California Code of Civil Procedure Section 731(a): Denial of Private Injunctive Relief from Air Pollution

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Section 731(a) of the California Code of Civil Procedure provides:

Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State 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 or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilizing plants, refineries and other similar establishments whose operation produce offensive odors.\(^1\)

This section has effectively prevented the issuance of injunctions in private actions against nuisance-creating commercial enterprises whose activities are protected by the zoning ordinances of their localities. As long as the enterprise adheres to the provisions of the zoning regulation, the adjoining landowners can, at most, collect damages; no injunction, however, will issue against the offending activity. It is the thesis of this Note that section 731(a) should be repealed. Private injunctive relief would not only serve the interests of the private plaintiff, but also would further the solution of the larger problem of air pollution. Before examining section 731(a) in detail, it is appropriate to discuss briefly the scope and extent of the air pollution problem.

The Effects of Air Pollution and Methods of Control

A. Nature of Air Pollution

Although air pollution has been recognized as a problem for centuries,\(^2\) its adverse effects have recently reached significant proportions

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1. CAL. CODE CIV. PROC. § 731(a).
2. In England, attempts to control air pollution have been made since 1300 and have included penalties of torture and death for polluters. See H. LEWIS, WITH EVERY BREATH YOU TAKE 16-20 (1965) [hereinafter cited as LEWIS].
n the United States. Air pollution is not only damaging to plant and animal life, but it is now producing such far-reaching effects as interference with hemispheric weather patterns. The loss to agriculture as a result of contaminated air has been extensive in recent years and is rapidly increasing; advanced industrial processes are emitting new contaminants which cause more extensive damage to plant life than the pollutants that have been discharged into the atmosphere in the past. The economic loss to property has been estimated to be $11 billion annually, which estimate does not include the social costs and the permanent effects that such losses may have upon this nation.

A great deal of nonagricultural property loss is also attributable to air pollution. Not only does air pollution offend the senses of residents in urban areas, but also it has been found to injure trees and other nonagricultural vegetation, to speed the corrosion of metals and to increase the rate of deterioration of rubber, building stone and other materials. Of course, California has not escaped the ill effects of air pollution. With the rapid technological advancement over the last three decades, California has become a highly industrialized state with many resulting problems. Air pollution in California is no longer confined to industrial areas but instead circulates over the state, inflicting the entire population and habitat with its detrimental effects.

Thus, the present dimensions of air pollution are far-reaching and severe. Moreover, there is reason to believe that the problem will in-
crease in magnitude. The ever-increasing demand for new and more consumer goods, the population explosion and the resultant increase in industrial production will cause the types and quantity of contaminants in the air to increase drastically unless the problem is successfully attacked. A substantial reduction in the amount of pollutants being discharged is technologically feasible, but forcing industry to adopt advanced control devices and methods of production is a difficult task. With the exception of nuisance actions brought by private plaintiffs, virtually all of the recent attempts to deal with industrial air pollution have been in the form of regulatory statutes, ordinances or administrative rulings.

B. California Control and Abatement Procedures

The California Legislature has recognized the problem of air pollution and has provided for its abatement by enacting two regulatory systems. The first was the Air Pollution Control Act of 1947 which provides for the establishment of air pollution control districts. Under this act a county may create an air pollution control district pursuant to a proper resolution by the board of supervisors. After such a resolution, the county board of supervisors then becomes the air pollution control board of the district and is authorized to make orders, rules and regulations to reduce the amount of air contaminants released within the county whenever it determines that the air in the district “is so polluted as to cause any discomfort or property damage at intervals to a substantial number of inhabitants.”

14. *Hearings on Air Pollution*, supra note 3, at 410; See also *Lewis*, supra note 1, at 1-8.
19. *Cal. Health & Safety Code* § 24202 provides: “An air pollution control district shall not transact any business or exercise any of its powers under this chapter until or unless the board of supervisors of the county in which it is situated, by proper resolution, declares at any time hereafter that there is need for an air pollution control district to function in such county.”
20. *Cal. Health & Safety Code* § 24262 provides: “Whenever the air pollution control board finds that the air in the air pollution control district is so polluted as to cause any discomfort or property damage at intervals to a substantial number of in-
The second regulatory scheme enacted to abate air pollution was the Mulford-Carrell Air Resources Act of 1967. Under this act the legislature has created the Air Resources Board to provide "a single state agency for administration, research, establishment of standards and the coordination of air conservation activities carried on within the state." To carry out its function, the board is empowered to establish ambient air quality standards that can vary throughout the state.

In spite of California's attempt to abate pollution, there is a need for still more effective control. The present statutory regulations do not provide an adequate means of controlling pollution in all cases. Governmental regulations are ineffective in many instances because of the inability of regulatory agencies to enforce antipollution statutes and the inflexible nature of the statutory regulation itself. Both the Air Resources Board and the air pollution control districts operate on a low budget, with a lack of trained personnel and with weak enforcement powers. As a result of these administrative deficiencies, inhabitants of the district, the air pollution control board may make and enforce such orders, rules, and regulations as will reduce the amount of air contaminants released within the district.

22. Cal. Health & Safety Code § 39013 provides: "It is imperative to provide a single state agency for administration, research, establishment of standards, and the coordination of air conservation activities carried on within the state."
23. Cal. Health & Safety Code § 39051 provides: "The board shall after holding public hearings: (a) Divide the state into basins to fulfill the purposes of this division not later than January 1, 1969. (b) Adopt standards of ambient air quality for each basin in consideration of the public health, safety and welfare, including but not limited to health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy. These standards may vary from one basin to another. Standards relating to health effects shall be based upon the recommendations of the State Department of Public Health. . . ."
24. In commenting on the many recently filed environmental suits, Professor Joseph L. Sax stated that "'[i]f there's a theme to all these suits, it's an attempt to circumvent relatively ineffective regulatory agencies.'" Conti, Cleaning Up In Court, Wall St. J., March 26, 1970, at 1, col. 6. It has been suggested that much of the recent emphasis on environmental conditions is only rhetoric and that no real effort will be put forth by the government. See, e.g., Kenworthy, Nixon's Pollution Policy, N.Y. Times, Feb. 12, 1970, at 42, col. 1. See also Hagevik, Legislating For Air Quality Management: Reducing Theory to Practice, 33 LAW & CONTEMP. PROB. 369 (1968); [hereinafter cited as Hagevik]; Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 Duke L.J. 1126.
25. See Hagevik, supra note 24, at 369.
27. "The lack of technically trained people to man the State and local air pollution programs presents difficulties in implementing these programs." Id. at 36.
forcement of prescribed standards must be selective and is unlikely to be directed at small, sporadic or nonflagrant violations. The inability to enforce air quality standards can be expected to increase as the number of violations become more numerous and understaffed agencies are forced to control only the most culpable polluters. Also, the lack of enforcement powers in the state agencies continues to impair the efficiency of air pollution control. In a recent progress report on the efficacy of air pollution control statutes, the Environmental Quality Study Council stated:

The Air Resources Board has divided the State into air basins and set air quality standards for the State as a whole; however, both the basins and the air quality standards are meaningless because the Mulford-Carrell Act did not give the Air Resources Board authority to do anything further in meeting the standards.29

The inability of state agencies to abate pollution is further illustrated by the nonexistence of air pollution control districts in many areas of the state.30 Since the establishment of such a district is discretionary with the board of supervisors of each county,31 it can be expected that counties without a responsive board of supervisors will have virtually no pollution abatement procedures. Moreover, the Air Resources Board is presently only a part-time agency32 with power to act solely in situations where the local authorities have failed to take action.33

Even if agencies were able to enforce the existing statutes properly, there would still be instances in which the statute was not adequate to solve the problem. No legislative enactment, especially in a new problem area, can hope to redress all current grievances. There will always be gaps in legislation because of the legislature's inability to foresee all possible situations or because of the inflexibility inherent in the statutes.34 For example, the California statutes exempt agricultural opera-


30. "Many areas of the State have no local air pollution control districts, although air pollution of one form or another is found everywhere, statewide. In those areas without control districts, there is no one to establish or enforce regulations that may be needed locally or required by the State." Id. at 33.

31. CAL. HEALTH & SAFETY CODE § 24202, quoted in note 19 supra.

32. "The State Air Resources Board is, at present, a part-time board. The extent of the air pollution problems make it appear that a full-time board may be desirable." STATE OF CALIFORNIA ENVIRONMENTAL QUALITY STUDY COUNCIL, PROGRESS REPORT 38 (1970).

33. CAL. HEALTH & SAFETY CODE § 39012 provides: "The state authority shall undertake enforcement activities only after it has determined that the local or regional authorities have failed to meet their responsibilities pursuant to the provisions of this division. Such determination shall only be made after a public hearing has been held for that purpose."

34. For example, although the 1967 Air Quality Act authorized the Secretary of
tions from pollution control. As a result, agricultural wastes have been disposed of by burning, which is a cause of air pollution in many areas of the state. Furthermore, the nature of the problem, as in the case of odors, may be difficult to control by statutory standards.

C. Private Injunction Actions as a Supplementary Abatement Procedure

In light of the inability of governmental control schemes to abate air pollution, it is desirable to provide for and to permit any other possible methods of pollution abatement. Consequently, private litigants seeking injunctions to abate pollution should be allowed to supplement antipollution statutes as well as vindicate their private rights. However, it should be remembered that the overall pollution control consequences of private actions are not a substitute for effective governmental regulations. Although private actions can abate air pollution in many instances, only comprehensive legislation can provide an effective solution to the problem.

In California a private party has no standing to enjoin solely public nuisances. With the exception of a few states a private individual has no action for a purely public nuisance. But if the pollution also constitutes a private nuisance because an individual is suffering special damages, then he will have standing to bring an action.

It is clear that the public will benefit by such private litigation:

When a private person thus obtains a standing in court, by reason of his having suffered special damages, although he can only maintain his suit for an injunction on that ground, yet the court grants relief, not solely because the nuisance is private so far as he is concerned, but because it is public, and the relief will benefit the public.

HEW to establish air quality regions and air standards, very little progress has yet been made in establishing adequate regulations. President Nixon acknowledged the problem in his message to Congress on pollution; however, comprehensive legislation seems a long way off. See N.Y. Times, Feb. 11, 1970, at 32, col. 1.

35. CAL. HEALTH & SAFETY CODE § 24360.2.
37. CAL. CIV. CODE § 3493 provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."
38. Recently some states have recognized the advantage of permitting private individuals to bring suits against private as well as public nuisances and have enacted statutes specifically authorizing such suits. E.g., Wis. STAT. ANN. § 280.02 (1958); FLA. STAT. ANN. § 60.05 (1969).
39. CAL. CIV. CODE § 3493, quoted in note 37 supra.
As long as the assertion of private rights seeking injunctive relief does not interfere with public control regulations, it seems clearly desirable to preserve these rights. The issuances of private injunctions can compensate for the inadequacies of government regulation while simultaneously protecting the rights of plaintiffs to the use of their property. First, private injunction actions may be used to abate nuisances caused by types of pollution that simply are not covered by existing statutes.\(^{41}\) Private control of such nuisances is a necessity for the individual landowner as well as the other members of the community who are affected by a polluting industry which is not subject to any governmental control. In this instance, private injunctive relief is the only means by which pollution can be controlled and, even if an injunction is ultimately not granted, the threat of possible success in court will perhaps discourage industries from polluting indiscriminately without making an attempt to control their operation.

Second, private injunction actions may serve to abate pollution when government agencies are not enforcing the statutes effectively. This purpose is particularly compelling in areas where the problem of air pollution has become so severe because of numerous violations that all violators cannot be compelled to comply with the statutory standards. Thus, private suits can provide a means for attacking pollution violations that are ignored by governmental agencies, either because those agencies are too overburdened with work to prosecute all offenders, or because the particular pollutant discharges are considered too insignificant to warrant official attention. For example, there may be an instance of pollution that is relatively minor in comparison with the emissions of major polluters, but which is nevertheless injurious to persons residing in the area affected by the pollution. In such cases, overworked governmental agencies may not consider it appropriate to exercise their authority to abate the nuisance.\(^{42}\) The availability of private injunctive relief in such a case would provide the aggrieved residents with a means of redress for the injuries they suffer. Moreover, such private actions would help to enforce governmental policy and would relieve some of the burden on governmental agencies.\(^{43}\) The lack of diligent enforcement of statutory regulations may also be the result of apathetic agencies which are making no real effort to abate pollution. Private injunctive relief would once again supplement the agencies’ functions in this situation.

Private injunction actions may also serve a significant purpose even

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41. E.g., see note 34 supra.
42. See text accompanying note 28 supra.
43. E.g., see note 38 supra for states which have recognized the advantage of private actions as a supplement to governmental control.
when the antipollution statutes are being enforced. In some cases actions brought by private suits may be preferable to administrative enforcement of inflexible statutory regulations.\textsuperscript{44} One objection to direct statutory regulation is that it results in considerably higher costs than would selective pollution abatement. The Federal Coordinating Committee on the Economic Impact of Pollution Abatement suggests that the cost of achieving a specific air quality standard could increase by 200 to 400 percent if all polluters were forced to comply with the same statutory standard rather than with a selective abatement scheme.\textsuperscript{45} Another writer fears that if a solely regulatory approach were applied to air pollution abatement, an inflexible set of quality standards would become entrenched in the law, thus impeding the adoption of improved antipollution technology in industries.\textsuperscript{46} As the extent of pollution increases, and as technology becomes more advanced, it will be necessary to adjust the standards of industrial pollution permissible on a case-by-case basis. In some instances an industry may be complying with the statutory standards and yet be able to reduce its emissions substantially; in this situation, a court of equity could impose a stricter standard suitable to the particular industry.\textsuperscript{47} The ability of the courts to take all of the circumstances of each particular case into account and to shape the remedies in light of those circumstances leads to the conclusion that the courts are able to provide a more flexible solution to individual problems than is a statutory regulation.\textsuperscript{48}

**Enactment of Section 731(a) of the California Code of Civil Procedure**

**A. California and Private Injunctive Relief**

The common law and a majority of jurisdictions in the United States have recognized the need and provided for private injunctive relief from nuisances since the earlier part of the eighteenth century.\textsuperscript{49}

\textsuperscript{44} See Hagevik, *supra* note 24, at 377.

\textsuperscript{45} *Id.*

\textsuperscript{46} Anderson, *supra* note 4, at 158.

\textsuperscript{47} It would be wishful thinking to expect industries voluntarily to adopt new technology. See Lewis, *supra* note 2, at 252-53.

\textsuperscript{48} Professor Cassell suggests that it may be necessary to permit both private and public nuisance actions if air pollution abatement is to be effective. Cassell, *supra* note 3. Other writers have also reached the conclusion that private litigants have an active role to play in the abatement of air pollution. Jurgensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 Duke L.J. 1126; Miller and Borchers, *Private Lawsuits and Air Pollution*, 56 A.B.A.J. 465 (1970); Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 Ariz. L.R. 107 (1968).

However, most courts limit the availability of private injunctive relief by "balancing the equities" between property owners who have conflicting rights of use of their property. The balancing of equities doctrine takes into account both the relative economic hardship which will result to the parties from the granting or denial of the injunction and the interest of the general public in the continuation of the polluting enterprise. If the defendant's conduct is more beneficial than detrimental to society, the operation generally will not be enjoined. Because society, as well as the interest of the parties, is considered, this policy of the vast majority of courts to balance the equities in a nuisance action produces the most desirable result in terms of achieving the greatest good for the greatest number. Damages, however, will usually be granted to the aggrieved plaintiff who cannot obtain an injunction.

California has also provided for private injunctive relief from nuisances since its earliest years. The California position, however, developed from the statutory provision, enacted in 1872, that land occupants have the right to be free from unreasonable interferences with the use and enjoyment of their property by enjoining, abating and recovering damages for such interferences which constitute nuisances. The California courts interpreted these enactments strictly, affording aggrieved property owners a striking amount of protection from nuisances. Once a nuisance was established, the courts would grant damages and an injunction preventing the continuation of the nuisance without balancing the equities between the parties to the action.

In *Hulbert v. California Portland Cement Co.*, for example, the trial court granted an injunction as well as damages to a relatively small farmer against a large cement plant for the nuisance created by the plant's dust emissions. On appeal, the defendant urged the court to balance the equities, contending that damages were adequate to compensate plaintiff for his loss, but that it was doing everything possible to keep the dust from being discharged and that an injunction would place an undue burden upon the defendant and community since the plant employed over five hundred people. After discussing nu-

50. See text accompanying note 78 infra.
51. Cal. Code Civ. Proc. § 731 provides: "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefore. . . ."
52. Id.
53. 161 Cal. 239, 118 P. 928 (1911).
54. Id. at 242, 118 P. 931.
55. Id. at 246, 118 P. at 931.
merous balancing of equities cases, the Supreme Court of California affirmed the decision, rejecting the defendant's contention. In refusing to apply the balancing of equities doctrine, the court stated:

Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim de minimis non curat lex is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interests must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.

The refusal of the California courts to adopt the balancing of equities doctrine is again exemplified in Judson v. Los Angeles Suburban Gas Co., in which a natural gas factory was enjoined from creating a nuisance. The plant was operating under municipal permission to furnish gas; there was no proof that plaintiff's land was depreciated nor that his health was injuriously affected by the operation of defendant's gasworks. Yet, both damages and an injunction were awarded to the plaintiff, a local resident, for the interference with his comfortable enjoyment of property. On appeal, the supreme court affirmed the decision enjoining the plant from operating in such a manner as to cause smoke or gases to be precipitated upon the property of the plaintiff. The court, in refusing to balance the equities, held that a business may not act to the detriment of others "even when operating under municipal permission or under public obligation to furnish a commodity."

This policy was again enunciated in Vowinckel v. N. Clark & Sons, wherein a large industry operating in a heavy industrial zone was enjoined by a plaintiff living in a residential area adjoining the commercial zone. Citing the Hulbert and Judson cases, the court held that an injunction will not be denied on the basis "that the injury suffered by the defendant will be greater, if the injunction be granted, than the injury suffered by the plaintiff if the injunction be refused." The

59. Id. at 173, 106 P. at 583.
60. 216 Cal. 156, 13 P.2d 733 (1932).
61. Id. at 163, 13 P.2d at 736.
court went on to say that the authorization of an industry by a municipality did not bar an injunction. 62

B. Section 731(a) and its Effect

In 1935 the California Legislature enacted section 731(a) of the California Code of Civil Procedure. 63 As demonstrated by the foregoing cases,

[prior to the addition of that section . . . the law was well 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 complaint was made and defendant was making an effort to operate his business in a careful and efficient manner. 64

The law was not furthering the interest of society to achieve industrial expansion at a time when it was necessary for the revitalization of the American economy. The Great Depression had recently culminated, and the economy was still suffering from its devastating effects. In light of the existing law and economic conditions, it was essential to protect and promote industrial growth. Consequently, the enactment of section 731(a) for the purpose of eliminating "injunctive relief where the business is operated in its appropriate zone and the only showing is an injury and nuisance to the plaintiff in such operation" 65 was an appropriate measure.

The courts have consistently allowed industries to assert section 731 (a) as a defense when private parties seek injunctive relief from nuisances. 66 In the typical case an industry operating in an appropriately zoned area cannot be enjoined even though its operation is creating a nuisance. The restrictive effect that section 731(a) has had upon the availability of private injunctive relief can be demonstrated by contrasting the recent case of Roberts v. Permanente Corporation 67 with

62. Id. at 164, 13 P.2d at 737.
67. 188 Cal. App. 2d 526, 10 Cal. Rptr. 519 (1961).
the *Hulbert* case, decided prior to the enactment of section 731(a). The facts of the two cases are similar. In *Hulbert* an injunction and supplementary damages were granted to a small farmer against a cement plant for the nuisance created from dust settling upon plaintiff's land. *Roberts* also involved a cement plant whose dust emissions had created a nuisance rendering a local resident's home uninhabitable; however, an injunction was denied since section 731(a) was held to be a valid defense. Although the plaintiff was allowed to recover damages on a second count for trespass, he was forced to endure the continuation of the nuisance, the abatement of which had been his primary concern.

Again, in *Kornoff v. Kingsburg Cotton Oil Co.*, damages were awarded to the plaintiff for the unreasonable interference with the use and enjoyment of his property by the operation of defendant's cotton ginning mill, but an injunction was denied. During the ginning season, which lasts approximately 6 months of each year, defendant's mill was emitting into the atmosphere large quantities of fumes, vapors, dust, sediment and other waste materials which settled upon plaintiff's home and person. The court, allowing damages for the trespass and nuisance, observed that "defendant's ginning mill is lawfully operated in a location properly zoned therefor and need not, or may not . . . be abated."

Although section 731(a) has accomplished the legislature's goal of limiting the availability of private injunctive relief, it also prevents pollution abatement by private injunction actions. In 1935, when the statute was passed, the failure of the section to provide for pollution control was insignificant, as air pollution was not a problem. Today, however, the deterioration of the environment has made it clear that legislation which restricts private injunctive relief should be modified or repealed.

There is no longer a need for section 731(a). The industrial complex in California has developed to the degree where a protectionist policy is not necessary. Instead, the social interest in a clean and healthy environment must be protected from the ever-expanding industrial sector. Furthermore, in the past 20 years the California courts have applied the balancing of equities doctrine in nuisance actions.

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69. Initially the trial court denied an injunction as well as damages, but the appellate court reversed the holding as to the latter.
70. 45 Cal. 2d 265, 288 P.2d 507 (1955).
71. *Id.* at 271, 288 P.2d at 511, *citing* CAL. CODE CIV. PROC. § 731(a).
72. See text accompanying notes 2-17 *supra*.
73. *Lomas Portal Civic Club v. American Airlines*, 61 Cal. 2d 582, 394 P.2d 548. 39 Cal. Rptr. 708 (1964): "[A]n injunction will be granted only when such a remedy
This change is significant because the refusal of the courts to balance the equities in cases such as Hulbert,74 Judson,75 and Vowinckel76 was the very reason section 731(a) was enacted. Thus, now that the reason for which section 731(a) was enacted has ceased to exist, so also should the law cease.77 This conclusion is particularly compelling when the balancing of equities doctrine is compared with section 731(a) as a method of adjudicating nuisance actions.

Under the balancing of equities doctrine, the courts determine whether an injunction should be granted by considering the circumstances and exigencies of the case at bar. The court may take into consideration the relative economic hardship which the parties will suffer from the granting or denial of the injunction, the good faith or intentional misconduct of each, and the interest of society in the enterprise.78 Thus, in deciding whether injunctive relief is appropriate, the court will give due weight to all the factors of each case to arrive at an equitable solution. Equitable relief for private litigants is particularly suitable to the present needs of society, because the courts could strike a balance between the conflicting social goals in the abatement of pollution and the enjoyment of the fruits of industrialization. In contrast, section 731(a) only permits the courts to determine whether an industry is complying with zoning ordinances.

Zoning regulations may be enforced only by the governmental entity which has enacted them; air pollution, however, is not confined by such artificial boundaries. California now has a vast industrial complex which is emitting intolerable amounts of pollutants into the atmosphere.79 They are now emitted in such quantity and are so widely distributed that their effects are being felt by the public at large and not merely by property owners adjacent to the polluting industries. Indeed, air pollutants may be carried by the elements to such distances

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74. See text accompanying notes 53-57 supra.
75. See text accompanying notes 58-59 supra.
76. See text accompanying notes 60-62 supra.
77. Cessante ratione legis cessat et ipsa lex. Reason is the soul of the law, when the reason for a law ceases, so should the law itself.
78. Injunctive relief is appropriate when there is a showing of irreparable injury for which there is no other adequate remedy. See generally 2 B. Witkin, CALIFORNIA PROCEDURE, PROVISIONAL REMEDIES §§ 49 (1970); W. Prosser, HANDBOOK OF THE LAW OF TORTS 624-25 (3d ed. 1964).
79. See text accompanying notes 12-17 supra.
as to create nuisances in different municipalities and states. The federal government has recognized the problem of long-distance circulation of air pollutants in the Air Quality Act of 1967 and has provided an administrative procedure for abating interstate pollution. But the procedure available has been criticized as "an outstanding example of wretched draftmanship" by the Chairman of the Missouri Air Conservation Commission because of the lack of effective emission standards and the time-consuming abatement procedures which may require from 3 to 10 years.

It is true that section 731(a) permits a landowner to recover damages from a polluting neighbor. However, "[i]t is evident that to leave property owners to an action in damages would, in many cases, deprive them of any effective remedy whatsoever." Recovery of damages usually will not prevent the continuation of the nuisance; the plaintiff, despite his recovery at law, will continue to suffer inestimable health and property effects. Furthermore, there are technical obstacles inherent in the determination of the extent of liability in nuisance actions. Not only is it difficult to discover the amount of the plaintiff's damages, it is even a greater task to adjudicate the extent of the defendant's liability, for it is often the case that there are several sources of pollution. Even if these obstacles are surmounted, it may not be wise for the plaintiff to attempt to deter a defendant's operation by bringing successive suits. If a court holds that the nuisance is permanent, then any prior litigation will be res judicata in regard to the amount of damages recoverable, and plaintiff will be barred from recovering subsequent damages. Once the landowner has recovered, he has no legal recourse to combat the cumulative effects of pollution. Finally, it will be impossible for everyone adversely affected to recover damages since the pollutants may circulate over vast areas.

80. See generally Green, State Control of Interstate Air Pollution, 33 LAW & CONTEMP. PROB. 315 (1968) [hereinafter cited as Green].
82. The Secretary of HEW is empowered to prescribe air quality standards and "recommended" control techniques for the abatement of such pollution. Green, supra note 80, at 317-19.
83. Id. at 320.
85. Money damages do occasionally deter commercial enterprises from discharging pollutants into the environment, but they do not abate such discharges in most cases, for it may be less expensive for an industry to reimburse complainants than to prevent the discharges. See Juergensmeyer, Control of Air Pollution Through The Assertion of Private Rights, 1967 DUKE L.J. 1126.
87. The aggregate accumulation of pollutants from many sources can have far-
An illustration of the unfortunate social effects of section 731(a) may be found in *Wheeler v. Gregg*, wherein twenty-six plaintiffs sought to enjoin a rock quarry and plant from commencing operations in a residential area. The court denied injunctive relief on the ground that the defendant was operating the rock quarry pursuant to a conditional use permit and was thus protected by section 731(a). Once the court determined that section 731(a) authorized operation of the rock quarry, it did not consider the circumstances which were detrimental to the public.

On appeal, the court affirmed the decision, giving no weight to the plaintiffs' evidence tending to show that the rock quarry was detrimental to the community welfare. The circumstances indicating the undesirability of a rock quarry were that the area had been zoned for residential-agricultural purposes for the previous 32 years that the city planning commission had reaffirmed the zoning classification as a residential area and had continually denied variance applications for permission to mine rocks within the area; and that there were more than 360 homes, two churches, a public school, a public park and a medical clinic in the immediate locality. The evidence strongly suggested that the rock quarry was more detrimental than beneficial to the public and, that it should have been enjoined. Because the action was brought by private plaintiffs, however, section 731(a) barred the court from considering all of the circumstances of the case and thwarted the interest of the general public in pollution control and abatement.

C. Exceptions Under Section 731(a)

1. The "Unnecessary and Injurious" Test

Although section 731(a) provides for two exceptions under which a court of equity may enjoin commercial enterprises, the courts have not interpreted and applied these exceptions to ameliorate the deficiencies inherent in the section. These exceptions, however, do offer to the courts an opportunity to fashion appropriate remedies for aggrieved landowners. The first exception states that a commercial enterprise may be enjoined if the plaintiff proves that the enterprise is employing "unnecessary and injurious" methods of operation.

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89. *Id.* at 356, 203 P.2d at 42-43.
90. *Id.*
91. At least a substantial number of residents and the city planning commission thought so. *Id.* at 359, 203 P.2d at 45.
92. CAL. CODE CIV. PRO. § 731(a).
only two instances have the California courts held that the defendant's activity was "unnecessary and injurious." In Gelfand v. O'Haver, where a music studio was enjoined for disturbing the neighboring residents, the defendant had made no attempt to insulate or diminish the noise in any way. The court, in determining his operation to be "unnecessary and injurious," said that failure to pursue methods customarily employed in a similar business in the vicinity tended to indicate that the methods of operation were "unnecessary and injurious." The court further defined the standards which the defendant must meet by quoting approvingly from the Pennsylvania case of Hannum v. Gruber, wherein it is stated:

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.

This case lends support by analogy to the proposition that a commercial enterprise is operating in an "unnecessary and injurious" manner if it is not using the most efficient control devices available at a reasonable cost. The question not answered, however, is whether a commercial enterprise employing the most efficient antipollution devices available may nevertheless be enjoined because its manner of production is so detrimental to the environment as to outweigh the utility of the product.

The later case of Christopher v. Jones does not provide an answer. The Christopher court applied the Gelfand test to find that a chemical repackaging plant was operating in an unnecessary and injurious manner. The decision was based upon evidence that the plant was leaking chlorine gas onto the plaintiff's land and that a well-maintained plant does not generally leak gas. Although the courts apparently have unlimited discretion in applying the "unnecessary and injurious" test, they have limited the condition to the most culpable operations. In both of the above cases the defendants were making no effort to prevent their operations from creating a nuisance. It is submitted, however, that the courts could broadly interpret the "unnecessary and injurious" clause so as to encompass many industries.

94. 33 Cal. 2d 218, 200 P.2d 790 (1948).
95. Id. at 221, 200 P.2d at 792.
97. Id. at 424, 31 A.2d at 103.
whose emissions are creating nuisances. Such a construction would increase the effectiveness of section 731(a) in controlling pollution and thus diminish, although not eliminate, the undesirable results which occur under the section. To achieve this effect the courts should employ the following test: If the injury to society from the pollution is not justified by the importance and utility of the manufactured product, then the operation should be enjoined. Under this test, an industry may be operating as efficiently as possible and still be enjoined. This standard, although perhaps difficult to apply, would achieve the most equitable results, for the environment would not be thoughtlessly sacrificed upon the altar of productivity, however efficient it may be.

2. The "Offensive Odors" Exception

The second clause which affords opportunities for circumventing the obstacle otherwise posed by section 731(a) excepts a class of commercial enterprises from the protection of the section. The concluding sentence of the section provides that

[n]othing in this act shall be deemed to apply to the regulation of canneries, fertilizing plants, refineries, and other similar establishments whose operations produce offensive odors.99

Industries within this classification are thus subject to the general nuisance law of California and may be privately enjoined.

The class of enterprises which may be included within this exception as characteristically producing "offensive" odors has not been clearly defined. One court has interpreted this exception to include industries other than canneries, fertilizing plants and refineries.100 In People v. A. & M. Castings, Inc.101 the court, in affirming a conviction for polluting the atmosphere, held that a casting plant emanating nauseating odors is within the "similar establishments" clause of section 731(a).102 Because there are no other decisions construing or limiting this clause, the courts are free to interpret this exception liberally so as to deny the protection of section 731(a) to industries. A. & M. Castings, which found a casting plant to be a "similar establishment," may provide authority for judicial expansion of exceptions to section 731(a). Likewise, what constitutes "offensive odors" is a qualitative test which is certainly subject to judicial interpretation and could be

99. California Code of Civil Procedure section 731(a) is quoted in full in the text accompanying note 1 supra.
101. Id.
102. Id. at 883, 316 P.2d at 780.
construed to mean an odor no matter how slight or unannoying. Thus, any large manufacturing industry held to be a "similar establishment," discharging odoriferous pollutants, no matter how inoffensive, could be subject to possible enjoinment under equitable principles.

Conclusion

The conditions under which section 731(a) was enacted have changed drastically. California is now a highly industrialized state with ever-increasing problems of air pollution. Air pollutants emitted by industries now have widespread effects upon the public at large, not merely upon property owners adjacent to the polluting industry. State regulation of the air pollution problem, unfortunately, is not adequate. Until government regulation is able to keep air contamination within tolerable limits, it is desirable to allow private individuals to seek injunctive relief, with the indirect result that the benefits of the injunction will inure to society at large. Section 731(a), however, frustrates this result by permitting courts to consider only whether an industry is operating reasonably in a properly zoned area, according to the zoning regulations enacted by a municipality. Although this approach may be proper with respect to actions brought by residents of the municipality whose zoning laws were enacted in their best interests, this reasoning should not extend beyond the borders of such a restricted legislative jurisdiction.

But for section 731(a), the courts would use the balancing of equities doctrine to determine whether an industry should be enjoined. Under this test the court would consider the relative economic hardships which the parties would suffer from the granting or denial of the injunction, the good faith or intentional misconduct of each and the interest of society in the enterprise. Thus, application of this doctrine would permit the court to evaluate the circumstances of each case; zoning ordinances alone would not be determinative. Section 731(a) should be repealed, thus permitting the courts to apply the balancing of equities doctrine to actions brought to enjoin commercial enterprises operating in appropriately zoned areas.103 The rights of private litigants could be vindicated, and, in the process, the larger problem of air pollution would be proportionately alleviated.

Until such time as the section is repealed, the California courts should

103. Two writers have taken the opposite view, but both articles were written in the 1950's when the effects of air pollution had not reached significant proportions. Perhaps the authors would reach a different conclusion in light of the present environmental conditions. See Steinberg, Rights Under California Law of the Individual Injured by Air Pollution, 27 S. CALIF. L. REV. 405 (1954); Comment, Legislative Limitation on Air Pollution Enforcement, 9 HASTINGS L.J. 191 (1957).
adopt a liberal construction of the exceptions under section 731(a). Polluting industries could be placed either within the "unnecessary and injurious" clause or within the provisions declaring "similar establishments whose operations produce offensive odors" to be an exception to the applicability of the section. As there have been no decisions limiting the scope of either clause, the courts may exercise wide discretion in future cases in which an industry wishes to avail itself of the defense afforded by the section.

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