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LEGISLATIVE LIMITATION ON AIR POLLUTION ENFORCEMENT

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With the ever increasing problem of smog and air pollution, questions have arisen as to the enforcement of the Air Pollution Control Act of 1947 which has been incorporated into the Health and Safety Code.[1] This article will attempt to point out problems which might be involved when dealing with manufacturing and industrial operations with particular emphasis upon Health and Safety Code, sections 24242 and 24243[2] for the prosecution, and Code of Civil Procedure section 731(a)[3] for the defense. Is there a conflict between these sections? When can section 731(a) be invoked? What are the exceptions to section 731(a)? What elements must be proved in order to obtain a conviction under sections 24242 and 24243? These questions and others will be discussed in this article.

I. Validity and constitutionality of Health and Safety Code Sections 24242 and 24243

Section 24242 provides that a person may not discharge into the atmosphere any contaminant for a period aggregating more than three minutes in an hour of a shade and opacity as dark or darker as that designated number two on the Ringleman Chart. The Ringleman Chart is a chart published by the United States Bureau of Mines used to determine shade and opacity of air contaminants and the constitutional focal point is centered around the use of the Ringleman Chart to determine the necessary shade and opacity needed for a violation of this section.[4] In *People v. International Steel Corp.*,[5] defendant was convicted of violating Health and Safety Code section 24242 in its operation of burning auto bodies. The defendant had appealed on the basis that the prohibitory provisions of this law were unconstitutional. The court held that the use of the Ringleman Chart was constitutional since a statute may refer to and adopt for expression of the legislative intent a statute, rule or regulation of another state or of the United States, and it seemed therefore equally permissible to use an official publication of the United States or Bureau established by law such as the

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1 CAL. STATS. 1947, c. 632, p. 1640: CAL. HEALTH AND SAFETY CODE §§ 24198–24341 comprise this act.

2 CAL. HEALTH AND SAFETY CODE §§ 24242 and 24243.

3 CAL. CODE CIV. PROC. § 731(a).

4 CAL. HEALTH AND SAFETY CODE § 24242: "A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is:

a) As dark or darker in shade as that designated as No. 2 on the Ringleman Chart as published by the United States Bureau of Mines, or

b) of such an opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in sub. sec. (a) of this section."

5 102 Cal. App. 2d Supp. 935, 226 P.2d 587 (1957).

Bureau of Mines. The court further held that the shade of smoke discharged as limited by section 24242 was sufficiently described and certain in the section, and that section 24242 was not unreasonable nor discriminatory merely because emission of a shade of smoke lighter than that which is prohibited might cause more contaminant if allowed for a long period of time than emission of prohibited shade for only a short time beyond the prohibited period.

In a later case, *People v. Plywood Manufacturers of California,*[6] the constitutionality of section 24242 was reaffirmed over an objection that there was unconstitutional uncertainty introduced by reference to the Ringleman Chart and those who would be observers. The court held that due process was satisfied because the use of the Ringleman Chart was sufficiently definite, and the fact that an average individual might not be able to identify such violation would not render it unconstitutional.

The use and applicability of section 24242 was again upheld in *People v. Southern Pacific Company*[7] where defendant allowed a fire to burn on its premises for a period in excess of four hours emitting smoke of such a shade and opacity as to violate the requisites for liability as established in section 24242.

The unconstitutionality of section 24243 has never been put into issue. In view of the fact that a presumption of constitutionality protects every legislative act and it is the duty of the courts to so construe legislative enactments as to uphold their constitutionality if possible, it seems likely that section 24243 will weather any constitutional attack.[8] Furthermore section 24243 and Civil Code section 3479 are similar in their terms and legislative intent in that the object of each is to do away with operations that create nuisances and disturb a considerable number of people. Therefore, it appears that these sections are analagous in their purpose. Section 24243 provides that a person shall not discharge a quantity of air contaminant or other material which causes injury, annoyance or nuisance to any considerable number of people or which endangers the comfort, health and safety of such people or the public.[9] Civil Code section 3479 provides that anything which is injurious to health or is indecent or offensive to the senses so as to interfere with the comfortable enjoyment of life or property or obstructs free passage of lakes, highways etc. is a nuisance.[10] The use of Civil Code 3479 has been upheld in a number of cases.[11] Therefore it seems logical that section 24243 will also be upheld when applied.

[6] 137 Cal. App. 2d Supp. 859, 291 P.2d 587 (1955).

[7] 150 Cal. App. 2d 815, 311 P.2d 200 (1957).

[8] People v. Amdur, 123 Cal. App. 2d 951, 267 P.2d 445 (1954).

[9] CAL. HEALTH AND SAFETY CODE § 24243: "A person shall not discharge from any source whatsoever such quantity of air contaminant or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health or safety of any such persons or the public, or which cause or have a natural tendency to cause injury or damage to business or property."

[10] CAL. CIV. CODE § 3479.

[11] Snow v. Marian Realty Co., 212 Cal. 622, 299 Pac. 720 (1931); Centoni v. Ingalls, 113 Cal. App. 192, 298 Pac. 47 (1931); Dauberman v. Grant, 198 Cal. 586, 246 Pac. 319 (1926).

Any violation of sections 24242 or 24243 may be enjoined in a civil action brought in the name of the People of the State of California,[12] or may be prosecuted as a misdemeanor.[13] It has been held that the only proof necessary to warrant a conviction under section 24242 is that a contaminant was discharged into the atmosphere and that it was of the specified shade and darkness prohibited.[14]

II. Code of Civil Procedure 731(a) and its effect

Section 731(a) provides that whenever a business is in a proper zone or district under authority of law wherein its uses are expressly permitted, the business shall not be enjoined or restrained by the injunctive process from a reasonable and necessary operation nor shall such use be deemed a nuisance without evidence of employment of unnecessary and injurious methods of operation.[15]

The purpose of the addition of section 731(a) to Code of Civil Procedure was aptly set out in *Gelfand v. O'Haver*[16] where the court said:

> "Prior to the addition of section 731(a) the law was settled that a person could enjoin certain conduct as a nuisance even though the business was conducted in a district zoned to permit business of the type of which the complaint was made and the defendant was making an effort to operate his business in a careful and efficient manner. In the light of this, the manifest purport of the adoption of section 731(a) was to eliminate injunctive relief where the business is operated in its appropriate zone and the only showing was injury or nuisance to the plaintiff in such operation. He must now show more, namely, that the defendant employed unnecessary and injurious methods in the operation of the business."

While this section substantially changed the law it is limited in its operation. The limitations and exceptions are as follows:

First, the section expressly exempts the application of the section in an action to abate a public nuisance brought in the name of the people of California. This was the effect of the amendment of 1947. When the statute was first passed in 1935 there was talk of the possibility of it being broad enough to apply to actions to abate a public nuisance. As has been said this was taken care of by expressly adding to the statute that such an action would make section 731(a) inapplicable.

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12 CAL. HEALTH AND SAFETY CODE § 24252.

13 CAL. HEALTH AND SAFETY CODE § 24253.

14 *Supra* note 6.

15 CAL. CODE CIV. PROC. § 731(a): "Whenever any city, city and county, or county, shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilization plants, refineries and other similar establishments whose operations produce offensive odors."

16 33 Cal. 2d 218, 220, 221, 200 P.2d 790, 791 (1948).

Second, the section expressly exempts application in the "regulation and working hours of canneries, fertilization plants, refineries and other similar establishments whose operations produce offensive odors." There may be some problem in determining what is meant by "other similar establishments whose operations produce offensive odors." Is this exemption limited to offensive odors or can it apply to non odoriferous air pollutants which might in one way or another be injurious to health and comfort? These questions will undoubtedly have to be decided by later judicial decisions.

Third, this section does not prevent recovery of damages but simply provides that "no one shall be enjoined or restrained by the injunctive process." In *Kornoff v. Kingsburg Cotton Oil Co.*[17] the court recognized the validity of section 731(a) but allowed an action for damages and in *McNeill v. Redington*[18] even though defendant's operation was permitted by zoning requirements and the method of operation employed by the defendant was expressly found by the court to be reasonable and necessary, an award of damages on a cause of action in the nature of trespass was held allowable. The court stated that section 731(a) ". . . . has no application because it does not purport, either expressly or by implication, to extend to trespassory invasion of another's property."

Fourth, while the section in certain cases does bar the issuance of an injunction, it certainly does not bar injunction where there is use of unnecessary and injurious methods of operation. This is illustrated in the case of *Gelfand v. O'Haver,*[19] which involved a music studio emitting noise to the disturbance of neighboring residents. It was established that there was no effort to control such emission of noise by soundproofing or any other means and, therefore, the method of operation was unreasonable and unnecessary. Injunctive relief was allowed. Although this case involves noise, the principle can by analogy be used in a case dealing with smog. In this same case, in determining what is necessary to establish unnecessary and injurious operation, the court said that failure to pursue methods customarily employed in a similar business in the vicinity was not the only evidence that would establish unnecessary and injurious method of operation and, although it was relevant, it was not indispensible. In *Hannum v. Gruber* [20] it was said:

> "If devices or more efficient management which would reduce the smoke, odors, gases, smudge and noises and vibrations issuing from its plant, are available to the defendant at a reasonable expense, it is the duty of the defendant to secure such devices or management and if it fails to do so the smoke, noises, etc., emitting from its plant may be regarded as unnecessary and unreasonable."

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[17] 45 Cal. 2d 265, 288 P.2d 507 (1955).
[18] 67 Cal. App. 2d 315, 154 P.2d 428 (1944).
[19] *Supra* note 16.
[20] 346 Pa. 417, 31 A. 2d 99, 102 (1943).

In other words, there is no set standard establishing what is unnecessary and unreasonable, but the circumstances in each case must be considered to determine what is an unreasonable and unnecessary operation.

Having discussed the limitations of section 731(a) the areas of its applicability follow.

First, the section is only applicable when the business sought to be enjoined is operating in an area wherein the type of use is permissible and expressly permitted to the particular business.[21] The reason for this is that the section expressly requires that to be free from injunctive restraint the business must be properly zoned and its uses "expressly permitted." Such use is not to be deemed a nuisance without evidence of employment of unnecessary and injurious methods of operation. It follows, therefore, that if the business is not properly zoned or its uses not expressly permitted the section would not apply.

Prior to the enactment of section 731(a) several cases had held that the mere fact that operations were permitted and in a district properly zoned for such uses could not avail the defendant. Also, that one may not use his property even in and about a lawful business if it be used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property.[22] These cases, however, do not appear to be authority at present since section 731(a) purports to protect the business where the use of unreasonable and unnecessary method of operation could not be established.

Second, section 731(a) is applicable to prevent a suit for injunction by a private person where unreasonable and unnecessary methods of operation are not established, provided the defendant business is in the proper zone and its uses expressly permitted.

The validity of section 731(a) has been upheld in a number of cases.[23] In *Wheeler v. Gregg*[24] a gravel plant was given a "conditional use permit" under the cities zoning ordinance. The court held that this was sufficient to bring it within the protection of section 731(a). In *Northside Property Owners Association v. Hillside Memorial Park*[25] the court held section 731 (a) to be applicable in an action to enjoin a corporation from establishing and maintaining a cemetery under a permit granted by the County Board of Supervisors.

[21] Markey v. Danville Warehouse and Lumber Inc., 119 Cal. App. 2d 1, 269 P.2d 19 (1953).

[22] Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678 (1933); Vowinkle v. N. Clark and Sons, 216 Cal. 156, 13 P.2d 733 (1932); Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 Pac. 484 (1927); Judson v. L. A. Suburban Gas Co., 151 Cal. 169, 106 Pac. 581 (1910); Tuebner v. Cal. St. Ry., 66 Cal. 171, 4 Pac. 1162 (1884).

[23] Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 266, 288 P.2d 507 (1955); Markey v. Danville Warehouse and Lumber Co., 119 Cal. App. 2d 1, 259 P.2d 19 (1953); Wheeler v. Gregg, 90 Cal. App. 2d 369, 203 P.2d 37 (1949); Gelfand v. O'Haver, 33 Cal. 2d 218, 200 P.2d 790 (1948); Northside Property Owners Ass'n. v. Hillside Memorial Park, 70 Cal. App. 2d 609, 161 P.2d 618 (1945).

[24] Wheeler v. Gregg, 90 Cal. App. 2d 369, 202 P.2d 37 (1949).

[25] Northside Property Owners Ass'n v. Hillside Memorial Park, 70 Cal. App. 2d 609, 161 P.2d 618 (1945).

III. Problems that may arise when these particular sections are invoked in the same suit

It has been established earlier that there are only two types of actions that can be brought under section 24242 and 24243, namely, an action for an injunction or a prosecution for a misdemeanor.

First, assuming an action is brought against a business charging a misdemeanor under section 24242, and 731(a) has been invoked in defense, what will be the result? Such a case would arise with the prosecution claiming a violation of section 24242 in that defendant discharged into the air a contaminant for a period exceeding three minutes in an hour and which was as dark or darker than that allowed by use of the Ringleman Chart. The defendant contends that his operation was properly zoned, that the uses were expressly permitted and that such uses were reasonable and necessary. A conflict arises. Although section 24242 does not contain nuisance language, a violation of it, that is, a discharge into the atmosphere of air contaminants of considerable darkness and opacity may well lead to the nuisance of smog. Section 731(a) provides a defense against prosecution under nuisance statutes in certain instances as has been shown earlier. Since 731(a) was established to protect industry and is applicable when a business is faced with a broad nuisance statute, it would seem by implication and legislative intent that the defense provided by the section should be available when section 24242 is invoked by the prosecution. By this analogy a conflict is present; section 24242 providing that such an operation is a misdemeanor and section 731(a) providing such an operation is allowable when its requisites are complied with.

The decision as to which section controls in this conflict might well be affected by what the court favors preventing, that is, smog or interference with industry. 731(a) was added to the California statutes to protect industry. With the great industry we have today, discharges and emissions of air contaminants are inevitable. The Air Pollution Control Act was adopted to eliminate operations which might produce smog but such regulation ought not to have the effect of eliminating industry at the same time. With these ideas in mind it seems that the court might favor the non-interference with industry where possible. Surely, if the prosecution could show unreasonable, unnecessary or injurious methods of operation, section 24242 would control since 731(a) is not applicable in this situation. However, here we are not concerned with the area in which these factors have been shown.

A logical interpretation of section 24242 seems to be that all uses wherein contaminants are discharged in violation thereof ought to be a misdemeanor except in cases wherein it is established that section 731(a) has been strictly complied with. In other words when reading section 24242, section 731(a) ought to be read as an exception and therefore control in the case where its requisites have been complied with.

A general rule of construction is that where two sections overlap and one construction might obliterate one section, while another construction

might allow each section to operate, that construction allowing each to operate should be adopted. This interpretation does not abolish the effect of section 24242 since the exception of section 731(a) would apply to only one particular area, specifically, when a business is properly zoned and its uses expressly permitted and section 24242 would be fully in force as to the remaining areas which might be shown to be violative of the section. A further argument supporting this interpretation is that since the entire body of law in this state is contained in the codes, the codes can only be regarded and construed together, and within such rule all parts of the statute must be blended, construed, and harmonized together.[26] In *People v. Brown*,[27] where sections from the Civil Code and Health and Safety Code were involved the court said: "All of the cited code provisions should be construed together and harmonized wherever possible." In light of this reasoning the logical interpretation of section 24242 just discussed seems even stronger because in harmonizing and reading these sections (24242 and 731(a)) together, the outcome ought to be that section 24242 should be read with section 731(a) as an exception, when its terms are complied with.

Second, assuming an action is brought under section 24243 charging a misdemeanor and section 731(a) is invoked as a defense. What result?

The prosecution would contend that defendant had discharged such a quantity of air contaminant that it caused a nuisance or annoyance to a considerable number of persons, and that the health or safety and comfort of these people was endangered. Defendant would invoke section 731(a) and contend that its terms had been complied with fully. It appears that a conflict is the result.

As has been shown earlier, section 24243 is similar in terms to Civil Code section 3479 and by analogy can therefore be considered a nuisance statute. With this interpretation this case is in effect a direct prosecution for a nuisance under section 24243.

In defense of this prosecution the defendant invokes section 731(a) which states that expressly permitted uses shall not be "deemed a nuisance without evidence of employment of unnecessary and injurious methods of operation." In other words, there is a conflict as to what a nuisance may be or is. Section 24243 states what a nuisance is and section 731(a) states that certain operations may not be deemed a nuisance.

As was pointed out in the first problem where the prosecution was invoking section 24242, it seems that the blending and harmonizing of the statutes would afford a remedy here and make section 731(a) an implied exception to section 24243 when unnecessary and unreasonable methods of operation were not established. Also, whether the courts favor prevention of smog, or non-interference with business might influence their decision as to which section would control.

[26] People v. Brown, 125 Cal. App. 2d 83, 269 P.2d 918 (1954); *In re* Porterfield, 28 Cal. 2d 91, 168 P.2d 706 (1946); People v. Roland, 134 Cal. App. 675, 26 P.2d 517 (1933).

[27] People v. Brown, 125 Cal. App. 2d 83, 269 P.2d 918 (1954).

Another line of reasoning which might solve the problem is that section 24243 is a general statute while section 731(a) is a specific statute pertaining to one narrow area. In such cases it seems that the specific statute would control the general in which case section 731(a) would be a defense if evidence of unreasonable and unnecessary methods of operation was not introduced. In light of this reasoning, it seems that the logical interpretation of section 24243 would be that section 731(a) is an exception.

It should be noted, however, that when an action to abate a public nuisance is brought in the name of the people of California under sections 24242 and 24243, the second type of action that may be brought, the other being an action for a misdemeanor, section 731(a) is inapplicable in such an action because of the express exception which was added in 1947, namely "except in an action to abate a public nuisance brought in the name of the people of California."

IV. Conclusion

With the smog problem ever increasingly present and legislation on the subject increasing, it seems that something should be done to alleviate the apparent conflict pointed out above. Possibly, the legislature could amend the Health and Safety Code sections to make 731(a) an express exception when the requirements of the section have been fully complied with. Another possibility is to blend and harmonize the sections as has been done with other code sections when invoked in the same case. It seems harmonization of these statutes so as to read an implied exception into the Health and Safety Code would at least be in order to deal reasonably and properly in such cases.