

**POLLUTION, PROPERTY AND PRICES,**

By J. H. Dales; (University of Toronto Press: Toronto), 1968; 109 pp.

Why should an economist's essay about pollution be reviewed in a law journal? The editor probably thought that it should be reviewed because the preface says that the book deals with "the relationship between law and economics," and that it contains an "economico-legal proposal." If the editor had read more than the preface, it is unlikely that he would have given me the book to review, because the legal content is slight, and it is in no way crucial to the author's thesis. He did not read further, however, so I have another book on my shelf and an obligation to tell a legal audience about it.

Lawyers will find the book compelling—for the same reason that virtually everyone else will as well. It is a profoundly original and highly readable treatment of one of the most perplexing problems posed by 20th century technology: controlling pollution of the environment in which we live. Professor Dales' discussion of this familiar problem is by far the most interesting I have ever read. The approach to pollution control that he proposes is so original, yet so plausible, that whether or not it is ever adopted, it will have to be taken into account by those who must ultimately decide how we will prevent man from destroying his environment.

His thesis is audaciously simple: the fairest and most effective method of controlling pollution would be to establish a kind of stock market in pollution rights. An independent pollution control authority, responsible to the government, would calculate how many tons of various types of pollutant may permissibly be released into the environment annually in a given area, and then would offer an equivalent number of pollution rights for sale to the highest bidders. Purchasers would be municipalities and industries with waste disposal needs, and perhaps even conservation organizations that would buy the rights to prevent their use. Industries, municipalities, etc. that were unable to purchase pollution rights would be required to provide adequate sewage treatment facilities. Pollution rights would be transferable on an open market, much like stocks or bonds. It is Professor Dales' hope that the market would be largely self-regulatory, and would obviate the need for the complex bureaucracy that would be needed to control pollution adequately by more orthodox techniques. Ultimately, as expanding industrialization increased the demand for pollution rights, and their price rose, it would become more economical for industry to treat its wastes than to continue paying for the right to pollute. In essence the scheme proposes to apply quite well-known economic techniques to a type of problem to which they have never before been

applied. Most lawyers would probably disclaim the expertise necessary to make a confident evaluation of the proposal, but I think few would deny that it rings sufficiently true to merit careful study by those who are better qualified to do so.

Professor Dales runs the risk of losing the sympathy of lawyers by inserting a chapter on the law of property rights that is filled with inaccuracies and misconceptions. He begins well, by pointing out that the legal concept of "property" is not concerned with *things* per se, but with the *rights* of people to make uninterrupted use of things in a variety of ways. This approach blurs the distinction between proprietary interests and leasehold and other more limited interests, of course; but as recent writing on property is making more and more clear, the distinction is merely one of degree, and it is not significant to Professor Dales' thesis. Where he begins to go astray is in assuming that property rights are the only rights protected by law. At several points during the discussion he appears to equate "legal rights" with "property rights," and fails to recognize that the law is replete with rights exercisable by the public at large (the right to free passage along a public highway or a navigable stream being obvious examples).

This leads him to the conclusion that unless property rights exist with respect to air and water, the law cannot be expected to offer much protection against pollution. As a result, he has high praise for the English treatment of fishing rights (making them all the subject of private ownership) which have been generally well protected from pollution by the vigilance of their private owners. (What he neglects to mention is that private ownership has also kept the pleasures of sport fishing out of the reach of a large percentage of the population).

Another of Professor Dales' important errors is his assertion that water cannot be the subject of property rights. In terms of the orthodox analysis of legal rights, which equates "property" with ownership in the strict sense, this is correct; but in terms of the broader definition of "property" which he has chosen to use, it is wrong. English water law, which has been inherited by most provinces (and Quebec's law is little different) vests substantial rights over the use of water in the possessors of the bottom and the adjoining bank.

Finally, by combining these errors, Professor Dales arrives at the completely false conclusion that legally "you have as much right to dump your garbage in Lake Ontario as any kid has to swim in it."<sup>1</sup> The law that now exists certainly does not provide a satisfactory method of pollution control, but it is grossly misleading to attribute so great a degree of permissiveness to it.

---

1. P. 67.

Fortunately, Professor Dales' thesis does not depend on the quality of his legal analysis. Most of his chapter on property rights seems irrelevant to me. I suppose he included it in order to accustom his readers to the use of property concepts in his pollution control scheme, but it doesn't seem to me to have been necessary, and it is very likely to cause serious misunderstandings about the state of existing law.

There is one comment that Professor Dales makes to lawyers that I do applaud: ". . . lawyers (should) tear themselves away from private law long enough to do some thinking about public law and put forward some legislative proposals for dealing with social problems."<sup>2</sup> (That's rather unfair, but I'll let it pass) ". . . our lawyers ought to be on a continuous outlook both for new legislative methods and for old ones that become newly practicable, in order to help control the use of our two most important common property resources, air and water."<sup>3</sup> He's right—if lawyers are to be worthy of the designation "social engineers" that Roscoe Pound applied to us, we must take an interest in problems like the ones described in this book, and do something about them.

DALE GIBSON\*

### VERDICT! ELEVEN REVEALING CANADIAN TRIALS,

By John Kettle and Dean Walker; (McGraw-Hill: Toronto), 1968; 289 pp.

This book contains nine chapters. Each one of seven of these chapters gives a brief account of a single Canadian trial. The other two each deal with two trials.

The authors are laymen and they use legal phraseology rather loosely. One does not have to read far into their book to become aware of this fact. For example, on page 5, they make this comment:

"At the bench, presiding over Ford (i.e. the accused who was on trial for murder), the lawyers, and the all-male jury, was Mr. Justice Morand."

After a weeks at law school, any wide-awake student would rephrase this sentence thus:

"On the bench, presiding over the court was Mr. Justice Morand."

The suggestion that a judge presides over lawyers as though they were schoolboys doing their sums is not a flattering one to a practising lawyer, and it seems to miss the point that the lawyer at the bar plays as neces-

---

2. P. 55.

3. P. 63.

\* Professor, Faculty of Law, University of Manitoba.