erroneous finding made in good faith. If the legislature has already made the judgment that no issue should be non-justiciable regardless of error, the Court expressly feels that a roundabout method of opening that question should not be permitted, even though the effect is to shield condemnors from charges involving bad faith. This reflects a judgment that such allegations are frequently spurious and are used only as a last ditch method of attacking necessity determinations. This may in fact be true in some instances, but the price which must be paid to smooth the condemnor's road is too high. Even if no condemnor had ever harbored an improper motive and no condemnee had ever been wronged by a bad faith determination of necessity, the *Mischke-Chevalier* rule would still be a dangerous precedent. Condemning authorities in California need not police themselves, nor fear rebuke from any judicial source, in this one area of supreme discretion. Such a situation invites corruption of the sort which the philosophy of a system of checks and balances was designed to negate. The *Chevalier-Mischke* rule has neutralized the only check upon this aspect of condemnation.

CONCLUSION

The touchstone of the traditional doctrine of necessity is the concept of the basic illegality of any administrative action which is motivated by fraud, bad faith, or abuse of discretion or is characterized by unreasonable, arbitrary or capricious action.[84] Numerous cases from all areas of administrative law have held that such actions present constitutional issues which will be adjudicated even though the administrative officer may have

[84]The words *unreasonable, arbitrary* and *capricious* are used in the sense of acts which are unreasonable, arbitrary capricious to the extent that they constitute an abuse of discretion on the exercised in bad faith.

been engaged in a quasi-legislative activity.[85] The Courts adopting the traditional approach to the necessity question have simply applied these all-pervasive principles to eminent domain proceedings. The United States Supreme Court, in *Dismuke v. U.S.*,[86] spoke in general terms of the requirements exacted by the 14th Amendment from all administrative officers:

> If he is authorized to determine questions of fact, his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence...or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which congress has authorized.[87]

The general principals elucidated in *Dismuke* are echoed by the majority of the Circuit Courts in the various decisions arising from the Federal condemnation suits. The few cases which have been appealed to the Federal Courts from State Courts indicate that the traditional Courts will decide State condemnation suits on the same basis.[88] In *Chesapeake and Ohio Ry. Co.* v. *Greenup County, Kent*,[89] the circuit likened the task of a condemnee alleging arbitrary and unreasonable action to that of an oarsmen pulling a heavy load, but the Court did recognize his right to make the attempt:

> The police power of the state is subject to the constitutional limitation that it may not be exerted unreasonably or arbitrarily. [cited omitted] If Greenup County is exercising its power of eminent domain unreasonably and arbitrarily, appellant should not be shut off from showing, if it can, in this condemnation proceeding, that, as a matter of fact, there have been no

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[85]Barsky v. Board of Regents, 347 U.S. 442 (1953); Porter v. Investors Syndicate, 286 U.S. 461 (1931); Washington v. Fairchild, 224 U.S. 510 (1911); Chicago M & P.R. R.R. v. Minn., 134 U.S. 418 (1889).

[86]Dismuke v. U.S., 297 U.S. 167 (1935).

[87]*Id.* at 172.

[88]Williams v. Transcontinental Pipe Co. 89 F. Supp. 485 489 (W.D. S.C. 1950); Government of the Virgin Islands v. 50 Acres etc., 185 F. Supp. 495, 497 (Virgin Islands, 1960); Lake Charles Harbor v. Henning, 409 F.2d 932, 936 (5th Cir. 1969); People ex rel Crane v. Hahld, 258 U.S. 142 (1921).

[89]Chesapeake and Ohio Ry. Co. v. Greenup County, Kent, 175 F.2d 169 (6th Cir. 1949).

> changed conditions which necessitate in the public interest the condemnation of the proposed right of way or easement across appellants tracts. To do so appellant must pull a heavy laboring oar, but at least it is entitled to strain muscles in the attempt.[90]

To date the Ninth Circuit Court has not had before it the *Chevalier* interpretation of Cal. Code of Civ. Proc. § 1241. A number of California attorneys specializing in condemnation suits have indicated that sentiment is against attempting to change the *Chevalier* rule by appeal to the Federal Courts. It is felt that in most cases where fraud, bad faith and arbitrariness are alleged, the same results can be achieved if the focus of attack is centered around public use rather than necessity.[91] However, there are frequent situations in which this maneuver will not work. Possibly one of these situations will give rise to an appeal on 14th Amendment due process grounds challenging the *Chevalier* interpretation of Cal. Code of Civ. Proc. § 1241. If the case reaches the Ninth Circuit Court of Appeals there can be little doubt that Court will rule against the California interpretation.

Kevin M. Lee

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[90]*Id.* at 175.

[91]The condemnee in such a case would merely allege bad faith, fraud, etc. with regard to public use. Public use is always a justiciable question. Thus where the complaint is actually directed against necessity, the same results can often be achieved by suggesting that the condemned land will not be used for a public use. The close relationship between use and necessity will often permit such a maneuver. However, if the project is clearly a public use (such as one specifically enumerated in a statute) and the land condemned will definitely be applied to that project, an attack on public use is not feasible even though bad faith or fraud may have motivated the necessity determination.