

THE CRABTREE FOUNDATION (AUSTRALIAN CHAPTER)

41ST ANNUAL ORATION

Joseph Crabtree and his Encounters with Antipodean Pettifoggers

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Presented at the Savage Club, Melbourne, on 11 February, 2015

President Kate, Living Burden, Chairman Paul, Elders, Scholars and guests.

It is both a delight and a privilege to be invited to give the Annual Oration this year, and especially so since this is the 41st. occasion on which a Crabtree Oration has been delivered in Australia. Forty-One years is a long time in any one's language and, when I look around this room, many of us appear to have experienced some time ago, that particular anniversary!

First, let me acknowledge last year's Orator, President Kate. Kate's oration was an excellent discourse, thoroughly researched and amusingly delivered. Professor Burrige is a renowned scholar of linguistics and an expert on matters of language. I was particularly intrigued by her advice that there was at one time a Crabtree Dictionary, but of which unfortunately there are no surviving copies, So, we are left wondering and it is on that theme, one of wonderment, that my contribution tonight will focus. Not of missing dictionaries, but on excitement and adventure on the other side of the world. Tonight is all about Crabtree Down-Under.

When one approaches the preparation of a Crabtree oration, they say it is advisable to read a sampling of previous orations to obtain, so to speak, a flavour of the thematic offerings.

Well, I did do just that, that is, I looked at a 'sampling'. If one attempted to look at the lot, there are over one hundred orations, a task I suggest beyond the keenest scholar. So, I focussed on the Australian Chapter and read a good sampling of orations past, by scholars, a number of whom are in the Club tonight.

First up, I acknowledge Elder Ian Cummins, who taught me all I know or can remember about Russian history when I was an undergraduate at Monash some few years ago, at a time when it was a seething hotbed of anti-establishmentarianism. Ian survived the faculty purges of that era to deliver his oration in 2007 which focussed on the collapse of Communism and Crabtree's part in this, albeit on the side of the Whites or Monarchists. I also recall Crabtree, according to Ian, had an interest in the Czarina or Empress, or maybe both, something which might be viewed today as inappropriate, or at least politically incorrect.

Still, a great oration and one which resonates with me today, even though, unfortunately, I was an apology on that particular evening.

Which takes me to another past oration, that of Elder Stephen Downes, again an oration with a historical bent. Stephen was the Orator in 2003 in which he described himself as a 'hard-bitten reporter'.

Stephen opened his 2003 oration with a bald assertion. He claimed that at the conclusion of the Battle for Stalingrad in 1942, German Field Marshal Von Paulus exclaimed to Adolf Hitler 'Have I got news for

you' and went on to advise the Fuhrer that the Russians had taken back Stalingrad. Well, as Elder Cummins might be able to confirm, such a meeting with Hitler was most unlikely since Paulus was a captured POW in Stalingrad, thousands of kilometres from Berlin and therefore in no position to personally exclaim anything to Hitler! It just goes to show that you should not take anything for granted, when listening to Crabtree orations, especially mine.

Without any further ado, Ladies and Gentlemen, it is timely that I move to a consideration and revelation of the new evidence available which makes it clear that Joseph Crabtree was very much active in colonial Australia, and especially in our very own Melbourne.

Chairman Paul is one of the relative few Australian orators, along with Elder Greg O'Brien, to have researched and verified Crabtree presence and contribution in and about this Nation's early colonial days. My work over the last year has built on their original contributions and, I am delighted to say, it reveals startling new material about Joseph Crabtree down under.

The more one digs into Crabtree history and exploits, the more one appreciates just what a fascinating person Joseph Crabtree was.

Variouly described as a poet, a polymath and sometime banker and brewer, he is said to have met and influenced William Wordsworth, Samuel Johnson, William Blake, Richard Nixon and even Alfred Lord Tennyson. His contributions to philosophy, science, and many other disciplines, placed him in a pivotal position in the history of the Age of Enlightenment.

Some say he even foresaw the invention of the World Wide Web, but failed to capitalise on it because he could not recall his log on password at the crucial moment. Whatever the truth, a remarkable man.

Now, Elders O'Brien and Rodan did canvas Crabtree and Australian connections but, notwithstanding the high quality and originality of their scholarship, I respectfully submit that both appear to have missed some key facts.

Now, the key facts:

First, Crabtree was Scottish, not English, a fact first revealed by Elder Ian Marshall, in his 2005 oration. Yes, it is all there but most subsequent orators including Rodan and O'Brien seem to have missed that point.

Second, Crabtree's various professional vocations included a career as a lawyer and qualifications as an advocate at the Scottish Bar, having been called to the Scots Bar in Edinburgh in November 1831. The lawyers amongst us tonight will appreciate the significance of this. Lawyers always appreciate significance.

Now I know any naysayers here tonight will want to point out that Crabtree was born in 1754 and this means that he must have been 77 years of age when he became a lawyer in Edinburgh in 1831. Well, nothing wrong with that because Crabtree was again at the forefront of new ideas. He was in fact the first Scot to graduate as a mature age student, having received many course credits for prior training and life experience generally. Thousands of university students today are very

grateful for Crabtree having blazed a path to accelerated course progression. And being able to graduate in double quick time.

Those of you that are sceptical about this are clearly exhibiting ageist prejudices, and should be thoroughly ashamed of yourselves!

However, the third and most relevant point I want to make tonight is that, from Scotland, Crabtree took his legal skills to the new Australian colonies, specifically the Port Phillip District where he made quite an impact, not all for the good, unfortunately. More of that later.

Back to Edinburgh, Crabtree arrived at the Scottish Bar just as significant political reform was underway. In particular, the passage of the *Scottish Reform Act 1832* marked the greater integration of Scotland into the United Kingdom, with London becoming the focus of power and society. This posed a problem for the newly graduated Crabtree because the number of cases in the Scottish courts was dropping, therefore fewer briefs and fewer cases to advocate. Very much a case of a lawyer with too much time on his hands, especially so when his briefs were down.

In those days, what did Scottish lawyers with too much time on their hands, do? Well, they tried out for politics and that is just what Crabtree did.

In 1837, Crabtree threw himself into local affairs in Edinburgh with an enthusiasm marked by prominent but short lived interventions. It was a style that would soon be repeated in the Port Phillip colony, as we will see. Politically, it was an interesting time. The *Scottish Reform Act 1832*, mirroring the electoral reforms of the English Parliament of the

same year, had widened the franchise and increased the number of Scottish MPs.

Crabtree seriously considered standing for Leith Burgh, a less than rotten borough but eventually withdrew in favour of the sitting member. By all accounts the political factions were operating even in those times and the sitting member, a Sir John Archibald Murray MP, got the pre-selection nod.¹ Disappointing for Crabtree, but at least he made a mark at the time through his articulate espousing of a range of liberal democratic ideas.

When one reads newspaper reports of the time, we find the honourable gentleman was in favour of repeal of the Corn Laws (and how many Australian politicians would be game enough to advocate that!), Crabtree also argued for the abolition of flogging in the army and navy (curiously he said nothing about applicability of flogging in the RAF and presumably this may have led to the outstanding performance of the RAF in the Battle of Britain a century later. Those Spitfire pilots were certainly flogged hard). Altogether a modern man was Crabtree.

Indeed, as Elder Schnaider told us in his 2009 oration, Crabtree was a natural for membership of the Reform Club in London, a pre-requisite for which was pledged support for the Great *Reform Act* of 1832. By 1840 Crabtree was visiting London regularly and was very much a member of that famous Club in Pall Mall.²

¹ The sitting member for Leith Burghs for the period 1832-1839 was (later Sir) John Archibald Murray (1779-1859). He was also the Lord Advocate (1835-39), a senior Scottish judge.

² At one stage the club was home to the liberal party of the United Kingdom. For further background on the Reform Club see <http://www.reformclub.com/> (14 December, 2014).

But, a problem was emerging. Crabtree had no obvious independent means and had started to incur debts. Something which could embarrass one at the Club, if remedial action was not taken.

The answer, in 1841, was to go adventuring in Australia, the colony of Port Phillip to be precise. Where the idea came from is unknown, although the newspapers of the time carried regular advertisements for a bounty system offering free passage to Port Phillip for intending free emigrants.³ The colony had only been established five years earlier.

However, more persuasive for a qualified and bored Scottish barrister may have been the knowledge of the frenzy of speculation in land purchases that was then occurring in Port Phillip, and the quick money there was to be made in the colony.⁴

We don't know for sure his motives, but certainly we do know from a range of documentary sources that Crabtree set sail on the Tasmania on 14 September 1841 to make his mark on the fledgling colony of Port Phillip. A four month sea journey, on which it may well have been that a fellow companion was Henry Dendy⁵, who was *en route* to take up his special survey of what is now said to be the prosperous suburb of Brighton.⁶ I live in Brighton, and I am not so convinced about the prosperity, but this oration is not about me!

³ See for example: *The Standard*, 'Emigration to Australia – Free', 6 July, 1839. In the period 1840-42 the bounty system brought just over 11,500 assisted migrants to Port Phillip from the United Kingdom. Another 2000 came out without assistance. See: Alan Shaw, *A History of the Port Phillip District: Victoria before Separation*, 1996, 146 and 'Port Phillip', *The Standard*, 21 April, 1840.

⁴ Another lawyer to make the trip to Port Phillip was John William Thurlow. He was in fact the second lawyer to arrive (1839). Thurlow came from a distinguished and interesting English family. He could proudly claim many persons of the cloth as family such as the Bishop of Durham (1737-1791): Bishop Thurlow died of bowel cancer and has achieved medical recognition as his rectum is preserved and on display in the Hunterian Museum in London. See: [http://en.wikipedia.org/wiki/Thomas_Thurlow_\(bishop\)](http://en.wikipedia.org/wiki/Thomas_Thurlow_(bishop)) (29 December, 2014).

⁵ Weston Bate, 'Dendy, Henry (1800-1881)', Supplementary Volume, *ADB*, 2005.

⁶ For a comprehensive history of the founding of Brighton see: Weston Bate, *A History of Brighton*, 1963.

No sooner was Crabtree in the colony than things happened. He was admitted as one of the first barristers to the Supreme Court at Melbourne by the first Resident Supreme Court judge in Port Phillip, the irascible Judge Willis.⁷ Interestingly, Crabtree's admission was moved by another Scot, the Crown Prosecutor, James Crook. Note that surname, Crook. If applied colloquially, it could well be taken as a synonym for the standard and calibre of legal practitioners in the Colony at that time. Things were a bit rough and ready.

But first some background.

The early years of the Port Phillip Colony and those of New South Wales generally, were characterised by a legal system which was distinctive for its lack of system. The first lawyers to arrive in 1788 were convicts.⁸ It took a further four decades before non-convicts or trained lawyer free settlers who actually chose to come to Port Phillip, began to arrive. The reputation of the profession was poor; too many lawyers were seen as 'Pettifoggers'.⁹

A 'pettifogger' was a universal derogatory descriptor for an inferior legal practitioner, especially one who dealt with petty cases or employed dubious practices.¹⁰ Of course today the term 'pettifogger' does not resonate because of superior legal standards, as those of you in the profession will be quick to point out.

⁷ See: Harold Behan, *Mr Justice J.W. Willis – First Resident Judge in Port Phillip*, 1979 and Bryan Keon-Cohen, B, 'John Walpole Willis: First Resident Judge in Victoria', (1971-72) 8 *Melb. ULR* 703.

⁸ For example: Michael Robinson, George Crossley, Edward Eager, George Chartres and William Fleming are the convict lawyer names that resonate in the early legal history of the NSW colony. See generally: John Bennett, *A History of Solicitors in New South Wales*, 1984.

⁹ See generally: Simon Smith, *Barristers Solicitors Pettifoggers; profiles in Australian colonial legal history*, 2014.

¹⁰ See press coverage such as 'LAW ABUSES, SHARKING PETTIFOGGERS', *The Australian*, 26 November, 1830.

Negative community attitudes in what was then, don't forget, a relatively tiny community of 5000 souls were regularly fuelled by examples of greedy lawyer behaviour and lawyers with more interest in money and women than their clients. Indeed, in 1839, the Port Phillip Patriot editorialised that 'gentlemen of the law seem to create litigation where none before existed'.¹¹ Of course, things are very different today.

In welcoming Crabtree to the Port Phillip Bar in 1842, Judge Willis gave a prophetic warning. He hoped no gentlemen of the Port Phillip Bar would enter into any sort of business or trade which might subject him to the bankruptcy laws.

I might say at this point that Judge Willis himself was no saint. A flawed figure, he had already been moved from the Bench in Upper Canada and transferred to Australia after difficulties in British Guiana.¹² Almost from the start he was quarrelling with most members of the Bar, court officials, the press, the clergy and most of the leading citizens of the settlement.

Willis even refused to hear a solicitor who wore a moustache, he rebuked a barrister who owned a stallion and advertised its siring services and, according to that early Melbourne identity, Garryowen, was ever in a state of hostility towards someone.¹³

It was into this colourful environment that Joseph Crabtree, barrister at law, sought to carve out a legal livelihood in the growing colony.

¹¹ Editorial, *Port Philip Patriot*, 16 November 1839.

¹² See footnote 7 above.

¹³ Edmund Finn, *The Chronicles of Early Melbourne 1835 to 1852 Historical, Anecdotal and Personal by Garryowen*, 1888, 870.

Although records are regrettably quite scant, it appears Crabtree's practice in the new jurisdiction was a busy one.

Propitiously, his very first case, the day following his admission resulted in a win. He successfully defended a Charles Jones on plagiarism charges. If only Crabtree had lived to defend others of more recent times on similar charges. Melbourne's eastern suburbs university might indeed have a different leadership history.

Over the next twelve months Crabtree's success was mixed. His legal work reflected what was, of course, a very male dominated colonial environment. Assaults on police officers, larceny, robbery and murder. How much of this work generated an income, given this is all pre the legal aid era, is unsure. However, his forays into land speculation, or what we would call today high density lifestyle living, saw Crabtree investing hundreds of pounds into projects which more often than not failed. The market had crashed already, a fact that Crabtree realised after the fact, as lawyers would say.¹⁴

With the wisdom of hindsight, it is now clear to us that Crabtree was having to draw on his private and diminishing capital, the Edinburgh experience over again. The bankruptcy spectre loomed, once again.

Still, the pioneering nature of the colonial environment did place Crabtree at the centre of a number of legal 'firsts' which is where we are accustomed to finding Crabtree in all his exploits. Upfront, setting the pace, and taking risks.

¹⁴ For further insight into the Port Phillip financial crash of the 1840s see: Janine Rizzetti, 'Sifting to the bottom of Financial Impropriety: Judge Willis and insolvency in Port Phillip 1841-3', (2009) 2 *Historical and European Studies Journal* 97.

In 1841, Crabtree appeared in the first ever 'breach of promise' case. Remember those? All gone today in our equal opportunity society. His opponent appears to have been Redmond Barry¹⁵, although, the records being so sketchy, this is hard to verify. In any event Crabtree and his client lost and Judge Willis ordered his client to pay one hundred pounds. Round one to Judge Willis.

Then, six months later Crabtree got caught up in what became a long running litigation involving George Arden¹⁶, Editor of the Port Phillip Gazette and Judge Willis himself. This litigation led to Arden being sentenced to 12 months in jail and fined three hundred pounds for contempt of court. This case caused outrage in Melbourne being seen as an assault by the judiciary on a free press. The case was the catalyst for what were moves leading ultimately to Judge Willis being removed from the bench, but I am getting ahead of myself.

As pro bono counsel for Arden (and note Crabtree's generosity of spirit and commitment to liberal values), Crabtree succeeded in persuading Arden to apologise and having Judge Willis order his release.

Another six months passes and they are at it again. Crabtree appears in the first criminal libel trial in the colony, with his client yet again being George Arden. Again, he loses. Later that month, Crabtree is defence counsel in another criminal libel case. Another loss. No good for the bank balance and certainly no good for relationships with Judge Willis.

¹⁵ For a comprehensive study of this formidable Melbourne pioneer see: Anne Galbally, *Redmond Barry*, 1995.

¹⁶ P. Brown, 'Arden, George (1820-1854)', 1 *ADB*, 1966.

In fact, Crabtree would never again appear in a Melbourne Court. His relations with Judge Willis were beyond repair and appeared to put an end to any prospect of a successful legal practice in Melbourne.

Again Ladies and Gentlemen, an all too familiar situation of a man of honour and principle being undone because of his sturdy commitment to the rule of law and fundamental civil liberties. And, I suspect, sailing a little too close to the wind in the property speculation game.

But, that is not the end of the Crabtree story in the antipodes.

Clearly, Crabtree did much good work in Melbourne but, like many others, was caught up in the economic depression then occurring and was being pressed by creditors.

He looked for a new start. Rebuilding his fortunes in remote Melbourne seemed too much of a long haul, especially for someone who had experienced the good life in London and Edinburgh. Crabtree's restless nature suggests the Melbourne stay was only ever intended as a short stay. It had been fun for 15 months, but what was the point? Better to move on to the next adventure, and adventure is something we all know Crabtree thrived on.

Unknown to most at the time when the legal proceedings were underway, was that Crabtree had made a secret journey to Sydney in October 1842 to take delivery of a purchase he had made. The purchase was a brigantine, yes a ship, called the 'Warlock', which had been recently seized by British authorities after having been found

engaged in the illegal slave trade.¹⁷ Where Crabtree found the funds to purchase the ship and have it comfortably fitted out in what Crabtree called 'first class style', is unknown, but if anyone is able to access funds quickly it is probably lawyers.

Indeed, some say that Crabtree had already tapped into Middle Eastern fund sources in search of petro dollars or 'funny money'. If he had in fact achieved this, then he was almost 100 years ahead of Rex Connor, Jim Cairns and the 1975 loans affair.¹⁸

Whatever, the purchase of the Warlock indicates to us that Crabtree was planning the next adventure in what social media commentators and celebrities are nowadays wont to call 'life's journey'.

On 13 January 1843, Crabtree secretly embarked on the Warlock from Westernport Bay and sailed for Guam, bound for China and for tea.

By late 1843, Crabtree and the Warlock were in Hong Kong.¹⁹ The island had been ceded to Britain the previous year and Crabtree was one of the first Englishmen, sorry, Scots, to do business there under the Union Jack.

It was from the colony of Hong Kong that Crabtree assembled his next, and by most accounts, his last adventure. Believing he had much to offer the people of the Far East, as the region was called, and even more to offer himself of a pecuniary nature, Crabtree set out to colonise

¹⁷ *Sydney Morning Herald*, 9 November, 1842. The *Warlock* had been seized by British authorities in 1841 having been found engaged in trading slaves. It is not known how it made its way to Sydney. The *Slavery Abolition Act 1834* (UK) had abolished slavery through the British Empire. See further *The Times*, 16 October, 1841.

¹⁸ For a study of the life of Dr Jim Cairns see: Paul Strangio, Paul, *Keeper of the Faith*, 2002.

¹⁹ For an early history of Hong Kong see Ernest Eitel, *History of Hong Kong*, 1895.

the east Coast of Borneo, hoping to emulate the other English rajahs carving out kingdoms for themselves in Sarawak and nearby regions.

He set sail in November 1843, bound for East Borneo. His ship was heavily armed with 40 crew, all keen to be part of this adventure. By early 1844 the expedition had sailed up the Mahkam River, the most important river in southeast Borneo and into the state ruled by the Sultan of Kutei. Hindsight now tells us that this move was a big mistake!

The warrior like people of the region did not take kindly to strangers, especially white people dressed in funny clothes. While Crabtree and his companions attempted to engage in a series of trade-focussed diplomatic exchanges with the Sultan, or what economists today would call free trade agreements, Crabtree realised too late that the Sultan in fact was not calling the shots. The people in effective control, as our real estate agents now like to say, were the Bugis warriors, whom Crabtree described in his ship's log as the most determinedly bloodthirsty and the greatest haters of Europeans.²⁰

One is left with the impression that Crabtree did leave all this a little late to find out, nonetheless on 16 February 1844 he attempted a retreat downstream. For the next two days a violent battle with guns and spears raged as the Warlock fought its way down river towards the open sea. During this battle Crabtree led by example and was in the thick of the fighting, standing on the bow of the Warlock. Shades of Lord Nelson here, even to the final denouement of these seemingly tragic events.

²⁰ For an interesting account of another English adventurer who ventured into Bugis territory in the 19th C see: B. Pearn, 'Erskine Murray's fatal adventure in Borneo, 1843-44', (1969) 7 *Indonesia*, 20.

Crabtree took a shot in the left breast and by most accounts was mortally wounded. We were all taught at school of those final immortal words of Admiral Horatio Nelson as he lay dying on the forecastle of his flagship the Victory, that 'England expects every man will do his duty' although other contemporary accounts suggest he may have actually said 'Kiss me Hardy'.

Whatever the truth of Nelson's final words, we think we know Crabtree's final words. As he stumbled and fell from the impact of the shot, Crabtree shouted out 'O my God'. Not quite the lofty heights of Admiral Nelson, but Crabtree's phrase 'O my God' has survived down the decades since Crabtree first uttered them, and have actually passed into everyday use by our teenagers today, shortened of course in text form to 'OMG' Another linguistic legacy courtesy of Joseph Crabtree, as President Kate will no doubt appreciate.

Ladies and gentlemen, there are some conclusions we can draw from Crabtree's life and his many experiences, particularly from those I have recounted tonight.

A key theme is timing, or rather mistiming.

He experienced disappointment, and lost the possibility of a career in public life, when the sitting member declined to stand aside, or as we would say today Crabtree just didn't have the numbers.

His arrival in Port Phillip was just as untimely. He arrived too late to benefit from the early land sale bonanza and made some injudicious investments and he had the further misfortune to come up against the

only English judge who would be dismissed twice from judicial office. Then the ultimate mistime; the deadly Borneo adventure.

But, Crabtree's life was a life replete with voyages through fascinating moments of history, to which he contributed positively and for the good. His dabble in politics put him in the vanguard of new liberal ideas, his tussles with Judge Willis led ultimately to that gentlemen's disgrace. Crabtree was the first and finest exponent and advocate in Port Phillip of a free press and civil liberties. And of course, he was in Hong Kong at the start of what would be 100 glorious years of imperial rule in that colony! A pioneering legacy and not a bad life when we look back on it.

But, was Crabtree's demise really at the bowsprit of an old brigantine, mowed down by indigenous peoples concerned about their own native title land rights, or did he in fact survive?

Well, I put it to you tonight that the best evidence that Crabtree in fact survived his Borneo experiences and returned to prosperity and a comfortable retirement in Melbourne until his passing in 1854, a full 100 years of age and possibly Melbourne's first European centenarian, is all around us now. Yes, look around you, above and behind you.

We certainly know that Crabtree enjoyed Club life and all it had to offer. He was always one to show his appreciation and, you will observe the many native (if I can use that word these days) artefacts, on display here at the Savage Club. Well, the apocryphal legend around here is that Crabtree brought all these back from Borneo and donated them to his new Club, the Savage Club. Not quite proof positive but probably more than enough for the average person. That

old legal maxim 'on the balance of probabilities' applies at this point, I suggest.

Certainly the Club's website makes no mention of any of this, or of Crabtree as a generous donor. Notwithstanding this, I feel the Savage Club sure has a Crabtree feel about it. I leave it to you to judge.

Thank you.

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