"THE SAME WIND THAT CARRIES THEM BACK WOULD BRING US THITHER"*

By H. M. Morgan

Lawyers in our industry tend to be looked upon as unnecessary and expensive appendages by our engineering colleagues. However, one of the points I wish to develop tonight is the primacy of law, not only for the mining and petroleum industry but for all economic activity.

The title for my remarks comes from a little storybook written over 200 years ago, in 1759, by the great lexicographer, poet, essayist and moralist, Samuel Johnson.

The storybook was called *The History of Rasselas; Prince of Abysinnia* but the book essentially comprises a series of philosophical and moral reflections. It is very short on plot, but very rich in sagacity and perception.

The two main characters are the prince, Rasselas, an Abyssinian or Ethiopian, and his mentor, a poet and philosopher called Imlac, who could have been a Persian. The prince asks Imlac a question which has perplexed many people since 1759:

> By what means, said the prince, are the Europeans thus powerful? or why, since they can so easily visit Asia and Africa for trade or conquest, cannot the Asiaticks and Africans invade *their* coasts, plant colonies in *their* ports, and give laws to *their* natural princes? The same wind that carries them back would bring us thither.

Imlac, who is Johnson's alter ego, cannot provide a satisfactory answer to the young prince. His response was this:

> They are more powerful, Sir, than we, . . . because they are wiser; knowledge will always predominate over ignorance, as man governs the other animals. But why their knowledge is more than ours, I know not what reason can be given, but the unsearchable will of the Supreme Being.

Rasselas was written 17 years before *The Wealth of Nations* was published. The full title to Adam Smith's great work is *An Inquiry into the Nature and Causes of The Wealth of Nations* in which he laid down the foundations of economics as a disciplined form of intellectural inquiry. Smith was interested in the very clear differences in prosperity which existed between England, Scotland and The Netherlands on the one hand, and the other major European powers, France and Spain on the other, and his consideration of the fundamental causes of this relative prosperity led to his extraordinary intellectual achievement.

Because of our historical perspective we can look back at the period from 1700 onwards and can see, as Adam Smith and Samuel Johnson could not see (because it was happening all around them) the extraordinary changes in the human condition that was then taking place, as a result of the Industrial Revolution. The world would never be the same again because the populations of Britian, North America and The Netherlands were rapidly increasing, but at the same time, per capita income and wealth was also increasing. This had never happened before in the history of mankind.

Why did the Industrial Revolution take place in these small countries, on the fringe of Western Europe, rather than in the great European powers, or more pertinently, in the technologically advanced society of Imperial China, a nation

* Address to AMPLA South Australian Branch, 12 December 1991.

not only with many people but which had long-distance ocean-going junks in the sixteenth century, or in the great Indian Empire of the Moguls?

The question why are some nations rich, and others poor, is still a question of significant contemporary ideological importance. For example, in the lead up to the jumbo-sized environmental jamboree to be held in Rio de Janeiro in June 1992, Prime Minister Mahathir of Malaysia has accused the industrialised nations, the so-called countries of the North, of using scares about greenhouse gases, ozone holes, and forest depletion, to establish a new age of green imperialism. Green imperialism, or eco-imperialism as it is sometimes called, will enable, so he claims, the countries of the North to keep the countries of the South, the so-called Third World, in a state of economic servitude and dependency.

Why did Western Europe, and the British Isles in particular, develop so dramatically in the eighteenth and nineteenth centuries, and why did culturally and technologically advanced societies, such as Imperial China, or the Mogul Empire in India, fail to grow economically at all?

This is a question to which many clever people have devoted much of their lives. And there are, of course, different answers to the question. The explanation which I find completely compelling is that it was in The Netherlands, and the British Isles, where property rights first became reasonably secure. As a consequence of that security, the incentives to work, to save, to invest (given that the rewards of working, saving and investing would not be expropriated by the State) were able to transform the economic condition of every member of those societies.

Why did property rights become secure in these countries? Well, I think the answer is, by accident. The first point to note is that Western Europe was divided up into a number of competing sovereignties. Spain and France were great powers but the rest of Europe was divided into a large number of City States, or Principalities of one kind or another. England and Scotland did not unite until 1700, for example.

Europe was thus characterised by competitive sovereignty, and if conditions, because of rapacity on the part of the ruler, were intolerable in one Principality, then people could often escape, with their human capital if nothing else, and seek to do better in a neighbouring city or Kingdom. England did very well out of refugees from Europe; the Huguenots, the Jews, Dutch Protestants fleeing from Spanish persecution in the sixteenth century, and so on.

The main form of competition between these States was in warfare. That is still true today as we saw in the Middle East in 1990. There were two ingredients to success in war: men and money. Paradoxically, those States which developed secure property rights, in which taxes were not levied on the whim of the sovereign, but through consultative and formal processes of appropriation, were able to spend more money on warfare than those States which disregarded property rights and taxed and expropriated without regard to process of law. England in the sixteenth century was able to pay mercenaries in Europe, and to finance a powerful navy, because the English economy was in much better shape than the economies of the great powers of Spain and France. India and China were centralised, giant Empires. There was no competitive sovereignty there. There were no property rights either. A change in the régime meant the expropriation of all property to be distributed to the supporters of the new régime.

In England, the Stuarts had a lot to do with ensuring that property rights became deeply entrenched both in law and in public opinion. Charles II reneged on his debts to the London bankers in 1672, and bankrupted many people as

a consequence. The Stuarts, from James I to James II — three generations, had a very cavalier attitude to other people's property, and one of the reasons why Cromwell received strong support from much of the aristocracy was because he respected their property.

When James II was kicked out in 1688, in the so-called "Glorious Revolution", the Whig nobles who installed William and Mary were determined to ensure that their property would never again be vulnerable to expropriation by the Crown. They did not care about those people lower down the social scale from themselves, but the principle of no expropriation was impossible to apply to one small group of Whig aristocrats. It had to apply across the board. It was in this way that the legal structure was established which allowed a market economy to develop. Security of property rights, and in the next century, the development of the law of contract under the guidance of that great lawyer William Murray, Lord Mansfield; these were the principles which enabled Britain to defeat Napoleon between 1797 and 1815, and then become the richest economy in the world, the Super Power of the time.

Why should this economic history be of any consequence to lawyers in our mining and petroleum industries? The answer is that our late twentieth century rulers in Australia, on both sides of the political fence, are adopting an attitude to property rights which is reminiscent of the Stuarts, the Bourbons, or the Hapsburgs. Unless we can convince them of the folly of such thinking, then the human capital that has developed the mining and petroleum industry in Australia to a high pitch of international competitiveness will, perforce, go offshore.

The mining and petroleum industries are characterised by large investments and sunk costs. Exploration, once carried out, yields knowledge which is relevant mostly to the area explored. An economic orebody, once discovered, cannot be relocated in the way in which an auto-manufacturing plant, for example, can be. A sovereign who decides to expropriate an attractive orebody can reap very large rewards in the short term. A democratic sovereign, whose life expectancy in office is usually limited to one or two parliamentary terms, is particularly subject to temptation if such expropriation can result in public support and votes at the next election.

It is useful to recall some of the major expropriations of the last 15 years or so. Perhaps the most significant, because it came from the conservative side of politics and established a major precedent, was the decision by the Fraser Government, in 1978, to ban mining on Fraser Island through the simple expedient of refusing to issue export licences for the production of the two licensees, Murphyores and Dillingham. The former company was a Brisbane-based mining company, the latter a major United States corporation.

Technically speaking this act was not a "taking", since the Commonwealth Government did not have power to stop the two companies mining at Fraser Island. It merely refused to allow them to export their product.

The Constitution does contain a clause, modelled on the United States Constitution (s. 51, pl. xxxi), which makes it unlawful for the Commonwealth to acquire property from any State or person except on just terms, and only in respect of those powers under which the Commonwealth can make laws. The two key words, "acquire" and "property" have been very narrowly defined by the High Court, notably in the *Tasmanian Dams Case*,[1] and the result is that

1. *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

it is a very simple matter for the Commonwealth to expropriate private and corporate property, for political reasons, without falling into the ambit of this section. Even worse, in *Tau v. Commonwealth*,[2] the High Court ruled in such a way that expropriation without compensation, by the Commonwealth, is even more a straightforward matter in the Territories than in the States.

State Governments are under no constitutional prohibition as far as expropriation is concerned. The only constraint acting upon State Governments is public opinion. Unpopular industries are therefore likely to get short shrift from State Governments, and mining and petroleum are industries whose popularity, at least among the chattering classes, appears to be inversely proportional to their economic significance.

Environmentalism and Aborigines have been the two great causes which have damaged property rights in Australia since 1975. The Aboriginal Heritage Act [*Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth)], passed as an emergency and interim measure in 1984 with a two-year sunset clause, but repassed in 1986 intact, has the capacity to stop any development project, of any kind, anywhere in Australia, regardless of the property rights of those concerned. The great saga of Coronation Hill and Bula, which ended up with the proclamation by Executive Decree, of the Coronation Hill area as part of the Kakadu National Park, and therefore subject to the Commonwealth National Parks Act [*National Parks and Wildlife Act* 1975], is still being considered by the joint venturers in terms of legal remedies which they might use to seek compensation for the expropriation which they have suffered. Any compensation which they might eventually obtain will only be the result of judicial review. Certainly the Government does not regard this expropriation as of the slightest consequence, morally, legally, or economically.

In December 1991, the New South Wales Government, a coalition government, decided to ignore the protests of Amoco and AGL, and the New South Wales Chamber of Mines, and declare the Nattai area west of Sydney a Wilderness Area under the 1987 *Wilderness Act*. In doing so, the leases held by Amoco and AGL, which have been developed for methane extraction from the large coal reserves of the Sydney basin, become valueless. There is no constitutional requirement for the New South Wales Government to compensate the leaseholders and no suggestion by the Government that it should do so. In enacting this legislation the Greiner Government is following in the footsteps of the Wran Government which expropriated all the privately-owned coal leases in New South Wales without any compensation at all.

One of the key players in this drama has been former Education Minister, Dr Terry Metherall, now an Independent, who precipitated government action by proposing a Nattai National Parks Bill. He was effusive in his praise of present New South Wales Environment Minister, Tim Moore, stating: "I'm Tim Moore's friend, I should give credit to Tim. It takes a lot of guts to keep fighting for what you believe in a government like this."[3]

Prior to this statement, the New South Wales Government had decided to put the issue on hold for three months, in accordance with a request from the New South Wales Trades and Labour Council. At this point Dr Metherall had attacked the leaseholders in very militant terms: "AGL and Amoco's actions

2. *Tau v. Commonwealth* (1969) 119 C.L.R. 564.
3. *Australian*, 6 Dec. 1991.

were an act of international thuggery, and the Government's acquiescence (in the three months moratorium) was an appalling indictment of the Government."

According to Dr Metherall then, the defence of one's property rights becomes an act of international thuggery. These words were uttered by a former conservative Minister for Education.

One of the most blatant acts of government expropriation in recent history took place in 1988 with the enactment of Commonwealth legislation concerning Kakadu Stage II. In 1974, Peko-EZ was granted 14 leases in this area, for 21 years. In 1987, the Commonwealth Government applied to have the area designated by the World Heritage Authority as a World Heritage Listing. Peko-EZ went to the Federal Court to seek a restraining order on the grounds that such a listing would make their leases worthless, since neither exploration nor mining would be permitted if the area were so listed.

The Federal Court granted Peko-EZ's application and the case then went to the High Court which upheld the validity of the Federal Court's decision. On the day the High Court's decision was handed down the Government's lawyers commenced drafting a Bill which when it became an Act, prohibited all exploration and mining in Kakadu II and disallowed compensation to any person by the Commonwealth as a consequence of the enactment.

Between the Bill and Act stages, Peko-EZ succeeded in the Federal Court in having the Cabinet decision to nominate Kakadu II for World Heritage Listing declared void. After the Act was law, a Full Bench of the Federal Court upheld the Commonwealth appeal and World Heritage Listing proceeded.

This legislation was retrospective, it was vindictive, it singled out a sole person for punitive treatment, it was on a par with the Bills of Attainder which the English Parliament used to pass in the days of the Plantagenets, the Tudors and the Stuarts, expropriating the property of fallen Ministers.

That the Courts have upheld this Act is a grim portent for the future of Australia.

Fortunately for the world's economy, and the supply of metals and energy minerals to feed that economy, indifference to property rights is not universal. After a century of poverty and decline, some of the countries of Latin America, for example, have discovered the centrality of property rights to economic growth, and in Chile, in Mexico, and most amazingly of all, in Argentina, the security of title to a mineral property is very well understood. If that Latin American trend continues, and if Dr Metherall and Mr Tim Moore gain in influence and power, then it is a simple prediction to make that, within a generation, the Australian mining industry will, in large proportion, be speaking Spanish and working in Latin America.

Sir Alan Walters, the distinguished monetary economist and former economic adviser to Prime Minister Margaret Thatcher, was in Melbourne in December 1991, discussing Latin America and the excitement there of rapid economic growth, based on security of property rights, flexibility and freedom in labour markets and massive privatisation programmes. Even Argentina, he said, was doing a lot of things right. Soon perhaps, Australia and Argentina will see their roles reversed. Australia could become the world's role model of how to go downhill from a position of great wealth and opportunity. Argentina could become a very rich, dynamic country.

Not only in Latin America do we find a keen understanding amongst political and intellectual élites of the centrality of security of title, the fundamental requirement that governments should not expropriate their citizens' or foreigners'

property rights without full and proper compensation. In Africa, in Eastern Europe, in Russia, the Ukraine and the Slavic States, the experience of Communism or Marxism has led to a full understanding of the consequences of hostility and indifference to property rights. Mining and exploration companies which visit these countries are lectured on these matters by earnest Ministers and officials. Would that we could hear such lectures in Australia.

In the parliaments, in the courts, in the broadsheet press, we find a pervasive indifference to property, and widespread ignorance concerning the centrality which property rights have as the foundation of a growing, confident economy. In mining and petroleum, property rights are even more important than in other industries. A motor car manufacturer can relocate its plant and its human capital easily. Service industries are not capital intensive, and the capital they use is substitutable in any case. Our property, our capital base, is non-substitutable; it cannot be moved to a better political environment; it is always subject to political expropriation. The only defence which we have is political diversification, the ability to wind down operations in one country and expand them in another.

One of the great political defences of property was made by the much neglected and much underrated American President, Calvin Coolidge. In a speech given in New York in 1925 in the Waldorf Astoria, he said:

> The prime element in the value of all property is the knowledge that its peaceful enjoyment will be publicly defended. Without this legal and public defence the value of your tall buildings would shrink to the price of the waterfront of old Carthage, or corner lots in ancient Babylon.

Here we have a succinct summary of the social nature of private property, the importance of its continuing defence, and a powerful image of the collapse of those societies which forget the moral and philosophical foundations which encourage enterprise and sustain prosperity.

Why is this chain of argument important to the petroleum and mining industries? It is a matter of concern that, within our industry, many of us have become so anaesthetised to continuing expropriation that we no longer even recognise it when it occurs. We have become silent accomplices in the destruction of fundamental values; values which are the foundation of our very existence as an internationally competitive industry. Expropriation has now become a routine matter for many government departments. They do not see it as theft, they see it as a lawful exercise of sovereignty, which for them is a matter of day-to-day routine. Because there is no constitutional prohibition on expropriation by the States, nor on expropriation by the Commonwealth within the Territories, our appeal has to be to fundamental moral principles, and to the centrality of property rights as the mainstay of prosperity. Regrettably, we have grown weary of arguing these matters.

We have to pull ourselves together, and recognise what has been going on. Our motto must be "theft is theft is theft", and we must hold to that very firmly, regardless of whatever political colour a particular government engaging in expropriation may be.

Unless we can bring our political leaders, our judges, our editorialists, to the same understanding of the centrality of property rights which Calvin Coolidge had, the Australian mining and petroleum industries will decline. That is certain. AMPLA has a major role to play, first of all within the industry, in this educational process. I do hope that each one of you will take an active part in it.