

SYD1819

SYDNEY GAZETTE, 10/04/1819

Court of Criminal Jurisdiction

Wylde J.A., 7 April 1819

This was a day of serious trial for the murder of **WILLIAM COSGROVE**, a settlor and district constable upon the Banks of the South Creek, on the first of the present month; by the discharge of the contents of a musket loaded with slugs into his body, of which wounds he died the following day. The prisoners were **TIMOTHY BUCKLEY** by whom the gun was fired; **DAVID BROWN**, and **TIMOTHY FORD**, all of whom had been in the Colony but six of seven months, and prisoners in the immediate employ of Government, and who unhappily had not renounced those propensities which sooner or later were to lead them to an unhappy end.

The first witness called was **THOMAS COSGROVE**, brother of the deceased, whose testimony was conclusive of the fact. The witness stated, that his murdered brother was a district constable at the South Creek; and that he having seen, and believing the three prisoners at the bar to be bushrangers, requested him, the witness, to joining in pursuit of the suspected persons; all of which was readily complied with, and a pursuit accordingly commenced. This was about one in the afternoon; the deceased went up to the three men (the prisoners at the bar), and found then in conversation with two young men who were brothers of the name of York, one of them a son in law of the deceased. The deceased called to the prisoners at the bar, declaring his willingness to point them out the road to the place they were enquiring for, namely the "Five mile Farm;" but appearing conscious that they were armed bushrangers, he hesitated not to rescue their giving themselves up to him, he being a district constable. This evidence further proved that the prisoners at the bar, were in conversation with two Yorks for many minutes prior to the pursuit which was proposed and persevered in by all the persons who joined in it by the manly boldness of the district constable, who, although a man in good circumstances, had reconciled the apprehension of danger with his manifest line of duty.

This witness, who seemed in his evidence to entertain no sort of feeling that could be construed into a vindictive sentiment, went further on to state, that one of the Yorks, the eldest, had joined in the pursuit; that his murdered brother had repeatedly required the three fugitives to surrender themselves; that Timothy Buckley, who had the musket, turned round repeatedly and levelled at them; that one of the fugitives, Ford, had attempted to rest the piece from him, but did not succeed; that the pursuers behaved themselves with great courage and with the most determined zeal in apprehending these three stout men, one of whom was armed with a gun, and appeared only to await the moment of murder until the difference of celerity in his pursuers should mark the most needful object. Brown, who was the tall and most powerful of the three, turned several times upon Buckley, who had the gun, and told him to keep a good look out on such a man, meaning the man who was closest in pursuit, and this was the deceased; who was armed with a pistol, but did not discharge it until after he had received the contents of a musket into his side, breast, and lungs, the charge consisting of eleven or twelve slugs; his pistol afterwards went off, but hurt nobody. Stricken with death, the poor man then sat down on a bank; was taken home; and lived in anguish until the following day.

This witness declared himself the brother of the deceased; and in the sympathetic feeling of humanity, received from the Judge Advocate the following much to be remembered sentence of condolence. "Witness, you have done your duty to Society;

you have acted well in the performance of that duty, and the world has much to regret that you have paid so dearly for it, in the loss of a brother, and of a good member of Society." **CORNELIUS RYAN** sworn. Witness went to last Thursday to the house of the deceased to get some wheat ground at his steel mill, and prior to any other communication the deceased asked him if he had seen three men of suspicious appearance, whom he considered to be bushrangers; to which he answered affirmatively, and consented to go with the deceased, then he knew to be the constable of the district, in pursuit of the run-aways; that the three men, now the three prisoners at the bar, were enquiring of the two Yorks the right road to the Five mile Farm; and the deceased telling them he would shew them the right path, they all ran off: on their doing which the deceased ordered them to deliver themselves up to him, as he was the district constable; that they nevertheless continued to run; the man (Buckley) who was armed with a gun, repeatedly turning around and presenting it at the nearest of his pursuers; that the deceased was armed with a pistol, which went off on the instant after the explosion of a musket contents of which lodged in his body.

Other witnesses gave evidence to the same effect, proving the murder in the clearest possible manner; and also that the whole three of the prisoners at the bar were actuated by the self same spirit of hostility determining on the taking of life rather than surrendering themselves to justice.

The evidence being too clear to admit of a defence the prisoners when called upon acknowledged being together on the unhappy occasion. Brown and Ford making no further observation than that the gun was in the hands of Berkeley, from whom Ford would have wrenched it, as appeared by the testimony of Thomas Cosgrove; but no conception could be entertained that his endeavour so to wrest it was well intentioned; and with respect to Brown, every witness had sworn that when the three were running from their pursuers, he said repeatedly to Buckley, "don't fire until there is occasion." He stated upon the contrary that his expression had not been until there is occasion, but that his actual expression had been, "do not fire, for there is no occasion." Every witness had distinctly sworn to the expression with which he had been challenged, "do not fire until there is occasion for it;" and he became of course a principal in the murder.

TIMOTHY FORD, a very young man, apparently not exceeding two or three in 20 years of age, was placed on the right hand of Buckley, who was in the centre; and from every appearance seemed to have reconciled himself to an unavoidable destiny. The hour of trial and the hour of death are so closely connected in the case of murder, that this unhappy creature had death precisely in his view and as much as animated nature would afford, he might be esteemed the appearance of a moving corpse. The unhappy man upon, each side of him decided themselves upon the principle that they could not prevent the firing; but why they, would the voice of reason say, associate with a man whom they could not control, bind, or manage armed with a loaded gun, and conscious of a punishment resulting to all connected with him for any crime he should himself commit.

The only doubt, His Honor observed was whether the Court was in the possibility of discerning between the unfortunate men at the bar any difference or distinction of crime. That there was only one musket was an established fact; and that this one musket was the identically presumed defence of all, not mattering in whose particular hand it was, circumstances had sufficiently shewn. The only point upon which the Court could doubt of an equal criminality was, whether there might not have been in the course of the transaction a forbearance, a kindness which even in the criminal world be looked at by his judges with regard; but here nothing of the kind appeared.

The man who fired the gun there could be no doubt respecting; but it was the entire wish of the Court to discover if possible a difference in the degree of guilt between the prisoners. One man endeavoured to wrest the musket out of the hands of the actual murderer; and it is only presumable that if he had got possession of it, he would have committed identically the murder committed by his companion. The man, Brown, had repeatedly desired Buckley, by whom the piece was eventually discharged, not to fire until it was necessary. In the terms until it was necessary there was a tendency to murder.

The investigation had been long and patient; and for what reason? Not to pass a verdict for a murder which was clear in its proof, but to consider whether either or both of the accompanying persons were guilty as principals or as merely accessories, the Court considering that its judgement would be final, and establishing its verdict upon proofs which left no doubt behind them. Men meeting and combining in an illegal pursuit, what mattered it of what cast or colour their pursuit might be, they were all equally liable to every danger that might accrue therefrom; and here were three men, escapers from their Government employ, travelling from place to place with a loaded gun; a gun loaded with the eleven or twelve slugs; the whole of which were deposited in the body of a man whose duty it was to apprehend them, and who in the mild performance of his duty was horribly murdered. Brown had said that his words were not "do not fire until there is occasion, but that his expression was, "do not fire, for there is no occasion." In this turn of expression there is a strong difference; but the entire weight of evidence is against him. The Court has been particular upon the point, and every witness has sworn particularly to the expression which brings this prisoner to the crime of murder as its immediate instrument and adviser. You heard the unhappy man who was murdered among you say that he was a district constable; you also heard him require you to give yourselves up to him; you, Brown and Ford, it is melancholy to remark, saw repeatedly the prisoner Buckley turning around and levelling his piece at his prisoners; and at length you heard the explosion; one of you, that is Timothy Ford, having repeatedly told the actual murderer Buckley to keep a strict eye upon his nearest prisoners; having also endeavoured to wrest the gun away from the man who had it, how was it possible to say for what purpose; the whole of his conduct was against the slightest sentiment in favour of him. His Honor the Judge of the Court went to considerable lengths in the retrospection of an evidence which admitted not of contradiction; and performed the painful duty of passing sentence of condemnation with that degree of energetic sympathy which has ever distinguished him as a Gentleman of feeling.

The unhappy men were yesterday executed.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 04/12/1819

Court of Criminal Jurisdiction

Wylde J.A., 3 December 1819

WILLIAM SMITH and JOHN PAGAN were indicted for the wilful murder of **JAMES WHITE**, at Newcastle, on the 11th of October last.

CHARLES POWELL, the first witness called, deposed that the prisoners at the bar, the deceased, and himself worked at the lime kilns, which are distant from the settlement of Newcastle 7 miles; that on the morning of the murder he saw the prisoner Pagan about 500 yards distant from the gaol in a stooping posture among the scrub, with a stick in his hand; and upon proceeding outward a little way his ears were

arrested via plaintive cry; he made towards the spot from whence it proceeded, and saw the prisoner William Smith striking the deceased; upon which witness exclaimed, "you rascal, what are you at?" When he made off, throwing the stick or bludgeoned from him. He, the witness, approached the deceased, who died in 15 minutes after. Upon examination of the head of the deceased it was discovered he had received seven wounds, which were proved to have been the occasion of his death. An immediate alarm was given; the prisoners were secured; and the body conveyed to Newcastle. An inquest was held upon the occasion, and the prisoners at the bar were committed to take their trial for the offence. This witness further deposed, that the prisoner Smith had in his hearing repeatedly avowed himself the murderer.

ROBERT SHAKESPEARE deposed, that he also belonged to the lime-kilns; that the prisoners at the bar, the deceased, and himself had made an agreement to escape into the woods some short time before; that they left their employments on Monday (Sept. 20), with the injection of carrying their plan into execution; that the prisoners Smith and the deceased walked first near the beach, and the prisoner Pagan and himself followed; and during the way Pagan disclosed to him, the witness, their intention to kill the deceased, James White; observing that in case of a discovery the prisoner Smith was to be named the perpetrator, who had a fractured skull, and which was to be the plea for his having committed the murder. Becoming thus accidentally acquainted with this their dreadful intention, he declared he would have no hand in it, and immediately turned back towards the lime-kilns, but was intercepted by the prisoner at the bar, Pagan, who denounced vengeance against him if he revealed what had been told him; in consequence of which threat he made no disclosure for some days afterwards, as he at length did to Dr Evans in the hospital at Newcastle, to which he had been removed on account of illness. This witness (Robert Shakespeare) positively swore that the prisoner Pagan struck the deceased a severe blow on the head with a stick or bludgeoned.

WILLIAM LEE and **THOMAS HOLLAND**, privates in the 48th Regiment, deposed, that the prisoner William Smith repeatedly acknowledged himself to be the perpetrator of the crime.

[A confession, made by the prisoner William Smith before the Commandant at Newcastle, was now read in Court, wear it was stated that the murder was contemplated three weeks before it unhappily occurred, by himself and the other prisoner at the bar; and that he Smith, was to be considered as the principal, entertaining the notion that in the case of his being placed on his trial for the crime, he would doubtless be acquitted on the plea of insanity, the skull being in an injured state.]

The prosecution here closed; and the prisoners were put on their defence, when the prisoner Smith, as he had done in the whole stage of a melancholy transaction, acknowledged himself guilty of the offence, exculpating Pagan from all participation in the crime; who denied his having had any criminal part in the transactions. The Court retired; and after half an hour's deliberation returned a verdict of Guilty against both the prisoners. His Honor the Judge Advocate pathetically exhorted the unhappy men to prepare for that awful change which would shortly take place: – His Excellency the Governor may think proper to direct; and their bodies to be dissected and anatomized.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1818

SYDNEY GAZETTE, 05/12/1818

Court of Criminal Jurisdiction

Wylde J.A., 5 December 1818

HARRIET MARKS was indicted for the wilful murder of her new born male infant on or about the 20th of September, at Parramatta. It appeared in evidence upon the trial, that upon the 22nd of September, about 10 in the forenoon.

MARY SURTHERLAND, the first witness called, was alarmed by the report of some children, that a dead infant was lying in a ditch, about 15 feet in depth; and on examination no external marks of violence were found upon it, except a small bruise on one of the temples, which by the Medical Gentleman who had examined the body, was pronounced to be insufficient to have occasioned death.

By the testimony of Mr **OAKES**, Chief Constable, it appeared that the state of the infant was reported to him in the forenoon of the 22nd of September; he repaired immediately to the cavity wherein it was found, which he described as leading into a barrel drain that crosses Phillip street, Mr Oakes reported it to the Resident Assistant Surgeon, Mr **WEST**; and having entertained a previous suspicion of the prisoner at the bar concealing a situation which had probably led to this melancholy catastrophe, he had made his suspicion known to her, she being a servant under his official authority, but she denied it to be the case. Induced by this suspicion, he went to the house in which the prisoner at the bar lodged, which was but at a small distance from the cavity wherein the infant's body was found, and the evidence against her becoming manifest, she was confined on vehement suspicion, and was fully committed by the Inquest.

It appeared by the testimony of a man in whose house she lived, that from its dimensions and other considerations it was nearly impossible the incident could have been born alive; but it was evident also that she had cautiously endeavoured to conceal her situation, and had persisted in its denial to her most intimate acquaintances; but shortly after she was taken into custody acknowledged herself the unhappy mother, also making admissions, which connected with the whole tenor of her conduct, left it more than doubtful whether it had not been uniformly her design to perpetrate the crime which there was no living evidence of her having actually committed.

The evidence against the prisoner concluding, she presented a written statement, which the Court was pleased to admit, and it was read accordingly. The contents went to a declaration of innocence as it affected the perpetration of the act of murder, to acknowledge the concealment, pleading in extenuation of this proved, as admitted fact, the dread of the second instance of imprudence becoming public against her, as she already had an illegitimate child of three years of age in the colony, to whom she had always carefully attended.

The reading of the defence being ended, the Court retired to the chamber of deliberation, and in half an hour returned to the Bench; when His Honor the Judge of the Court addressed the prisoner at considerable length, in a language so truly impressive as to affect her almost to a state of convulsion. Did the room of our columns, the space of time before us, and above all, were we happy in the capacity of affording to our readers even an outline of the observations which proceeded from the Learned Judge upon the occasion, we should exult, not in the unhappy duty of exposing to public odium the wretchedness of a fallen creature, but in the occasion it would afford of placing before the many who might be capable of involving

themselves in crime without reflexion, a polished mirror which could not fail in reflecting upon the least inconsiderate mind a sense of duty to society from which the happiest effects might be expected to result.

His Honor, in the course of his address, recapitulated all the points of the evidence that had been adduced in support of prosecution; animadverted upon each in order – denouncing the crime with which the prisoner had been charged as of all others the most direful of offences in every part of the world. It was an offence, which, weighed and considered in all or any of its relative enormities, had been always esteemed as most horrible and unnatural. It was a crime against the public policy and the political advantages of the country; and, as it affected the duties of Religion and reality it exceeded every human power to suggest how it could be possible that such an offence as infant murder by a mother could have ever been committed; the mother to her incident was its natural protectress ; it was a charge consigned to her most tender care and regard; and in the betraying of the solemn trust she must ever evince a depravity which unfitted her for every future purpose in society. From the evidence taken upon the trial there might considerable apprehensions be entertained as to her inducement for the long and continued concealment of a situation which the very act of concealment had by a former law, which His Honor cited, been punished with death, unless a child could by a witness be proved to have been dead-born: by a subsequent act, passed in the 43d of His present Majesty, which strongly discriminated between the death of an infant arising, from the concealing of pregnancy, and its actual murder, although the punishment of death was removed from the offender, yet a punishment was by law provided, which the Court, from all the circumstances of the case, conceded it their duty to enforce. It was therefore the judgement of the Court that she be acquitted of the murder, as there was no proof the child had been born alive, but that for the felonious concealing she should be committed for the term of two years to the gaol of Parramatta.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1820

SYDNEY GAZETTE, 02/12/1820

Court of Criminal Jurisdiction

Wylde J.A., 29 November 1820

JAMES CLENSEY, JAMES WALL, and NICHOLAS COOK, were indicted for forcibly and feloniously entering the farmhouse of **JAMES SAVILLE**, within a mile of Parramatta, on the Windsor side, and after committing many violent outrages, stealing sundry articles therefrom.

BENJAMIN RATTY, a constable, deposed, that seeing the three prisoners passing through the town after eight at night, he hailed them, but instead of stopping, they answered civilly, yet did not stop: they were advanced upon, and refusing to stop, assaulted the constables with stones, one of which wounded **DILLON**, another constable, severely on the face, and knocked him down.

More aid was quickly obtained, and Cook was taken after a vigorous resistance. Wall ran towards Mrs Reid's fence, and he was likewise apprehended. A shawl, now produced, was found close to the spot where they were first challenged, with a mask close to it, formed of a part of a blanket, with three holes in it for the eyes and nostrils. **EDWARD DILLON** deposed to his having joined in their pursuit. He saw the men run towards the Court house, and saw one raise his hand, as if he had thrown something over the palisade. Cook, deponent stated to be the man who had struck him with a stone on the face. He and Wall were taken to the watch-house, and some silver was taken from Cook. They were all close to Mrs Reid's fence when accosted. Witness produced a stone, broke into 3 pieces by the violence it had been thrown with, which was polished, and rounded with a bead; and was evidently a fragment of the 17 mile stone, which is broke into small pieces, and lies between Parramatta and the house robbed. The deponent had ascertained the morning after, that the three prisoners belonged to Farris's gang, employed on the Sydney Road, 8 miles from Parramatta. Deponent was sensible this was the stone thrown by Cook, as he had picked it up immediately after.

EDWARD WHITE, constable, deposed, that he saw Wall and Cook at the watch-house, where half a pound of soap was taken out of Cook's pocket; also, five dumps, one half crown, and 2s. in copper coins; and a quarter dollar.

MAXWELL, a constable at Fairhurst's gang, at Longbottom, eight miles from Sydney, to which the three prisoners belonged, but were absent from one o'clock on the day he named, being Sunday, and when not returned to the eight o'clock muster at night. At seven in the morning he saw Clensey, who in consequence of the Parramatta information was apprehended, when he immediately enquired what had become of Wall. [Note. From this enquiry after Wall, the idea that struck many of the authority was, that as Cook was the first taken, he was already acquitted with what had become of him, and therefore confined his enquiry to Wall, of whose fate he was uncertain]

G. FAIRHURST, overseer at Longbottom, deposed to the same effect; and particularly to Clensey's enquiry after Wall.

WILLIAM SEVILLE deposed. He is a farmer a mile out of Parramatta. Upon that evening three men rushed into his house after twilight. **LUCY RAINER** and her child were with him, a boy between 7 and 8. As soon as they rushed in they said they were bush-rangers and wanted food. They were disguised with such masks of blanket as

were now shewn to him. Their persons he described, and the description barely corresponded with the persons of the prisoners at the bar. They had bludgeoned, one of which was pushed violently into deponent's face, with menaces and a command to silence. Two of them forced deponent and the woman into the bedroom. The child was worse treated by the third, who unfeelingly dashed his little scrap out of his hand, and then inhumanly threw the little unoffending creature on the fire, which, had it been a cold month, and burning fiercely, must have burnt him to death; but it had been happily marked September in the Calendar of Fate, and the fire was sufficiently low to permit the little otherwise devoted innocent to crawl off with very little hurt; yet trembling beneath the dreadful menaces of the miscreant, still threatening to cut his throat, as soon as he should extricate himself from the scorching embers. The same man broke open two boxes, one having been broken open before, and took out a shawl, the property of one at **MARY BARTMAN**; he then searched the woman's pockets present, and took her money, 5 dumps a quarter of a dollar, one half crown, and some copper coin. Having effected their purpose, and eat and drank in the house, they went away, taking with them the fragments; ordered them to shut up the house and go to bed: but had scarcely quitted the door, when one proposed to go back and murder them; which horrible proposition was opposed by a second, who exclaimed " O no, we'll do no murder."

LUCY WAIN, the woman in the house when the robbery took place, deposed to the money being taken out of her pocket.

MARY HARTMAN deposed to the shawl being taken out of her box, at Seville's, on the night of the robbery.

The little boy was desired by the Court to be brought forward. Mr Beale, keeper of the Parramatta gaol, had recounted surprising instances of the recollection this child had of two of the robbers, whom he had secreted repeatedly from among a number, notwithstanding many a change of position. The child was desired to point out the person who had treated him violently, and he unhesitatingly pointed at Clensey, as he had always persisted in doing, with innocent confidence.

His Honor the Judge Advocate summed up the evidence, and dwelt with much energy upon the facts that chiefly militated against the prisoners at the bar.

Three masks of old blankets found where the prisoners were first challenged had been produced in Court, and were the same as those worn by the robbers; the stone with which the prisoner Cook had wounded Dillon the constable, was proved to be a fragment of the backen mile stone; the shawl that had been beyond doubt cast away by one of the persons was sworn to by Mary Hartman; the money was of the same amount and description as that taken out of the pocket of Lucy Wade, and three prisoners at the bar left their gang together on Sunday noon, and were the only persons absent from it all night; two were taken nearly upon the spot; and Clensey and another had been selected repeatedly from a number by an innocent child who had had frequent opportunities of seeing part of their faces, not withstanding their loose disguise, before he was acquainted with any of the foregoing circumstances relative to them; and yet one of the prisoners, Clensey, had brought in a man, his brother, to swear he was elsewhere; but his voluntary testimony perished in the early stage of his examination.

The competency of **JOHN WAIN (the little boy)** to be made an evidence was a question of consideration to the Court, who would have discerned at whether there was sufficient reason in the child to remember and to relate what he had seen and experienced: he did not appear to have been daunted; and he was unacquainted with deeds of cruelty, and was fearless of that of which he had as yet formed no

conception; and on account of his youth the robbers were perhaps heedless of his looking at them. The causes that had induced so young a child, bound to humanity by all the tender ties of natural affection, so strenuously to persist in this declaration, rested with God: – his competency he as an evidence remained with the Court. His Honor could not help adverting to and contrast in the expressions the two persons who had disagreed on the horrible proposition of returning to murder all the people they had robbed. God, he fervently hoped, would look down with compassion upon the errors of him, who in the midst of crime, had still shewn that he was not dispossessed of the common feelings of humanity. – His Honor having concluded this impressive retrospect of evidence, the Court without retiring returned a verdict – All Guilty. Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 16/12/1820

Court of Criminal Jurisdiction

Wylde, J.A., 14 December 1820

JOHN KIRBY and JOHN THOMPSON were indicted for the wilful murder of **BURRAGONG, alias KING JACK**, a native chief at Newcastle, on the 27th of October; and the first witness called in support of the prosecution:

ISAAC ELLIOT, a superintendent at that settlement who deposed that the two prisoners charged were employed in the blacksmith's shop there; that Kirby had been removed thither from hence, two years ago, under sentence of the Criminal Court; and that Thompson was also sent thither, for endeavouring to effect an escape from the Colony; that on the 26th of November they were absent from their work, and he discovered that they had both run from the settlement; which being reported to the Commandant, he immediately dispatched a military party, attended by two constables, in quest of them. In ten minutes after the party had left a black woman arrived with information to deponent of two men being taken up by some natives, who were conducting them into the town: the... party were in consequence recalled from their adopted route and joined by deponent, went out to meet the natives with their prisoners; and shortly met a number of natives (accompanied by the two prisoners), all armed with spears and other weapons, the murdered chief guarding Kirby: both the prisoners very soon desecrating deponent and the pursuing party: immediately whereupon the natives set up a yell and shout, and clearly articulated the words "Croppy make big Jack booy" by which was to be comprehended that one of the white men had killed Jack their chief; whom the prisoner Kirby was seen to raise his arm to seize upon, but fell himself from a blow by a waddy.

Witness further deposed, that no blow was struck by the natives until the murderous act had been committed by the prisoner Kirby. The other prisoner at the bar had only

endeavoured to effect his escape, but was secured by one of the constables, as was Kirby also, who had risen, and endeavoured to run off. Deponent saw the deceased in a wounded state, by some sharp instrument, in the belly, and bound him round: had him conveyed into the town; had a search made for the destructive implement, which could not be found. After ten days survival, the deceased went to deponent with an order from the worthy Officer that commands the settlement, to receive a suit of clothing, and then said he was murry bujjery, meaning that he was much recovered; but in five days after, deponent heard that this kind, useful, and intelligent elder had breathed his last. The fatal wound was given on the 27th of October, and he painfully languished till the 7th of November ultimo.

JAMES WILLS, one of the constables who attended the party, corroborated the foregoing evidence; and particularly to the fact that no blow was struck by any native before he saw Kirby stretch out his arm towards the wounded man, and heard the yells and shouts of the natives; and that while in the act of hand-cuffing the two prisoners, the prisoner Kirby expressed his regret at not having killed the deceased outright. He saw the deceased a few days after in the woods, and he then expressed a complaint of much illness, owing to his wound, and in a few days after he was dead.

The other Constable of the party, **MENCELO**, corroborated the foregoing testimony.

Mr. **FENTON**, assistant surgeon of the 48th Regiment, gave testimony of the deceased having been brought into the settlement wounded, and was attended to with every care, in his own quarters; where he would not continue after the third day, though every persuasion was used to detain him, he being desirous of restoring to the expedients practised by themselves in wounded cases. Dr Fenton described the wound to have been received in the abdomen, and extremely dangerous. In five days after he is quieting, he returned, and Dr Fenton dressed his wound, he then appearing in a convalescent state; but he soon after heard of his death. Dr Fenton had no doubt of the death ensuing from an internal mortification in the abdomen, occasioned by the wound proved to have been inflicted by the prisoner John Kirby; against whom a verdict was returned of Wilful Murder; and sentence of Death was immediately pronounced upon him – his body directed to be dissected and anatomized. John Thompson was acquitted.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 16/12/1820

Court of Criminal Jurisdiction

Wylde J.A., 11 December 1820

WILLIAM BELCHER, indicted for wilfully and maliciously firing at his master, **THOMAS SILVESTER**, with intent to kill him and whereby he was severely wounded, upon Wednesday the first day of November last, pleaded not guilty: and evidence for the prosecution being called the following appeared the circumstances of this extraordinary case:

The prosecutor is a settler on a farm a few miles from Sydney in the vicinity of King's Grove, and was called to town on business a few days before the crime took place leaving the prisoner at the bar, who was his Government servant, in charge of a temporary residence he had erected, and all it contained, having had no cause to suspect his honesty. He left on the farm a [?] foal and in the cottage, amongst other property a musket (unloaded) with ammunition, such as slugs, powder &c. The prosecutor returned in four days, and perceiving that the mare had not been tethered at

the place he had given directions for, but on a bare spot, divested all of herbage and finding no person about the farm, he proceeded to that part of the ground where the prisoner ought to have been at work; but he was not to be found, and all work had been neglected by him. Thence strongly suspecting something improper had taken place, he proceeded towards the barn, calling around for the prisoner, whom he at length perceived advancing from the brush with a fire brand in his hand, and apparently unwell. The prosecutor enquired at his ailment, and was answered that he had been robbed by bush – rangers of his provisions. The prosecutor then asked if they had taken the musket, and the prisoner replied that it was safe in the hut; then commiserating the condition of the prisoner, from the supposition of long being without food, he directed him to provide a meal, while he went in to see after the musket ; but not finding it described, he challenged the prisoner with the assertion of an untruth; whereupon the latter, in contradiction of the first report respecting it, affirmed positively that he had already informed him the bushrangers had taken that away likewise. He described the persons of the bush-rangers; and said that one **SPARKES**, residing half a mile distant, knew them very well.

The prosecutor much dissatisfied at the whole account, went to Sparke's, leaving the prisoner cooking: and on his return found him on his knees, behind the stump of a tree, and supposed he was collecting firewood; but on his approach within seven yards, he saw him rise deliberately upon one foot, and then on the other, levelling a gun at him; which he immediately fired, and lodged the contents, of slugs, in the left side of his face: he fell senseless; but gradually recovering sufficiently to hear a noise at his feet, he rose on his knees, and perceived the prisoner was in the act of reloading the gun: he begged his life might be spared; but feeling assured that personal exertion was needful to its preservation, he arose thoroughly, and ran for the hut, the door of which was so secured as to require more loss of time than his danger would admit, and he made for King's Grove, half a mile distant; as he gained and entered the gates of which, he sunk exhausted, but had sufficiently sounded the alarm to find ready assistance, and one of the people, **NETICK EFFIRNAN**, went off immediately and secured the prisoner on the prosecutor's premises; but he denied being the man that fired, though the fact had been established against him in terms indubitable as incontrovertible.

The prosecutor spoke highly of the prisoner's previous character and demeanour; but related some expressions that had before dropped from him in common conversation; the one of which he remarked to him that he had heard a bad character of him as a master to his Government servants, and that rather than submit to such himself, he would do something that should affect his life: at another similar conversation he enquired of him, the prosecutor, at what distance slugs would kill, and was told at about 8 yards.

The Court exerted its usual circumspection in the examination of evidence. The prosecutor swore again and again to his person, in which he could not be mistaken. The gun had been removed from its place, and not found, therefore was not to be produced; and Effirnan swore that the prisoner had told him it was on the spot where the mare had been tethered; but which no one was acquitted with.

The evidence of Silvester, the prisoner's master, now his prosecutor, was decidedly corroborated by the testimony of Effirnan and other witnesses, as regarded the point that had come under their connoissance; and the case for the prosecution concluding, the prisoner was put upon his defence, which was comprised in a declaration of his innocent; and a verdict – Guilty was returned after a short deliberation.

His Honor the Judge Advocate having announced the awful verdict, explained at much length and with corresponding energy, on the extraordinary and almost incredible circumstances that had been developed upon this trial. For the credit of human nature, he entertained the hope that so flagitious an act, however clear and indubitable the proofs under which it had been established, the world would feel disposed, as the Court had been, to pause upon the possibility, while they shuddered at the enormity, of the crime. His Honor, after embarking upon the relative conditions of the prosecutor, and the prisoner at the time of his committing the dreadful crime that had brought him to the bar, expressed his regret that the human character should have been so debased, as in this he hoped unparalleled instance of depravity it had unhappily been.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 23/12/1820

Executions .. on Friday [22 December 1820]

For the robbery of a house near Parramatta, and highway robbery, **JAMES CLENCY**, ... and **NICHOLAS COOK**.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 23/12/1820

EXECUTIONS. On Monday last [18 December 1820] **JOHN KIRBY**, who was found guilty of the late Criminal Court for murder, was executed pursuant to his sentence.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1821

SYDNEY GAZETTE, 17/02/1821

Court of Criminal Jurisdiction

Wylde J.A., 23 January 1821 (**Hobart** session)

The trial for the murder of **HENRY DUTTON**, from the blow of a spade received on the head, of which wound he died in about a fortnight after, came on for hearing. The prisoner was **JOHN RYAN**.

The first witness called was **PETER DUTTON**, son of the deceased, whose testimony clearly detailed all the facts of the case. This witness stated, that his father was a sawyer, residing in a house at the upper end of the Macquarie-street; and that in consequence of his father hearing a noise about eight o'clock in the evening on the 4th of December last while sitting in his house, made one of the number of spectators looking on at the affray. From ten to twenty persons were present; and the fight was between the prisoner Ryan and a man named **WHEELER**. During the quarrel, Ryan hit his antagonist a foul blow while down on the ground, which occasioned some of the bye-standers to interfere, and to strike the prisoner two or three times for his cowardly behaviour. Upon the prisoner getting up, he ran into a house near the spot, and immediately returned with the weapon in his hand with which he gave the deceased (who happened to be the first man within his reach) the blow that unhappily caused his death. This happened in sight of the son, and of several others who were witnessing the fight. The son told the prisoner to mind what he was doing of when he attempted to strike him also with the remaining part of the spade, which had been broken into two by the first blow, but which the son and another extricated from his hands; he then ran away, and was pursued, receiving some blows from the spade handle: he was not apprehended for several days afterwards, owing to the recovery of the deceased being expected. This witness further deposed, that the deceased had not taken any part whatever in the fight, but merely stood by as a spectator; and that both he and his father were perfect strangers to the prisoner, and had never spoken to him in their life. Ryan did not endeavour to escape from the hands of justice, but always after seemed very sorry for what had happened, and afterwards made many enquiries respecting the health of the deceased, going very early the following morning to offer any recompense in his power.

WILLIAM THOMAS deposed, that he saw the prisoner strike the deceased with the spade; and that he had passed several persons previously, who got however out of his way, to his giving him the blow. This witness also proved, that the deceased was not one of the men who had beat the prisoner when he struck Wheeler the foul blow. Another witness gave evidence to the same effect.

Three Gentlemen of the faculty, who had examined the body of the deceased, deposed, that they had not the least doubt but the wound on his head was the immediate cause of his death, and that no medical treatment could have been of service to him.

The prisoner put in a written defence, which acknowledging the criminal act of which he had been proved guilty, stated that he had been on a discovery with a gentleman on the Coast of Africa, where he caught the brain fever, which he never got the better of.

His Honor the Judge Advocate, upon summing up the evidence, observed, in the commencement of his remarks, that there was no crime which harrowed up more of the feelings of man, than the one now for the consideration of the Court; but the law had, in mercy of human infirmities of temper, drawn very nice distinctions in cases of

homicide, between actual murder and manslaughter; to such, the Court would, he was satisfied, pay anxious attention as to the charge now for their judgement. The prisoner there could be, no doubt, had been the death of the unfortunate deceased, and the question would be for the Court to consider how far the prisoner had, under the circumstances of the case, that full possession of his reason and self conduct at the time, which were required in legal principle and decision to raise the crime now laid against him in amount to murder; but if on the contrary, that the prisoner had unlawfully killed the deceased without malice, either express or implied, under sudden heat of passion, it would be but manslaughter. The Judge Advocate then entered into a very full elucidation of these two points, remarking, all killing was held to be murder until satisfactorily proved to the contrary; but that in every case a very principal feature for the Court to have in regard was that malice aforethought must appear to have existed before it could amount to murder. We have not room to enter more fully into the matter of remark made on the occasion.

His Honor then went through the whole of the evidence, with suitable comments; and the court, after a short deliberation, returned a verdict – Manslaughter.

The Honorable the Judge Advocate, in a very impressive manner, pointed out at some length to the prisoner of the narrow escapes is open to him through the merciful Administration of Criminal Justice, which he trusted would make such impression upon his mind during his future life as duly to restrain his passions, and work that contrition for the past, which would best prepare for that awful judgement which yet awaited him in another world. The prisoner then received sentence of five years transportation to Newcastle.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 30/06/1821

Court of Criminal Jurisdiction

Wylde J.A., 15 May 1821 (**Hobart** session)

HENRY BUTLER was charged with the wilful murder of one **BENJAMIN DAVIS**, on Monday the 26th day of March last, at the farm of Beames, on Norfolk Plains. The evidence taken in this case extended to a great length. The prisoner and the deceased had been, it appeared, on the farm together for about three weeks or a month, during which time it seemed to be clearly proved, that the most friendly terms had subsisted between them, nor was the slightest difference known to have taken place up to the time of Davis's death. The deceased had been drinking at Beames's, in company with the prisoner and two or three others, during the latter part of the Sunday, and again on the Monday morning, until he became "stupidly drunk;" and all the party were more or less intoxicated. As the deceased was lying on the floor before the fire in this state, the woman of the house requested the prisoner and another to take him out and lay him under the stacks, about 20 or 30 yards distant, where he was accordingly carried, and the men returned into the house. Soon after, the prisoner went out to thrash: and Beame's son, a boy about ten years old, said he would go with him; when the prisoner, in good temper, said, "come along, I'll soon wind you." The mother of the boy followed soon after, within five minutes, as she swore, when she heard the flails go; and on coming to the ground saw the prisoner with the flail in his hand, but not the boy. As she passed the deceased, who was laying under the neatest stack, she observed him to look very pale, and called upon the prisoner to lift him up, and she thought "he was strangling from the liquor." The prisoner held the head of the deceased for an hour or more in his lap; when, in the presence of several people, the

deceased expired without having uttered a word, and without a struggle. The general impression was, as the witnesses all swore, that the deceased had died from the effects of excessive drinking, which remained so till towards the evening of the same day, when the boy stated to his mother and a neighbour, as he swore again at the trial, that he had seen the prisoner run and jump upon the deceased, having, without saying any thing at the time thrown down his flail while thrashing with him; that the deceased had cried out "Oh God!" and turned himself half round, immediately after the violent shock occasioned by the jump. The boy further swore, that one **TIMSON**, who had taken the job of thrashing at the place with the prisoner, was present, and called out to the prisoner "not to touch the deceased." This in every point, however, was contradicted by Timson in Court, who swore that the boy was not by the stacks when he went to get wheat, which he immediately afterwards took to a neighbour's mill to grind. The body of the deceased had been afterwards inspected, under an order of the Magistrates, by two Surgeons, who, at the trial, declared their decided opinion to be, that the deceased had died, not from the effect of suffocation by drinking, but from a rupture of the blood vessel in the thorax, occasioned by great violence of some sort.

Upon this evidence the Court, after the case had been very fully summed up and remarked upon by His Honor the Judge Advocate (Wylde), adjudged a prisoner to be guilty of manslaughter, and that for the offence he be transported to Newcastle for the term of four years.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 11/08/1821

Court of Criminal Jurisdiction

Wylde J.A., 10 August 1821

JAMES ROBINSON, a black man and native of Angola, was indicted for the wilful murder of **CHARLES LINTON**. The circumstances were briefly as follows: The prisoner was a harbourer in one of the gangs stationed at Fort Macquarie in the month of March last; and becoming notorious for neglect of duty, and contempt of his overseers orders, the latter one day gave him in charge of barrack constable (the deceased); in order that he should be dealt with accordingly; but the prisoner refusing to obey the constable's instructions and also resisting his authority, the latter went to seize him, when the prisoner drew a knife, and stabbed him in the back, from the effects of which he shortly after died. The case was amply proved, and the sentence of Guilty recorded. The awful sentence of death was immediately pronounced.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 18/08/1821

Execution. Yesterday morning were executed, pursuant to their sentence, William Swift and **JAMES ROBINSON**. These unfortunate men received sentence of condemnation, for murder, on Friday se'nnight. Robinson, who was a native of Angola, during confinement, was perfectly indifferent to the things around him, and appeared insensible as to the least dread of an hereafter. Swift, however, always expressed great abhorrence at the dreadful crime for which he has paid the penalty, and ever manifested feigned contrition: he left the world in peace.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1822

SYDNEY GAZETTE, 15/03/1822

Court of Criminal Jurisdiction

Wylde J.A., 11 March 1822

LAWRENCE MAY, the younger, was indicted for feloniously and maliciously shooting at and wounding with intent to kill and murder, on the 11th of December last, **THOMAS SMITH**, a settler at Hawkesbury.

It appeared, by the testimony of Thomas Smith, that the prisoner and himself had long been friendly neighbours, their farms being adjoining; but a trifling dispute arose as to the proprietorship of part of the land which had been located to Smith by the Deputy Surveyor; and, in consequence, cultivated by the latter. Smith, on the evening previous to the unhappy transaction, told the prisoner he should send his men in the morning, and reap the wheat; whereupon he (the prisoner) declared he would shoot the person that would make the attempt. Accordingly, two of the servants of Smith went on the 11th to reap; when they were commanded by the prisoner to desist, upon pain of being shot. This was reported to the prosecutor, who proceeded to the spot at which the prisoner was, and began to reap himself. The prisoner (May) then retired somewhere about 20 yards, and fired at the prosecutor, who immediately fell, being wounded in several places. These are the key features of this transaction, at once so lamentable and so much to be deplored. Smith was dangerously ill for some days, but has now sufficiently recovered to walk about with a good deal of exertion.

WILLIAM DEAN, a servant to the prosecutor, deposed to the above facts, but said he did not see the prisoner level the muskets; and, that after his master fell wounded the prisoner began and continued reaping.

NICHOLAS DUKES also bore testimony to the events before stated; adding also, that he saw the prisoner actually level the musket; and, after he discharged its contents, commenced reaping.

HENRY BACH corroborated the evidence of the above witnesses; and here the prosecution ended.

Respectable persons were called on behalf of the prisoner as to the mildness and nature of his general character; which went to say, that he had been considered as a humane and inoffensive young man. As to evidence being called to rebut a serious charge, none was forthcoming. The Court retired for a few minutes; and, upon the Members resuming their seats, the verdict of Guilty was returned. Remanded.

...

The following remanded prisoners that had been convicted received sentence as follow:... Lawrence May... life, to such part of the territory as His Excellency the Governor may think proper and direct.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 22/03/1822

Court of Criminal Jurisdiction

Wylde J.A., 18 March 1822

MARY ANN LYONS was indicted for the wilful murder of **THOMAS CLARK**. From the evidence it appeared, that the prisoner at the bar had cohabited with the deceased for five years past; that, on the 6th of January last, in the evening, some words occurred between them, an event far from being unusual, when the prisoner

seized the opportunity, wilfully and deliberately, and evidently with malice aforethought, of striking the deceased, her miserable associates, with a hammer on the head, which, in six days after, terminated his earthly career. It was clearly proved, that the blow was not given in the moment when excuse might have been offered for exasperation, but after passion should have long subsided. Circumstances also came out on the trial that evinced the ill-fated woman had an eye to the property of the deceased, with whom she was then criminally living. The case was made out to the satisfaction of the Court, and the prisoner was pronounced Guilty of Murder, and immediately received sentence of death.

It would be a departure from justice were we to omit affording publicity to the following circumstance, which came out of the above trial: Mr **WILLIAM WALKER**, who stated himself to be a professional man, was called upon to inform the Court (having been with Thomas Clark before and after his death) as to the actual cause of the demise of the deceased. He affirmed that it had wholly arisen from intensity of drinking, which had produced internal inflammation; and that the blow, supposed by him to have been given by the hammer, was not the cause, neither could such a blow occasion death. Well did it happen for the ends of public justice, and highly to the credit of **WILLIAM HOWE**, Esquire the Magistrate for Upper Minto, that the body was sent from that neighbourhood down to Liverpool, the nearest place where proper surgical experience (upon which alone depended the issue of a most critical investigation) could be obtained. The body was examined by Dr **HILL**, R. N. Assistant Colonial Surgeon. This Gentleman was enabled satisfactorily to state to the anxious Court, that the wound occasioned by the hammer was sufficient to produce death – the skull having thereby been seriously fractured; and that he (Dr Hill) could have no hesitation in saying, that it was his decided opinion the deceased had just met with his death. William Walker, who was a professional man, practising in this Colony for the last twelve years, and had passed through (or by, probably) the Colleges of Edinburgh, London, Paris, &c. upon the contrary, said, that it was only a small wound quite unimportant, had not affected the skull, and could not have been followed by death. Dr Hill also declared, that the life of the man would most certainly have been saved, had proper treatment been timely administered; it only required the bone depressed by the violence of the blow, to have been elevated, whereby prompt relief would have naturally ensued, and that the deceased had now been in existence. This circumstance is mentioned for the express purpose of preventing persons from being egregiously, and perhaps fatally deceived, by such impudent and wretched professionalists.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 14/06/1822

Court of Criminal Jurisdiction

Wylde J.A., 10 June 1822

SETH HAWKER was indicted for the wilful murder of a **black native woman** at Illawarra, or the Five Islands, on the 15th April last. The principal features attending this case are as follow: The prisoner was an overseer upon an estate at Illawarra, belonging to Captain Brooks (the Magistrate that had committed the prisoner to take his trial for the offence with which he now stood charged before the Court); and, upon the night of the 15th, was alarmed by the violent barking of the dogs upon the farm. The prisoner was induced to arise, and in company with others proceeded, without hesitation, in the direction to which the watchful animals conducted them. The

prisoner was lost sight of for a few moments by his companions, in which interim the discharge of the musket was heard, which he had seized in the house upon the first alarm. When he returned, the prisoner said he thought he had shot something, or somebody. He was desired to return to the dwelling with his companion, and reload the piece; and again went in pursuit, the dogs continuing to bark. The prisoner, with another man, proceeded through a corn field, which was enclosed, and just as they had quitted it, on the offside, a figure was beheld in the act of endeavouring to effect its flight. The prisoner fired and the poor object fell, which (to be brief) turned out to be an unfortunate black native woman. The poor thing, it is supposed, was shot dead, as the body was found the next morning much mangled by the dogs. Two nets, such as the natives carry their food in, were found containing shelled maize, one of which was full and held about a peck. The prisoner was properly advised, by a brother overseer in the same concern, to hasten to the district constable with all speed, and inform him of the unhappy circumstance, so that the nearest Magistrate might become acquainted with the fact, and proceed accordingly. It was proved by the constable that the prisoner followed the directions given him, and hence became committed. From the whole of the evidence on the part of the prosecution it was easily observable, that no murderous intention had existed in the mind of the prisoner; nor did any circumstance transpire, during the arduous examination of the witness by His Honor the Judge Advocate, to enfix even the most remote degree of manslaughter upon the prisoner. As was the case in former times and not many years since well to be remembered, no consequence of the decisive measures that were resorted to by the Government for the protection of the settler, and his family, the natives are excessively troublesome and annoying in the neighbourhood of the Five Islands, during the corn season. This last season that had been remarkably active in committing depredations; in the space of one night 100 or two of them would take the liberty of clearing a field of every corn and thus ruin the hopes of a poor hard-working man's family. This species of bitter robbery had been on repeated, and the natives became worse daily, purloining every thing that came in their way. One man, of the name of **GRAHAM**, who has a wife and large family, was near being killed in the act of pursuing those sable robbers. One night a party had stripped his field and its produce; and in the morning himself, and eldest son, went in pursuit. They fell in with five of the natives, who had two nets full of the preceding nights spoil. He required them to surrender the corn, when they made off. Graham then fired at the legs of one of the natives who had a net; when one of them, armed with a bundle of spears, was preparing to throw at Graham who lost no time in making up to him, and with the butt end of his musket broke all the spears, which would have been immediately discharged at him, had not one of the other natives, who had flown, taken the wommerah with him; to which circumstance Graham and his son, may doubtless owe their lives. The native then took from his girdle a tomahawk, with which he endeavoured to cleave the head of Graham, when the latter, at the same instant, seized from the hand of his son a sword, with which he cut off the hand of the native that held the tomahawk, when the Black immediately made off, with the loss of his limb. This circumstance came out, among others, upon the trial, which shewed that the prisoner was only endeavouring to protect that property that was confided to his care though it was to be lamented that a life (in such a case) had been untimely destroyed. His Honor the Judge Advocate wished it to be properly and lastingly impressed upon the minds of all, that the aboriginal natives have as much right to expect justice at the hand of the British Law, as Europeans; and that such ever would be the case; in this instance it was exemplified. The prisoner was acquitted; but previous to being liberated from custody, received that pathetic and

energetic admonition, which, it is to be anxiously hoped, will ever remain indelibly and profitably stamped upon his conscience.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 04/10/1822

Court of Criminal Jurisdiction

Wylde J.A., 26 September 1822

ATTEMPT AT ASSASSINATION

WILLIAM DAVIDSON, otherwise **JOHN DAVIDSON**, was next indicted for attempting to murder Mr **ROBERT HOWELL**, on the evening of the 15th of June last. The case was open, on the part of the Crown, by Mr Solicitor Norton, in the absence of Mr Solicitor Moon (Crown Solicitor). Mr Solicitor Rowe conducted the defence.

Mr **HOWE** being the first witness called, deposed that, as he was proceeding homeward from the Mission house in Prince street, about 15 minutes past nine of the evening named, he was violently assaulted and dangerously wounded by some individual, in the left breast. Being about 60 yards distant from Mr Scott's, he made the best of his way thither, giving the alarm of "murder;" and that he was enabled to reach the house of his friend in an apparently dying state, where he threw himself on a sofa till surgical aid was procured. It was then found he had been stabbed with an old rusty bayonet, which had penetrated about four inches. Of the unfeeling perpetrator of the horrid deed, the Deponent stated he had not the least knowledge; and, as to the prisoner at the bar being the wretched creature he would have been as ready to suspect the greatest stranger in the Colony, as well from his non-intimacy, as from positive consciousness of never having most a distantly injured him. In addition to the above, Mr Howe conceived it incumbent on here on him to inform the Court of the following circumstance, which had been strongly impressed on his mind: About three weeks prior to the 15th of June, the deponent was proceeding to Macquarie-street Chapel in the evening when his attention was arrested by the circumstance of seeing a man upon the outside of the Chapel, perched under one of the north windows, sustained by a stick and looking into the Chapel. Curiosity prompted Mr Howe to see who the individual was, and upon approach, found it to be the prisoner at the bar, Davidson: that, seeing the deponent, he left his curious situation, and retired from the building.

Mr **F.E. FORBES** deposed as to the fact taking place and also, that he, with others, went in search of the instrument which were said by Mr Howe to be in the street: that an old rusty bayonet, fixed upon a native waddy, was found in the centre of the road, about 15 yards from Mr Scott's, and that Mr Howe's hat was picked up in the drain near the pathway, about 15 yards further distant. Mr Forbes further said that the point of the weapon was imbrued with blood.

JAMES BOWMAN, Esquire Principal Surgeon of the Territory, who kindly visited the sufferer under his affliction occasionally at the request of Dr. **BLAND**, deposed, that he considered Mr Howe to be in imminent danger.

Dr **MITCHELL**, of the 48th Regiment who first attended upon the unfortunate event, in company with Dr Stevenson, of the same Regiment also deposed, that it was his opinion, upon examining the wound externally, that death would very likely soon be the consequence.

JOSEPH McKINLAY, a resident near the Market-wharf in Cockle bay, deposed, that he had been absent on the 18th of June up the Parramatta River, on business that had prolonged his return till about a quarter past nine; that he had scarcely been in the

house three minutes before the prisoner Davidson, who had lodged at his house for 7 or 8 years past, tapped at the door, and begged that his lamp might be lighted; that the prisoner was undressed, and did not seem in the least way agitated; that upon the contrary he made enquiry how the witness had disposed of his business, and then retired. McKinlay further said, that the demeanour of the prisoner, for so many years, had been peaceable to an almost extraordinary degree; that he was a steady harmless creature; that he was certain the occurrence referred to, in his testimony, occurred on the 15th June, as the following day he heard, from various quarters, of the accident that had befallen Mr Howe. This witness also said, that he never heard the prisoner mention the name of Mr Howe, directly or indirectly. The bayonet being handed to him for inspection, he recollected having a similar instrument in his possession about his premises for some years, but that he had not seen it for nine months past, at least. The one produced he could not identify to be the same with that which was now absent, but it had something of its general appearance, for it was an old rusty bayonet. Several native waddies, too, were in the house; two were before the Court, one of which he remembered to have seen in the room occupied by the prisoner, but the one to which the bayonet could alone be conveniently fixed, he could not, and therefore would not, swear to.

HENRY DURBAN next sworn, deposed, that he was rightly acquainted with the prisoner at the bar; that the early part of June, he was in the house of Mr Bullivant, in Cumberland street, and there met with the prisoner, that the latter and Mr Bullivant were in the act of conversing what he was engaged reading, and that he heard very distinctly, the following words: "This would be of service to Mr Howe:" the prisoner Davidson holding a dirk or dagger in his hand; which the deponent said had been produced by Mr Bullivant. Mr **CHARLES JAMES BULLIVANT** confirmed the statement of the last witness, with some small variation. He said that the dirk or dagger was suspended in the ceiling or rafters of the room in which the prisoner and himself were discoursing upon various topics; that the instrument accidentally catching the eye of the prisoner, he took into his hands, and lovingly said, that "Mr Howe deserves a portion of this". This witness informed the Court, that he had been accused of pilfering a book by Mr Howe, which circumstance had come to the knowledge of Davidson, and upon that account he supposed the prisoner conceived he (Mr Howe) delivered some such chastisement; but still he, Bullivant, believed Davidson, from his laughing mood, to be only sporting.

[It is as well just to mention here, that Mr Howe, in the onset of the trial, acquainted the Court that he, of the moment, suspected Mr Bullivant to have been the individual who had stabbed him; being conscious that he had, a few days before, innocently accused him of a crime from which he, (Mr Bullivant) had been satisfactorily exonerated. That in consequence Mr B. was taken into custody for a short time on suspicion, as well as a man named Johnstone; both of whom appearing to be unconnected with the horrid offence, were consequently discharged.]

Mr **CHARLES GRAY** deposed, that in a casual conversation with the prisoner on Friday evening, the 14th of June, at his gate in York-street, he expressed it as his opinion, that Mr Howe had severely injured him. This assertion induced the witness to make further enquiry, and it appeared that the prisoner was aggrieved at the circumstance of a Mr John Davidson being advertised to depart the Colony, saying that the Printer was sporting with his feelings, as he was a prisoner of the Crown. The witness then endeavoured to explain away the mist that covered over the mind of the prisoner, and told him that the advertisement alluded to was intended for a gentleman of the name of Davidson, who was supercargo of the Medway, and therefore was not

meant for war. The prisoner had a waddy in his hand, one of those before the Court seemed to be it, and asked Mr Bray whereever it would not knock a man down? to which the latter replied in the affirmative. The prisoner had then said that he would be revenged and went away. Upon Sunday morning following, the circumstance that had taken place being reported to the witness, he immediately went in quest of the prisoner; you found him in the course of a few minutes, and then said to him, that he hoped that he (Davidson) had not any hand in the attack on Mr Howe; he replied, "No! That it was no more than he deserved at my hands, if it had been so."

JOHN FORSTER, constable, deposed, are between six and seven on the evening of Thursday, the 13th of June, he, in company with others of the police, was walking up George-street, and met the prisoner Davidson opposite the new building intended for the police office; that his intention was attracted, it being a fine starlight night, by the prisoner being armed with a waddy; that he stopped him, and upon examining the waddy found a bayonet turned down, to use his own words, upon it; that the prisoner was questioned as to the motive for carrying such a weapon, when he replied it was to protect him from the dogs, as he had been violently attacked a short time before by those belonging to Smithers. Forster then handled the weapon, and drew it through his hands several times; but it was a very rusty bayonet, and a heavy and rather rough waddy. Upon being desired to examine one of the waddies and bayonet before the Court, he stated that it much resembled that in the possession of the prisoner. The other waddy was then attempted to be enfixed in the bayonet, but was found not fit. This active police officer added further, that the prisoner told him he was then going to Church. Next morning the prisoner spoke to the witness Forster, as well as those that were with him on the preceding evening, and asked him if the bayonet had been found, as he supposed the constables must have seen him secrete the same under some rubbish near the new police office; but the witness replied in the negative. That upon the Tuesday morning, the third day after the attempted assassination, he went to the prisoner's lodgings; that he was met at the door by the prisoner, who had been once or twice apprehended and discharged on suspicion; that he had a waddy in his hand, and said that was the waddy he had with him on Thursday night. This waddy was before the Court also; and the witness Forster solemnly averred that was not the waddy, but that the other one much resembled that which the prisoner had, both in point of weight, size, and roughness.

JOHN MATTHEWS, another constable, confirmed the former part of the last evidence, and also said, that the bayonet was a dark looking rusty bayonet.

Mr **THOMAS WILLIAM PARR**, deposed, that upon suspicion being first attached to the prisoner, from a long knowledge of his person, and an acquaintance with his general mild character, he felt disposed to befriend him; that upon the second or third time of his apprehension on the horrid charge, the prisoner sent for him into the back room of the present police office; he then asked him (Mr Parr) if he was still inclined to serve him; to which the witness replied in the affirmative, so long as innocence was the garment he wore; that the prisoner then requested him to procure a bayonet, instead of that which was missing (for the immediate recovery of which Mr Parr had strenuously advised the prisoner to offer a reward), and have it placed in the spot which the prisoner said his bayonet had been secreted by his own hands, but which appeared now to have been unfortunately removed; that the witness then shook his head, said he would have nothing to do with the affair, and left him. Upon the point being strongly urged by His Honor the Judge Advocate, on the recollection of Mr Parr as to the request of procuring another bayonet, he further affirmed, that the

prisoner said, in that case, viz. on the obtainment of the bayonet, "the matter would be hushed, and it would do away that the business." The prosecution here closed.

The prisoner being called upon for his defence, informed the Court that he left it entirely to his Solicitor Mr Rowe. A sensibly written address to the Honorable Members of the Court was recited by His Honor: it went to say, the prisoner had been an active and brave officer in the army in former days; that he had comported himself with every possible decency and good conduct since his arrival in this Colony; and that the preparation of such an outrage upon society, as that with which he then stood charged, was as opposite to his nature, as it was abhorrent and disgusting to the dictates of humanity.

Two witnesses, who were in the boat with McKinlay upon his return from up the river, corroborated the testimony of McKinlay, so far as related to the circumstance of having returned by a quarter past nine, more or less.

JOHN THOMAS CAMPBELL, Esquire, Provost Marshal, being called upon as to the character of the prisoner since his knowledge of him, deposed, that, for the last nine years, his quiet, orderly, and apparently meritorious conduct had impressed him with the most favourable views; and that he should have believed the prisoner to be one of the last persons that could be capable of perpetrating so truly diabolic an act.

His Honor the Judge Advocate proceeded to sum up the evidence, in the performance of which important and involvement task, His Honor remarked upon the nature of the evidence that had been presented to the Court upon this occasion; that it was wholly circumstantial; and that not a single fact had been alleged against the prisoner that could possibly criminate him as the perpetrator of the crime with which he was now awaiting the judgement of the Court. It was a case of that peculiar complexion, which demanded the most jealous attention, and should therefore be narrowly watched. His Honor said, that it was a chain of circumstances that required to be traced link by link, and if but one link should be found wanting, which gave birth to a doubt, that that doubt should most unquestionably be thrown into the scale of mercy, and weigh on the side of the prisoner, however guilty he might be; thus leaving him to the vengeance of Him, who hath wisely pronounced that "vengeance is mine!" But, upon the other hand, should there be found a sufficiency of evidence to establish the crime against the prisoner, in that case, His Honor said, it would be unnecessary for him to remark as to what punishment would visit such an offender. The Court retired, and in about five minutes return with a verdict of Guilty. Remanded.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 11/10/1822

Court of Criminal Jurisdiction

Wylde J.A., 3 October 1822

WILLIAM BAXTER, JAMES GARDNER were indicted for feloniously entering the dwelling house of Mr **WILLIAM WHITFIELD**, at a place called the Dog-traps, on the 23rd of July last; and the former prisoner was also charged with firing at and wounding, with a loaded gun, one **ROBERT HAWKINS**, with intent to kill and murder. Baxter pleaded Guilty three several times; in order, he said, to exculpate his fellow prisoner, whose innocence he strongly asserted; but His Honor the Judge Advocate, strenuously enforcing upon the mind of the miserable man that such a plea neither would save the alleged innocent prisoner, nor be available to himself, he retired his former plea, and pleaded Not Guilty. It appeared that the prisoners entered

the dwelling-house at the hour of midnight and that the prisoner Baxter immediately fired at the poor man (Robert Hawkins), who is slowly recovering from the effects of a dreadful wound, and that they then rifled the dwelling of all that could be found worth taking, and shortly after decamped. The evidence in support of the crime was too indubitable to admit of much hesitation as to the Guilt of the prisoners, to which effect the verdict was returned.

The two last prisoners were again indicted for the perpetration of divers robberies; and **THOMAS KELLY, JAMES MADDOCK, JAMES HAGGERTY, and PATRICK MULLATON**, were arraigned as accessories after the fact. Baxter was found Guilty. Gardener, Acquitted. The other prisoners were all declared Guilty, 7 years transportation.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1823

SYDNEY GAZETTE, 02/01/1823

Court of Criminal Jurisdiction

Wylde J.A., 27 December 1823.

TERRENCE FLEMMING was indicted for the wilful murder of **CATHERINE KENNEDY**, on the 9th of November. From the evidence that came out on the trial, it appeared that the prisoner and the deceased cohabited together; that they [had] a small shop in Clarence- street, as well [as owning] three cows; that the deceased was occasionally a drunken and intemperate woman, and that the prisoner was a sober and industrious man. Upon the 3rd November last, the deceased was thrown down by one of the [cows] while in the act of milking her, and trod upon in the lower part of the abdomen. She was taken up forthwith, carried into the house. In a short time the prisoner came home, when the deceased began to accuse [him of] neglecting the cows, and said she would come by death in consequence of the injury unfortunately received. She became more violent, getting furious [at] last, and then a regular combat began between them. The deceased was soon knocked down or thrown down by repeated blows; and, when on the ground, was savagely kicked by the prisoner. However it was [proved] that he conveyed her to bed, where she was [believed] to groan most piteously the whole night. [The next] morning, the prisoner sent for Dr **BLAND**, who contended the deceased up to her death, which occurred in five days after. She told him that the complaint originated in a tread from a cow [on] Sunday evening; the wound, corresponding with [the heartless] tale, manifested itself extensively below [the] abdomen. From its deep discoloration, the [terrible] state of the wound, and emaciated state of the woman altogether, Dr Bland conceived it would be fatal, but which nevertheless might have favourably terminated, had the deplorable creature been induced refrain, for a little while, from wine drinking. She always told Dr Bland and others who occasionally saw [to] the wound, which caused her death, proceeded from the cow; notwithstanding which, it was sartorially proved, that the prisoner had maltreated [her] upon the same evening. Previous to pronouncing [the] decision of the Court upon the occasion, His Excellency the Judge Advocate pathetically and solemnly told the prisoner, that it was doubt, and doubt alone, that [saved] him from that ignominious destiny which otherwise would have inevitably awaited him. Not Guilty.

SYDNEY GAZETTE, 02/01/1823

Court of Criminal Jurisdiction

January 1823

[1]

HATHERLY and JACKIE, two aboriginal natives, we[re] next indicted for the wilful murder, on the 10th Oct[o]ber last, at Newcastle , of **JOHN M'DONALD**. It [ap]peared that the deceased had been left in charge of [the] Government tobacco plantation at Nelson's Plain about 22 miles from the settlement of Newcastle. H[e] was missed for the space of a fortnight, and the h[ut] which he had occupied was plundered, of its little a[?]. With the aid of another aboriginal native called Georg[e] who is attached to the interests of Europeans, the bo[dy] of the deceased was found lying in a lagoon, in a hor[r]ibly mangled condition. It exhibited such man[ner] of native atrocity, as were frequent in former time[s]. Suspicion fell on these two natives, the prisoners, [as?] they were left with the deceased in the hut, when la[st] seen; and they had become latterly invisible abo[ut] their usual haunts[.] A plan being laid, they

we[re] entrapped, and acknowledged that they had per[pe]trated the deed, but each charging the other with t[he] most atrocious part. Before the Commandant t[hey] confessed the crime; and even in court while t[he] Members had retired to consider of their disposal, th[ey] acknowledged the foul transaction. The Court, however, under all the peculiar circumstances of the cas[e] as there existed no other proof against the prisoner[s] than their own declaration, which could not legally, [in?] this instance, be construed into a confession, returned [a] verdict of Not Guilty .

[1] Our copy of this report omits the last few letters of each line of text. Our thanks to Lisa Ford for pointing out the existence of this case to us. A question here is whether the confessions were inadmissible because non-Christian Aborigines were unable to give evidence, or because of the general laws concerning confession.

We are checking the reference for this case, which may not be right.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 08/05/1823

Court of Criminal Jurisdiction

Wylde J.A., 5 May 1823

MARY REDMAN and BRIDGET LEVER were next indicted for wilful murder of **HAPPY FILLER**, on the 27th of December last; and **THOMAS FRANCIS and WILLIAM FENNING** were indicted as accessories in the said crime. About 20 witnesses were called on this trial, but none of the testimony could bring home the offence to any of the prisoners. From the evidence of Dr **MORAN**, Assistant Surgeon on the Colonial Establishment, no doubt could be entertained as to the deceased woman having met with a premature end, in consequence of a violent blow in the lower part of the skull, inclining to the right year; but whether this was produced by a blow from a rounded weapon, or occasioned by a fall downstairs in a fit, this Gentleman could not positively say, though he much doubted the latter. It appeared that the prisoners, as well as the hapless deceased, had all being in a state of drunkenness on the night of the supposed murder, and that more infamous and abandoned characters never before polluted a Court of Justice. However, as nought but a perplexity and infliction of circumstances came out on the trial, which only tended to thicken the mystery in which the transaction seemed to be shrouded, a verdict of Not Guilty was returned.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1823

SYDNEY GAZETTE, 02/01/1823

Court of Criminal Jurisdiction

Wylde J.A., 27 December 1823.

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SYDNEY GAZETTE, 02/01/1823

Court of Criminal Jurisdiction

January 1823

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SYDNEY GAZETTE, 08/05/1823

Court of Criminal Jurisdiction

Wylde J.A., 5 May 1823

MARY REDMAN and BRIDGET LEVER were next indicted for wilful murder of **HAPPY FILLER**, on the 27th of December last; and **THOMAS FRANCIS and WILLIAM FENNING** were indicted as accessories in the said crime. About 20 witnesses were called on this trial, but none of the testimony could bring home the offence to any of the prisoners. From the evidence of Dr **MORAN**, Assistant Surgeon on the Colonial Establishment, no doubt could be entertained as to the deceased woman having met with a premature end, in consequence of a violent blow in the lower part of the skull, inclining to the right year; but whether this was produced by a blow from a rounded weapon, or occasioned by a fall downstairs in a fit, this Gentleman could not positively say, though he much doubted the latter. It appeared that the prisoners, as well as the hapless deceased, had all being in a state of drunkenness on the night of the supposed murder, and that more infamous and abandoned characters never before polluted a Court of Justice. However, as nought but a perplexity and infliction of circumstances came out on the trial, which only tended to thicken the mystery in which the transaction seemed to be shrouded, a verdict of Not Guilty was returned.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYD1824

SYDNEY GAZETTE, 29/01/1824

Court of Criminal Jurisdiction

Wylde J.A., 23 January, 1824

Mr. **WILLIAM GORE** was next indicted for feloniously firing at and wounding, with intent to kill and murder, one **ANDREW BEATTIE**, a private in His Majesty's 48th Regiment, on the 21st of November last. The prisoner was also charged on a second indictment with the misdemeanour.

ANDREW BEATTIE, deposed, that he is a private of the 48th Regiment; that he was employed as military grass-cutter occasionally in the District of Lane Cove. On the day named in the indictment he was procuring grass on or contiguous to the farm of the prisoner; in which spot, or within half a mile, he had been before. There was a fence quite close to the spot; he was outside, and alone. When he first saw Mr Gore, he was 50 yards distant, and he had then made up, in bundles, 4 dozen of grass. He saw the prisoner's government servant prior to his seeing Mr Gore. Upon the prisoner getting sight of the witness he ran forward, exclaiming he had found one. Mr Gore commanded him to lay down his hook; the witness said that the prisoner was welcome to take the grass if it belonged to him, but seemed unwilling to give the hook, whereupon Mr Gore struck with his fowling piece on the right shoulder, which staggered him; and recovering himself, the witness ran off with his hook. The prisoner then levelled his fowling-piece at the deponent, and shot him, at the distance of about 80 yards: the prisoner never uttered a word. The deponent positively swore that the prisoner came up to him on the charge, cocking the piece as he advanced; and that there was not above the intervention of a minute and a half between the blow and the discharge of a gun. The deponent did not fall upon being wounded, he ran to some distance, and out of sight of the prisoner and his servant, ere he found himself wounded: the shot had entered his fingers, hand, arm, shoulder and right side. Becoming weak from loss of blood, the deponent thought it most advisable to return towards Mr Gore, to obtain aid. On returning, the back of the prisoner was towards deponent: when within a few paces, however, the prisoner suddenly turned, and seeing the deponent, exclaimed – "You rascal: have you come to trouble me again?" and made for the deponent; who informed him, the prisoner, that he was wounded. The reply of the prisoner to this was that he was nothing the worse, and he was sorry it had been a ball, for it would have stopped his running. The deponent replied it was bad enough, and begged for assistance to Sydney; which the prisoner refused to grant him. He then entreated that information might be promptly transmitted to his master, for he was unable to go home. Mr Gore to this also, said he would not; the deponent then was compelled to take shelter under a tree. The prisoner told him, the deponent, that he was able to walk; and, if not, he might die at the bush. The government man, Mr Gore's servant, then advanced towards the wounded man, and said he was wounded ill enough. An interchange of looks took place between the master (the prisoner) and a servant, Mr Gore then said he would go, in person, to the Doctor. The prisoner then directed his servant to take the wounded man's rope, jacket, and hook up to the house, and then return and take him (the deponent) up to the old well, and wash him. The man, however, assisted the deponent to the well prior to going to the house where he was left for about 7 minutes. He was then washed, and the prisoner, dressed some of his wounds with sticking plaster. The prisoner then promised to go to Town, and told the man to take him to his bed, and keep him there till he returned where he remained for 2 or 3 hours; till removed by a party by his comrades. That he met the

prisoner on his way to Sydney, who enquired after his health, but he (the deponent) gave that no reply. This transaction occurred about 10 in the morning. Upon his cross-examination, the deponent admitted, that Mr Gore had frequently reprimanded him from trespassing on his grounds, and taking away the grass; but this occurred when a mile and a half distant from his house. The witness had been admonished by the Adjutant of the Regiment against a repetition of this offence: which was 6 months prior to November last. Upon one occasion, Mr Gore took the grass from him; and, when he was lying at the old well, Mr Gore expressed his sorrow that it was him. He was confined 11 days in the hospital.

WILLIAM FREEMAN, an assigned crown servant of Mr Gore, deposed, that he had been two years with his present master; that he knew Andrew Beattie, the foregoing witness, well; and that from the circumstance of having frequently seen him on his master's estate at Lane Cove, employed as a grass cutter. The deponent stated that Beattie was so employed on the morning of the 21st of November last, between the hours of 9 and 10, which was the day he was shot. He, the deponent, first saw Beattie at the bottom of the lower orchard, on the outside of the fence. He went and informed his master of the circumstances who was employed in the garden, some distance from the deponent. He called to his master, who answered him by a wave of the hand. That his master, then left the garden for the dwelling, from whence he shortly came with a fowling-piece; and both of them proceeded in a direction to secure the grass-cutter (Beattie). Upon coming within had, Mr Gore demanded his hook; but Beattie said he might take the grass, but he would not give up the hook; upon which Mr Gore immediately gave him a blow on one side of the head with the fowling-piece. As he approached Beattie, the prisoner held the piece in both hands; but this witness said, that the gun was not cocked till after the blow. Upon being struck, Beattie ran off. Mr Gore commanded him to stop, saying – "Stop, you villain, stop; for if you don't I'll fire!" and he fired; that Beattie still running. The ground was steep and rocky, owing to which Beattie was soon out of sight. Mr Gore and the deponent then turned towards the fence, the latter searching for the grass, which was found close to the spot, with a jacket, rope, &c. Shortly after, Beattie returned, explaining he was badly wounded; and begged Mr Gore would send some one to Sydney, who declared that he would not. Beattie then said he must lie there and die; and threw himself under the shade of a tree. At the repeated entreaty of the wounded man, Mr Gore said he would go to Sydney himself. The prisoner, aided by the witness, then washed and dressed Beattie. This witness further deposed, that his master's farm had been continually trespassed by the grass-cutters; some of whom had used the most defying and abusive language, insomuch that prudence dictated the necessity of being properly armed, to avoid the threatened attacks being carried into effect. He had seen Beattie twice or thrice on the farm; and he never heard of anyone being struck or ill-used by the grass-cutters; but he had been threatened 5 or 6 times. For the last two years he had known the grass-cutters to be visiting the fields for the purpose of depriving his master of that species of property, which alone constituted the principal support of his family. Mr Gore was in the custom of taking his fowling piece, which he found it necessary to warn off the grass - cutters. He said there was nothing mentioned about a bull.

ROBERT KELLY, late overseer to the Government grass-cutters, deposed, that he heard of Mr Gore's farm repeatedly. The prisoner had made complaints to him of the depredations committed by the grass-cutters; and he had, in consequence, exerted all his influence in preventing those annoyances. Mr Gore once told him, the witness, that he had made frequent complaints to the Superintendent of Police, as well as to the

Adjutant ; and that he (the prisoner) was determined to make an example of some of them. Mr Gore, upon this occasion, asked deponent if he knew Andrew the soldier, meaning the wounded man, saying he was one of the party. In reply, the deponent told Mr Gore that the grass-cutters were ever making complaints against him, alleging that it was impossible to pass his house without losing their grass and their hooks, as Mr Gore came upon them with his musket. The interview terminated with the prisoner declaring that he would certainly shoot some of the most troublesome.

G.A. STEPHENSON, Esq., Surgeon, 48th Regiment, deposed, that the soldier Beattie was under his care. He saw him about 5 o'clock in the evening on the day on which he was shot. He had been wounded with small shot; from the back bone under the side they were 8 shots; on the back part of the upper arm, there were 10; and on the fore arm hand, 24 were lodged. This Gentlemen said, from the appearance and situation of the wounds, he was unable so desired for several days as to a recovery. If we understood Doctor Stevenson correctly, there remain 41 shots in Beattie still. Here the prosecution ended.

Messrs Garling and Rowe were the Solicitors on the part of the prisoner. A written defence, combining ingenuity and ability, was read by Mr Garling. We refrain, from very obvious motives, entering into many particulars that were detailed in this feeling Address to the Court; suffice it to say, that it contained and alluded to transactions with which most of the Public are already in possession.

T. WEATON, Esq., Adjutant of a 48 Regt. being called by Mr Rowe, deposed, that Mr Gore had once complained of the soldier Beattie; and that Mr Gore was then told the man should be punished for his conduct; but that the prisoner of the time interfered in his behalf, expressing the hope that such trespassers would not be followed up.

Mr **WILLIAM GORE, junior** deposed, that the grass-cutters were continually trespassing on his father's farm, almost every day, and always 3 or 4 times a week. Upon some occasions, they would be particularly rude and violent; while, at other times, cruelty might mark their conduct. Once they went so far in insolent behaviour, as to threaten him, the deponent, with the loss of his head, which they declared they would cut off! It was nothing uncommon to be threatened with maltreatment, when he interfered. They have often been so daring as to come within 100 yards of the house, on this side the inclosures. His father invariably told him to the comport himself with civility towards them, and cautioned him against cocking the piece at them. He saw Beattie once on the cultivated, and twice on forest land. That his father sent him into town next day (the day after this affair) to Mr Garling to enquire as to the state of the soldier; and to ascertain whether his attendance would be necessary. He returned home with a message from the Solicitor, and his father immediately surrendered himself.

WILLIAM FORSTER, late district constable in Lane Cove, deposed to the marauding conduct of the grass-cutters, for many years, in that quarter.

The defence being concluded, His Honor the Judge Advocate proceeded to sum up the case to the Court, remarking on the two particular legal principles appearing to be involved in the prisoner's defence, for the consideration of the Court as affecting the degree of criminality arising upon almost every case of homicide; while the charge, exhibited against the prisoner, was to be determined exactly upon the same point as if the discharge of the musket had proved the fatal cause of death to the party at whom it was directed. In which view, therefore, the question would have been, whether the prisoner had discharged the gun in such a transport of passion and sudden irritation as to reduce the offence, in that event, to manslaughter; and again, whether as homicide

was justifiable, if committed only in prevention of a felon's escape from justice, the act of firing off the piece by the prisoner had taken place only for the purpose of preventing the otherwise unavoidable escape of the prosecutor, as a felon. His Honor then went into detail of observations illustrating those legal principles, immediately reading the evidence taken, and applying the facts as bearing, or otherwise, upon either point. As to the feelings of the prisoner on the occasion, it would be for the Court to weigh the great provocation, that had been so fully proved to have been so long and grievously endured by the prisoner, by continued trespass, and loss of grass from the estate generally, as also, in particular, several times by the prosecutor himself: – that if the Court found, that the gun had been carried from the house to the spot, from no offensive intention, but for personal protection only, though used indeed afterwards offensively under ebullition of passion, excited in so great a degree from the prosecutor's refusal to lay down his hook, when desired to do so, as for a moment to overpower his reason, – all malicious motives being thus removed – the prisoner would be entitled to his acquittal. But if, on the other hand, the whole course of conduct and feeling on the part of the prisoner, seemed to shew him as a master of himself, and as acting under previous or immediate resolution to use personal violence against the prosecutor, with such a deadly instrument, – at any hazard, – or even under any misapprehension of legal ingenuity, or protection – if it should appear, that he must have immediately recognized the prosecutor, and would thus be satisfied, that a ready course was open to him therefore, by complaint to the commanding officer of the Regiment to which he belonged, as on a former occasion, of bringing him to punishment. If, in short, upon the evidence it appeared uncontroverted, that the prisoner used violence without any the least personal provocation at that time, rather than the trespass committed, and the grass found in the prosecutor's possession, then the law would imply the malicious motive in the act of the prisoner, so as to bring him within the charge on the information. With regard too, to the point of justification, though there could be no doubt of the prosecutor having removed the bundles of grass, when removed from the freehold, and therefore a subject of larceny, and although the prisoner would have been justified perhaps in apprehending the prosecutor, it was to be observed still, that the law allowed no more personal force than was absolutely necessary for the apprehension, and that the death of the offender sought to be taken, or any act of violence, such, as was alleged against the prisoner and that under the present information, could be justified so far only, as it should satisfactorily be made to appear, that all other means would have been ineffectual to prevent escape. With this view, the Court would consider, whether upon the circumstances in proof, they could find any intention either before or after the discharge of the gun on the part of the prisoner, to apprehend the prosecutor, by any words used at the time, – by any pursuit upon the prosecutor's flight, – or arrest after he was rendered unable to fly; – whether in fact, although the gun was discharged, he was escaping from justice, or from farther violence only, after the blow from the market on the prisoner first coming up with him. It was again to be had in recollection, that a great distinction was also applicable to the principle of justification, which was extended only to the prevention of escape by felons upon commission of [endangerous?] felonies, and not to cases of offences of greatly inferior enormity and mischief. It was still further to be observed, upon the facts of the case, that as the prisoner had made so many complaints to the Police and others during the previous month upon the trespassers in question, it was unfortunate, at least, that he had not had police officers on any day to apprehend parties so offending, as alleged, every day almost of the week (and the greater the injury, the stronger in

force the observation), so as thus to take the easy legal means of repressing the evil, rather than to take the law so violently into his own hands, in fulfilment of the menaces he was proved to have made on the subject: "that if the grass-cutters, as well as the prosecutor, did not keep away, he would certainly shout some of them to make an example."

We are unable to pursue His Honor in his laborious investigation of the case, or the arguments adduced both on the law and feel irresistibly convincing as to the grounds on which a decision of the Court should be directed and controlled.

After an absence of about 15 minutes, the Members resumed their feet; and His Honor pronounced the prisoner Guilty of the first count in the indictment. Sentence
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

R. v. Miller

Court of Criminal Judicature

Wylde J.A., **7 February 1824**

Source: Court of Criminal Jurisdiction, Informations, Depositions and Related Papers, State Records N.S.W., SZ803 [1]

[59] Sir,

I cannot hear of any other witnesses in the case of the King versus Thomas Miller, than the Black Natives, and as you inform me in your Letter of 16th Jan last, that, they are not Competent witnesses in a Criminal Court, I shall not forward them to Sydney.

I have this known to be,

Sir,

Your obedient Humble Servant

[signature]

His Hum

The Judge Advocate

Note

[1] See also R. v. Fitzpatrick and Colville, 1824.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 17/06/1824

Supreme Court of New South Wales

Forbes C.J., 11 June 1824 [1]

Murder.- The first case that became exhibited to the Court was one of a sanguinary description, in which two fellow creatures were to stand their trial for their lives, on the charge of depriving a fellow mortal of that existence which man can take away, but which none except the Creator can bestow.

MICHAEL MURPHY and JOHN SULLIVAN were indicted for the wilful murder of **WILLIAM BYRNE**, on the evening of the 7th of March last.

[The prisoners were informed that they had a right to challenge, on the ground of interest or affection, any of the Jury. [2]]

The Attorney General [3] opened the case, in which the learned Gentleman briefly stated such facts as became developed in the course of the evidence. The first witness called on the part of the prosecution was,

Dr. **ANDERSON**, Assistant Surgeon on the Colonial Establishment, who deposed, that he examined the body of William Byrne, the deceased, on the 8th of March last, in the General Hospital. He found the head considerably injured and swelled by two

contused wounds; one of which was much larger than the other - the largest at the back part of the head. That, in cutting down upon the scalp, there appeared a considerable extravasation of blood between the skull and scalp, with an extensive fracture of the occipital bone. So satisfied was Dr. Anderson of the cause of death by these wounds, that he proceeded no further in his examination of the body. The wounds were evidently inflicted by a heavy blunt instrument.

G.M. SLADE, Esq. Coroner, deposed, that he convened an Inquest on the melancholy occasion on the 8th of March, the day after the murder, and that the papers now handed into Court were correct copies of the depositions and verdict.

JOHN THOMAS CAMPBELL, Esq. proved some additional depositions that were taken before him, and other Justices of the Peace.

CATHERINE BRUCE deposed, that she was acquainted with Byrne, the deceased, as well as the two prisoners at the bar. She lived at the Waterloo Mills, about 3 miles from Sydney on the Botany-road, with her husband. She came into town about 3 in the afternoon of the 7th of March, the day on which the murder was perpetrated; that upon coming to the toll-gate, she saw the prisoners at the bar, who were then apparently proceeding on the Botany-road, on their way to the Mills, of which the prisoner Murphy had then the charge as overseer and clerk. - At or about 8 o'clock in the same evening, she returned through the toll-bar, in her progress homewards, in company with three men, viz. the deceased, **JOHN BAXTER**, and **PATRICK HAYDON**. Shortly after their entering upon the Botany-road, the witness beheld four men advance from the bush, who leaped over the fence. Having hold of the arm of the deceased, she exclaimed, "Billy, my lad, see who is coming!" And before the words were scarcely articulated, poor Byrne received a violent blow on the head from one of the four men, which caused the blood to fly over the bonnet and face of the witness. The prisoner Murphy gave this blow. The other prisoner, Sullivan, then struck him, was the last that struck him, and was the man that killed him! The other men were engaged in beating Baxter. In behalf of the deceased she vainly implored mercy at the hands of the dire ruffians, when one of them gave her a blow. As soon as the murder was complete, the party seemed to return towards Sydney. The witness dispatched Baxter to Sydney, to give the alarm; and the other man, Haydon, went for her husband to the Waterloo Mills, whilst the witness remained with the body. She laid the head of the deceased in her lap, and rubbed the temples, but there was no sign of life remaining.

Upon the part of the prisoners the witness was cross-examined by Mr. Solicitor Rowe. She still deposed to meeting the prisoners on the way out through the toll-gate, while she was coming into Town. At the time, she added, that one **JAMES PURCELL** accompanied her. She called at the Woolpack public-house, just at the entrance of Sydney, and obtained one pint of beer, which was drank by Purcell and herself. From thence she went to the house of one Wheeler in George-street, but there had nothing to drink. After this she called at the house of **DANIEL KELLY**, where three others and the witness drank a quart of beer. From Kelly's she returned to the Woolpack, where she met with the deceased, Baxter, and Haydon. Here she had nothing to drink. The witness stated that she was perfectly sober, and did not require any assistance home; and that Baxter only went to protect her out of friendship to her husband. She again, most particularly swore to the prisoners; but the other two she had no recollection of, neither would she be able to identify them. The four men were dressed in black, and wore long great coats. The night was sufficiently light to behold the faces of the prisoners at the bar.

JOHN BAXTER deposed, that he was out at the Waterloo Mills to see the husband of the last deponent, on the afternoon of the day on which the murder was committed. That Mrs. Bruce left home for Sydney about 3 in the afternoon; and waiting rather late, her husband requested him to come into town for the purpose of seeing her safe home. When within 200 yards of the Woolpack public-house, he could distinguish the voice of Mrs. Bruce. He found her in company with the deceased, and the other man, Haydon. This was between 6 and 7 o'clock. A few minutes after 8, Mrs. Bruce, the deceased, Haydon, and himself set out for the Waterloo Mills. They had just left the toll-bar, and entered upon the Botany-road when Mrs. Bruce desired him to go forward; upon complying with which his eye caught 4 or 5 men coming up, whom he supposed to be constables. One of them gave him a blow on the head, and in recovering from the effects of its violence a second was inflicted, which felled him to the ground, and produced insensibility for some considerable time. He was quite sober, but knew none of the party. He was on the right hand side of the road when assaulted, and the deceased on the left, only a very short distance. The men seemed to have large coats on, that came below the knees, which were all of a dark colour. He recovered in time to perceive the assailants make for Sydney.

In his cross-examination by Mr. Rowe, the witness admitted that Mrs. Bruce had been drinking, and that the two men, Haydon and the deceased, were intoxicated. Mrs. Bruce gave the deponent some beer at the Woolpack. The men were 100 yards off when he first saw them on the Botany-road, and were then in the rear; they walked together on the right hand side of the road. That finding they were all intoxicated, he thought it his duty to conduct Mrs. Bruce home. It was a cloudy night, and so dark, that it was not possible to discern the countenance of any of the parties; but still, had he been intimately acquainted with any of them, he admitted it would have been easy to identify their persons. He would not swear to either of the prisoners.

In answer to a question put by the Attorney General, the witness said, that a very few minutes only could have elapsed from the time he first saw the four men, till the moment he was struck; and that the face of Mrs. Bruce was not turned towards the party, till he, the witness, told her they were coming.

RICHARD PALMER deposed, that he met Mrs. Bruce, and her party, going towards the Waterloo Mills, on the evening of the murder, between 8 and 9. He was then coming in to town from Botany; and having a knowledge of the deceased Byrne, spoke to him, in passing. None of the party appeared to him in liquor, nor did he think they were. So far from its being a dark and cloudy night, as deposed by Baxter, this witness stated it as a windy and moon-light light, [sic] the moon being within an hour of setting. Upon coming to the bottom, or the commencement, of the Botany-road, he met Sullivan, one of the prisoners at the bar, with whom he was acquainted. He, Sullivan, came across the road from 3 or 4 other men. He enquired of the witness where he was going; he replied, to Sydney. The witness then asked Sullivan who were those men, in great coats, on the other side of the road; and the latter immediately asked if he, the witness, met Mrs. Bruce on the road, and who was with her? He told him, that "Little Bill, the Carpenter," meaning, the deceased, was among the number. The witness then bade Sullivan good night, which salutation was not returned. He stated, that Sullivan was dressed in blue, and that the others wore great coats. Business requiring his return to Botany early the next morning, the witness saw the body of the murdered man; he then gave information of the previous evening's interview with the prisoner Sullivan, but was not aware, at the time, that he was then in custody on suspicion.

JOSEPH SMITH, who lived at the Waterloo Mills, in the same house with the prisoner Murphy, deposed, that the latter came home on the afternoon that the murder was committed, exchanged a white jacket that he had worn all day, for one of a blue colour, and went out saying, that he would endeavour to secure the deceased Byrne, and lodge him in the watch-house, for absence and neglect of duty. Sullivan, the other prisoner, also dressed in blue, accompanied Murphy from home: the latter had a stick, but which he was unable to describe to the Court. Murphy returned in the evening, saying he could not find "Bill," the deceased, and that he would not further perplex himself about him. The witness did not see Sullivan till the constables came to apprehend him at 11 at night.

PATRICK COGHLAN deposed, that he slept in the same room with the prisoner Sullivan. He saw both the prisoners on the 7th March. They were dressed in blue. Sullivan came home some time in the night, and told him he had seen Mrs. Bruce and the deceased on their way home, and that they knew him.

JOHN BRUCE, a resident at the Waterloo Mills, deposed, that he saw the prisoner Murphy on the evening of the 7th of March, before sun-set. He was enquiring for the deceased, Byrne, and one M'Coy; both of whom were under the orders of the prisoner Murphy, as the overseer of the Mills.

The case for the prosecution here closed.

DANIEL KELLY was the first witness called by Mr. Rowe, in behalf of the prisoners. He deposed that he saw Mrs. Bruce about an hour before sun-set on the evening of the 7th of March last. She was "rolling drunk" past his gate. He then lived in Pitt-street, and Mrs. Bruce being acquainted with his wife, came in. She sent for half-a-pint of rum, giving the witness's wife a silver shilling to procure the same; of which Mrs. Bruce partook one-sixth, or half-a-glass. After remaining here half-an-hour, Mrs. Bruce went into an adjoining public-house, where she continued till sun-set. Upon leaving the public-house, she was so drunk that the witness stated she wished to return to his house to become sober, but which his wife would not allow. A man, who came out with her, conducted her away.

JOHN CULLEN, innkeeper in George-street, Sydney, on the Brickfield-hill, deposed, that he recollects the evening of the murder well; that he saw Mrs. Bruce, and two men, going by his house on that evening towards the toll-gate; and that all three appeared to be drunk, as they talked loud, and conducted themselves as intoxicated persons. He had often seen Mrs. Bruce in an inebriated condition.

FLORENCE M'CARTHY deposed, that he lived at the toll-gate; that he saw Mrs. Bruce on the evening of the murder returning homewards, with three men; and that she appeared so drunk, that they were holding her up; but cannot positively say she was intoxicated, only coming to such a conclusion from appearances.

John Baxter was here re-called. - He stated, that he saw the man who gave him the second blow; but not him that struck the first. To either of the prisoners he could not swear.

JAMES DUNLEVY, a constable at the first round-house, on the Parramatta-road, deposed, that he was in quest of bush-rangers in the vicinity of the Waterloo Mills on the evening and night of the 7th of March; that about 6 o'clock, upon the other side of the Mills, he fell in with the prisoner Murphy, who was driving some bullocks out to pasturage for the night, and he complained, at the time, of the absence of some men from the Mills. They remained in company till 25 minutes before nine o'clock, when they separated at the Waterloo-gate, Murphy going towards the Mills, and the witness making a short cut across the country to the round-house, which saved half-a-mile,

and avoided the scene of murder. He concluded his testimony by remarking that Murphy wore a blue dress.

Many respectable witnesses were called on the part of the prisoner Murphy, as to character; and one and all agreed as to his sobriety, diligence, and honesty.

The prisoners having closed their defence, the Attorney General rose, and addressed the Court by observing, that he could not do better, for the ends of justice, than leave the case with the Jury.

His Honor the Chief Justice then proceeded to sum up the evidence; and, in his charge to the Jury, His Honor could not avoid remarking on the discrepancy in the evidence, as far as regarded the sobriety of Catherine Bruce - the only witness that ventured on swearing to the prisoners at the bar, and upon whose testimony their destiny seemed to hinge. Her testimony remained unsupported; and several witnesses deposed to her inebriety upon the evening of the murder. His Honor stated the law upon the subject to the Jury; going over the whole of the evidence, and making such comments as the importance of the case, and the intricacy of the circumstances, required.

The Jury retired about half after five, and resumed their seats about six; when the Foreman returned a verdict of Not Guilty against the prisoners, who were directed by His Honor to be immediately discharged.

[1] This was the first trial held in the new Supreme Court, and the first before Forbes C.J. in New South Wales. Forbes was pleased with the results of the first criminal session in the Supreme Court, saying that it was received well by both classes of people (the emancipists and exclusives): Forbes to Wilmot Horton, 10 July 1824, 14 August 1824, Catton Papers, Australian Joint Copying Project, Reel M791.

[2] The jury was comprised of six army officers, and one naval officer: Sydney Gazette, 17 June 1824.

[3] Saxe Bannister.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 24/06/1824

Supreme Court of New South Wales

Forbes C.J., 21 June 1824

[1]

Murder. – **CORNELIUS FITZPATRICK and THOMAS COLVILLE** were indicted for the wilful murder of **JOHN BENTLEY**, a shepherd in the vicinity of the settlement of Newcastle. It appeared by the testimony of **ROBERT SEARS**, an accomplice, that the prisoners and himself were in company on the way from Patrick's Plains to Newcastle; that, when within a few miles of the settlement, the prisoner Colville and the witness passed a hut occupied by Bentley, the deceased, leaving behind Fitzpatrick and a black native. That when about 60 yards a-head of Fitzpatrick, the witness heard the report of a musket. Upon Fitzpatrick coming up, the witness Sears enquired the cause of his discharging his piece at that time, it being in the night: - the reply elicited was, that he had been shooting at a dog; and here, for the moment, further enquiry dropped. On their arrival at Newcastle, however, the native and the witness Sears were at the house of a constable, named **YOUNG**, when the black-man expressed vast sorrow for what had been done by Fitzpatrick, whom he, the native, then impeached with the death of "Old John," meaning unfortunate Bentley, the deceased. Further enquiry became instantly instituted, and the information given by the native proved to be too true! In the presence of the gaoler at Newcastle, it was also

proved, that Fitzpatrick acknowledged to the discharge of the musket, which had occasioned the death of Bentley; at the same time exculpating the witness Sears, and adding that the musket went off accidentally. There was corroborative testimony of the fact, that the prisoner Fitzpatrick did fire the gun, and that the deceased met with death in consequence. The Members retired after the charge of His Honor the Chief Justice, and were occupied nearly an hour in the jury-room, when a verdict of Guilty was returned against the first prisoner, Cornelius Fitzpatrick, and Not Guilty against Thomas Colville.

The awful sentence of the Law was then passed upon the murderer, by His Honor the Chief Justice; which decreed that he should suffer death on Wednesday morning (yesterday). [2]

[1] Elsewhere in the same day's issue of the Sydney Gazette (p. 2, col. 1), it was noted that:

"The King against Fitzpatrick and Colville. - In the course of this trial it appeared that **BULWADDY, a black native**, was present at some part of the transactions. His evidence could not be offered to the Court, inasmuch as he had not that belief in a superior Being, the avenger of falsehood, which the Law requires to sanction an oath. But, as he had made certain statements to a competent witness, in the presence of one of the prisoners, that witness was called upon to repeat them. The statements, however, did not affect the prisoner, and he [Colville] was acquitted on the whole case.

"Before the statements so made were received, Bulwaddy was produced, in order that the Court might judge of his capacity or inability to take an oath. He appeared to know well the distinctions between truth and falsehood, and appeared to have some apprehension of an existence after death; but not to have either a superstitious or religious fear of a superior Being, who would punish him if he should speak falsely. His testimony therefore could not be taken, except under the circumstances before mentioned."

[2] Forbes respited the sentence until Governor Brisbane could review the case. He told the Governor that "Your Excellency will observe that the evidence against the prisoner, is presumptive, and that without taking into consideration his confession, it does not completely bring home the Guilt of Murder to his charge - the confession is qualified, by the affirming of the prisoner, that he killed the deceased Bentley by accident and without knowing at the time that he had killed him.

"Your Excellency will also observe that there was a person present at the fatal scene, who could have proved the exact circumstances under which Bentley came to his death - that person is a native New Hollander, called Bullwaddy - but from the Rule of our Law, which requires a Witness to believe in a future state of Reward and punishment, his testimony could not be taken at the trial.

"I have felt that under the peculiar and perhaps unprecedented circumstances in which the Court was placed, that the best evidence (at least vital evidence) had not been produced; and that it was possible the crime of the accused might not have amounted to more than manslaughter, - I have therefore respited the prisoner, in order that your Excellency might have an opportunity of considering the case, divested on those restraints which the strict rules of evidence imposed upon the Court at the trial, and with that light which the evidence or statement of Bullwaddy will in all probability throw upon it." (Source: Forbes C.J. to Governor Brisbane, 24 June 1824, Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, p. 1.)

Brisbane replied as follows on the same day: "After I had the honor of an interview with you on the subject of Fitzpatrick case, the Attorney General produced

Bullwaddy, who I examined in his presence and he gave a clear and distinct account of the murder of Bentley which removed every doubt in my mind of Fitzpatrick having committed a cool and deliberate murder on the unfortunate Bentley. This link in the chain of evidence I felt necessary to fortifying my mind as to the guilty of the Prisoner, which Bullwaddy's testimony has completely turned against him and I have in consequence to direct the Execution of Fitzpatrick, the day to be decided upon by you." (Source: Brisbane to Forbes, 24 June 1824, Archives Office of New South Wales, 4/6651, p. 2. This correspondence is also quoted by C.H. Currey, *Sir Francis Forbes: the First Chief Justice of New South Wales*, Angus and Robertson, Sydney, 1968, 103.)

Under (1752) 25 Geo. III c. 37, s. 1 (An Act for Better Preventing the Horrid Crime of Murder), those who were convicted of murder were to be hanged the next day but one after the conviction (unless that day were a Sunday). By s. 4, however, the judge had power to stay execution, as happened in this case. On this Act, see *R. v. Donovan*, 1824.

Forbes reported this case in a letter to Wilmot Horton on 14 August 1824 (Catton Papers, Australian Joint Copying Project, Reel M791): "I have already discovered several defects in our act - among the more important is the want of means to get at the testimony of the native black people. They have no sense of an after state of rewards or punishments, but they are governed like ourselves by that instinctive love of justice, and natural law which always leads to the expression of truth where there is no superior inducement to falsehood. Lord Coke says an infidel is not to be taken as a witness - the light of latter times has dissipated this very barbarous notion - but still the exact application of our present rules of evidence will utterly exclude the testimony of all the aboriginal people of this extensive country for our Courts. A case lately occurred in which the injustice of the ordinary rule was forcibly felt - it was a case of murder upon circumstances - the only person present was a native black -the prisoner admitted the fact of killing, but stated it was by accident. The Jury convicted, altho' it was possible the excuse set up by the Prisoner might be true. I respited the sentence and recommended the Governor to have the black before him and inquire into those circumstances which we could not legally bring before the Court - the governor had up the native, and he gave in presence of the Attorney General, the fullest, clearest, and most conclusive account of the whole affair - Now was it not barbarous to exclude such testimony by a mere rule of Court, which was engendered in days of superstition, and framed by men who never heard of the consequences to which it would tend. Why is not competency confined to interest, and credibility left in all cases to the jury? Truth is a natural institute of mankind -it is founded in moral feeling -and providence has so guarded it, that perhaps it is next to impossible so to cover falsehood as to prevent its discovery, if sufficient care and means be used to expose it. I shall at a future period bring this subject under the official notice of Lord Bathurst." Forbes rarely wrote so strongly about what he saw as injustice.

Fitzpatrick was hanged on 28 June 1824, a week after the trial. The *Sydney Gazette*, 1 July 1824, p. 2, col. 4 reported that "He confessed the fact of having discharged the gun which wounded and killed poor Bentley, but averred it originated in accident. The justice of that sentence, however, which doomed him to an untimely end, he fully acknowledged; and hoped for mercy through the merits of Christ Jesus."

On Aboriginal evidence, see also *R. v. Miller*, 1824.

On Aboriginal evidence, see A.C. Castles, *An Australian Legal History*, Law Book Co., Sydney, 1982, 532-534; B. Kercher, *An Unruly Child: a History of Law in Australia*, Allen and Unwin, Sydney, 1985, 15-17.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 08/07/1824

Supreme Court of New South Wales

Forbes C.J., 2 and 6 July 1824

THE BLACK NATIVES.

An application was made on Friday last [1] to the Supreme Court, to admit to bail Mr. **JOHN JOHNSON**, one of the six persons "charged (as the committal stated) on suspicion of the murder of three black women." - These women were said to be original natives of the Colony, and their murders, or deaths, were supposed to have taken place, if at all, in the neighbourhood of Bathurst. The grounds of the application, as stated by Mr. Rowe, were - First, that there was so much informality in the warrant of commitment, as to render it probable that no deaths had taken place. This was supported by an affidavit, averring, that no Inquest had been held by the Coroner, although the alleged scene of murder was only about seven miles from his residence; upon which oversight of that officer, if the outrage complained of were committed, several remarks were made in Court.

The second, and chief ground of this application was, that the case against John Johnson was so slight, that his innocence was much more probable than his guilt. He was brought into Court by Habeas Corpus. A difficulty arose as to the mode of bringing before His Honor the Chief Justice the depositions on which Mr. Johnson was committed by the Magistrate, in case the Chief Justice should not deem the committal sufficiently informal to warrant his granting bail upon it. In pursuance of the former practice of the Colony, these documents had been transmitted to the Attorney General.[2] [sic] This practice seemed to have been borrowed from the practice in England, directed by certain ancient Acts of Parliament, although, under the modifications rendered necessary by our present institutions, the sending to the Attorney General depositions, taken on committal for the Supreme Court, was stated to be in all respects convenient and tending to the good administration of criminal justice; but the nature of the charge, in this case, rendered a disclosure of the contents of the depositions as improper by the Attorney General, as that of the evidence before a Grand Jury would be. The Court, however, thinking that the committal was not sufficiently defective to authorise bail, it was agreed by consent, that His Honor should read the depositions in order to determine on the application, without any further disclosure being made.

On Tuesday [3] His Honor, after much deliberation, delivered his opinion, that the prisoner could not, upon the face of the depositions, be admitted to bail. But the prosecution, His Honor observed, would be required to be had with the least possible delay .[4]

The Court adjourned sine die.

[1] 2 July 1824.

[2] Saxe Bannister.

[3] 6 July 1824.

[4] The trial (for manslaughter rather than murder) was held on 6 August 1824: R. v. Johnston, Clarke, Nicholson, Castles, and Crear, 1824. All the defendants were acquitted.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 08/07/1824
 Supreme Court of New South Wales
 Forbes C.J., 1 July 1824

WILLIAM BLUE was next arraigned for manslaughter. It appeared that the prisoner had been considerably annoyed by several boys, among whom was one **THOMAS COX**; that the aggressors (the boys) gathered round the prisoner, and made such sport of him, as to cause him to throw a stone, which unfortunately struck the deceased, Thomas Cox, and soon after caused his death. A verdict of Guilty was returned; but the Jury very strongly recommended the prisoner to the favorable consideration of His Excellency the Governor, which His Honor the Chief Justice was pleased to say should be attended to.

[*] He received a sentence of six months imprisonment, computed from the day of commitment: Sydney Gazette, 8 July 1824, p. 2, col. 3. This is presumably the well known Billy Blue. He was of African descent.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 12/08/1824
 Supreme Court of New South Wales
 Forbes C.J., 6 August 1824

Friday. [1] - The Attorney General [2] informed the Court, that he would present an information against **JOHN JOHNSTON, WILLIAM CLARKE, JOHN NICHOLSON, HENRY CASTLES, and JOHN CREAR**, charged with an assault on an aboriginal black woman, which terminated in death. The prisoners were accordingly indicted for manslaughter.

The Attorney General observed, that this was not a case which affected the lives of the prisoners, as there were certain transactions which prevented a capital charge being preferred. There were circumstances of danger which led to the present trial, but nothing, in his opinion, that could justify the measures that had been adopted. Many accounts of the barbarities perpetrated by the black natives had been circulated, and there had also been lives and property destroyed; which, in extreme cases, there could be no question should be defended at the risk of the lives of the assailants. The Attorney General further remarked, that no difference existed between individuals, whether black or white, but that the same laws, now in force, equally extended to each; and, although it was necessarily admitted that danger had no small influence upon the minds of the prisoners, nevertheless it was to be proved, that the steps resorted to were unjustifiably rigorous. Witnesses were then called in support of the prosecution.

Mr. **WILLIAM LANE**, overseer to Mrs. Hassall, at O'Connell-plains, in the Bathurst country, deposed, that a party of the natives visited that neighbourhood about the latter end of May last; shortly prior to which 7 white men had been killed by them, in the vicinity of Mudjee. This occurrence had spread terror and alarm through the country. That a tribe of the natives also visited Brisbane Valley, a station belonging to Mr. **JAMES HASSALL**, distant 15 miles from O'Connell-plains. Here they plundered the stockmen of all their comforts and provisions. On the 31st of May, one of the men under his controul, named **JOHN HOLLINGSHEAD**, came home wounded in two places; one spear having passed through the left arm, just below the elbow, and another fractured the thumb bone. This man reported to Mr. Lane, that he had been pursued within one mile of the farm. The consternation among the men on the estate increased. Application was made by the prisoners at the bar, in conjunction with one

Alexander Grant, to be allowed arms, that they might go in pursuit of the natives, else they would all be murdered. The witness, considering his family and people were in imminent danger, supplied the prisoners with horses and arms: four had muskets, and the fifth (Castles) could only obtain a sword. The wounded man (Hollingshead) having been pursued in the S.E. direction, which was close to the main road leading from O'Connel-plains, the prisoners went off in that route. In the evening the party returned, reporting the fruitlessness of the expedition, as they had not fallen in with any of the natives. After this, Clark and Castles admitted they had seen a party; in which they were borne out by the declaration of Alexander Grant, in presence of the prisoners. The latter remarked to the witness, that the blacks had their spears prepared to throw at him; that he called to the five prisoners, who were rather behind, to advance; that a volley was discharged in their midst; and that some of them dropped, but whether males or females then they did not know. It was afterwards ascertained, by the story of Grant, that one was an old woman, but of the age or sex of the others they pleaded ignorance. The party, which had been so fired at, contained about thirty in number, and fle[d] into the mountains. The prisoner Castles admitted, that as he passed, he gave the old woman a prick with his sword. Mr. Lane said, that he saw no dead natives, but that he was acquainted with some few of them by name, and that one was called Joe.

In reply to the cross-examination of Mr. Rowe, the Solicitor for the prisoners, Mr. Lane added, that about 50 armed natives had been at his place sometime previous to the late unhappy occurrence; at which period two of these sable marauders were suffering imprisonment at Bathurst for outrages that had been perpetrated. Their appearance manifested symptoms of hostility, though they conducted themselves quite peaceably, as all their wants were then supplied. It was generally reported, that seven white men had been killed, which was a fact well known to one of the prisoners at the bar (Nicholson), as he had been at Bathurst, and actually seen the bodies in a cart. The whole of the country, Mr. Lane stated, was in great agitation from the violence of the natives; some of whom, he has been informed, had fire-arms in their possession. He allowed the prisoners to go out in quest of the natives merely from motives of apprehension.

HENRY TRICKEY, a crown servant [3] in the employ of Captain Raine, deposed, that he lives on his master's estate at the two mile creek, distant five miles from O'Connel-plains, and eighteen from Bathurst; that he is acquainted with Sidmouth Valley. He was going, about five weeks since, on a Tuesday, with his mess to grind; when between Sidmouth Valley and the two-mile creek, a trifling distance from the main road to Bathurst, his attention was arrested by a large quantity of crows, eagle hawks, and other birds of prey; he proceeded to the spot, and was surprised to find the bodies of three black women. The ground upon which those bodies were, is called the Government reserve. He returned to his hut for a spade, and interred the bodies, which were in a state of putrefaction. He did not particularly examine them, only one was an old woman, and the others were apparently girls. He was at work the day before within half-a-mile of the spot, but heard the discharge of no musketry. The day subsequent he saw the prisoners, but had no conversation upon the subject. This witness also stated, that the country was in considerable alarm from the atrocities committed by the natives.

Mr. **STEPHEN GEARY WILKS**, acting surgeon at Bathurst, examined the bodies of three aboriginal women. Upon one of the bodies he discovered a wound, which had penetrated the cavity of the abdomen; in examining the second, there appeared a hole upon the bone of the skull; and the third exhibited nothing extraordinary. The wounds

were sufficient to cause death. That, inflicted upon the skull, was of such force as to leave no doubt of its being occasioned by a gun-shot. He knows of 13 men that have been killed by the natives, two of whom have undergone the operation of scalping, which was supposed to have been done while the poor men were yet alive; but to this he could not speak positively.

Mr. **WILLIAM WEBB SHANNON**, resides at Raineville, near Bathurst. At the direction of the Commandant, on the 19th of June, he was present at the medical enquiry upon the bodies of the black women. They had been interred within half-a-mile of his residence, on the left side of the road from Sydney. He could not venture an opinion as to the cause of the wounds.

John Hollingshead is in the employ of Mrs. Hassall, under the superintendence of Mr. Lane. He deposed, that while searching for horses, on the 31st of May last, he fell in with a tribe of black natives, about 30 in number, upon the summit of a hill. There were in ambush; and, as he was aware of disturbances that had only recently occurred, he took to flight. The spears came flying after him in showers; he was twice wounded, as already described, but kept running, as the natives were in close pursuit with the tomahawk, till he came within a mile of home; when the chace was relinquished. He further added, that it came within his knowledge, that many atrocities had been committed upon the white men prior to this occurrence, some of whom had been burnt to death in their huts.

ALEXANDER GRANT is in the same employ with the last witness. He deposed, that he went out in the morning after some cattle, and that proceeding about a mile on his way, he beheld one of the sable hordes; he called to them, but no reply was made; he named one of them; but as he was riding, and attended by several dogs, he passed unmolested. When he returned about 12 o'clock, he found the last witness in a bleeding state, from the effect of the wounds caused by the spears. The prisoners at the bar were equipped for an expedition after the natives, and as he had so lately seen a party, he was requested by the overseer (Mr. Lane) to accompany them. In scouring the woods, he became separated from the prisoners at the bar, and went to ascertain the safety of the flocks, and the stock-keepers. At a place called the 8-mile swamp, 7 miles from the main road, he espied the same tribe he had seen in the morning. He called to Joe, one of the chiefs, and he replied in an abusive and insolent way. He then named Simon, and being answered with a shower of spears, he was compelled to retreat in quest of his companions, the prisoners at the bar, who were 3 miles away. The little force then went in pursuit to the 8-mile swamp, but the natives had flown into the mountains. The stations of the shepherds were found safe, and the party returned home. He said he could not tell whether the prisoners had discharged their guns during the separation. Prior to this day, he had seen the bodies of 5 white men taken into Bathurst in a cart.

PETER MURPHY is also in the above employ at O'Connel-plains. He saw Hollingshead subsequent to being wounded; at the time it happened he was absent with the team. He heard the prisoner Castles say, in the evening, that they had been out after the natives, but had seen none. On the following day, the 1st of June, by the orders of Mr. Lane, the party renewed the pursuit, but returned without encountering any of them.

JAMES CARTER, a shepherd to Mr. Arkell, deposed, that his station is about 28 miles from Bathurst, and 14 from O'Connel-plains; and that about the latter end of May the natives took from him 490 sheep; but that the greater part had been recovered. Here the prosecution closed.

Mr. Rowe respectfully suggested to the Court, on behalf of his clients, that he did not see there was any necessity for the prisoners to enter into a defence, as the charge laid in the information did not appear to be borne out by the evidence that had been adduced. The learned Gentleman also contended, that the prisoners were entitled to the benefit of two points of law which suggested themselves in the case; viz. 1. - That the indictment charged the prisoners with having committed an offence within the County of Cumberland, whereas the spot, on which these poor native women met with death, was in the County of Westmoreland; and, 2. - That the prisoners were warranted in the adoption of the steps that had been taken, having acted under the direction of a Proclamation, bearing date the 4th of May, 1816; one clause of which enacted "That from and after the 4th day of June next ensuing, that being the Birthday of His Most Gracious Majesty King George the Third, no black native, or body of black natives, shall ever appear at or within one mile of any town, village, or farm, occupied by or belonging to any British subject, armed with any warlike or offensive weapon or weapons of any description, such as spears, clubs, or waddies, on pain of being deemed and considered in a state of aggression and hostility, and treated accordingly." In reply to the learned Solicitor, His Honor the Chief Justice observed that these were matters of evidence, and it was necessary that the prisoners should go into their defence.

Mr. **ROBERT HOWE** called. - His father, the late Mr. **GEORGE HOWE**, was the Editor and Government Printer in 1816; and he (the witness) succeeded to the situation in 1821. That it was usual for all Proclamations, and other Orders of the Government, to be published through the medium of the Gazette; and that such had been invariably the practice. That it was a standing Order, "that all Public Communications which may appear in the Sydney Gazette, signed with any Official Signature, are to be considered as Official Communications made to those Persons to whom they may relate." The Proclamation, bearing upon the present question, was published by the late Governor (General Macquarie). That it had been called forth in consequence of certain outrages and murders that had been committed by the natives, on this side the mountains, which was the habit of being repeated every maize season; that it was found expedient to send out military aid to the settlers, owing to which numbers of the natives had been killed; and that since the date of the Proclamation, the natives had been in a tranquil state, with the exception of those in the new-discovered Country (Bathurst). In his cross-examination by the learned Attorney General, Mr. Howe stated, that he had not heard of disturbances in the vicinity of Bathurst, till within the last 8 months; and the preamble of Governor Macquarie's Proclamation was read to the witness, reciting that the black natives of the Colony had, for three years before its promulgation, manifested a strong and sanguinary spirit of animosity and hostility towards the British inhabitants, &c.

[The Proclamation was now read to the Court by the Prothonotary, by consent; its not being legal evidence being waved [sic]].

The Rev. **THOMAS HASSALL** was next called. - This gentleman also stated that the Proclamation had been issued by the late Government, owing to the destructive and cruel ravages of the natives; and it was true that several natives had been killed in the new country. The country over the mountains is designated "Westmoreland." For general humanity and kindness, Mr. Hassall gave the prisoners a most excellent character, and was quite lavish in his encomiums on John Johnston, whom, together with the prisoner Clark, he had known from a state of childhood.

On being cross-examined, Mr. Hassall stated that he knew nothing of the consequences of the Proclamation of 1816 of his own knowledge; and the concluding

paragraph of the Proclamation of 1816 was read to Mr. Hassall by the Attorney General; viz. "And finally, His Excellency the Governor hereby orders and directs, that on occasions of any natives coming armed, or in a hostile manner without arms, or in unarmed parties exceeding six in number, to any farm belonging to, or occupied by, British subjects in the interior, such natives are first to be desired in a civil manner to depart from the said farm; and if they persist in remaining thereon, or attempt to plunder, rob, or commit any kind of depredation, they are then to be driven away by force of arms by the settlers themselves; and in case they are not able to do so, they are to apply to a Magistrate for aid from the nearest military station; and the troops stationed there, are hereby commanded to render their assistance when so required. The troops are also to afford aid at the towns of Sydney, Parramatta, and Windsor respectively, when called on by the Magistrates or Police Officers at those stations." Mr. Hassall, on being asked, stated as to the clause - "they are then to be driven away by force of arms," - that his impression was, that the settlers might kill the natives, although they themselves were not attacked.

WILLIAM COX, Esq. J.P. deposed, that he remembers the Proclamation referred to perfectly well; and that it emanated from the Government on account of the murders that had been committed upon the settlers, and their families, which happened about the maize season. In his situation as Magistrate, a military guard had been placed at his disposal. Parties went out in 1816 with the Magistrate at their head; and they always came to a Magistrate, except the soldiers under Captain Shaw, who received their instructions from Government; and the settlers did never attack the black natives alone without a Magistrate. There have been no depredations, by the natives, on this side the mountains, since the promulgation of that Regulation in 1816; but that outrages have been occurring, since that period, in the County of "Westmoreland;" and the late hapless scenes had taken place 70 miles from the County of Cumberland. Mr. Cox added, that the natives have been more troublous, within the last eight months, than at any former period. He then enumerated the various acts of cruelty and depredation that had been committed, within his recollection. Mr. Cox thinks the natives may now be called at war with the Europeans; and that, in his opinion, resistance is justifiable. Well acquainted with the prisoner Johnston, who received an additional proof of humane and unblemished character. It never was usual to fire upon the natives, unless in such emergencies as called for the interposition of the Executive, and times like the present.

Mr. **RICHARD LEWIS**, a resident of Bathurst, deposed, that he left home about 14 days since. His estate is 20 miles from Raineville, and is called the Mill-post. He had one man killed by the natives. One of his neighbours, a Mr. **TYNDALL**, had 3 men slain, two of whom were burnt to death in their hut. Within 8 years 19 Europeans had been killed by the natives, and 7 of that number had met with a premature destiny from this cruel source, within as many months.

The learned Attorney General addressed the Court, upon the conclusion of the defence, observing that the case stood simply as to the particular fact which occupied its attention; and that, therefore, no reference could be had to the Proclamation that was exhibited. The learned Gentleman pressed upon the recollection of His Honor and the Jury, that violences had been mutual; and that reasonable men might have sufficient cause of alarm; but the fact for the Jury to consider was, whether the woman, mentioned in the information, had met with her death at the hands of one or either of the prisoners, without the occasion having justified her being killed. It could not but appear strange, that 30 natives had so defended themselves, as to expose three women, and that the men should escape. If it could be credited that a conflict with

men had taken place; and that this conflict had been produced by personal danger, and that the women had met with their death by the prisoners in that conflict, their happening to be women could undoubtedly constitute no difference as to the point of law; although women should be put to death in very extreme cases of danger indeed. But the argument was this:- women only being killed made it incredible that there was such a conflict, and such danger as to justify these parties. It was to be remarked that they were not charged with murder, and although there might be terror on the mind, still there was no necessity for killing those three women. The learned Attorney General then ended his observation, by saying, "If you believe Lane, who obviously is a most unwilling witness, you must come to the conclusion that the prisoners killed the women mentioned in the information, without being in danger sufficiently great to justify the act; and it is only to this point I would press the question."

His Honor the Chief Justice [4] was pleased to observe, that the case was quite a different one from that of murder, as it required that malice aforethought which constitutes the crime of murder. His Honor then went through the whole of the evidence throwing out all superfluous statements, giving the simple facts as pressed upon His Honor's mind, separating the degrees of evidence, and laying down the points of Law for the direction of the Jury.

In remarking upon the Proclamation that was produced to the Court, His Honor observed, with all the deference due to the Authority from whence such edicts issue, that no Proclamation could furnish any protection to individuals committing outrages upon the natives of the Colony.[5] The main defence seemed to be, that what the prisoners had done was restored to in self-defence. His Honor did not consider that they were justified in taking arms against the natives, it being known that cruel acts had been perpetrated by the natives; as one of the prisoners (Nicholson) had actually seen the bodies of several white men at Bathurst, and one of their own people (Hollingshead) had been speared. The circumstances were sufficient to warrant the act, as it would have been too late to seek for that protection and assistance which they might otherwise have obtained. But, looking upon the subjects that had fallen victims, it seemed strange that these poor women should only have been killed; and His Honor could not help feelingly to remark upon the wantonness of Castles, in the instance related of pricking the old woman with the sword! It would, however, be for the Jury to determine whether the prisoners had acted with sufficient authority, or otherwise. His Honor was not aware that the same particularities existed here as in the Mother Country, regarding the specification of counties, as it appeared, by the evidence, that the county mentioned in the information should have been Westmoreland instead of Cumberland. [6] But in case the Jury were of opinion that the prisoners were Guilty, the point of law would then be reserved.

After a short consultation, the Jury resumed their seats, and, through the Foreman, returned a Verdict of Not Guilty. [7]

[1] 6 August 1824. For preliminary proceedings, see *R. v. Johnson*, July 1824.

[2] Saxe Bannister.

[3] Convict assigned to work for a private master.

[4] In a confidential letter to Wilmot Horton, dated 10 July 1824, a month before the trial, Forbes C.J. talked of the conflict between Aborigines and whites in the "interior". He said that the extent of the clashes had been "infinitely exaggerated". "Hopes however are confidently entertained that upon communicating with them, peace will be restored; and the causes which led to the rupture removed - they are generally, an improvident destruction of Kangaroos and other wild animals upon lands occupied by the natives, and an abuse of their women." This letter was

withdrawn, apparently, and replaced by another dated 14 August 1824, after the trial. In the later letter, Forbes C.J. made clear that he was referring to the Bathurst area. He referred to the trial's evidence that seven or eight people had been killed on either side, and said that Governor Brisbane's response had been appropriately mild. In this letter he did not, however, attribute blame for the clashes on the whites. (Letters in Catton Papers, Australian Joint Copying Project, Reel M791.)

[5] The correct legal position appears to be, that in the absence of a legislature before the reforms introduced by (1823) 4 Geo. IV c. 96, the Governors did have power to make general Proclamations and Orders which had the force of law. They could not do so, however, if the Proclamations or Orders were repugnant to the laws of England which were in force in the colony: see E. Campbell, "Prerogative Rule in New South Wales, 1788-1823"(1964) 50 *Jnl of the Royal Australian Historical Society* 161, at 180; R. Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law" (1963) 49 *Jnl of the Royal Australian Historical Society* 1, at 5; V. Windeyer, *Lectures on Legal History*, 2nd ed., Law Book Co., Sydney, 1957, 306. Evatt thought the Governors could make law even when it was repugnant to that of England: H.V. Evatt, "The Legal Foundations of New South Wales" (1938) 11 *ALJ* 409, at 423; H.V. Evatt, *Rum Rebellion: a Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps*, Angus and Robertson, Sydney, 1938, 1975 reprint, 82-83. For discussion of nineteenth century views on the issue, see B. Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales*, Federation Press, 1996, 6-9.

[6] A similar defence was attempted in *R. v. Charland*, 1824.

[7] The most dramatic of the cases where whites were charged with the killing of Aborigines was the Myall Creek case of 1838, as to which, see R. Milliss, *Waterloo Creek: the Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales*, McPhee Gribble, Ringwood, 1992. For the reverse, where an Aborigine was charged with killing a white, see *R. v. Foley*, 1824. On frontier violence, see the works of H. Reynolds, particularly *Frontier: Aborigines, Settlers and Land*, Allen and Unwin, Sydney, 1987. On the legal status of Aborigines in the nineteenth century, see B. Kercher, *An Unruly Child: a History of Law in Australia*, Allen and Unwin, Sydney, 1995, chap. 1; A.C. Castles, *An Australian Legal History*, Law Book Co., Sydney, 1982, chap. 18.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 12/08/1824

Supreme Court of New South Wales

Forbes C.J., 7 August 1824

Saturday. [17 August 1824.] – **MARY ANN BRADNEY** was indicted for feloniously, maliciously, and traitorously poisoning her husband, **JOHN BRADNEY**, between the 21st of March, and the 18th of April, at the Settlement of Port Macquarie.

The peculiar heinousness of this crime was pathetically depicted by the Attorney General, upon the opening of the trial. But, as it is our intention only briefly to give the outlines of a case which occupied the attention of the Court from 11 in the forenoon to 9 at night, we forbear remarking upon the opening of the case by the Attorney General.

The deceased John Bradney was well known in the town of Sydney, about two years since, as a brazier and tinman. Having unfortunately been implicated in the forgery of dollar-notes, he was sentenced to serve the remainder of his original term of

transportation at our penal settlement of Port Macquarie. At this settlement, by good conduct, he became introduced to the kind consideration of the Commandant (Captain Allman), and was put into the post of gaoler, in which office he was also enabled to employ his leisure hours in his trade. From the testimony of Dr. **MORAN**, M.D. Assistant Surgeon on the Colonial Establishment, doing duty at Port Macquarie, there was not a more healthy and ruddy-faced man on the settlement, up to March last, in which month he first became ill. On the 20th March, the deceased attended Dr. Moran, who observed a great alteration in his countenance; he said that he had been indisposed from pains in his bowels and loss of appetite. Medicine was then administered, and on the night of the 30th he was hastily called for, Bradney being then pronounced in a dying state. When the Doctor saw him, the deceased appeared terribly agitated, and observed that he should die before morning. His teeth had been locked, but as pulsation was then regular, the Doctor told him not to be alarmed. By next morning, the pains had yielded to the medicines that were administered the previous night; he seemed considerably restored, and the anxiety consequently was abated. He went on tolerably well till the 5th of April, when the Doctor found him bent double in bed, and writhing in agony. He described the pains to be somewhat similar to those which might be produced by a hot poker introduced into the bowels; that he was excessively thirsty, his lips parched, and that, in attempting to allay it, his thirst became increased. Dr. Moran now became apprehensive that poison had been administered, which he confidently related to a Gentleman on the Settlement. A large blister was applied to the affected part; the patient was fomented, and other remedies given. In two days after he was able to walk about again, and gave every hope of a speedy recovery. On the 8th of April, however, Dr. Moran was surprised to find that the disease had returned, accompanied with strong delirium; - as the day previous he was in a convalescent state. The Doctor then expressed his apprehensions to the prisoner (Bradney's wife) that something improper must have taken place; in consequence of which, he, the Surgeon, should direct his immediate removal to the hospital; which was accordingly promptly attended to. For two or three days the poor man appeared to be returning to health rapidly; but, to the astonishment of Dr. Moran, he died on the morning of the 18th of April, having only been four days at the hospital. The body was opened, and dissected, and so far from incertitude being dispelled, it became increased.

Upon the removal of the unfortunate man to the hospital, Dr. Moran had deemed it prudent to issue an order that no provisions, or article of comfort coming from Mrs. Bradney (the prisoner) should be given to her husband; and that admittance was not to be allowed her. It came out, however, in the course of evidence, that the overseer of the hospital sent to the prisoner for a fowl, to make some soup for the patient. One of the hospital attendants (who admitted he had been convicted and punished for perjury in the Colony), was commissioned to go on this errand. Instead of bringing a fowl as directed, he waited for a few minutes, and conveyed a canteen of soup to the hospital. This witness said, that the overseer threw the same away, and ordered that the canteen, which contained a very small portion of the soup, should be deposited in the dispensary, in the event of being applied for. When Bradney died, this transaction was made known to Dr. Moran. The canteen, with the remains of the soup, was brought forward, and the latter underwent a chemical process, with the view of leading to a discovery of the poison, with which it was supposed the soup might be impregnated. After a very laborious investigation, Dr. Moran had reason to believe his former conviction of the man's death by poison, to be tolerably correct - so far as opinion

could go. Hence, the prisoner at the bar underwent examination before the Commandant, and was committed to take her trial for the offence.

A good deal was said upon the trial, and attempted to be proved, in reference to arsenic having been seen in the possession of the prisoner. It was stated by some of the witnesses, that arsenic was requisite for the business of a brazier, and that this dangerous ingredient had been in the possession of the deceased, who occasionally made use of it in endeavouring to exterminate rats from the gaol, which was greatly infested by those vermin. It was also proved, that upon one occasion the prisoner at the bar mixed up some poison with a small quantity of flour, for the purpose of killing rats; and that she then threw the residue of a powder into the fire, in the presence of two men.

Two witnesses stated to the Court, that Bradney, during his illness, was subject to occasional fits of insanity, in two of which he attempted to destroy himself; viz. once by threatening to stab himself with a knife; and secondly, by trying to thrust a table spoon into his side, but had been prevented by men who happened to be at hand. In confirmation of the evidence for the prosecution, the witness, who went for the soup, stated, that Mrs. Bradney never so much as tasted it, to ascertain whether it was palatable, although he allowed only part of the soup was sent to the hospital; whereas another witness, on the defence, declared, that he and another man actually assisted Mrs. Bradney to make the soup, and that the residue was eaten that night for supper by the prisoner and her children; and that next morning, two men, the prisoner at the bar, and her children, breakfasted on the remains of the fowl.

It was attempted to be proved that there was an illicit intercourse maintained between the prisoner and one **JAMES DUFF**; but only one interview, that had the blush of criminality, was manifested throughout the whole trial. Upon the contrary it did appear, that the prisoner conducted herself, generally, as a wife and a mother ever should. It was stated by some one or two of the witnesses for the prosecution, that the prisoner did not evince all that regard which might be expected towards a sick husband; whereas, upon the defence, it was urged that she expressed the utmost joy at the thoughts of his speedy recovery, and dismissal from the hospital. In reference to the soup that was sent to the hospital, and stated by one of the witnesses to have been thrown away; it was proved, upon the evidence of a man whose veracity was not to be questioned, when contrasted with that of an avowed perjurer, that so far from the fowl-soup having been thrown away as related, that the overseer, and the witness **LIGHT**, actually drank the soup, and eat the fowl! That when the canteen was thus emptied of its contents, some hospital soup occupied its place, and that it was then deposited in the dispensary; and this was the soup that had engaged the scientific scrutiny of Dr. Moran. The sides of the canteen, this witness added, were much disfigured by rosin.

His Honor the Chief Justice, in summing up the case, remarked that the crime, with which the prisoner stood charged, was of the most atrocious description; and so horrible had it been considered by the Law, that it was denominated TREASON. His Honor went through all the evidence; and, in charging the Jury observed, that in order to find the prisoner guilty of the offence with which she stood charged, that it would be essential, for the ends of Justice, in the first place, to ascertain that the deceased came by his death, by poison; to which Dr. Moran, and several other Gentlemen of the Faculty, could come to no conclusion; and, in the second instance, it must be proved, that the poison was administered by the prisoner, which had, in no stage of the evidence, been developed.

The Jury retired for about three quarters of an hour, and returned with a verdict of Not Guilty.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 19/08/1824

Supreme Court of New South Wales

Forbes C.J., 16 August 1824

Murder: - **FOLEY, an aboriginal black native**, was indicted for the wilful murder of one **CHARLES TINKLER**, a crown servant [1] at Port Macquarie, on the 28th March last. By the evidence it appeared, that the prisoner occasionally lived in the house with the deceased and two or three other white men, and that he was in the custom of going out, with the deceased, to shoot ducks and other game; such being an indulgence extended by the Commandant to the deceased, on account of his good conduct. At the instigation of the prisoner, the deceased proceeded upon a fowling excursion, accompanied by the prisoner, two other black natives, and the father of the prisoner. This was on Tuesday. No tidings being obtained after 3 or 4 days' absence, a military party, with 3 natives, was sent out in search of the deceased; who, after some difficulty, was accidentally found in a wounded state, a spear having entered the lungs, and still remaining in the body. The poor man was immersed in water, with his head reclining on a stump. At first he seemed insensible; but immediate attention being had to his pitiable condition, he recovered sufficiently to give an account of that which had happened to him. He said, that after shooting a pair of ducks, he handed over the gun to the prisoner to make a fire by, and when in the act of drinking at a pond, one of the natives threw some mud in his face; and another struck him on the head. Upon turning round, he saw the prisoner making up a hill with his gun. He endeavoured to pursue him, when the latter told him he would be devil-devilled, or killed; and almost immediately after the prisoner's father speared him. He was soon overtaken, and so cruelly beaten by them, as to be supposed dead. In this dreadful state, the unfortunate man crawled to the spot where he was discovered, having been in that condition from the Tuesday till the Sunday following, on which day he was received into the hospital under the kind care of Dr. Moran, the Resident Surgeon. The deceased informed this Gentleman, that he should not live long; and in about an hour after medical aid was afforded, friendly death rescued our too confident fellow-creature from further suffering. The deceased exculpated the prisoner from the charge of spearing him, saying it was his father. It did not appear by any of the evidence that the prisoner's offence consisted in aught else but running off with the gun, and that the others, to cover this act, cruelly treated the deceased, as described. It was proved that the prisoner had ever conducted himself as a quiet inoffensive native, and was one of the last that could be supposed likely to perpetrate such a deed. Our limits will only permit us to say, that the prisoner was Acquitted. [2]

[1] Convict.

[2] For the reverse, where whites were charged with killing an Aborigine in 1824, see *R. v. Johnston, Clarke, Nicholson, Castles, and Crear*, 1824. On frontier violence, see the works of H. Reynolds, particularly *Frontier: Aborigines, Settlers and Land*, Allen and Unwin, Sydney, 1987. On the legal status of Aborigines in the nineteenth century, see B. Kercher, *An Unruly Child: a History of Law in Australia*, Allen and Unwin, Sydney, 1995, chap. 1; A.C. Castles, *An Australian Legal History*, Law Book Co., Sydney, 1982, chap. 18.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 26/08/1824

Supreme Court of New South Wales

Forbes C.J., 20 August 1824

JAMES CHARLAND was indicted, under the Act commonly called Lord Ellenborough's Act, for wilfully, maliciously, and unlawfully assaulting one **JOHN PROCTOR**, with intent to kill and murder, at Penrith on the 11th of July last. Upon a second count in the information, the prisoner was charged with a common assault.

In the opening of the case, the Learned Attorney General gave the Court to understand, that it seemed no longer a question whether the Act, under which the present information was found, extended to this Colony, or otherwise; but that the late New South Wales' Act decided that it did extend to the Colonies, in all its provisions. This circumstance is mentioned in reference to the superseded highest Legal Authority in the Colony, whose Judicial opinion was at variance with the principle now laid down; which we take the opportunity of promulging for general information.

[1]

John Proctor was the first witness called. He is the gaoler at Penrith. Upon Sunday evening, the 11th of July last, he was despatched by John M'Henry, Esq. one of the Magistrates in that district, to the ferry at Emu Ford, upon a particular service. On his return, about mid-way between the ferry and his own house, he was suddenly and violently attacked by a man, who struck him on the back part of the head with a stick; upon turning to face the assailant, he met with another blow upon the left side of the mouth; and this was followed by one more violent on the left temple, which felled him to the ground. In the act of rising he was again struck. The ruffian and the witness having closed, a struggle ensued, in which the latter was wounded on the right shoulder, hand, and thumb, with a knife. The deadly instrument having dropped from the hand of the assailant, the witness threw it some yards distant beyond his reach. He then was fortunate enough to grasp the bludgeon with which he had been so maltreated, and, acting defensively, turned upon his antagonist, till he cried - "murder!" Immediately on rising, the prisoner at the bar, whom the prosecutor knew by this time, enquired for his knife (a large butcher's knife), saying he had it to grind, or had been grinding it. With assistance the prisoner was secured, and lodged in custody.

Upon being cross-examined by Mr. Rowe, for the prisoner, the prosecutor adds, that the prisoner came in the ship with him; that he is a married man; and that he has been subject to considerable distress of mind, of late, owing to an illicit intercourse that was said to exist betwixt his wife and one of the prosecutor's crown servants.[2] He thinks that the prisoner is far from being right in his mind, else he would not have acted in such a way towards him (the prosecutor), as they had been upon the most friendly terms. About six months ago, in a fit of insanity, he attempted the life of his wife.

THOMAS LEWIS, deposed, that he was called upon by John Proctor, the last deponent, between the hours of 9 and 10 o'clock at night, on the 11th of July, to aid in apprehending the prisoner at the bar; by whom the prosecutor had been wounded in several places.

JOHN WILCOX deposed, that on the morning after the attack upon Proctor, he accompanied him to the spot in search of the knife, with which Proctor said he had been wounded. He described the instrument; it was found upright a few yards from

the place where Proctor said he had contended with the prisoner; and it was covered with blood.

GEORGE GODFREY deposed, that he is acquainted with the prisoner, and that the knife now before the Court he had seen in his possession prior to this transaction. Here the prosecution closed.

Upon the part of the prisoner, **JOHN M'HENRY**, Esq. Justice of the Peace, deposed, that he knows the prisoner. From the improper conduct of his wife, at times, the prisoner was in a distracted state of mind. **Some months since he endeavoured to destroy her.** In other respects he is a quiet inoffensive man.

JOHN LOFTUS deposed, that he heard the prosecutor say, he would endeavour to have the prisoner removed to Port Macquarie, as no one's life would be safe while he was at large.

His Honor the Chief Justice, in summing up this case, and giving his charge to the Jury, with accustomed perspicuity, remarked that the hour of the night, and the circumstances of the attack, must too clearly shew premeditated malice. His Honor briefly and forcibly animadverted upon the attempt that had been made to set up the plea of mental imbecility, observing the danger that would be likely to arise if such excuses, as aberration of intellect, were once to be admitted in justification of such atrocious acts. The Jury retired for about half-an-hour, and returned a Verdict of Guilty - Remanded.

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SYDNEY GAZETTE, 26/08/1824

Supreme Court of New South Wales

Forbes C.J., 20 August 1824

[1]

Murder by Burning:- **JOHN DONOVAN** was indicted for the wilful murder of **THOMAS BROWN**, on the 8th of July last. The circumstances of this case will appear by the evidence.

Dr. **WEST**, Resident Surgeon at Windsor, deposed, that on the 8th of July last, the deceased Thomas Brown was brought in from the Government Settlement at Emu Plains, in a cart, in a shockingly burnt condition. The poor man was wasted from the soles of the feet up to the shoulder blades, and even round the sides. Wishing to afford the patient time to recover from the fatigue of the journey, Dr. West thought it unwise to interrogate him immediately as to the cause of the distressing situation in which he was placed; but, on the following morning, for the ends of justice, required a narration of the particulars. The deceased then told the Surgeon, that the prisoner and himself were fellow-sawyers at a short distance from the settlement at Emu; that their work was allotted to them by the task, to perform which the prisoner, his associate, was most unwilling; whereupon he told him, the prisoner, that it would be necessary to report the same, as he, the deceased, would not be punished for his neglect. After this conversation, the prisoner went into camp (the settlement at Emu). About midnight he returned to the hut, which was occupied by the deceased and the prisoner. Another man was in company, whom he reported as being a stock-keeper in quest of some lost cattle. The deceased then desired the prisoner to dress the man some provision, as he might require refreshment. The prisoner and the stranger went to supper, and the deceased fell asleep. About four in the morning, as near as he could recollect, he was awoken by the prisoner and the other man, in the act of conveying him from the bed to the fire. He was laid between two large logs. He resisted the savages, and succeeded

in tearing himself from their horrid embraces. Not from any hope of obtaining assistance, as the hut was too far from the settlement to be within the possibility of hearing, he made the woods to re-echo with the dismal cry of "murder," and thus intimidated his assailants from pursuit, whilst he made for and gained the camp; from whence he was immediately sent in to Windsor, for the benefit of professional aid. Dr. West added, that the deceased did not give his declaration under the impression that he was dying, but that, on the contrary, the man entertained hopes of recovery; which, however, was at variance with the judgment of Dr. West, who at once discovered, from the height the fire had ascended the body, that the vital parts were affected; and which, he had no question, caused the dissolution of the man upon the 12th of July - four days after the affair transpired.

Mr. **JOHN PURCELL**, chief constable at Penrith, deposed, that he was proceeding towards the Rev. Mr. Fulton's on the morning of the 8th of July, and perchance fell in with the prisoner at the bar, who being of a suspicious appearance, was immediately secured by him. At this time he knew nothing of the present transaction. But, upon hearing of the circumstance, he was led to scrutinize the prisoner, and ascertained that his trowsers were singed or discoloured by fire, and that his face was marked by several scratches. While in Penrith gaol, the prisoner, so far from denying the crime laid to his charge, attempted a justification by remarking, that the deceased had always been annoying him; that he was in the habit of calling him a "Munster stork," meaning thereby that he was an idler, coming from a particular part of Ireland; and that he, the deceased, used to thrust the saw in his face. He added further, that there was no third person present, but that a quarrel ensued owing to unpleasant epithets from the deceased; and in the act of grappling, they fell into the fire. The reason he assigned for running away was, that the deceased had gone into camp, and that he expected to be punished. The trowsers, with the marks of burning, were exhibited in Court.

JOSEPH PETERS, principal overseer at Emu Plains, deposed, that it is his duty to locate the prisoners to their various employments; that the deceased and the prisoner were placed in one station, and one hut, as a pair of sawyers. He saw the deceased after he was burnt; he was roasted all over. In less than half-an-hour after the transaction he, the witness, visited the hut; and the prisoner was absent, and was also absent from work that morning. The interior of the hut bore every appearance of disorder and confusion. The bedding was scattered over the room. From a view of the fire-place it appeared that some one had been lying in it, as the ashes were evidently pressed flat, and retained the impress of feet; but there were no logs in the fire-place; only a small fire in the back of the chimney, and the scattered ashes were quite hot. In answer to a question put by the prisoner, the witness admitted that the deceased was an aggravating man.

JOHN M'HENRY, Esq. Justice of the Peace, was called to prove a deposition made by the deceased while lying in the hospital at Windsor; but as this declaration was not made in the presence of the prisoner, the Court could not receive it as evidence.

The prisoner gave in a written paper, which was read by the Prothonotary, Mr. Moore. This paper merely went to confirm that part of the conversation sworn to by Purcell to have taken place between him and the prisoner; of which, in fact, it was a repetition. He persisted in declaring there was no third man. The prisoner called no witnesses.

His Honor the Chief Justice remarked, that the defence of the prisoner, which might be called a confession, must either be taken altogether, and not in part, or rejected; and therefore it would be incumbent on the Jury, under all the circumstances, to lose

sight of any admission from the prisoner. The whole of the case was suspended upon a very tender point; and that point was, whether the deceased made his declaration to Dr. West, under the impression that he was in a dying state? This was the extreme tenderness of the case, and it remained with the jury to decide the question. The verdict was Guilty.

His Honor the Chief Justice then proceeded to the painful duty of passing the awful sentence of the law upon the prisoner. His Honor pathetically remarked, that he would not aggravate the sufferings of the unhappy man, but called upon him to prepare to properly meet that fate from which there was no escape. He was then consigned to death, on the 23d inst. (Monday).[2]

[1] The Sydney Gazette (26 August 1824) made the further comment, apparently in reference to this case: "A point arose in a case lately before the Criminal Court worthy the attention of Magistrates. A man was charged with putting another to death. In support of the charge, a deposition, made by the deceased, was offered in evidence; but, not having been taken in the presence of the prisoner, it could not be received; - the rule of law resting on its being just that no man shall be bound by what is done in his absence. Magistrates should be careful to cause the defendants to be brought before them, wherever the persons to be examined are not in fear of dying."

[2] 23 August 1824. See Sydney Gazette, 26 August 1824 for a report of his execution on that day. In this case, as in many other murder cases, the trial was held on a Friday and the prisoner condemned to die on the following Monday. This was consistent with the provisions of a 1752 statute (25 Geo. III c. 37, An Act for Better Preventing the Horrid Crime of Murder). By s. 1 of that Act, all persons convicted of murder were to be executed on the next day but one after sentence was passed, unless that day were a Sunday, in which case the execution was to be held on the Monday. By holding the trials on a Friday, Forbes C.J. gave the condemned prisoners an extra day to prepare themselves for death. The Act restricted the opportunity for clemency in murder cases: see Australian, 5 August 1826. By s. 4 of the Act, the judge was given power to stay the execution; for an example of that, see R. v. Fitzpatrick and Colville, 1824.

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SYDNEY GAZETTE, 02/09/1824

Supreme Court of New South Wales

Forbes C.J., 26 August 1824

Petty Treason and Murder. – **JAMES STACK and JOHN HAND** were indicted for feloniously, wilfully, and traitorously assaulting their master, **MICHAEL MINTON**, in the district of Evan, on the night of the 8th of August last, from the wounds of which he died. The information comprised four counts, severally charging the prisoners with having perpetrated the deed by means of a knife, an axe, a hammer, or a musket.

In opening this terrific case, the Attorney General observed, that the relation in which the prisoners stood with the deceased would have to be proved; but, should the testimony of two witnesses to that fact, as regarded the crime of petty treason, be wanting, then it would be competent for the Jury to judge of the evidence as affecting the prisoners for the crime of murder. The confession of one of the prisoners, the Attorney General informed the Court, would be offered in evidence. By this admission it must appear that the prisoners were present aiding and assisting in the crime; and that, were it urged to have been perpetrated by others, it would be manifest that the premises were too well guarded, by dogs at that season of the night, to allow

of a silent or uninterrupted intrusion. That the prisoners were in a condition to execute this fatal mischief, was also to be proved; and that it was totally improbable, as well as impossible, that any one else but them could have effected the deed. It would be shewn that the prisoner Stack had a part of the property in his possession; and, moreover, that the death was occasioned by arms, and other deadly weapons, in the house.

Dr. **WEST**, Resident Surgeon at Windsor, deposed, that he was called on to examine the body of Michael Minton, the deceased, at his house in the district of Evan, on the morning of the 10th instant. It was lying on a bed. He ascertained that a pistol ball had penetrated the back, but had not entered far, owing to the circumstance of an interception by the bedding. A musket shot had perforated the fleshy part of the left arm. The throat was cut almost from ear to ear - the jugular vein, and all the larger vessels were divided. Several fractures were observable upon the head. One was just above the left eye, which had the appearance of infliction by a hammer. Three or four other fractures evidently were perpetrated by blows from an axe, or some similar implement. From the nature and complication of these wounds, Dr. West was most decidedly of opinion that the poor old man could not have survived over five minutes. - Mr. Rowe, who appeared for the prisoner Hand, made some enquiry of Dr. West as to the circumstance of his client having been under his medical care in the Windsor Hospital; but as this case appeared totally irrelevant to the case in point, it is not entitled to further consideration.

THOMAS JONES was next called. - He lived in the service of the deceased 11 months, and was a fellow-servant with the prisoners at the bar. His master's farm was in the district of Evan, and there are several houses near to, and in a line with that of the deceased, his late master. The Nepean river is half-a-mile distant from the house. Leary's house lies between Minton's and the river. His deceased master came home from Richmond upon the evening of the murder, about sun-set. When he supped, the deceased retired to the inner room to bed: there were only two rooms in the house, with the exception of a passage about 3 feet wide. At the time his master went to bed there were the following persons in the house, viz. Mrs. Minton (the wife); two children; **CATHERINE SPALDING** (the wife's sister); the two prisoners at the bar; one **JOHN WRIGHT**, and the witness. In the whole, there were four crown servants[1] on the farm, who had been variously occupied during the day. Between 8 and 9 o'clock when his master was in bed, his mistress despatched him, the witness, to the house of one **MARY PECKHAM**, at the distance of half-a-mile with a sheet and shift to be made. These articles were delivered to him by the prisoner Stack through a skilling-window; who told him, that in the event of his master waking, he would report him as being in the barn; and accompanied him a short distance on the road. When he arrived at Mary Peckham's, some conversation took place between her, the witness, and one **JAMES DANKS**. He had not been in the house more than three minutes when the report of a gun was heard. The woman remarked, that that was "Old Minton" firing; which the witness denied, as he had left his master in bed; but the sound coming in that direction, he thought it best to return, not having remained on his errand, in the house, above five minutes. When he left home his fellow-servant, John Wright, was not in the house. When within 6 or 7 rods of a large tree that stands contiguous to the deceased's house, he saw the prisoner James Stack, and a woman whom he supposed to be Mrs. Minton, his mistress, in company, going towards a drain at the foot of the hill, which lies between the dwelling and the river. He swore it was Stack, but could not so clearly identify the person of his mistress, though he was pretty conscious it could be no stranger, as his master was particularly strict against

allowing people to go across his farm. For the space of three minutes they were lost sight of; but, on the witness continuing to make for the house, he overheard some inaudible conversation - the parties spoke very low. Suddenly the prisoner Stack came up the side of the hill, and observing the witness, enquired "who was there?" "Jones," was the reply. He then ran up, clasping his hands, and loudly exclaiming, "My God - my God! my master killed!" In answer to some questions put by the astonished witness, the prisoner (Stack) replied, that five men rushed into the house, and killed their master. He said that the mistress and children were safe; and that Mrs. Minton was gone to a neighbour's house to make an alarm. All this time the witness had not seen the other prisoner (John Hand), of whom Stack seemed to know nothing. Accompanied with Stack, the witness proceeded to the house; he wished the former to enter, but excessive agitation apparently prevented him from a compliance in this instance. The witness glanced in at the front room, and conjectured he saw a man stretched out by the right side of the fire-place, who appeared to be on fire. Stack told the witness he should know two of the murderers. There were two good-sized dogs on the farm; he never knew them to bite any one; but they invariably barked at strangers. That evening he did not hear these animals give any alarm, only when the gun fired, and that was but momentary. His master kept a fowling piece or musket, and two pistols in the house. About the premises there were also two axes and a hammer. The axe, which was most commonly in use, could not be found up to the night of the murder, as it was sought after for the purpose of keeping up a fire. He, the witness, saw no strangers, or bush-rangers, about the premises, either prior or subsequent to the dreadful transaction. Several of the neighbours flocked in upon the alarm becoming general. His master was habituated to visit the fields in the evening to ascertain whether the cattle and horses were safe. The prisoner Stack, who was the overseer of the other men, was not very much esteemed till of late by his mistress, Mrs. Minton; but, latterly, her familiarity with this man (Stack) was obvious. At one time she was in the habit of continually expressing a dislike of him to his master, her husband. The two prisoners at the bar were not the most friendly till recently. The witness stated that the prisoner Stack was a faithful overseer, and that he had no personal animosity against him. He was not more than half-an-hour gone to Peckham's, during which short interim the bloody deed had been accomplished. His master was accustomed to discharge a pistol every night. The axe and gun produced to the witness in Court, he verily believed to be the property of the deceased.

John Wright, in the same service with last deponent, deposed, that his master went to bed immediately after supper; he saw him undress, and close the bed-room door. The men, that were in the house, consisted of the two prisoners at the bar, Thomas Jones, and the witness, together with Mrs. Minton, her sister (Catherine Spalding), and two children: there were no strangers present. Between 8 and 9 o'clock his mistress gave him a dump, and directed him to go to a neighbour's, about 3-quarters of a mile off, and pay him that piece of silver for some butter which she owed him. The name of the man was Sells. He left the two prisoners, the only men present, in the house - Jones, the former witness, being sent out previously. At the distance of half-a-mile, the report of a gun arrested his attention, as it came from his master's house. He went to the house of Sells, and after some difficulty, occasioned by the opposition of the dogs to his entrance into the premises at that hour of the night, he delivered the coin into the hands of Sells, and returned homewards. On the way he met John Hand, one of the prisoners, who exclaimed that he was "a happy man;" for, since his absence from home, the house had been filled with robbers, who had murdered the master. He enquired if they were still there, to which Hand replied that he thought they were

gone. Hand then prevailed on the witness to accompany him to Weyham's, a neighbouring settler, to give the alarm, and obtain assistance in so frightful an exigency. Mr. Weyham immediately despatched 4 government men, with the witness and the prisoner Hand. They leaped over his master's fence; the dogs came barking at them; but the witness quieted the animals, which he observed; to his knowledge had not barked before that evening; though it was usual, upon the approach of strangers, for them to make a great noise. The house was in a cloud of smoke. He, the witness, by means of a fire, soon procured a light. It should have been stated, that upon the witness gaining the scene of blood, he found Jones on the spot before him, afraid to enter. His master was lying within a foot and a half of the fire-place; the shirt, which he wore, was consuming; his night-cap was a short distance from the body; and the blood was running, in a stream, from under the head, into the fire. The vital spark had been driven away, but the body was not yet cold. Some of the bedding was also on fire. The prisoner Hand was one of those who sat up all night with the corpse. Fuel was wanted in the course of the night, and the axe was missing. That which is in Court belonged to his deceased master; as also the gun, pistols, and the hammer. Mr. Minton used to keep the gun at the head of his bed.

WILLIAM SELLS, settler at the Nepean, corroborated the testimony of the last witness, as far as regarded the nocturnal visit, and payment of the dump. This witness added, that the deceased's former wife was killed about 3 years since; and that that was not occasioned by bush-rangers, as attempted to be urged, but was committed by a government servant living on the farm.

JOHN TUCKSFORD, who lived at Mary Peckham's, deposed to the fact of the witness Jones (the servant of the deceased) coming to their house on the night already stated; that he came about a sheet and a shift. While the man was in the house the gun was fired, upon which he bade the people "good night," and proceeded home, only stopping about 5 minutes.

SAMUEL LEARY, settler at the Nepean, deposed, that he heard the deceased exclaim "O Lord!" and afterwards cry out "murder!" four times. This was between 8 and 9 o'clock; after which a gun was discharged, and not till then did he hear any dogs bark. His house is situate between the river and that of the deceased. In half-an-hour after, or thereabouts, he heard Mrs. Minton, with her children, going to a neighbour's house. He despatched a servant off, on horseback, to ascertain the cause of these disturbances.

JOHN BAKER, servant to the last witness, deposed, that he also heard the cry of "murder" four times, in the direction of Minton's house. He heard the report of the gun. At the direction of his master he was going to find out the meaning of this report, as well as the cry of "murder;" and having gained a knowledge of the distressing particulars, he returned and acquainted his master.

THOMAS WEYHAM, another settler in the vicinity of the deceased's residence, deposed, that he heard the report of the gun about 9 o'clock. An alarm was presently made, and he despatched four of his men, to render assistance. He also followed, and, upon approaching the house, met the wife of the deceased, who told him that her husband had been murdered. He saw the prisoners at the bar. A conversation ensued between him and the witness, and the prisoner Hand. He said Minton was killed, and that "he was a dreadful man;" that he was always finding fault with him: and that it was not much matter about his being killed.

THOMAS KEIGHAN, servant to the last witness, confirmed his master's testimony; adding further, that Hand should say, that five men rushed into the house, but none of whom he would be able to recognize; and that he, Hand, had been placed

against a door by the ruffians, who threatened to shoot him, in the event of turning round.

JOHN ABLETT, settler of the Nepean, deposed, that his farm is not above a quarter of a mile off that of the deceased; he heard the dogs barking exceedingly; and also heard Mrs. Minton cry "murder!" When he went to poor Minton's house, he found the four servants present. The prisoners at the bar related the same tale to him about the five men as Hand had previously mentioned to Thomas Keighan. The witness was aware that the deceased had been in Sydney on the Thursday previous, and bought a new plough.

JOHN FLEMING, servant to the last witness, corroborated the evidence given by his employer.

JOHN HICKMAN, servant to Thomas Weyham, deposed, that he was one of those that went forward to render assistance, by his master's orders; and that, upon asking the prisoner Hand whether he would be able to identify any of the ruffians, he indifferently replied that he knew nothing about it, and walked off.

Mr. **JOHN PURCELL**, chief constable at Evan, deposed, that about half past 11 at night, upon the evening of the murder, he was directed by the Magistrate to proceed to the house of the deceased, and gain every possible information that might lead to a disclosure of the parties. In a general conversation that ensued during the night, the prisoners at the bar concurred in one tale, viz. that five men rushed into the house; that two of them came into the room in which they were sitting, and commanded them to stand with their faces towards the wall; another placed himself at the door with a pair of pistols, while the others went into the bed-room, and demanded Minton's money; he replied it was in the Bank, then "we'll bank you," was the reply; to which no resistance was offered either by the servants, the two prisoners at the bar, or the wife! They further added, that the murderers went off, immediately the fire-arms were discharged. From certain information that he derived next morning, he proceeded to search the premises; and from thence went towards the drain spoken to by the second witness, Jones, who said that he saw Stack, and a woman like his mistress, proceeding in that direction. With very little trouble, one of the bye-standers handed over to Mr. Purcell, the following sanguinary weapons, viz. a gun, a pair of pistols, an axe, a hammer with some human hair appending to the claw, and a white-handled case knife, covered with blood! These articles were produced to the witness, and they were identified to be the same found in the drain. They were all sworn to be the property of the deceased. - While searching the house, one of the knives were reported missing by Mrs. Minton, and the one found in the drain corresponded with those in the house. From the dwelling to the drain the ground went in a declivity towards the river. There was not the least appearance of any property having been stolen by the five bush-rangers, who were said to have committed the shocking deed.

CHRISTOPHER FLOOD, a publican in York-street, Sydney, deposed that the deceased was in town on the 5th instant. He sold a quantity of pigs, for which he received, in presence of the witness, £98 in six 50-dollar notes, one 5-dollar ditto, and a Bank check drawn by Mr. De Mestre in favour of John Flood for 72 dollars, dated Aug 5. One of the 50-dollar notes was cashed in town. The others Minton took home with him, leaving with the witness the numbers, dates, and sums, which Mr. Flood was so careful as to take in his own hand-writing.

THOMAS HOBBY, Esq. Coroner for the district of Evan, deposed, that he held an Inquest on the body of Michael Minton, the deceased, on Tuesday the 10th instant.

WILLIAM COX, Esq. Justice of the Peace, deposed, that he resorted to every expedient to lead to a discovery of this dreadful transaction. The prisoners at the bar

related to him a similar tale to that which was afforded to Purcell, the chief constable. They were sent to different gaols. On the 10th instant they were brought before the Coroner's Inquest. Mr. Cox stated that he had some conversation, upon this occasion, with the prisoner Stack; in which, at first, he adhered to the old story. But, after some short time, he sent for Mr. Cox, and told him he was most unhappy in his mind, and entreated the Magistrate to direct him (Stack) how to act. Mr. Cox observed, that he could not be admitted as an evidence either at the Inquest, or before the Criminal Sessions, but that, "if he hoped for mercy," he would tell the truth, and that upon his relating the truth he (Mr. Cox) might be induced to speak favourably of him to the Court. This Gentleman was then upon the eve of recounting the nature of this confession made by the prisoner Stack, when he was stopped by the Solicitor for the prisoners (Mr. Rowe) who started two legal objections to such a confession being adopted as evidence. The first was, that terror had been exercised by the Magistrate; and secondly, that the hope of mercy was held out to the prisoner; either, or both of which, were contrary to Law, and therefore fatal to any confession so received. The question, one pregnant with the deepest interest as affecting the case, and also of general import, was ably argued by the Attorney General and the Learned Solicitor. It remained, however, for His Honor the Chief Justice to decide the point; and His Honor was pleased to observe, upon mature deliberation, that "he was of opinion that the confession could not be received; as the conversation that took place between the Magistrate and the prisoner Stack was certainly calculated to convey hope to the mind of the prisoner."

The prosecution here closed. The prisoners entered into no defence, other than by denying all knowledge of, or perpetration in, the crime.

We should fail in doing justice to the lucid and elaborate charge given by His Honor the Chief Justice, were we to attempt following up the observations that emanated from the Bench on this occasion; perhaps it will be sufficient to observe, that, after an absence of about five minutes, the Jury returned with a Verdict – Guilty.

His Honor the Chief Justice immediately passed Sentence of Death upon the prisoners; which decreed them to die on Saturday. [2]

[1] Convicts, assigned into private service. Though the master of these convicts, Minton himself was a former convict. His two children were born in 1822 and 1823: M. Nichols, *The Hawkesbury Pioneer Register*, Hawkesbury Family History Group, Windsor, 2nd ed., 1994, 127.

[2] For correspondence between Forbes C.J. and the governor about this case, see Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, p. 11.

Mary Minton, the deceased's widow, was then tried for aiding and abetting the murder: see *R. v. Minton*, 1824.

Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 02/09/1824

Supreme Court of New South Wales

Forbes C.J., 28 August 1824

Saturday. - Murder. - This day **MARY MINTON** was indicted for feloniously, traitorously and wilfully aiding, abetting, assisting and maintaining the before-mentioned prisoners **JAMES STACK** and **JOHN HAND**, in murdering the said **MICHAEL MINTON**, her husband. [1]

[For this trial a new Jury was impanelled, under the Precept of His Excellency the Governor in Chief.]

We should not feel justified, there being but trifling variation in the main points of evidence that occupied the attention of the previous trial, in which the principals were adjudged Guilty, were we to traverse the same ground, by giving repetition of the testimony that was adduced on this trial, which could not but be nearly similar with that already detailed. Two or three new witnesses were called, who only went to corroborate certain facts proved on the former trial. No new fact, of any importance, appeared to arise in this woman's trial. One witness was called, who swore to finding the murderous weapons in the drain. **THOMAS JONES**, still persisted in his non-identity of the prisoner, as being the woman whom he had seen going towards the drain with Stack. Several others testified that the prisoner at the bar acknowledged to them, upon the night of the murder, that the deceased, her husband, had done what he never did before, in giving over to her charge the money, as it had been the practice of the deceased to keep all monies in his possession. Most of the witnesses gave the prisoner an excellent character in her relative situations of a wife and mother, and went so far as to say that a bad word had not been known to escape her lips. Mr. Magistrate Cox deposed, that the Bank-bills, &c. which were sworn to by **CHRISTOPHER FLOOD** as being the identical notes in the possession of poor Minton when he left Sydney, were found under a stump or tree by the condemned man, Stack, who confessed to him that he had received the same from the prisoner.

Mr. Rowe, who conducted the defence, at the request of the prisoner, was allowed by the Court to read a written defence. This paper stated, that the house was rushed by five men; that two of them entered the room in which was the prisoner, her children, sister, and two crown servants, [2] Stack and Hand, who guarded them, whilst the other three proceeded to perpetrate the murder; and that, as soon as she, the prisoner, could effect an escape, an alarm was the consequence. She denied all knowledge of, or participation in, the dreadful crime which bereft her of a husband, and her children of a father. She enquired where did the inducement appear that could possibly have influenced her to assist in so terrible an act? and concluded by throwing herself upon the merciful consideration of the Court.

The following, we believe, to be a correct sketch of His Honor's charge to the Jury:-
 "The prisoner at the bar, Mary Minton, stands charged with the murder of her husband, Michael Minton - an offence of the deepest die; it is termed petty treason, from the sacred relations of private life which it violates, and is second in degree only to that higher crime, which goes at once to destroy all the relations of society."
 "The information consists of five several counts, which variously set forth the manner, and instruments, by which the murder was accomplished, and they all charge the prisoner at the bar, as present, aiding and abetting at the fact; or, as the Law terms it, a principal in the second degree. From the nature of the charge, it is necessary that the accused should have been present; but such presence need not be actual, such as would make her an eye or an ear witness; if she were constructively present, such as by taking some part assigned her in the common act, she is as guilty in the estimate of the Law, as if she were immediately engaged."

The Learned Judge then proceeded to review the few leading particulars, which are established by direct and positive evidence; "that the deceased, Michael Minton, had been at Windsor, on Sunday, the 8th August, and returned home about seven o'clock in the evening, that he desired his wife to prepare his supper, which he ate, and retired to bed about eight o'clock; that shortly after, the prisoner gave Jones, one of her servants, some linen, desiring him to carry it to a neighbour called **MARY PECKHAM**, to make up; that about the same time, she also sent Wright, another servant, to another neighbour called **THOMAS SELL**, with a dump to pay for some

butter. That at the time these two servants were so sent away, the prisoner and her sister, a girl between ten and eleven years of age, her two infant children, and two other servants, Thomas Stack, and John Hand, were the only persons left in the house with Minton. That soon after the departure of the servants, Jones and Wright, the voice of Minton was heard, crying "murder" several times, and immediately after a gun was fired at Minton's house, but no dogs were heard to bark, and for many minutes all was still and silent. Jones, who was at Mary Peckham's, and heard the report of the gun, immediately set out on his return home, and on his approaching within a short distance of the house, he saw Thomas Stack and a woman going from Minton's house towards a drain, situated below the house. They were conversing at the time - he stopped for a moment, and then proceeded onwards, when he saw Thomas Stack returning up the hill from the direction of the drain. On seeing Jones, he called out, "Who's that?" and Jones answering, he said "my master is murdered." He further related, that five men, two of whom he described, one with a scar on his face and the other with a yellow jacket, had rushed into the house and made all the party there turn their faces to the wall, while they murdered the deceased. He also affected to be afraid to go into the house, and desired Jones to do so, which, after some hesitation, he did, and there found his master lying dead - in the manner described by the surgeon - the frontal bone of his head was indented, as if by the stroke of a hammer; the back of his head was also cut and fractured in three places, as if by an axe, his throat was cut, the jugular vein quite severed; and a shot from a gun or pistol had penetrated his arm and grazed his back. On the following day, suspicions being excited, a search was made for certain implements which were missing from Minton's house, and in the drain towards which Thomas Stack had been seen going were found a gun, a pair of pistols, an axe with some hair in it, a hammer also with grey hairs on it, and a knife which was stained. These instruments are all identified, as having belonged to Minton, and being in his house shortly before his murder."

The Chief Justice then went on to remark upon the points established in evidence, to the following purport:- "That the instruments, found in the drain, were those, by which the horrid deed was done, there can be no doubt, and that Minton was murdered by persons belonging to his house is equally clear. In the first place, no property was stolen, and it is not easy to believe that five persons should confederate together for the mere purpose of committing a profitless murder. In the next place, a gun was fired, and was heard by all the neighbours, an unlikely thing to have been done by a banditti, as it would be sure to give the alarm to the neighbourhood, - an act of all others, that persons bent upon mischief would most likely endeavour to avoid. Again, no dogs were heard to bark, although Minton had dogs that were used to bark at strangers; and they must have been heard, for the voice of Minton was heard distinctly by two persons who swear they heard no dogs bark, but that after the gun all was silent and still for some time. Besides, murderers going to attack a house which was armed, and where five men were known to reside, would have been furnished with arms of their own, and some marks of those arms would in all probability have been impressed upon the body of the deceased. But Minton was slain and mangled by implements of his own; the hair upon the axe, and upon the hammer, the indentation of his forehead, the blood upon the knife, all point to the fact in a manner too strong to be mistaken. But if no other circumstance had appeared in evidence, the false, incredible, and self-refuting tale of the five men, would be sufficient to prove that he was murdered by the persons who invented and propagated the tale. Suppose - I will only put it hypothetically for the present - that these accused persons had murdered their master, they must account for his death in some way or other - now what story

more likely to be invented than the one which has been set up? a few circumstances easily invented and remembered would be agreed upon - and a close silence beyond those circumstances; - but, on the other hand, suppose that the story were true, and that five persons had actually rushed into Minton's house, and made the five persons who were in it, turn their faces to the wall, while they perpetrated the murder, a thousand circumstances would have rushed upon the recollection of the accused. The story would have been so replete with particulars, how they looked, what they said, what they did, where they went, the conduct of the parties in the house, the cries of the deceased, the struggles, the fact unaccounted for, of his being found by the kitchen fire, and not in the bed-room where he slept, these and a thousand other circumstances, would have sprung so spontaneously from the mouths of the parties, that every question which could be asked, and every doubt which could be raised, would elicit fresh evidences of truth, and establish the innocence of the accused beyond the reach of suspicion - it would have been impossible to sustain even a colourable charge against them. To me it is clear that the deceased was murdered by his own servants, and that Stack and Hand were engaged in that murder. Stack was seen going towards the fatal drain - he was not afraid to go there, although he hesitated about going to the house - the cruel and unfeeling expressions of Hand towards his master, while his body was not yet cold in death, point to him as a principal in the act. But it is not necessary to go into many details upon this point, their guilt has been established. The point for our consideration is, the situation and conduct of the prisoner at the bar, and what part she took in the cruel plot. The first circumstance, is her having sent away Wright and Jones. With respect to Wright, it appears that she had spoken to him to go to Sell's early in the afternoon; but afterwards stated that she was afraid he would not be back before her master returned, and would therefore defer it till evening. It is singular that she had also proposed sending Jones away early in the afternoon, but he did not then go as it would rather seem he was employed in the garden. Now, either these are the indications of a deep and premeditated design, or they are accidental. I should hardly venture to affirm they were premeditated. If they were accidental, they explain away something of the unfavorable circumstances of two of the servants being sent away just before the destruction of Minton. The next circumstance to which I shall call your attention, is the fact of a woman being seen with Stack descending the hill, in the direction of the drain. Was this the prisoner? The witness Jones will not positively swear it was - but he says, he thought it was. If it were the prisoner, when and where did she pick up her sister and the children, so as to be at Ablett's gate? This is difficult to explain, and the discrepancy of the evidence, as to the interval of time between the firing of the gun, and the hearing of Mrs. Minton's voice at Ablett's gate, rather goes to encrease than to solve the difficulty. Could she have sent them on, and afterwards joined them? I should be afraid to hazard a conjecture upon this very tender point. The next and worst feature of the case, against the unhappy woman at the bar, is the story of the five men. What! a wife who affected to love her husband, the mother of his two infant children, quietly turn her face to the wall, and let the business of murdering that husband go quietly on, without once attempting to assist him, one alarming shriek, or one supplicating word for his life! But this story does not deserve a moment's consideration - it is utterly false - and it is the share which the prisoner had taken in this false tale, which is the strongest circumstance against her. Could it be that Stack and Hand had alarmed her fears, and practised upon her credulity? But why then should she tell it as a thing she saw and heard herself? Can she have been a party to this tale, and be guiltless?

"Again, it is proved that the deceased had, just before his death, received a sum of money for the sale of pigs in Sydney. On one of the witnesses telling the prisoner that this money had probably been the cause of the attack on her house, she replied, "No; the money is safe - I have planted it." - Indeed! how then came Stack to know where this money was planted, and to conduct the Magistrate to the spot where it was hidden, in the hollow of a tree? And here I must notice, what is untruly said in the defence, that the money for which the pigs were sold, was not the money Mrs. Minton said she had planted. Now the witness Weyham proves that the conversation he had with the prisoner related to the money lately received in Sydney for the sale of pigs. This was the money the prisoner told Mrs. Ablett she had planted; - how came the murderer Stack in the secret of the hiding place? The inference from it is strong, and has led me reluctantly to a conclusion not reconcilable with the innocence of the prisoner.

"On the other hand, she has had the strongest testimonials of her general character of tenderness and humanity, and even of living happily with her husband. There appears to have been no motive for this dreadful act, of which she has been accused. Gentlemen, if you have doubts upon the case, from the evidence before you, you should give the prisoner at the bar the benefit of those doubts; but if, on the contrary, you should be led to the conclusion that she is guilty, however painful that conclusion may be to your feelings, or distressing the duty you will have consequently to perform, I feel a perfect assurance that you will discharge that duty with integrity and justice."

The Jury retired for about 25 minutes, and returned a Verdict of Not Guilty. The prisoner was directed to be discharged.

[1] See R. v. Stack and Hand, 1824.

[2] Convicts.

SYDNEY GAZETTE, 23/09/1824

Forbes C.J., 23 September 1824

The prisoner [**JAMES CHARLAND**] was tried under the statute 43 Geo. III. called Lord Ellenborough's Act. The offence was stated to have taken place at Penrith, on the 11th of July last.

The information contained a second count against the prisoner for an assault with intent to murder, but the statute being omitted, the second charge resolved itself into a mere misdemeanor at common law. The Jury found a general verdict of "guilty." Afterwards the Attorney General [3] entered a nolle prosequi [4] on the first count, and prayed judgment on the second; but it was contended by the counsel for the prisoner, in arrest of judgment, that the information was irregular, because it did not lay the offence in any county, [5] although the facts were proved to have been done in the county of Cumberland; that the offence charged amounted in fact to felony, and could not receive judgment as for a misdemeanor. The Court took time to consider the points, and on this day gave judgment, of which the following will be found to be a correct summary:-

The Chief Justice.- "The objections which have been raised in the present case, are partly matter of fact, and partly matter of law. I shall make a few observations upon them, in the order in which they have been raised. The first objection goes to the omission of the county, in which the offence charged against the prisoner was proved to have been committed. But it appears to me there is a preliminary question to determine, - has this Colony ever been, in fact, divided into counties? and, supposing it to have been so divided, are all the legal considerations incident to counties in

England, necessarily applicable to the present condition of this Colony? The King, in virtue of his executive authority, may, I conceive, cause any of the Colonies dependant upon his Crown to be divided into counties and parishes; there is an opinion of Sir Dudley Rider, and Lord Mansfield, at the time he was Solicitor General, to that effect. But, I apprehend, that in order to give the full force of law to such a measure, it must be done in pursuance of an express authority from the Crown. I feel rather confirmed in this opinion, by referring to the patent commission of the Governors of the Colony, in which, although a great number of specific powers are given, and amongst others the power to appoint fairs and markets, as well as ports and harbours; there is no power expressly given to divide the settlement into counties, nor does the commission contain any general words from which such a power can be inferred. It was doubtless in the recollection of the advisers of the commission, that this Colony had not yet received the right of choosing representatives, or of trial by a jury of the county, and therefore the power of erecting counties, with all those incidents which are essential and inseparable from counties in England, appears to have been wisely reserved for a more advanced age of the Colony. The King may indeed communicate to his representative as many of his royal powers as he may deem necessary for the government of his Colonial subjects; but all such powers, unless they be clearly incidental, can only be communicated by express words; for the grant of the prerogatives of the Crown, like all other royal grants, are to be taken strictly against the grantee, and cannot be extended by construction. It does not appear to me that there has been any power within the Colony to divide it into counties, with the legal incidents of counties; nor do I collect, from the orders issued by the Governors of New South Wales, which I have been enabled to find, that any thing more was intended by them, in giving the names of counties to particular divisions of the territory, than to afford convenience and certainty in the description of particular places. The first order upon the subject I have met with is one of Governor King, in the year 1802.

"The order of Governor Bligh, dated, the 22d of September, 1806, professes merely to define the limits of the several military commands within the Settlement. That of Governor Macquarie, in 1819, in which his Excellency was pleased to call the newly discovered county beyond the mountains by the name of the county of Westmoreland, was, I apprehend, dictated in the same spirit.

"Entertaining the opinion which I do upon the matter of fact, it is the less necessary to observe upon the law of the case. I shall therefore briefly state, that the rule of law which requires the specific county to be named in the indictment or information, does not, in my opinion, apply here. In England, the institution of counties is coeval, at least, with the trial by jury. It is part of the law of trial by jury, that the jury should be returned from the county where the offence is alleged to have been committed. Hence, for the convenience of trial, circuits were instituted throughout the different counties in England. It was always, however, in the power of the Court of King's Bench to try at bar, if the necessity of the case should require such a manner of trial. This Court is a Court of King's Bench; and, in virtue of its Supreme Jurisdiction, may hear and determine every case which can regularly be brought before it. Although trials at bar are rarely resorted to at home, it is merely because it is more convenient to proceed at the assizes. In the application of this principle of convenience, the Court is governed by circumstances; and applying the same principle of convenience, I should feel inclined to hold, independently of any express law, that it would be more convenient in this Colony to bring offenders to the bar of this Court, than to remove the Court, composed as it is, of officers whose presence at the garrison is essential to the security

of the Colony.[6] Again, by the express words of the Act,[7] this Court is constituted a Court of Oyer and Terminer, and General Gaol Delivery, in and for New South Wales;- not for the counties or divisions of New South Wales but for the whole colony at large. Had the Legislature intended it to be itinerant, it would have added the Commission of Assize and Nisi Prius; but in adding to its authority as the Supreme Court of the Colony, the commission of Oyer and Terminer, and Gaol Delivery, it appears merely to have intended to simplify its proceedings, and render them more active.

"Upon the whole case, I am of opinion, that it is not necessary, in any criminal proceeding in this Colony, to state the offence to have been committed in any particular county, provided there be words sufficiently descriptive of the place to bring it within the jurisdiction of the Court, and to give the party accused every benefit of defence.

"Upon the second ground I am of opinion, that as the offence charged as a misdemeanor, does in fact amount to a felony, that judgment must be arrested upon it. There is another ground which leads to the same conclusion; it is this:- The party has been prosecuted for a felony, and consequently deprived of those benefits which he would have been entitled to, if he had been tried for a misdemeanor - a copy of the information, a special jury, and the advantage of a full defence by counsel; therefore judgment must be arrested."

[1] On 2 September 1824, the Sydney Gazette clarified this statement: "Lord Ellenborough's Act. - In the case Rex against Charland, reported in our last, we rather prematurely added an explanatory paragraph of our own, to an observation that emanated from the Attorney General, on the opening of that case. This note might have appeared to more advantage in some other part of the Paper, had it struck us as important. It was far from our wish to induce any one to receive such a remark as coming in the shape of a legal declaration from the Attorney General. Neither did we intend the most remote disrespect to be conveyed to His Honor the Judge Advocate by the insertion of this terminating clause, which is to be seen on a reference to the Paper. We were anxious that the Public should have the benefit of the opinion of the first Law Authorities in the Colony upon a question of so much Public import; and one in which we once felt more than ordinary interest."

[2] Convicts assigned to work for the prosecutor.

[3] Saxe Bannister.

[4] "To be unwilling to prosecute." A stay of proceedings, not equivalent to acquittal and no bar to a new information for the same offence.

[5] A similar defence was attempted in R. v. Johnston, Clarke, Nicholson, Castles, and Crear, 1824.

[6] All criminal trials in the Supreme Court were prosecuted by information and tried before "a jury of seven commissioned officers of His Majesty's Sea or Land Forces": (1823) 4 Geo. IV c. 96, s. 4.

[7] (1823) 4 Geo. IV c. 96, s. 2.

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SYDNEY GAZETTE, 30/09/1824

Supreme Court of New South Wales

Forbes C.J., 13 August, 23 September 1824

September 23. - On Thursday last the Court re-opened at 11 o'clock; when

WILLIAM LEWSY was put to the bar. - This prisoner, it will be recollected, had been previously indicted for feloniously committing an assault on the person of **JOSEPH SEARSON**, at the Settlement of Port Macquarie, on the 9th of December last, and wounding the said Joseph Searson on the head with an axe, with intent to kill and murder; but the trial was then put off, at the entreaty of the prisoner, to give him the opportunity of procuring evidence (said to be material) from Port Macquarie. [1] In support of the information, which was briefly opened by the Learned Attorney General, Joseph Searson was called. He deposed that a dispute had originated between the prisoner at the bar and himself, about a week prior to this transaction, relative to some flour that was owing to the prisoner from the prosecutor in barter for a jacket. A few days subsequent to this quarrel, the prosecutor was ordered by his overseer to procure some wood; and when beyond sight of the station at which the prisoners were worked, the prisoner at the bar overtook him; and, without uttering a word, struck him on the back part of the head with an axe, and then made off. He saw the prisoner afterwards at the hospital, and is positive that he is the man who gave him the blow.

Dr. **MORAN**, Resident Surgeon at Port Macquarie, examined Searson about 9 in the evening on the day he was wounded. He had been conveyed to town from the lime-burners' gang, three miles distant, in a state of insensibility, which arose from an injury in his head. There was a very extensive fracture in the head, and a great depression of the bone: he was so dangerously wounded, as to induce the Surgeon to think life would be extinct in 24 hours. Dr. M. raised the bone from the brain, when sensibility returned; and Searson, the prosecutor, then declared the prisoner at the bar (Lewsy) was the man who had reduced him to that state. From the indentation of the wound, Dr. Moran was of opinion that it had been caused by the back part of an axe.

Other witnesses were called who spoke as to the dispute which existed between the prosecutor and the prisoner, and who further stated that the latter had expressed a determination to be revenged on Searson the first opportunity. It was also given in evidence that the prisoner, after being taken into the presence of the prosecutor, whilst in the hospital, declared that he was sorry he had not terminated his life - as he would then have been prevented telling tales, or some words of similar and conclusive import.

Mr. Rowe made two legal objections in behalf of the prisoner: - 1st, that the charge mentioned in the information did not follow the words in the statute (commonly called Lord Ellenborough's Act) strike and cut - the words in the statute being stab or cut; and 2dly, that, from the evidence which had been adduced, it clearly appeared the instrument was not a sharp instrument, as required by the statute to constitute the capital crime with which the prisoner stood charged, but that the blow was given, and the wound inflicted, by the back of an axe. Mr. Rowe suggested to the Court that the words of the statute must be strictly followed - it being so laid down in Law; and, as there could be no doubt that the information varied with the statute, and that the blow was given by an obtuse and not a sharp instrument, he hoped that the prisoner would have the benefit of these objections.

The Chief Justice, in summing up the case to the Jury, stated, that there was no doubt of the fact that the prisoner at the bar had made a premeditated attack upon Searson, with an intent to kill him; and in the execution of such intent, that he had fractured his head with an axe, so as to cause a depression of the brain, and render the recovery of Searson almost desperate. Had Searson died, there could be no doubt that Lewsy would have been guilty of murder; but the question was, whether the case was within the Act. The statute enacted, that any person who should "stab or cut" another, with intent to murder, should be adjudged guilty of felony. In the construction of the

words stab or cut, it had been holden that the offence could only be consummated in the one case by an instrument having a point; or, in the other, a sharp edge[.] Thus it had been decided, that striking with the blunt end of a hammer, or with a square iron bar, was not a cutting or stabbing within the statute. It was for the Jury to determine, whether, from the evidence before them, the wound inflicted on Searson was by the edge, or the back part of the axe. If by the latter, which the evidence of Dr. Moran went strongly to establish, the case was not within the statute. It was not for the Court, or Jury, to speculate upon what might be the law; - the province of the one was, to interpret the law as it found it; and of the other, to determine the evidence. The Jury, without retiring, found the verdict Not Guilty.

[1] See Sydney Gazette, 19 August 1824.

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