

to comply with terms of the law; nor because there are no appliances available to prevent the prohibited fumes or smoke.

Because the law can regulate a business to the extent of closing it, it is expedient to familiarize oneself with cases brought to test. Essentially, the earliest cases involving smoke and other pollutants of the air were tried on the "nuisance" clause where there was no specific ordinance prohibiting the action or condition that was obnoxious. One of the earliest cases settled on the "nuisance" clause was *People v. Detroit White Lead Works*, 82 Michigan 471, 46 N.W. 735 (1890). A large paint factory operating in the midst of a populous community was prosecuted for "consistently producing odors, smoke and soot of such noxious character, and to such an extent that they produce headache, nausea, vomiting and other pains and aches injurious to health." The corporation and its officers were convicted of violating a Detroit ordinance prohibiting any factory from allowing any nuisance on the premises within the limits of Detroit, even though the business was carried on in a careful manner and nothing was done that was not a reasonable and necessary incident to the business. The court said, "When, ever such a business becomes a nuisance, it must give way to the rights of the public, and the owners thereof must either devise some means to avoid the nuisance or must remove or cease the business. It may not be continued to the injury of the health of those living in its vicinity." Note that the date was 1890.

On the other hand, contrary to the above ruling, in several cases involving private nuisances the businesses involved were found not guilty of violations because the court said they were using the best-known modern appliances to prevent smoke and fumes, as in *Downs v. Greer Beatty Clay Co.*, 29 Ohio C.C. 328, 58 A.L.R. 1226 (1905); and *Price v. Carey Mfg. Co.*, 310 Pa. 557, 165 A. 849 (1933).

Glucose Refining Co. v. City of Chicago, 138 Fed. 209, 215 (1905) was settled on the basis that smoke and fumes constitute a nuisance, as was *Northwestern Laundry v. Des Moines*, 239 U.S. 486, 60 L. ed. 396, 401 (1915), which is often quoted and used in settling other cases to this day. In its decision on the laundry case the court said, "Nor is there any valid Federal Constitutional objection in the fact that the regulation may require the discontinuance of the use of the property or subject the occupant to large expense in complying with the terms of the law or ordinance."

Many interesting questions have arisen in connection with court cases, several of which are of import to industry:

1. How much damage must be shown by the person or persons bringing suit?
2. Does "coming to the nuisance" influence a decision?
3. Where there is more than one source of pollution, must plaintiff show damage from each one specifically?

In reply to the first, actual damage need not be shown. The "reasonableness" of the ordinance is usually the deciding factor. The courts have been meticulous

in adhering to the true meaning of the word "damage," having ruled against the plaintiff in a number of cases because they held that the resulting condition was not "damage" but rather an "inconvenience." It is interesting to note that in several instances in Missouri, Ohio, and Minnesota, where decisions were made in favor of the industry or business, it was only on the grounds that the city or local body bringing suit did not have the power to do so. More and more in recent years this has been changed by the "enabling legislation" enacted by the states.

With reference to question 2, generally the "right of habitation" takes precedence over the right of industry or trade. Where population growth approached a nuisance, the decisions of the courts were: "... it is the duty of those having the power to put an end to it" (*Mahone v. Autry* [1951] 55 N. Mex. 111, 227, N.W.2d 31) and "... one cannot erect a nuisance upon his land adjoining vacant lands owned by another, and thus measurably control the uses to which his neighbor's land may in the future be subjected" (*City of Rochester v. Charlotte Ropes Co.*).

With reference to question 3, instances in which one source was not responsible for enough pollution to constitute a nuisance, but the total contribution of two or more sources of pollution was a nuisance, were adjudged cases of joint liability. Recent rulings have held those responsible for the various contributions to be "joint tortfeasors" or at least not in position to object if the court divides the damages between them as best it can. In another case (*Permanente Metals Corp. v. Costa*, CCA-9 [1946]) where the court found it was not possible to differentiate between the damage arising from injury attributable to the defendant, and damage which had another origin, the trier of the facts "should be left to make from the evidence the best possible estimate." In *Learned v. Castle*, 78 Cal. 452 (1904), "... a wrongdoer who contributes to a damage cannot escape entirely because his proportional contribution to the result cannot be accurately measured."

B. PRESENT STATUS

An examination of the state statutes shows that all states have the requisite authority to engage in air-pollution control activities or to delegate such authority to one or other political units if these do not already possess such power. Many local governments have the authority to implement air-pollution programs, although in some states it was first necessary to pass "enabling legislation" to strengthen and clarify the authority of the local governments. In California, Kentucky, New Jersey, Pennsylvania, and Wisconsin either some or all counties have been authorized to conduct air-pollution control programs. New York has given the authority to towns (townships).

The study of the past and present legislative data reveals the trend for larger and larger areas to be under one air-pollution control authority. Many state legislative bodies have submitted bills designed to create state-wide air-pollution control programs; to date very few such bills have become law. Los