

The Crabtree Foundation (Australian Chapter)
1978 Oration
Lux Gentium Lex

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Mr President, distinguished guests, gentlemen

It is a great honour for me to deliver this, the third Australian Crabtree Oration. Following, as I do, in the footsteps of those noted scholars, Mr. Donald Charlwood, and our learned President, Mr. Keith Bennetts, I feel totally inadequate for the task.

However, I felt constrained to accept the invitation, or demand, extended at our last meeting, seeing as I did the obvious gap in our knowledge of Crabtree's considerable contribution to the law.

It was said of Frederick William Maitland, by Lord Justice Scrutton, that *Most historians throw a light on dark places; he threw a searchlight on the unknown* (2 Holmes-Laski Letters, 1142) .

As no legal historian to date has turned his attention to Crabtree's impact on the law, I too will tonight seek to turn a searchlight into the unknown.

Another learned Judge, Mr. Justice McNaghten, said of Maitland that he *was not a lawyer at all, but a poet* (ibid.) . Previous Orators have established that Crabtree was an outstanding poet; but he was also an outstanding lawyer.

I will briefly sketch, for those who are unfamiliar with the record of his early years, some of the known facts.

He was born on St. Valentine's Day 1754, of a notable Yorkshire family, and received his early education at the village school at Chipping Sodbury, in the Cotswolds. He rapidly assimilated all that the village schoolmaster had to offer, and went on to Oxford. His penchant for good wine and bad women, which he seems to have carried with him for some time, led to his being sent down in 1773. There followed what was once described as *one of the obscurest decades in Crabtree's long life*. This decade is less obscure today, since Mr. Charlwood's researches set forth in his Oration entitled *Crabtree: The Obscure Decade and After*.

It is known that by 1783 he was working in Orleans with the firm of Crabtree and Hillier, wine shippers. Others have traced his close association with Wordsworth over this period, establishing that much verse attributed to that poet in fact flowed from Crabtree's quill. It is known that he sired a child by Annette Vallon, and that, in appreciation of the literary debt owed to Crabtree, Wordsworth acknowledged paternity of the child. Crabtree thus avoided what would most certainly have been instant dismissal from the firm by its senior partner, his uncle

Oliver, a strong Methodist of the strictest morals.

I shall turn later to other established aspects of his later life, but will first trace something of his education in the law, which occurred in the space of the *Obscure Decade*.

Whilst it seemed obvious that a man, whose contributions to literature and science were so tremendous, must have had a legal background, I was able to confirm many of the details of his work in and for the law through a happy chance. As I do from time to time, in order to develop my knowledge of men of affairs, I was flicking through the pages of *Who's Who 1977* when, at page 538, I came upon an entry: *Crabtree, Jonathon, A Recorder of the Crown Court since 1974*. Jonathon Crabtree had been called to the Bar at Gray's Inn in 1958. His son, Richard John is also a Barrister (see *The Law List 1976*, page 244). It was apparent that there was, at least in this century, a tradition that Crabtrees go to the Bar. Noting that the Recorder's home address was in York, and knowing that Joseph was born in Yorkshire, an association seemed at least probable.

I took the liberty of writing to Jonathon Crabtree, who proved to be a great-great-great-great grandson of Joseph. He was kind enough to provide me with photocopies of various diaries wherein Joseph had recorded some details of his life in the law. My guess is that these were intended for publication. In any event they provided me with the source of what follows, some of which I have been able to confirm through a study of Law Reports and other legal literature.

Like his great-great-great-great grandchild (the Recorder) and his son, Joseph gained his entry into law through Gray's Inn. He was admitted as a Student in 1774, and achieved the rank of Barrister in 1780. One can easily imagine him holding sway at dinners in the Great Hall at Gray's Inn, enjoying fine food and wine under the watchful eyes of famous members of the Inn whose portraits adorn the Hall walls. One can see him enjoying the pleasures of Gray's Inn gardens, known as the Walks. These were laid out by perhaps the most famous alumnus of the Inn, Sir Francis Bacon. Charles Lamb called them *the best gardens in London* and Joseph Addison remarked of them that *to touch on nature's tresses is my blessing*. (Daniell, *The Lawyers*, 1976). One wonders whether, in the light of his known liking for the gentler sex, he, like Samuel Pepys, might on occasion have been distracted from the horticultural beauty of the Walks by the sign of fair maidens on promenade. Pepys noted in his Diary on 17 August 1662 that he was *Very pleased with the sight of a fine lady that I have often seen walking in Gray's Inn Walks*.

It was, and is, a custom at Gray's Inn for learned debates on moot points of the law to take place at, or following, dinners.

It was on one such occasion, noted in the annals of the Inn, that he delivered the definitive paper on Criminal Conversation, the suit by which a husband could obtain damages against his wife's adulterer. Legend has it that a fellow Barrister was heard to comment that it was not the conversation which was criminal, but what happened at its conclusion.

In his days as a Junior at the Bar, he gained a reputation as an outstanding drafter of pleadings. Knowing that Crabtree was of a poetic bent a colleague once taxed him, for a wager,

to turn some lines from *Paradise Lost* into Interrogatories, with this result:

*Was it man's first or some other or what disobedience,
and the fruit of that forbidden or some other and what
tree, whose mortal taste, brought death into this or
some other and what world and all our woe, and if not
why not or how otherwise.*

That he was a leading Junior after only a brief time at the Bar is apparent from the fact that he took silk and became a Bencher at Gray's Inn in 1791, following his sojourn in Orleans. It appears from his diaries that he assisted Erskine to prepare his memorable speech for the defence at the trial of Tom Paine. There are a number of drafts in his own handwriting of the following passage, which hitherto has been attributed to Erskine, setting out definitively the duty of counsel towards those who seek his aid.

I will for ever, at all hazards, assert the dignity, independence, and integrity of the English bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. - From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. -If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

(*R. v. Paine (1792) 22 St. Tr. 357 at 412*).

We must now come forward in point of time to Crabtree's judicial career in England. He was appointed a Judge in 1801. What follows is merely a selection from his many outstanding utterances and decisions as a Judge. His command of the English language was considerable. He it was who penned the well known maxim, that it is *of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*.

In passing it is strange that Lord Chief Justice Hewart in repeating these words ([1924] 1 K.B. 256, 259) failed to acknowledge their derivation.

Crabtree, though a man of logical bent, saw that the law is not necessarily a logical code. In a classic phrase, later taken up by Mr. Justice Holmes, he averred that *The life of the law has not been logic: it has been experience*.

Some of his greatest contributions to jurisprudence arose out of his judgments in cases involving statutory interpretation. While conceding *that words, like men, grow on individuality; their character changing with years and with use*, he was nevertheless unprepared to hold that cream was *meat* within the meaning of section 3 of the Sunday Observance Act, 1677.

His robust attitude to life is reflected in his response to an argument that an indictment charging the common law offence of *exposing the body and person* failed to state the offence with sufficient certainty. The argument was that the indictment should have been for exposing his private parts. *Person*, said Mr. Justice Crabtree, *means 'penis', no more and no less.*

Perhaps his greatest influence has been his effect on the minds of Judges during this century. He was on the Bench at a time when the tort of negligence was not developed. He once heard a case where a man claimed damages from a brewery when he was poisoned by drinking a bottle of ale containing the decomposed remains of a mouse. The defence argued that as he had purchased the bottle not from the brewery but from an inn, there was no contract between the plaintiff and the defendant, and that liability depended on a contractual nexus between the litigants. The majority of the Court upheld this argument; the plaintiff got nothing. Mr. Justice Crabtree dissented in the strongest terms. It was not until nearly a century had passed that his view was accepted.

This was in the great case of *Donoghue v Stevenson* [1932] A.C. 562 (the snail in the bottle case) where the House of Lords, by a majority, held that a Plaintiff in such a case is entitled to recover. Lord Atkin stated, at 580:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Lord Atkin, too, failed to acknowledge the source of his *neighbour* principle.

. One could go on all night describing the light which Crabtree shone into the interstices of the law during his judicial period. Your President's invitation suggested that I could be expected to shed new and exciting light on Crabtree's noble endeavours to bring enlightenment, through the law, to the embryonic nation of Australia. In a sense I have done this, for English law is much the same as Australian law. Judges in Australia tend to follow English decisions, and this is particularly true of a jurist of Crabtree's stature.

But we are aware of the fact that Crabtree lived in Australia for some time after he resigned from the Bench for health reasons. Having visited Australia previously, he was much taken with the idea of spending his declining years in this country, whose climate he somewhat inaccurately recalled to be idyllic.

The precise date of his arrival in the Colony is not clear. It was established by our President in his 1977 Oration that he settled at Lake Charlie-grark, near Lake Boorookpi on the southern fringe of the Little Desert. He did not practise as a Barrister in the Colony, nor did he accept judicial appointment.

Mr. Bennetts has shown that he eked out his judicial pension by writing for various journals and newspapers. Further information as to his activities came to light as a result of correspondence with the Honourable William Frederick Farrar Crabtree, Minister for Lands in N.S.W. since 1976. Although Mr. Crabtree lives now in Kogarah, in New South Wales, he told me that his family came originally from Lake Charlie-grark. The connection is thus obvious.

The Minister informed me that Crabtree refused appointment to the office of

Commissioner of the Court of Requests, which came to be occupied by Sir Roger Therry, who incidentally, bore a strong resemblance to Crabtree. (see his portrait in the Mitchell Library, Sydney, reproduced in Therry's *Reminiscence of Thirty Years Residence in New South Wales and Victoria*). Given that Mr. Charlwood has shown that Crabtree had at one point used the name Perry, I for a time considered the possibility that Crabtree and Therry were one and the same person. It is clear, however, that Therry came from Cork, in Ireland, and that he lived beyond 1854, the authenticated date of Crabtree's death.

Whilst Crabtree, then, did not actively engage in the administration of Justice in the Colony, his service to the public did not end with his arrival at Lake Charlie-grark. He was called on to sit on a number of Boards of Inquiry, the subject matters of which show that history does indeed repeat itself.

His first Board of Inquiry concerned the deaths of several workmen who were erecting a stringybark bridge over the Booroopki river (*Booroopki* is Aboriginal for *entry to the West* or *Westgate*). He also inquired and reported into allegations that Irish immigrants were growing opium poppies near Griffith, in central New South Wales. He concluded that these allegations were *a slur upon the good name of honest squatters, who, though of convict origin, are now pillars of society who attend Church on Sundays and Saints Days*. He also presided over Inquiries into rioting at Melbourne Gaol, and into allegations that a *special branch* of the militia were preparing dossiers on respectable gentlemen of the Colony.

Whether his efforts in untangling some of the teething troubles of the young country were recognised in the form of Decoration from the Crown is unclear. It is clear that his great contribution to the development of the law was recognised at Colonial level. The pages of the Port Phillip Gazette record that he assisted the first resident Judge at Port Phillip, John Walpole Willis, in laying the foundation stone of the new Supreme Court building at the North West corner of La Trobe and Russell Streets (where the City Court now stands) on 25 July 1843.

Despite the title of this Oration I lack facility in foreign tongues. I will not, therefore conclude, as scine may have expected a lawyer to do, in the language of Rome. (Incidentally Crabtree, like others, abhorred the term *quasi*).

I end this Oration with these words from Longfellow's *A Psalm of Life*, in the sincere hope that the works of this great man, whom we honour tonight, will inspire us all in our daily lives.

*Lives of great men all remind us
We can make our lives sublime,
And, departing, leave behind us,
Footprints on the sands of time.*