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 employee 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 compiled 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 wretched 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 re 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 principles 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 are 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.

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 inhumanely 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 descrying deponent and the pursuing party: immediately whereupon the natives set up a yell and shout, and clearly articulated the words "Croppy make big Jack booey" 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 connoissauce; 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 abbhorence 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 or 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 ineffusive 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 June1822

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 was 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 wherever 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 the 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 WILLLIAM 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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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 .
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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 WILLLIAM 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, father 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 Hmm
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.

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 Geueral.[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 August1824
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'Connel-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'Connel-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 Birth-day 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 dismission 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.
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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.

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
[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 awoke 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.

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., 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.

SYD1825

AUSTRALIAN, 20/01/1825
Supreme Court of New South Wales
Forbes C.J., 17 January 1825
Monday. **STEPHEN SMITH** was capitally indicted, under Lord Ellenborough's Act, for wilfully and maliciously attempting to shoot **JOHN HARRIS**, Esq. J.P., on the 30th of August last, at Cawdor, in the county of Camden.

From the testimony of the prosecutor, it appeared, that having occasion to visit the Cowpastures, in company with Mr. **WILD**, of the 48th regiment; also, with Messrs. **Wm. and Jas. MACARTHUR** he met the prisoner and another man carrying a gun and a bag; he stopped them, and asked who they belonged to ---- they replied to the Rev. Mr. Reddall, that they had been driving bullocks, and were returning home. The ingenuous manner in which they replied to all his interrogatories, removed from his mind all suspicion of their being bushrangers; but Mr. James Macarthur differed in opinion, and urged Dr. Harris to secure them. When the prisoner very deliberately cocked the gun and presented it at him, declaring that he would shoot him if he attempted to interrupt him. Dr. H. still persisted in following him; he repeatedly presented the piece. Mr. M. asked him if he knew what he was about, and how he presumed to present a gun at a Magistrate ---- on this he seemed to waver; but on being pursued, pulled the trigger, upwards of twenty times, at the Doctor; but fortunately it missed every time. Upon this, the prisoner took it by the muzzle, and aimed a furious blow at him; which broke the stock, and caused the horse Dr. H. was riding, to throw him; at last they were both secured, and safely lodged in confinement. The charge was drawn from the musket, which was found to have been heavily loaded with a large quantity of powder and fifteen slugs. This statement was corroborated by Mr. Jas. Macarthur. The Jury found the prisoner Guilty.

[*] On 17 February 1825, Smith was sentenced to death, but recommended to the Governor for mercy: Sydney Gazette, 24 February 1825. The Gazette reported this trial on 20 January 1825.

Later in 1825, the legality of prosecutions under Lord Ellenborough's Act came into question. On 8 February 1825, Governor Brisbane wrote to Earl Bathurst to ask him to refer some legal questions to the crown lawyers in London. One question concerned the date of reception of the statute law of Great Britain to New South Wales, unless the colony were named in the Act in question. Two opinions were held on the point, he said, either 1788, the date of foundation of the colony, or 1823, the date of introduction of a legislature. He also asked about the impact of the colony's constitution, (1823) 4 Geo. IV c. 96, on this issue, noting that Lord Ellenborough's Act (43 Geo. III c. 58) was in question since it was enacted after 1788. See Historical Records of Australia, Series 1, vol. 11, p. 495. Bathurst replied unhelpfully. He said that the question had recently been raised in Newfoundland as well, but gave no answer. He also left open the issue of the impact of 4 Geo. IV c. 96, noting that a new Act was in the course of preparation: Historical Records of Australia, Series 1, vol. 12, p. 54. In doing so, he relied on the advice of James Stephen; see Stephen to Horton, 15 August 1825, Historical Records of Australia, Series 4, vol. 1, p. 614. (Eventually the question was settled by legislation; see (1828) 9 Geo. IV c. 83, s. 24, which provided a new date for reception of 1828. This made clear that Lord Ellenborough's Act was received from 1828 onwards, though it left open the legality of prosecutions before that date.)

A number of people were punished for breaches of Lord Ellenborough's Act on the basis of the unorthodox opinion of Forbes C.J. on the date of reception. Forbes and Attorney General Bannister disagreed on this question. Forbes thought that in the absence of a colonial legislature, post-1788 Acts of Westminster were automatically applicable until a local legislature was established, while Bannister, more conventionally, thought that the correct

date was 1788: see A.C. Castles, An Australian Legal History, Law Book Co., Sydney, 1982, p. 378. Once again, Forbes C.J. showed a flexibility about colonial law which others lacked. Until the question of the applicability of Lord Ellenborough's Act (and the Black Act) was settled, Forbes C.J. thought that prisoners should not be hanged upon conviction under them. Instead, he recommended, they should be sentenced to life at Norfolk Island. Forbes said that one of his predecessors, Judge Advocate Wylde, had referred the applicability question concerning Lord Ellenborough's Act to the Crown lawyers in London, but had received no reply. Forbes said he had no doubts on the issue, but recommended this approach because others did have doubts. (Source: Forbes C.J. to Governor Brisbane, 27 June 1825, Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, p. 42.)

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

AUSTRALIAN, 27/01/1825
Supreme Court of New South Wales
Forbes C.J., 21 and 22 January 1825

MARTIN BENSON, JAMES COGAN, JOHN SPROLE, ANTHONY RODNEY, and ELIZA CAMPBELL, stood indicted for the wilful murder of their late master, **JOHN BRACKFIELD**, of South Creek. There were two counts in the indictment; the first charging Martin Benson as principal, and the others as accessaries. The second count charged all as principals. In the indictment the date of the murder was laid on the fifth day of November, 1824. The first evidence called on the part of the prosecution, was Mr. **PAT HILL**, R.N. surgeon examined the body of the deceased, on the 13th of November, being the morning after the murder; found the body lying near the bed side, on the floor. The face was black and swoln; and blood issued from the nose and mouth. The right leg and thigh were forcibly contracted, and the left perfectly straight. The arms were in an inverted position. There was also a contused wound on the head, above the ear; considered that the deceased met his death by strangulation; was present at the confession of **NICH. KAINE** ---- had in consequence of some information therein contained, examined the person of Martin Benson, and found a wound in his knee; the body, when he examined it, could not have been long dead.

JOHN ATTWOOD, constable of the district of Cabramatta, lives at South Creek, about 130 rods from the house of the deceased ---- the land is clear, could hear distinctly the dogs of Mr. Brackfield, bark. Mr. B. kept 5 or 6 ---- one was remarkably ferocious. Though a near neighbour, he could not approach the house without calling for some person to pacify the dogs --- on the night of the murder, and all the day previous, heard no noise; saw the deceased in a field with his wife in the afternoon; the next morning was called up by Benson and Kaine; the former said in reply to a question, "he hardly knew what had been the matter; the house had been robbed, the doors had been broken open, and the trunks all tossed about; did not know where his master was, but supposed he was murdered." He requested Kaine to stop at his house, while he went to the house of the deceased. Benson told him, that at eleven o'clock the night previous, the hut was attacked by bushrangers; two of whom stood at the door and window, presenting loaded muskets at them, and threatening them with death if they moved. When within 20 yards of the house, met Eliza Campbell; asked her what was the matter, she answered she did not know. He then went into the house, and found the deceased in the position described by the last witness; the body was quite cold. The female prisoner said she had been dragged from her bed into her mistress's room; upon whose bed she was thrown, and forcibly held there by a man

who burst the front door open, and was followed by another ---- she heard a noise in her master's room.

This witness had a horse running in a paddock, about 30 rods from the house of the deceased, on the evening of the murder, in good order and fit for work; on looking at him the morning following, he found him much injured; his head, knee, and shoulder were wounded; and his back swoln, and very tender ---- evidently from the effects of hard riding, and an overload. Knows Jones and Chittenden; they live about 7 miles from the deceased's; Jones is married examined the door, was of opinion the injury it received was effected after the door had been opened employed some black men to search the grounds contiguous but could at the time discover no traces of footsteps. Several days after, at the bottom of the garden several tracks were visible; as of persons jumping over the railings; but went no further than that spot; went in company with Nicholas Kaine and a black, to a water hole distant from the house, 200 yards; and, agreeable to the statement made by Kaine, 2 guns and a hammer were found by the black; knows one of the guns belonged to the deceased; had frequently borrowed it himself. The men said that the bushrangers staid at the hut two hours; saw the deceased alive on the 12th, on the 13th saw him dead.

JOHN HUTCHINS, is a carpenter and fencer; knows Brackfield's house; examined it the following Sunday; is of opinion that the violence used to the door, was done while open; knows all the prisoners; went with a constable on the Thursday following, to Eliza Campbell; she was in bed, but got up, and sent for some beer; she said she had no hand in the murder, but knew who had; she asked him to take care of a small bundle for her; he desired her to throw it among the potatoes; but saw no more of it.

NICHOLAS KAINE, one of the accomplices, having been cautioned against any deviation from the truth, on either side, proceeded to give his testimony as follows --- I was in Mr. Brackfield's employ at the time of his death; and all the prisoners, in number seven. On leaving their work on the night of the 12th of November, Anthony Rodney told the men in the hut he had seen Eliza Campbell, at the back door, and told her, if she should hear a noise in the night, not to make an alarm, to which she assented: but would render no assistance; she came to the hut in half an hour, and asked what they were going to do: Rodney told her they were going to rob the house, and kill their master; she then went into the house, and returned after dark in her chemise; he heard her say to Benson and Rodney, who were standing outside the door, that she was going to bed with her master, and they might come in and do what they thought fit; they expressed surprise that she should sleep with her master; she replied that he had threatened to send her to the Factory [1] for two pieces of tobacco he had found in her pocket; she then went into the house, saying she would leave the back door open for them. Wright was also present. Martin Benson immediately fetched Attwood's mare; Sprole, Rodney, and witness, went to catch their master's two horses, but returned without them; witness went into the hut, and sat down; the other two went again to the field, and caught the horses, and tied them to the railing; heard Benson ask them what was the best thing to put the master to death with; one of them replied "choke him;" Benson said his silk handkerchief would do the business well; he immediately went to his box, and took it out; went towards the house, followed by Cogan, Sprole, and Rodney; witness went and hid himself behind the pig-stye contiguous to the house; in two minutes after, saw Eliza Campbell run out in her shift; she went into the hut, came out quickly, and ran towards the road; in about 12 or 13 minutes Rodney followed her; then Benson came out, and went to the hut; Rodney and the woman returned from the road, and also went into the hut; while he was standing behind the pig-stye, he heard a groan, as of a person being strangled; saw one

of them come out of the hut with a lamp in his hand, and was followed by Rodney and Eliza Campbell; shortly after they came out, and went to the storehouse; cannot say who opened the door; brought some beer out and drank --- Eliza Campbell then discovering him there, asked him what he was doing; and requested him to drink; he at first refused, but afterwards complied; Benson and Rodney brought out three sacks, which they afterwards filled with tea, sugar, and wearing apparel, and a saddle and bridle; Benson loaded the constable's mare, and rode away; the other two, Sprole and Rodney, followed with the other horses; after they were gone Cogan and Eliza Campbell brought a dish full of papers, and burned them; he did not enter the house, himself, that night; the men with the horses returned an hour before day break; they put two of the horses in the stable; and the constable's mare was left in her own paddock; heard them returning very fast; they brought no bag with them back; they went into the house, and brought out some victuals; Benson said they had left the property at "Long Tom's" (Chittenden's); and that Jones was not at home; he also said, that Attwood's mare fell, and that he had cut his knee across her head; Sprole and Benson asked him to throw two guns and a hammer into the creek, which he did; he afterwards pointed out the spot to the constable; about ten in the morning Eliza Campbell asked him to draw her a bucket of water, and gave him two other hammers to throw in; they were dry and clean; usually hung over the fire in the back kitchen; heard Benson say they had taken 34lbs. of tea, and 31lbs. of sugar; went for a constable with Benson; should know the handkerchief used to strangle his master; had often seen it before.

Cross examined.

Has been confined in gaol with Wright by himself; never talked of making up a story to tell the Court; did not go into the house that night, himself, at all; was confined from Tuesday till Sunday, and did not communicate what he knew all that time; denied to Mr. Throsby, that he had any knowledge of the transaction; afterwards said if he could have his clergy,[2] he would tell; does not expect either pardon or reward; was promised both by Mr. Throsby; expects he may yet be tried himself; leaves all to the goodness of the Court; heard Eliza Campbell say, in the morning, it was time to put her in her mistress's room; and desired one of them to give her a blow to mark her; one of them replied, he had not the heart to do that; washed nothing the next morning.

LEWIS SOLOMON, is a carpenter and undertaker, was called on to inter the deceased; his suspicions were excited by Eliza Campbell refusing to put the shroud on the corpse; when he insisted on her doing it, she turned pale, and trembled very much; said to constable, "that woman's guilty."

MATILDA JONES is the wife of **STEPHEN JONES**, lives on the Orphan School Farm, about 3 miles from Liverpool; knows Long Tom; also Martin Benson; saw the latter on the night of the 12th, about eleven o'clock; he came on horseback; she said to him "For God's sake what brings you here at this time of the night," and desired him to go away; is positive he is the man.

DAVID O'HARA and **JOHN KNOBLETT**, belonging to clearing parties at Cabramatta, saw three men on horseback, riding very fast, on the night of the 13th, in the direction from the Orphan School Farm, to South Creek; mentioned it the next morning, when they heard of the murder; do not know either of the prisoners.

Mr. **IKIN**, chief constable of Liverpool, and **GEORGE GREENHILL**, a constable, deposed to finding the property now produced; part on the premises of **CHITTENDEN, alias Long Tom**; and part concealed in the ground adjoining.

Mr. **HENRY MARR**, of Sydney, proved having sold several of the articles now produced, and found concealed at "Long Tom's," to Mr. Brackfield.

Mrs. **BRACKFIELD**, widow of the deceased, identified the property so found, as belonging to her husband.

This witness has been for many years in a state of mental derangement; but at this time was lucid and sensible.

SAMUEL WRIGHT, the other approver, corroborated all the statement of Nicholas Kaine; he farther added, that he heard Sprole say, that he and Rodney had hit him on the head with a hammer; and Benson said, he had tied the handkerchief, and strangled him; heard them say that Long Tom's wife weighed the tea and sugar; while they were gone, Cogan and Eliza Campbell burnt a shirt, because it was bloody; Sprole also, on his return, burned another, for the same reason; saw a hammer lying on the dresser, in the kitchen, next morning; Eliza Campbell said that was the hammer they killed the master with; it was very bloody; she took a cloth and wiped it off; he was in bed while the murder was perpetrated; shortly after they went out to kill the master. Eliza Campbell ran into the hut, and said, "Lord have mercy, they are killing the master;" she then went out; he did not go into the house till next morning.

JOSEPH LEON, a prisoner in the gaol, was employed by Sprole to write a letter to Eliza Campbell; saying, therein, that the property had been left at Jones's; that he was the putter up of this business; and was clearing himself at their expense; that he had received £6, all but a dump, for some of the property.

This was the case on the part of the prosecution. No evidence was called on behalf of the prisoners. The Chief Justice, in summing up, expressed a strong opinion of the guilt of the prisoners. [3] The Jury retired for about ten minutes, and then returned with a Verdict of guilty against all.

On behalf of the prisoners an arrest of judgment was moved, on the ground of its having been laid in the indictment that the murder was committed on the 5th, and proved in evidence that it was committed on the 12th of the month. The Court adjourned till Saturday, [4] when the Attorney and the Solicitor-General,[5] on the authority of Lord Hale's pleas of the Crown, contended that the objection was groundless, which was the opinion of the Court; [6] and the Chief Justice, therefore, proceeded to pass sentence of death upon the prisoners.[7]

The Chief Justice observed, that it was not his intention to wound the feelings of the unfortunate persons, or to aggravate their sufferings by entering into the details of the evidence; it was his duty to tell them that no recommendation for mercy could with justice be forwarded to His Excellency on their behalf.

They were ordered for execution on Monday the 24th inst. and their bodies to be delivered to the surgeons for dissection.[8]

The male prisoners were very little affected when their awful doom was communicated to them; the female, on the contrary, appeared deeply sensible of her unfortunate situation.

During the whole of the trial the prisoners manifested perfect apathy; they heard the evidence of Kaine, particularly describing the perpetration of the horrid deed, with hardened indifference they made no defence when the verdict was pronounced. The woman, for the first time, betrayed a slight agitation; exclaiming "she was innocent." The men said their lives had been sworn away by two vagabonds; and Rodney observed, "that he would haunt them as long as God Almighty would give him liberty."

They were all young men; the oldest, Sprole, not appearing more than 30. Mar[t]in Benson, who is represented as being the most active, looks about 22. The countenance of Rodney was dark and forbidding.

THE EXECUTION.

The unfortunate convicts were attended to the place of execution on Monday [9] by the Rev. Mr. Cowper and the Rev. Mr. Therry, Roman Catholic Clergyman. After the usual devotions in which they all joined, were ended, the culprits ascended the fatal scaffold, where they were again joined by the Rev. Clergymen; they acknowledged the justice of their sentence; one of them sung two hymns, and the whole of them evinced the utmost penitence for their crime ---- they were then launched into eternity. [10]

Notes

[1] The reference is to the Female Factory, which was at simultaneously a prison, a barracks for female convicts, a factory, and a marriage bureau. See A. Salt, These Outcast Women: the Parramatta Female Factory 1821-1848, Hale and Iremonger, Sydney, 1984.

[2] Benefit of clergy, in effect an exemption from prosecution at first available only to the clergy. It was abolished in 1827, by 7 & 8 Geo. 4, c. 28. The term is apparently used here as shorthand for an exemption in return for giving evidence.

[3] The Sydney Gazette, 27 January 1825 gave a summary of the Chief Justice's charge to the jury.

[4] 22 January 1825.

[5] Saxe Bannister and John Stephen, respectively.

[6] The Sydney Gazette, 27 January 1825 summarised the judgment as follows: ``His Honor the Chief Justice, in closing these discussions that had occupied much time, and in which some legal science had been displayed, was pleased to observe, that he had looked into Authorities since the past evening, and that he would now only refer to one, whose high legal learning, blended with correct moral character, would be sufficient to set the point at rest His Honor alluded to Lord Hale. The passage was recited by His Honor; and it went to prove that the particular day on which the crime was committed, need not be mentioned in the information, unless it be in cases wherein escheats of the crown are involved, otherwise it is immaterial whether the day recorded in the information be before or after the commission of the offence so that the fact itself be proved. This, to us, appeared the substance of the passage, upon which the present important case was decided against the prisoners, but in favour of justice. The Court therefore held the present information to be a good information."

[7] The Sydney Gazette, 27 January 1825 quoted the sentence as follows: ``That you, Martin Benson, James Coogan, John Sprole, Anthony Rodney, and Eliza Campbell, be taken from hence to the place from whence you came, and from thence to be drawn on a hurdle to the place of execution, and there be hanged by the necks till your bodies be dead, and the Lord have mercy on your souls."

[8] Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer was to be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential contemporary justification for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing, New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in

providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.

[9] 24 January 1825. As usual, the murder trial was conducted on a Friday and the execution 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.

This did not mean that there was no opportunity to consider clemency. However Forbes C.J. found that there was nothing in the case which could lead him to recommend Crown mercy. Governor Brisbane said that he had no alternative but to carry out the sentence, after reviewing the notes supplied by Forbes C.J: Forbes C.J. to Governor Brisbane and reply, 22 January 1825, Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, pp 22-23; and see Mitchell Library document A 744 Letters from Governor Brisbane to Forbes C.J., 22 January 1825. Neither of them made special mention of the sex of Elizabeth Campbell.

As the crime was murder, the governor only had the authority to defer the sentence until a final decision was made in London. The governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision had to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645; and see R. v. Dwyer, Kinnear, Madden and Blewit, 1825.

Crown mercy was rarely afforded to those guilty of murder. Lesser crimes often gave rise to it, however. In the 1825 cases of two highway robbers (Watson and Golding), for example, Forbes C.J. hinted that execution might be appropriate, since it had been so frequent lately. Governor Brisbane replied, however, "that I am induced to shew Mercy to both in Pursuance of the principle which had hitherto guided me in the Extension of Mercy in such Cases, as it does not appear by your Letter, or from your notes, that either of the Prisoners actual committed violence with the Act of Robbery; and under the Impression that the sending of these Prisoners to Norfolk Island, will as effectively prevent their future Crimes or Injury to Society, as their actual Removal from the World. This Conviction combined with the opinion that Executions do not deter the Commission of Crimes have weighed with me in extending Clemency towards these two Individuals." (Source: Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, pp 37-38.)

The crime and capital punishment statistics for 1819 to 1824 show the capital punishment rates for these years, divided into types of crimes: see Historical Records of Australia, Series 1, vol. 11, pp 478-479.

[10] The Sydney Gazette, 27 January 1825 said that Eliza Campbell confessed that she knew the others planned to kill her master.

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

AUSTRALIAN, 03/02/1825
Supreme Court of New South Wales
Forbes C.J., 28 January 1825

Trial for Murder. – **JOHN BENNETT** stood indicted for the wilful murder of **MARY BRYANT**, a woman with whom he had cohabited for several years.

The Attorney-General [Saxe Bannister.] opened the case, and called the following evidence:-

Mr. **ALLAN**, Assistant Surgeon on the establishment at Parramatta, stated he was called upon to examine the body of the deceased, in October last, at the house of the prisoner, in the Field of Mars; that he found the body lying on the hearth stone, very much burned about the waist and body; on examination found a wound on the upper and back part of the head, an inch and a half long; could see no cause of death, but by being burned, and not from the wound in the head. On cross-examination, admitted that deceased was burned more about the waist, than any other part, which caused her death: has been informed deceased was subject to fits; said that had deceased been put on the fire, she must have been nearly doubled; had deceased fallen on the floor, she might have received such a wound on the head.

CORNELIUS McCARTHY was next called; knows the prisoner's house, was working for him at the time of the deceased's death, with **JOSEPH NEWTON** and **DARBEY CONNOR**; that on the night of the fatal occurrence, Newton was called by deceased to make her bed, but as he had a sore hand, deponent did it; came and told the prisoner, who was sitting in the kitchen, the bed was made; that prisoner and deceased both went to the bed room; deceased came out, and told deponent, that if the prisoner had a drop of rum, it would do him good; he then fetched a pint and a gill, of which the prisoner took a glass a half; and deceased also partook of it; witness then made prisoner some punch; heard prisoner call the deceased a variety of opprobrious names, and threatened to hang the deceased as round as a hoop; saw the deceased go into a fainting fit, and after recovering, went into another; left the deceased sitting on a stool, near the fire; prisoner was then in bed; saw Connor light a pipe of tobacco for deceased; they all wished her a good night, and the door was closed after them; in half an hour after heard deceased cry murder; he got up and went to the door, but all was silent, when he retired to rest again; in the morning, when he awoke, saw the prisoner, who told all the people in the house to go to the neighbours and tell them his wife was burned to death; examined the body, which was much burned, as well her clothes; nothing but the fragments were left; has seen the prisoner and deceased several times quarrelling.

On cross examination stated the prisoner's house was robbed a few days previous, and that deceased was much hurt from blows she had received from one of the robbers. Darbey Connor corroborated the testimony of former evidence. On cross examination said, prisoner seemed much distressed.

Joseph Newton also spoke in corroboration of the preceding testimony; admitted he gave deceased a lighted pipe, bid her good night, and left her; got up at day light in the morning; heard prisoner exclaim, "Mary is dead, Mary is dead;" afterwards saw deceased lying quite straight, with little bend in her knees.

On cross examination stated that a great deal of spirits had been drunk on the night in question; had seen deceased have many fits; did not observe the floor was black.

The only witnesses called on behalf of prisoner, were **MARY FINLAND** and **THOMAS COLLINS**. The Chief Justice then summed up; and the Jury having retired for about twenty minutes, returned a verdict of Not Guilty. The prisoner was discharged.

[*] The Sydney Gazette, 3 February 1825 reported the Chief Justice's summary as follows: ``The Chief Justice, in summing up, observed on the circumstance of the prisoner not being awoke by the smoke, as well as the unusual blaze that no doubt

took place, not disregarding the smell which invariably accompanies the slightest destruction of linen by fire: --- His Honor also called the attention of the Jury to the circumstance of the knocking at the door, upon the cry of ``murder." But, upon the other hand, the presumption that the deceased might have fallen into a third fit, with a lighted pipe in her hand, and thus been the unconscious instrument of her own hapless destiny, was not to be lost sight of; neither was the extraordinary good character the prisoner bore, in this instance, unworthy of due consideration."
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 10/02/1825
Supreme Court of New South Wales
Forbes C.J., 4 February 1825
MANSLAUGHTER.
ABR. HERNE was next put to the bar, charged with the murder of **Wm. HARCOURT**, at the Cowpasture river, on the 24th December last.

WILLIAM WEB deposed, that he was at the house of the prisoner, on the above day; heard a noise of quarrelling between some persons in the house; went to see what it was, and heard the deceased using improper language, and challenging prisoner to fight; prisoner refused, and endeavoured to get out of his way; which he did for some time; but upon prisoner's return, the deceased said, if you, Herne, don't give me some spirits, I shall settle you; the prisoner, to make him quiet, gave him liquor, which only made him more unruly; prisoner ordered him out of the house, and told the servants in the huts, to keep their doors shut, and not let him in; the deceased swore, if he was not let in, he would soon settle the prisoner Herne; deceased returned again, to prisoner's house, and sat down; and, after some altercation, a struggle ensued, in which the prisoner was knocked down, and was carried to his bed-room, by his wife and servant; the deceased still continued outrageous in the house, and insisting for more liquor, which Mrs. Herne refused; a short time after, the prisoner recovering, went up to him and desired him to begone, as it was now dark, and he would not find his way home; this the deceased would not do, but used great violence to all in the house; he then pulled the prisoner out, and swore he would be his match; struck the prisoner several blows with his fist, and made him stumble some yards backwards; upon this the prisoner took up a stick, which lay within 15 yards, and struck the deceased two or three severe blows on the head; the deceased fell, and never spoke any more; the prisoner went into his house.

On cross examination deposed, that the deceased was a tall strong man, an overmatch for the prisoner; and that the prisoner acted only in self-defence.

WILLIAM JENNINGS, servant to the prisoner at the bar; did not see deceased when he came to his master's house, but afterwards saw him much the worse for liquor, and was so unruly as to strike and ill use the prisoner; he was thrice ordered out of the house; he gave prisoner several very severe blows, which made him fall back to the ground; upon rising, he saw him go and take up a stick, and give him a blow on the head or shoulders, upon which the deceased fell.

GEORGE AMBRIDGE, had known the prisoner and the deceased for a long time past, knew that the deceased was a very violent man; fond of fighting; also knows, that the prisoner is a quiet man.

ROBERT HARBYSON, carpenter at Bringelly, saw the body at the Inquest, and also saw the stick; Doctor Hill examined the body; said the deceased death was

occasioned by the stroke of a bludgeon; believes the stick now shewn, to be that produced at the Inquest.

EDWARD CROW, was at the house of the prisoner on the night the accident happened; saw Harcourt, the deceased, very drunk; heard him use a great many bad expressions, before Mrs. Hearne and the children; checked and cautioned him to no purpose: saw him strike the prisoner a violent blow; told him what he had done to Mr. Herne, and how bad he was; his reply was, "Never mind, never mind, Ned, I will soon bring him out, and break his head too;" upon saying this, he went, and pulled him out; struck the prisoner again; prisoner took up a stick, said he would defend himself and his family, as long as he was able; he gave him a stroke on the head; afterwards, being told that he was dead, said he was very sorry for it; witness went for a carpenter and the Coroner.

Mr. **JONATHAN HASSALL** has known the prisoner these twelve years past; knows him to be a very good neighbour, and an honest man.

Mr. **JOHNSTON** deposed the same as Mr. Hassall.

Four other witnesses were called as to character.

The Chief Justice having at considerable length summed up the evidence, and charged the Jury to consider whether the offence committed, amounted to murder or only manslaughter.

The Jury retired for a few minutes, and returned Not Guilty of murder, but Guilty of manslaughter.

[*] The Sydney Gazette, 10 February 1825 noted that ``the trial lasted from 9 in the morning till 7 in the evening".

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

SYDNEY GAZETTE, 07/04/1825
Supreme Court of New South Wales
Forbes C.J., 30 March 1825

MATTHEW DWYER, PATRICK KINNEAR, THOMAS MADDEN, and ROBERT BLEWIT, were indicted for the wilful murder of **THOMAS CHESHIRE**, at Yellamundi's lagoon, in the district of Richmond, on the 25th of Jan. 1824. Upon the prisoners pleading Not Guilty to the information,

The Attorney General opened the case in nearly the following terms: 'The prisoners at the bar are charged with the crime of murder; two other persons are named in the indictment; one of them has died in gaol, the other has not yet been found so that you will take the case with reference only to the four prisoners now before you. There is nothing in the case to warrant supposition that the murder was premeditated; but, if death occurs, in doing an illegal act, `tis murder. The prisoners at the bar set out together, with some other persons, with an intent to rob the house of Mr Cheshire; some opposition was made to their purpose; and one of them fired a shot, of which Mr Cheshire, on the instant died. It is immaterial by whose hand the shot was fired; if it can be proved that they were all engaged in the robbery, they are all equally guilty. The evidence, free from taint, against the prisoners, is very slight. The son in law and daughter of Mr. Cheshire were in the house on the night of the robbery, but cannot identify any of the prisoners; they only remember that they spoke with the Irish accent. The principal evidence against the prisoners rests upon the testimony of an approver, an accomplice, one who represents himself as having been one of the party. He can give direct evidence; whether he is entitled to belief remains with the Court to say; but it is my duty to observe, that he was capitally convicted some months since;

he has been since pardoned; and I submit that he is a proper evidence, although great doubt may fairly be held on the subject. Independent of this man's testimony, the case against the prisoners is very slight. The Magistrates have used every exertion, since t[h]ey first received information of the murder, and n[o]thing new can be hoped for in the case. It is now brought forward, with the evidence which I have described."

THOMAS MARKWELL deposed, that he is the son-in-law of the late Mr Cheshire; was in the house on the night of the robbery, which occurred on the night of the 25th of Jan 1824; that he was awakened by the breaking open of the door, upon which he issued forth from his room, when he stumbled against a man, whom he caught and held in his arms, until assistance came to the robber's aid from without, when he was knocked down, and beat severely. Mr. Cheshire was in the act of advancing from his room, calling out `What's the matter?" when a shot was fired, and he fell dead! The ruffians then called for a light; there was no fire in the house; they went into the kitchen, and shortly after one man returned with a light. He exclaimed ``Men what did we come here for? why don't you come on?" The others had left the bloody scene, upon which he also fled, throwing away the light. Witness thinks they were Irish by the accent; he only saw the man that had the candle; and heard several voices.

MARIA MARKWELL, wife of the last witness, deposed, that she heard the shot fired; and that the robbers remained in the house about 20 minutes; but is unable to identify any of the prisoners.

SOPHIA MARKWELL corroborated the testimony of her parents, adding that the man who procured the light, had his face blackened, and was habited with dark clothes.

EDWARD POWER was now placed in the box, and about to be sworn, when Mr. Solicitor Rowe, on the part of the prisoners, arose: ``Under the same circumstances as on a former day I resisted the testimony of this man, I now deny his competency he being capital convict, and under sentence of death."

Mr. **GURNER**, clerk of the Court, was then sworn. This gentleman proved the conviction of Power on the 30th June, 1824, and sentence of death passed on him on the 3d July, 1824.

Power here produced his pardon, which rehearsed that His Excellency the Governor had pardoned him of various crimes, &c. on condition of remaining in the custody of the Sheriff of New South Wales, till sent to one of the penal Settlements, there to remain during the pleasure of the Governor for the time-being."

Mr. Rowe called for the Governor's Commission, empowering him to grant pardons. The Commission was produced, and the clause read, empowering the Governor to grant pardons as he shall think fit of all offences, murder and treason only excepted, and in those cases authorising him to suspend the execution of the sentence till His Majesty's pleasure be known.

Mr. Rowe ``By the statute of the 27th Henry VIII. it is provided that the power to pardon is solely vested in the King, and I deny that the King has any right to delegate to another, what the Constitution has vested solely in himself; and supposing, for argument sake, that the King has the power to delegate, I would contend that the words of the Commission relate only to offences committed at home, to those who have been sent to this country under the sentence of the law. Surely, if the Commission had any other meaning, would it not be set forth in the Act of the 4th Geo IV? The 34th and 35th sections of that Act relate solely to persons sent out as prisoners from the mother country, authorising the Governor to remit their sentences, if he shall see cause; and even then, his pardon must have the sanction of one of His

Majesty's Principal Secretaries of State. I submit that the Commission only applies to offences committed at home; I object also to the pardon on another ground it is only conditional; the witness comes to the Court in vinculis.[In bonds, chains or fetters.] The condition of the pardon is, that he shall when ordered, go to one of the penal settlements without resistance, and in the mean time remain in the custody of the Sheriff. Suppose he does resist? Suppose, when he goes there, he refuses to remain what then? His pardon is revoked; the condition is not fulfilled. A conditional pardon cannot entitle the possessor to its benefits, till the condition is shewn to be fulfilled. If the condition be transportation, I submit that the witness is not competent, till the term is expired, as then only is the condition fulfilled. Where the pardon is conditional, the performance of the condition must be shewn."

The Attorney General was called upon to answer the last objection, and relied on the distinction between the effect of conditions precedent and subsequent. This was a subsequent condition and therefore pardon was good until forfeited.

Chief Justice `With respect to the objections taken to the pardon, my opinion is, that the last only is valid. As to the provisions of the Act of Henry VIII. I am not quite clear; but from practice I know that the custom has been, from time immemorial, for the King to delegate the power to pardon to the Governors of his Colonies abroad; and the great Crown Lawyers in England all agree that the King can delegate many of his prerogatives; this is still the King's pardon, though flowing through another channel. As to the last objection, I am of opinion it is fatal; the pardon is conditional and to entitle the witness to the benefit of that pardon, the condition must be shewn to be performed. I am quite clear that the Governor has the power to pardon, but it does not stand before me free from conditions sufficient for me to allow its competency."

No evidence sufficient to go to the Jury being against the prisoners, independent of the testimony of the approver Power, the learned Attorney General relinquished the prosecution. [*]

[*] There was conflicting authority over the ability of attainted convicts to give evidence in the courts of New South Wales. In R. v. Farrell, Dingle and Woodward (1831) 1 Legge 5, the Supreme Court decided by majority (Forbes C.J. dissenting) that the common law rule against the admission of evidence by attainted felons was not applicable in New South Wales. However Lord Bathurst told Governor Darling on 24 August 1825 that the ``Laws of the Colony must coincide with the Law of England'' and that attaint rendered the felon incapable of giving evidence; a pardon either under the Great Seal of England or under the colony's public seal, restored the capacity to give evidence, except in some cases of perjury: Historical Records of Australia, Series 1, vol. 11, pp 495-496. He relied on the advice of James Stephen: see Historical Records of Australia, Series 4, vol. 1, p. 615. See B. Kercher, An Unruly Child: a History of Law in Australia, Allen and Unwin, Sydney, 1995, p. 38, and see chap. 2 on the development of the law of attaint in the colony. For other attaint cases in 1825, see Hart v. Rowley, October 1825; Polack v. Josephson, August 1825. See also Campbell v. Hart, 2 August 1825 (Sydney Gazette, 4 August 1825) in which leave was granted to proceed in action at law against a prisoner of the crown convicted of felony.

On 18 March 1825, Lord Bathurst gave instructions to Governor Brisbane on the methods to be used in granting pardons, but this, of course, had not arrived by the time of this trial. See Historical Records of Australia, Series 1, vol. 11, p. 545; and see Brisbane to Bathurst in reply, 30 September 1825, p. 862. See also Stephen to Horton, 27 March 1825, Historical Records of Australia, Series 4, vol. 1, pp 603-604.

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

AUSTRALIAN, 14/04/1825
Supreme Court of New South Wales
Forbes C.J., 8 April 1825
The trial of **EDMOND BATES**, of Kissing Point, master sawyer, for the murder of **JULIA BATES**, his wife, came on this day. The circumstances proved in evidence are as follows: On the 24th December last the prisoner, in company with one **JOHN COCHRANE**, a sawyer, who was at that time in prisoner's employ, returned from Sydney, and brought up with them a gallon of strong rum. They arrived at the prisoner's dwelling in the night time, (i.e.) very early on Tuesday morning. After breakfast the wife of the prisoner, Julia Bates, the deceased, scolded him, because he had not returned home on Christmas eve, saying, "She was sure he had been with his w---- in Sydney." The prisoner acknowledged afterwards to have been in improper company while at Sydney. However, the deceased was appeased, and they all sat down in good humour to reduce the gallon of spirits. The company consisted, at first, of the prisoner, the deceased, Cochrane, and **CLARKE**, who all lived together. About half-past two a young man named Pearson, came in, and took two glasses of raw rum; and in about two hours departed, in company with Clarke. By this time all parties, save the prisoner and young **PEARSON**, were drunk. Clarke and Cochrane, however, both swore the prisoner was drunk also; but Pearson, who swore to his sobriety at five o'clock, when he left the house. Cochrane was at that time so intoxicated as to be nearly senseless.

About 8 o'clock in the evening, one **PORTER**, who lives about half a quarter of a mile from the prisoner, while retiring to bed heard the prisoner at his gate, calling "Porter, Porter come over, for my wife is killed and burnt to death." Porter accordingly sent his wife and son along with the prisoner, while he went to get his cutlass, and then followed himself. When he got to the house of the prisoner, he saw the deceased lying dead, within about six inches of the fire, which was nearly out, but would not examine nor remove the body till the Coroner and Doctor arrived, whom he instantly sent for; and also the district constable. In the mean time some conversation took place between Porter and the prisoner. Porter said, ``Ned long looked-for is come at last." Prisoner replied, "Do you think I've killed my wife?" Porter answered, "I do." Prisoner re-joined, "If I had killed her I would have put her where you could not have found her; no, not for six months. I'll go and drown myself." Porter told him that he should not do that. Prisoner said, "Then I'll go away" ---- Porter answered he should either stop or go without his head. Prisoner continued to allege, as at first, she was killed and burnt to death; but did not say who had killed her. Close to the body of the deceased lay Cochrane, so drunk as to be speechless ---- when he came to himself so far as to speak, which was more than 3 hours afterwards he complained of sore ribs --- the prisoner acknowledged he had made them sore by kicking him in order to awaken him. At length **SMALL** the constable arrived, and he immediately put a pair of handcuffs on the prisoner, which he afterwards attempted to break off. When the Surgeon arrived, (Mr. **ALLEN**, of the medical department Parramatta) he examined the body, and found it mangled and bruised to a great extreme. The following wounds were sworn to by Mr. Allen:---- Three small wounds on the right side of the head ---- a contusion on the forehead, near the root of the nose ---- nearly all the ribs of the right side fractured and rent from their articulation with the spine, which could only have been effected by an axe, a mall, or what was more probable, from the flattened

appearance of the corpse, from jumping on it. Bruises on the right butock, near and upon the loins ---- a small lacerated wound on the inner and upper part of the thigh ---- severe bruises on the knees, legs, and right arm, which last limb also shewed two cuts near the elbow ---- a compound fracture near the ancle of the left leg ---- burns on the buttocks and right leg ---- and from an effusion of air under the skin. He was decidedly of opinion that the disjointure of the ribs alone, would cause the death of the deceased.

THORN, chief constable of Parramatta, swore, that on the 27th Dec. the day after he had had the prisoner in his custody, the latter acknowledged to him he had killed his wife, and that nobody touched her but himself, but at the same time the prisoner said all he could remember of the affray was throwing a kettle at the deceased, which he supposed was that which broke her leg. To Small the constable also, the prisoner used this expression, "If I killed her I did it when I was drunk."

Mr. Wentworth was Counsel for the prisoner. It was endeavoured to be shewn that the prisoner was jealous of Cochrane.

The prisoner was described as a hard-working man, of unoffending and quiet manners, not given to quarrels.

In recapitulating the evidence, the Chief Justice dwelt particularly on the prisoner's own expressions, from first to last, as being strongly presumptive of his guilt --- "Porter come over, my wife is killed and burnt to death" ---- and afterwards the prisoner never alluded to any one killing her except himself, ---- which confession he afterwards deliberately made to Thorn ---- again ---- "Do you think I killed her? if I had killed her I would have put her where you could not have found her; no, not for six months" ----"I'll go and drown myself;" and when Porter said he should sooner lose his head, he replied, "Then I'll go away" ---- when all this was coupled with his fright, unaccompanied as it was with any distress of mind or remorse of conscience, it looked like guilt --- why not say who killed his wife, if he knew, or if he suspected any one? for the prisoner was in his senses, he could walk on the foot-path, and converse with distinctness. As to the quarrel mentioned, the prisoner did not say to Thorn that if he killed his wife, he did it on that account; but that he did it because he was drunk. Now the deceased met her death by blows ---- the prisoner had been proved to be present, and had acknowledged to have thrown a kettle, which he supposed was that which broke her leg. It was established then, that the prisoner not only met her death by blows, but that one of those blows at least was inflicted by the prisoner.

The prisoner's excuse to Thorn was, that he was drunk, and that he was therefore insensible of his actions. [1] But drunkenness, unless it can be proved that it was involuntary, and had produced an aberration of the mind, is not by English law admitted as an excuse or justification of a criminal act. But the drunkenness of the prisoner produced no such aberration of the mind; if his inebriety existed to any extent, it was at all events voluntary ---- he himself brought the liquor to his house ---- there was in this instance no seduction to inebriety ---- the transactions all took place in his own dwelling, where he was particularly responsible ---- he was therefore equally accountable for his actions, as if he had been sober ---- the evils of such kind of drunkenness admitted in law of no excuse or mitigation. But the prisoner, it appears, was not greatly intoxicated at any time on Christmas day. Cochrane says he was drunk by four in the afternoon. Clarke says the same. But Pearson says, that at five o'clock he was not so drunk but he could converse rationally. Now, between 4 and 8, or at least between 5 and 8, there was in evidence no account of the acts or state of the prisoner ---- but at 8 he walked in a narrow path, from his own house to

Porter's, and afterwards conversed distinctly ---- there was not time, then, to have become so sober, if the prisoner had been just before extremely inebriated.

Again ---- the number and nature of the blows shew the animus ---- there could be no possible motive for such extreme, such continued violence, except malice and cruelty. Some little shew of jealousy has been set up, but the prisoner himself has vindicated Cochrane from adultery, as he also did from the murder.

The Jury returned a verdict of Guilty.

HE WAS EXECUTED ON MONDAY.[2]

The prisoner was a tall man, of respectable appearance, but his countenance displayed no higher feeling than that of dismay mingled with sullenness.

[1] The trial was reported by the Sydney Gazette on 14 April 1825. It reported the Chief Justice as giving the following charge to the jury: ``This is an information against the prisoner at the bar for the wilful murder of his wife, Julia Bates, on the 25th of December, 1824. The information sets forth, that she came by her death in consequence of blows inflicted by the prisoner with an axe. The precise circumstances as to how she came by her death, is not in evidence before you. On the morning after the murder she was found lying near the fire, with several wounds on her body. From the testimony given by Mr. Allen, the Surgeon, it appears to have been the fracture of the ribs which caused her death; but, on his cross-examination, as to the instrument with which the wounds were inflicted, he does not think they were given by an axe. The exact instrument does not appear in evidence; but, Gentlemen of the Jury, it is not necessary that the precise instrument, with which the murder was committed, should be proved -- though it is necessary to state it as near as possible, in the indictment. It appears that by blows, stamping, or some violence, she came by her death; but I beg to state to you, Gentlemen, that it is not necessary to prove the exact weapon, if the general features of the case will bear out the indictment; and it is in evidence that Julia Bates came by her death in consequence of blows inflicted by the prisoner at the bar. The defence set up, is drunkenness. Gentlemen; drinking is no excuse for that mental incompetency which causes such acts as those before you. The law says, that drunkenness is no excuse for crime; but even if it were, it cannot be found in evidence that the prisoner was in a state of intoxication which would render him insensible to the enormity of the crime he was perpetrating. The witness, Porter, distinctly states, that the prisoner was not drunk; that he was only tipsy. Gentlemen; there are various names for various grades of this frightful propensity; but this witness describes exactly the manner of the prisoner; that he was perfectly collected; that he held conversations. If it had been proved that he was actually drunk it would have been no legal excuse; but no such evidence is before you; and it is my duty to state to you, that, in my mind, there is not doubt of the guilt of the prisoner."

[2] 11 April 1825. 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.

On the day of the trial, 8 April 1825, Forbes C.J. sent his notes of the trial to Governor Brisbane, saying that he could see no favourable circumstances to recommend mercy. On the next day, Brisbane replied, confirming the sentence: Chief Justice's Letter

Book, Archives Office of New South Wales, 4/6651, pp 30-31; and see Mitchell Library document A 744 Letters from Governor Brisbane to Forbes C.J.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 26/05/1825
Supreme Court of New South Wales
Forbes C.J., 20 May 1825
JOHN CLAIG was arraigned on a charge of having committed wilful murder on the body of **LUCY CLAIG**, his wife. [1]

Dr. **ALEXANDER NESBITT** examined. - I was applied to on the 10th of January last to attend the house of the prisoner. Upon examination I found the upper part of the body rapidly advancing to a state of putrefaction. I observed a cut on the head, just above the right ear, in length from one inch and an half, to two inches deep. I also examined the state of the brain: when I turned it out of its place a quantity of blood was diffused in the base of the brain. From the state of the body it was impossible to discern any marks. I am decidedly of opinion the deceased died from an effusion of blood in the brain. I conceive, from the appearance of the deceased, she had sustained an injury some time previous to her death.

WARBY stated, that he was at the house in the evening previous to the decease of Mrs. Claig; sat down to tea with her and the prisoner at the bar. Said, by way of joke, Mr. Claig, "I think you was very greedy at Liverpool, in having so many women." Observed deceased colour in the face. Witness assured her it was a joke. She got up in haste, apparently irritated; in doing of which she flung the chair from under her, suddenly reeled round, and struck herself against the table; deceased fell. Having recovered, she caught hold of a tea-pot, and flung it out of her hand. Prisoner begged of her to desist, as such conduct would offend his customers. Prisoner pushed her, he told her if she had a drop in the head to sit down and be quiet. Prisoner appeared greatly concerned when he afterwards discovered his wife was seriously ill. He said, if she dies I shall lose my right hand.

Mr. **WALKER**, surgeon, examined. - Attended the deceased. - Considered that she was afflicted with epilepsy.

His Honor the Chief Justice summed up.[2] Verdict - Not Guilty.

Upon the motion of the Solicitor General, **JOHN TURNER**, witness in the above case, was brought forward for a contempt of court, having appeared as witness in a state of intoxication.

It having appeared that this witness had not been regularly subpoened to attend the court, but came voluntarily at the request of the prisoner,

The Chief Justice observed, that upon those considerations, he should not inflict any punishment in this case, but merely cautioned him to be more careful for the future in what state he entered a court of justice again; - it was no trifling matter for a witness to appear in a box, in a state of intoxication in a case of life and death.

[1] The Sydney Gazette, 26 May 1825, reported this case under the name Clegg. It said that the Solicitor General (John Stephen) argued that in all cases of murder, the law assumes a malicious intent and, according to Blackstone, the defendant had to prove otherwise.

[2] The Sydney Gazette, 26 May 1825, noted that Forbes C.J. said ``that the subject of the present prosecution was of the highest kind which could happen in human society, and aggravated in the present case by the relationship existing between the parties."

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

AUSTRALIAN, 25/08/1825
Execution. ---- **JAMES WEBB**, who was convicted on Friday se'nnight with **PETER CARLINE**, for the wilful murder of **JAMES COLLETT**, a settler at Toongabbee in the month of May last, underwent the awful sentence of the law, at the usual place of execution on Friday last. The circumstances attending the trial, and the subsequent conduct of the prisoners, were somewhat of a novel nature. It appeared that Webb was a government assigned servant to Collett, and the other prisoner [CARLINE] had lived in a similar capacity on the adjoining farm. The murdered man was found lying in front of his own house weltering in a gore of blood, caused by a severe contusion on the forehead. Suspicion was attached to the prisoners, and on their being taken before a Bench of Magistrates at Parramatta, were fully committed for trial at the present Criminal Court for the murder. On the verdict being pronounced by the Jury the prisoners urged their innocence in the strongest terms. The Judge, however, ordered their execution on the Monday following, but in consequence of Webb's confession, and other circumstances, an order was received at the gaol to delay the execution until some particulars which were stated by Webb were investigated. Webb was then ordered for execution, and his companion reprieved. The former having been led to the fatal scaffold, was permitted to see his comrade, with whom he shook hands most cordially. He again confessed his own guilt, and declared the other's innocence. Having ascended the platform, he requested of the Rev. J.J. Therry, who had attended the unhappy culprit with the most unremitting anxiety since his conviction, to state to the assembled multitude that the horrid deed which he had perpetrated, and for which he was then about, most justly to expiate, by his death, was owing to his having drank to a great excess on the day that the melancholy circumstance took place; he therefore wished to caution the multitude against becoming a prey to that baneful habit. The Reverend Clergyman having shook the unhappy culprit by the hand left him; and, in a few moments he was launched into eternity.
[*] As a result of Webb's confession, **CARLINE** did not hang. The governor was unable to extend pardons to cases of murder, but he could reprieve the defendant until the King's pleasure was known. On 18 November 1825, Governor Brisbane wrote to Lord Bathurst, recommending a pardon for Carline. He enclosed a report by Forbes C.J. outlining the circumstances. Forbes said he had told the jury that he did not think that there was sufficient evidence against Carline, but they found him guilty. Forbes immediately respited Carline and sent the case to the governor on 14 August 1825. He said that he had had doubts about Carline's guilt even before Webb's subsequent confession made clear that Carline was innocent. Governor Brisbane replied to Forbes on 16 August, saying that he had decided that Carline's sentence should be commuted to transportation for life at Norfolk Island. The documents are in Historical Records of Australia, Series 1, vol. 11, pp 900-903; and in Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, pp 54-55, 57, 62-63. See also Sydney Gazette, 18 August 1825, 1 December 1825; and Stephen to Horton, 27 March 1825, Historical Records of Australia, Series 4, vol. 1, pp 603-604.
Carline was transferred to the hulk, where an attempt was made on his life. His attempted murderer was hanged for this offence. Carline was then put on a ship for Norfolk Island, but she was seized by convicts and taken to New Zealand. The vessel was recaptured with the assistance of Maori warriors and the convicts, including

Carline, were returned to Sydney and tried for their lives on a charge of piracy. Carline was acquitted, and eventually received his pardon for the murder conviction. See R. v. Griffiths, 1826 (the attempt on his life); R. v. Flanaghan and others, 1827.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 15/09/1825
Supreme Court of New South Wales
Forbes C.J., 9 September 1825

PATRICK MOLONEY was indicted for the wilful murder of **WILLIAM ELLIOTT**, at Port Macquarie, on the 29th of March last.

The Attorney General stated the case. The prisoner stood charged with the highest offence, which could be perpetrated in society, and if the Jury believed the evidence that would be brought forward, by which it would appear that there was no previous quarrel between the parties, nor the least shadow of reason for the commission of the act, there was no other possible conclusion to be arrived at, but that the prisoner was guilty of murder, as charged in the information.

THOMAS GREGORY examined. I am Hospital Assistant at Port Macquarie. On the morning of the 29th of March, while I was in the dispensary, I was informed that one of the prisoners had been murdered in the gaol-yard. Shortly afterwards he was brought down by two men, and carried into one of the wards, where I assisted Dr. Moran in dressing the wound. There was an extensive fracture on the right side of the head through the bone into the substance of the brain, part of which had exuded from the wound, and from which several splinters of bone were also extracted. The deceased gradually lost his strength, and died on the 6th of April, I am positive from the effect of the wound.

Cross-examined by Mr. Rowe. I was brought up to the profession of a surgeon; Dr. **MORAN** was the Medical Attendant, and saw the wound first; I was not present at the Coroner's Inquest; Dr. Moran gave evidence there; I have never heard Dr. Moran say that the deceased did not die particularly from the effect of the wound; nor have I heard him give any specific opinion on the subject; I expressed an opinion, that the deceased could not survive, on seeing the wound; the deceased was not a strong man, and rather subject to ill health; Dr. Moran might be able to give better testimony on the subject, but I feel perfectly competent to state positively, that the wound caused the death of the deceased.

By the Court. Paralysis came gradually on until the day the deceased died.

THOMAS MOXAM examined. I am armourer to Captain Gilman, at Port Macquarie; I reside in the gaol for safety, in consequence of having fire arms in my possession; I was in the gaol-yard on the morning of the 29th of March; the prisoner was brought in the day before, as a bushranger; my attention was drawn by a noise of something crashing near to me; I turned round, and saw an axe drop from the prisoner's hand, and heard him exclaim, ``you d---d scoundrel," or ``you bl--dy scoundrel, you are settled." The prisoner was secured, and the deceased taken to the hospital, where Dr. Moran immediately attended him.

Cross examined. The report of the blow was what first attracted my attention, I did not see it given; I have never heard Dr. Moran say that the deceased did not die of the wound.

JOHN HOWARD examined. I was present in the gaol-yard, when the deceased received the blow; I was sitting next to him at breakfast; the prisoner sat at the other side; an axe lay near a heap of wood in the yard; the prisoner went for it to break a

bone which was in his mess, when he had broken the bone he laid the axe down, and after looking round the yard to see that no one observed him, he again took it up, and struck Elliot on the skull, saying, ``you villain take that;" the deceased fell against the paling. Moxam came up just after it happened.

Cross-examined. Moxam came up about five minutes after, the axe was then lying on the ground; I did not see the deceased draw a knife, nor make a blow at the prisoner; I am sure they had no quarrel, and I saw no cause whatever for the act. I do not know what book I have been sworn on, nor for what purpose I am sworn. I do not know the consequence of not telling the truth, nor what will become of my soul if I swear false. I do not know what religion I am of; I cannot say any prayers; and I have never been at any church or chapel.

By the Court. I was never taught to say any prayers when at school. I do not know that my soul will go to the Devil if I tell lies; and have no idea what will become of me when I die. I have been here three years and a half, and was sent here for stealing a shirt.

WILLIAM ACRES examined. I am a wardsman of the gaol at Port Macquarie; I was in the yard on the morning of the 29th of March, and saw the prisoner strike the deceased on the head with the axe, and then throw it on the ground. Howard, the last witness, was standing near him at the time.

Cross examined. The deceased was a weak sickly man.

The Chief Justice summed up the evidence, and observed, that in consequence of his extraordinary ignorance of an oath, he threw out of the scale the evidence of Howard, further than as it served to corroborate the other testimony, by which nothing appeared to show the act to be the effect of self-defence, or of passion; there was nothing to justify, nor any possible cause for its perpetration; there was no quarrel, but in a moment words of a bloody character were used, the axe was raised, and the man struck. From the evidence of Mr. Gregory it appeared, that the blow caused the death of the deceased; and the law was, that where a man strikes another maliciously, with intent to do him some great bodily harm, and death ensues, it is murder. The Jury returned a verdict of Guilty. The prisoner was sentenced to die on Monday, the 12th instant. [The trial was also reported at less length in the Australian, 15 September 1825.]

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

AUSTRALIAN, 15/09/1825

EXECUTION.

PAT. MALONY was executed in pursuance of his sentence on Monday morning last. After his conviction the Rev. J. J. Therry visited him in gaol. His behaviour on leaving the cell on the morning of his execution shewed a mind suited to his awful situation. Having reached the scaffold, he enquired for a lad to whom he was personally known; the boy was brought to him, he shook hands most affectionately and conjured him to take warning by his untimely end. He then addressed the multitude around him, nearly as follows: - "My friends, I have been justly found guilty of an offence; and I am now about to expiate that crime by an ignominious death. But I forgive my enemies - with my dying breath I pardon them for all the wrongs with which they have oppressed me. My religion teaches me to die in peace with all mankind. I die happy. There is, however, one thing which I am anxious to mention; that hard usage, cruel treatment, hunger, and severe scourging, drove me to

the commission of the fatal act," - here he was interrupted by the Under Sheriff. He then said a few words to the minister; and was launched into eternity.
[*] On 12 September 1825. 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 short period between conviction and execution did not mean that the governor had no time to consider pleas for mercy. Forbes C.J. gave notes of the trial to the governor, but was firm that he would never recommend that the sentence of death be carried out. If he did that once, he said, then any time in which he did not do so might be misconstrued as a recommendation of mercy. Following English precedent, he did, however, recommend mercy when he thought it appropriate: Forbes to Wilmot Horton, 26 November 1825, Catton Papers, Australian Joint Copying Project, Reel M791. For correspondence between Forbes and Governor Brisbane on individual cases, see Mitchell Library A 744 Letters from Governor Brisbane to Forbes C.J.
In the same letter, Forbes C.J. showed that he sympathised with what appeared to be the view of Moloney that harsh treatment of convict servants was the cause of some violent crime. He concluded that ``there is something in Convictism, like Slavery, corrupting to the mind when we fasten a chain round the leg of a prisoner, and place it in the hand of a Settler, we in effect bind two men in fetters; the one becomes a Tyrant, the other a Slave".
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 06/10/1825
Supreme Court of New South Wales
Forbes C.J., 30 September 1825
Wm. CHAPMAN was tried for the wilful murder of **SARAH ALLEN**. [Reported by the Sydney Gazette, 3 October 1825.]
It appeared in evidence that the prisoner, William Chapman had been drinking at the Green Man public house, in George-street, in company with several labouring men assembled there to receive their weekly wages, on the evening of the 20th of May last. About eight o'clock the deceased, Sarah Allen, entered the room where prisoner and the others were drinking; she appeared ill, and rather inebriated. On deceased asking prisoner to leave the house and return home, he rose and struck her several blows on the head. Some of the by-standers succeeded for the time in preventing further violence, but upon deceased leaving the room, the prisoner already sufficiently intoxicated, followed her and repeated his blows. She fell, upon which prisoner gave her a kick; he then returned into the house. On coming out again and observing deceased bleeding and unable to stand, prisoner said, "Sally, my dear, what have I done to you?" she replied, "my dear Chapman I am terribly hurt." A wheel-barrow being procured, deceased was subsequently removed to her home.
The learned Judge in summing up remarked, that this case was involved in much mystery. No conclusive evidence had been adduced to prove whether the blood stated to have flowed from the unfortunate woman, had proceeded from the bursting of a blood vessel or external injury; in this essential point there was a defect of evidence.

If a man in the heat of ungoverned passion kicks and strikes a weakly female and thereby induces death, the law will consider it murder though to a person in health the result might not have proved fatal. It appeared to the learned Judge that the prisoner had no intention to commit murder, that no malice prepense existed. Indeed, the very affectionate language which passed between the parties, the circumstance of their both being intoxicated, and the prisoners' subsequent conduct were sufficient to rebut this idea. Intoxication should certainly never excuse a man for committing crimes; however his honor considered the present offence as amounting only to manslaughter.
Guilty of manslaughter.
[*] On 14 October 1825, he was sentenced to be transported to Port Macquarie for two years: Sydney Gazette, 17 October 1825; Australian, 20 October 1825.

AUSTRALIAN, 13/10/1825
Supreme Court of New South Wales
Forbes C.J., 7 October 1825
JOHN BYRON stood indicted for the wilful murder of **SAMUEL LUPTON** on the 29th of May last. [1]

JOSEPH HAGGARS stated that he saw the deceased, Samuel Lupton, at a public house on the Parramatta-road, kept by one **JACOB ISAACS**, and that the deceased had not left the house more than fifteen minutes when the report of fire arms was twice distinctly heard; the first report was not noticed, being considered a no-s thing [sic] strange; shortly after the second discharge heard the prisoner's voice; prisoner said he had shot a man, and that it was for running away from the round house with a musket; the man was found about sixty yards from the watch-house quite dead; saw a musket lying about fifteen feet from him; went back to the round house, where was a pistol lying on a table, which had been discharged; prisoner said that he had fired the first piece when he returned, and procured another, which he also discharged; on examining the body there were a number of wounds, evidently occasioned by slugs or shot; prisoner at that time stated that deceased had taken hold of the musket in the round house, and said that he was as good a man as him (meaning the prisoner;) the latter replied if the piece was loaded he would have been a dead man, and thereupon ordered him to descend into a cell, which he refused to do, and on seeing the watch-house door open, ran out, when prisoner took his pistol, followed him, and discharged it; he afterwards returned and procured a musket from the house, which he also discharged.

RICHARD ROBINSON deposed that he was in company with deceased, on the Parramatta-road, on the evening of the 29th of May last, was proceeding from Parramatta to Sydney, when, on passing a round-house within three miles from Sydney, prisoner came out with a pistol in his hand and approached towards them, on looking witness in the face he observed you are not the man; he then looked at deceased and enquired who he was, he said, I will tell you who I am, you remember, I suppose, to have worked with me in loading stone for **JENNY MUCKLE**. Prisoner then remembered him, suffered both to proceed on their way, and returned back to his watch-house; deceased then said that it was a hard case to be stopped by constables, and that the prisoner Byron knew him to be a free man; the constable returned and asked what he was grumbling about, insisted on seeing his certificate of freedom, which deceased said had been left by him in Sydney. Prisoner said, if you cannot produce it I will take you in custody to the round-house. Not more than three minutes had elapsed from the prisoner leaving them the first time and his return, deceased and witness had some words together respecting his going in custody to the watch-house,

but was at length prevailed upon to go; witness proceeded alone on his journey, about five minutes after heard the report of a piece fired, it appeared to proceed from the direction of the prisoner's round-house. The deceased was sober when accosted by the constable.

Mr. **ANTHONY BEST** - Knew deceased; three years prior to the day of his death he became a free man; he had always a remarkably quiet and peaceable temper.

Some witnesses were called on behalf of the prisoner. [2]

The Jury retired for about forty minutes, verdict Not Guilty.

[1] Reported by the Sydney Gazette, 10 October 1825. It summarised the opening address by the Attorney General (Saxe Bannister). He noted that the defendant was a constable, whose offence was committed in the execution of his duty. There was no danger in the duty, however, and no felony had been committed by the deceased. Therefore the defendant had killed without cause.

[2] The Sydney Gazette, 10 October 1825, summarised Forbes C.J.'s charge to the jury: he said that this was the most difficult case he had tried in New South Wales. The report of the charge went on: ``The question turned entirely upon whether the prisoner acted under a consideration of his duty; it had been stated to be part of his duty to protect the road. The deceased was passing, the constable came out, as he conceived, in the execution of his duty, and demanded his certificate; as a matter of fact, he did apprehend the deceased, and brought him to the watch-house, and what happened there was only to be collected from his own statement, which should notwithstanding be taken altogether. Now then the deceased was apprehended, he ran off, and ran with the musket belonging to the person who apprehended him. Taking the case then, with the reference, not only to its own immediate circumstances, but also with other circumstances connected with it, bushrangers to a great extent being about the place, a highway robbery having been committed a short time before in the neighbourhood, the deceased being apprehended, running away, and carrying off the constable's arms, the case did not appear to amount to more than manslaughter."

After stating the verdict, the Gazette went on: ``Previous to his being discharged from the dock, His Honor addressed the prisoner in nearly the following words: `**JOHN BYRON**, you have been acquitted of the crime with which you were charged, by the verdict of the Jury, who have come to the conclusion, which the whole circumstances of your case seemed to them to warrant; but, before you are discharged, I must admonish you, as an officer of the Police Establishment, and through you, others who fill similar situations, that they are not to conduct themselves as you have done; your situation was a delicate one, but your conduct might have been different, and at the same time equally efficient; there were other means which you might have used, before you fired a pistol at a flying man, you might have called for, and obtained assistance, and have again taken him into custody, for let it be understood, that officers are not justified in firing a pistol after a man merely flying from arrest, for by possibility he might be innocent of the charge, and fly from timidity, or from apprehension. And let it also be known by all persons in like situations, that they are not allowed to resort to force unless opposed by force, and then only in proportion to the measure of resistance, or they subject themselves to be called to account, which may lead to different results, from that which has occurred to you this day."

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

SYDNEY GAZETTE, 21/11/1825
Supreme Court of New South Wales
Forbes C.J., 18 November 1825

JOHN CLYNE was indicted for the wilful murder of **DAVID RAMSAY**, by stabbing him with a pitchfork, at the Field of Mars, on the 20th day of October last.

The Attorney General stated the case for the prosecution.

JOHN WRIGHT deposed, that he rents a farm, and lives at the Field of Mars, about 14 miles from Sydney; that while he was at work on Thursday, the 20th of October last, between 4 and 5 o'clock in the evening, he heard a noise of two persons, apparently at high words, at some distance from him, and immediately after saw the prisoner running after the deceased; that the deceased ran towards the bush, and the prisoner then returned towards his own dwelling; shortly after the deceased came again towards the prisoner, who again followed him, and returned alone; a third time the deceased ran towards where the prisoner was at work, when he seized something, which appeared to witness, at a distance, like the handle of a pitchfork, and once more pursued the deceased, and the witness then lost sight of them. Shortly after witness heard the voice of the prisoner, calling out ``Murder! Murder! Master!" and immediately proceeding to the place whence the voice came, accompanied by his brother, and a man named **BUTLER**, they found the deceased lying on the ground, in a gore of blood, and the prisoner holding him down; a pitchfork and a shingling hammer were lying close to the body. Witness said to the prisoner, ``you have killed the man;" when he replied, ``by G---d, this is the fellow who is constantly robbing me." The deceased died almost instantly.

Cross-examined by Mr. Rowe. --- The deceased was a stranger to witness; has heard since that he was a bushranger; the prisoner had no idea that he had killed the deceased, for he said he would ``get up directly, and run away."

Wm. WRIGHT and **Wm. BUTLER** corroborated the evidence of the last witness.

THOMAS WALSH a constable, apprehended the prisoner; he said the deceased came to rob him, and that he was killed in the scuffle with the pitchfork,

Cross-examined. --- Has heard since that the prisoner (sic) was a bushranger, a runaway from Emu Plains; knew him to have been sent to Emu Plains as a prisoner from the Court at Parramatta.

For the defence, **F.A. HELY**, Esq. examined. --- The deceased has been a runaway from Emu Plains for 12 months prior to September last; he was apprehended since on a charge of felony, and broke out of gaol.

His Honor recapitulated the evidence, and observed, that the only question was, whether a malicious intent existed in the mind of the prisoner, or that being under an impression that the deceased came to rob him, he had used means to drive him away, met with resistance, and the death ensued in the scuffle. Altogether it was not a case upon which a conviction for murder could conscientiously take place; it was for the Jury to consider how far the prisoner was guilty of manslaughter. The Jury returned a verdict of --- Not Guilty.

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

SYD1826

AUSTRALIAN, 26/01/1826
Supreme Court of New South Wales
Forbes C.J., 21 January 1826
CHARLES OTHAM was indicted for the wilful murder of **JAMES KINLEY**, at Bathurst, by shooting him with a pistol.

The deceased had been employed as a shepherd on the farm of Mr. Innes at Bathurst. On the 25th of November last an entertainment, in celebration of Mr. Innes's marriage, was given to the overseer, labourers, and other domestics employed on the farm: about twenty persons assembled, each man being allowed half a pint of rum. In the course of the evening a quarrel took place about a difference of country, in which the deceased was engaged. This dispute was soon dropped, and most of the party dispersed. Shortly after a man named Griffin was observed with a gun in his hand close to the overseer's hut, in earnest dispute with the deceased, who was armed with a batten. Otham was between, endeavouring to separate them. Griffin threatened to shoot the deceased. Otham still interfered, making use of every effort to drag the latter away from the scene of tumult. In the conflict Otham's pistol went off, and instantaneously the deceased fell. Mrs. O. exclaimed, oh! Charles what have you done? he answered, "my God! I have shot the man; it went off unknown to me. What I've done I must suffer for," and fell on his knees. When examined before the inquest, the pistol, it was found, would go off at half cock; there would be a difficulty in cocking it with one hand. - Death did not immediately ensue; about eight and twenty hours after removal to the hospital at Bathurst elapsed before the unfortunate man breathed his last. The third rib had been fractured, and some of the detached pieces forced into the lungs. The cavity of the stomach was filled with extravasated blood several small shot were also found in it.
The prisoner received an excellent character from Captain Innes, of the Buffs, from which regiment his discharge had been purchased. Captain Innes had known him ten years; he was regarded by the entire regiment as a quiet, peaceable man.

The Chief Justice in summing up, observed, that the facts for the Jury's consideration were reduced to two points; --- whether the prisoner was justified in bringing out so dangerous a weapon as a pistol; and if, having been so brought out, it was fired intentionally. After a few minutes consultation, the Jury returned 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, 26/01/1826
Supreme Court of New South Wales
Forbes C.J., 20 January 1826
WILLIAM CURTAN and THOMAS RYAN, were indicted for the wilful murder of **JOSEPH JACKSON**, at Bringelly, on the 31st of October last.
The Attorney General [Saxe Bannister.] stated the case.

Mr. **HILL**, Assistant Surgeon on the Establishment at Liverpool, examined the body of the deceased on the 3d of November; it was taken out of a water-hole at some distance from the house; the bones of the face were beat to pieces, and several large

fractures on the upper part of the head; the wounds were sufficient to cause the death of any person; a rope was tied round the body to which was fixed a large stone.

Mr. **JOHN HORSLEY**, Coroner of the District of Bringelly, held an inquest on the body of the deceased on the 3d of November last; the two prisoners came forward at the inquest, and each persisted in making a declaration, which witness committed to writing; the prisoners were frequently warned before they made any declaration, and no promises whatever were held out to them on an inducement to confess. The witness then proceeded to read the declaration of the two prisoners, each of whom accused the other as the actual perpetrator of the murder. The prisoner Curtan stated, that in consequence of having been served with a summons to attend the Magistrates' Court, by the deceased, with whom he had some dispute, he mentioned the circumstance to Ryan, who told him that Jackson was certainly laid out to do him some injury, if he was not prevented, and that the only way to be safe was, to knock out his brains, and that he (Ryan) would do the deed himself for a glass of grog. The two prisoners accordingly repaired to the dwelling of the deceased the same evening; Curtan remained at the door while Ryan entered the house, and after a short interval, during which, Curtan heard a scuffle within, Ryan came forth and said "Jackson is dead." The two prisoners then dragged the body between them to a water-hole, at some distance from the house, and having attached to it a large stone with a rope, they threw it in, and then returned to the house, from which they took a quantity of tobacco, which was divided between them. The declaration of Ryan went to state that on the evening of the day on which the conversation took place between them, as detailed by the other prisoner, that Curtan came into the house of a man named Brown, where they both lived, about 9 o'clock, looking very pale; that after having his supper, they both went out to go to bed, for which purpose they had to cross the yard; that on the way, Curtain told Ryan that he had killed Jackson, and asked him to go and help him to remove the body, as it was too weighty for him to manage by himself, and that he (Ryan) refused to have any thing to do with it.

Cross-examined by Mr. Keith. --- No hopes whatever were held out to the prisoners to induce them to make any confession; Ryan charged Curtan first; witness cannot say positively whether Curtan was the first that came forward, but he was very urgent to make a declaration.

JOHN MOLLOY examined. --- Witness is stockman on the estate of Captain Piper at Bringelly; knew the deceased, and knows the prisoners; witness was passing the house of Jackson on the morning after the murder took place, and saw two children belonging to the deceased crying at the door; on going into the house he saw the clothes of the deceased scattered over the floor, and also some blood sprinkled about, in consequence of which, and the deceased being missing, he informed the district constable; the prisoners lived at the house of a man named Brown, about a mile from the dwelling of the deceased.

MICHAEL McMAHON, constable at Bringelly, apprehended the prisoners at the house of Brown; found in the bed where Curtan slept, a shirt stained with blood, Ryan said, "thank God you can find nothing bloody in my bed;" witness handcuff'd Ryan, and after some time, he said he would not keep handcuffs on for any other man, and that if witness would send away Curtan and Brown, he would shew him something that had more blood on it; that he would shew them Curtan's clothes that were hid at the back of the barn, and also where the body was, in a water hole. Witness saw the clothes taken from the place where Ryan had described, by another constable named Ambridge; a pair of blue trowsers, brown jacket, and check shirt; the body was found

in a water hole, to which they were conducted by Ryan, about 15 rods from the house of the deceased.

Cross-examined. --- Curtan said, when the clothes were found, that they were lent by him to Ryan, and that he had not seen them for six weeks before.

ROBERT HARBISON, clerk to Mr. Lowe the Magistrate, at Bringelly, was present when the prisoner was taken into custody. On the following morning, Ryan seemed desirous of making some discovery, and took Ambridge a constable, and witness to a dung-heap at the back of the house, where some clothes were found concealed. The body was afterwards found by Ryan's direction in a water-hole, some distance from the house of the deceased; it appeared to witness, by Ryan's manner, that he knew exactly the spot where the body was thrown; they searched a number of holes as they went on; they found the body about six inches below the surface of the water, but it was not removed till the following day, when the Coroner attended. The deceased had been two or three days before to Mr. Lowe, to take out a summons against Curtain, for taking away; or harbouring his wife, without his consent; a hoe-handle was found in the house of the deceased, with an appearance of blood and hair upon it.

MICHAEL McGLYNN was present at Browne's house, when the constables apprehended the prisoners; Curtan was handcuffed first; when the constables came in witness saw Ryan leave the house, go to the stable, and take out some clothes, which he shook, and then proceeded towards the straw-yard, where he remained a short time, and then returned to the house; the clothes were found afterwards in the yard, near the place where he had seen Ryan go to.

The prisoners being called on for their defence, severally denied the charge, and Ryan stated, that if he had been admitted King's evidence, he would have brought the whole matter to light.

GEORGE BROWN, called as a witness for Ryan, deposed, that Ryan and Curtan lived in his house; that Ryan was at home on the night when the deceased was supposed to be murdered; that Curtan, on leaving the house early in the evening, asked Ryan to accompany him, which he refused; that he remained within, and supped with witness and his family; about two hours after, Curtan returned and took his supper, and Ryan and he then went out together to go to bed; they then slept in the stable. Witness saw no more of them till next day; has heard people talk of Curtan and Mrs. Jackson frequently; the deceased himself has complained to witness of Curtan.

A witness was called on the part of Curtan to prove an alibi, but failed.

The Chief Justice summed up the evidence. The information against the prisoners contained two counts, the first count charging the murder as committed by Thomas Ryan, and then went on to charge Curtan as present, aiding and abetting. The second count reversed the relation, and charged Wm. Curtan as giving the blow, and Ryan as present aiding and assisting. The case turned partly upon the confession of the two prisoners made before the Coroner, and partly upon circumstances.

It was distinctly disclaimed on the part of Ryan, in his declaration, that he knew any thing of the transaction, except from Curtan after the deed was done. It appeared also that after, he was taken into custody, he made certain disclosures; that he asked the constables to take the handcuffs off, and said that he would not suffer for another man, and that if the shackles were taken off, he would shew where the clothes were. It was stated, that upon searching the sleeping place of Curtan, that a shirt was found stained with blood, and that Ryan said, "thank God, you can't find any bloody clothes on me," and on the following morning the conversation took place with the constable,

that if the handcuffs were taken off, he would shew where the clothes were. Then with his knowledge of that fact, how came he to conceal it from the constable on the night before? The conclusion certainly was against him. It was also stated, by McGlinn, that on the night before, after Curtan was taken into custody, he observed Ryan go to the stable, take some clothes out, and proceed to the stable yard, and on the following morning the clothes were found within a yard of the spot where he was so seen; and therefore, supposing they were the clothes of Curtan or any other person, who commited [sic] the murder, how came he to conceal them, unless he was somehow mixed up in the transaction? He must have known at all events, that Jackson had been killed, though it by no means followed that he was the person who actually slew the deceased, or even that he was present aiding and assisting, but that he was at all events in possession of the fact of the death, and though not guilty of the charge laid in the indictment, as a principal, either in the first or second degree, he still might be guilty of concealing the murder. The question then was, was the murder done in the interval between Curtan's leaving Browne's house, and returning? It might have been committed in that time, and Ryan not be a principal either in the first or second degree. Considering therefore, that circumstance, it would be for the Jury to give the prisoner the benefit of any doubt which they might entertain. The case against Ryan was, that he knew of the murder, and did not make the disclosure in the way an honest man would have done. With regard to the case of William Curtan, he, like Ryan, was found in the situation where the clothes were found stained with blood; there was also found in his bed a shirt stained with blood, which had not been in any way by him accounted for. The clothes also which were found, though pointed out by Ryan, still they were identified as like those which Curtan wore. He related before the Coroner, after having been previously warned, that being served with a summons to answer a complaint of the deceased, that he mentioned it to Ryan, who said, if Curtan did not take care, Jackson would send him to Port Macquarie. A conversation then ensued between them, in which Ryan said the only way by which Curtan would be safe, was by knocking out the brains of the deceased, and that he would do it himself for a glass of grog. In pursuance of that purpose they repaired together to the house of the deceased, Curtan stated that he remained outside, while Ryan went in, and that in about 25 minutes he returned, saying "Jackson is dead" that they then dragged him out, and having fastened a stone to the body, threw into a water-hole. The declaration then of Curtan, though he stated the deed as having been done by Ryan, was not evidence against Ryan, but was as far as it went, evidence against himself. It proved, even according to his own account of the transaction, that he was present aiding and assisting, for in the eye of the law, being present, did not mean being present so that he could actually see the deed perpetrated, for he might be on the watch or in some other way at hand, so as to aid if necessary, as it appeared even from his own confession, coupled with other circumstances of suspicion, there could be no doubt of his being a principal in the second degree.
The Jury returned a verdict, Curtan Guilty. --- Ryan, Not Guilty.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 26/01/1826
Failed execution: 23 January 1826
Curten, who received sentence of death on Friday last, [2] and of whose guilt, considering the evidence adduced on trial, but little doubt existed, was visited in the gaol by the Roman Catholic Clergyman during Sunday with whom some time was

passed in prayer; devotional exercises, occupied a greater part of that night, and as the unhappy man could not read himself, a fellow prisoner kindly performed that office. As the morning dawned, and the final hour of retribution advanced, his composure of mind did not appear impaired. The firmness which he had manifested on trial still appeared predominant, and the exhortations of the Clergyman were listened to with fixed earnestness. At nine o'clock, the Under Sheriff arrived at the gaol, and immediately proceeded to the culprit's cell, who observed that the time was short, but he was prepared to die. The crime for which he had been found guilty, he declared his entire innocence of; at the same time, from what was sworn against him on the trial, a different issue could hardly be expected. The unhappy man being divested of his irons, was conveyed down the steps to the gaol yard. He then ascended the scaffold with great firmness - his countenance not evincing the slightest change. Having shook hands with the Clergyman, he was left alone. Upon a preconcerted signal, the drop fell, when strange to say, the rope snapped, and precipitated him to the ground, from a height of nearly thirty feet. Restoratives were despatched for by the Reverend Clergyman, who humanely requested that some time might be allowed the culprit for recovering. This was instantly complied with, whilst the Under Sheriff and he repaired to government-house to state the circumstance. They returned in a short time with information that in consequence of some circumstances which had transpired, the Governor had been pleased to order a respite for one day, during which time the culprit would have an opportunity of proving the truth of those asserrions [sic] which he had made of his innocence. The unhappy man declared that he trusted in his God to bring proof for him; he was then carried away in the arms of four men. At 12 o'clock the same night a further respite sine die [**] was received at the gaol.

[*] 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. See R. v. Butler, July 1826. The Act restricted the opportunity for clemency in murder cases: see Australian, 5 August 1826, pp 2-3. 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, June 1824.

Governor Darling initially said that the law must take its course, that the prisoner was to hang: Darling to Forbes, 21 January 1826, Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, p. 67.

[**] Indefinitely. On 30 April 1826, Governor Darling wrote to Earl Bathurst about this case, saying that he had reprieved the prisoner until His Majesty's pleasure was made known. In light of the prisoner's continued protestations of innocence until the moment of his failed execution, and of the injury he suffered at that time, the Executive Council changed its earlier decision that he should hang. It decided that his sentence should be commuted to hard labour and imprisonment on Norfolk Island for life. In his initial report, Forbes C.J. said that there was nothing about Curtan's trial which allowed him to recommend mercy. See Historical Records of Australia, 1/12, pp 243-245. Eventually, the King granted Curtan a conditional pardon: Bathurst to Darling, 2 November 1826, Historical Records of Australia, Series 1, Vol. 12, p. 673. See R. v. Butler, July 1826.

SYDNEY GAZETTE, 11/02/1826
Supreme Court of New South Wales
Trial, 9 February 1826

PATRICK LAVERY was indicted for manslaughter, in causing the death of **WILLIAM FINIGAN**, by stabbing him with a bayonet, at Newcastle, on the 25th day of December last.

It appeared in evidence, that on the 25th of December last, a riot took place in Newcastle, between some prisoners of the Crown and two soldiers, who were in a state of intoxication, running through the street with drawn bayonets; information was immediately given of the circumstance, by the Chief Constable, Mr. Muir, to Dr. Brooks, the Magistrate, at that settlement, who directly repaired to the Guard-house, for the purpose of obtaining the assistance of the military, to allay the disturbance. The guard, however, had previously gone to the scene of action, considerable resistance was made, and several stones thrown at them. The deceased, who appeared to have been one of the rioters, was taken into custody, by the guard, from whom he ran and was pursued by the prisoner and another soldier. The deceased ran towards the house of a man named Lynch, who, perceiving his object was to escape from his pursuers, by getting into the house, held the door open, as he stated in evidence, for the purpose of immediately shutting it against the soldiers, when the deceased had entered; the soldiers followed up the pursuit, and were within a short distance of the deceased when he arrived at the door of Lynch's house; one of the soldiers, the prisoner Lavery, not being near enough to lay hold of the deceased, as he ran into the house, made a push at him with his musket, on which a bayonet was fixed; but whether with an intent to introduce the gun between the door and the frame, in such a manner as to prevent it being immediately shut, or to wound the deceased, did not very clearly appear. The deceased, however, did receive a thrust from the bayonet at this time, which penetrated between the 11th and 12th rib, on the right side of the back-bone and which, though extremely slight in appearance, had punctured a large blood vessel, and caused his death on the following day, from internal bleeding.

The Jury, after a long consultation, returned a verdict of Guilty, accompanied by a strong recommendation to the mercy of the Court, from the nature of the circumstances under which the wound was given, and the extreme liability to such accidents with those carry arms.

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

AUSTRALIAN, 09/03/1826
Supreme Court of New South Wales
Stephen A.C.J., [1] 3 March 1826

JAMES BURKE was indicted for the wilful murder of **JOHN COGAN**, at Bringelly; on the 7th of January last; and **CORNELIUS DONAHU** as an accessary after the fact, in harbouring and concealing the said Burke.

RICHARD BURKE deposed that he was at the house of one McGill on the evening of the murder, both the prisoners were there; they were sitting at McGill's

door with Mrs. Cogan, the wife of the deceased. Shortly after **MICHAEL McGLYNN** came up and asked Mrs. Cogan to go to a house about a mile distant, which she refused. Burke took her by the arm and led her a short distance from the house. Cogan just then rushed from a haystack and knocked the prisoner Burke down, he got up and went back to the house; Donahu then coming up was also knocked down by the deceased. This witness did not see more of Burke or Cogan till he heard McGill cry out, the man is murdered. McGill was observed with an axe in his hand, and Burke was heard saying to him, "it is you who have killed him." While this dialogue was passing, McGill was standing over the body, and Burke a rood and a half distant. McGill threw down the axe when he thought himself observed. Cogan about a fortnight previously had charged McGill with stealing a keg of rum and a garment from his wife. McGill's testimony was a contradiction to the former, it went to prove that as he was standing by the deceased, Burke came up and struck deceased under the ear with an axe, which felled him at his feet. McGill in attempting to take the axe from him, narrowly escaped himself. Burke again struck the deceased on the shin bone. Donahu then came up and made a blow at McGill with a hoe,, which struck into the ground. Donahu was heard to say, in English, to Burke, "don't strike poor Cogan," and immediatel [sic] after, directly the reverse in Irish.

Mr. Justice Stephen summed up; from the conflicting nature of the evidence, it was competent for the Jury, if they thought circumstances warranted such a step, to give the prisoner Burke benefit of clergy, by finding him guilty of manslaughter only. With regard to the prisoner Donahu, the evidence adduced did not implicate him as an accessary before the fact. He was therefore ordered to be detained, to stand trial as accessary after the deed.

Against the other prisoner the Jury returned a verdict of Guilty.

Sentence of death was passed in the usual form, and carried into execution on Monday. Some particulars may be seen in another column. …

EXECUTIONS.

On Monday [2] morning the execution of those unfortunate beings, Corbett and Burke, at an early hour attracted a rather unusually large concourse of people; they occupied the heights overlooking the gaol wall, from whence every preparation connected with the gloomy, but necessary, act of depriving a fellow being of existence, may be distinctly observed. Corbett had been in the employment of Mr. Hayes, at the South Creek; he had assisted the bushrangers in the attack on the house, and subsequent spoliation of that gentleman's property.[3] He confessed his guilt, as well as the justice of that sentence which condemned him to close his mortal career with a painful, an ignominious death;---that pardoning mercy which justice could not but deny him here, he trusted he might look for in an hereafter; and, with a true heart, forgave all who might have been concerned in his condemnation. Burke, when about to ascend the scaffold, confessed to the sub-sheriff his guilt of the offence alleged against him---it was murder, the appalling crime of murder. A man named Cogan had met his death from some human hand; his skull was fractured. Suspicion fell on the present unfortunate culprit, he managed to evade the pursuit of justice for a short time; but was detected, brought to trial on Friday last, and doomed to expiate his crime on the gallows. The unfortunate man declared his crime to have been totally unpremeditated; that intoxication paved the way for its committal, and when the quarrel with the deceased did take place, he had no intention to commit murder. Some suspicions had been unjustly attached to the deceased's wife, relative to the present transaction, which he felt anxious to contradict.

At half past nine o'clock it was intimated that all was ready; when upon a given signal, the drop fell, and death soon took possession of his victims.
After hanging the usual time, the bodies were lowered into their coffins; that of Burke's was conveyed to the Military Hospital for dissection. [4]
[1] Forbes C.J. was on sick leave from 23 February 1826 until 29 May 1826; John Stephen was Acting Chief Justice in this period: see Australian, 23 February and 3 June 1826.
[2] 6 March 1826. 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, the judges gave the condemned prisoners an extra day to prepare themselves for death. See also Sydney Gazette, 8 March 1826, on these executions.
[3] See also R. v. Patient, Morrison, Roberts and MacCullum, March 1826; R. v. Hogarty, How, Bailey and Laragy, March 1826. Other cases concerning the South Creek robbery were reported in the Australian, 2 and 9 March 1826; and see Sydney Gazette, 4 and 8 March 1826, and 26 April 1826.
[4] Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer was to be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential contemporary justification for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing, New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.

AUSTRALIAN, 29/04/1826
Supreme Court of New South Wales
Stephen A.C.J., [*] 28 April 1826
ANDREW WHITE was arraigned for the murder of **PATRICK TAGGETT**, on or about the 22d of February last. This charge rested almost entirely on circumstantial evidence, which was gone into at some length. Mr. **JAMES PURCELL**, chief constable, was the first witness examined. He deposed, that from information reaching him of Taggett's murder, he proceeded with several persons, most of whom were subsequently examined, to the scene where it was rumoured the murder had been committed. It was at a stockstation, called Ottoo-hill, at some distance from the settlement at Bathurst, and belonged to Mr. Hassall, where the prisoner was employed as a shepherd, and Taggett, the deceased, as a hut-keeper the nearest station was distant not less than six or seven miles. Here, on the 26th of February Mr. Purcell arrived with several other persons, and prepared to search the hut, of which prisoner and deceased had been inmates. They found the unfortunate hut-keeper stretched at his length within. The body lay with the face downwards, which covered a space of blood of about two feet in diameter. There was a large wound on the back of the

head; another on the side: and three other stabs, as if from a knife, in the throat. A knife lay by the side of the deceased, and appeared to have been instrumental in the work of blood. On searching further near the hut, an axe, partially covered with blood, and portions of human hair adhering to the back part, was discovered hid under some pumpkin and potatoe vines; there was also a shovel, covered with blood.. Whilst this search was carrying on, prisoner shewed no willingness to assist ; he informed the chief constable that three bush-rangers were in the habit of paying friendly and frequent visits to the station, and it must have been at their hands that deceased received his death blow. The night he found Tagget murdered, the prisoner affirmed there was a more than usual barking from the dogs; deceased besides was very subject to fits, and upon prisoner going into the hut and seeing him stretched along the ground, he at first imagined it might be from an attack of that kind, but was soon unhappily deceived. Prisoner was desired to take off his clothes, for the chief constable's inspection, and on the shirt which appeared to have been but newly washed, were found traces of what was at the time considered blood, more particularly about the right arm. The shirt was here produced in open court, and there appeared marks of what may have been blood, but of a very dark colour, and the axe which was also produced, seemed to have rusted in the part which was sworn to by several witnesses, as having been covered with portions of the dura mater, mixed up with blood, when first discovered. Upon prisoner being put upon his oath, and reminded of the heinous crime of swearing falsely, his countenance and conduct seemed to undergo no particular change. He informed Mr. Purcell, that nothing more than a steel mill had been taken away from the hut.

HENRY ROBINSON, an overseer of the sheep stations to Mr. Hassall deposed next to his being present when Taggett's body was discovered had heard that the latter was subject to fits, but prisoner mentioned nothing to him about dogs barking. Enoch Jones, another stock-keeper, was at the hut occupied by White and deceased. On the Thursday the former was within doors at an unusual hour. Jones and another partook of some provisions, and left the hut for their own station prisoner remaining behind. Next morning before sunrise, a bitch belonging to White came into Jones's hut, and White himself followed almost immediately, with information that the bushrangers had stolen a steel mill, and that Tagget was dead and fit for burying. He asked the man to take charge of his sheep, whilst he should be getting to the next station to inform the constabulary. Several other witnesses were examined; most of them concurred in the opinion of the deceased and prisoner having lived together on friendly terms. One said that deceased had complained of prisoner's behaviours to him. The latter attempted, in his defence, to prove that, whilst employed with his sheep, away from the hut, he was aroused by the barking of dogs; and it was his suspicion then, and at the present moment, that bushrangers had robbed and plundered Tagget, as he was frequently in the habit of boasting of his hard dollars. The learned Judge recapitulated the evidence very minutely, and concluded, by recommending the Jury to, find the prisoner guilty, provided the circumstantial evidence adduced could be thought conclusive; but, if a doubt existed, it was a principle of the British law, that the ends of substantial justice would be better answered by letting twenty guilty persons escape, than that one innocent man should perish.

After consulting about six minutes, the Jury found the prisoner guilty. Sentence of death was then passed in the usual way.

[*] Forbes C.J. was on sick leave from 23 February 1826 until 29 May 1826; John Stephen was Acting Chief Justice in this period: see Australian, 23 February and 3 June 1826.

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

AUSTRALIAN, 03/05/1826
Execution, 1 May 1826
EXECUTION.
The execution of the ill-fated man **WHITE** took place on Monday morning. He was, as was mentioned in our last, found guilty of one of the most horrifying offences to humanity that of murder; the murder of a hut-keeper, an unfortunate being similarly situated with himself employed under the same master, and living together in an isolated part of the country, where the very nearest station occupied by civilised man, was not less than from 6 to 7 miles. What his incentive for committing this horrid act may have been, is doubtful. The deceased was said to have boasted of his having money, and perhaps a desire to get possession of this may have inspired the direful crime. The evidences of White's guilt, though alone supported by concurrent circumstances, seem too strong to admit of uncertainty. His being the only person residing with or near the deceased---the knife which White was in the habit of using at his meals being discovered lying by the dead body---the shirt of the deceased being stained with blood---and all the moveables of the hut, which it is more than probable bushrangers, if any such had been there, as was said, would have carried away altogether, being found "planted," as they term it, in different directions contiguous to the hut, operated strongly against the prisoner. A steel mill was the only article missing, and even the canvas which was used to cover this was also picked up. A certain degree of dubiety with regard to the guilt or innocence of accused persons must ever exist, where nought but circumstantial evidence can be brought forward ; but the evidence adduced on trial, though of this nature, it might be said scarce left a "peg to hang a doubt upon."---From about seven o'clock of Monday morning the culprit was assiduously attended by the Reverend Mr. Therry, and he continued to receive the consolations of religion until past nine. His father, who seemed to be a very old man, was present in the condemned cell, and did not leave it until the executioner entered with the apparatus of death. The unfortunate man continued kneeling before a crucifix during the preparatory operation of binding the fatal rope, and when all was announced to be ready, he moved from the cell accompanied by the Reverend Clergyman, sub-sheriff, the gaoler, and several other persons, towards the yard at the rear of the prison. An officer's guard was drawn up fronting the drop, and a number of the prisoners in irons were arranged on one side. When the culprit had got to the yard, his death warrant was read by the sub-sheriff, who importuned the unfortunate man, now that all hope of escaping an ignominious fate had deserted him, to confess his crime, and not aggravate it by being hurried into another world, with the consciousness of having spoken a falsehood. In this request Mr. Therry joined, but could elicit nothing further than an attestation from the ill-fated being, that he forgave, with the utmost feeling of sincerity, all who may have been accessary to his fate; he would never perhaps have been so well prepared to die as just then, and that he could confess nothing further than what he already had to his clergyman in the Attorney General's presence. He then conversed with and took an affectionate leave of his father and two prisoners whom he called from among the crowd of others, and gave a free vent to his tears. The clergyman continued to pray and read with the culprit, who made the responses in a firm and penitent voice, until it was intimated that the time for carrying the law into execution, had nearly transpired. White then recovered from his kneeling posture, and called out again to some others of his former companions.

Notwithstanding the awe and feelings of sympathy which scene of death, like the present, cannot but at all times excite; there was a singular mixture of sorrowful humour in the manner of the unfortunate man. On getting off his knees, he stared about for a few moments, then called out, "Arrah, Jem, Father, Howell, and all o'ye's, why don't you's all come here and speak to me?" The men he addressed himself to stepped forward, and with the unfortunate father took a hasty farewell; the culprit conversed with them in Irish, until he was reminded by Mr. Therry, that it was then time to wean his mind from all mundane associations, and fix it on his Saviour, in whose presence he was shortly to appear. In about three minutes more the mortal career of this misguided young man was finally closed. He struggled but little, and seemed to meet death without much apprehension.

It is rather a singular coincidence, that this youth should have suffered death on the day of his birth. He had only just attained his twentieth year on Monday last, the very day of execution. His body after being suspended the usual time, prescribed by law, was placed in its coffin, and conveyed away to the hospital, for dissection. This reservation of punishment applied to murderers, does not appear to have that horrifying effect upon delinquents in this country, as elsewhere. With the lower orders of Irish, more particularly, a great and universal horror of having their bodies exposed after death to the surgeon's knife, predominates. Many of them view this latter part of their atonement in a darker light than death itself but here where the unfortunate criminal is most generally far removed from kindred and early associations, this idea becomes fainter, and where there are no friends "no women to make lamentation," he becomes indifferent as to the disposal of his body after death, and is most generally consigned to the earth unlamented and unhonored.

[*] Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer was to be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential contemporary justification for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing, New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.

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

SYDNEY GAZETTE, 31/05/1826
Supreme Court of New South Wales
Forbes C.J., [1] 30 May 1826

PATRICK CUMMINGS was indicted for manslaughter, in causing the death of **NICHOLAS ROACH**, on the 17th of March last, at Emu Plains.

The deceased, it appeared, was in a state of intoxication, and challenged the prisoner to a fight, and died some days after from the effect of the blows received on that occasion. [2]

A person who was the medical attendant at the Hospital, at Emu-plains, deposed that he saw the deceased shortly after the affray, he thought the jaw was fractured, the teeth were all started from their sockets, but the head was altogether so swelled as to

prevent his being able to state positively. He prescribed remedies, which, however, he had reason to suppose, were not attended to by the deceased, and he heard of his death some days after.

On cross-examination by Mr. Rowe, for the prisoner, the witness admitted, that he did not know of his own knowledge, that the deceased was dead, he did not see him dead, but was informed that he was so.

Mr. Rowe submitted that the prisoner was entitled to his acquittal, as in fact, there was no death proved, and for any thing which appeared before the Court, Roach might still be alive. It was one of the averments in the information, that death was caused, and he therefore submitted that the evidence of the Surgeon, who saw him dead, was absolutely necessary.

His Honor stated to the Jury, that he should be loath at any time to let a case go and public justice be defeated, merely on a point of informality, when there was substantial proof that the crime had been committed; but as the law in this case was strict in its punishment, so also it was strict in requiring positive proof of guilt. He thought there was wanting that direct proof of death having actually taken place, which was necessary to bring home the charge to the prisoner, and he was therefore of opinion, that it was better that the accused should escape, even with some imputation of guilt on him, that the direct and positive rules of evidence should be broken through. --- The Jury returned a verdict of Not Guilty.

[1] Stephen J. resigned as temporary Justice of the Supreme Court on 27 May 1826, and was not sworn in as puisne Justice until early November 1826. See C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, pp 97-98; Australian, 3 June 1826. In the meantime, Forbes C.J. sat alone.

[2] The Australian, 31 May 1826, described this as a boxing match, before which a quarrel had taken place. Strangely, it reported that the defendant was found guilty of manslaughter. The Sydney Gazette's report is more convincing on this occasion.

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

AUSTRALIAN, 22/07/1826
Supreme Court of New South Wales
Forbes C.J., [1] 21 July 1826

HUGH MITCHELL was capitally indicted for the wilful murder of **LAURA MURPHY**. It appeared in evidence that the prisoner and deceased had cohabited, unhappily, it would seem, together, for some time past. In one of their small quarrels the prisoner struck the deceased a fatal blow, which led to her death. [2] The difference was understood to have arisen in a fit of jealousy. Verdict - Guilty of manslaughter. Remanded. [3]

[1] Stephen J. resigned as temporary Justice of the Supreme Court on 27 May 1826, and was not sworn in as puisne Justice until early November 1826. See C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, pp 97-98; Australian, 3 June 1826. In the meantime, Forbes C.J. sat alone.

[2] The Monitor, 28 July 1826, said that "On the evening of Friday, Mitchell was heard treating the unfortunate object of his fury with brutal violence - he had dragged

her from her bed, and after the infliction of the alleged violence he flung her into the street, where she lay for some time insensible. The deceased was carried to the General Hospital, where she lingered until the following Sunday, when she expired. The Surgeon who examined the body, was of opinion, that severe internal injury occasioned by violent treatment occasioned her death. The fact of her survival for 24 hours after the infliction of the wounds, taking away in some degree the capital part of the charge, the Jury returned a Verdict of Manslaughter."
[3] On 4 September 1826, Forbes C.J. sentenced Mitchell to transportation for three years: Australian, 6 September 1826; Monitor, 8 September 1826; Sydney Gazette, 6 September 1826.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 29/07/1826
Supreme Court of New South Wales
Forbes C.J., [1] 28 July 1826
Charles Butler was indicted for the wilful murder of Catherine Collins on the 13th day of May last. [2]

It appeared in evidence that on the day in question the prisoner and deceased, who had cohabited together for some time before, proceeded in a boat to the residence of one Summers, on the banks of the Hawkesbury; that they arrived there, and after having partaken of a moderate share of refreshment, rejoined their boat and set out in a direction towards home. The prisoner, it would seem from the evidence, reached home by himself, and on being asked where the mistress, meaning the deceased, was, said he had set her on shore at Doyle's Point, for the purpose, as she stated, of obtaining the signature of Mr. Doyle to a petition, which she had drawn out for some particular purpose. This mode of accounting for the non-appearance of the deceased, seems to have been disregarded at the moment , on account of the feasibility of the prisoner's statement; but, it happening some time after that a report was raised of the deceased's body having been found floating down the Hawkesbury River, suspicions were excited, and several persons in the neighbourhood and places adjacent thereto, repaired to the Coroner's Inquest. The body, on examination, was found to exhibit a mark of violence on the cheek bone. A stone appended to another stone, was also fixed to the chest. This was, in substance, the case against the prisoner.

There was no defence; and the Judge proceeded to sum up the evidence to the Jury, who, after some minutes consideration, returned into Court, finding a verdict - Guilty. The Judge then proceeded to pass the awful sentence of the law, on the unhappy prisoner. - In the course of his observation the learned Judge, said that, after a patient hearing of the whole case the Jury combining the whole circumstances together, had pronounced him (the prisoner) Guilty; it therefore became his Honor to pass the verdict of the Court on the prisoner. Situated as you are, continued his Honor, it would indeed be highly improper in me, to address you by any language from which an inference might be drawn, of mercy being extended to you - think not of Hope, that is shut out least in this world. The learned Judge then passed the sentence of the law, in the usual manner, on the unhappy criminal; and which was fixed to take place on Monday morning next. [3]
[1] Stephen J. resigned as temporary Justice of the Supreme Court on 27 May 1826, and was not sworn in as puisne Justice until early November 1826. See C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales,

Angus and Robertson, Sydney, 1968, pp 97-98; Australian, 3 June 1826. In the meantime, Forbes C.J. sat alone.

[2] The Monitor reported this case on 4 August 1826, noting that Butler was a convict assigned to the service of his wife, who lived at Portland Head. The victim, **Catherine Collins, also known as Kitty Carman**, was a lodger in the same house.

[3] 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, the judges 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, pp 2-3. By s. 4 of the Act, the judge was given power to stay the execution; for another example of that, see R. v. Fitzpatrick and Colville, June 1824.

For the governor's decision that the prisoner should hang, see Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, p. 74.

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

AUSTRALIAN, 05/08/1826

The unexpected delay in the execution of Charles Butler, who suffered on Thursday morning,[3 August 1826] occurred partly on account of the reason stated in our last, and partly owing to an Order of the King in Council - an Order which has recently reached the Colony. In England the fate of criminals who receive, or who are liable to receive sentence of death, frequently depends much on the opinions of the Judge who happens to try them. He is considered best able to speak of the features of the crimes committed, and say, whether any thing exists in individual cases, calling for the exercise of clemency, or for a mitigation of punishment. Circumstances which may affect the doom of the culprits sometimes appear when the cases are settled by the King in Council, but for the most part the Judge's notes, or the Judge's sentiments are the main guide. This is a weighty responsibility for a Judge, and we therefore do not wonder at the Chief Justice of a distant Colony feeling delicate in the exercise of it himself, when he might with propriety leave that responsibility in the hands of the Executive Authority. - Accordingly the Chief Justice, when requested by the late Governor to express an opinion in capital cases for the guidance of his Excellency, very wisely adopted the course of laying before the Governor the notes taken on the trials, unaccompanied with comment, and immediately suggested to Lord Bathurst the propriety of the Governor receiving the assistance of an Executive Council as to these matters, after the manner of the Royal Council at Home. This suggestion has been

replied to. And an Order of the King in Council, which, as we have stated, has just reached the Colony, ordains, that when a criminal has been capitally condemned, the Executive Council shall meet and finally determine, whether he must be executed. So stood the case with respect to Butler.

In the generality of capital cases, the assembling of the Council for the above purpose, will be attended with no inconvenience, but we can hardly see how it is possible, however expeditious matters may be conducted, for the Order in Council to be complied with in cases of murder, and without violating a public and peremptory law - a law which cannot be dispensed with by order of the King in Council … a law which requires a person convicted of murder to be executed, within twenty-four hours after the verdict of the Jury is recorded. For these trials Friday is usually selected, in order to evade the strict letter of the law, by making Sunday, which is in law a dies non intervene between sentence and death. A trial may endure till late on Friday night, it might last till Saturday. The time for calling together a Council, and going through all the forms rendered necessary by the Order, is obviously too short, unless the law we have alluded to be violated. The Council was called together in the case of Butler, but we believe that the power of doing so will be fully considered before its interference on a similar occasion will be called for. …

EXECUTION. [*]

Charles Butler, who was tried yesterday week and found guilty of murdering a woman named Collins; who was sentenced to pay the forfeit of his life on the following Monday; was in some measure prepared for the awful event, but had it deferred from that day, suffered on Thursday morning. He professed himself a protestant. The Rev. Mr. Cowper attended him assiduously, and endeavoured to bring the unfortunate man to a sense of the enormity of the crime for which justice demanded that he should suffer a premature - an ignominious death - that an open confession of the part which he taken in depriving the hapless woman Collins of existence, would not tend to make his final exit from this world the more painful, nor detract from that shew of commiseration which witnesses of his untimely end would naturally feel, and which it was a foolish and a very general idea with many person unfortunately situated like himself, would not be afforded, when the culprit promptly confessed his crimes, and that his punishment was called for to appease the laws of outraged justice. On Monday, when the fatal warrant was momentarily expected to arrive, Collins appeared firm and composed in his demeanor. He spoke but little, and maintained his innocence of the horrifying crime of murder. Subsequently he admitted having been present when the woman met her death, but denied any participation in it himself. He accused two men, who have since been apprehended and lodged in Gaol, of having been the assassins. That those were the men who having rowed in a boat with himself, and the woman Collins, to some distance up the Hawkesbury River, satisfied their murderous dispositions by throwing their hapless victim overboard. Whether any violence had been committed on her previously to this taking place, he would not disclose. From the circumstance of a severe gash being discovered on the cheek bone, when the body was found, it was conjectured that some additional violence had been offered. At nine o'clock, or a few minutes after, of Thursday morning, Charles Butler left one of the condemned cells - repaired to the usual place of execution, at the back of the gaol - and, after passing a short time in prayer, with the Rev. Clergyman, ascended to the fatal platform. When the ministers of death had completed their preparations, and when the last sound of retreating footsteps, as the Clergyman and other descended from the scaffold, had died away, the drop was let fall - the criminal became suspended between earth and heaven. His agonies appeared long and painful;

and between seven and eight minutes had slowly expired, ere the body ceased to exhibit symptoms of animation. This unnecessary prolongation of punishment, at the view of which humanity shudders, was thought to originate in the executioner's negligence. This unhappy man had a wife - she appeared to have scarcely seen 17 winters; and in her manners, exhibited symptoms of strong and unaffected grief.
See also Sydney Gazette, 5 August 1826.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 09/09/1826
Supreme Court of New South Wales
Forbes C.J., 8 September 1826
ISAAC SMITH, was capitally indicted for the wilful murder of **Wm. GREEN** - and **DENIS MOORE**, for aiding and abetting.

Captain **JOHN BRABYN**, J.P. residing in the neighbourhood of Windsor, recollected Sunday, the 20th of August last - about half-past two o'clock in the afternoon of that day was walking in his verandah, when at some distance of, the prisoner Smith and his (Capt. B's) female servant **JUDITH CONNOLLY** were observed conversing together - saw the prisoner use some violence towards the girl, who was then on her way home from Church, and immediately despatched constable Green, (the deceased) to the protection of the girl - shortly afterwards it was reported that Green was murdered - the prisoner Smith was in custody, and had repeatedly confessed his having committed the act - the prisoner's conduct appeared to be that of a savage - he exulted in his diabolical deed, and expressed sorrow that he had not imbrued his hands in the blood of others.

THOMAS FINCH, in the employment of Capt. Brabyn, deposed to having heard, at about half-past four o'clock on the day before stated, cries of "murder" - they were distant about one hundred yards, or perhaps more - he hastened in the direction from whence the cry seemed to proceed, and found the prisoner (Smith) employed in encouraging a bull-dog to attack the deceased - witness requested Smith to call the dog off, when the latter threatened to "serve" witness the same way if he dared to interfere - witness left the spot for a few moments - spread an alarm - returned with assistance, and found the deceased stretched on the grass nearly lifeless - he was conveyed to the general Hospital. The prisoner with his dog was standing a few yards off. A Windsor constable who took him into custody, deposed to several unfeeling expressions having been subsequently uttered by the prisoner within his victim's hearing, such as upon his hearing a groan from Green, who lay in an adjoining room, - "Ah, you'd be settled before morning, and stiff.' The constable further deposed, that upon prisoner being brought near to deceased's bed, the latter accused him of being his murderer. Prisoner not only confessed the crime, but avowed that he had broken a pistol over the deceased's head. A waistcoat stained with blood was found on the person of the other prisoner (Moore.) He was the opinion of Mr. Thomas Allen, the examining surgeon, that the severe distinct and fatal wounds on the superior part of the head, had been produced by blows.
Smith in defence affirmed that the constable had first assaulted him, and what he had done was under the impulse of irritated feeling. He exculpated the other prisoner from any participation in his crime.
The Judge summed up.

The Jury acquitted Moore, and found Smith guilty.- Sentence of death was then pronounced on the unhappy man Smith, to be carried into execution on Monday next.[*]

EXECUTION.

Isaac Smith, who was found guilty on Friday last, of having murdered a constable, named Green, in the neighbourhood of Windsor, paid the forfeit of his life on the gallows, during the forenoon of Monday. It did not want many minutes to ten o'clock when the Sheriff entered the gaol, provided with the fatal death warrant. At this time Smith was in one of the condemned cells, situated on the right of the right side of the prison, in communication with the assiduous Roman Catholic Clergyman, Mr. Therry. When it was announced to the criminal that the time permitted by the just, but outraged laws of his country for repentance, and making his peace with the Almighty, was drawing fast towards its completion, he advanced for the last time towards the door of his cell, and accompanied by the Rev. Clergyman, who walked on his right - the Sub-Sheriff, several constables, and others, proceeded along the front of the prison, and through a central passage leading directly towards the yard, where stood upreared the gloomy apparatus of death. An Officer's guard with bayonets fixed, was ranged nearly in front of the gallows, by the side of which lay on the ground a rudely constructed coffin, in such a situation as could scarcely fail of meeting the eye of the criminal on entering. Nearly all the different felons in confinement, many of them heavily ironed, and many divested of those incumbrances, were as usual grouped together on one side - a number of spectators were crowded together on the height overlooking the rear of the prison. Smith's step as he proceeded from the cell was firm and regular - his conduct and manner of speaking when at the foot of the gallows and after hearing the Sub-Sheriff read over his death-warrant, betrayed no simptoms of intimidation or discomposure. He made no secret of having perpetrated the appalling crime for which he was about to atone, and attempted to excuse himself, by stating, that his unfortunate victim was the aggressor - that being aware his resisting a constable would probably subject him to transportation - he preferred drawing on himself the law's severest rigour, by sating his demoniac vengeance in blood and murder, to the former mode of punishment. His words were uttered audibly and distinctly, but without leaving to the hearers any particular reason to infer that the wretched culprit was impressed with remorse or sorrow for the consequences of his act. He knelt down, and remained for some time in prayer with the Clergyman. He appeared to lose none of his firmness on ascending to the fatal platform, from whence the Clergyman descended, after communicating for some time longer, and recommending the culprit to withdraw his thoughts from a fragile existence, and address them towards his Redeemer. For a few moments the wretched criminal was left to himself - he attempted to clasp both hands together in a posture of supplication - on a prescribed signal by the Sub-Sheriff the drop fell - the wretched man's convulsive struggles continued perceptible for several minutes after - his death appeared to be a painful one. Smith's person was low and robust - his age about one or two-and-thirty. His manner during trial, and on conviction was extremely hardened - it is not always that men of Smith's description wait the approach of an ignominous death with so much apparent indifference, as was evinced on the foregoing occasion.

[Stephen J. resigned as temporary Justice of the Supreme Court on 27 May 1826, and was not sworn in as puisne Justice until early November 1826. See C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, pp 97-98; Australian, 3 June 1826. In the

meantime, Forbes C.J. sat alone.] This trial was also reported by the Sydney Gazette on 9 September 1826.
[*] 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, judges gave the condemned prisoners an extra day to prepare themselves for death. See R. v. Butler, July 1826. The Act restricted the opportunity for clemency in murder cases: see Australian, 5 August 1826, pp 2-3.
On 10 September 1826, Forbes C.J. told Governor Darling that there were no circumstances in the case to favour Crown mercy. Darling replied on the same day, with his decision that the prisoner was to hang: Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, pp 75-76.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 09/09/1826
Supreme Court of New South Wales
Forbes C.J., 6 September 1826
JOHN GRIFFITHS, a prisoner on board the Phoenix-hulk, was indicted under the statute of the 43d Geo. III [**1**] for an assault, with intent to murder, on the person of **HUGH CARLING**, also a prisoner in the hulk, on the 18th day of May last.

Hugh Carling, having been sworn, was proceeding to detail the circumstances of the outrage, when he was interrupted by His Honor the Chief Justice, enquiring whether he was not the man who had, some time since, been tried for a supposed murder, and had sentence of death passed on him. The witness having replied in the affirmative, His Honor applied to the Crown Officer to know whether he had not some other witnesses from whom the Court would be able to collect the circumstances of the case, as, in point of fact, Carling stood with judgment of death on him, though, from matters which had come to His Honor's knowledge since the trial, he was satisfied of the man's innocence and had recommended him for an absolute pardon, which had been sent home for approval. The witness was accordingly directed to withdraw. [**2**]

Mr. **JOHN SLIGHT**, Superintendent of the Hulk Phoenix, deposed, that on the 18th of May, being on shore, he received a note from the Assistant Superintendent, stating that the prisoner had struck Carling with a cleaver, and that he considered the wound mortal; witness went immediately to the visiting surgeon, Dr. McIntyre, and having made him acquainted with the circumstance, they both proceeded on board, where the witness saw Carling with the right side of his face, a little below the eye, dreadfully cut; witness enquired of the prisoner why he had committed such an act, when he replied that Carling had been the cause of sending men to Port Macquarie, and also of having people punished in the hulk, and that, if he had five hundred lives, he would take them and also, if he had an opportunity, the life of another man on board, who, witness afterwards learnt, was one Powell, one of the boatswain's mates.

By the Court. --- Witness held out no promise to the prisoner to induce him to make this confession; the prisoner admitted striking Carling; he did not say what with; witness did not see any iron about the place; the would appeared to have been inflicted with a sharp instrument.

EDWARD POWELL, a prisoner on board the hulk, acting as boatswain's mate, deposed, that when the assault was committed he was in the rigging taking down some clothes; when he came on deck he saw Carling bleeding from a cut on the right check, as if with an axe; witness asked what had caused it, when some one said that he fell from the rigging, but which witness knew not to be the case, as no other person was there but himself; witness could not say who it was made that reply, as the prisoners were all crowding round; the prisoner was then on the quarter-deck, in charge of the sentry.

JAMES WRIGHT, a corporal in the Buffs, deposed, that he was on duty on board the hulk, on the 18th of May; was sent for by the sentry on the quarter-deck, who told him that the prisoner had come to him, and given himself up, stating that he had murdered a man on the deck. Mr. **SPICER**, the Assistant Superintendent, asked the prisoner who he had done in. He replied that he would not satisfy him by giving him any reason, and that there was another man on board whom he would serve the same way. A cleaver was found near the wounded man at the time.

JOHN STEWART, a soldier in the Buffs, deposed that he was on duty as sentry on board the hulk, on the 18th of May, when the prisoner came and gave himself up, saying that he had committed murder; Mr. Spicer the Assistant Superintendent, came up, and had him handcuffed; when the prisoner heard that Carling was not dead, he observed it was not his fault, that he meant to kill him, and if he thought the blow which he had given would not have killed him, he should have had another that would, and also that there was another man on board whom he would like to serve the same way.

Mr. Sleight recalled by the Court. --- Witness did not examine the wound on Carling merely saw it as he lay in bed; he was not insensible when witness saw him, but that was some time after the wound was inflicted; never observed the prisoner to exhibit any signs of mental derangement; he was always desperately wicked.

The prisoner being called on for his defence stated, that a quarrel had occurred between himself and Carling relative to a shirt; that Carling used provoking language, and struck him first with a billet of wood.

JAMES ROBINSON, a prisoner on board the hulk, on being called as a witness on behalf of the prisoner, was questioned by His Honor as to the sentence which he was under, and it appearing that Judgment of death had been recorded against him, His Honor observed, that he was not a competent witness, but desired him, nevertheless, to go on with his testimony. Witness was not present when the blow was given; heard high words between the prisoner and Carling, and saw a piece of wood in Carling's hand.

CHARLES DALY, a prisoner, under the same sentence of the last witness, deposed that he heard a dispute, between the prisoner and Carling, about a shirt; saw Carling take up a piece of wood, larger than witness's arm, and make a blow at the prisoner, which he caught on his arm; was not present when the prisoner struck Carling.

His Honor, in summing up the evidence, observed, that the case before the Court was one of difficulty, owing to the peculiar circumstances under which some of the witnesses were placed, and also the absence of a material evidence, that of the surgeon, who could have spoken as to the particular character of the wound. It was a serious prosecution, and one, the event of which might lead the prisoner to the gibbet, as he was indicted under an Act, which made cutting or wounding, with intent to kill, a capital felony, without benefit of clergy. His Honor also remarked, that he had gone beyond the law in admitting, as witnesses, person who had sentence of death passed upon them, but he did so, from a consideration, that the outrage was committed in a

place where the witnesses were all in a situation not to come regularly before the Court, and on that account he felt himself warranted in receiving testimony, which, under other circumstances, he should have rejected. The question, then, for the consideration of the Jury, from what had been detailed to them in evidence, was, first, whether the prisoner intended to do some bodily harm; and secondly, whether there appeared to have been that degree of provocation, which, had the man died, would have entitled the prisoner to a verdict of manslaughter, as, under Lord Ellenborough's Act, the violence should be committed in such a way as that it would have been murder had the party died. Verdict --- Guilty. Remanded. [3]

[1] The reference is to Lord Ellenborough's Act. On the legality of prosecutions under Lord Ellenborough's Act in New South Wales, see R. v. Smith, January 1825.

[2] Carling (or Carline) was originally convicted of murder. He received a pardon for that, and eventually was released from custody, but only after a trial for piracy; see R. v. Webb, 1825; R. v. Flanagan et al., 1827.

[3] According to the Australian, 13 September 1826,Griffiths was sentenced to death on 11 September 1826, but Forbes C.J. "said that from some circumstances which had arisen in the case, he should be disposed to recommend a mitigation of the severe part of the sentence." The Australian said he had been "capitally convicted under the late Lord Ellenborough's act, of cutting and maiming, with intent to kill". It appears that he was hanged in October 1827: see Archives Office of New South Wales Reel 624: Copies of Letters to the Judicial Establishments, letter from Col Secty. Alexr McLeay to Sheriff John MacKaness, 14 Oct 1826.

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SYDNEY GAZETTE, 23/09/1826
Supreme Court of New South Wales
Forbes C.J., [1] 20 September 1826[2]

JOHN RIDGWAY, SAMUEL CHIP, EDWARD COLTHURST, and one STANLY, [3] not before the Court, were indicted for the wilful murder of an **aboriginal native youth, called TOMMY**, at Miau River, near Port Stephens, on the 8th day of May last.

The following are the circumstances detailed in evidence: - It appeared that at a station near Port Stephens, where a person named Pennington acted as overseer to Mr. Lord, there were three huts - one occupied by Pennington, one used as a store, and the third at some short distance from the others, with a small creek between, was the dwelling of the three prisoners, a man named Stanly, who has since absconded, and another man. A day or two before the 8th of May, the deceased boy had been about the place, and on the 8th was in Pennington's hut, when some of the prisoners were sent in search of some strayed cattle. They returned about 12 o'clock the same day, stating that they had not been able to find them, and, as they were crossing the creek on the way to their own hut, Mr. Pennington, who was confined with a bad leg, heard one of them say, "let us drown the little b-g-r." The deceased was in Pennington's hut at the time. Shortly after the prisoner Colthurst came in, telling the deceased that "white man wanted to give him something to eat," took him away to the prisoners' hut, and when he came there Stanly went out, and returned with some wet curryjong, which was described by the witness to be a bark used instead of rope for various purposes, asking Chip if that would do? Chip replied "yes," and soon after he and Stanly went on board the boat, to proceed, as they said, to the cedar raft, taking with them the deceased, and leaving Ridgway, and some others, on shore. As the boat

pushed off, Ridgway called out, "mind the young b-g-r does not jump over the bows," when some one of the party on board replied, "Oh! we'll take care of that." The party who remained on shore then proceeded into the bush, as they said, to look for a kangaroo, taking the same direction as the boat, but refusing to allow one of the men, the same who gave evidence to this effect, to accompany them: after the lapse of about an hour the boat returned, but without the deceased, and nearly at the same time the other party also came back. Mr. Pennington stated, that when the boat came back he distinctly heard, from the hut where he sat, Stanly say, "do not say any thing about it," and that he felt convinced the boy had been put an end to, but he was afraid to make any enquiries, from an apprehension that some plot would be laid for him if he did so. It was also in evidence, that in two or three days after this occurrence, the native who had brought the boy to the station, came several times and made enquiries after him, and not receiving any satisfactory accounts, manifested extreme dissatisfaction and anger. About nine days after, on the 17th of the month, a drowned body was seen floating in the river, and on a report being made to Mr. Pennington, he gave dirrections that it should be drawn ashore and buried, which was accordingly done. The witness, who deposed to this fact, stated that he believed the body to be that of the deceased boy, Tommy, but that it was much disfigured from being eaten, as he thought by the crows. Stanly, who was present when the body was brought on shore, observed, that "it looked very like himself," and that he supposed he had been crossing the river by a tree, had fallen in and been drowned; and on a subsequent occasion observed to another witness, that he did not think the blacks would come again about the place to be used as guides, on account of the boy being put aside. The Chief Justice, in putting the case, depending as it did on circumstances, to the Jury, observed, it was hardly necessary for him to say that his Majesty's white subjects in this colony were as amenable to the laws, for violence committed on the persons of the natives as if it were perpetrated on any other of the inhabitants.

His Honor had seen some of the natives brought before the Court for outrages committed on the white people, and if, therefore, the blacks were liable to the penal consequences attendant on a breach of the laws towards the whites, certainly the whites were responsible for acts of violence towards them; and surely in no case more than murder. The natural instinct that was in man, impelling him to the preservation of life, was of itself sufficient to shew that the law, as regarding murder, was not confined to persons or to places; it was not municipal, it was not local, it was the laws of nature and of God, and equally extended to all mankind. His Honor then minutely recapitulated the evidence, remarking on its various points as they affected the prisoners, and the man Stanly, who, though not before the Court was equally prosecuted with them, and stated that as all were engaged in one common transaction, what one said or did, was to be taken as evidence against the whole. The accounts given by the prisoners also at their examinations before the Magistrate, was evidently untrue. They then stated that, on the day charged in the information, they had none of them seen the boy about the place, and that in direct contradiction of the positive testimony given by the witnesses, some of whom were of their own party. His Honor did not wish to put the case to the Jury stronger against the prisoners than the circumstances required, but most certainly it impressed itself strongly upon his mind, throughout the whole of the case, that the boy had been made away with. It was entirely for the consideration of the Jury, whether the facts detailed in evidence were strong enough to warrant their pronouncing the awful verdict of guilty; if they had any doubts they would give the prisoners the benefit of them; if not, they would discharge their conscience. The Jury, after a short consultation, returned a verdict of Guilty.

His Honor then proceeded to pass the sentence of the law upon the prisoners. He observed, that the Court had in vain looked for any thing like a motive which could have induced them to perpetrate the crime of which they had been convicted. It was proper that, if the natives were to be kept in subjection, and to pay the dear penalty which they sometimes do for some small crime, that they should also be protected from outrage, and His Honor hoped that the example of the prisoners would show others that they could not destroy the natives with impunity. They were ordered for execution of the 23d instant. [4]

[1] Stephen J. resigned as temporary Justice of the Supreme Court on 27 May 1826, and was not sworn in as puisne Justice until early November 1826. See C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, pp 97-98; Australian, 3 June 1826. In the meantime, Forbes C.J. sat alone.

[2] As it often did, the Sydney Gazette got this date wrong. The trial was held on Wednesday, 12 September 1826: Forbes to Darling, 21 September 1826, Chief Justice's Letterbook (Archives Office of New South Wales, 4/6651, p. 77.

[3] Stanley was tried and found guilty on 3 March 1827: see R. v. Stanley, March 1827. For other cases concerning the killing of other Aborigines in this period, see R. v. Lowe, May 1827; R. v. Jamieson, May 1827.

[4] The 23rd of September 1826 was a Saturday. This indicates that this was not a normal murder case. Most murder trials were heard on Fridays, and if found guilty, the prisoners were hanged on the following Monday, in accordance 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 usually holding the trials on a Friday, judges gave the condemned prisoners an extra day to prepare themselves for death. See R. v. Butler, July 1826. The Act restricted the opportunity for clemency in murder cases: see Australian, 5 August 1826, pp 2-3. 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, June 1824.

A new policy was put into effect in 1826. The Monitor, 13 October 1826, reported that "In order to increase a more powerful example by the execution of criminals, it is in contemplation to make the actual scene of their respective crimes in future the place of punishment. With this view it is supposed that the delay has taken place in allowing the law to take its course in the cases of nine unfortunate men who are now awaiting the awful mandate. Port Stephen - Parramatta - Bathurst - and Burwood, will in that case, witness the operations of retributive justice." This was of doubtful legality where the crime was murder, due to s. 1 of the murder Act. It was not possible to reach Port Stephens so quickly. See also R. v. Mustin and Brown, October 1826.

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SYDNEY GAZETTE, 14/10/1826

Samuel Chip will be conveyed to Port Stephens, and there expiate the awful crime of murder at such time as the Executive Authority may think proper to appoint. We fervently trust, after this just but terrible example, people in this land will - 'Cease to do evil, and learn to do well." The Governor has a painful but imperative duty to perform --- but he must not bear the rod of office in vain. To spare such men would,

indeed, be a waste of mercy. Too long have these culprits abused clemency. Oh, that the living --- the living --- may lay such things to heart, and profit by the awful spectacle that will take place.

[*] In fact, only Colthurst was hanged, and that for piracy rather than murder. On 21 September 1826, Forbes C.J. sent his trial notes of this case to the Governor, suggesting that it should be referred to the Executive Council before the sentence should be carried out, because of the "peculiarity of the case": Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, p. 77. (On the practice of Crown mercy, see also R. v. Butler, July 1826.)

The Executive Council discussed the case of the Port Stephens murderers on 21 and 23 September 1826 (Executive Council Minute Books, Archives Office of New South Wales, reel 2436l, pp 74ff). Forbes C.J. introduced the case of Colthurst, Chip and Ridgway, saying "it was, however, attended with some circumstances of difficulty, and he recommended the examination, by the Council, of the principal witness on the Trial, Mr. Pennington, as likewise that Mr. Lord, to whom the prisoners were assigned Servants". Pennington's letters showed that he believed that Tommy had been murdered by the prisoners, even before the body was found.

The Executive Council minutes for 23 September 1826 said, "After the most mature deliberation it appeared to the Council, that example has become so imperatively necessary from the circumstances of recent occurrence, that it was recommended in the case of Samuel Chipp, the Law should take its course, and in that of John Ridgway and Edward Colthurst, that they should be respited until the case should be further considered." The minutes continued: "In carrying the Law into effect against Samuel Chipp, it was recommended that he should be executed at Port Stephen, and further, that a high reward be offered for the apprehension of Thomas Stanley"… The minutes continued "the Council likewise advised that the Governor should express in the strongest terms, its marked disapprobation of the wanton aggression which appear to the Council to have been heretofore made on the Native Black Inhabitants in the remote parts of the Colony."

On 8 October 1826, Governor Darling sent the cases of Ridgway and Colthurst to Earl Bathurst, with the recommendation that they should be reprieved but transported for life to Norfolk Island and put to hard labour in chains. He made clear that the final decision rested with the King. His despatch explained: "Samuel Chipp and Thomas Stanley are supposed to have been the Principals in this act. The former has been entered for execution at the place, where the murder was committed. Stanley, who absconded after the event, has been apprehended only within these few days, and is now awaiting his trial. Ridgway and Colthurst, being considered less criminal, are therefore recommended to mercy." (Source: Historical Records of Australia, Series 1, Vol. 12, p. 632; and McLeay to MacKaness, 25 November 1826, Copies of Letters to the Judicial Establishments, Archive Office Reel 624.) The governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision had to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645; correspondence between governor and judges, 1828, Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, pp 190ff.

After Stanley was captured and convicted, he and Chip were both condemned to die at Port Stephens. On 30 March 1827, the gaol governor, Steel, was told that they were to be taken on the next day to the Lambton cutter, to be conveyed to Port Stephens. However, later the same day, Governor Darling decided that the Lambton was too

"crowded" to take them on that trip. (Source: McLeay to Mr Steel, 30 March 1827; McLeay to Mackaness 30 March 1827, both in Copies of Letters to the Judicial Establishments, Archives Office of New South Wales, Reel 624.)
Eventually, both Chip and Stanley were reprieved as well, and sent to Norfolk Island to work in chains for life. (Source: Sydney Gaol Entrance Book 1825-1828, Archives Office of New South Wales, Reel 851, 4/6430.) Forbes became convinced that Governor Darling was autocratic. Part of his evidence for that was " Shameful neglect of executing sentences - Port Stephens case ." That is, he blamed Darling for the failure to execute Chip and Stanley, after the Executive Council had agreed that they should be hanged. (Source, document apparently in Forbes' handwriting, in his personal papers, Mitchell Library, A 743.)
Colthurst was placed on a ship for transport to Norfolk Island, but he was one of the pirates who seized the vessel while at sea. Found guilty of piracy on rather slim evidence, he was one of the few pirates chosen to be hanged. The choice was made on the basis of the seriousness of his previous offence, that is murder. In effect then, he did hang for the murder of the Aboriginal boy, possibly the first European to do so. See R. v. Walton et al., February 1827.
Forbes C.J. wrote to his friend Horton about this on 15 May 1827 (Mitchell Library, Reel CY 760), knowing that Horton would have to consider the case of those convicted of the crime. He said that the father of the murdered boy slew the first white man he came across "according to the rite of his countrymen, which demands blood for blood"; the man killed was called **McDONNA**, and had had nothing to do with the murder of the boy. Forbes also said that Chip was in a cell for seven months, awaiting execution, and that four times he was warned to be ready the next morning to be taken to his place of execution. "Colthurst had been convicted of another capital felony, and on the scaffold acknowledged the murder - But it had now become too late to do justice by executing these murderers - the long confinement and torturing suspense of Chipp, had awakened a strong sympathy among the public - his sentence had been immeasurably increased by the delay of its execution - and about the latter end of last month, the governor brought the case of Chipp and Stanley before the Council, upon no other plea than the long interval since their execution had been awarded - I, for one, yielded to the merciful side - but a more cruel, unprovoked, and atrocious murder I never tried - I hope, however, that the sentence of these men will be commuted by His Majesty - the feelings of the public here would be wounded by seeing the law put into force after so long, an unnecessary, an interval of suspense - increased as it will now be by reference to England."
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 25/11/1826
Supreme Court of New South Wales
Trial, 24 November 1826
SARAH RADLEY was indicted for the wilful murder of her husband, on the 2d day of November, instant.
The particulars of this case have been already detailed in this Journal. After a lengthy examination of several witnesses, the Learned Judge charged the Jury, and observed, from all the circumstances of the case, that the deliberation, or previous malice necessary to constitute the crime of murder was wanting, but if they were of opinion that the blow which caused the death of the deceased, was given under the sudden impulse of passion, they would find a verdict of manslaughter; if, on the other hand

they should think the infliction of the wound was altogether accidental, they would acquit the prisoner. The Jury, after a short consultation, returned a verdict Guilty of Manslaughter.
After the verdict was delivered, His Honor observed that he was not at that moment prepared to pass sentence, and intimated to the Acting Attorney General, that, on **account of the present crowded state of the gaol, and for the sake of an almost infant child of the prisoner, which appeared before the Court he had no objection, with the** consent of the Crown Officer, and provided the sureties were approved of by him, to admit the prisoner to bail, to appear when called on to receive the judgment of the Court. The prisoner was subsequently discharged upon her own recognizance in £100, and two sureties in £50 each, to appear when called on.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 02/12/1826
Supreme Court of New South Wales
Forbes C.J., 29 November 1826
WILLIAM WELLS, of Sydney, victualler, was indicted under Lord Ellenborough's Act, [*] for shooting at **WILLIAM HODGES**, with intent to kill, on the 5th of October last. Two other counts in the information charged the prisoner with intent to maim, and also to do some grievous bodily harm.

The circumstances detailed in evidence were briefly as follow. The prisoner, William Wells, in the month of October last, occupied a house situated at the corner of Pitt-street, Sydney, held from Hodges on a lease for two years, and an agreement to quit at the expiration of that term, on receiving a notice three months previous. The conditions, however, were not complied with by the prisoner, who refused to give up the premises according to the contract, in consequence of which a dispute occurred between the parties, and Hodges placed the matter in the hands of a solicitor. On the 5th of October, in the evening, Hodges went to the house of the prisoner, in company with another person, in consequence, as he stated, of a message he had received, through his solicitor, informing him that the prisoner would compromise the business and give him up the house. On entering he called for a glass of grog which was handed to him by the prisoner, and which he drank without any conversation taking place between them, and then went away. In about a minute and a half, he again returned, and commenced abusing the prisoner, calling him a scoundrel and swindling rascal for not giving up the house according to his agreement. The prisoner recriminated, accusing Hodges of having injured his credit in various ways, and declared that he would as soon shoot him as eat his supper and go to bed, and, finally, came from behind his counter, pushed him down the steps into the street, and shut the door. A number of people were, by this time, collected outside, and Hodges finding that he could not again get admission into the house, rushed forward to the shop window and broke several panes of glass with his clenched fist. The prisoner then went into a little room adjoining the shop and returned with a pistol, calling out to Hodges that if he broke any more of the windows he would shoot him; Hodges replied, "you shoot me, you scoundrel! that is more than you dare do," and immediately sent his fist through another pane; at the same instant, the prisoner fired, and Hodges received a wound in the temple, and fell. From the testimony of another witness, however, who detailed the circumstances more minutely, Hodges did not fall, but staggered backwards, and, on recovering himself, again rushed towards the window and demolished some more glass. Dr. Bland, who was called in to attend

Hodges, stated that he had received an irregular longitudinal wound in the temple, about an inch in length, which appeared to have been inflicted by slugs. The outer table of the scull was fractured, and death might have been the consequence of the injury received. On a cross examination, however, Dr. **BLAND** admitted that, supposing the pistol had only contained powder, fragments of glass through which the pistol was discharged, might have been impelled by the wadding, and, from the situation of the parties, being so close together, produced the wound, but, notwithstanding, he was of opinion it had been inflicted by slugs or some irregular body.

The Chief Justice, in summing up the evidence, stated to the Jury that, to sustain an information, under the statute of the 43d of Geo. 3d, commonly called Lord Ellenborough's Act, it was necessary, not only that a wound should be inflicted which might have caused death, but it should also be given under such circumstances of malice, as if death had ensued it would have been murder. His Honor then minutely commented on the evidence at considerable length, and left the case entirely with the Jury to consider, from the testimony brought forward, first, whether the wound might or might not have been mortal; secondly, whether the pistol was actually loaded, or whether, if only charged with powder, the glass against which it was placed, might not have been impelled by the force of the wadding, and have caused the injury; and, thirdly, if they should arrive at the conclusion that the pistol was loaded, whether there was not that degree of provocation on the part of Hodges to rouse the passions of the prisoner to such an extent as to excuse the act he afterwards committed.

The Jury, after a short consultation, returned a verdict of not guilty.

The trial seemed to create a considerable interest, the Court being crowded in all parts.

[*] On the legality of Lord Ellenborough's Act in New South Wales, see footnote 1 to R. v. Smith, January 1825. This case was also reported by the Australian, 2 December 1826.

SYD1827

AUSTRALIAN, 03/02/1827
Supreme Court of New South Wales
Forbes C.J., 2 February 1827

GEORGE WORROLL stood capitally indicted for the wilful murder of **FREDERICK FISHER**, on the 17th of January last. [1]

Mr. **DANIEL COOPER** deposed that the prisoner came to him several times, prior to the deceased being found, respecting some papers, which were the title deeds of a farm belonging to Fisher, in the district of Campbell Town; these papers were in witness's possession and prisoner said if witness would give them up he would satisfy a debt due to witness about £80. Witness pressed him to state what had become of Fisher; but prisoner, in an indifferent manner, said he had gone out of the country to avoid a prosecution for perjury. In another conversation which witness had with the prisoner, he said that Fisher had given him a power of attorney to act for him; but witness never saw any such document.[2]

JAMES CODDINGTON, is overseer of a farm belonging to last witness, in the district of Campbell Town. On the 8th of last July, he was in the township, and met the prisoner, who proposed selling him a young horse, which witness partly agreed to buy; however, having some scruples that the horse formerly belonged to Fisher, who was then reported to have absconded - witness requested to see prisoner's authority for selling the animal, when he presented a bill of sales and receipt for 134l. for four horses, signed "Frederick Fisher."

THOMAS HAMMOND, knew deceased - remembers prisoner coming to him about the month of July last, and offer to him some building boards for sale, which he stated to belong to Fisher - but must be sold to ratify an execution. Prisoner said that Fisher had left the Colony, and assigned as a reason for his departure, that he was apprehensive of a criminal prosecution being entered against him - prisoner said he would produce his power of attorney to sell - but failed to do so.

In August following, prisoner came with witness to Sydney, in a gig, and put up at the Emu Inn. On the road, witness mentioned to prisoner, that it was the opinion of a good many persons, Fisher had been murdered. The prisoner treated the subject with levity - observed him turn pale, and affect to smile. The conversation on that subject ceased. It had been arranged between witness and prisoner to stay at the Emu Inn that evening, and return to Campbell Town next morning - but prisoner without stating his intention to any one, left the house, and was not seen until next morning; when he appeared, he said, he had been to Parramatta and back.

A receipt deposed by the last witness, to have been shewn to him by the prisoner, purporting to be Fisher's, was here handed to the witness, and denied by him to be Fisher's receipt.

MARY TALBOT deposed, that prisoner received monie from witness, on Fisher's account. - Prisoner said that Fisher was not in the Colony.

JANE HOPKINS deposed, that on the 17th June last, prisoner and deceased left the house wherein they both lived, at about the same time - saw deceased about nine o'clock on that evening - he gave some trifle of money to some men on the farm, to go and get something to drink.

NEWLAND, a constable, was employed to search for the body of Fisher - saw sprinkling of blood, on some paling, about 50 rods from prisoner's house - some

blacks accompanied him to a creek, at a short distance - **GILBERT**, the black native, jumped into the water, and with a corn husk swept the surface of the water - then put it to his nose and declared that he could smell "a white man's fat."[3] The body was found, buried close to - his features, though decomposed, were identified by several persons to be the body of Fisher. Proof was adduced that the prisoner made a declaration that two persons were guilty of the murder, and confessed he was present, though not an active agent in the business [4] - Guilty. - To be executed on Monday.

[1] The Sydney Gazette reported the case on 5 February 1827, noting that the prosecution was conducted by W.H. Moore, Acting Attorney General. Worroll was defended by Mr. Rowe. The Gazette spelt his name Worrall, and the Monitor Worral (3 February 1827).

Fisher's estate was subsequently advertised for sale: see, for example, Sydney Gazette, 8 March 1827.

This is the famous Fisher's ghost trial, which is so well known in the Campbelltown district.

[2] According to the Sydney Gazette, 5 February 1827, Cooper said that the victim and the defendant usually lived next to one another, but at the time of the victim's disappearance he was living on the defendant's premises.

[3] The Sydney Gazette, 7 April 1825, noted that the magistrates could reward Aboriginal trackers, but that they were too miserly in doing so on some occasions. On trackers, see also R. v. Styles and Shepherd, Sydney Gazette, 6 January 1831; Australian, 14 January 1831.

[4] According to the Sydney Gazette, 5 February 1827, Forbes C.J. said in his charge to the jury "that when a train of circumstances all meeting in one point were brought together it was almost impossible to have any stronger evidence, more particularly in cases like the one before the Court, where the crime was usually perpetrated in such a way as to preclude the probability of obtaining direct proof."

[*] 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, judges gave the condemned prisoners an extra day to prepare themselves for death.

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

AUSTRALIAN, 07/02/1827

Execution, 5 February 1827

EXECUTION. - Monday morning **GEORGE WORRELL**, who was convicted on Friday last of the wilful murder of **FREDERICK FISHER**, a settler living at Campbell Town, underwent the awful sentence pronounced upon him, in pursuance of his conviction. The culprit, during his trial, appeared wholly indifferent as to its issue, and that sameness of demeanor was observable upon the retirement of the Jury. Criminals in his situation are generally remarked to betray some emotion of alarm upon the return of the Jury, but this was not the case with this unfortunate man. As the Jury re-entered their box, after having retired for consideration, prepared to give the fatal verdict, the prisoner stood boldly forth, and without betraying the slightest visible change of countenance, heard the fatal verdict of guilty recorded. His

demeanour was afterwards precisely the same, but savoured of sourness, which precluded the society of those who were desirous of conversing with him. - As the awful hour which was fixed for his final dissolution drew on, he expressed a strong desire to be visited by a Protestant Clergyman. The Rev. W.Cowper promptly attended to the request, and administered to him spiritual consolation. The Rev. Minister was unremitting in his exertions to bring the culprit to a proper sense of his awful condition. The criminal, aroused to a sense of religious duty, communicated to his Clergyman that what he had stated to the Magistrates upon his examination, was wholly false, and confessed he alone was the murderer. It will be recollected by our readers that the prisoner attempted to relieve himself from the imputation of murdering the deceased Fisher, by stating that two persons were guilty of the murder, and that he was present, though not an active agent in the business. In accounting for his motive in perpetrating the awful deed, he said, that he and Fisher (the deceased) left the house together, with an intention to go into the township to enjoy the evening. They were perfectly good friends and had been so for some time before - that having walked together a distance of about 30 rods from the house, he observed some stray horses among the wheat crop, one of which was within a short distance of him, when he laid hold of a rail, which lay on the ground, and thereupon aimed a blow at the horse; it struck his companion Fisher. The latter, by the force of the blow, fell to the ground. The night was dark, but he quickly discovered his mistake, and in raising Fisher up, found that he was in an almost lifeless state. Fearful of communicating the circumstance to any one he watched by the insensible man for some time, when finding life was extinct, he raised him on his back, and in that position carried the deceased to a distance of about fifty yards. For that night he left the mangled victim among some rushes, which grew on a marshy spot of ground, and which was strongly impregnated with alum. Having done this, he returned to his home. There was a jovial company of hard working labourers, who had met to spend the evening - but he escaped to rest. "Ah," said the wretched man, "the evening before this fatal occurrence I was happy; I could boast of being a free man; I had my two or three servants at command, and my orders were obeyed; I was possessed of property; I had a relative who was dear to me, but now how can I dare to meet the face of an honest man to-morrow." The man died penitent, but left the confession of his guilt to be made known by a person who sat up with him the previous evening. A few moments only sufficed for his dissolution.

The account of the execution published in the Sydney Gazette, 6 February 1827, said that he "also acknowledged that it was his full intention to hang the two men who were apprehended, in order to save himself, but now he acquitted them, or any other, of having any participation in the crime".

The Monitor (10 February 1827) described the discovery of the murder after an interval of four months as being "almost miraculous". The Monitor said that he did not die instantly, but that he showed symptoms of life five minutes after he was hanged. It went on to say that his "body, we understand, was given to one of our Sydney practitioners, as a subject for anatomical and phrenological experiment; the sentence of law having awarded dissection."

Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer was to be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential contemporary justification for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing,

New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 10/02/1827
Supreme Court of New South Wales
Trial, 9 February 1827
JOHN CLIVES, alias MALKLAND, alias McLANE was capitally indicted for the wilful murder of **CATHERINE DOUGLAS**, on the 17th December last.

JOHN BENNETT sworn - is a settler living in the district of the Field of Mars, situate on the Parramatta river - knew deceased - she was in witness's service at the time of her death - prisoner rented an adjoining farm of witness - he was in the habit of coming to witness's house, though he had been repeatedly desired not to do so. About three o'clock on the 11th December last, witness went with deceased to the house of one Williams, a relative and neighbouring settler, to spend the afternoon - a man servant also accompanied them - as they were leaving the farm, the prisoner joined them - when the party reached W's. house, deceased told prisoner not to sit in her company - they were in the habit of having repeated quarrels - but witness did not take much notice of it, at first, as it was so usual - prisoner went into another room, and drank some beer; while deceased and witness continued to sit for about an hour, drinking some wine, moderately - at the expiration of that time, witness and deceased got up, to go away - on coming out at the door, prisoner was standing there - witness desired him to go home - there appeared to be some angry feeling subsisting between prisoner and deceased - witness returned into the house, in search of his man-servant leaving deceased standing outside - upon his return, which was in the course of a very few minutes afterwards, deceased said she had been a good deal abused by the prisoner, who charged her with incontinency - witness desired her to take no notice of it, but go home - deceased called prisoner some opprobrious name, when he immediately stooped down, and taking a large stone in his hand, threw it at deceased - it struck her on the right side of the head - she instantly fell to the ground, and became insensible - the prisoner attempted to kick the deceased, whilst in this situation, but was restrained by witness and another person, who came to his aid - the prisoner maddened with disappointment in being forcibly held - caught hold of witness's throat and attempted to strangle him - he likewise bit his hand in several places - he was at length overpowered and removed from the spot - deceased continued to be insensible - her head bled profusely - she was conveyed into the house and put to bed - a temporary return of reason occurred, during which she said the prisoner had killed her - the woman died the same night.

JOHN ALLSOPP deposed to seeing the prisoner throw a stone, which struck deceased. Prisoner, on learning next day that the woman was dead, confessed he had occasioned it. - Other witnesses were called in corroboration of the foregoing testimony. The Jury found the prisoner Guilty.
The Judge then proceeded to pass the awful sentence of death on the unhappy man, and ordered him for execution on Monday morning next. [*]

The Sydney Gazette's report of this trial (10 February 1827) said that the defendant was called **CLINES, alias MULKLEY**, and that the victim was 60 years old.
[*] 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, judges gave the condemned prisoners an extra day to prepare themselves for death.
The public execution was reported by the Monitor on 17 February 1827. It described the Field of Mars (which is near Sydney) as being "a famous district for murder". It also reported that the prisoner insisted on publicly expressing his innocence, even on the scaffold. The Monitor reported that "notwithstanding that such a proceeding was in direct contravention of the wishes of his spiritual attendant, he was obstinate in his determination, insomuch that a gentle contest arose after mounting the scaffold, the worthy Priest entreating him not to commit a breach of charity which he strongly apprehended, but to abstract his mind from worldly concerns, and forego any public declaration." The execution took place in the Sydney gaol yard (Australian, 14 February 1827), but it could be observed from outside the gaol. The Australian said that Clives accused the principal witness, Bennett, of having committed the crime.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 17/02/1827
Supreme Court of New South Wales
Stephen J., 16 February 1827
G. JONES stood capitally indicted for the wilful murder of **J.BELLINGER alias PURTON**, on the 26th of December last.[1]

J. STEADWORTH, living at Parramatta, remembers on the 26th of December going to Kissing Point, to a house called the Waterloo, had brought with him a loaded gun, but discharged the contents before he entered the house, this was done in sight of the prisoner. Two hours after this, witness recharged the guns with slugs. Witness did this in the room and the prisoner was sitting there, but engaged in talk with some other men. He sat in the room for the space of a minute with the gun in his hands when the prisoner got up and took hold of the piece. Witness, thought he took the gun merely to look at it. He appeared to be examining the barrel, when it went off; the deceased, who was standing immediately in front of the prisoner, and in the same direction the muzzle of the gun was pointed, instantly fell, having been shot in the head. Witness thinks the prisoner did not pull the trigger; is sure the piece was not cocked. On discovering the injury that was done, prisoner appeared to be very much affected and cried bitterly. Does not think the prisoner knew the piece was loaded at the time of firing it.

J. LEE deposed to a similar effect.

Mr. **ANDERSON**, surgeon, examined as to the wounds of deceased, who was removed to the Hospital at Parramatta.

The Learned Judge summed up to the Jury, observing there was not the slightest room to imagine that the prisoner had been guilty of what was in law considered as murder. The prisoner had, to say the most, only acted incautiously with the piece he

took in his hand; but, under all the circumstances of the case, his Honor did not think the present could be considered even a case of manslaughter.
Verdict - Not Guilty.
The Judge admonished the Prisoner, and ordered his discharge.
See also Sydney Gazette, 19 February 1827.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 06/03/1827
Supreme Court of New South Wales
Forbes C.J., 3 March 1827 [1]
THOMAS STANLEY stood capitally indicted for the wilful murder of **an aboriginal native** of the Colony, at Port Stephens. [2]

Mr. **JOSEPH PENNINGTON** examined --- I live at Port Stephen Branch, situate about 18 miles from Newcastle, and the same distance from Port Stephens --- I have been some time there, as superintendent for Mr. Lord - prisoner was a servant of Mr. Lord's, and lived at the same place - I knew a native boy who frequented the huts - he was about 12 years of age, and was called **Tommy** - On the 18th of May last, one Colthurst came into my hut, where I and the native boy were - the latter was asleep, but Colthurst awakened him - he said to the boy "white man will give you patter," meaning dinner - In the course of the same afternoon it was proposed by some of the men, that they should go kangaroo hunting - Stanley (the prisoner) and another man named Chips got into a boat, taking the boy along with them - as soon as they had pushed off from the beach, one of the men who remained on shore, called out to the two in the boat "take care the little --- don't jump over the bows" - one of the men from the boat replied "we will take d--d good care of that" - the boy cried out to give him his pipe - a reply was made to him, that "he should get his pipe to-morrow" - the boat proceeded down the river - the other two men, Colthurst and Ridgway, who remained ashore, proceeded along the bush, in a direction towards the place where it was intended the boat should make - about an hour after, the whole of the four men returned - the boy was not with them - I overheard the prisoner (Stanley) say "don't tell him anything about it" - considered from that, he meant me - my suspicions were excited in consequence - but being in the power of those men, I gave no hint of my suspicions - about ten days after, I observed the body of a black person, resembling the boy that was missing, floating up the river - there was a crow sitting on the body - I ordered the body to be drawn on shore, and had it buried - the prisoner assisted on the occasion - he was the first who recognized the body to be that of the boy Tommy - in speaking of the boy's death, he said he supposed the boy had fallen from a tree, and got drowned.

DANIEL WOODHILL --- is servant to last witness --- recollects the prisoner proposing to get the boy out of the superintendent's hut - heard prisoner say "let us take the boy to the cedar raft" - this was about half-a-mile from the huts, down the river - another servant, a man named Chips, consented - prisoner then went out of the hut, and brought in with him some wet currojong - this is generally used as a substitute for cord or string - prisoner asked Chips, if that would do --- the latter replied "yes, if there is enough of it" --- witness, with the prisoner Stanley, Chips,

Ridgway, Colthurst and the black boy, went to the boat. This witness described their going and returning, in much the same terms as last witness.

The Chief Justice summed up the evidence, and the Jury returned a verdict --- Guilty. [3]

Notes

[1] This case was tried on Saturday, 1 March 1827. Murder trials were usually held on Friday, and if the defendant were found guilty, the execution took place 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, judges 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, pp 2-3. 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, June 1824. Unless a stay were granted, Stanley should have been executed on Monday, 3 March 1827.

However, a new policy was put into effect in 1826. The Monitor, 13 October 1826, reported that "In order to increase a more powerful example by the execution of criminals, it is in contemplation to make the actual scene of their respective crimes in future the place of punishment. With this view it is supposed that the delay has taken place in allowing the law to take its course in the cases of nine unfortunate men who are now awaiting the awful mandate. Port Stephen - Parramatta - Bathurst - and Burwood, will in that case, witness the operations of retributive justice." This was of doubtful legality where the crime was murder, due to s. 1 of the murder Act. It was not possible to reach Port Stephens so quickly. See also R. v. Mustin and Brown, October 1826.

[2] The other three were tried and convicted in September 1826: see R. v. Chip, Ridgway, Colthurst and Stanly, September 1827.

[3] After he was initially ordered to be executed at Port Stephens, Stanley's sentence of death was eventually commuted to hard labour in chains for life at Norfolk Island. The path to Crown mercy in his case is examined in the footnotes to R. v. Chip, Ridgway, Colthurst and Stanly, 1827.

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

AUSTRALIAN, 20/03/1827

Supreme Court of New South Wales

Forbes C.J., 16 March 1827

WILLIAM PUCKERIDGE, EDWARD HOLMES, RICHARD SNEID, and JAMES LEE were indicted for the wilful murder of **PATRICK McCOOY**, on the 19th of February last.

JOHN DUNNOVAN examined --- is a housekeeper living the Brick-fields, Sydney --- Patrick McCooy, deceased, lodged in his house at the time he met his death --- this was on the night of the 19th of Feb. last --- about eight o'clock on that evening, witness had occasion to go into a paddock adjoining his house, to look after some cattle, which he suspected had broken out of the enclosure --- he discovered that a calf was missing --- happening to see McCooy, whom he had a few minutes before left in the house, standing by the paddock fence, he called to him for his assistance, to secure the stray calf --- McCooy did so --- whilst employed in securing the fence, two of the

prisoners, Puckeridge and Holmes, came up --- the former laid his hand on McCooy's shoulder, enquiring, at the same time, who he was? McCooy evaded the question, but Puckeridge insisted on an answer --- McCooy then told him his name --- Puckeridge asked him if he recollected a particular night, and mentioned some street --- McCooy said he did not --- the prisoner Homes said he did, and addressing his companion, Puckeridge, said "now's the time, sheet it home to the -----." Puckeridge replied "I've been looking out for you, McCooy, some time, and now I'll McCooy you" -- he thereupon struck him in the breast, knocked McCooy down, and afterwards falling on the man, rose himself from the body, and with his whole weight fell on his knees upon the man's bowels --- this he repeated two or three times. Holmes appeared to be the instigator of this act of violence --- his language appeared to excite Puckeridge to proceed to those extremes. Holmes said to Puckeridge "stamp his guts out." McCooy, in a faint voice, said, "Oh, oh, oh, I am dead." Witness then interfered, to prevent any further outrage, when Holmes caught hold of his throat and said, if he took part with him, meaning McCooy, he would serve him in the same way. Puckeridge thereupon struck witness several blows, and likewise kicked him --- he eventually knocked him down. Puckeridge was pursing the same course of treatment towards him, and he had used to McCooy, having once jumped on him, with the whole weight of his body, when a woman of the name of **KENNEDY** was seen approaching with a light --- a voice, which witness could not recognise, but thought it to be that of some spectator, cried out "knock off, knock off, here are lights coming" --- the person came up with a light, and a crowd of person soon became assembled. Puckeridge and Homes still remained on the spot --- witness had known Puckeridge for four years past, and Homes for a considerable time --- there were six or seven persons who stood at a short distance, witnessing the affray --- a woman called Ann Puckeridge, who is reported to be the mother of the prisoner Puckeridge, was not present at the scene of those occurrences --- she was not at witness's house during the whole of that day on which the fatal occurrence happened. Ann Kennedy corroborated much of the testimony of last witness.

Wm. FULLER --- remembered the night of McCooy's death --- about eight o'clock on that evening, he was proceeding along Goulburn-street, on his way homewards, when interrupted by four men, who were standing against the fence of Dunnovan's paddock - the night was dark - but previous to being interrogated by the men, and being within a short distance from them, heard one of the men say to each other "here comes the ---, now's the time" --- on witness's approach, the prisoner Puckeridge asked him if he lived in yon corner house, alluding to the dwelling of Dunnovan --- witness replied in the negative. Puckeridge then told one of the party to look at witness in the face, and see if he was the person they wanted - the person who was spoken to said not. Puckeridge then apologized to witness, for interrupting him, and bid him good night --- witness proceeded on --- about a quarter of an hour after, there was a considerable tumult in the street, near to Dunnovan's house --- witness went out to ascertain the cause --- he came up to a concourse of persons, who had assembled, and then witnessed McCooy lying on the ground, apparently in a dying state, and McCooy's brother, with Dunnovan standing close to him --- amongst the number of spectators were some girls --- one of whom observed, that it had just served McCooy right --- the person who said this was a stranger to witness. **FELIX McCOOY** corroborated some of the testimony of first witness.

-- **FORRESTER** deposed, that on the same night as the outrages occurred, he saw a man leading the mother of the prisoner Puckeridge round the corner of Dunnovan's house --- this was a little before the assault took place on McCooy --- the man had his

arm round the woman's waist --- witness, however, was at thirty yards' distance from them, and the night was dark --- he could not distinguish the features of the man --- about ten minutes after, or a little better, heard a noise in the street --- went up to the place where several person were collected together --- witness enquired what was the matter --- Holmes said some person had been ill-using Mrs. Puckeridge --- Dunnovan was standing by at the time --- Puckeridge struck him, and afterwards kicked him --- witness interfered, and succeeded in persuading Puckeridge not to repeat the violence --- deceased, McCooy, was lying down at the time --- the woman witness alluded to, appeared to be intoxicated --- the man appeared the same --- but the woman seemed particularly so, --- she appeared to resist the man --- observed her to hang back, as if unwilling to go with the person --- heard the woman cry out "don't kill," or "murder me" --- the prisoner Lee, was also a witness to this occurrence.

Dr. **BLAND** deposed to examining the body of deceased; on opening the body, he found an extensive lacerated wound of the liver, apparently the effect of some mechanical violence; considered it to be the cause of the man's death; is certain the death was occasioned from external violence. This was the case for the prosecution. Witnesses were called for the prisoners.

The CHIEF JUSTICE summed up at great length. [Incomplete]

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

SYDNEY GAZETTE, 20/03/1827

The EXECUTIVE COUNCIL sat on Sunday afternoon, to take into consideration the case of the native youths, **PUCKERIDGE and HOLMES**, who were condemned to death on Friday for the crime of murder. The circumstances in this case were of so peculiar a nature, that several Gentlemen of rank, and other respectable individuals, together with a number of Ladies, were constrained to subscribe their names to a petition, which, to his credit be it recorded, was attended to by Mr. George Smith, of Pitt-street, Sydney, who, though only allowed half an hour to complete the number, still effected his mission within the period allotted him, and the petition, in favour of the condemned, was conveyed to the GOVERNOR in Council in the very nick of time. It did not, of course, enter into the merits of the case, but merely begged the Chief Justice to point out to HIS EXCELLENCY any favourable circumstances that might, by possibility, have appeared in the course of the trial, as the petitioners were well aware His Honor would not omit interposing in behalf of life where mercy could be urged. HIS EXCELLENCY, in the exercise of those high powers with which the SOVEREIGN has judiciously invested him, and in answer to the call the Public, strengthened by the recommendation of the CHIEF JUSTICE, was graciously pleased to respite the culprits during pleasure. We hope this very narrow escape will not be lost in influence on the rising members of our Community; as, even in the event of parents being insulted and abused, children are not illegally to take the law into their own hands, and undertake to inflict that corporal chastisement, which, in all probability, may be followed by DEATH --- by MURDER!

We have ascertained, from respectable authority, since the above was written, that the Chief Justice entertained some doubts at the trial that there was a material chasm in the evidence that would have been favourable tot he prisoners, which, however, was not then within reach; and His Honor was consequently precluded from stating his feelings to the Jury, where there was nothing in the evidence upon which a case could be put, as to this fact, by the Court. His Honor, however, with his usual anxiety to render impartial justice, had two witnesses examined at the Police Office on Sunday,

and from these parties the facts were elicited, upon which doubts, favourable to the condemned, originated in the mind of the Court during the trial. On the representation, therefore, of the Chief Justice, HIS EXCELLENCY the GOVERNOR felt sincere pleasure in sparing the lives of the young men, who will have to mourn over an act of indiscretion through life, which will not be less lacerating to their feelings, when it is recollected that a human victim has been offered on the altar of their ungovernable passions. It is an awful thing to shed human blood, and the justice of the GREAT ETERNAL is yet to be satisfied --- to which there is only one narrow access: but we will leave the Minister and the Bible to do their own work.
[On 17 March 1827, Forbes C.J. sent the case to Governor Darling for consideration of Crown mercy. He said that "No malice appears to have been entertained by the principal Puckeridge towards McCooey personally, but he appears to have acted under an impression of indecency and violence being offered to his mother, Ann Puckeridge by some person; and it further appeared that McCooey was in some way or other pointed out to him as the person who had taken attempted liberties with his mother - whether such was the fact or not was not very clear in the evidence". He said that it was not a case in which he could recommend mercy, but thought it should be referred to the Executive Council: Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, pp 96-97.]
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 24/03/1827
Supreme Court of New South Wales
Trial, 21 March 1827
DENNIS M'DOWALL stood capitally indicted under Lord Ellenborough's Act, for stabbing one **ALEX. McLEARNE**. It appeared in evidence that the prisoner was an indented servant to the New Zealand Company - the prosecutor was the same. On the 29th of last Sept. those two persons were on board the barque *Rosanna*, **lying at anchor about 12 miles up the River Thames, at New Zealand**; a dispute arose between the prisoner and a man named Gray, on board the vessel, respecting some working tools; the prisoner struck Gray on the hand, and the latter instantly struck him with his fist in the face; prisoner fell on the deck, on rising he said to Gray he would give him the length of that, meaning a small knife, which he grasped; Gray then doubled his fist at the prisoner; prisoner stabbed him in the breast; Gray cried out murder; the prosecutor in this case called out to some persons who saw Gray bleeding, would no person take the knife from that damned old scoundrel; prisoner then run up to prosecutor and stabbed him with the same knife he had stabbed Gray; he ran towards some New Zealanders who were on the same deck, for protection; prisoner followed, and falling on him, inflicted several more wounds; the surgeon who examined them said they were generally of a slight character, but two of them were inflicted in vital parts, being a little below the lungs, the weapon having come in contact with the bone, prevented fatal consequences ensuing.
Some legal objections were taken to the information by prisoner's Counsel, owing to its being laid under Lord Ellenborough's Act, though the offence was committed at New Zealand. The Chief Justice put the facts to the Jury, leaving the prisoner, if found guilty, to take advantage of the object (as they appeared on the Record) in arrest of judgment, if it should appear that they were tenable. Verdict - Guilty.

[The Sydney Gazette reported this trial on 24 March 1827. It added that "the brig *Rosanna* sailed from England in the early part of the last year, on a speculative voyage, to establish a settlement at New Zealand."]
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 09/05/1827
Hearing, 8 May 1827
ALEXANDER M'DOWALL, who was convicted at the last sittings of the Court, upon an information laid under Lord Ellenborough's Act, for cutting and stabbing one **M'LARNE**, on board the ship *Rosanna*, **whilst at New Zealand**, was brought up yesterday and discharged. Judgment having been arrested on a legal objection taken by Dr. Wardell, at the time of trial, and subsequently argued. The Court had taken time to consider of the motion in arrest of judgment, and ultimately acquiescing in the validity of the point raised, the prisoner was ordered to be liberated.
[The case was argued on 3 April 1827. According to the Sydney Gazette, 6 April 1827, the motion to arrest judgment was "on the ground that the operation of Lord Ellenborough's Act, under which the prisoner was indicted, did not extend to New Zealand; that though, as part of the law of England, it had been ruled to be in force in this Colony, still the Supreme Court here had only the power to try such offences committed at the various places enumerated in the New South Wales Act, as would be triable in England, not to create an offence, and put the prisoner in a worse situation than he would be, if tried in England, where, the Counsel contended, this could not have been tried under Lord Ellenborough's Act." On the legality of prosecutions under Lord Ellenborough's Act in New South Wales, see R. v. Smith, January 1825.]
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 11/05/1827
Supreme Court of New South Wales
Hearing, 9 May 1827
The following prisoners were brought up to receive sentence:-
The Acting Attorney General [W.H. MOORE] prayed the judgment of the Court against **Wm. WARD and THOMAS COOKE**. These prisoners had been convicted under the Black Act, as principals in the second degree, upon a charge of shooting one **RATTY**, a constable at Parramatta. The case had stood over for a considerable length of time, some doubts having arisen in the mind of the Court, how far under such an indictment the prisoners had been properly found guilty. It had been admitted by the prosecution, on the outset of the trial, that the prisoners were not the actual party who fired the identical piece at the constable but that another constable, mistaking Ratty for one of a party of persons, among whom were the prisoners that had a design to commit a robbery, discharged the piece. The prisoners had been first tried for the robbery, but the prosecution failing to prove that the robbery had been completed, the case fell to the ground; the prisoners were then detained to answer to a prosecution for shooting Ratty. The Court, in reviewing the various circumstances of the case, thought, that as the Act, under which the prisoners were tried, was so strict in its enactments, as to require proof of a gun being loaded with something of a mischievous character, and an intent to do some personal injury; and as there was no proof whatever in the present case of these facts, it being also admitted on the prosecution that the shot wound whereof Ratty died, was caused by one of his own

party, the Court must discharge the prisoners. Cooke was discharged by proclamation; the other prisoner was detained to answer to another information.
See R. v. Ward and Power, May 1827.
These men were only convicted after three trials. According to the Australian (7 February 1827) and the Sydney Gazette (6 February 1827), Ward, Cook [sic] and James Curry were found not guilty of maliciously firing at Ratty at a trial held on 5 February 1827. At that trial, Ward was charged as principal, and the others as principals in the second degree. In the trial which finally led to their convictions, held on 14 March 1827, Ward and Cook were both found guilty of aiding and abetting some person or persons unknown to shoot at Ratty; Curry was found not guilty (Sydney Gazette, 15 March 1827). The Monitor said on 10 February 1827 that prior to the February trial, Cook and Curry had also been tried as principals and acquitted.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 14/05/1827
Supreme Court of New South Wales
Forbes C.J., 11 May 1827
TIMOTHY SHEA, alias SHEAN, was indicted for the wilful murder of **PATRICK HENLEY** at Portland Head, on the 15th of March last. The information contained two counts. The first count laid the blows which caused the death to have been inflicted with a musket. The second count merely varied by stating the weapon to have been a hoe.

The Acting ATTORNEY GENERAL (W. H. Moore, Esq.) stated the case, and called the following witnesses.

ELIZABETH BRADLEY stated, that she resides about four miles below Portland Head; her son-in-law, her daughter, and their three children, all lived in the house with her; had frequently seen the deceased, but had no particular acquaintance with him, 'till about a week before his death, when he came to work for her son-in-law; the deceased was an old man, but apparently in good health; on the 15th of March last in the evening, a person named Byrne, who lived on the adjoining farm, came to witnesses house, and invited her, and the other parts of the family, to spend a couple of hours at his residence, which was only at the distance of a few rods from witness's dwelling; witness and family accordingly went, leaving the deceased to take care of the house till their return; after remaining at Byrne's about an hour, witness found herself indisposed, and proceeded homeward alone; this was about 9 o'clock at night; on approaching the house, witness heard a groaning inside, and presently after, heard the deceased call out "Is that you, Mrs. Bradley? I am murdered." The prisoner at this time was standing in the door-way, with a piece of a stick in his hand; witness asked him what was the matter, when he replied "the old villain has snapped the gun twice at me, and afterwards broke it on the step of the door in a rage," at the same time shewing witness, where the gun was lying broken; the deceased was, at the time lying under a bed, in an inner room; witness did not go into the house, but immediately ran to Byrne's, who with her son-in-law, and the rest of the family came back with her to the house; witness was so alarmed that she did not go into the house until the deceased was removed into a bed; he only survived till 11 or 12 o'clock the next day; the prisoner was detained by witness's son-in-law, the whole of the night, and, on the following morning, given into the custody of the district constable.

By the Court. The prisoner was stock keeper to Byrne; witness had seen him the same day about two o'clock, when he came to the house, and asked the deceased, and

witness's son-in-law, to assist him in extricating a cow from a bog; does not think the prisoner and the deceased had ever spoken to each other before that time.

WILLIAM BAYLEY son-in-law to the last witness, stated that, on the way to Byrne's house, in the evening of the 15th of March, he met the prisoner, and asked him if he had his cattle in, and upon his replying that he had, witness told him he might as well go up to his countryman Henly (the deceased) and spend an hour with him; the prisoner said he did not know whether he would or not; witness never knew of any old grudge subsisting between the prisoner and the deceased, or that they had ever seen each other previous to that day; they were both from Ireland; witness's mother left Byrne's alone, about 9 o'clock, and had not been long gone, when she returned, calling out that murder had been committed by Byrne's stockman; the whole party immediately left Byrne's and hastened home; the prisoner was standing about three rods from witness's door, and, upon being brought back into the house, and asked by witness why he had used the deceased in that way, he said he would not have done so, had he not snapped the musket twice at him; witness found the deceased under a bed, in a very dangerous state; he said his thigh was broken, that he was beaten by the prisoner, at first, with a stick; that he afterwards broke the musket across him, and then repeated the blows with a hoe; the prisoner denied having done so; he said it was with a stick he had struck him, that he was sorry he had beaten him so much, but that he would not have done so, had he not struck him first, and snapped the gun at him twice; the deceased was present when the prisoner stated this, and exclaimed "Oh you murdering villain! you have murdered me;" the deceased was a very violent tempered man, and would on a former occasion have struck Byrne (for whom he worked at the time) on the head with a morticing axe, had he not been prevented by the bystanders; he was about 60 years of age; witness has every reason to believe that the deceased attempted to turn the prisoner out of the house, when he came there, and in that way the quarrel took place; it is very probable the deceased might have got the gun from the bed-room where it was deposited, in order to drive the prisoner from the house; the deceased admitted that he went to push the prisoner out of the house, and that he replied he also was left in charge and would not go.

PHILIP ROBERTS, district constable at Portland Head, stated that he was informed by the last witness (Bayley) of what had taken place: witness enquired of the deceased, in the presence of the prisoner, how it happened; the deceased stated that the door was burst open on him, that the prisoner broke a musket over him, and then took a hoe, and looking at the prisoner exclaimed "Oh you murdering villain." He died about half an hour after; witness thought he was badly wounded, but did not imagine he was so near the point of death; did not however think he would live from the wounds it was stated he had received; he said his thigh bone was smashed; witness took down his last declaration in writing.

His HONOR observed, that he could not permit that statement to be read, inasmuch as there was no evidence as yet that the deceased thought himself past recovery.

ELIZABETH BYRNE stated, that she heard the deceased say that the prisoner had beaten him; the prisoner stated that the deceased wanted to turn him away, and that he refused to go, as he had been desired to remain there until the party returned home; that the deceased took the gun, and snapped it twice at him, and then broke it in passion on the step of the door, and struck him with a piece of it, which he (the prisoner) wrested from him, and struck him in return; witness thought the deceased was in a bad state, but did not imagine he would have died so soon; he said himself that he should never recover.

The Court here permitted the deceased's declaration to be read, which stated that the deceased was ordered to take charge of Bradley's premises during his absence; that the prisoner came there, said he was ordered too, broke the door in, committed great violence, beat the deceased first with a musquet, and afterwards took a hoe.

Mr. **THOMAS BINDMORE ALLEN**, Surgeon on the Establishment, stated that he was present at the Inquest, and examined the body of the deceased; there were several incised wounds on the superior part of the head, one of them above the eye, and longer than the others; there were also several wounds on the right arm, but not deep, and appeared as if inflicted with something like a knife struck through the clothing when the arm was held up in defence; there were many contusions in different parts of the body, and a fracture near the hip joint, on the upper extremity of the thigh bone, which was considerably shattered by some heavy weapon; a considerable extravasation of blood had taken place between the muscles of the posterior part of the thigh, and towards the belly; the blows altogether might have been the cause of the death, but the fracture of the thigh and the extravasation of blood were the principal cause; there was also a slight appearance of extravasation on the right kidney, which might have been caused by disease, but the intestines were generally healthy.

The prisoner put in a written defence, stating that he had been directed by the witness Bayley to stop in the house along with the deceased, until his return from Byrne's; that on his going there some conversation occurred between them, and the deceased said he was sure the prisoner was one of the croppies, and engaged in the affair at Vinegar-hill, and endeavoured to thrust him out of the house; that he (the prisoner) refused to go, as he had been ordered by the owner to remain there till he came back, when the deceased ran for a musket from an inner room, snapped it twice at him, and finding it would not go off, broke it on the step of the door, and struck him with the barrel; that a struggle ensued, when the prisoner succeeded in wresting the weapon from him, and struck him with it in return.

The CHIEF JUSTICE, in summing up, observed, that in all cases of this kind, the great point of enquiry was the animus, with which the act had been committed, for death might be caused, and still the crime not amount to murder; malice being the main ingredient which distinguished that from other degrees of homicide, which were various. With the single exception of the statement made by the dying man, there was nothing in the present case but the evidence of circumstances, which it was necessary particularly to weigh. There was also the absence of any proof of long preconcerted malice; the meeting appeared to have been purely accidental, as the prisoner had been invited by Bayly, on the way from his own house, to go up and sit an hour with the old man. There was therefore the total absence of any thing like a malicious intention; as, it did not appear from any evidence that the parties had ever seen each other before that same day, when they met for the purpose of extricating a cow from the mire. Under such circumstances, then, did the Jury believe, that the declaration made by the deceased contained a statement of every part of the occurrence as it took place? Dying declarations were tender things to deal with. The law only admitted them on the principle, that a man dying speaks under the same obligation as he would on oath; but the law, at the same time, requires that; the party should be in extremis; that he had a full conviction on his mind of the state he was in, and had abandoned all hopes of surviving; because, if such was not proved, it did not come within the reason upon which the law admitted declarations of that nature. In the present case, the deceased appeared to have been under the influence of strong feeling. His last words appeared to have been "Oh, you villain!" And His Honor put it to the Jury, whether

such an expression would appear to have emanated from a person in that state of making his peace with all the world, dying in that universal forgiveness with all mankind, which the law contemplated; and whether a declaration, made under such feelings was made under the same obligation as if delivered on oath, and that the prisoner had the opportunity of cross-examination. His Honor knew that he was treading on delicate ground in leaving the point to a Jury, as it had been laid down as a mere question of law; but he was rather inclined to think, with a learned Judge who had held it to be one of fact for the Jury under the direction of the Court. He did not think that short and summary statement contained all the circumstances of the case; and, in such a case, it was most material to have every circumstance and every expression, if possible. It did not come within the compass of probability that the prisoner, under a passing invitation, would have gone and broken open the door and committed that violence without some sort of provocation; and the most reasonable conclusion, seeing that they had only presumption from which to judge, appeared to be that at which the witness Bayly had perceived namely that when the prisoner went to the house, the deceased had endeavoured to turn him out, and that a quarrel had in consequence arose; particularly, seeing that there was strong positive proof, that up to that day, the parties were strangers to each other. It was a case, however, entirely on the consideration of the Jury; but His Honor was of opinion, taking all the circumstances together, it was not one upon which a conviction for murder could safely rest; whether the Jury considered the prisoner guilty of manslaughter it was for them to decide

The Jury found a verdict --- Guilty of manslaughter. Remanded.

See also Australian, 16 May 1827.

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

AUSTRALIAN, 16/05/1827

Hearing, 14 May 1827

TIMOTHY SHEA, alias SHEAN, found guilty of manslaughter, was next put to the bar. The Court in passing sentence on this prisoner said, it would avail itself of a power which it derived from a late statute, which enabled a Judge to award aggravated punishment in cases of manslaughter, where the circumstances that accompanied the crime were of a heinous character; in such light did the Court view the present case, and was therefore called upon to visit the offender with severe punishment. The sentence of the Court was that he should be transported for seven years.

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

SYDNEY GAZETTE, 18/05/1827

Supreme Court of New South Wales

Stephen J., 16 May 1827

JOHN JAMESON, jun. a settler, was indicted for manslaughter, in killing an aboriginal native called **Hole-in-the-book**, at Brownlee, in the County of Argyle, on the 31st of December last.[1]

The Acting Attorney General (W.H. MOORE, Esq.). stated the case as one, at the very utmost, which could not amount to more than the offence that was laid in the information. It was evident that the prisoner acted under an impression that a murder had been committed by the native whose death he was charged with having occasioned, and the circumstance attending which, he had himself communicated, immediately after the occurrence, to His Excellency the GOVERNOR, in a letter

which he (Mr. Moore) in justice to the prisoner would then read to the Court. Mr. Moore then read the following letter, addressed to His Excellency the GOVERNOR, by the prisoner, that will be found illustrative of the matters which were afterwards detailed in evidence.

SIR,Greenwich Park, January 3, 1827.

It is with deep regret I have to inform you, that one of my men, in the capacity of watchman, came over to my farm, on the 23d of last month, which he usually did once a-week, for the shepherds' rations, being a few miles from my place. He left in good time; but, poor fellow! he was not allowed to return back. On the following morning, one of the shepherds informed me that the watchman had not come home. I was much surprised, and conjectured he had gone astray. I went in search of him, but got no tidings whatever. I then began to think of some natives that were at my farm, the evening before it happened, and made off in the night, which was not usual. Suspicion fell on them, that they had killed the man and dog --- a most sagacious animal --- for, had the man lost himself, as the other men said, the dog would have made to the folds, by sun-set. I saw there was no time to be lost. I wrote to the district constable, as the Magistrate was not at home. I waited two days, and no constable came, so I thought it was high time to go myself in pursuit hearing, the evening before, that the natives had been seen with some sugar. Accordingly, I prepared myself, and took two men with me, well armed. The first place I made for was Wollondilly. There I fell in with the very natives that made off, on the very night before the murder was committed, evidently having it planned the day before. I immediately made them all prisoners, and charged them with killing my servant, which, in a little time, a girl and three boys confessed was the case; but that the black, naming him and his gin that had done the murder, was gone to Bong Bong, and that the man's body was cut up, and put in a hollow tree, and the dog buried.

I saw the first thing necessary was to pursue the savages that committed the deed. Accordingly, I made the four secure at Wollondilly, that I wanted to shew me the body, and six more, two men, three women, and a boy, I sent off to Bong Bong. Mr. Bayne then informed me, that the native, Hole-in-the-book, and his gin, had left the others two or three days; and I must here mention the handsome and ready manner Mr. Bayne offered to assist me in taking the ruffian.

We started off for Bong Bong, and there heard that he was at Mr. Wright's the day before; but a man coming in about the same time, and telling the people that Mr. Jamieson had a suspicion of Hole-in-the-book for killing his servant, another native, hearing what was said, told Hole-in-the-book who was standing outside. Mr. Wright noticed how the savages' countenance changed. They made off directly, saying they were going to Browly, a farm at a little distance from the public road. A man put me in the way, and I pushed on, as it was then getting late. On coming in sight of the place, I said, "Mr. Bayne, there they are." The moment they got sight of me, they shrieked out "Jamieson!" and ran in every direction. I soon got my eye on his gin, and rode on her so quick, that she took up a mail tree. I called out to Mr. Bayne to secure her, but he mistook what I said, and rode after another black, thinking him to be Hole-in-the book, but I caught sight of the ruffian, and soon pulled him up, desiring he would stop, or else I would shoot him, but he would not. At last he got over a fence, and ran through the wheat, to evade the horse. I now thought I should have lost him, but I sprang from my horse, and got over the fence, and now hard running took place. I was determined to have the ruffian if possible. I soon came up to him, and not wishing to shoot him, if I could take him without, I pacified him to walk towards the house, which he did, though with great reluctance, and by this time, Mr. Bayne

returned, seeing his mistake. Four or five men and two or three women came to meet me, to see what was the matter. I desired one of the men to go to the house for a cord to tie his hands. I then told him, in the presence of the people standing by, what he had been guilty of. He looked horror-struck when he heard I was in possession of every particular, and I said the Governor would be sure to hang him. It was now nearly dusk, and I was stretching out my hand to take the cord to secure his, when he made a sudden dart and ran. I saw there was no alternative but to fire. I did so, but the first barrel seemed to take no effect. I gave him the second, and he still continued running until he fell dead. I have now stated every particular, for fear there might be any misrepresentation. I went immediately and informed Mr. Throsby.

The six natives that I was sending to Bong Bong, got away from the two men that had them in charge. The men endeavoured to get them through the brush, before the night came on, but they would only walk as they pleased. When it got dark, they made a sudden start, and got clear off. I do not attach any blame to the men, for I am sure they did their best, and I hope from this ready and willing behaviour, your Excellency will give them some indulgence. On our return to Wollandilly, we found the four safe, and one more the man had got.

I had them brought to my farm, to shew me the man's body; but, after a long and useless search, we could find nothing. I got very vexed with them, at last, seeing they were making entire fools of us. They then confessed that the man was cut in pieces, roasted, and eaten, and likewise the dog. They then took us to the place where the fire had been made, but all we could find was a bit of the man's small entrails, a piece of bone which they said come out of his leg, and a little bit that belonged to the dog's scull. It seems they were so sure of no suspicion ever being on them, that, when they eat the flesh, they burned the bones to ashes; and it further appears, that where the man was killed, they made the fire over the spot.

What will your Excellency think of the natives now? I have been living up here nearly four years, in all that time never had any words with them, treated them in the kindest manner, likewise my people, two of their children had been living in my house for six months, and only left the day before the horrible deed was committed. After all my kind treatment to them, they waylay one of my men, within little more than half a mile from my door, and not content to take the meat, sugar, and tobacco, the poor fellow had with him, the cannibals must destroy an inoffensive and faithful servant. I have done my duty as a master, in looking so strictly into this matter, and I have no doubt that your Excellency, together with the public at large, will approve of my conduct.

I have only to add, that I trust your Excellency will, for the safety and protection of His Majesty's faithful subjects, make a proper example of the whole that were accessary to this cruel and wanton act; and that by, as we supposed, our civilized tribe. I think this will for ever put down any advocate for the aborigines of Australia. The three boys and the girl, that are in custody, I much wish would be taken into your Excellency's presence, as they would then shew unto your Excellency, in what form Hole-in-the-book cut up the unfortunate man.

I have the honour to be,
your Excellency's most faithful
and humble Servant,
(signed)JOHN JAMIESON, JUN.
To His Excellency Governor Darling, &c. &c. &c.
****

Shortly after this letter was written, it was discovered that the man, a servant belonging to the prisoner, who had been missing, and was supposed to have been murdered by Hole-in-the-book was alive, having lost his way in the woods. It was, however, supposed, notwithstanding, that some person had been murdered; for, in corroboration of the confession of the natives, some bones were discovered, which, on being shewn to a Surgeon, who was then in attendance before the Court, he had given it as his opinion were human bones. He (Mr. MOORE) however, knowing that a native had been shot, though, as he was ready to admit under an erroneous impression, still, considering the office which he held, he had deemed it his duty to bring the case before the Court, and would proceed to call witnesses who would state the circumstances which took place on the occasion.

MARK RUSSEL stated, that he resided at Mr. John Wait's, at Bong Bong, in December last; on the 31st of December, or the 1st of January, in the afternoon, witness saw the prisoner on horseback, accompanied by another person, riding after a black native, who was running away from them, across a field of wheat; the prisoner, who had a double barrelled gun in his hand, alighted from his horse, and pursued the black, who had got over the fence across the field; the prisoner overtook, and brought him back to the end of the field, when witness went to his assistance; the prisoner said the black had killed a servant of his, and asked for a rope to secure him, which was procured, and witness held the prisoner's gun whilst he attempted to tie the hands of the native behind him; the native resisted, would not suffer his hands to be tied, and made off; the prisoner called out after him, that if he did not stop, he would certainly shoot him, which was disregarded by the native, who still kept running; the prisoner then fired, when the native was about 28 yards off, but he still continued to run; the prisoner again called out two or three time, to him to stop, but the native still running on, the prisoner discharged the second barrel of his piece after him, when he was nearly 40 yards off; the native ran for about 39 yards, as appeared when the ground was measured, after the second shot, and then fell; witness did not go up to the spot where he fell, at that time, nor see the body till the evening; cannot say where he was shot; believes the person who accompanied the prisoner was Mr. Hannibal McArthur's overseer; did not see any constables with the prisoner at the time.

Cross-examined by Mr. W. C. Wentworth --- The native understood English very well; when the prisoner taxed him with the deed, he said he had killed no man; witness thinks he would have escaped, had not the prisoner shot him; witness lives in Argyle, but not near the residence of the prisoner; does not know of any man being missing there; does not know what sort of a character Hole-in-the-book was.

EDWARD PARKER, Government servant to Mr. Wait, stated, that he was in his master's paddock, bringing up a calf, on the 31st of December last, when he saw two gentlemen riding along the road, but did not at that time, know who they were; the prisoner was one; when witness saw them riding up, there were some black people about Mr. Walt's place, who, when they saw the persons approaching, all ran off, in different directions; the prisoner followed one of them on horseback; the native jumped the fence, and ran through a wheat-field; the prisoner alighted and pursued him, calling out to him at different times to stop, which was not heeded by the native; the prisoner at length overtook him at the end of the field, and brought him to the draw-rail of the fence, calling at the same time on witness, and others who were present, for assistance, as the native had killed a servant belonging to him, and observing he was glad he had taken him alive, rather than he should have shot him; the prisoner sent witness for his horse, and when he returned, found that he (the prisoner) had sent for a rope, which was brought, and giving his gun to the last

witness, Russel, to hold, he desired the native to turn round whilst he tied his hands behind; the native said "beal you tie my hands," and ran off; the prisoner took his gun from Russel, and called out several times, to the native to stop, or he would shoot him; the native would not stop, and the prisoner fired after him, but he still kept running; the prisoner again called after him once or twice to stop, or he would fire again, but the native not complying, the prisoner fired again, and after running about 30 yards further, the native fell dead; witness went up immediately to the spot, and found him lying on his back; the prisoner asked if he was dead, and being answered "yes," replied he was sorry for it, as he would rather have taken him alive; one shot went through his head.

By a JUROR --- He would have escaped if the prisoner had not fired the second time.

By the COURT --- When the prisoner was endeavouring to secure him, the native understood all that was said; he could speak English, and understood what was said to him nearly as well as witness could.

Cross-examined. The native knew what the prisoner had arrested him for very well. John Fuller stated, that he is Government servant to the prisoner, and lives on his farm; knew a man named **HENRY PRESTON**; he lived on a farm belonging to Mr. Stuckie, about five miles from where witness lives, and was also in the prisoner's employ; Preston was in the habit of coming weekly to Greenwich Park for rations; he came as usual, on the Saturday before Christmas-day last; the same night, it was reported to his master (the prisoner) that he had not reached home with the rations; there were a tribe of natives about the neighbourhood at this time, and also two natives living in the Government men's huts; the prisoner to when the news of Preston being missing was told, left home on the following Monday morning in search of him; he returned the same evening, and expressed his fears that Preston had been made away with, meaning that he was killed; witness had occasion to go to a place called Mulvana, and was absent from the farm for several days; shortly after his return, news was received that Hole in the book's gin had been seen with plenty of sugar, and that the nets of each of the tribe were filled with provisions; this information was communicated to the prisoner, who directly intimated his suspicion that the natives had killed Preston, from their having so much sugar and provisions with them, and expressed his determination to go in pursuit of them, which he accordingly did, accompanied by two men belonging to the farm; on the Tuesday following, this party returned, bringing with them five black natives and a constable; the prisoner said, "Hole in the book has killed Preston;" witness was told by Hole in the book's gin, that she had eaten part of the man's arm that was missing, and whom she described to be Preston; the natives consented to take the prisoner to a place where the bones of the body had been left, and accordingly brought him, and his party to a hollow tree, next to which a fire had been made; they produced the plinter bone of a man's leg, and promised that, on the following day, they would also produce the bone of the man's arm, which they did, together with some more bones, and some entrails, evidently those of a human body, and which they said belonged to Harry, which was the name that the man who was missing was known to them by; Hole in the book's gin also drew from a water hole, the bone of a man's arm; the natives afterwards took the party to Wollondilly, where they came up with a strange black, called by the others Billy Rooty, who was employed in breaking some bones; the several pieces of bone as found, were collected, and shewn to Dr. Elyard.

Cross-examined --- All the natives concurred in saying, that Hole in the book had killed the man Harry; his gin made the same statement.

Mr. **JOHN BAYNE** stated, that he is Superintendent of a farm belonging to Mr. Hannibal McArthur, in the County of Argyle; remembers hearing of a man being missing in that neighbourhood, about the latter end of last year; shortly after witness heard this, a tribe of natives came on the farm, whom he asked if they knew whether a servant belonging to the prisoner had been murdered; they appeared much agitated, but gave no reply; on the Sunday following a native came to witness, and asked him if the soldiers were coming, and complained of being lame, and that he should not be able to run away; the natives, generally, seemed to entertain some fear of this sort; witness thought it prudent to remove an impression of this sort from their minds, and told them that they need not be alarmed, as no soldiers were expected; the prisoner came to witness; house, shortly after, and as they were sitting in an inner room conversing, a native named biddy came to them, and told them that Hole in the book and his gin were the persons who murdered the prisoner's man; Hole in the book stayed on the farm only one day; he had gone away to Bong Bong, whither witness accompanied the prisoner; on arriving there, they heard that Hole in the book having heard of the suspicions that were entertained of his having murdered the prisoner's man, had gone precipitately away; witness and the prisoner then set out in the direction of Mr. Wait's farm, where they found Hole in the book, his gin, and two other natives; as soon as the natives saw witness and the prisoner approach, they dispersed, and ran away in different directions; witness pursued one of them; the prisoner ran after Hole in the book, whom he finally overtook and secured, the prisoner asked him why he ran away, but he gave no answer; it was then agreed to take him to Bong Bong goal, preparatory to an enquiry being instituted relative to the supposed murder; a piece of cord was procured from some men who were close by, with which it was intended to tie the native's hands, with a view in taking him to gaol with more safety; Hole-in-the-book resisted and ran off; the prisoner repeatedly called on him to stop, he not complying, the prisoner fired, but he still kept running, seeming to pay no regard to the prisoner's threats, who then fired a second time, when Hole-in-the-book, after running a short distance, fell, and died instantly.

By a Juror. --- If the second shot had not been fired, he would certainly have made his escape.

Cross-examined. --- Witness has no doubt but that the natives killed some man; it was strongly impressed upon witness' mind at the time that they had killed Preston, from the circumstance of their distributing tobacco among the men on the farm; and it being known that Preston had some of the same sort with him, and some sugar, of which also the natives appeared to have a quantity; witness knew Hole-in-the-book very well, and thinks if he was put to the bar for killing one of his companions, or a white man, he would understand what was going on; if he was innocent, witness thinks he would understand how to defend himself, and know the necessity of calling witnesses; witness has known some of them to do so when he has called them to account about many things.

HENRY PRESTON (the man who was supposed to have been murdered), stated, that he went, according to custom, to the prisoner's at Greenwich Park, for the rations, about 2 o'clock in the afternoon of the 23d of December last; Greenwich Park is about five miles from the out-station where witness is employed; on his return back, witness quitted the regular path, for the purpose of seeing an acquaintance, a shepherd, whom he expected to find; and went astray in the woods, nor could he discover any station till he got to Mr. Blackman's at Burragarang, on the 2d or 3d of January, about 40 miles from the main road, and nearly 80 miles from the place to which he was proceeding.

Cross-examined. --- Hole-in-the-book and his tribe were on the prisoner's run when witness was returning home with the provisions; Hole-in-the-book asked for some tobacco, but witness told him he had none; he was at the out station on the preceding evening, and wanted some flour, which witness told him he could not have, but offered some wheat, if he would grind it, but he refused; witness had 21lbs. of meat with him, and some sugar, and tobacco, when he went astray; was ten days absent before he was found, and was then in a state of complete exhaustion; part of the meat was fresh mutton, and becoming blown, was given to the dog; the remainder which was in a bag with the sugar, witness dropped into the river, when climbing a perpendicular rock in endeavouring to discover his way; was not robbed by any of the natives.

Dr. **ELYARD**, late surgeon in the Navy, and at present coroner for the County of Camden, stated, that he held an inquest on the body of a black native called Hole-in-the-book, on Wednesday, the 3d of January. There was a gun-shot wound in the back part of the head, and one of the like nature between the shoulders; either of the wounds would have caused death; they appeared to have been given with buck shot; hearing afterwards that the body of he man who was supposed to have been murdered was found, witness proceeded to Greenwich Park, the residence of the prisoner, accompanied by a constable belonging to Mr. Throsby; there was no body found, but only some bones which were shewn to witness; there was part of a shin bone, a left collar bone, and a bone of the arm, produced by a man named Fuller, which witness, as also Dr. **REID**, who had seem them, had no doubt were human bones; witness, on his way to the prisoner's, met some natives with whom he spoke, and who told him that a black woman had eaten part of the arm of a man who was murdered; and even after Preston had been found, and appeared in the Court, they persisted that a man had been killed and eaten, but described him as a white headed man, or flour-headed, as they called him.

Cross-examined. --- The verdict of the Jury, who sat on the Inquest held on Hole-in-the-book, was justifiable homicide; witness saw some fat picked up, but it was mixed with red ochre, which prevented him from speaking positively to its description, though it certainly was different from any he had usually seen; the natives said it was part of the fat taken from the kidney of the man who was killed; witness has not the least doubt but some man had been murdered, and has heard so from other natives; knows that an investigation was held before the Magistrate of the district, subsequent to the inquest, and that they made a report to Government.

The report of the Magistrates, by the consent of the Acting Attorney General was then read by Mr. Wentworth, and stated, in their opinion, after a full investigation of the case, the conduct of the prisoner was perfectly justifiable, under all the circumstances, and that they themselves would have acted in a like manner.

The case closed here.

His Honor Mr. Justice STEPHEN minutely recapitulated the whole of the evidence, and observed, that the only question for the consideration of the Jury was, whether, from all the circumstances of the case, there was reasonable ground for the prisoner to suppose that a felony had been committed by the deceased native. It should never be understood for a moment, that the natives were not equally under the protection of the laws with any of His Majesty's subjects in the Colony; neither should it be understood that where there was reason to suppose a felony had been committed any person was not authorized in securing the individual without any warrant or assistance from the civil power; therefore, as he had already stated, though no doubt could be reasonably entertained, that the native had come by his death in consequence of a shot fired by

the prisoner, still the question for the Jury to determine was, whether there was sufficient ground for the prisoner to entertain a belief that a felony had been committed by the deceased, as, if so, then he was authorized in law to resort to force in order to prevent his escape.

The Jury, almost immediately, returned a verdict of Not Guilty and the prisoner was discharged by proclamation.

See also Australian, 18 May 1827. On that day it commented as follows: "We have given a long report of the trial of Mr. John Jamieson, for manslaughter, in destroying a Black Cannibal who had murdered a stockman or other servant, and who, after being laid hold of in consequence of the act the black had committed, contrived to effect his escape from his capturers. The trial caused a good deal of interest, mingled with a portion of surprise, that the charge of manslaughter should have been preferred against Mr. Jamieson, and that he should have been compelled to appear in the Supreme Court, after a Coroner's Jury had returned a verdict of justifiable homicide. It does not seem that any imputation was thrown upon that verdict - a verdict supported by the unanimous testimony of the district Magistrates, who, on being called upon, said enough to acquit the defendant, and to prove the propriety of his acquittal by the Coroner."

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

AUSTRALIAN, 23/05/1827

Supreme Court of New South Wales

Forbes C.J. and Stephen J., 18 May 1827

NATHANIEL LOWE, a Lieutenant in his Majesty's 40th regt. stood indicted for the wilful murder of a negro black of the Colony, named **Jackey Jackey, alias Commandant, alias Jeffery**, at Wallis's Plains, in the month of August last. [1]

A second count stated the deceased to be a negro, whose name was unknown.

The prisoner being called on in the usual manner to plead to the indictment, Doctor Wardell rose and addressed the Court.

``May it please your Honors -

"Before the prisoner pleads to the indictment, I feel myself called upon in his behalf to object to the jurisdiction of this Court. I do so now because I consider if he were to plead it would conclude him, and he would not be able to avail himself of the objection, which I think arises in this case, from the want of jurisdiction in this Court. Upon the record it appears that Mr. Lowe is charged with having unlawfully killed a native black called Jackey Jackey. Now, I imagine, that this Court can take full cognizance of the fact, that the native called Jackey Jackey is an aboriginal native. What that aboriginal native is, it is necessary that I should enquire, in order, by enquiry, to shew that this Court has not jurisdiction to try a British subject for an alleged offence, committed against that aboriginal native. Assuming, in the first place, he is an aboriginal native, and that he was deprived of life by the defendant, as stated in the indictment, I ask what this aboriginal native is with regard to the British Sovereign, and in contemplation of the law of England. Is he an alien enemy? he is not, because his tribe is not in hostilities with the British Sovereign. Is he an alien friend? he is not, because his tribe may be, and in fact is in a state of public hostility with individual subjects of the British Sovereign, and because no friendly alliance has ever been entered into. He is not a subject of the British King, because his tribe has not been reduced under his Majesty's subjection, and because there has been no treaty, either expressed or understood, between his country and that of the British King, and because in fact there could be no treaty between him as a member of NO commonwealth and the British King. In the next place, as a subject of England, he would be liable to be tried according to the forms of the English law, but that he is not amenable to the English laws, nor to this Court, is clear, from two plain reasons. First, he does not understand the forms of our Courts - he has not sense to comprehend the meaning of those forms by which he would be tried; and in the next place, if he did possess that

knowledge he could not have that trial, which, by the Laws of England, he would be entitled to - The New South Wales Act provides, that in all cases, trial by a jury of seven military and naval officers, shall be "the trial by jury" of this Court, in all cases - that is in all cases contemplated by the British Legislature on passing this Act. It is self evident that the Legislature never contemplated the aboriginal natives, or the trial of them, and therefore they are entitled to that mode of trial provided for foreigners by the common law of England, that is, they are entitled to be tried by a jury composed half of British subjects, and half of natives,[2] because the New South Wales Act cannot take away this right by implication, therefore the aboriginal natives cannot be tried by this Court for any offence by them committed. How then are they to be tried, if any offence be committed by them? [3] how are they to be punished? Is the divine law, the law of nations and [?] because this Court has not jurisdiction to try [?] If it be murder by the law of England to slay an aboriginal native, it would surely be murder to hang him by the judgment of this Court, for the reasons I have stated, because they have no understanding of that mode of trial to which they would be subjected, and to the forms to which they must submit. In law, a native put upon his trial for or on account of a capital or other offence, would be considered as a lunatic, a madman, how then is retributive justice to overtake one who offends against the laws of God and nature, unless it is admitted that a punishment may be substituted for the punishment of a Court of Judicature. I will assume that the aboriginal native mentioned in the information has committed a murder. Now by the divine law it is decreed, `whosoever sheddeth man's blood, by man shall his blood be shed.' Can that divine law be fulfilled, unless there be an instrument of Heaven to carry it into effect. By this court the native who committed the murder could not be tried for want of a proper mode of trial. Suppose the defendant has proved that instrument and punished him according to the divine law, and in a manner comprehended by the native and his tribe, can he be held to have committed any moral offence, much less an offence falling within the jurisdiction of this Court? For want of power in a Court to take cognizance of an offence committed by an aboriginal native, this mode of punishment appears to be the only one by which at once the divine law can be fulfilled and the three great ends of punishment laid down by writers on the law of nations accomplished. [4] The first of these ends being the reformation of the offenders, when the crime is of a nature to admit of reformation; the next is what is called caution to the party injured - protection from a similar offence; and the third being the general security by the force of the example. But none of these provisions can be accomplished, if the native escape the visitation of punishment, or be beyond the reach of all law. It is a general proposition, according to Grotius, that `the infliction of all exemplary punishments ought to be lodged in the government of every state' but he holds, as do all writers to the law of nations, that there are exceptions to this general rule, and as instances of these exceptions, pirates and freeholders are mentioned as not being subject to any `determinate Court of Judicature' and any man may draw his sword against them, and it surely is as reasonable that a similar power may be considered as lodged in an individual area with respect to offending aboriginal natives, out of the jurisdiction of every determinate Court of Judicature; otherwise they would be amendable to the avenging hand of Justice, in no shape whatever, and those who did resent their aggressions would be liable to be punished for constituting themselves a substitute for a Court of Judicature. It cannot surely be contended that hte [sic] natives of this Colony are subject to punishment at the hands of man in no shape whatever. Puffendorf, among other writers, states a case, the identical case indeed I may assume now before the Court. He states if there be persons living in a state of nature and they commit an offence against another, who comes amongst them, that that other can, by the law of nature, take upon himself to punish them. His reasoning is this - `It may sometimes happen that any private subject may assume the same right of defence which he would have had in a state of nature, for instance, if he happened to come into any place which belongs to no commonwealth, but continues in its primitive liberty of nature. But then in this case it is to be considered, whether the person be assaulted by his fellow subject, or by a stranger. For if we suppose, by the first, he is allowed the use of his own force to resist only the present danger. But the further punishment of the injury must be left to their common Sovereign, except it appears that the person who makes the assault intends to return no more into his own country, and hath left nothing behind him that can make satisfaction for the injury. But if a man be assaulted in any such place by a foreigner, he hath liberty, if he can prevail against him to bring him to the last extremities.' - According to this doctrine then the right of punishing crime is vested in the individual insured, or in his avenger. And surely nothing is more rational in regard to beings living in a state of nature, than to deal with and punish them

in a manner they can comprehend, and as they would punish another who had transgressed against them, and had fallen into their hands - surely nothing is more rational than for persons going into a strange country, even if it be a country in a state of nature, to remain submissive to, and contented with the laws and usages, such as they are of that country, into which they come. No injury can thus accrue to the natives, and no injury to civilised man. If the natives understand not the forms of civilised nations, the members of these could not on the other hand be chargeable with inhumanity, in submitting themselves to, and enforcing those forms of punishment which the barbarous nation prescribe. If then nothing more have been done by the defendant than to take the life of a man confessedly living in a state of nature, and who had shed the blood of a fellow creature, by the doctrine of Puffendorf and other writers of the same kind, he has not rendered himself amendable by that act to punishment, and consequently has not committed an offence failing wishing the cognizance of this Court. I have taken for granted that the crime of murder was committed by the native, and that having fallen into the avenging hand of the defendant, the latter becomes the instrument of divine vengeance, substitute for a court of Judicature, to prevent the offender's escape, and has acted so towards society as best to fulfil the several ends of punishment. He has in him held up an example to his tribe, that they shall not commit murder with impunity. Punishment and example being the objects aimed at, it matters not whether the offending native was deprived of his life in the heat of a conflict or deliberately. Unless this principle be admitted, and this course of reasoning assented to, and the validity of it be allowed, we must come to this conclusion, that aggression may be made by one set of people, and no power exists of inflicting punishment on them, as no Court of Justice has a power over them superior to the power of an individual. It is of consequence, I contend, in which way retribution comes, whether in the moment of conflict, or by making a solemn example to the tribe, to shew them the punishment which they must expect to be inflicted on all as guilty as the sufferer. If I had followed some great writers - great lawyers indeed, I need not have looked upon the aboriginal native as one who had taken away the life of another. Lord Bacon, in speaking of tribes of savages, less uncivilised than the aborigines of this country; in speaking of the American Indians says, that `they were to be looked upon as people proscribed by the law of nature, inasmuch as they had a barbarous custom of sacrificing men, and feeding upon man's flesh'. [5] Puffendorf does not join in the idea of the general proposition, but allows that a right of war against them exists in those who people have been thus inhumanly treated. Barbeyrac, as the commentator of Puffendorf, considers the custom so savage and so destructive to society, that all means are justifiable which are adopted for its abolition. [6] According then to these notions, if the savage for whose murder the defendant is arraigned, had been guilty of no crime, but merely indulged in this propensity of feeding on human flesh, he would be held as a being proscribed by the law of nature, and to slay him would be no offence. This, however, is only an argument subservient to the main argument, and I submit to your Honors that this Court has no jurisdiction to try one, who has committed an offence according to the law of nations, and the law of nature, but who, according to the tenor of the information, has inflicted summary punishment on an offender who could not otherwise be punished, or being punished could not be punished with so much effect… There cannot be that fair and equal measure of punishment expected to be meted out in both sides, if mutual offences be committed, and punishment by the laws of God and man is held to be mutual among all mankind.

Mr. Wentworth. - In following the lucid reasoning of my learned friend, I will quote a dictum of Vattel, which goes to provide that a nation, after it becomes properly so called, is as such bound by the laws of nations as before it settled into that shape. It becomes, therefore, necessary to go back and ascertain what are the rights of individuals before any regular or settled form of government becomes established among them. In that identical state the natives of this country are placed at present, and it is clear that while they combine in this state, the right of any individual to punish the aggressions of another, is indubitable, that right, in fact, in the exercise of it, is essential to the common safety, because if the right of punishment does not exist in the individual, it exists no where; that this is the case, I believe, all writers of the law of nations concur. By the New South Wales Act the jurisdiction of this Court in New South Wales is rendered co-extensive with the jurisdiction of the Court of King's Bench in England. It is a preliminary question then what is New South Wales? I think I shall prove that New South Wales in this act means such parts of the territory as are occupied by British subjects, and that this is the meaning of the act, I think the act demonstrates in another part. I will not suppose this Court can be ignorant of the early annals of this country, because

it must be within the judicial cognizance of this Court, as much as the battle of Hastings in the Court of Westminster - that we landed on these shores without opposition, that we took it, and remained in it without opposition, and that no conquest was ever made of it by his Britannic Majesty. I find this act as well as in the instructions of his Majesty to the Governors of this Country, that no conquest has ever been made, because if any conquest had ever been made, it is clear that it was competent to his Majesty, by virtue of his prerogative, to delegate to his Governors various powers, which he withheld from them. The King would have had the power to authorise his Governors here to make laws, and levy taxes, and not have been under the necessity to have had recourse to this legislature for any provisions - provisions of this Act of Parliament. I take it, therefore, that this Act of Parliament contains an implied legislative declaration, that no conquest has been made of this country. If this be the case then, what is our situation in this country with respect to the aborigines. To ascertain this we must refer to the law of nations. Vattel, in speaking of countries like this, says, "that when many independent families (and the natives of this colony are such) are established in a country, they occupy the soil and demesne of the country, but have no empire among them, since they do not form a political society. No person can take possession of that empire, because it would be to subject them, in spite of themselves, and no person is under condition to subject free born men, unless they submit voluntarily. The land belongs to them exclusively, and one cannot, without injustice, deprive them of their land". He goes on to shew that an establishment like that which has been formed here, may legally and properly be made, but not so as to exclude the native tenants of the soil. According to this principle, and in consonance with a legislative declaration, what was the situation of this community in taking possession of the country. It seems to me almost doubtful, from this jurist, whether taking possession of a country under these circumstances we have a right to establish empire among ourselves, and that our civil polity is for this reason repugnant to the law of nations; but at all events, our right can go no further than ourselves. We could not, according to any principles, have assumed any right of sovereignty over them; they are the free occupants of the demesne or soil, it belongs to them by law of nations, anterior to any laws which follow from human institutions, and that right is not at all attempted to be infringed by this Act of Parliament. Now, I think, on this point, taking them to be in that situation, I contend they are - I think a fatal objection occurs to the jurisdiction of this Court. By what right, I would ask, can any one of them be arraigned in this Court. Does this Act of Parliament mean that these men should be subject to the jurisdiction of this Court; if it does, how is it that so many of them, who have been known, and proved to have committed murders, have been turned out of the gaols? why they have been turned out rightfully, because they are not subject to our jurisdiction; they cannot be legally be tried for acts of this sort, nor can they be legally tried for any acts of aggression they may commit, be their character whatever they may. How is it that many a native black dashes out the brains of his child; that many of them murder their wives. How is it, I ask, that these things are daily witnessed, almost at the Magistrates doors, and no cognizance is taken of these atrocities. It is because they are independent families, and come within the class of persons named in Vattel, possessing the free demesne of the country, without any Sovereign or laws among themselves, besides the native customs which are peculiar to their own race. Now, I take it then, that these people, by the law of nature, are not subject to the jurisdiction of this Court for that reason. I take it, on the reasoning of my learned Friend, that they are men, no more subject to punishment by our code, than a set of idiots or lunatics. I ask the Court, if this savage, stated to have been killed, even supposing the Court to have jurisdictions unacquainted with our language, was put to the bar to take his trial for an offence he might have committed, whether it would not be a solemn judicial farce, the mere mockery of a trial, whether, if found guilty, he could be sentenced and executed. I say he could no more be executed on common principle, no more, I repeat, than an idiot, who in law possesses no knowledge of right from wrong, and in consequence is not responsible to human punishment. On these grounds it occurs to me a complete objection arises to the jurisdiction of this Court, because when men become incorporated into civil societies, and civil governments, they only give up the right of punishment to the Magistrate, on condition that he will afford them protection; they are co-extensive rights, and it appears to me to follow, as a necessary consequence from the inability of this Court to punish the aboriginal blacks; that it has no jurisdiction to punish any British subject, who may have committed an offence against them, be it of what nature or degree soever. With regard to the jurisdiction of this Court, another argument, I think, may be raised, to which my learned Friend has adverted. Suppose these blacks were in England, the jurisdiction of this Court is taken to be co-extensive in this

colony with that of the Courts in England, for offences committed within its limits. Suppose this native stated to have been murdered, was arraigned before a Court in England, he would have a right, according to the law of England, to demand a jury, a half of whom should be his own countrymen. If such a jury could not be found, I take it he could not be tried. Supposing he could (an impossible case) what would be the result? Here are a set of natives one degree just above the beasts of the field - possessing no understanding beyond a confused notion of right and wrong, and that is all. Men, who are certainly in such a state of barbarism and ignorance, that they could not be legally sworn in any Court of Justice. What then would be the result of a man so situated, who claimed a right which the common law of England would give him? Most likely no such jury in law was entitled to, could be by any means obtained, but if such could be found, how could they be impanelled and sworn in. A native, therefore by insisting on his common law right in England, would not be amendable to punishment. Even supposing him to be viewed as an alien, he would be an irresponsible person and might commit any act within the jurisdiction of that Court, without incurring the slightest punishment for his offences. An Englishman, in this case, would therefore be bound to take the punishment into his own hands, seeing that no redress could be had in any other way. But my learned friend has very properly stated his difficulty to find out what character to give these people. He has contended they are neither alien friends, nor alien enemies, nor subjects. That they are not subjects, I think the argument on this head has gone a long way to prove - that they are not alien enemies is also clear, from the arguments of my learned Friend - that no declaration of war has ever been made against them - that they are not alien amis is equally clear, from this circumstance, that there is no right of empire among them, no Chieftain in a condition, from their vagabond state, to make a treaty with the head of any civilised government. If there be no public compact of this sort, there can only exist a tacit compact among individuals, which goes no further than to say, we will be at peace with you if you keep peaceable with us, and that compact would be sufficient to authorize the gentlemen at the bar to punish any of these natives - who violated this compact, in any way he might think fit. It appears to me that the act charged in this information is an act over which this Court has no jurisdiction. I therefore humbly submit this trial cannot be proceeded with.

The Chief Justice ---- The objections which have been taken to the jurisdiction of this Court, in the present case, rested on two grounds. [7] As to those which rest upon the abstract principles of the law of nations; the Act of Parliament has put an end to them. How far it is proper to pass an act, taking in these territories, and naming them the territory of New South Wales, and establishing therein our own rules and ordinances, is a question not for us to entertain. It is sufficient for us to say that the territory is recognised as the Colony of New South Wales. This is a judicial fact which comes within our knowledge; and beyond that we cannot go. It is admitted that the law of nations is only the law of the land; so far as they owe their whole force to adoption. As to the law of nations, we take them no further than they are incorporated in our own code. The Court looks at the Act of Parliament only. If the Act of Parliament has recognised a sovereignty over this country, and recognised the application of English law here, we must look to the British law as established here de facto; and the Court is of that opinion. [8] The next thing to consider is whether the place, where the offence for which the prisoner stands charged is said to have been committed, is within the jurisdiction of the Court. It is stated to be at Wallis's Plains, in the district of Newcastle, in the Territory of New South Wales. It is on the Information that the individual charged is a person bearing his Majesty's Commission, and is an officer in the 40th regiment. He then is personally within the jurisdiction of this Court. The offence charged against him is that of having taken away the life of a native; now, this native must be considered, whatever be his denomination, a British subject. If not to be an alien friend, or an alien ami, in any case he is entitled to lex loci, and it is only under peculiar circumstances he can be excluded from that right. The question then resolves itself into this, whether this case comes under the New South Wales Act. Now, this Act of Parliament gives this Court jurisdiction to try all offences as in England; [9] and prima facie, this comes properly before this Court. The Court then has jurisdiction. As to the form of mode of trial, that we can only try according to the law. [10] The present Act is too explicit as to the mode of trial; it points out a trial by jury of a certain number of officers. I have also less difficulty in coming to a conclusion on this point, as the questions which have been raised appear on the face of the record itself. I therefore do not lay it down with that force, as to say I am not open to conviction, if any other arguments may be raised in a subsequent stage of the proceedings, if rendered necessary. With the present impressions on my mind, I do not

see any grounds to prove the want of jurisdiction of this Court, so as to call on me to stop the case. [11]

Mr. Justice Stephen coincided in the opinion given by his Honor the Chief Justice. There were no facts upon which to found a belief that the Court had not jurisdiction in the case before it. The information charges the prisoner, who is to be put on his trial, with killing a negro of the colony - a native who is under the protection of his Majesty. Nor was there any fact from which the Court were to infer but that he was a subject of his Majesty. He, his Honor, felt very happy, on the present occasion, that no necessity existed for entering upon a discussion into what was, and what was not the law of nations themselves. There were such contradictions with writers with respect to the situation of people living in a state of nature, that it was difficult to arrive at any fixed opinion. His Honor was decidedly of opinion that the natives of this colony were within the protection of the laws; and that there appeared no sufficient grounds to arrest the trial.

The plea of Not Guilty was then received.

The Acting Attorney General stated the case for the prosecution; and proceeded to call witnesses.

THOMAS FARNHAM sworn, I have been a constable in the employ of the police at Newcastle. In August last I was a stationary constable at Mr. M'Intyre's in that neighbourhood, about seventy miles from Wallis's Plains. In the month of August last a native black was apprehended by Dr Little and placed in my charge, with directions to convey him to Wallis's Plains. I did not know him; they called him Jackey Jackey. I proceeded with him to the old Military Barracks at Wallis's Plains, and gave him up in charge of the military who were stationed at the barracks. I arrived there in the evening. It was shortly before the Quarter Sessions at Newcastle. He was placed in the old Barracks and left there that night, with his handcuffs on; he was chained to a post in the side of the fireplace. It is a hut boarded and flagged. I left him there and went away to report what I had done to Mr Echford, the chief constable. I stopped at the house of one Smith's, at Wallis's Plains, about a quarter of an hour the same evening. About six o'clock the next morning I went to the barracks and saw the black still chained there. Two soldiers were doing duty at the barracks at the same time. About seven o'clock two soldiers took him to government house, where Mr Lowe was then living. I followed them to government house and heard Mr Lowe order four soldiers to take him to the rear of the government house and shoot him. They took the man about a quarter of a mile off in the bush. The soldiers had their muskets with them; they placed him by the side of a tree, three of them fired at him. I was standing close by; he fell and the fourth soldier who had not yet discharged his piece, went within a few yards of where the black lay and put a ball through his body. Mr Lowe, the four soldiers, and myself, were the only persons present that I saw; there might be others in the bush looking on. The mounted police were at government-house at this time. I went up to the native, he was wounded in the jaw and in his head; he was quite dead. We all came away and left him there.

Cross-examined by Dr. Wardell: Witness was present at the murder; he left the spot immediately after he saw the man dead, and set off for Newcastle the same day. On reaching there he reported what he had seen relative to the native to Mr Muir, the chief constable. He had some despatches to convey to several persons; cannot recollect to whom he carried them. First went to Martin's; brought some despatches from Mr Little and some from Eckford. I'm quite certain that he told Mr Muir of what he had seen it might be an hour or two after he got to Newcastle. Does not recollect whether he took the dispatches to Mr Muir or the Commandant. Some letters he put

in the post office. Does not know whether he told Mr Muir that evening or not. Always spoke the truth when sworn. Mr. Close asked about this business. Witness denied knowing anything about it then. Does not know whether he was sworn or not. He denied knowing anything about the black fellow. Mr. Close took what he said in writing. [12] He can write his own name; but he does not always do it. Sometimes makes his mark. Was afraid to disclose then what he knew about the murder. Cannot say he was afraid of being hurt by any person for telling what he knew. He never told Mr. Muir that he had loaded a musket, and let fly at the black himself. He has been punished for several robberies which were laid to his charge.

By the Court, - Witness called on the house of Mr Martin on his way in Newcastle. Did not tell him what had taken place; he had no motive for withholding any information from Mr. Close the magistrate. It was at the instance of Mr Close that he made the statement he did. He was called upon to state what he knew about the business. He was first asked by Mr Close if he knew anything about the affair, and he said no. He believes he was sworn, has not spoken the truth on oath both times. Speaks the truth now.

Wm. SALISBURY. - I lived at Wallis's Plains in August last. I recollect a black fellow being brought in custody there by a man called Tom. [The witness was told to look round to identify the person.] The last witness was the man. I was sitting in my hut and saw two soldiers pass by with the black in their charge. They took him towards government house, as soon as they came there saw him turn off in a different direction with some soldiers. Cannot say how many; there were a number of them. Mr Lowe was of the party. They took the black to a hollow behind government house, where they tied the man to a tree, was not near enough to see if any muskets were levelled at him. I was about fifty yards off. I heard the report of three muskets; and almost immediately after heard the report of a single musket. Mr Lowe was there. To the best of my knowledge Lee was one of the soldiers who fired, but can not tell the names of the others. I went in after this and finished my breakfast. A short time after a labourer named Newton came to the hut and ordered out two men to assist in burying the native. Does not know the name of this black; but understood he came with Tom, the constable, from Patrick's Plains. I assisted in burying him. He was wounded in the cheek and through the head; he had been bleeding a good deal.

Cross-examined by Mr. Wentworth. - I was fifty yards off when I saw the firing take place. I do not know the day of the week or month that this occurred. The constable called Tom might have been present at the time; but I did not see him. If he had been there I think I could not help seeing him. I was once tried before the magistrate of Wallis's Plains for stealing a musket; upon this charge I was sentenced to be transported from there to a penal settlement. I was sent up to Sydney and put in the gaol, preparatory to being sent away some where. Wallis's Plains until late years was a penal settlement. I was transported to Wallis's Plains by the late Supreme Court for robbery. I arrived in the colony originally a prisoner. I was convicted in England of robbery, and transported here in consequence. I was never punished but once at Wallis's Plains, which was for a robbery; and that is the reason why I was in confinement in the gaol. I never mentioned anything about the affair of the black fellow until I was put into Sydney gaol.

Wm. CONSTANTINE. - I am employed as a messenger at Wallis's Plains. I remember about the middle of last year a black fellow, who was called Jackey Jackey being brought to the Plains by a constable. I saw Mr Lowe and Sergeant Moore standing together, and talking with the black man, near the government-house. I did not hear the conversation. I had to go 200 yards for water; when I returned with the

water the black man, the sergeant, nor Mr Lowe were there. After I had put the water down I was going to my hut, when Sergeant Moore called after me; he desired me to get a pick, axe and shovel; he asked me where Jones was; he told me to get someone with me to assist in digging a grave. I saw one Thomas Newton, who volunteered to go with me and dig the grave. He went to where the man was shot; about 200 yards from the government-house. The black man was lying between two saplings; he was dead and was bruised on his face and head. He had a red shirt on. He was put into the grave by Newton and one McKoy. Some time after this a man of the names of Jones, who was in the hut with me, told me there was to be an enquiry and begged me to say nothing about it. I told him I would not unless I was put upon my oath. Some time after this Jones and another man disinterred the body of the black fellow, and put it into a bag, with which they walked away. This was done in the night time; the body was taken towards a creek. I do not know who it was that asked them to take up the body. They asked me to help them while I was there; but I felt myself sick from the decomposed state of the body and stood at a distance from the grave.

Cross-examined. - I was present when the black was buried and taken up; the body had lain in the grave between three and four months, it was rapidly advancing to decay. I agreed with Jones to deny this, unless I was put on my oath. I did deny it once to Dr Bowman; and I wish I had continued to do so. I was of no trade before I came to the colony. I was transported here; and have been punished several times while I have been here.

The case for the prosecution being closed by the Acting Attorney General.

Dr. Wardell. - I submitted that there was no evidence in the case to go to a Jury. All the witnesses who had been examined, acknowledge themselves to be accomplices; their testimony was unsupported by any other evidence whatever.

The Court. - That is a principle of law which the Court does not think falls within the present case.

Counsel for the prisoner then called witnesses -

Mr. **M'LEOD** - I know a man named Salisbury, who has given evidence in this case; he bears one of the worst characters I ever heard of any man. I would not believe him on his oath. When a man was charged with stealing a gun-stock, he swore he made it for the accused; though it afterwards appeared that he himself had stolen it. I have heard the man declare today in Court that he never was punished at Wallis's Plains. I know he has been in the gaol gang there, besides other punishments.
Mr. Francis Williams - I am clerk to the magistrate at Newcastle. I know the witness Salisbury to have been repeatedly punished, and placed in the gaol gang at the settlement for thefts. I recollect when Newcastle was a penal settlement, Salisbury was then one of the worst characters in it.

Mr. **JOSEPH JONES** - I am brickmaker, living at Parramatta, I know Thomas Farnham who has been examined this day, I consider him a loose bad character, and I would not believe him on his oath.

LUKE ADDY - I have known Thomas Farnham for seven years past. I believe he is now free by servitude. I always considered him an idle bad character; his oath is not to be depended on.

Wm. TURVEY - I am a constable at Newcastle. I would not believe Thomas Farnham on his oath. I know him to be a notoriously bad character.

THOMASS KELLY - I would not believe Thomas Farnham on his oath. I employed him a little time ago to purchase some tobacco for me. The money I gave him for this purpose he spent; and on being applied to for the tobacco, denied receiving the money from me.

Wm. JONES - I was examined at the police office lately relative to a black man. I know a man named Constantine; he is now in Court. I never assisted him to take up the body of any dead black; he never asked me to do so. I formerly lived in the same hut with Constantine at Newcastle. I never had any conversation with Constantine on the subject of a black being killed there.

JAMES NEWTON deposed to the same effect.

A deposition made by Thomas Farnham, the first witness called by the prosecution, before Mr. Close at Wallis's Plains, was put in and read to the Court. The substance of the deposition was directly opposite to the evidence given by him before the Court.

Counsel for the prisoner here closed the defence.

The Chief Justice summed up - This was an information filed by the Acting Attorney-General against Nathaniel Lowe, of his Majesty's 40th regiment, for an alleged murder, stated to have been committed on the person of a native called Jackey Jackey, at Wallis's Plains, in the month of August last - there are two counts in the information, but they resolve themselves into one general charge - the first count states the deceased to be known by the various names of Jackey Jackey, alias Commandant, alias Jeffery - the second count described the deceased to be a person whose name is unknown - this is, Gentlemen, a case of some peculiarity of circumstances which must not pass over - it is one depending entirely on evidence - and the question will be, how far the case has been established? I will assume a general proposition - in all cases that the natives of this country (while they treat this soil) are entitled to the protection of our laws, unless from circumstances it be shown they have thrown themselves out of that protection. [13] It is sufficiently laid down in the information, that the individual named as a negro is entitled to the protection of the law, which will not allow another to lay violent hands on one of them, much less to destroy him. There is another particularity I would just mention - the person who stands charged on this Information is of military profession - Gentlemen, you are all military men - and I am sure I need not have to impress on your minds the obligation you are under to your country in the discharge of the important duties you are vested with as jurors - you will not permit your minds, unguardedly, to stray from the evidence which has been adduced before you, nor be influenced in any way from any previous impressions you may have entertained respecting the case, to the prejudice of the prisoner [14] - but, Gentlemen, I will now draw your attention to the evidence itself. This is a case entirely in your province to determine; for it rests entirely on the credibility of the witnesses. It is not upon the score of competency - for then it would have been our duty to stop the case without putting it to you. Some legal points have been raised, as to their competency, but I think them set aside, by referring to what the witnesses have stated - they were merely lookers-on, and took no further interest in the matter - their testimony is, however, liable to this objection, they have told different stories at different times - the principal witness is one Thomas Farnham - this man tells a very plain tale, and appears to make out a plain case - but there are various doubts raised as to the credibility of this witness - that this man has a very bad character, I take there can be no question. A number of persons (four or five) have deposed that they would not believe him on his oath, from the general bad character he bore - but his evidence is open to a much greater objection - he has himself stated that he was called on by Mr. Close (a Magistrate), to say on oath, what he knew about this firing, and he then denied - this statement, then, is completely contradictory with what he has said today. It would, I think, hardly be possible to make out a clearer case of perjury in a witness - he even admits the fact of perjuring himself; therefore his testimony, if it were single testimony in this case; would be sufficient to call on

the Court to stop it.[15] But then, his testimony is corroborated by a witness named Salisbury - in the main he corroborated the statement made by Farnham - nor could I find a single circumstance that this witness mentions which has not also been mentioned by Salisbury - now this witness is also liable to the same objection. Mr. McLeod speaks to this man's general bad character; but the particulars which follow, his being convicted of perjury, are conclusive - this is a strong circumstance, and I will put it to you, Gentlemen, whether a witness so situated is worthy of your belief? It is also a strong circumstance that this man tells you he never mentioned the subject to any one, but a man of the name of Natty, until he was in prison. Looking therefore at the evidence of Salisbury and Farnham, and the one does not say a single thing more than the other, I put it to you if it does not look like evidence capable of having been made up. I express to you no opinion on the case; it is entirely one for your sole consideration. Then, there is another witness called by the prosecutor, and that is Constantine - this evidence does not state so many particulars as the other two, but he speaks to a new fact. Now, he admits himself that he denied knowing any thing about the matter in question - this is an extraordinary circumstance - and he then goes on to state a particular fact - the disinterment of the body of the dead black. He says one Jones was present and assisted him in digging up the body - but this man and another of the name of Newton are called in the defence, and they deny what Constantine has said, relative to this particular; there is, however, one exception to be made to the evidence of these two men, inasmuch if Constantine's story be true, they were present, aiding and assisting in disinterring the body - you see then, Gentlemen, the three witnesses for the prosecution labour under a considerable weight of objection - at the same time something extraordinary appears in this case. Respectable evidence might have been called to negative particular parts of the transaction which is stated to be truth. There was Martin - he was in no way implicated. There were Serjeant Moore, Mr Muir and others similar situated with regard to this case. Why were not these persons produced to contradict the various statements that have been put forth? Why they have not been called can only be with us a matter of conjecture, and therefore not fairly to be considered to the prisoner's prejudice. We must take the evidence before us, and see how far that evidence has made out the case, and how far that evidence is entitled to belief. If the prisoner has committed the offence imputed to him, then it is for me to tell you, gentlemen, he has broken the laws of this country. If the evidences examined against him are to be believed, then he is guilty of the offence; but if on the other hand you do not believe them, then the case is not proved, and you will give the prisoner the benefit of the doubt you entertain of the credibility of the witnesses.

The Jury retired for about five minutes, during which time the utmost impatience was manifested by the auditors in Court to hear the result. The Jury having returned, and silence being restored, the Foreman delivered a verdict - NOT GUILTY.

Loud and general applause accompanied this announcement of the verdict. The numerous friends of Lieutenant Lowe crowded round to congratulate him on the happy termination of the trial. A second burst of applause was given as he triumphantly left the Court. [16]

Notes

[1] This trial was also reported by the Sydney Gazette, 21 May 1827. Dr Wardell and W.C. Wentworth acted for the prisoner, and W.H. Moore, the Acting Attorney General, for the crown. The Gazette gave Jerry as one of the aliases of the victim, not Jeffery. For some of the background papers to this case, see Miscellaneous Correspondence document numbers 10, 14, 14a, 15, 15a, 15b and 18.

On 4 September 1826, eleven landholders at the Hunter River petitioned the governor for military protection against hostile Aborigines. Attorney General Bannister advised a declaration of martial law, which Governor Darling refused. Darling thought that the underlying cause of the trouble was the conduct of the stockmen, not the Aborigines. See Darling to Hay, 11 September 1826, Historical Records of Australia, Series 1, Vol. 12, pp 574-578. He did, however, send troops: see Darling to Bathurst, 6 October 1826, pp 608-623. (This despatch included background documents from the period of this case.)

Darling first reported the shooting of Jackey Jackey to Earl Bathurst on 6 October 1826 (Historical Records of Australia, Series 1, Vol. 12, 623-628.) The governor ordered an inquiry, and in the meantime told Bathurst that "There can be no doubt of the criminality of the Natives, who have been concerned in recent outrages; but, though prompt measures in dealing with such people may be the most efficacious, still it is impossible to subscribe to the massacre of prisoners in cold blood as a measure of justifiable policy" (p. 623).

The depositions from the inquiry are at pp 625-628. The soldiers who gave evidence all said that three natives were shot in attempting to escape. Lowe himself said that the shootings were in accordance with his orders to shoot those whom the soldiers knew to have committed atrocity, where there was no alternative way of stopping them from escaping. The three had been tied by ropes but managed to get free. One of the soldiers said that one of the shot Aborigines was later "hung up by the Men of the Farm as a terror to the other Blacks." See also Historical Records of Australia, Series 1, Vol. 13, p. 177, for Bathurst's initial reply.

Some of the original correspondence is in the New South Wales Archives Office, 5/1161 (Miscellaneous Correspondence Relating to Aborigines). A letter from McLeay, the Colonial Secretary, to Captain Allman, Commandant at Newcastle, 28 August 1826 (p. 64) shows that there were three Aborigines shot by the Mounted Police under the command of Lieutenant Lowe. The inquiry, however, only concerned the killing of one man: McLeay to Scott, 9 October 1826, p. 72. (The same reference contains a lengthy report of conflicts between Europeans and Aborigines in the Hunter district, written in 1826: pp 42-49. The following pages provide the background to this case against Lowe. One of the first hints of trouble was a reference to an Aborigine having been killed in "peculiar circumstances": p. 60.)

Darling reported this case about the killing of Jackey Jackey to Hay on 23 March 1827, stating that the initial inquiries were unsatisfactory. The first inquiry was poorly conducted by the local magistrates. The Chairman of Quarter Sessions was then sent to the district, but was shipwrecked on the way. Darling said that the matter was then placed in the hands of the Acting Attorney General (W.H. Moore), who was sent to Wallis Plains. Darling continued: Moore "is endeavouring to find one or two individuals, whose testimony he understands would be important; but I strongly suspect that they will be kept out of the way, the inhabitants of every class being at least indifferent to the fate of the Natives, and unwilling that any one, that has been actuated by the same feelings, should be made answerable for his conduct." In the meantime, Lowe was detained in Sydney, and the Executive Council repeatedly discussed the case. The inquiry was suggested by Forbes C.J. "There has been no desire on the part of Government to screen the party, though circumstances, which could not be controlled, have prevented the enquiry from being prosecuted with the success which was desired. The matter being in the hands of the Civil Power, I have of course abstained from interfering with the Party as Military men". In this despatch,

Darling was responding to criticisms of him by the Monitor. Source: Historical Records of Australia, Series 1, Vol. 13, pp 179-180; and see p. 317.
Darling reported the case to Bathurst on 4 June 1827 (pp 399-413), enclosing copies of Moore's reports and letters, and the depositions at the magisterial inquiry. Moore complained that he "was not a little mortified to find that I, who was an entire stranger in the neighbourhood, was obliged to give up all hopes of having any assistance rendered to me by a person, who, from his local knowledge of the place, was so capable of giving it, and which, however unpleasant it might be, I conceived it was his duty to do without hesitation" (pp 400-401). He was referring to a magistrate in the Wallis Plains district, Mr Close. Close thought that he was under investigation, rather than Lowe. One witness, Robertson, declined to answer a question whether he had discussed the case with Lowe. The cover up was broad: "there was a general fear in the neighbourhood of any one acknowledging what he knew". There was an unwillingness to talk, from the lower class of persons to the higher. This leaves the strong impression that Lowe got away with murder.
[2] The Sydney Gazette, 21 May 1827, gave this jury the name of de midictate linguae.
[3] The Sydney Gazette, 21 May 1827, reported Wardell as saying here: "Was the Divine law, and the law of nations, to be violated with impunity by an aboriginal native, in a state of nature, because he could not be tried?"
[4] The Sydney Gazette, 21 May 1827, said that Wardell attributed this to Puffendorf.
[5] This apparently gratuitous reference to cannibalism may have been influenced by R. v. Jamieson, 1827, which was tried only two days earlier.
[6] The Sydney Gazette, 21 May 1827, recorded Wardell's argument here as follows: "Puffendorf did not go quite so far; for, he says, that if they only eat those who die, he does not see the offence; but Lord Bacon is followed up by the commentator, Mr. Barbeyac, who contends that even had the natives committed no offence, but possessed that propensity to eating human flesh, they would justly be proscribed, that an exterminating war carried on against them would be justifiable and destroying one of them would be no more than destroying that which was offensive to heaven. Puffendorf also, speaking of civilized nations said, that where a party was a[g]grieved, he ought to appeal to the public Magistrate; but when this was done, and no redress was afforded, where was the offence in the individual taking the law into his own hands. The main strength of the argument which he urged was, that the Court had no jurisdiction to try one who committed no offence, according to the law of nature, but who had put himself amongst a tribe of savages, had submitted to their laws and usages, and only did that whilst among them, which they might have done to him. For these reasons, therefore, he submitted, that there was a want of jurisdiction in the Court; because the prisoner had merely done that which was recognized to be lawful according to the notions of the tribe; and also, whether the act was lawful or not, it was still without the jurisdiction of the Court, because there was not that fair measure of punishment on both sides, which was contemplat[e]d by the British law. This member of a savage tribe having taken the life of a British subject, according to the laws of nature, his life was justly forfeited."
[7] The Sydney Gazette, 21 May 1827, said here: "An objection has been taken to the jurisdiction of the Court on two grounds, namely, the abstract principles of the laws of nations, as applied to the subject before us, and also as to the Act of Parliament not giving jurisdiction."
[8] The Sydney Gazette, 21 May 1827, said here: "The lex loci must therefore be our guide."

[9] The Sydney Gazette, 21 May 1827 recorded this as: "This Court, like the Court of King's Bench, in England, has a territorial jurisdiction."
[10] The Sydney Gazette, 21 May 1827 recorded this as: "As to the objection that the Court can only try certain cases according to the common law, I apprehend the Act has do[n]e away with that by prescribing a particular mode of trial in the Colony."
[11] Given his background as Chief Justice of Newfoundland, it is not surprising that Forbes C.J. decided this way. In 1819, while Chief Justice there, he chaired a meeting which aimed to achieve reconciliation with the native people who periodically visited Newfoundland: Le Guyt to Leigh, 3 June 1819, Provincial Archives of Newfoundland, GN 2/1/30 Vol. 30, 1819, p. 162.
[12] The Sydney Gazette, 21 May 1827, said here: "A deposition given before Mr. Close, in which the witness denied any knowledge whatever of the transaction, was put in and read."
[13] The Sydney Gazette, 21 May 1827 recorded this as: "He would at once assume it as a general proposition, that the natives of this country were within the protection of the British laws, unless it were shewn, by some circumstance in proof, that they were thrown out of the protection of those laws, which otherwise prohibited any person from laying violent hands on, much less destroying them."
[14] The Sydney Gazette, 21 May 1827 gave a different account of this: "Another peculiarity in the case was, that the person charged was a Military Officer, bearing His Majesty's Commission, as likewise were the Jury, with the exception of one gentleman, who was an Officer in the Navy. He did not point to that circumstance in order to remind the Jury of the obligation which they were under as to their oaths, but to entreat of them to divest from their minds all feeling and prejudice, and to consider the case of Lieut. Lowe, of His Majesty's 40th Regt. differing only from any ordinary case of the same nature, so far as he was proved innocent."
[15] According to the Sydney Gazette, 21 May 1827, Forbes C.J. said here that Farnham had offered no explanation for the apprehension he said he felt, which would have been some justification for his inconsistent testimony.
[16] Apparently, the British army was disturbed by this case. The Duke of Wellington requested a copy of the trial notes: Chief Justice's Letterbook, 1828-1835, Archives Office of New South Wales, 4/6651, p. 158.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 13/08/1827
Supreme Court of New South Wales
Stephen J., 10 August 1827
FRIDAY, 10. – **JOHN KELLY** stood indicted for manslaughter, in causing the death of **JOHN PARKER**, at Windsor, on the 10th of July last.

From the evidence of several witnesses, it appeared that the prisoner was provoked into a pugilistic combat, by the deceased, about four o'clock on the day laid in the information, the termination of which was a violent fall, and being unable to rise from the ground, the deceased was carried into the kitchen of Mr. **BEASLEY**, at Windsor, where he was placed on a bed, and expired shortly after midnight. Dr. **ALLEN**, on the medical establishment at Windsor, examined the body, but no external mark of injury appeared. He afterwards proceeded to open the deceased, and found the lungs distended, and hard with blood, in consequence of the rupture of a blood vessel. the rupture was in the substance of the lungs, so as to fill the air-cells, and prevent respiration. There was no extravasation outwardly, and the contents of the thorax had

otherwise a healthy appearance. Dr. Allen further stated, that such a rupture might be occasioned by various causes; as from drinking, hard-riding, previous disease, the deceased's own exertion during the fight or any other cause which wou[l]d excite the arteries to over exertion, or increase the circulation. It might also have arisen from blows or falls; but, in that case, he should suppose there would have been some external marks.

Mr. JUSTICE STEPHEN summed up the evidence, and whilst he lamented the prevalence of such practices, as that in which the deceased had come by his death, or that any encouragement should be given, by people of education and reflection, to an act which too often terminates in fatal consequences, still he was of opinion, there was nothing before the Court to show that the fight in which the deceased and the prisoner were engaged, was other than a trial of strength and skill in boxing, without any previous ill-will existing between the parties, or that any unusual or unfair proceeding had taken place in the course of a transaction which had ended so unfortunately for the deceased. The Jury found a verdict of Not Guilty, and the prisoner, after an admonition from the Learned Judge was discharged by proclamation.

See also R. v. Francis, 1827.

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

MONITOR, 24/09/1827

Supreme Court of New South Wales

Forbes C.J., 21 September 1827

SUPREME COURT, FRIDAY. - Before the Chief Justice. The Criminal Court sat specially this day, for the trial of **GOUGH, WATSON, and MUIR, or MOORE,** three of the Mutineers at Norfolk Island; who were now indicted for the Wilful Murder of Lance Corporal **ROBERT WILSON**, at Norfolk Island, on the 25th day of Sept. 1827. [1]

THE witnesses called to substantiate the Charge, were Serjeant **JOHN BOYLE**, and Privates **EUSTACE**, and **JACKSON**, from whose testimony the following facts were collected. On the morning of the day specified in the indictment, the witnesses, in company with the deceased, whose duty it was to escort the invalid prisoners to and from the Hospital, proceeded from the Settlement to the Hospital; on their way thither, the Serjeant stopped to adjust some part of his dress; on proceeding to overtake his comrades he saw the three prisoners, together with one **WEAVERS** (who died on his passage up to Sydney,) standing near an old ruin. They rushed on the soldiers, crying out ``stand! stand or we'll blow your brains out.'' These expressions were not proved to have been made use of by any one in particular, but appeared general. Gough rushed on Eustace, putting a pistol to his face; he was in the act of turning round, when Gough discharged it; the contents grazed his face; he attempted to retreat, but was followed by Gough; he fell in the long grass; was overtaken, and received some blows from the pistol on the head; he got up and after a struggle, succeeded in wresting the weapon from Gough's hand; Moore then came up and stabbed him in the shoulder. He (the witness) was then conveyed to the Gaol and there confined, until released by the Commandant. On the cross-examination of this witness, he declared that he did not see the deceased either shot or stabbed. Jackson spoke to the same effect; on his cross-examination he admitted having heard that one Jackson (a prisoner) had been alleged to have perpetrated this act. Serjeant Boyle deposed to having seen Watson fire at Wilson; (spoke positively as to the fact) the latter fell instantaneously, without uttering a single exclamation; his motions indicated the

agonies of death; he was quite hearty previously; turning round, Watson said ``I've done one b---'s job,'' and addressing the Serjeant, added, ``You - you ought to have been first,'' at the same time discharging a pistol at him, (the Serjeant) which missed him. Saw Moore go to the body of Wilson, raise a bayonet over his head, and plunge it in the apparently lifeless body. Weavers immediately came up, and presenting a knife at his (the Serjeant's, breast, said, ``You --- if you move I'll drive it through your heart;'' did not see Gough commit any particular act; he was among the others; saw Wilson after his death; there were two wounds in his body, one of a pistol-shot near the spine, the other a bayonet wound. The Surgeon of the Settlement, Mr. Busby, examined them; Mr. B. was not in attendance; he probed them; they appeared to be deep. The Attorney-General expressed himself greatly amazed that notwithstanding the Surgeon had been subpoenaed, he had not proceeded to Sydney.

MR. WILLIAMS appeared as Counsel for the prisoners. In answer to an interrogatory to one of the witnesses by Mr. W. he (the witness) stated, that it had been said that Weavers, the fourth prisoner, died on his passage up, of hardship; could not say positively that it was of starvation. Heard the prisoners on the Island say since the mutiny, that it was their object to have taken the Island, until a vessel came from Sydney, and then to capture her. The learned Counsel questioned Serjeant Boyle as to whether there were any women on the Island, and was answered in the negative. He observed, that he was instructed that the men's minds (most of whom were transported for life) were in a state of irritation and madness, and that crimes of horrifying nature existed there. The learned Counsel then proceeded to take an objection, on the ground, that the information did not set forth the crime with that scrupulous certainty which was requisite, and further, that what was set forth, had not been substantiated, there being no proof of the deceased having been wounded by the prisoners, or that the wounds caused his death. The absence of the Surgeon was so material a circumstance, that had he anticipated his non-appearance, he would himself have subpoenaed him. The Chief Justice overruled all these objections, and the prisoners were called on for their defence. Watson and Muir offered nothing, but Gough addressed the Court nearly as follows:- (Gough is a man of colour, tall and thins, with (when his mind is at ease) a frank, open, mild, but enterprising bold vivacious countenance, evincing a martial spirit. He has had hair-breadth escapes without number, and his life would be a more extraordinary tale than half those invented in Novels. His language was tolerable, his voice clear, his manner energetic, and he rivetted the attention of a crowded Court.) His defence consisted of a detail of the hardships and privations endured at Norfolk's fell Isle, and which account, as the late Commandant, Captain Donaldson, was present in Court, might virtually be said to challenge contradiction. The Prisoner set out by stating, that he had been at every penal settlement in the colony, and had been very severely flogged at various times; Liberty was always what he had ever sought and only sought; that he never shed blood; nor would do so wantonly; that he had not done so on the present occasion. He had, until a very short time previously to the mutiny, been personally commended by the Commandant, as the best man on the Settlement, and was (to use his own phrase) a ``a fancy man'' of Captain Donaldson. But that at length he was charged with stealing a gill of paint, which brought down the ire of the latter, who then changed his conduct towards him, and upbraided him for having read Catholic prayers to other of his more ignorant fellow-prisoners. He observed, that the ration allowed the men at Norfolk Island, was a pound and quarter of badly baked bread like putty, and a small portion of salt meat, OFTEN PUTRID, to cook which, time was not allowed, so that it was frequently eaten raw; that they were often in a state bordering on starvation. at the

same time there were hundreds of wild pigs and goats running about the Island, with an abundance of grapes, to touch a bunch of which ensured fifty lashes. That for this infliction of Corporal punishment, a stage three feet from the ground had been erected, in order to give the flogger more power over the men's backs. They were worked from daylight, till the stars rose at night; were often urged on to extraordinary exertion by the Commandant, who would promise, that if such and such a job were completed, they should have liberty to go into the bush, and get a supply of food. That having finished their task, the Commandant broke his word, and in one instance diminished the indulgence they had previously enjoyed. The prisoner proceeded to describe with great minuteness, the petty tyranny, as he conceived it, of the Overseers, who, he said, by their villainy greatly increased their miseries. ``So hopeless and wretched'' (said the ``unhappy culprit) ``is our conditions at the Island, that ``plans have been projected, to commit murder, IN ``ORDER TO GET UP TO SYDNEY TO BE HANGED. As for ``myself, though a stout-hearted man, I have often ``wept with despair.'' He had at an early period acquired a bad name in this Colony, and not all his endeavours afterwards could releive [sic] him from the consequences of a bad character. Here the prisoner was interrupted by the Chief Justice, who observed, that he could not allow him to proceed any farther in that line of defence. His Honor then proceeded to charge the Jury, recapitulating the evidence as detailed and explaining the relative situation of principals in the first and second degree, as the prisoners at the bar were described in the information. With regard to the objections raised by the Learned Counsel, he had looked over the informations, and did not consider them substantial; if however he had looked them over too hastily, it was in his power to have recourse to them again, and prevent his present decision on being turned to the injury of the prisoners. Upon a review of the facts addressed in evidence, it did appear to him, that the prisoners at the bar were actuated by one common design, of which the result was, the death of Wilson. The evidence of the Surgeon would have been more satisfactory, and might possibly have benefited the prisoners. Whenever men set out with a community of design, they were all equally guilty of its consequences. If the Jury could conscienciously [sic] arrive at the conclusion, that they were aiding and abetting each other, they would find a verdict accordingly. The Jury retired for a few minutes, and returned a verdict against the whole of Guilty.

THE CHIEF JUSTICE proceeded to pass sentence of Death upon the prisoners. ``John Gough, Edward Watson, and John Moore, you have been convicted of the Wilful Murder of Robert Wilson. The circumstances under which you acted were deliberate; that you intended to kill the deceased in particular, may not appear, but you set out with an intention to murder some one. Your's is indeed an aggravated case. I shall say a few words upon the defence set up by one of you. Your life, you acknowledge to have been one uninterrupted series of crime; you describe all the penal settlements; unquestionable proof of the committal of some acts of violence of which you have been guilty, and for which you were sent there. It is within the recollection of this very Court, the narrow escape you have before had of your life; well would it have been for you, had your race then been run, before you had brought upon yourself the blood of a fellow creature. With respect to the charge of harshness against the Government, there is nothing to substantiate it. Extreme severity cannot be urged, when the Court knows, that it is only for the deepest crimes, which twice, and thrice, and even four-times-convicted culprits are ever sent there; the object in sending such is to correct crime, and to make an example; and it is a happy thing that a place has at length been found, where this object can be effected. Can you imagine that your are sent there to indulge in the luxuries of life? the conduct of the

Authorities is far from deserving your reproach; it appears salutary and good, that a check should be put to crimes such as yours. It now becomes my duty to pass that sentence on you which the law awards; which is, that you John Gough, that you Charles Watson, and that you John Moore, he taken from hence to the place of execution; and that you there be severally hanged by the neck until your bodies be dead, and that afterwards, your bodies be delivered over to the Surgeons for dissection." ``Thank you my Lord" was responded by the prisoners; Gough at the same time observing, that he was convinced His Honor had passed a sentence contrary to his own feelings, and that as for himself, he (Gough) felt it was a sentence which was justice without mercy, but that he was glad at all events ``that all was now over".

See also Sydney Gazette, 24 September 1827.

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

AUSTRALIAN, 26/09/1827

EXECUTION.

A desire of witnessing the finally closing scene of the three criminals, Gough, Moor, and Watson, who were brought to the bar of justice on Friday last, contributed to draw together a more considerable number of spectators than such a catastrophe commonly excites here, where unhappily there exists too frequent and urgent a necessity for its repetition. Gough had earned for himself a name in the record of outrage and crime. Not a penal settlement at present, or for several years past existing, but had witnessed his presence and his frequent punishment. He had been sentenced to die, and allowed to live. He had seen many of his participators in lawless deeds tucked up, and become the unresisting prey of the common hangman, whilst he himself continued to inhale the breath of life, and run the race of depravity, on which strong passions and the consciousness of a bad name appear to have impelled him. Watson and Moor, the fellow sufferers with Gough, were not so much the objects of public attention as the latter, though had their characters courted equal notoriety, it is not impossible but that one would be found equally deserving with another. All three played an active part in the mutiny at Norfolk Island on the 27th of September last, during the morning of which day they rushed from behind an old ruined building upon a military party, consisting of a sergeant, corporal, and two privates, who were at the time about proceeding towards the hospital. Watson, it was deposed on trial, shot the corporal, Wilson; and Moor was observed shortly after making "assurance doubly sure," by stabbing the unfortunate corporal whilst he lay apparently bereft of life along the grass. Gough fired in the face of Eusten, one of the soldiers, from the fatal effect of which the latter, by happening to turn his head aside, narrowly escaped. The soldier was then pursued, and stabbed in the shoulder, but he finally escaped, and lived to appear as a witness against the murderers of the corporal Wilson, on Friday. The facts adduced on trial then were conclusive, and the Jury unhesitatingly delivered their verdict of guilty, and the Judge his awful judgment against the three criminals. On this momentous occasion Gough thanked Heaven for the boon, and then charged the Jury with measuring out justice without mercy, and the learned expounder of the law with having pronounced a judgment contrary to his conscience. -

"How oft when men are at the point of death,
Have they been merry? which their keepers call
A lightning before death."

One of the three misguided criminals put on his hat immediately on being made acquainted with his awful fate, and it required the intervention of persons present, and the desire of Gough, to induce him to forego this and other unnecessary exhibitions of disrespect. From the firm and careless demeanor displayed throughout, and afterward, it was generally imagined that Gough and his two fellow sufferers would have acted up the same scene to the last. Shortly after nine on Monday morning Watson and Moor, accompanied by the Rev. Mr. Cowper, and Mr. Hynds, of Sydney, walked slowly forth from the condemned cells on the right hand side of the gaol, wherein they had passed the night. Gough followed with the Rev. Mr. Therry. His step and countenance appeared in a great measure to have lost their original firmness. With a tottering step he followed the other two sufferers into the execution yard, where as usual were arranged on one side, the numerous confines of the gaol; in front, a strong guard of soldiers, and a dense crowd of spectators all round. He hastily threw himself on his knees, and kissed one of the three coffins which lay under the drop. The demeanor of Watson and Moor as they joined in prayer, was composed and decent. Gough knelt apart from the other two - his feelings seemed to be intensely wrought up, and his ideas to be concentrated towards their proper object. Watson ran nimbly up the ladder, Moor tottered after him, and Gough, when he had climbed to the scaffold, kissed the rope which was intended to suspend him. They prayed for some time, Gough leaning with an appearance of extreme exhaustion on the shoulder of the Roman Catholic Clergyman. It was full ten o'clock before the executioner had finished his gloomy preparations. Gough stepped forward and asked leave to speak a few words - proceeding in a hurried but rather firm tone, he said, he had been a wicked man, and betrayed into a vicious course of life by bad company, whose connection he recommended all person sedulously to avoid. He thanked the Almighty who had permitted him the opportunity of thus atoning and seeking forgiveness for his offences, as for enabling him to face death divested of its terrors. He hoped his disgraceful end might operate beneficially on the assembled multitude, as well as all person, who, like himself, had been ill-disposed. Watson and Moore made no confession. The unfortunate fellow sufferers shook hands and ardently embraced. After being kept for some moments in a state of suspense extremely painful to the feeling part of those looking on, owing to the awkward manner of the finisher of the law, the drop was finally let fall, and after a few convulsive struggles the pulse of life of the three unfortunate culprits ceased to throb.

Gough was a West Indian Mulatto, woolly headed, and apparently about forty years of age, but muscular and actively limbed - of the middle height.

Watson and Moor were both robust and athletic men. - Their bodies, after swinging the usual time, were taken down and given for dissection. [*] Dr. Bland obtained the body of Gough. His skull is said to present a fine subject for the observation of the Phrenologist. The other two bodies fell to the Surgeons of the General Hospital.

See also Monitor, 24 September 1827, for an account of the executions.

[*] 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, judges gave the condemned prisoners an extra day to prepare themselves for death.

[*] Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer was to be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential contemporary justification

for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing, New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.

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

MONITOR, 26/11/1827
Supreme Court of New South Wales
Forbes C.J., 24 November 1827

SATURDAY. - An aboriginal Native was arraigned by the name of "**TOMMY, alias JACKEY JACKEY**," for the wilful murder of **JEOFFREY CONNELL**, near George's Plains, on the 20th of June last. The prisoner it would seem, could not speak English, and therefore the Rev. Mr. **THRELKELD** and **BUNGAREE**, the Chief of the Sydney Blacks, attended as interpreters for him. It appeared from the evidence, that on the evening before the day on which the murder was committed, the prisoner at the bar came, unaccompanied by any other of his tribe to the hut where deceased and a man named **OLIVER**, both in the employ of Mr. Kable were stationed, to tend a flock of sheep; and from the peculiar ferocity of his countenance, Oliver expressed a suspicion that he had some hostile designs upon them. They however, according to a custom pretty generally practised among stockmen, entertained him with a part of their fare - he smoaked his pipe, and having waited about an hour, departed, seemingly little thankful for the kindness shewn him. He had it seems encamped for the night, about two hundred yards from the hut with his two "Gins," also a boy, and an infant. On retiring to rest, Oliver expressed to deceased his apprehensions that "Jackey Jackey" was on no good design, and in order to guard as much as possible against any hostile attempts during the night, released the dogs, and let them range at large, himself also placing a sickle under his head, as there were no fire arms at the station. Early the following morning Oliver arose, and before going out with the sheep, directed deceased (who was hut-keeper) not to prepare breakfast for about an hour and a half, but give the black fellow and his family some food, and get rid of them as easily as possible, and that he would return to breakfast at the prescribed time. About one hour and three quarters after he had left the hut, a Kangaroo bitch came running to him, and first jumped up to his breast, and then seemed as if it wanted to return home - continually repeating the same motions, witness's attention was at length attracted; and suspecting something had happened to Connell, he followed the animal in the direction of the hut, which when he reached, he found was consumed to the ground. About two yards therefrom, there was a small fire, in which deceased was lying; his head broken and burned - his legs burned also, and his right arm placed across his heart. Witness fainted at the appalling spectacle, and lay senseless for some time. However, a sense of his own immediate danger occurring to his mind, tended to remove the temporary weakness with which he was affected, and he recovered, called his dogs, and made away in a direction to George's Plains, where he obtained the assistance of another man, who with a stick and some dogs accompanied Oliver to the black's camp, where they found an empty box which had contained tea, sugar, a yellow jacket, and some other things. They then tracked the blacks to the bank of a creek, where the mark of a bare foot was evident; and as the direction to which it tended was considered too far to pursue the Natives it was determined to return and

drive the sheep to the Government station at George's Plains. On their way home, they fell in with two stockmen, mounted on horseback, searching for government cattle, to whom they related the circumstance, and they returned with them to the hut, viewed the body, and then departed in the direction pointed out to them as that which the blacks had taken. Shortly afterwards, one of the stockmen (who was looking after cattle) found them in a valley, and refused to go any farther with the other, who was in quest of horses; upon which the latter went alone, and had not rode far, before his attention was arrested by a loud shriek, when he spurred his horse, and galloped towards the place whence the noise issued. In was on the side of a mountain that he beheld the prisoner Tommy - two black women - one of them far advanced in a state of pregnancy - one little boy, and a young infant. The Prisoner, upon seeing the horseman approach, hastily took up the infant and ran up the mountain. He then stooped, and picked up a bundle, about the bulk of a bushel of wheat, with which he resumed his flight. The side of the mountain was too steep for the stockman to ascend on horse-back, and the fear of being similarly treated to the deceased, deterred him from pursuing them alone on foot; so that he turned upon his proper course, and made off for George's Plains with the account. This was the case as affected the prisoner. The defence set up by the latter was in his native tongue, mingled with broken English. "Baal kill white fellow," "Baal make fire." This was elicited from him by repeated questions put by Mr. Threlkeld and the Chief, Bongaree. The Chief Justice in charging the Jury, said, that there did not appear to him any thing which could exculpate the prisoner from the charge brought against him, and that the case in his opinion was fully made out, unless the Jury could suppose, that the three men who were the principal evidences in the case, and who were in different employments widely apart from each other, could have coalesced in plotting the prisoner's destruction; but as this did not seem probable, no doubt of the prisoner's guilt remained on his mind. With regard to the liability of the Aboriginal Natives to English law, (continued His Honor) they certainly were amenable in every essential point to be controlled by it: - but how much more so in the case of murder? which was an offence against the law of nature and of nations; and which required that whosoever shed man's blood, should pay his own in forfeit. Supposing the prisoner at the bar to have been never so ignorant, he was very conscious of having violated a law in slaying a fellow creature, or why scream out and fly at the approach of a pursuer? The Jury retired for about five minutes, and returned a verdict of GUILTY. The Judge then passed sentence of Death on the prisoner, and ordered him for execution on Monday. [*]

This trial was also reported by the Sydney Gazette, 28 November 1827, which reported that Threlkeld and Bungaree were unable to draw anything from the prisoner beyond a denial of having taken part in the transaction. See also Australian, 14 November 1827; and see the Aboriginal Defendant case, 1827.

[*] On the day of the trial, 24 November 1827, Forbes C.J. wrote to Governor Darling as follows:

"I have the Honor to enclose my notes taken in the trial of a native black, commonly called Tommy" or "Jacky" for the wilful murder of Geoffrey Connell, at Bathurst on the twentieth of June last. The prisoner has been convicted, and I have passed sentence upon him, and ordered his execution on Monday next agreeably to the act of Parliament but I have caused the execution to be respited until your Excellency may have an opportunity of looking into the case - The prisoner made no defence, and called no witnesses indeed he could not be made to understand the proceedings which were instituted against him - I think it is a case in which your Excellency will

probably deem it proper to consult the executive Council." He wrote again on 8 December: "Fearing that my letter dated the 24th ult. Containing a short report of the case of the Native Black who was convicted of Murder may have escaped your Excellency's recollection I beg leave to remind your Excellency of that case as well as of many other prisoners who are confined in the Cells of the Gaol under sentence of death awaiting your Excellency's decision." The governor replied on 18 December, saying that the subject had not escaped him, but that he had been detained by the pressure of other business. (Source of correspondence: Chief Justice's Letter Book , Archives Office of New South Wales, 4/6651, pp 121ff.)

In private, Forbes was very critical of the governor's delay in this and other cases concerning Aborigines. In his bitter "Sketch of Defensive Operations", written between 24 November and 31 December 1827, Forbes referred to the governor's "Shameful neglect of executing sentences," in particular those in the Port Stephens case (see R. v. Ridgway, Chip, Colthurst and Stanly, 1826; and R. v. Stanley, 1827), this case of Tommy, and the "case of Cato the native murdered at Newcastle." (Source: Forbes Papers; Sudds, Thompson and Robison, Mitchell Library, A743.) The date of this document is clear from the references to the Tommy case, which stated he had been sentenced, but, by implication, that he had not yet been executed. Another document at the same reference, and seemingly by Forbes, complained that the Port Stephens murderers were not hanged, and that Cato's killers were not prosecuted.

It was unusual that this trial was held on a Saturday. In most murder cases, the trial was held on Friday and the sentence carried out 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, judges gave the condemned prisoners an extra day to prepare themselves for death. See R. v. Butler, July 1826. The Act restricted the opportunity for clemency in murder cases: see Australian, 5 August 1826, pp 2-3. By s. 4 of the Act, the judge was given power to stay the execution; for another example of that, see R. v. Fitzpatrick and Colville, June 1824.)

Under (1823) 4 Geo. IV c. 48, s. 1, except in cases of murder, the judge had considerable discretion where an offender was convicted of a felony punishable by death. If the judge thought that the circumstances made the offender fit for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved (s. 2). The fact that the judge had no such discretion in murder cases shows how seriously they were taken.

The governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision had to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645.

Aborigines were rarely tried for murder of whites. More Europeans were tried for killing Aborigines than the reverse. This case shows, however, that when a conviction was recorded for murder, this racial differentiation was reversed. Forbes C.J. seemed to suggest that Tommy should not be hanged, yet he was. It appears that in all cases up to this time, no European had been hanged for killing an Aborigine. The closest to that was in R. v. Ridgway, Chip, Colthurst and Stanly, 1826; and R. v. Stanley, 1827.

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

SYDNEY GAZETTE, 28/11/1827
The execution of the sentence of death passed on the **aboriginal native, TOMMY**, for murder, and which was to have been carried into effect on Monday last, has been respited sine die. The grounds of the delay are variously stated. An Executive Council, it is said, will be summoned to consider the propriety, under all the circumstances, of putting the sentence in force; but the most received and public opinion, more particularly after the observations of the Chief Justice, as to the law of the case, on the trial, is, that the prisoner is to be transmitted to Bathurst, the scene of his crime, in order that the execution may operate as a warning to the tribes about that settlement.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 28/11/1827
Supreme Court of New South Wales
Forbes C.J., 24 November 1827
WILLIAM BACON was indicted for the wilful murder of **RICHARD HARRIS**, by stabbing him with a knife, at Parramatta, on the 15th of October last.
It appeared in evidence, that the prisoner, and two others, met at the house of one Jones, a butcher, in Parramatta, for the purpose of slaughtering a bullock. They had just commenced skinning the animal when one of the party, a man named **CHEEVERS**, who had a knife belonging to the deceased in his hand, refused to give it up when it was asked of him by the latter, in consequence of which an altercation arose, and the deceased knocked Cheevers down, and possessed himself of the knife. The whole party were more or less intoxicated, and on Cheevers rising from the ground, he appealed to the prisoner to take his part, in consequence of which he interfered, and requested the deceased to go away, and not annoy them any farther. The deceased refused, and struck the prisoner a violent blow on the nose, which made the blood gush out, and felled him to the ground, upon which the prisoner immediately started up, and with the knife which he still held in his hand stabbed the deceased in the side, and wounded his intestines, which protruded through the wound. The deceased was removed to the Hospital where he lingered for two days and died. Previous to his death, he stated, that he had received the wound from the prisoner, but declared that no malice whatever had existed, as they had lived on the most friendly terms for some time past.

The CHIEF JUSTICE summed up the evidence, and minutely pointed out to the Jury the necessary ingredients to constitute the crime of murder. In the present case, it should be borne in mind, that the weapon with which the fatal blow had been struck, had not been sought for. The prisoner was in the act of skinning a bullock, and had the knife in his hand when he received a blow with considerable force, and of a character to produce a strong excitement; and though His Honor was not prepared to say that a man would be justified in using a weapon of that description on such an occasion, yet if the Jury were of opinion, from the circumstances, that the passions were excited from the provocation received, and bearing in mind also, that the weapon was not sought for, but in the prisoner's hand at the time, then His Honor felt himself bound to tell them, that the case wanted that malice aforethought which the law

deemed essential to constitute murder, and the case only amounted to manslaughter. - The Jury found the prisoner guilty of manslaughter. Remanded.
See also Monitor, 26 November 1827 for a report of this trial.
[*] Bacon was sentenced to two years in an iron gang: see Sydney Gazette, 3 December 1827; Australian, 6 December 1827.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

MONITOR, 29/11/1827
We do not know any thing that has given us more satisfaction, as regards the interests of national justice, than the prosecution by our new Attorney General, of the Aboriginal Native, for the murder of a quiet, harmless just-keeper, in the neighbourhood of Bathurst. We entirely agree with the Chief Justice in the sentiments he delivered in summing up the evidence on the trial of this Black, seeing that the latter was accustomed to receive from the white people civil treatment, and a certain degree of hospitality. **THOMAS TAYLOR**, of Lake Bathurst, a hut-keeper belonging to Dr. Sherwin, was murdered by the Blacks, in manner differing somewhat to that of poor **GEOFFREY CONNELL**; but under circumstances equally unprovoked, and fully as atrocious, save, that poor Connell was not cut up in junks, roasted, and eaten, by **JACKEY JACKEY** (the present murderer); whereas, all the fleshy parts of poor Taylor's body were cut off, part eaten then and there, and the rest carried away to be devoured another time. The brave and discreet Captain Bishop, with a troop of the horse patrole, (then just raised) captured one of the black murderers of Lake Bathurst, and lodged him safe in Sydney Gaol. There he lay for a considerable period; we suppose it must have been six months. During this time, we did all we could to convince Mr. Bannister, of the legality and expediency of bringing the Savage to trial; but in vain. The man was finally let out of Gaol; not banished the territory, but turned adrift without the least restraint, and he actually returned to Lake Bathurst, the scene of his wickedness, as if on purpose to exasperate the white stockmen by his hated presence. It comes to our knowledge, that several stock-men had resolved to kill this man whenever they met with him privately; and to bury him or burn him, so as that he should never be head of more. A most illegal and improper determination we admit; but the people of Lake Bathurst vindicated their intention, not indeed on the law of man but on the law of nature and of divine revelation. This anecdote proves, at all events, the strong instinctive aversion there is in civilized men, from letting a murderer live. The intention just-mentioned, however, became known to the murderer after his return to Argyle, and he suddenly absconded. It is reported he left Lake Bathurst for the interior wilderness, to join a distant tribe of his countrymen south of the Snowey Mountains. Some indeed have entertained the idea, that retributive justice overtook this Native, and that a musket ball avenged the death of Taylor. We however have reason to believe, that the man really absconded, and is now a resident among the Appenines, south of the Limestone Plains.

Up to the present date of the trial of Jackey Jackey, we had always concluded, that our Chief Justice and Mr. Bannister, had mutually agreed on the unconstitutionality of the position, that the Heathen tribes of New Holland were in respect of murder subject to English law. For we did not suppose that so young a man as Mr. Bannister, would have chosen to take upon himself the responsibility of deciding such a question opposed as (it seems now) his opinion was, to that of a Judge whose powers of investigation, talent for reasoning by analogy and comparison, and logical mode of deduction, are, to say the least, not common, even among Barristers and Judges. The

question was, in our opinion, most important. Man, as a rational creature, on whose mind God has stamped a sense of justice in indelible characters, cannot sit down contentedly, and see his fellow man, his neighbour or kinsman, murdered, roasted, and eaten, without craving after satisfaction. If Mr. Bannister thought he could, we differ from him most essentially. The consequence therefore of Mr. B's. not bringing the Blacks to justice, when they murdered the whites, would necessarily have been, a system of secret assassination and butchery, among our people, on all the confines of the interior settlements, alike inconsistent with law, reason, justice, and humanity. As Mr. B's. notions of law went to constitute the Ab-origines, a species of wild beasts, their attacks upon the whites, and on their property, would naturally, and we think we might say, necessarily, be repelled, by the latter shooting and exterminating the whole race as fast as they possibly could. Schools and churches, baptism, confirmation, and Sabbath-keeping, will be unknown on the confines of this Colony in a great measure; nay, such is the general sterility of Argyle, that we do not calculate on churches being built in that county, near enough to each other to collect the scattered population which cover a hundred miles of its surface, for a century to come. In the absence then of the ordinances of religion; - in the absence of Sabbath devotional employments; there would have been (had Mr. B's. law prevailed) the habit among our boors, of employing their leisure on a Sunday in hunting down the Native Blacks, as it is already customary on those days, to take out the hounds and hunt down the native wolf-dogs which make such havoc among our sheep. No Missionaries of modern times, we prognosticate, will ever settle on our confines to preach to the adult stockmen, and to baptize and catechize their children. For no Philanthropic Society in England would support such a class of teachers in sufficient numbers; and without good salaries, modern Missionaries do not seem disposed to labour. It is not to be expected, indeed, that any men in this day will be willing to spend their lives in poverty and privation, for the sake of a thinly-scattered people. Such is done by the Moravian Missionaries in Greenland; but we confess, that while we cannot but admire their patience, we consider their labours comparatively thrown away. Even St. Paul enjoyed the sympathy and consolation which attend the ministering to numbers; which attend the coming in contact with men capable of reasoning; although it was often in the way of contention.

The society of the Bush of Australia therefore; the pastoral country of Argyle; and other like sterile tracts of territory in New Holland, would gradually sink into a lawless banditti, if the law continued to refuse its protection to the Whites in the aggressions of the Blacks; and to the Blacks in the aggressions of the Whites; which appears to us would have been the result of Mr. Bannister's theory on this subject.

BUT by the late trial, and (as we devontly hope) by the execution of Jackey Jackey, on the very spot where he committed the fell deed, both the Blacks and the English will henceforward be taught, that the law, the matchless English law, embraces within its beneficent and protecting arms, men of all colours, and of every tribe, kindred, tongue, and people, over whom the British Government can by any means exercise dominion de facto. The late Attorney General lacked conviction, that we could exercise this right de jure. The Chief Justice, contenting himself for his guide, with common sense and practical wisdom, has rejected fanciful theories; and reduced our right to bring Jackey Jackey to trial, to the following rule. "with regard to the "liability" (said Mr. Forbes) "of the Aboriginal Natives of this country to English law, they certainly "are amenable in every essential point, to be controlled" by it; and especially so in a case of murder. Murder "is an offence against the law of NATURE, as well as of "nations; and the law requires, that he who sheddeth "man's blood, shall

be made to give his own in forfeit "Supposing the prisoner at the bar to have been never "so ignorant, still it was palpable that in the present "instance, he was very highly conscious of an internal "law, in the killing of Connell, or why scream out and "fly at the approach of a pursuer?"

THIS we take it, is not only plain common sense, which even Bungaree (the Sydney Chief) himself would agree to, if it were put to him but we doubt not, also, as agreeable to sound English law, as it is to the law of nature, of NATIONS, and of GOD. Not being Deists, but Christians; and being in a country where the Christian religion is the law of the land, (thanks be to God for the same,) we shall not hesitate to give what our English law holds to be the express revealed will of the Deity on this subject. "And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man's brother will I require the life of man. Whosoever sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man."

THIS text is not part of the judicial law of the ancient Jews, as given by Moses It is not given to any nation in particular. It was delivered to Noah, the second father of the human race, and the representative of future millions. It is a primeval command. It was evidently given to Noah as the feudal head of the human race. No reservation is made. As the rainbow was given in the natural world as the pledge of a particular promise, so this primeval law was delivered as the wish and purpose of the Deity in regard to blood-shedding, which was to endure so long as the present state of things consists.

DR. PALEY intimates somewhere in one of his books, which we read a long time ago, that the law of the natural conscience, is, of all laws, the strongest and most binding upon man. He illustrates his position, by the supposed case of a savage being injured; either by a bodily injury, or by some mental outrage, such as deep ingratitude, and which in one form or other, all will allow it is possible might be inflicted upon the body or mind even of an Indian or a New Hollander. The pain which the injured man would feel by reason of such wanton injury, would unavoidably, and to a moral certainty, teach him to beware how he inflicted the like injury on his neighbour. And if, notwithstanding this conscience, (a still small voice in the first instance, but when defied and violated, a voice louder than thunder) he did inflict a like injustice at any time upon his neighbour, such savage would justly incur the charge of wilful guilt; he would be conscious it; and he would become a proper subject for punitive justice. The screech of Jackey, Jackey, when he first had a glance of the way-faring Stockman - whence did it proceed? The agonized shriek of horror of the Lake Bathurst Savage too, when, hoisted stiff on his feet, the putrid mangled skeleton of Thomas Taylor presented itself to his starting eye-balls, what did that prove? Both instances proved the existence of remorse in the men, and that too in a very high degree; and loudly proclaimed how richly both deserved to be brought to condign punishment.

WE sincerely trust therefore, that while through the conscientious scruples of the amiable Mr. Bannister, the last-mentioned monster escaped, the first-mentioned will not be able to avert the doom, for which justice, both natural and judicial, so loudly calls.

THIS illustration of the nature of the natural conscience, shews clearly, that no rational being can fail to possess it more or less; (for he will possess it in proportion to his powers of ratiocination; among civilized men, those with great intellect are more conscientious than others;) and accordingly, the following text from the inspired Paul, establishes Paley's theory and our common experience on this subject. "For when the Gentiles, who have not the revealed law of God, do by nature the things contained in

the law, these, though not having the law, are a law unto themselves: and shew its operation, written as it were on their hearts, their conscience bearing witness, and their thoughts and reflections the mean while, accusing and excusing them, in the day when God shall judge the secrets of man by Jesus Christ." St. Paul ought to be esteemed a first-rate Casuist even by Deists. 'Tis true, it is hard to believe a man to be a sound moralist, and of a benevolent mind, whom at the same moment we count an impostor; imposing on the world as the will of God, that which he never revealed; and, consequently, committing of all lies, the most heinous, the most blasphemous, and the most impudent.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

MONITOR, 29/11/1827
Supreme Court of New South Wales
Trial, 24 November 1827
SATURDAY. SUPREME COURT. – **JAMES FRANCIS**, was put to the Bar, charged with the wilful murder of **JAMES ROURKE**, at Patrick's Plains, on the 5th of July last. The case arose out of a pugilistic contest, between the prisoner and the deceased respecting an axe. The deceased challenged the prisoner out to fight, which after some hesitation the latter complied with; and after about six or seven rounds, (in the two first of which the prisoner was successively knocked down) the deceased fell, and after having been raised for a few minutes upon his second's knee, he suddenly fell to rise no more !!! It was the belief of the witnesses who deposed to this last fact, that deceased died while falling the last time, as he was never seen to struggle in the least, but on sinking to the ground, turned his eyes up in the action of a dying man. His Honour in charging the Jury coincided with Mr. Williams, (who conducted the prosecution in the absence of the Attorney General,) that although contests of this kind were by no means warranted by law, still, while no foul play was allowed to take place, there was an absence of that malice which is necessary to constitute a charge of murder. The Jury retired for about two minutes, when they ACQUITTED the prisoner both of the charge of murder, and of manslaughter. He was accordingly discharged by proclamation. [See also R. v. Kelly, 1827.]
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

MONITOR, 03/12/1827
[**JAMES] FRANCIS**, whom we stated to have been acquitted as well of murder as manslaughter, was only cleared of the former; he was convicted of the latter offence.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 03/12/1827
Supreme Court of New South Wales
Forbes C.J., 30 November 1827
GEORGE CHARLES STEWART, was indicted for the wilful murder of **JOHN BELL**, on the 15th of October last.

The ATTORNEY GENERAL stated the case.

It appeared in evidence, that the prisoner and the deceased lived together. The deceased was, generally, a quiet inoffensive man, but was sometimes in the habit of

drinking, on which occasions his temper became irritable, and frequent quarrels ensued, none of which, however, were of such a nature as to leave any ill-blood behind as returning sobriety always brought with it a return of friendship and good humour between the parties. The principal witness in this case, a man named **OAKES**, who was servant in the house where the prisoner and the deceased lived, stated, that on the evening of the 15th October, about sun-down, the prisoner came in and remained a few minutes, after which he went away. Shortly after, the deceased entered the house, and stopping a short time within, he also went out. In a few minutes after the departure of the deceased, the prisoner again came in, looking very angry, and immediately followed the deceased out, but had not been away many minutes, when he returned back into the house, and taking a gardener's spade, immediately went out with it in his hand. Neither of the parties appeared for some time after, when the prisoner, who was first that came in, entered the house, and said to Oakes, that, if any constables came for him, he was not at home. After this, the prisoner again left the house, and the deceased, almost immediately after, came in, with a cloth bound round his head, through which the blood oozed plentifully. Oakes with an exclamation of surprise, and an enquiry as to what had happened, took off the bandage, when he discovered that the blood flowed from a deep wound across the eye-brow, in an oblique direction, and about an inch long. The deceased also exhibited his hat, which was cut across the rim, in the place immediately covering the eye, and observed, that that had been his protection, as but for it he should have been killed on the spot. Oakes advised him to report what had happened to the Police, but the deceased declined doing so, and said he hoped he should get better shortly. The prisoner was not at home during that night. On the following morning he came home, and telling Oakes to follow him, they proceeded together to a ditch, at some short distance from the house, out of which, after searching about, the prisoner took a spade, observing that he was glad he found it, for if it had been lost he would have had six shillings to pay for it. The prisoner also said something about a brick, and taking up one from the ground, said to Oakes, "he," meaning the deceased, "threw that at me." At this time the deceased was lying very ill, and the next day a man named Johnson called on him, and advised him to get medical aid. Johnson stated, that the first intimation he had of any thing having happened to the deceased was from the prisoner, whom he met on the morning of the day on which he visited the deceased, and who told him that the deceased was very ill, and wished to see him. The prisoner also told Johnson the circumstances of their quarrel, observing, in reference to the spade, that he did not mean to hit the deceased, but when he threw it, it went as straight as an arrow. Thornton, a constable, also stated, that he visited the deceased after he became speechless, and upon asking him what was the weapon with which he was struck by the prisoner, he took a small bit of paper, on which, with a pencil, he wrote the word "spade." The deceased lingered in a very bad state from the 15th to the 23d of October, when he was seized with locked-jaw, and conveyed to the General Hospital, where he died on the following day, the 24th. Dr. **MITCHELL**, who attended the deceased after he was admitted into the hospital, stated, that the proximate cause of the locked jaw was the wound over the eye, which fractured the outer table of the skull.

The CHIEF JUSTICE put the case to the Jury, as one depending on circumstantial testimony, but circumstances, notwithstanding which, taken together, pointed too strongly to the prisoner, to leave any doubt but that he was the person by whom the fatal wound had been inflicted. Whether such was, or was not the case, formed the first point of enquiry for the Jury. The second point for their consideration was, the

circumstances under which the blow was given. His Honor here minutely pointed out the distinction between the circumstances attending the death of an individual which were necessary to be shewn in order to constitute the crime of murder, and those cases in which the offence amounted to the lesser crime of manslaughter, leaving it to the Jury to say, from the evidence before them, of which the prisoner was guilty. The Jury retired for a few minutes, and retired with a verdict of Guilty of manslaughter. - Remanded. See also Monitor, 3 December 1827.
[*] The prisoner was sentenced to transportation for seven years: Sydney Gazette, 3 December 1827; Australian, 6 December 1827.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 31/12/1827
Execution, 31 December 1827
EXECUTION.
Monday morning witnessed the painful and disgraceful exit from this world, by the hands of the common hangman, of five criminals. Four of them were white men, and one the black native, **TOMMY, or JACKEY JACKEY**, who was convicted of murder several weeks ago; the other who suffered were John Carrington, William Lee, and James Charlton, for breaking into and robbing a hut, situated somewhere in the interior; and Wm. Pearce, for a robbery on the King's highway. All four were young men, in the prime and strength of manhood. They exhibited a degree of decency and composure, when mounted on the fatal drop, and exhibited to the view of the dense concourse of people who came to gaze upon their fate. The criminals did not long remain kneeling; they mounted, one after another, up to the scaffold-board, and were mustered and ranged by the hangman, who fitted the halters speedily, as they arrived; it was an awful sight. There were five human beings standing on the brink of, and ready to be hurled into eternity, without a hope - without the slenderest thread whereon to hang a hope of reprieve. Carrington professed himself a Protestant, and was attended by the Rev. Mr. Cowper; the other three by the two Roman Catholic Clergymen, Messrs. Power and Therry. Mr. Threlkeld, of the Wesleyan Mission, and the Rev. Dr. Lang, Presbyterian Minister, tried to bring Jackey Jackey to pray, but to pray he did not appear at all disposed. He nodded frequently to the gazing crowd below, but became restive when the white cap was drawn over to obscure his black features, and he struggled hard several times, and with success, in shoving it half way up the face. The executioner at length thought it necessary to give him a tighter pinion, which seemed to overcome the natural philosophy of the unhappy Jackey Jackey, and he grumbled "Baal me like it dat, you no pialla white fellow" - he then turned his head towards the north, and fell into an apparent state of torpor. Carrington wept bitterly. The five criminals died without considerable struggling.
Jackey's body, when cut down, was given for dissection.[4] His person exhibited an appearance of strength not always seen among the aboriginals; and his features, of wildness, which the thick beard, that bristled round his jaws, did not tend to soften. The Sydney blacks, and their gins, mustered strong, but did not appear to lament their countryman greatly.
See also Monitor, 31 December 1827.
[*] Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential co

ntemporary justification for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing, New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.

SYD1828

SYDNEY GAZETTE, 02/01/1828

TOMMY, the black native, persisted to the last in denying all participation in the murder for which he was executed. He frequently said to one of the clergymen who occasionally visited him in his cell, "All gammon white fellow pai-alla cabon gunyah, me tumble down white fellow." It was all false that the white fellows said in the Court-house, that I killed the white fellow. He seems, indeed, to have been induced to believe, that if he should persist in denying all knowledge of the murder, the sentence would not be put in execution. The different accounts of it, however, which he gave at different times, afford the strongest presumption of his guilt, and when combined with the evidence adduced against him, leave no doubt on the subject. At first he merely denied all knowledge of the murder, frequently repeating the words, "All gammon, me tumble down white fellow." But on the evening of Sunday, after he had made his ineffectual attempt to escape from the gaol, he charged the notorious Saturday with being the murderer, and repeated the charge on the Monday morning previous to his execution; finding, however, that he could not gain any credit for this assertion, he subsequently accused Jingulo, another notorious character, in the Bathurst district. But on being told that it would be of no benefit to him to deny his guilt any longer, as the white fellow was coming with the kurryjong, and that he must die, he shook his head and said, "kurryjong bail boodgeree," by which he seems to have meant, "It is a sad thing to die in this way." Mr. Threlkeld, who had been with him for some time, then left the cell; when turning to the clergyman who remained with him, and exhibiting an appearance of earnestness which he had not previously evinced, he said, "Me like it pai-alla you gentlemen." I wish to speak to you Sir. "Bail Saturday tumble down white fellow, bail Jingulo tumble down white fellow, bail me tumble down white fellow -- Tommy tumble down white fellow, sit down Palabbala, bulla jin, like it me, brother." "Neither Saturday, nor Jingulo, nor myself killed the white man; Tommy, a black fellow, who lives at Palabbala, (about thirty miles from Bathurst) and has two jins, and is as like me as my brother, killed the white fellow."

After he had mounted the scaffold, he looked around him at the multitude, and said "cabon white fellow, cabon gentlemen sit down." He seems to have borrowed the word cabon, and several others which he used, and which we are informed by an intelligent proprietor of land, who resides beyond the Blue Mountains, are not in use among the natives of Bathurst, either from the stockkeepers or the aborigines of this neighbourhood, as he did not seem to use them in the sense in which they are used by the natives of the Eastern part of the Territory. When the executioner had adjusted the rope, and was about to pull the cap over his eyes, he exclaimed, with a most pitiful expression of countenance, "Murry me jerran." "I am exceedingly afraid," and immediately afterwards, casting his eyes wistfully around him, and giving a melancholy glance at the apparatus of death, he said, in a tone of deep feeling, which it was impossible to hear without strong emotion, "Bail more walk about," meaning that his wanderings were all over now.

When the executioner was about to do his duty, the Rev. Mr. Power, Roman Catholic Chaplain, who had previously been engaged in preparing those of the other criminals for their departure, along with his colleague the Rev. Mr. Therry, came to the end of the scaffold where Tommy was standing, and addressing him by name, asked him "if he wished to be saved? Displaying, at the same time, a bottle of

consecrated water, with which he seemed desirous of performing the baptismal rite, before the miserable man should be launched into eternity. Tommy of course made no reply, but the Rev. Dr. Lang, who was standing by, ventured to remonstrate with Mr. P. on the gross impropriety of administering the ordinance of baptism in such a case, observing that the man could not possibly understand the nature of the rite, and could not reap any benefit from it in his present state of mind, as he was evidently a heathen, entirely destitute of all knowledge of Christianity; repeating, at the same time, the words of Scripture, "He that believeth and is baptized shall be saved," but nevertheless leaving Mr. P. to administer the ordinance, if he thought proper, at his own peril. Mr. P. replied by saying, "We baptize infants who do not understand the nature of baptism; he is in the same state;" and immediately making the sign of the cross on the native's forehead with the consecrated water, in nomine Patris et Filii et Spiritus Sancti, he told him, for his consolation, that "he should go to the Daia (the Irish or Gaelic word for God) that is, that he should be saved. Whether the Rev. Gentleman, in quoting the case of infants, meant to say that the case of a child whose parent or guardian is a member of the Christian Church, and solemnly engages at his baptism, to train him up in the Christian faith and practice, is exactly parallel to that of an adult savage who has never heard of the Gospel, and to whom the truths of the Gospel cannot possibly be made known, from our entire ignorance of his language; who, moreover, has been found guilty of murder, and dies in an obstinate denial of his guilt --- we do not know. At all events it is a hard saying, and we Protestants cannot bear it. The book of God does not forbid us to implore Divine mercy for such a person as Tommy, while he continues to live, but surely it does not authorise us to admit him to Christian baptism, and he who does so notwithstanding, profanes a divine ordinance and does so at his peril. The Saviour's commission to his Ministers in the last verses of the Gospel of St. Matthew, authorised them to "Go and teach (that is convert to the Christian faith or make disciples of) all nations, baptising them (when thus converted, or made disciples) in the name," &c. But would any of the original bearers of this commission, Peter or Paul for instance, have ventured to baptize a savage in his state of impenetrable darkness and hopeless barbarism, a murderer in his state of impenitence? If Mr. Power's commission is derived from their infallible successor, surely his acts bear but slight resemblance to the Acts of the Apostles.

Two of the men who died Roman Catholics, had acknowledged themselves Protestants on their entering the gaol. That institution, it is well known, is generally swarming with zealous and faithful members of the Church of Rome. When, therefore, there is any extremely illiterate Protestant condemned to die, he is immediately assailed by one or other of these constant inmates of the prison, and is told that there is no salvation out [sic] of mother Church. He is told, moreover, of the mystery of confession, and the clear conscience it leaves one; of the mystery of absolution, and the comfortable state it procures one; of extreme unction, and the safe passage it secures to another and a better world; of purgatory, that desperate resource of superstition, where any balance of iniquity that remains, after the final settlement with the Priest, is sure to be cleared away by an after consideration, prayers for the dead on the one hand, or purgatorial fire for a limited period on the other. The Protestant Minister, on the contrary, has a most dismal and unwelcome tale to tell, when he tells the culprit, that without such repentance as arises from a thorough and entire change of heart, he cannot be saved; that the law of God is peremptory in its condemnation of the guilty; and that the mercy of God is manifested only to the humble and contrite one. In this dilemma, the hardened and ignorant criminal, terrified at the approach of death and the certainty of judgment, and feeling none of

that sorrow for sin, or sense of its heinousness which is indispensable in genuine repentance, throws himself into the arms of the Priest, who administers a course of opiates to the conscience of his willing patient, and lulls him asleep in the fatal assurance that all is well. We will not say that this was not the case with the two men who embraced the Romish faith on this occasion. We only state the fact, that they were to the last degree ignorant of the first principles of Christianity on their entering the gaol; as much so perhaps as the black native, while we leave our readers to form their own judgment of their conversion. [*]

The report of the execution carried by the Sydney Gazette, 2 January 1828, included the following: "Many of the blacks assembled to witness the awful ceremony, and numbers of them were armed with woomaras, waddies, and spears. What is somewhat singular, but one of their women was present. … Dr. Lang and Mr. Threlkeld offered up prayers for the unfortunate savage, who was about to render an account of his deeds at the throne of Him who is alone capable of subduing the stubbornness of the human heart; but, alas! The savage stood erect, and appeared to be reckless of devotion, and little if at all impressed with the fate which awaited him, though every endeavour had been made to fix it upon his mind." The Gazette said that by "bale that," he meant do not pull the cap over his face. Its report went on: "It was currently rumoured that Tommy had been converted to Christianity on the scaffold by Rev. Father Power, but this was without foundation in truth, as he execrated and threatened the executioner in language the most revolting, almost to the last moment, and even then threatened that his tribe would avenge his death. … It may be worthy of remark, that the fate of Tommy seemed to make the desired impression upon the minds of the tribes who had assembled upon the occasion; for it was observed, when the drop fell, that they all involuntarily shuddered; whence it may be inferred, that the awful spectacle which was exhibited before their eyes, will restrain them from future acts of barbarity upon the peaceful and unoffending settler."

[*] This raised religious passions: see letter from "A Spectator", Sydney Gazette, 7 January 1828. There was also a rumour that four stockmen had been murdered by Aborigines in reprisal for the hanging: Australian, 11 January 1828.

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

AUSTRALIAN, 08/02/1828

Supreme Court of New South Wales

Stephen J., 4 February 1828

The first trial called on was that of **JAMES RUSSEL**, who stood charged with violently assaulting **MARY** - his wife, with intent to kill and murder her.[1]

The prisoner's wife was called to give evidence, but neglecting to appear, it was intimated in Court, that she was purposely keeping out of the way.

JOSEPH SMITH was then sworn - Is a blacksmith by trade, and in the prisoner's service; recollects on the evening of the 10th of January last, his mistress leaving home, and staying out a considerable time; on her return the prisoner reproved her for going out without previously acquainting him with her intention; heard prisoner tell her. If she wanted to go out at any time, it should be with his knowledge, and then he would stay within to mind the house; prisoner said, if she (his wife) went out in future, without first acquainting him, it would cause a quarrel between them; saw mistress upon this, take her cap off her head, and throw it in a violent manner upon a side board, saying, "I have but one life to lose, and I don't care how soon that is gone." Prisoner was eating his supper at the time; he had a large carving knife in his hand;

witness during the whole of this conversation was sitting in the same room with them nursing a child; mistress ran against him, and witness being apprehensive that the child would be hurt, left that room, and went into the adjoining one; had his back towards the prisoner on leaving the room; did not see prisoner at all strike his wife; did not over-hear any conversation between them whilst in the other room; is conscious of being now on oath; never swore at the Police-office, that he saw mistress laying down, and prisoner standing by her; was a good deal alarmed in consequence of the child becoming hurt from mistress running against him; at that moment had seen prisoner running towards mistress with knife in his hand, but did not see him strike her with it; did not apprehend any violence from the prisoner's conduct just then.

Here the Attorney-General repeated several questions to the witness, and took down his answers in writing - having previously cautioned him to be careful of his words, as was it to be apprehended they would hereafter have to form the ground-work of a prosecution against him for perjury.

Examination continued - Swears that from the prisoner's manner, at the time, he did not appear to be violent. Did not see the prisoner after his wife pushed witness down. Was not alarmed at the prisoner's behaviour. Did not swear this at the Police office. Saw the prisoner advancing towards his wife, with the knife, in a pointed direction towards her, in his hand; and shortly after saw her laying on the bed. Did not hear her speak to any one. Did not hear her groan; but saw some stains of blood about the upper part of her dress. Was told by Sutland (a constable), that he wanted to speak with the prisoner - and brought them together. In about an hour and a half, from the period of the prisoner's wife's return home, saw a wound in her back. She asked witness to put a blister on it. She did not bleed at that time. Does not know what occasioned the wound, or how it was done. Mistress did not tell witness how she came by it. Swears he did not see the wound inflicted.

FRANCES SUTLAND - I was a wardsman in the Sydney police in the middle of January last. I recollect on or about the 18th of the month, some time in the evening part, Mrs. Russel (prisoner's wife) running into my house, which is convenient to her's, and, throwing herself into a chair, saying she had been hurt, or cut, or some such expression - cannot say which. She appeared to be excessively faint. It was some minutes before she was sufficiently recovered as to speak again. She could not explain how the injury had been done. Mrs. R at last said her husband and she had had some words together - but did not say he had stabbed her. She was then cut in the back.

Dr. **BLAND** stated, that he examined the prisoner's wife on the evening of the day laid in the indictment, and found a wound in the back of between three and four inches deep. It was in an oblique direction, towards the left shoulder, near the shoulder-blade. Thinks it was probable that the injury was occasioned by a large knife, and was done by a plunge. If the knife had been sharp, it would not have required much force to do the injury. The woman said it was done by her husband. The prisoner, however, was not present when this statement was made by his wife.

The learned Judge summed up the case, putting it to the Jury as one, for which there was no sufficient evidence to warrant the them in finding a conviction. There had been no evidence whatever to prove that the prisoner was the person who committed the assault, the subject of this prosecution, although there was strong presumption that he was the guilty one. The most material evidence in the case, was that of the servant, who stated he only heard a quarrel, and had sworn most positively, that he did not see the commission of the injury complained of. There was one person - that was the wife

of the prisoner - whom the law shut out from giving evidence against her husband - and under such circumstances, the Jury would have to acquit him. Not Guilty.

Before being discharged, by proclamation, the Judge admonished the prisoner, recommending him to be more circumspect in future. [*]

See also Sydney Gazette, 8 February 1828.

[*] See also R. v. Chamberlain, reported in Sydney Gazette, 4 February 1832 and Australian, 10 February 1832, another unsuccessful prosecution for assault with intent to murder. Justice Stephen directed the jury that if death had ensued, it would not have been murder. As a result, the prosecution had to fail. See also R. v. Yates and Jones, reported in the same newspapers on the same day.

AUSTRALIAN, 13/02/1828

Supreme Court of New South Wales

Stephen J., 8 February 1828

JOHN HARTLAND, a middle aged man; was capitally indicted for the wilful murder of **ELIZA WATKINS**, on the 10th of January last.

It appeared in evidence that the deceased, who was a married woman, but had lived apart from her husband for some years, had cohabited with the prisoner for some months antecedent to her death. On the 10th of last month the prisoner and deceased having been out drinking, returned home, neither of them remarkably sober, and deceased having in the course of the day occasion to go to a box, wherein she kept some money, missed a few shillings, and taxing the prisoner with taking them, protested she would complain of him. The woman was in the act of leaving the house hastily, and as if for the express purpose of procuring a constable, to take the prisoner in charge, when the latter following, overtook the deceased, and as she was stooping, bestowed on her two kicks between the ribs, which occasioned a rupture of the spleen, and the woman having immediately fallen, expired within a few minutes after receiving the injury. In summing up the learned Judge recommended that the Jury should be ruled in giving their verdict by the circumstances under which the rash act was committed. If the Jury were of opinion with him, that there had been on the prisoner's part a total absence of malice prepense, of any premeditated intention to murder, they might find an acquittal for the prisoner of the capital charge, and convict him of the less capital one, of manslaughter. [1]

After retiring for a few minutes, the Jury returned into Court, acquitting the prisoner of the charge of murder, and finding him guilty of manslaughter. [2]

[1] The Sydney Gazette, 11 February 1828, summarised the charge to the jury as follows: "Mr. Justice Stephen summed up the evidence, leaving it to the Jury to say, whether, from the circumstances of the case, there was that malice prepense either direct or implied, which His Honor explained to them, was necessary in law to constitute the crime of murder. If they were of opinion that no previous malice existed in the mind of the prisoner, but that the unfortunate occurrence had taken place during a gust of passion, for which, in consideration of the frailty of human nature, the law had made allowance, they would acquit the prisoner of the crime of murder, and find him guilty of the minor offence of manslaughter."

[2] On 29 February 1828, he was sentenced to imprisonment for two months: Australian, 5 February 1828.

AUSTRALIAN, 27/02/1828
R. v. Kelly (No. 3)
Supreme Court of New South Wales
Forbes C.J., 25 February 1828
Case Of Murder.

JAMES KELLY, a middle aged man, was arraigned on a charge of wilful murder.

JOSEPH HANDLE, a lad about thirteen years of age, deposed that on the 6th of February last prisoner came to the house of a man named Grady, where witness was, and saying he had been robbed, he could not tell by whom asked Grady for the loan of a gun, which the latter refused. Prisoner expressed a desire that Grady should accompany him in quest of the robber. To this also Grady refused to assent. Witness finally offered to accompany the prisoner, which he did as far as a place called the Rocks of Towro, about fifteen miles from Parramatta, whence observing a smoke in the bush, they immediately made towards it, and found it to proceed from a fire which appeared to have been recently kindled. No person was near the fire. Witness, with the prisoner, then proceeded to explore the cavity of a neighbouring rock, in which they discovered a man as if attempting to court concealment. Kelly, who was the first to discover him, told the man to stand. The latter, upon this, was making an effort to creep out of the cavity on his hands and knees, without evincing any disposition whatever towards resistance, when prisoner levelled a musket, which he had in his hand, at the man, who at this instant cried out "for god's sake don't shoot me, I give myself up." These words had scarcely been uttered, when the prisoner, with a musket, fired upon him. Witness examined the cave, and found therein a q[?]r pot and a blue basin.

Wm. MOORE, a constable, deposed that on the 6th of Feb. last he met the prisoner on the road between Castle Hill and Parramatta, who told him he had just shot a man. Witness asked him who it was. Prisoner made answer, "that fellow," meaning a man named Fuller, who has been robbing me so often. Witness went to the place called Rocks of Towro, and there found the man on the spot to which prisoner directed him. The man lay weltering in his blood. Witness asked him if he thought the wound was mortal. Prisoner said "no, the villain has not done the trick yet, but I shall see him again for this."

JOHN DUGGAN, an attendant at the Parramatta hospital, confirmed the circumstance of Fuller, on the 6th of February, being brought into the hospital in a wounded state, and to his having died next day.

Mr. **ANDERSON**, surgeon at the medical establishment at Parramatta, stated that he examined the wounds of the deceased man Fuller, immediately after his death. Discovered two wounds about a couple of fingers breadth under the right arm. They appeared to have been occasioned by two small bullets, which had perforated the right side. Is of opinion they were the immediate cause of the man's death.

Witness examined the wounds but superficially. Is confident, notwithstanding that they were not produced by other means than by bullets. Arrives at this opinion in a great measure, from previous report; but had he not heard the circumstances of the man's death before examining the body, should have come to a like conclusion.

Witness. The Court will perhaps allow me to explain the cause of what may be considered neglect in not examining the body earlier. My reason was this; many of the Juries, assembled on Coroner's Inquests at Parramatta, have shown a dislike to the body being disturbed in any way, much less to open and inspect it before having

assembled, whilst from the length of time that frequently elapses between the death and the holding of an inquest, the body often becomes in a putrid state.

The Attorney-General. **Then sir, I tell you, that I think it highly expedient a body should be examined immediately after death, and that you should not wait until a Coroner's Inquest be assembled, notwithstanding it is always desirable that an inquest should be convened as early as practicable after death.**

The Chief Justice. I certainly do recommend that what Mr. Attorney-General has pointed out, should be in future attended to.

Two witnesses were called on the part of the prisoner; one of whom swore that the name of the deceased man was, Thomas, and not John Fuller, as laid in the indictment. This witness had also heard him called Fulton, but the deceased commonly answered to the name of Fuller.

Counsel for the prisoner took occasion upon this to plead a misnomer, and also, that the direct cause of death had not been distinctly made out; both of which the learned Judge considered to be subjects for the consideration of the Jury, at the same time, that his Honor thought the surgeon's evidence sufficiently conclusive on the latter head, and one witness alone had differed on the other, that of the man's name being Thomas or John Fuller. His Honor could not see any feature in the case to justify the Jury in softening down their verdict to manslaughter; but should the Jury feel disposed to conclude that the prisoner, in firing as he had upon the deceased, was not influenced by a worse motive than that of endeavouring to recover property stolen from him, by securing him whom he considered the thief, then, their verdict might aptly be attended with a recommendation for mercy, which would not fail of being entertained.

The Jury retired for about ten minutes, and returned into Court with a verdict of Guilty.

Proclamation being then made for silence through the Court, the prisoner was asked if he could assign any just cause for judgment upon him being deferred. Argument on the technical objections raised previously on behalf of the prisoner being again urged, but not considered by the Court as sufficiently valid, the learned Judge addressed himself to the unhappy prisoner:- "James Kelly, you have been tried for, and convicted of, the wilful murder of one John Fuller, on the 6th day of February, by inflicting on his body mortal wounds, which the following day closed his existence. I have put it to the Jury, that if they should be of opinion you acted under impressions without any malice towards the deceased, they might make such a recommendation to the Court as circumstances would call for, and that I would take an opportunity to represent them in a proper quarter. The Jury has not made any such recommendation, and therefore I have to conclude that they do not see any circumstance in your case upon which I could do so. It therefore devolves upon me to perform the painful duty of passing sentence upon you. [After commenting on the manner of the prisoner's crime, the learned Judge continued] - the sentence therefore of the Court is, that you be taken from hence to the prison whence you came, and that on Wednesday the 27th of this present month of February, you be hanged by the neck until you be dead."

The prisoner in tears earnestly besought the favor of a long day, and he was finally removed by constables from the dock. [*]

See also Sydney Gazette, 27 February 1828. Mr Rowe acted for the defence.

[*] The prisoner was respited and the case sent to the Executive Council: Forbes to Darling, 27 February 1828, Chief Justice's Letterbook, Archives Office of New South Wales, 4/6651, p. 144; Australian, 27 February 1828. On 25 March 1828, Darling sent a despatch to Huskisson of the British government, stating that the Executive

Council had recommended that the sentence be commuted to transportation to Moreton Bay for seven years, and hard labour in chains. Darling recommended the commutation to the King. (Historical Records of Australia, Series 1, Vol. 14, p. 41.)
On 31 May 1829, Governor Darling sent a further copy of the trial notes to the British government: Historical Records of Australia, Series 1, Vol. 14, pp 900-902.
The governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision had to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 05/03/1828
Supreme Court of New South Wales
Trial, 29 February 1828
GEORGE BROWN, was indicted for the wilful murder of an **aboriginal native female child**, whose name was unknown, at Wellington Valley, on the 11th of December last.

The Attorney General stated the case, and called the following witnesses.

FREDERICK HAMBUSH deposed that, about 4 o'clock in the afternoon of the 11th of December last, he heard the report of a pistol in an adjoining hut, where the prisoner dwelt, and on going out, saw a little black girl, between 8 and 9 years old in the agonies of death, and the prisoner standing over her with a pistol in his hand; witness asked the prisoner what was the matter when he exclaimed "My God! I have shot a child by accident;" he stated there were several of the native children about the door, asking for bread, that he told them to go away, which they would not do, and that he took down the pistol, which he did not know to be loaded, and presented it at them for the purpose of frightening them away, when his finger accidentally coming in contact with the trigger, it went off, and shot the child; there was one large hole in the back of the deceased's head, through which several slugs might have entered; life was extinct in a moment.

Cross-examined. - Witness knows the prisoner for some time; he was always particularly kind to the black natives; about a quarter of an hour after this occurrence, the prisoner said that Broadhurst, the constable, from whom he had the pistol, told him it was not loaded; from what witness knows of the prisoner's character, and from his demeanor afterwards, he has, no doubt, that the occurrence was positively accidental.

Other witnesses spoke to the same facts, and the Jury, under the direction of the Court, found the prisoner guilty of manslaughter. Remanded.
[*] A.M. Baxter. See also R. v. Binge Mhulto, 1828, for details of another inter-racial conflict in 1828.
On 28 August 1828, Governor Darling also reported to Huskisson on "a very gross Outrage committed by a Party employed in Patrolling the Neighbourhood of the Settlement of Fort Wellington on the Northern Coast in the Month of December last." (Fort Wellington was in what is now the Northern Territory, whereas Wellington Valley, the site of the killing of the Aboriginal child in Brown's case, was in western New South Wales: see evidence in R. v. Lookaye alias Edwards, 1828. The similarity in place names is a coincidence.) The commandant at Fort Wellington, hoping to reduce native attacks, decided to capture an Aborigine. The aim was to prevent further attacks and operate later as a means of conciliation when the captive was released unharmed. In attempting to do this, a patrol came across a large body of native people. Frightened of their own weakness, they fired on the Aborigines and wounded four or five, including a woman and two children. The woman and

one of the children died. The other wounded child, a girl of six or seven, was taken to the settlement. They also "despatched", deliberately killed, another wounded Aborigine, to relieve him of his sufferings. Darling referred the matter to the Executive Council, but it made no further suggestion. The governor ordered that the men who committed these acts be sent to Sydney, but said that "it did not appear, much as the Event is to be deplored, that any benefit would result from the further prosecution of the matter". Thus the killings continued on the frontier, relatively unhampered by the law. (Source: Historical Records of Australia, Series 1, Vol. 14, pp 350-351.)

Murray replied to Darling about the Fort Wellington killings on 3 September 1829 (Historical Records of Australia, Series 1, Vol. 15, pp 153-154). He said "I cannot too strongly express my reprobation of the behaviour of all the Persons concerned in this inexcusable transaction." Soldiers and convicts, without an officer, being sent on the promise of a reward for the capture of an Aborigine, inevitably led to the deaths. Captain Smith's conduct led to loss of life and harm to the damage of the British name. Murray sent the file to military authorities for action against him. Murray reluctantly agreed that the length of time since the events and the withdrawal of troops from the area meant that it was too late to act against the members of the party who committed the acts. He warned that if anything similar happened in future, the British government would proceed with the utmost severity against those concerned, either as principal or accessory.

Time and distance, it appears, made the British government feel powerless to do more than warn. Once a decision had been made in the colony not to prosecute, the delay in getting British advice meant that the initial decision could not be overturned. In this way, matters such as this were left in colonial hands.

A very similar event occurred in Newfoundland while Forbes was Chief Justice there. A group of fishermen, frustrated by natives who were damaging their equipment, decided to seize a native with the same misguided notion of reconciliation through kidnapping. They, too, killed one native and seized another. Despite the governor's attempts, the seized woman was not returned to her family, and died in white custody. (Source: Provincial Archives of Newfoundland, Letter Books of the Colonial Secretary's Office, Vol. 30, 1819, GN 2/1/30, pp 122-137, 156-164, 180-181, 201-209, 260-262, 299-308.) As Chief Justice, Forbes did not try the kidnappers or killers, but merely set a Grand Jury inquiry in motion and took a leading role in a town meeting on native reconciliation. Those responsible for the kidnapping and killing were held not to be criminally liable, and were not put on trial.

There was also another conflict in New South Wales in 1828, which the Colonial Secretary, McLeay, described as a massacre of natives at the Liverpool Plains by whites. Singleton had opened a new run (a squatter's property) there, and the killings were said to be in self defence. No legal action followed. See the correspondence in Archives Office of New South Wales, Miscellaneous Correspondence Relating to Aborigines, 5/1161, pp 94-99.

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

SYDNEY GAZETTE, 05/03/1828

Forbes C.J., 1 March 1828

GEORGE BROWN, convicted of manslaughter, for shooting an **aboriginal native female child**, being placed at the bar, the Chief Justice stated, that if it were only to set an example to shew that accidents produced by such incautious conduct as that of which the prisoner had been guilty, should not pass unpunished, and to teach others that the lives of the unfortunate natives were not to be sported with, the sentence of the Court was, that the prisoner be sent to an iron gang for two years.

The Australian, 5 March 1828 reported this differently: "George Brown, for manslaughter, in shooting at a native female child, name undescribed, the prisoner having put in, justification of the act occurring in self defence - to be worked on the roads in chains for a term of two years."

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

SYDNEY GAZETTE, 07/03/1828
Supreme Court of New South Wales
Dowling J., 4 March 1828

JOSEPH PIGOTT was indicted for manslaughter in causing the death of **MARY ANN ELIZABETH BERRY**, by driving a curricle and pair of horses over her body, in the king's highway, at Sydney, on the 19th day of December last. **RICHARD CRAMPTON** was also indicted as being present aiding and assisting.

DAVID NEARN sworn - I reside at Sydney; on the 19th of December, about 5 o'clock in the evening, I was walking down King-street, and saw the prisoners driving in a curricle drawn by two horses; they called out to me to take care, and I got out of the way and allowed them to pass; they drove round the corner of Phillip-street; they were driving in a trot, at the usual pace that other carriages drive; after the curricle had turned the corner of Phillip-street; they were driving in a trot, at the usual pace that other carriages drive; after the curricle had turned the corner of Phillip street, I saw Mrs. Berry, with her child in her arms, exclaiming ``My God! My child is killed;'' she went up to the hospital with the child, and as I was standing in the street, a gentleman, whom I believed to be a Magistrate, took my name; I saw a little blood on the child's face; it was about two minutes, or not so much from the time I first saw the curricle, until I saw Mrs. Berry with the child.

ELIZABETH BERRY sworn - I reside in Phillip-street; on the evening of the 19th of December, I was setting at the door, working, whilst the deceased was playing in the road, when a curricle, driven by Pigott, with Crampton seated beside him, turned the corner of the street; the horses were galloping; I called out to Pigott to take care of the children; he took no notice, and turned round and saw the horses kicking the child on before them; the curricle passed over the child; I picked up the child in my arms, and cried out to stop the curricle, as my child was killed; the prisoners did not stop; the child was bruised in the head, and spouting blood from the mouth and ears; she was attended by Mr. Cooke, and died in about eight hours and-a-half after.

Cross-examined by Mr. Rowe - Pigott might have heard me cry out, or he might not; the curricle made a considerable noise; it might have gone over the child without Pigott observing her.

By the Court - It was sufficiently light at the time to distinguish objects in the road; the street was not crowded. I cannot say whether the curricle was on the right or wrong side of the road; after I found that the child had been run over, I called out loud enough to be heard by the people in the curricle to stop; they did not do so, but went on as before; when I saw the curricle turn the corner of Phillip-street, the horses were galloping; the prisoners came to my house the same evening to enquire after the child, and appeared to be sorry for the accident.

Mr. Rowe submitted that there was no evidence against the prisoner, Crampton.

The Court was of opinion that it was a question for the Jury.

Mr. Rowe submitted that, as, in law, Crampton was neither principal nor accessary, it was not a fact for the consideration of the Jury, but for the decision of His Honor.

Mr. Justice Dowling - I am of opinion that the case must go to the Jury to decide upon the guilt or innocence of either or of both the parties.

Mr. **ARTHUR HILL**, the employer of the prisoner Pigott, gave him an excellent character.

His Honor minutely recapitulated the evidence, and the Jury found the prisoner Pigott Guilty. Crampton Not Guilty.

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

SYDNEY GAZETTE, 07/03/1828
Dowling J., 6 March 1828
This morning, His Honor, Mr. Justice Dowling passed sentence on the following prisoners convicted before him during the week.
JOSEPH PIGOTT, for manslaughter. Three months imprisonment.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 23/03/1828
EXECUTION OF THREE CRIMINALS.
WILLIAM JOHNSON, who was brought to trial on Friday, and found guilty of murdering, upwards of three months back, a fellow-being at Moreton Bay, [1] died with another culprit named Gilroy, by the hands of the hangman on Monday. The gloomy ceremony was gone through with at the usual place of such scenes; but certain unusual circumstances which attended it, caused the finisher of the law not to have his work finished till it was very near the hour of noon. 'Twas on the 11th of December last, at Moreton Bay, that Johnson perpetrated the act which brought him and the gallows in collision. He and a man named **MORRIS MORGAN** were on that day employed together felling timber. Both were labouring for government. They were not generally considered, by others on the establishment, as bad friends; but, on the day described, Johnson came up from where he was felling wood, to wards four of a brick-making gang, and calling from over a fence which parted them, to one of the gang, Johnson said "Morgan has threatened many times to blow out my brains, and I've hit him with my axe." describing, at the same time, where Morgan lay. The brick-maker, Stones, and another man named Mallen, immediately rushed towards the spot pointed out, and arrived in time to receive Morgan's last gasp. There was on the right side of the dying man's scull a fracture, and a deeply incised wound towards the back of the head, as if inflicted by an axe which lay near the spot, and bore on it marks of blood. Smith and Gilroy were the two fellow sufferers appointed to the die with Johnson, for a cart robbery, of which they and another (Donahoe), were convicted; but Donahoe, by escaping whilst on his way from the Court-house to the Gaol, 'scaped hanging also, for this time, though, if report speak true, he signalized the very night of his death 'scape, by an exploit or two on the road, and was retaken a few days back, up the country. Johnson's crime did not rank him so high in the scale of villany, as if he had been a cool and premeditated murderer - his offence seems to have been excited during the whirl of passion; and there consequently was more pity for his fate, spread among the spectators, than is usual when a culprit swings for murder. Johnson, was a stout, sailor-like man, of the middle size. He had served in the fleet under Lord Exmouth, at the bombardment of Algiers. Smith and he were attended by the Rev. Mr. Cowper, the Presbyterian Minister, Dr. Lang, and Mr. Horton, of the Wesleyan mission. Gilroy professed being of the Roman Catholic persuasion, and was attended by the Reverend Mr. Power. About the usual time being passed in prayer, and other preparations, the three culprits were at last left in possession of the gallows - the executioner suddenly withdrew the spring supporting the drop, and it fell - a universal burst, expressive of horror and surprise, instantaneously burst from those within sight, inside and outside of the gaol-yard - the rope which was to have suspended one of the culprits (Smith) had snapped asunder, and he tumbled to the ground in a senseless state. Thus unexpectedly scaped from the jaws of destruction - the culprit slowly recovering to a sense of his dismal situation,

was placed on his own coffin - between the fall and the fright, the limbs of the unhappy man appeared to have become paralysed. He attempted to say something, but in so faint and inarticulate a way, that their purpose could scarce be guessed at. His fellow culprits were in a few minutes rendered unconscious of the world. Suspended by the neck, their carcases swung to one side and another, and over the head of the living culprit, who, shortly after recovering, ardently desired that he might be allowed to breathe a little longer, were it but for half an hour. He continued sitting on his coffin, painfully vibrating between hope of mercy, and doubt, and fear, until the return of the Sheriff from the fountain of Grace, whither he had been to know how matters were to work. The Sheriff re-appeared - there was a deep silence of some instants - was a trying moment. Many felt disposed to hope that mercy would take her seat with justice -

> "The quality of mercy is not strained -
> It droppeth as the gentle dew from Heaven,
> Upon the place beneath; it is twice blessed -
> It blesseth him that gives, and him that takes;
> ****
> And earthly power doth then shew, likest God's
> Where mercy seasons justice." -

Certainty, however, soon took the place of suspense. The Sheriff was instructed to tell the culprit "the law shall take its course." He was then conveyed back to the condemned cell. About eleven o'clock, the bodies of the other two having been suspended the usual time, were lowered into coffins, prepared for the purpose. The body of Johnson was given for dissection: and the cap of Gilroy being drawn up, by the Sheriff's order, a transfusion of blood, which shewed immediately after his being turned off, was found to have proceeded from the nose. The bodies having been disposed of, Smith was again led into the yard, and in the arms of two or three fellow prisoners re-placed on the gallows, whilst he sobbed most piteously. The executioner made surer of his prey this turn, than before, and a few minutes longer sufficed to render the culprit insensible of any scene passing around him, though he struggled hard with death to the last.

[*] For a report on the trial, see Sydney Gazette, 24 March 1828. Johnson claimed that he was disadvantaged in his trial by the absence of several witnesses. Justice Dowling, the trial judge, inquired into the evidence they could have given and found that it was not material. He also informed the jury that "on the authority of Lord Hale, and Mr. Justice Blackstone, whose dictum he quoted, that no degree of provocation could justify a homicide; the utmost it could do would be to mitigate it to manslaughter. The weapon, too, with which the fatal blow had been given should also be taken into consideration, as to whether it was such an instrument as was likely to cause death, and whether the use of it was commensurate with provocation, assuming that a provocation had been given. But there was also another question for the Jury in this case, namely, supposing that a threat or some other provocation had been given on the part of the deceased, whether the prisoner could not have run away and avoided the injury to himself, without turning on a fellow-creature, and taking that life which God gave him. His Honor then recapitulated the whole of the evidence, and concluded by again pressing on the attention of the Jury, the to points for their consideration which he had already stated, namely, first, whether they could collect from the whole of the circumstances, that such a provocation had been given as was commensurate wit the use of such an instrument as the prisoner had employed on the occasion; and, secondly, assuming that the prisoner was himself attacked, whether he

had not an opportunity of escaping without resorting to the desperate means he had employed, and depriving a human being of his existence." See also, editorial comment, Sydney Gazette, 24 and 26 March 1828.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

DOWLING, 02/05/1828
Dowling, Select Cases, Vol. 1, Archives Office of N.S.W., 2/3461, [p. 88]
[Friday 2nd. May]
[Rex v Robert Atkins; Mr. Thos. Chambers; Henry Milton]
[Atkins and Chambers were found guilty, the other prisoner was acquitted.]
Before Forbes C.J.
This was an information against the prisoners charging them all as principals, with the wilful murder of Charles Pemberthy, by shooting him with a pistol loaded with ball and gunpowder. At the trial before Forbes C.J. this day it appeared in evidence that the prisoners and the deceased had been mariners on board the ship Elizabeth. The prisoner Atkins, and the deceased having quarrelled, and a blow being struck the former challenged the latter to fight a duel. The parties met on Garden Island and Atkins at the second fire with a loaded pistol killed the deceased. The other prisoners acted as seconds on the occasion, and assisted in loading the deadly weapons, having accompanied the combatants from the ship to the shore, for the purpose. - It was objected by Dr. Wardell on the part [p. 89] of the prisoners that there was a variance between the information and the evidence. The information charged that all the prisoners discharged the pistol at and against the deceased, whereas it appeared in evidence that one of the prisoners only discharged the pistol. The information should have charged Atkins as the principal in the first, and the other prisoners as principals in the second degree. It might be true that in the eye of the law they would be all punishable as principals, but still the information should have charged the offence according to the fact and not according to the intendment of law. In fact, but one hand discharged the pistol. It should have been so alleged and that the other prisoners aided and abetted Atkins. He cited Hailes P. C. 442. 452.-
Baxter A.G. contra. said that the principals in the second degree might be charged as principals in the first at the option of the pleader. He cited Callaghan's case. [**1**]
Forbes C.J. overruled the objection, but reserved the point for the consideration of the other [p. 90] Judges. The case being mentioned to me, I looked into the authorities, and
Dowling J. I am of opinion, that although in practice it is usual in this sort of cases, to charge the person who gives the mortal blow, as the principal in the first degree, and the second as being present aiding and abetting the felony as accessaries, yet as in the eye of the law they are all principals, the indictment may well charge them as such, at the option of the pleader. In cases of this kind where all the parties go out in the prosecution of an unlawful purpose, "the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike." [Foster 357] [**2**] Upon this principle, it is laid down in Hailes P.C. [1 Hale 437. 463. 2 Id. 344. 345] that, "where the indictment chargeth, that A. gave the mortal [p. 91] stroke and that B. and C. were present aiding and abetting if it cometh out in evidence that B. was the person who gave the stroke and that A. and C. were present aiding and abetting, they may be all found guilty of murder or manslaughter at common law, as circumstances may vary

the case. The identity of the person supposed to have given the stroke is but a circumstance, and in this case a very immaterial one; the stroke of one is in consideration of Law the stroke of all.
[1] A marginal note here states "Atkins and Chambers were found guilty, the other prisoner was acquitted."
[2] This and the next references are marginal notes in the manuscript.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 07/05/1828
Supreme Court of New South Wales
Forbes C.J., 2 May 1828
ROBERT ATKIN, JOHN THOMAS CHALMERS, and HENRY MILTON, were indicted for the murder of **CHARLES PENBRTHY**, in a duel fought on the 2d of April last.

The circumstances of this affair being already pretty generally diffused throughout the Colony, we will not go through a detail of the evidence adduced on trial, - that given by the two seamen, **JOHN BARDWELL** and **ROBERT NASH**, who were retained as witnesses by the crown, not differing very materially in point of fact from the evidence given before the Coroner's Inquest, which was convened the same day the affair transpired, and published in The Australian of the 4th ult. Mr. Penberthy, the deceased, had been chief mate of the ship *Elizabeth*, Captain Cock, which sailed hence about a month ago, bound for the Mauritius, of which ship the two first named person in the indictment were, respectively, the third and second mates, and the third - named (Milton) was the boatswain. The chief mate and Mr. Atkin, the third mate, having had an altercation when on board the ship, some time of Tuesday evening, the 3d ult. it was agreed that both should meet the following morning on Garden Island, in order to decide their mutual differences, provided with a loaded pistol each. On Garden Island, off which the Elizabeth lay but a short way, they accordingly met. Atkin being accompanied by Mr. Chalmers, the second mate; the boatswain (Milton) appearing on the ground with the chief mate (Penberthy) - four of the seamen who rowed them ashore being also within view. On a given signal Penberthy fired his pistol without taking effect; that of Atkin burnt priming, but did not go off. The latter re primed, but refused to fire again, until his opponent had re-loaded. Both again presented, and Atkin's pistol again missed fire - a pin was called for to clear the touch-hole of his pistol. Penberthy came forward with one, saying to his antagonist, "I have no animosity against you." "Nor have I against you, "replied the other," only that you struck me." Here Mr. Chalmers interposed, and endeavoured to bring about a reconciliation - it was ineffectual - the parties again took their ground - presented - Atkin's pistol went off, and Penberthy exclaiming, "By God," or "My God I'm done," immediately fell to the ground. He was promptly removed on board of the Elizabeth, and shortly after breathed his last, and the surviving parties voluntarily surrendered their persons to the custody of the law.

Dr. **HUGHES**, of the R. N. examined the body, and certified the cause of the deceased's death before the Coroner's Inquest, but having sailed four or five weeks since for the Isle of France, his evidence viva voce, was not rendered available to the crown on trial, to which Counsel for the prisoners took an objection, inasmuch as there was no positive proof produced to the Court, shewing that the deceased had come by his death in consequence of the pistol shot stated to have been discharged by the prisoner Atkin; and also from a want of proof that either of the two other persons,

charged as principals in the first degree had loaded, carried, or even touched a pistol; and finally from the indictment being informal, which Counsel contended did not charge as it ought, one as principal in the first, and the two others as principals in the second degree. To these objections the Crown Officer replied, and the Chief Justice having shewn grounds for over-ruling the objections taken, proceeded to sum up the case to the Jury.

The offence of duelling (his Honor maintained) was as murder in the eye of the law. From that consideration the Court could not deviate. There was the law, and they must be guided by it, and not by the practice of the day. The first point for the consideration of the Jury would be to enquire whether they were conscientiously and satisfactorily convinced that the deceased (Penberthy) came to his death in consequence of a shot wound, as laid in the information, by the prisoner Atkin. The best evidence that circumstances would admit, had been brought forward. That of the surgeon who examined the body however, would have been material; but he was not to be found. A witness who was put in the box by the Crown Officer, stated, that this person had sailed from the Colony. But his Honor could not see that it mattered much. For, if the Court believed what the witnesses had sworn, there could be no doubt whatever about determining on this first question. Should the Jury be of this opinion, they would then go on and find how far the parties had been actuated by malicious feelings. When arrived upon the ground, his Honor had collected from the witnesses, that they alluded to some quarrel that had taken place previously. The one said "I have no animosity against you" - "Nor have I," replied the other, "but you gave me the blow." "Yes," retorted the first, "you gave me the lie." In consequence of this, it should appear, the parties had met to seek reparation; the one against the other. The testimony of all the witnesses strictly coincided in the narration they gave of the affair. It was clear (his Honor continued) that whatever causes of provocation there might be, to bring about a contest like the one under consideration, that one fighting a duel with, and slaying his fellow-being, is guilty of murder. The next question then for the consideration of the Jury, would be, whether there were any accessaries in the affair, aiding either one or both of the parties (Atkin's or Penberthy); and on this head his Honor was of opinion, that strong evidence had been given to shew that Chalmers had acted as an abettor in the duel; but with regard to the other prisoner (Milton), his Honor thought it only fair to say, that from the evidence it did not appear he had taken any active hand in the business, but stood by as a spectator. His Honor continued, he had certainly known cases where Judges, in putting a case like the present to the Jury, had left it a matter of discretion with them, to soften their verdict to manslaughter; but then there must be an absence of all unfairness proved to have been exercised by the survivor. Lords Hale and Hawkins laid duelling to be murder; and these high authorities went so far as to say, that a party would not be justified, but be guilty of murder, who should accidentally meet another, quarrel with him on the spot, and kill his adversary, notwithstanding the destructive weapon had been put into his hand by the aggressor. His Honor however had told the Jury what was the practice now-a-days; it was a practice which his Honor knew to prevail with very able judges of the present day; but it was a dictum which he could hardly take upon himself to lay down. The Jury upon this retired; and after a brief consultation returned Atkin's and Chalmer's as guilty, and acquitted Milton. The Court ordered that the former two should be brought up for judgment at ten o'clock next morning. Upon the motion of their Counsel however, judgment was deferred till Wednesday (this day), when a mitigation of sentence will be prayed for. - Milton was discharged by proclamation.

Mr. Atkin's and Mr. Chalmers were allowed to retire from the Court-house in a chaise.
See also Sydney Gazette, 5 May 1828 for commentary and another version of the report of the trial; and see its issue of 9 May 1828.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

DOWLING, SELECT CASES, Vol. 1, Archives Office of N.S.W., 2/3461
Forbes C.J. and Dowling J., 8 May 1828
[pp 113-114]
[Where an indictment for manslaughter, the prisoner was charged with killing the deceased
who in the introductory and concluding part of the indictment charged by a wrong surname
as Whitfield for Wakefield and the mistake was discovered after the jury were charged but before the merits of the case were gone into, and an acquittal recorded, Held that this acquittal
was no bar to a second indictment charging the name of the deceased corrected for the prisoner was never in jeopardy upon the first indictment.]
[p. 113]
Thursday 8 May 1828
Present Forbes C.J. & Dowling J.
The King v William Guise
The prisoner was indicted for feloniously killing and slaying a person named Edward Gibbon Whitfield at Sydney on the 12th April, by striking him divers mortal wounds in a pugilistic contest. The indictment charged him in the outset with feloniously killing and slaying one William Gilbert Wakefield and after setting out the manner of the death charged that "so the said William Guise feloniously killed and slayed the said William Whitfield and concluding [p. 114] with the usual averment by the Attorney General that the prisoner had feloniously killed and slayed the said W.G. Wakefield. So that in the commencement and conclusion the deed was described by the wrong surname of Wakefield and in the middle, with the word "said", before it he was called by his right name of Whitfield. To this indictment the prisoner pleaded the general issue of not guilty. After the Jury were charged with the indictment but before any witness was sworn the mistake in the name of the deceased was discovered; whereupon Forbes C.J. directed the prisoner to be acquitted, but ordered the prisoner to be detained in order to answer a second indictment for the same felony. A second indictment having been prepared, with the right names of the deceased [p. 115] the prisoner was again arraigned this morning upon that indictment, and thereupon put in a plea of auterfois acquit.[2] with a prout palet per recordum. The Attorney General replied new trial record.
Moore in support of the plea urged that the acquittal of the prisoner on the former indictment was a bar to the second indictment but
Forbes CJ and Dowling J held that as the prisoner had never been in jeopardy upon the former indictment, (upon which indeed no judgement could have been pronounced it was no bar to this indictment, and therefore ordered that the prisoner should plead over
The prisoner then pleaded not guilty and was tried.[1]
[*] Autrefois acquit: formerly acquitted. A defence that the accused has formerly been acquitted of the same charge on the same facts.

[1] He was found guilty. The following is the full account by the Australian (9 May 1828) of this day's proceedings: "William Guyse was again brought up and indicted for manslaughter in slaying William Gibson Whitfield, on the 12th of April last.
"A plea of autrefois acquit was put in by the prisoner's Counsel, but the Court over-ruling this objection, ordered the trial to be proceeded with. The prisoner was found guilty, but in consequence of the strong recommendations in his favor by several respectable persons, as being at all times a very peaceably disposed man, the Jury recommended him to the merciful consideration of the Court. The Judge promised that this recommendation should be attended to.
"Remanded in custody for judgment."
For another case in which a prisoner was convicted of manslaughter, see R. v. Cullen, reported in the Australian, 6 September 1833; Cullen was sentenced to be worked in irons on the public roads for two years. See also Sydney Herald, 5 and 9 September 1833.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 09/05/1828
Supreme Court of New South Wales
Trial, 7 May 1828
TRIALS.
WILLIAM GUYSE was put upon his trial on an indictment, charging him with committing manslaughter, in slaying one **WILLIAM GIBSON WHITFIELD** (**or Wakefield, as the name was also described in the indictment**) on the 12th of April last.[1] The indictment having been read by the Clerk of the Arraigns, the prisoner's Counsel requested that it might be read again distinctly and audibly. When the Clerk came to the reading over of the name of the person described as deceased, Counsel requested the man to be spelled, which was accordingly done. The name ran as follows "William Gibson Wakefield." In another part of the indictment the name was written "William Gibson Whitfield." Upon this Counsel for the prisoner submitted to the Court that it was clear, where a variation in the name, as in the present indictment, happen not to be idem sonans, the error must prove fatal to the indictment.

After a few minutes pause, the Court, addressing Mr. Garling, who officiated in the room of the Attorney or Solicitor General, in the conducting of the prosecution, observed, that upon the indictment the prisoner would have to be discharged.

Mr. Garling assented to the necessity of doing so, from the incorrectness discovered in the indictment, but submitted the propriety of the prisoner's further detention, till such time as he should take, and act upon the opinion of the Attorney General in the case.

The Jury were then called over, and in the ordinary way asked if the prisoner were guilty or not guilty. A verdict to the latter effect was returned: upon which Counsel moved that the accused be allowed to enter into fresh bail to appear when called upon, and moreover to be furnished with a copy of the indictment under which he had been already tried.

To these applications the Court saw no objection. In the first place the prisoner having been already out on bail up to the period of his appearing in Court, there could be no harm in receiving the renewed application, and in the next place the prisoner's Counsel was entitled to a copy of the indictment for which he applied.

The prisoner, upon entering into fresh bail, retired from the Court. His Counsel intimated that his object in applying for a copy of the indictment, was to give notice of

plea in bar of a second indictment being preferred in the same case, should the Attorney General be disposed to present such a one.
[*] The victim was a publican, killed in a "pugilistic contest": Australian, 7 May 1828. See also Sydney Gazette, 9 May 1828, and commentary, 25 June 1828.
For another case in which the prisoner was acquitted because of a misnomer of the victim, see R. v. Byrne, reported in Sydney Gazette, 3 August 1833.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

STRALIAN, 09/05/1828
[WILLIAM GUYSE]
A plea of antrefois acquit was put in by the prisoner's Counsel, but the Court over-ruling this objection, ordered the trial to be proceeded by with. The prisoner was found guilty, but in consequence of the strong recommendations in his favor by several respectable persons, as being at all times a very peaceably disposed man, the Jury recommended him to be merciful consideration of the Court. The Judge promised that this recommendation should be attended to. Remanded in custody for judgement.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 09/05/1828
Forbes C.J. and Dowling J., 7 May 1828
The case of **ROBERT ATKIN** and **GEORGE ROBERT CHALMERS** coming on next for a final adjudication, the Attorney General prayed the judgment of the Court; upon which the Clerk of the Arraigns proceeded in the ordinary manner to read the record of their conviction; viz. an acquittal on the charge of murder, for which the indictment was laid, and a verdict returned by Jury who tried the case, of guilty of manslaughter. Being asked if they had anything to offer in arrest or mitigation of judgment, several affidavits and affirmations, tending to shew the principles upon which both had been actuated immediately or distantly throughout the whole of the affair, were submitted to the discretion of the Court. Those affidavits tended to shew that the affair of the duel duel had sprang from a train of provocatiens on the part of the deceased. Letters highly complimentary to the characters of both were also put in, addressed respectively to Messrs. Atkin and Chalmers (the latter, however, was not read openly) from Captain Cock, of the Elizabeth, expressive of his warm regard for the propriety of conduct and steadiness in the discharge of their respective duties, uniformly manifested by both whilst on board his ship; at the same time that he regretted the fatal issue of the affair in which they had taken part.
Upon a candid hearing of the foregoing, the Judges remained in consultation for a few minutes, at the conclusion of which the Chief Justice proceeded to pronounce the sentence of the Court.[*] They (Messrs. Atkin and Chalmers) observed his Honor, had been tried for the wilful murder of a person named **CHARLES PENBERTHY**, lately an officer belonging to the ship *Elizabeth*, which vessel, at the time of the unfortunate affair, now the subject of jurisdiction taking place, lay in the harbour of Port Jackson. A merciful Jury who tried this case, had, however, by their verdict, mitigated the offence to one of manslaughter; consequently his Honor would not feel himself justified in treating the offence in the way of animadverting upon it, otherwise than as one precisely of manslaughter, for such he would repeat, it had been designated by the Jury. The offence, however, on being looked at by a calm,

dispassionate observer, would strike as being of a very grave character, were the consequences attendant upon it, the only matters to be looked to; for it had been productive of nothing less than depriving a fellow creature of existence. It was possible that the hand which was the instrument of effecting so fatal a catastrophe, did not reckon upon the consequence which was the sad result of that unfortunate day. By him (Atkin) when he went over the side of the ship to meet his brother officer, as appeared on trial, it may not have been anticipated; - but his Honor was confident that whatever the sentence about to be passed upon him that day, for the illegal act he had thus committed - illegal both in the sight of God and as regarded the laws of mankind, a sentence which the Court was inclined to be as merciful in meting out as justifiable, he and his fellow prisoner would reflect deeply upon reason never to fail in pondering upon it, and deploring it to the latest moment of their existence - deprived, as one or both had, a fellow creature of his life. He was now lost to his friends and connections - friends who, perhaps at that moment, were fondly cherishing and cultivating the hope of his speedy return. Who could paint their probable anguish - what words could tell the torment of their feelings, when the tidings would reach them of the untimely end that had befallen probably a brother - a relation - a beloved friend? - It would be impossible to calculate upon the consequences. Perhaps the deceased's was the protecting, the saving hand of aged and infirm parents. Who could tell the consequences that might accrue to them upon the receipt of intelligence of so direful a character? It has appeared, continued his Honor, from the affidavits handed in to the Court this day, that a quarrel of some description or other had taken place on board ship, and that it was under a sense of what was called "honour," you, Richard Atkin, were induced to accept of a challenge to go out with the deceased Penberthy. But let me tell you, it would have been far more honorable in you, recollecting the duties you owe, as a member of society, had you avoided a step of this kind. To proceed to such extremes as these, to satiate the ebullition of passions arising out of angry feeling, is indeed false honour. You not only exposed your own life, but placed that of another in jeopardy - the death of your opponent was the consequence. You permitted yourself to be hurried on this step by an impulse of feeling which the giddy world is apt to say, arises out of injured feeling, and to resent what you conceive an insult; - you satiate that resentment by causing a fellow creature's death. When you, Atkin, labored under a sense of wrong having been done you, there was a course open to you, by which ample redress might have been obtained. But this will teach you a lesson on the effects of taking the law into your own hands. With respect to the other party (Chalmers) his offence, in the opinion of his Honor, was much greater than that of Atkin. He had no passions to satisfy - no feelings to soothe, to call him to go out upon such an occasion. He, his Honor considered, might have prevented the duel taking place; his offence, therefore, was much more serious, and were it not that it did appear before the Court, that whilst on the ground he did come to a right sense, and endeavoured to interpose in the work that had commenced, the Court would have felt itself called upon to make a signal judgment in his case, in order to shew that in the eye of the law, seconds were more guilty in the acts of the kind then under judgment, than principals. They were not swayed by feelings of false passion and false honour. But as it did appear, that he (Chalmers) did subsequently endeavour to pacify the parties, the Court would not be severe in its judgment. The greater part of the punishment, continued his Honor, addressing the young men, will be with yourselves. - After receiving the mitigated sentence the Court is now about to pass upon you, it will be for you to reflect upon every matter connecting it, with anguish and with heart-felt sorrow during the remainder of your lives. The sentence of this Court is,

that each of you be kept in his Majesty's gaol at Sydney for the space of three calendar months to be computed from the period of your commitment.
The persons to whom the learned Judge addressed this affecting appeal, at its conclusion bowed, and retired from the bar.
See Sydney Gazette, 9 May 1828.
[*] Forbes had also commented on duelling when he was Chief Justice of Newfoundland. He told Governor Hamilton in a letter dated 27 October 1821 that "Your Excellency knows that in duels between Gentlemen, it is not usual to inflict the severe penalties of the Law, provided the parties have used no unfairness, and have met on equal terms": Provincial Archives of Newfoundland, GN 2/1/32 1821-1822, p. 214.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 14/05/1828
Forbes C.J., 9 May 1828
WILLIAM GUYSE, against whom the Jury had returned a verdict of manslaughter, was next called up for judgment.
He had been found guilty, (the learned Chief Justice observed), of manslaughter, in killing a person named William Gibson Whitfield, on the 12th of April last. The Jury had, in its clemency, recommended him (the prisoner), to mercy a recommendation which would have its proper influence in mitigating somewhat the extent of punishment which the Court would otherwise have felt itself bound to award. That the prisoner was father of a family had been urged on the present trial consideration of that, his Honor thought, should have prompted the prisoner, not heedlessly to expose his own life, nor to seek that of another. By his agency a fellow-being had become deprived of existence. No one, the prisoner had stated, could regret the unfortunate affair more than himself, and sufficient reason he had to regret it. However, on a review of the case, his Honor felt disposed to allow some latitude in favor [sic] of the prisoner. It appeared in evidence that the prisoner was the challenged party - that he went out to fight the deceased with a view of displaying a skill in the disgraceful practice to which he had resorted, rather than from a malicious disposition towards his adversary, and that the contest was prolonged by the obstinacy of the deceased, in refusing to give it up, thought frequently intreated [sic] to do so. But the law, his Honor desired to impress upon the prisoner, would not, under any circumstances, afford its sanction to such proceedings. It was no excuse in law, that men become engaged in a transaction having fatal consequences, merely to make a trial of superior skill, merely for sport what was it they were to sport with? with their own lives, and with the lives of others, on both of which the law had set its value, and would not sanction the wanton deprivation of either. The mildest construction the Court had been careful to put upon the offence. The contest was, it appeared to his Honor, for money, which was to become the prize of the winner; that of itself the learned Judge thought contemptible, and as reprehensible as any other part of the affair. The sentence of the Court (in conclusion observed his Honor), upon you William Guyse, is that you pay a fine of £50 to the King, being the amount of what it appeared you staked on the cause of this unhappy contest, and that you be imprisoned till such fine be paid. The prisoner upon this retired from the bar.
See also Sydney Gazette, 14 May 1828.
When Chief Justice of Newfoundland in 1822, Forbes had been faced with a similar case. John Hauton had been found guilty of manslaughter for killing John Welsh in a fist fight, which

Forbes told the governor was "conducted in the fairest manner, and upon terms of perfect equality". He went on: "Your Excellency knows that in duels between Gentlemen, it is not usual to inflict the severe penalties of the Law, provided the parties have used no unfairness, and have met on equal terms, and this case only appears to me to differ in the mode of Combat and the situation of the parties." Some punishment appeared to be necessary, Forbes thought, and so he affixed a fine of £10 for the unlawfulness of the fighting and not for the fatal consequence which ensued, which if felt to be the subject of punishment at all should be of the most exemplary kind. Hauton was initially sentenced to a fine of £10 plus three months imprisonment. Forbes recommended remission of the imprisonment, which Governor Hamilton accepted. See Provincial Archives of Newfoundland, Letter Books of the Colonial Secretary's Office, GN 2/1/32 1821-1822, pp 213-215, and see pp 226-227 for the governor's response.

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AUSTRALIAN, 04/06/1828
Supreme Court of New South Wales
Dowling J., 2 June 1828

WILLIAM BARLOW was next arraigned, being indicted under Lord Ellenborough's Act, for cutting and maiming, with intent to kill **JOHN PURPEL**.

Evidence in support of the indictment being adduced, the learned Judge who tried it, Judge Dowling, proceeded to a recapitulation of the whole. The prisoner, he observed, had been indicted under an Act of Parliament, passed for wise purposes, an Act entitled Lord Ellenborough's Act - an Act, the principal features of which he, the learned Judge, considered it would not be amiss for him to represent to the Jury. That Act recites, his Honor would observe, that whereas divers quarrels had led to barbarous outrages in divers parts of England and Ireland, tending to murder and to disable divers of his Majesty's subjects, a law should be enacted, from and after the passing of which all or any persons who should wilfully or maliciously shoot, present at, load or fire any fire-arms, or draw a trigger, and discharge the same at, or against any persons, or stab or cut any of his Majesty's subjects, with intent to murder, hurt, maim, or disable any of his said Majesty's subjects, should be adjudged guilty of a capital felony, and suffer death accordingly. The points which in the estimation of the learned Judge it would be material for the Court to consider in the present case, were whether or no the prisoner had brought himself, according to the general tenor of the evidence produced against him, immediately within the provisions of that Act. The present indictment having been framed under the particular statute already adverted to, the Jury must be clearly satisfied of this fact before they would be warranted in returning the prisoner as guilty. Much would depend certainly upon the degree of credibility which the Jury might entrust to the witness's testimony. Whatever the law of the case might be, if the Jury did not feel disposed to trust implicitly to the oaths of the witnesses called, it would behove them, without hesitating, altogether to acquit the prisoner. The testimony of the principal witness examined in this case, the learned Judge would give in the words of the witness himself. I am a prisoner of the crown, that person had deposed. In the month of October last I was at Moreton Bay. Prisoner at the bar was there, being also a prisoner of the crown. I was at work in the Brickfield's on the settlement, when one day in the same month I gave the prisoner a pipe of tobacco to smoke, in return for which he promised that next day he would give me some bread and meat. I had no words with him at this time. The day after the day in question, I asked him for the bread and meat he had promised me. - Then I had no words with him, but spoke sharp, when prisoner said he would fight me with his fists I had a shovel in my hand, and told him if he struck me with his fists I would strike him

with my shovel. I was intending to strike him with my shovel, but before I had time to strike, he struck me with an iron poker on my head. I told the Commandant on the settlement the same thing immediately afterwards. - His Honor would observe the he (witness) had said I would have struck first only I had not time.

JOHN STONE is the next witness called, continued the learned Judge. He tells you, gentlemen, that he also is a prisoner of the crown; that he was in the Brickfields at the time the affray, alluded to in the preceding evidence. He saw the prisoner at the bar strike Purpel, who was at the time working in the brickmaking gang. He saw Purpel with his staff about to strike prisoner, and says that he had no doubt that Purpel would have struck prisoner, had he not defended himself. Under such circumstances had the wound been inflicted. What the unhappy man now standing in the dock said afterwards, as to what was his intention in committing the act, to take his own construction upon his own act, and to conclude upon that, would not be equitable. Gentlemen, concluded the learned Judge, in point of law, whatever your opinion of the case may be, you will be bound to say - not Guilty: - verdict accordingly.

On the legality of prosecutions under Lord Ellenborough's Act (49 Geo. 3 c. 58) in New South Wales, see R. v. Smith, 1825.

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

AUSTRALIAN, 22/08/1828

Supreme Court of New South Wales

Forbes C.J., 20 August 1828

GEORGE LELLAND was indicted under Lord Ellenborough's Act, for maliciously shooting at, and wounding, one **GEORGE GREENHILL**, at Campbelltown, on the 26th of May last.

The information contained four counts; the first, laying the offence to have been committed with intent to kill; the second, with intent to maim; the third, with intent to do some grievous bodily harm; and the fourth, maliciously shooting at, &c.

George Greenhill - is an assigned prisoner of the Crown to the Rev. Thomas Reddall, in the district of Airds. In the afternoon of the 26th of May last, was proceeding from his own hut, to the house of a man named Rexin, who lived about a quarter mile off; had something to drink there; did not leave for home till late in the evening, when witness met the prisoner and one of the mounted police, who insisted on taking him to the watch-house; witness refused to go with them, and ran off; prisoner said he would fire at him if he did not stop. The police-man advised him not to do so, saying there was no occasion, as he could easily take witness or any other man that happened to be intoxicated; but scarce had those words been spoken, ere witness received two shots, one in the loins and the other in the middle of the back; believes they were discharged from a pistol, as prisoner had one in his hand. Cannot understand how the police-man escaped, as at the time of the firing he was within a few yards, in the same direction with witness, who became insensible after receiving the shot, and did not remember any thing till the following morning; was, in consequence, confined to bed for six weeks after. The grains of shot have not yet been altogether extracted.

Mr. **JAMES KIERNAN**, examined - Is an Assistant Surgeon, residing in the district of Airds. On Monday, the 26th of May last, was called by one of the mounted police to see last witness, who had been shot, and was then laying in the middle of the road, about a quarter of a mile from the house of a man named Rexin; found he had received two shot wounds, one in the right hip, the other between the shoulder; they were not dangerous wounds, but the man was very ill after, owing as well to his

wounds, as to the state of intoxication he was in at the time of receiving them. Had the wounds been a little closer to the region of the kidneys, they would most probably have proved fatal. Prisoner, when witness visited him, was quite insensible, owing to the quantity of spirits the man appeared to have swallowed. The grains of shot have not yet been extracted.

DAVID FITZGERALD - Is attached to the mounted police at Campbell-town. Remembers being in company with prisoner, between ten and eleven o'clock, on the night of the 26th of May, prisoner called upon witness for assistance, stating that there was a riot at a house which he (prisoner) mentioned; witness went with him, and on proceeding a little distance, met the prosecutor, who was very much intoxicated, and took him into custody; prisoner called him by name. Greenhill, however, attempted to make his escape, by running off; prisoner then called out to the man to stop, or he would fire; witness desired him not to do so, as he could easily come up with him; prisoner fired almost instantly after. When the man was secured, prisoner asked witness to lend him his pistol, and he would blow the b ---'s brains out- but he did not know Greenhill was wounded at the time.

This was the case for the prosecution.

The prisoner having called witnesses as to character, - the learned Chief Justice proceeded to sum up the evidence;

A question similar to that before the Court, his Honor would observe, had some time before been raised. In this Colony, the police assumes a power beyond that which is vested with the police in the Mother Country - a power, in a considerable degree, owing to the mixed nature of the population; being partly made up of emigrants - partly of emancipists, and a large proportion of prisoners of the Crown - people who had been banished from their Mother Country for crimes yet remaining un-expiated, and which continue to lay them under the bar of the law. But still the police could exercise no wanton act of power. There however does exist, a certain power in the police of this Colony, his Honor would observe, with which the police of the Mother Country is not invested; but that power was to this extent and no further; - a certain portion of the population of this Colony, it was to be assumed, were transported here for offences which they had committed in the Mother Country. Certain misconduct in them, made them liable to a summary jurisdiction under the Magistrates. Drunkenness in a prisoner of the Crown, was one of those offences over which the Justices of the Colony had a summary control. This, however, was not the case in England; for there, unless a man in his moments of inebriation, betrayed symptoms of riotous behaviour, so as to commit a breach of the peace, he could not be lawfully placed in a state of arrest. But in this Colony, generally speaking, calculating on the mixed population of the community of the Colony, of which prisoners of the Crown, under sentences of transportation, formed so considerable a mass, the law made that offence of drunkenness, with respect to that class of persons, a punishable offence by the Magistrates, for which such persons were liable, at the discretion of the Justices, either to the infliction of a moderate corporal punishment, or to some days' solitary confinement. The present, his Honor considered, was an offence which the Magistrates had a power to try pursuant to Act of Parliament; and constables, in consequence, had a right to apprehend a person labouring under conviction of transportation for such an offence as the one described - taking, however, this principle with them, that their own conduct must be guided by temper and moderation - lest they, being peace makers, should become peace-breakers.

His Honor ruled, in the present case, that the prisoner was not justified in discharging fire arms at the prosecutor, and that his conduct throughout, seemed to

have been marked by the desire to exercise a wanton and arbitrary usurpation of that power which was vested in him as constable; for though placed in that situation, was a constable, it was to be observed should have a certain scrupulous regard for human life; should deport himself with calmness, for under no circumstances was a constable, considering he possessed only limited power, warranted in firing off a loaded gun at another, though that man be a runaway prisoner, and one who was supposed by the constable, at the time of discharging the fire-arms, to be a felon. For it would be absurd for a moment, continued His Honor, that a constable accidentally coming up with a person who chose to take it into his head not to obey the peremptory mandate of the constable to stand, when bid so to do, that he should be followed by a discharge of fire-arms. And again, suppose the party who ran were even guilty of felony; why then perhaps the law, in treating of the offender's case, might not go to the extent of taking away life, and consequently the law can never delegate one subject to do that, which, in all probability, the law, in exercising its severest penalty, would never have inflicted. For a constable, therefore, to do that which it had appeared in evidence, in the present case, had been done, His Honor considered was assuming an authority wholly unknown to the law. The question, therefore for the consideration of the Jury, was principally to say by their verdict, whether the prisoner had exceeded the bounds of moderation in the discharge of his duty; and whether, in endeavouring to bring others to justice, he himself had not violated the law. The Jury would have to collect from the evidence, if, under all the circumstances of the case, the constable was justifiable in having recourse to the extremity to which he had proceeded. [**1**] The Jury, after some minutes' consultation in their room, brought in a verdict of guilty, but begged leave to recommend the prisoner strongly to mercy in consequence of his previous good character. The Judge, on receiving the verdict, promised that the recommendation should meet attention.[**2**]

See also Sydney Gazette, 22 August 1828. [Despite the apparent seriousness of this crime, in February 1828, the Attorney General agreed to a proposition by the counsel for Joseph Layton that a charge of this kind be abandoned in return for his agreement to pay £5 "by way of mulct to the King." Source: Australian, 8 February 1828. In an unnamed case in April 1829, Forbes C.J. ruled that Lord Ellenborough's Act could be breached if a gun were discharged which had only powder and wadding. If it were near enough, that action could damage a person: Sydney Gazette, 21 May 1829.]

[1] The Sydney Gazette, 22 August 1828 added the following: "The Counsel also adverted to the applicability of Lord Ellenborough's Act to the Colony, upon which he stated he understood a question had already been raised. The Chief Justice. - The Supreme Court has decided that that Act applied to the Colony, as part of the Law of England." On the latter point, see R. v. Smith, January 1825.

[2] He was sentenced to death recorded, the court promising to lay before the proper quarter (the Governor and Executive Council) the jury's recommendation on his behalf (Australian, 10 September 1828; Sydney Gazette, 8 September 1828). (In the sentencing reports, both newspapers spelt his name Lewland.) Death recorded meant a formal sentence of death, without an intention that the sentence would be carried out. Under (1823) 4 Geo. IV c. 48, s. 1, except in cases of murder, the judge had considerable discretion where an offender was convicted of a felony punishable by death. If the judge thought that the circumstances made the offender fit for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved (s. 2).

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

AUSTRALIAN, 03/09/1828
Supreme Court of New South Wales
Dowling J., 29 August 1828
Mr. Justice Dowling having taken his seat, and the Court being formally opened,
JOHN GEESON, JOHN HERBERT, and WILLIAM WELSH, three private soldiers belonging to the 39th Regt, were severally capitally indicted, the first named prisoner as principal and the two others as accessaries to the wilful murder of **TERRENCE ROONEY**, on the night of the 17th August last, to which the prisoners pleaded not guilty.

The Attorney General conducted the case for the prosecution, and Mr. Rowe that for the defence.

The first witness called in support of the prosecution, was, Mr. **P.H. COHEN**, and next, **HENRY WARD**, both of whom deposed to an effect similar to what they had previously at the Coroner's Inquest.

JAMES HAGGETT, a settler, living at Campbell Town, deposed to having seen the deceased running under the gateway of a public-house, opposite Payne's, but could not say by whom the deceased had been wounded.

WILLIAM DANKS, a private soldier, belonging to the 39th Regiment, deposed. On the evening of the 17th August, I was in Sydney. About 7 o'clock that evening, I was in company with Corporal Duffey and Michael Russell. We were in a public-house together in Pitt-street. We had previously gone to Girard's house, in George-street. I cannot say whether I saw the prisoners at the bar there. I went into the tap-room with Russell and Duffey. I had nothing to drink at Girard's house. I was sober at the time. I left parade about 5 o'clock. I had tasted three or four glasses of rum, besides my ration rum, which is about two glasses and a half. There might have been as many as a dozen soldiers in the house, of the 39th. They were quarrelling with each other, and I left with Russell and Duffey. From thence we proceeded to a public-house in Pitt street, and staid there about a quarter of an hour[.] Returning to Barracks, in company with Russell, we had got to the Barrack gate, at the east corner of the Barrack wall, I saw some stones falling to the ground, and people making a great noise. There might be twenty persons or more. At that time Russell left me[.] I was then perfectly sober. I saw prisoners Herbert and Welch against the Barrack wall, and the civilians beating them. A little lower, Geeson was on his knees. I ran and lifted him up. He had his bayonat drawn, and was brandishing it, saying he would have been killed if I had not come on. There was a man under him. I took no particular notice of the bayonet, but it was unsheathed and in his hand. After I had raised Geeson from the ground, he kept knocking the bayonet about while I held him, and after some time he broke loose from me, and ran towards the corner of the new building just beyond the Barracks, at the corner of a lane. After I had taken him up from the man under him, he wanted to strike some man, and run up to the corner of the lane, where there was a parcel of people. I saw no more of him till I saw him in the Barracks. I got my hand hurt in the struggle to hold Geeson. I saw Geeson the same evening at his quarters, at 9 o'clock. I saw Herbert next day. He had lost a brush from his belt. Next day we were called out by the Serjeant Major, and afterwards had a conversation with Geeson and Herbert. I told them I should say as little as I possibly could; that if I was called upon I would say that I picked him, Geeson, up when he was down, thinking he would be killed, if I had not, I believe

this to be the fact. The prisoners were earnest in their entreaty that I should tell as little as I could. When Geeson got away from me, he returned towards the corner of the new building. I did not see him again that evening. He was dressed the same as I am. I am not certain whether Geeson had his cap on at the time when he left me. The other two soldiers had their caps on.

Cross-examined. Geeson said in the presence of the man who was lying under him, that had I not got up he would have been killed. There were three or four person round Geeson when I came up.

BERNARD FITZPATRICK. I am a conductor of Police. On the 20th of August, the prisoners Geeson and Herbert were brought to No. 5 watch-house this was pending the sitting of the Coroner's Inquest. They were confined in separate rooms. I recollect a soldier of the 39th bringing them breakfast. I was then in the watch-house alone, besides the prisoners. A soldier of the 39th came to the watch-house door, knocked at it. I opened it, and the soldier presented two canteens, saying, it was breakfast for Geeson and Herbert. He made a motion to come in, when I told him you can't come in. He said, I want to speak to them. I told him he could not, as it was against the orders I had received. I then took the tins from him, and bid him go round to the window, where he would see me divide it. He went to the window which looks into the street, and in his view I divided the breakfast. On opening the ward-door, each of the prisoners began a conversation; asking, who's there? I told them that one of their regiment had brought breakfast to them. After giving them their breakfast, I withdrew, closing the door after me, and then retired into an inner-room, at the back of the wards, where I could hear any conversation, moderately loud, which passed in the wards. Hearing Geeson call out "Bill, are you there" I listened. An answer was returned from the soldier on the outside, yes. Geeson then said to this soldier, "Bill, is that constable there?" No, returned this soldier, he is gone backwards! Says Geeson, Bill, where is Danks now? answer He is in No. 5 watch-house! Geeson - Is he locked up as we are? Answer No, he is in the kitchen where the fire is! I saw him this morning, and spoke to him. Geeson, I say, what is he confined for? Answer Oh, you know well enough! Geeson Do you think he has split any thing? I understood him to mean, by the word split, had he divulged any thing? Answer I don't know. Geeson said, I suppose they have got him drunk, and have picked something out of him? Answer I can't say: but it's a bad job at any rate. Geeson All I can say about it is, Danks saved my life. Herbert, then from the opposite wall, interrupted the dialogue by saying, Jack, I wish you would hold your tongue, or you had better hold your tongue, cannot say which. The conversation then dropped. Geeson spoke in a common Irish accent, I should take him to be from Munster.

Cross-examined. Geeson said, "well, at any rate, Danks saved my life." I took the whole of Geeson's conversation to refer to Danks only.

Dr. **JAMES MITCHELL**. I recollect on Sunday evening, the 17th instant, receiving the dead body of Terence Rooney in General Hospital. The man must have been dead several hours. I examined the body, and found a penetrating wound in the right side, in the place of which I discovered a thrust through the liver and lower part of the stomach. One of the vessels had become lacerated, which injury, in my opinion, produced the man's death. I supposed the wound had been occasioned by an instrument pointed triangularwise; and such an one, as might have been occasioned by a bayonet. There was no other appearance of injury on the body. Deceased was a young man.

THOMAS BROWN. I reside in Sydney. A man of the name of Terence Rooney was my assigned servant. At a quarter to six o'clock on Sunday evening, the 17th

instant, he left my house to go to Church; he was then alive, and well, and sober. I have never seen him from that time to this.

Dr. **HALLORAN**. I am Coroner for Sydney. On the 18th instant, I commenced holding an Inquest on the body of a man named Terence Rooney. I took depositions under the Inquest. A person of the name of Dalton was examined at the Inquest. I now hold in my hand a soldier's brush, given to my hands by witness, **WILLIAM THOMPSON**.

William Danks recalled. The brush now produced, appears to be the same brush which was produced at the Coroner's Inquest. It is prisoner Herbert's brush. Herbert told me on the next day after the affray, that he had lost it over night. I had seen him set the hair of it about five days before.

THOMAS DALTON - I was examined as a witness at the Coroner's Inquest held on the body of Terrence Rooney, on the 18th instant, and succeeding days. On Sunday evening, the 17th instant, I was going (through George-street) to a new building at the Market-wharf, which I had to take care of. In going along George-street I met three men in my master's employ - named Hacket, Hart, and Dowd, in company with a blacksmith. It was proposed by one that they should go somewhere and have something to drink. We were on our way to our master's in George-street, when three soldiers, linked arm in arm, overtook us. They were walking in the middle of the road. When the soldiers came in a line with us, they jostled one and all against me, with some force. I then turned to the right, seeing they were soldiers and wishing them to pass, I asked their pardon. The blacksmith, who was with me, linked arm in arm, said - "Soldiers, take care of your pipe clay." On this word, prisoner Geeson struck the blacksmith - the blacksmith then loosened his arm from mine, and struck Geeson the conclusion was, that the blacksmith knocked Geeson down. The other two soldiers then struck at me with their fists, Geeson then drew his bayonet. The blacksmith at this time was falling, and had his arms upraised, endeavouring thereby to save his face from being kicked by the two soldiers. At this time the two soldiers were in the act of kicking the blacksmith in the face, head, and body - wherever they could. Geeson then, on the moment, drew his bayonet, between the waistband of his trowsers and his waistcoat, and stabbed the blacksmith in the small of his back. I called to the other two men to come up to assist, and the men then made their escape. I called to them not to run and see a man murdered. I then took hold of the prisoner Herbert, and pulled him two or three yards away from the blacksmith. The other two soldiers then faced me with their naked bayonets, and I let go my hold of the soldier I had. I then seised a stone, for my own preservation, and slung it at Herbert, I cannot say whether it struck him, but I think it did, on the hand which he held up to ward the stone off. I then made towards my master's gate, and got out of the street. The three soldiers turned about then, and made towards the Barrack-gate, I heard some people say in the street - "Is there nobody to apprehend these men?" I said I would for one; when the persons who spoke accompanied me after the soldiers. The soldiers observing this, turned about, and forced their way up the street again, with their naked bayonets drawn in their hands, brandishing them, and striking people with them as they passed along. The persons who had been speaking to me about the constables, withdrew from the foot-path to avoid the soldiers. The next thing I heard was the scream of some persons from the south side of the Barrack-wall. I did not hear the person who screamed. Two gentlemen called - "Is there no constable to assist?" As soon as this expression was made, the prisoner Geeson came over to them, and, presenting his bayonet, made a thrust at them, and asked them what call had they with this. The gentlemen replied, nothing my good man. The same soldier, who had no

cap on at this time, swore by the Holy G--t he would kill them. He then turned as fast as he could over towards Mr. Morris's new building. I then heard the cry of a man - I'm killed - I'm murdered." I then saw Geeson pass over from Mr. Morris's to where his two comrades were scuffling with some of the people. The guard from the Barracks then appeared in sight, and the soldiers disappeared, by running up the lane towards the south Barrack-gate. I saw no more of them. I saw a man stabbed at Morris, gate, and afterwards saw this man lying under the gate, wounded. I saw the prisoner Geeson in the act of stabbing this man, and heard a man to cry out he was stabbed. At this time the other soldiers were at the corner of the lane, within a few yards of Geeson. I was called upon at the Coroner's Inquest, the ensuing Wednesday. I was blind-folded at the Inquest, for the purpose of ascertaining if I should know any person by their voice. In the first instance Geeson was made to speak, whilst I was blindfolded. I recognised his voice - it was the same voice I heard speak in George-street on the evening of the 17th instant. I heard Geeson in his conversation with the gentlemen, and also with his comrades, on that particular evening. I had not seen Geeson the day on which I was blindfolded. When he was introduced, I instantly recognised his voice. The three prisoners also spoke while I was blindfolded. I heard Herbert speak. He was the man I had hold of in George-street.

Cross-examined - I am a prisoner of the Crown for seven years. I arrived in the Colony last July twelvemonths. I never saw Geeson, to my knowledge, before the night of the 17th. He had not his cap off the first time I saw him that night. When I first met the men, the blacksmith, who was of my party, addressing the soldiers, said, "Soldiers, mind your pipe clay." I never said that I knew a soldier of the name of McGuire. I have a fellow servant of the name of McGuire. I never told any person on the particular night, that I knew the soldier who had stabbed the man. The man whom I saw with the cap off, was not beastly drunk. He might have been drunk. Geeson spoke in a very loud, tempestuous manner in the street. When Geeson was before Coroner, he spoke in a law tone of voice. While I was blind-folded, I recollected the prisoners' voices. I don't know which of the three prisoners spoke first in the Jury room. I only recognised the voices of two of the prisoners. I have been in the rear of the Court-house all day. I had not been in Court during the trial, nor until I was put into the witness-box. I have accidentally heard persons going out of Court, converse an odd word together - one asking the other how the matter was getting on. I did not converse with any one on the subject. The man who had the cap off had darkish hair. I never saw Geeson since the 17th of August till I saw him brought from the gaol to the court this morning. I never said to the Coroner that I did not know the person of Geeson. The three soldiers were all riotous together. I did not see the two soldiers endeavour to pacify the other. I had hold of one of the three soldiers when the blacksmith was removed. I don't know who removed him. The last time I saw him was when he was laying on his back in the street. I did not go with Thompson any where that night. I spoke to him at Payne's house. I never saw him any where, except a few yards from the house, that night. I did not speak to Thompson individually. I did not go with him to a crowd of ten or a dozen persons. He might have gone, and been there, but he did not accompany me. Neither of the two soldiers prevented the third from doing further mischief. It might have been done without my seeing it. When I had hold of Herbert, I had my eyes fixed upon him, and upon no other person at that time. The three soldiers were all outrageous, but not so determined as Geeson. The three soldiers drew their bayonets, when the quarrel took place with the blacksmith. I have been in the army. In the regulars - in the 83d Regiment. Was discharged in 1810. I was disabled in an action. I was 14 years in the army, and on

my discharge got a pension. I held a pension when I committed the crime for which I was sentenced to this country. I was tried in Dublin - Question - What was the crime you was charged with? - Witness hesitated for some time to give an answer to this question. The Attorney-General told the witness he need not answer the question, unless he chose.

Witness - My offence may be ascertained on reference to Mr. Hely's office.

Question - Was you ever charged with theft? - It is not for my honesty my country has sent me here.

The Court - Can the witness say more than what he has? He has given the answer to the question. He stands in the box a transported convict.

Question - Were you ever charged with perjury? - Witness. I will not answer the question.

Examination resumed - I told the Coroner that I could identify the person of the soldiers. I do not know the reason why I was blindfolded. Immediately upon the two men speaking at the Inquest, I identified their voices to be the two men who had done the murder.

Dr. Halloran - I examined last witness at the Inquest, relative to the identity of person. He said he thought he could swear to the person of one of the men, but was quite sure he could to the voice. I then had him blindfolded, and placed in a corner of the room, with a large board before him, so that it was impossible he could see anyone. I then called in three or four soldiers into the room, and put some unimportant questions to them, merely for the purpose of his hearing their voices. Upon hearing the voice of Geeson, this man called out, aloud, "I'll be upon oath that's the man who committed the murder, and the man who spoke before him is the man I pulled away from the blacksmith." When the soldiers had withdrawn, I read the whole of the depositions to the witness, slowly and attentively. There were some omissions made in the depositions to this witness, from his going on too fast, and I omitted to notice a particular fact, in the order it occurred, and that was the cause of the interlineation, and then it was inserted.

Cross-examined - When the witness was speaking about the identity of one of the soldiers, I think he said he was pock-pitted. I cannot say whether he said the soldier had light hair. He said three soldiers were flourishing about their bayonets. He did not say that two soldiers attempted to prevent the third from doing any mischief, or that one of the three threw himself between a soldier and a civilian, to prevent mischief being done. There was one, if not two brought in, before other of the prisoners at the bar. I am quite sure of this. Herbert was the second man called in - Geeson the third. He did not speak of Herbert till Geeson spoke, and then he said, that is the man who committed the murder, and the man before (Herbert) was the one he pulled from the blacksmith. There was nothing so particular in the dialect of the first soldier who was called before the Inquest, that I could ascertain what particular country he was of, but I believe him to be an Englishman.

EDWARD KERSHAW examined - I am a blacksmith, living in Sydney. On Monday week, about seven o'clock in the evening, I was going towards the wharf, down George-street, in company with one McCarthy, when three soldiers, to the best of my knowledge, overtook me, and shoved against me. I asked them their reason for doing this, as there was plenty of room before them, as well as I had. The answer they made me I don't know. They gave me no time to talk, when one of the soldiers struck me with his fist. There were three soldiers in company. I did not notice what description of men they were. The man who struck me, I struck again, and I brought him to the ground. I was saving myself as much as I could, when I was again struck

by another of the soldier party, by the socket of the bayonet, on the side of the head. I was then knocked down. While on the ground, and before I could recover myself, another man stabbed me with a bayonet in the hip. The wound was inflicted between the breech-band and the waistcoat. I got up from the ground, and while I was getting up, the soldier stood over me, when one of the soldiers came and pulled him away. The first soldier who stood over me had previously made repeated efforts to stab me but his bayonet missed. I was severely wounded. I am now labouring under the effects of the wound I received. I could not swear to any of the soldiers who were concerned in this affray. I struck the soldier as hard as I could. I am not sure whether I struck him in the face or not, so as to leave any marks thereon. This happened in George-street, convenient to Mr. Payne's premises. Three soldiers drew their bayonets, but I received only one stab.

Cross-examined - I was walking linked arm in arm along the footpath, when we met the three soldiers, whilst going down George-street. We pushed against each other. We were not very sober. The only man in my company was a man named McCarthy. We had been drinking together. There was no other person in our company. There might be persons walking close to us in the street. There was no other person linked on my arm but McCarthy. I did not take notice whether McCarthy, with whom I linked arm in arm, was in link with another person besides. I had one arm disengaged. It was me who used the offensive expression to the soldiers, but it was after I had been shoved off the foot-path. I took no notice whether any other person spoke to the soldiers. I did not hear any one say I beg you pardon, soldiers. The soldiers were very offensive in their behaviour. The words I spoke to the soldiers were spoken pleasantly. I told them that the street was wide enough for them, and that they need not to have shoved me. I made use of no other offensive expressions to the soldiers. To the best of my knowledge I did not say to the soldiers, "mind your pipe clay, soldiers." I had hardly time enough to say that.

The witness at this stage of the cross-examination complaining of extreme exhaustion, in consequence of the wound he had sustained, was permitted by the Court to take a seat.

Examination resumed - The man who knocked me down, to the best of my knowledge, was not the man who stabbed me. One soldier attempted to prevent the two others from ill-treating me. - They did not kick me, that I know of, but I was cut in the leg, and how that was occasioned I do not know.

Re-examined - Several persons took me away to Mr. Payne's. At so early an hour as 7 o'clock, and on Sunday evenings particularly, it is common for George-street to be crowded with persons walking. I was walking along with McCarthy, and Hart might have met with some of his friends, for aught I know.

The Attorney-General having closed the case for the prosecution, witnesses for the defence were called.

JOH N McMAHON. I am a cabinet-maker, and a native of the Colony. I know a man of the name of Kershaw.

The Attorney-General interrupted the witness. Was this upon the Inquisition? Witness, yes! I went to see the body of Kershaw. The Attorney-General objected to the witness being examined as to this particular. The Court ruled, that the Court was now sitting to try the three prisoners, upon an information filed by the Attorney-General, and had nothing to do with what took place would be the depositions taken by the Coroner, which were in Court, and to be overlooked on application to the Crown Officer.

Dr. Halloran was upon this called, and Mr. Rowe, put the question following;

Did you attend a wounded man of the name of Kershaw, and did he say any thing about pipe-clay?

The Court overruled the question. Counsel then moved that the deposition of Edward Kershaw be read.

The deposition was accordingly read.

Kershaw was exceedingly ill while I took down his deposition. I took down his evidence according to the best of my understanding, skill and knowledge.

PATRICK SULLIVAN, private soldier of the 39th Regiment. Had known Geeson, one of the prisoners. Recollected seeing him about the hour of seven on Sunday evening, the 17th August, when, to the best of witness's opinion he was not drunk. He had disembarked on the day of the evening on which the affray took place, from a vessel from Port Macquarie.

Serjeant **HAWKINS**, of the 57th Regt. saw Danks in George-street, a little after 7 o'clock, on Sunday week last, near the south-east part of he Barrack wall. He was not drunk. He had been drinking. Did not perceive any blood upon him.

RICHARD BRAY, private soldier of the 39th, deposed to having seen Danks given in charge of Corporal Willbore, who also deposed to a similar fact. Danks' hand was cut, and his belt besmeared with blood, between 7 and 8 o'clock, on Sunday week last.

ROGER CRAWNE and **JOHN MOEHAN**, both belonging to the 39th Regt. deposed to having seen Danks drunk the preceding Sunday week.

Colonel **LINDSAY**, of the 39th Regt. - A detachment was landed from Port Macquarie on Sunday the 17th instant. Geeson was of that detachment. He had been away from Head Quarters probably for twelve months. Knows prisoner Welch always bore the character of a well conducted man and a good soldier. Had had a conversation with the witness Danks, who was formerly a serjeant in the 39th, but is now a private.

Serjeant **JOHN WALTERS**, of the 39th Regt. - I arrived in the Colony on board of the *Countess of Harcourt.* I was the serjeant of that detachment. There was a prisoner came out in that vessel by the name of Thomas Dalton. His conduct on board ship was bad. From his general character, I would not believe him on his oath.

This closed the case for the defence.

Mr. Justice Dowling proceeded to sum up ``[in] conclusion to the grave and important enquiry upon which the Court had been occupied, the learned Judge considered it his duty to offer such remarks as might assist the Jury in deciding upon such a verdict as would be satisfactory to their conscience, and consonant with the ends of Justice.

The affair under comment, his Honor was aware had been a subject of public excitement, to which, from the limited nature of the community in which they lived, it was very possible the Jury were by no means strangers. It was difficult, the learned Judge considered totally to divest the mind of first impressions, but he was persuaded from the habits and education of the gentlemen constituting the Jury, that their minds would not be warped by any unjust prejudices. The learned Judge felt called upon to make such a preliminary observation from the circumstance of the prisoners happening to be a soldiers, and the Court, by the peculiar constitution of Criminal Courts in the Colony being partially composed of military officers, but the learned Judge felt confident that the Jury would not allow any natural impulse of indignation to operate against the prisoners, nor on the other hand lose sight of what was due to the offended laws of the Country. To strict and impartial Justice the unfortunate person into whose death the Court was enquiring, was as fully entitled, as if he had not belonged to that class whose offences may have consigned them to exile. Situated

as the deceased was, it should still be considered he was a British subject, and entitled to the ample protection of British law; and the learned Judge doubted not but the Jury would give the whole case before them that degree of calm, temperate, and deliberate consideration it deserved. Having premised thus far, the learned Judge would proceed to point out the legal features of the case. The law made no distinction between principals in, and accessaries to, a murder. [*] By accessaries were meant those who were aiding and abetting, but a person might be present at a murder, and if he took no part either in the commission or prevention of it, be neither a principal nor an accessary. It should therefore be proved before conviction of the two prisoners charged in the present case as accessaries, whether a murder had or had not been committed, and how far the latter may have been concerned. - The alleged offence of murder was laid in the present case, as committed with malice aforethought, that was to say, with a disposition deliberately, bent upon doing harm, though not directed against any particular individual. All homicides, the learned Judge would observe, the law considered as murder, until some circumstances capable of alleviation could be produced, to shew the contrary, and provocation could not be considered as exculpatory of express malice. It did not appear that the unfortunate deceased had provoked the fate which befel him. From the evidence it would seem that he was at the time a quiet inoffensive passenger in the street, but collecting every circumstance, it would be but a charitable construction to put upon the case, that the deceased had in some way provoked his fate; though the law however disposed to allow for the frailty of human nature, under certain circumstances would not extenuate acts of disproportionate and barbarous revenge.

With regard to the alleged principal in the crime of murder, the learned Judge would beg leave to point out two questions for the consideration of the Jury - firstly, was the death of the deceased occasioned by the prisoner who stood charged as principal? and secondly, assuming the prisoner to be such, was the revenge so taken, inflicted under the first made transport of passion, and proportioned to the supposed degree of provocation given? If the Jury were disposed to bear to the latter opinion, then they might feel justifiable in finding a conviction of manslaughter? and for the better consideration of both questions, the learned Judge would invite the Jury to a rehearsal of the evidence of which he accordingly entered on a minute recapitulation, concluding with some observations upon the two prisoners charged as accessaries, against whom there had been no conclusive evidence to shew that they had been aiding and abetting Geeson in the act for which he stood indicted as principal. Whatever the decision of the Jury might be, the learned Judge, in closing his charge, felt confident it would not be otherwise than consistent with the ends of justice and the public interest.

The Jury, upon this, retired, and after remaining out of Court about a quarter of an hour, returned, finding the prisoner Geeson guilty of manslaughter, and acquitting the other two prisoners, who were next day discharged by proclamation.

For its report of the case, see Sydney Gazette, 1 September 1828; and for comments, its issues of 1, 3 and 10 September 1828. In the latter, the Gazette responded to an attack by the Monitor on the jury's decision. The jury consisted of soldiers trying soldiers.

[*] The Sydney Gazette 1 September 1828, reported that Dowling J. said:

"In point of law there is no distinction between principal and accessaries, in murder, as to legal responsibility, `for all are principals, and it is not material who actually did the murder' (Rex v. Wallis and others, Salk. 334). Therefore `If A be indicted as having given the mortal stroke, and B and C as present aiding and assisting, and upon the evidence it appears that B gave the stroke, and A and C were only aiding and assisting, it maintains the indictment, and

judgment shall be given against them all, for it is only a circumstantial variance, and in law it is the stroke of all that were present, aiding and abetting (1 Hale, 438. Plow. Com. 98, 9 Co. 67, b. Rex v. Macknally, 1 East p. b. c. 5, s. 121, p. 350). Upon this principle it has been held that in the case of a duel in cold blood, not only the principal who actually kills the other, but also his second is guilty of murder (1 Hale, 442, 452, 1 Hawk. p. 6, c. 31, s. 31). In order, however, to make an abettor to a murder, a principal in the felony, he must be present, aiding and abetting the fact committed. The presence however need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder, and another keeps watch or guard at some convenient distance (1 Hale, 615, Fost. 350, 4 Bla. Com. 34). But a person may be present, and if mot aiding and abetting, be neither principal nor accessary; as if A happen to be present at a murder, and take no part in it, not endeavour to prevent it, or to apprehend the murderer, this strange behaviour though highly criminal, will not of itself render him either principal or accessary (Fost. 350, 1 Hale, 439).

"With respect, therefore, to the two prisoners who are charged as accessaries to this alleged murder, assuming that a murder in point of law has been committed by the supposed principal, before you can convict them of murder, you must be satisfied that they were present aiding and abetting the fact charged to be murder.

"Before however you come to the consideration of the cases of the prisoners charged as accessaries, you will first have to determine whether there has been a murder, or that which in point of law amounts to a murder, committed by some one of the prisoners.

"The information charges the alleged offence to have been committed with malice aforethought, thus describing the offence in the technical language I which it is defined by law. `The legal definition of murder is, the killing any person under the King's peace, with malice prepense or aforethought, either express or implied by law. Of this description, the malice prepense, malitia praecogitata, is the chief characteristic, the grand criterion, by which murder is to be distinguished from any other species of homicide. It should however, be observed, that when the law makes use of the term `malice aforethought,' as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particular individuals, but as meaning that the fact has been attended with such circumstance, as are the ordinary symptoms of wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief (Foster, 256, 262), [sic] And, in general, any formed design of doing mischief. may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also in many other cases, such killing as is accompanied with circumstances that shew the heart to be perversely wicked, is adjudged to be of malice prepense, and consequently murder (1 Hawk, p. 6, c. 31, s. 18; Foster, 257; 1 Hale 451, 454.)

"Malice may be either express or implied by law. Express malice is, when one person kills another with a sedate, deliberate mind, and formed design; such formed design being evidenced by external circumstances, discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes, to do the party some bodily harm (1 Hale, 451, 4 Blac. Com. 199). And malice is implied by law from any deliberate cruel act, committed by one person against another, however sudden; thus, where a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears from circumstances of alleviation, excuse, or justification; and that it is incumbent upon the prisoner to make ou [sic] such circumstances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him. It should also be remarked, that were the defence rests upon some violent provocation, it will not avail, however grievous such a provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was affected. And provocation will be no answer to proof of express malice; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will have his blood, or the like, and afterwards carry his design into execution, he will be guilty of murder, although the death happened so recently after the provocation as that the w [sic] might, apart from such evidence of express malice have imputed the act to unadvised passion (1 East, p. c. c. 5, s. 12, p. 224.

"The writers, upon this branch of the criminal law, have divided cases of murder into different classes, which it is unnecessary for me on this occasion to particularize. One, however, of these classes is cases of provocation, within which class, I think the case now under consideration may be treated as falling, although it certainly does not appear that the unfortunate man, who has lost his life, had given any the slightest provocation to the party by whom the mortal wound was inflicted. Indeed, according to the evidence, he appears to have been an unoffending passenger in the street, at the time of the transaction in question. In think, however, it may now fairly be collected, form all the circumstances of the case, that the person who inflicted the mortal wound acted under a supposition, in his blind fury, that the deceased had either himself, or was one of the persons who had given some provocation. Viewing the transaction in that light, which in point of charity we may fairly assume to be the case, I shall inform you, what the law is, as applicable to such a state of assumed provocation.

"As the indulgence which is shewn by the law, in some cases, to the first transport of passion, is a condescension to the frailty of human nature, to the furor brevis, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation, which is allowed to extenuate in the case of homicide, must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. All the circumstances of the case must lead to the conclusion, that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment, and previous malignity of the heart, but solely imputable to human infirmity (1 East. P. 6. c. 5, s. 19, p. 232). For there are many trivial, and some considerable provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead. Though an assault made with violence, or circumstances of indignity, upon a man's person, and resented immediately by the party, acting in the hear of blood, upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood, that the crime will be so extenuated by any trivial provocation, which, in point of law may amount to an assault, nor in cases even by a blow. - Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice. By Lord Holt, Keate's case, comb. 408, an assault, though illegal, will not reduce the crim of the party killing the person assaulting him to manslaughter, where the revenge is disproportionate and barbarous."

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

AUSTRALIAN, 10/09/1828

Forbes C.J., Stephen and Dowling JJ, 6 September 1828

PASSING JUDGEMENTS.

Shortly after the Chief Justice, and two Assistant Judges severally taking their seats on the Bench this morning, the Attorney-General rose, and prayed the judgement of the Court on such prisoners as had been tried during the Session, and remanded for sentence agreeably to which, the following prisoners were called up to the bar the first of whom was John Geeson, a private soldier, belonging to the 39th Regiment, convicted of manslaughter. On the prisoner being asked in the usual form by the Clerk of the Arraigns, if he could say why judgment should not be passed upon him, Mr. Rowe, in his behalf, moved an arrest of judgment upon the record, which the Court, considering untenable, overruled. [*] There being no other bar presented to the passing of sentence, one of the three learned Judges,

Mr. Justice Dowling, proceeded to address the prisoner.

He, John Geeson, the learned Judge would premise, was then about to receive the judgment of the Court, having been found guilty of feloniously slaying one Terence Rooney, on the 17th day of August last. For the wilful murder of the same person he (the prisoner) had been indicted, but the Jury, considering all the circumstances of his case, had felt themselves warranted in bringing in such a verdict as would fall short of

incurring the penalty which the law was accustomed to award on cases of wilful murder. With the finding of the Jury (observed the learned Judge), I find no fault. Upon a merciful view of your case (continued he, emphatically addressing the prisoner), they have saved you the horrors of an ignominious death, and I have been relieved from the painful duty, at all times distressing to a Judge, of sending a fellow being into the presence of his God. A human tribunal has pronounced you (prisoner) not guilty of wilful murder; but, in the sight of God, the offence of which you have been convicted requires the same penitence, contrition, and reparation, as if you had been found guilty. You stand convicted of slaying an unoffending fellow creature under the circumstances of your peculiar case highly disgraceful, in any state of society. It is with criminal grief that I see a person having the honor to wear the King's uniform placed before the bar of justice to receive judgment for crime; enrolled as a member of a highly distinguished regiment honored by being sent here to share in a reputation and called upon as far as in you say, to set an example of sobriety and good conduct to uphold the laws and the Government in these remote regions. But what has been your conduct? Regardless of your duty as a soldier, and profaning the Sabbath day, you are found reeling drunk in a populous town, seeking an opportunity of giving offence to the peaceable inhabitants. Upon a shew of resentment by the inhabitants, to your violent behaviour towards them, you at once, by way of gratification, evince those actions and that behaviour, which only spring from a malignant heart. I am willing to suppose that you suffered strong irritation, under a supposed injury; but, admitting this, does it become a British soldier to sheath his steel in the bosom of an unarmed man? Can such conduct be reconciled with that magnanimous terperament [sic] for which his Majesty's subjects stand pre-eminent? Every man in whose bosom the pulsation of British blood is felt, will blush with shame at so grievous a departure from the natural feelings of his countrymen. I feel for the reputation the wounded honor of the distinguished regiment to which you belonged seeing that they must be influenced on beholding the disgraceful example which justice requires should be made of you. Your case painfully exhibits the dreadful consequences of drunkenness a vice equally destructive of every generous and noble quality in man the prompter of crime, the destroyer of human happiness involving alike the soldier and the citizen in brutal degradation. I do hope, continued his Honor, that the events of Sunday evening will have a salutary operation upon the general society of this Colony, the prosperity of which depends upon a proper observation of those ordinances which the wisdom of the legislature have enacted. I am willing to believe, but I fear there is too much reason for suspecting that a supposed sense of superiority over some portion of his Majesty's subjects in this Colony, had its influence on your mind on the particular evening in question. While it is proper to set a high value on an untainted character, yet those who do not stand on so proud an eminence in society must not be trampled upon or ill-treated. The constraint persons of this description have to labour under, should rather excite motives of sympathy and compassion not to take an advantage of their constrained situation, in order to ill use them; for such is at as direct variance with the peace of society, as it is opposed to the laws by which all of his Majesty's subjects are entitled to protection. The Judges of this Court, after the most anxious consideration of all the circumstances of your case, marked as it has been with an utter disregard to human life, feel themselves bound, in the firm discharge of a public duty, to pass the severest sentence which the law has fixed in cases of manslaughter.

The sentence therefore of the Court is, that you, John Geeson, be transported to such penal settlement as his Excellency the Governor shall think proper to direct, for the term of your natural life.
The prisoner was then removed from the dock.
See also Sydney Gazette, 8 September 1828.
[*] Justice Dowling gave the following account of this point (Dowling, Select Cases, Vol. 1, Archives Office of N.S.W., 2/3461, p. 332):
"[Where a prisoner was found guilty of Manslaughter only upon an indictment for murder, Held that the indictment would not conclude "Contrary to the form of the "Statute"; and that he may be sentenced under statute.]
"Saturday 6th September 1828
"Forbes CJ Stephen J Dowling J
"Rex v John Geason
"Manslaughter
"In this case Rowe for the prisoner moved in arrest of Judgment that as the indictment did not conclude against the Statute no judgment could be passed, clergy having abolished by the 7&8.G4.C.29.
"The Court was however unanimously of opinion that there was nothing in the objection, and I proceeded to pass sentence."
See Application of Criminal Laws Opinion, 1828 on the applicability of the new English criminal laws in New South Wales.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 26/09/1828
Supreme Court of New South Wales
Dowling J., 19 September 1828
CASE OF THE "NIGER."
An aboriginal native of Moreton Bay, was placed in the dock on Friday, for the purpose of being tried on an indictment charging him with the wilful murder of a European.[1] Before the information being gone into or the prisoner called to plead, the learned Judge Mr. Dowling enquired whether or no the black was at all conversant with the English language, to which the Attorney-General[2] replied in the negative.
Judge Dowling - Then how do you purpose Mr. Attorney-General to try this man. The prisoner, according to the principles of the British Constitution, is entitled to be tried by a jury composed one half of his own countrymen. But waving even this as a matter of consideration; by what means do you intend Mr. Attorney-General to convey to this man's mind whom you purpose to try for a capital felony, the nature and particulars of the charge?
The Attorney-General - May it please your Honor. I consider, that in the trial of this aboriginal native, it is not incumbent in me to provide either of the requisitions to which your Honor refers. Constituted as this Colony is, in respect of the aboriginal population, it is, I apprehend, to be considered on terms of relationship and good feeling between this class of people and Europeans. I hold that the aboriginals of this Colony are amenable to the British Laws for any acts they may be found guilty of, in the same proportion as Europeans, convicted of offences against them, might be punished by our Courts. With respect to the formation of a Jury composed one-half of Europeans and the other half of aboriginals; this, in the present untutored and savage state of the natives, is next to impossibility to effect. Hence, then, the absolute necessity of departing from the rule of law, which your Honor has adverted to, but

which I admit is strictly in unison with the spirit of the British Constitution. But in the present unlettered state of the black community, I apprehend your Honor will see the necessity of foregoing this rule in the instance before the Court.

The Judge - The material question for the consideration of the Court is - does the prisoner stand in such a situation as that he may be made to understand what is passing to his prejudice on the trial?

The Attorney-General - I believe your Honor he does not; and it may perhaps be necessary for me to explain to your Honor, why I have not taken the precaution of having persons in attendance who are conversant with the dialect of the Moreton Bay blacks, and who might have been used as interpreters on the occasion. The reason was this. Some months ago, a black native was tried for murder. On that occasion, I obtained the attendance of Mr. Threlkeld, a gentleman connected with the Wesleyan Mission, who understood tolerably well the native language of the person then on trial. I also procured the Chief, Boongaree, who was employed in Court to assist Mr. Threlkeld in interpreting and propounding questions to the black. The latter however, for reasons best known to the man himself, refused to make answer to any of the questions put to him. The black was convicted, and subsequently executed in the usual course of legal proceedings.[3]

The Judge - Mr. Attorney-General, this man is a savage. He stands before the Court in the same light as a dumb man - as void of all intellect. You purpose examining witnesses in support of a charge, and that of capital felony, which affects his life. The man knows nothing of what is being said against him. He is incapable of making any defence. Non constat.[4] If this man were made sensible of the nature of the charge you are here prepared to prove against him, he might set up such a satisfactory defence as to prove that he had been placed in such a situation, as that the retaliation on his part, which affected a European's death, was justifiable in law.

The Attorney-General - I will just observe to your Honor, that the case as affects the prisoner, is one so clear and satisfactory in its character, as that it would be morally impossible, by any evidence which might be offered on the prisoner's side, to shake that testimony. I can have no wish, your Honor, beyond the promotion of the end of public justice - but I must say that in the present instance public justice would be sacrificed, if the dry forms of law were to be rigidly adhered to, in instances where the aboriginals of the Colony are parties who have to appear before the Court. Your Honor is not perhaps aware of the fact, that with the black natives here, they do not make it a practice to revenge any insult that may have been offered them, upon the actual aggressor, but that they do so upon the very first European they meet with.

The Judge - The public justice of the country cannot be in any way defeated by the delay of this trial. The aboriginal inhabitants of the Colony are most certainly amenable to all the consequences of punishment which the English law affixes - but if these wretched people are to be held liable to punishment, the same as a European, surely those miserable outcasts are entitled to all the privileges and protection which the British law affords to its own immediate subjects. Looking at this case, in any point of view, I am clearly of opinion, that if I were to try this savage, in his utterly defenceless situation, I should be at once departing from the spirit and letter of the British law. As such I will not try this man. Let him be remanded. - the Attorney-General has it in his power to provide interpreters from the district the man came from (Moreton Bay), against the next Criminal Court Sessions. - In India (continued his Honor), trials of this sort are of common occurrence. Fixed interpreters are there named by the courts; and these are called upon whenever instances of quarrel or theft are committed between the Europeans and the black population of that country.

The Attorney-General said he would be prepared to proceed on the trial of the prisoner next Session; and the man, who appeared before the Court almost in a state of nature, having an old blanket merely wrapped round his persons, was then released from the dock, and ordered to be returned to gaol, with express instructions by the learned Judge to the Sheriff, that whilst there, the man should meet with humane treatment.[5]

State Records, NSW 28/10171 4/2005
Supreme Court
19 December 1828
Sir,

I have the honor to inform you for the information of His Excellency, that there are Two Native Black men, (Binghi Multi and Willimore) now confined in Gaol on charges of Murder. – On consultation with their Honors the Judges I have been advised, in consequence of the impracticability of enabling these men to take their Trials under all or any advantages of British Law or Justice, to forego the Prosecution and to recommend their being removed to some part of the Colony distant from their former abodes –

The first man, named Binghi Multi, was sent down from Moreton Bay, and the other, Willimore from the neighbourhood of Port Stephens.

I have the honor to be
Sir,
Your most obedient servant,
Alex. M. Baxter

To the Hon.
The Colonial Secretary

[1] See also Sydney Gazette, 22 September 1828.

Justice Dowling recorded this case as follows (Dowling, Select Cases, Vol. 1, Archives Office of N.S.W., 2/3461): [p. 338]

"[An aboriginal Black Native, who could neither speak or understand English was put to the Bar charged under Ld Ellenborough's act, with stabbing a white subject of the Crown, and there being no interpreter produced who could speak the language of the prisoner or make him understand the proceedings of the Court Dowling J. refused to try him until a properly qualified interpreter was produced and ordered him to be remanded for that purpose.]

"Friday 19 September 1828

"Crown Case

"Rex v Binge Mhulto

"Case of an Aboriginal Native

"This person, an aboriginal Native who could not speak a word of English was put to the bar under Lord Ellenborough's act with stabbing with a spear a British Subject at Moreton Bay.

"The Attorney General informed me that he had no interpreter who understood the prisoners language and he knew of no person who could speak it, but he said on the authority of a case tried by the Chief Justice when the native was executed for murder he purposed proceeding to [p. 338 sic] try this person.

"I said I could not try this man any otherwise than by the English Law, and as the prisoner must be made acquainted some how or other with the proceedings against him I could not try him until an interpreter was properly instructed to communicate and interpret the proceedings to the prisoner. I likened this course of proceeding to the case where a person unacquainted with the nature of an oath, the trial was postponed until the witness was properly instructed.

"Attorney general adopted the suggestion and hearing that Captain Logan the committing Magistrate was in Town, he should make inquiry as to the practicability of procuring an interpreter."

Lord Ellenborough's Act (43 Geo. 3 c. 58) applied to specific kinds of attempted murder. On its applicability in New South Wales, see R. v. Smith, 1825.

On 27 March 1828, Governor Darling sent Huskisson Archdeacon Scott's report on proposals to "civilize" the Aborigines. Darling was sceptical about the plan, noting that those who learnt

English at the school in Black Town returned to the woods as soon as their education was complete "though accustomed for some considerable time to the Comforts of a House, good food and Clothing". The report, based on the work of Sadleir, recommended the acquisition of knowledge of the language of the native people, but Darling pointed out that it failed to notice the great multiplicity of Aboriginal languages. (Historical Records of Australia, Series 1, Vol. 14, pp 54-64.)
Governor Darling reported other violence in the north in a despatch to Huskisson on 25 February 1828 (Historical Records of Australia, Series 1, Vol. 13, p. 793). A surgeon at Melville Island, near what is now Darwin, was reportedly murdered by natives in November 1827. On 1 November 1828, the British government ordered the abandonment of the settlement there: Murray to Darling, 1 November 1828, Historical Records of Australia, Series 1, Vol. 14, pp 410-411; and see p. 521.
See also R. v. Brown, 1828 for another tragic inter-racial conflict in 1828.
For a case in which Aborigines were discharged without trial, see Australian, 5 April 1842 (Bathurst Circuit Court, Stephen J.): "Two blacks were placed at the bar for murder, but the interpreter not being able to understand what they said, his Honor refused to try them."
[2] A.M. Baxter.
[3] This apparently refers to R. v. Tommy, 1827.
[4] It does not follow.
[5] On 12 November 1828, the Sydney Gazette noted that there were two Aborigines in gaol at that time, one for murder, presumably Binge Mhulto, and the other as accessory to a murder allegedly committed by a convict at Moreton Bay.
It appears that Binge Mhulto was never tried. He does not appear on a contemporary list of Aborigines tried between 1824 and 1836, though the list may not be complete. See SRNSW, 5/1161, Miscellaneous Correspondence Relating to Aborigines, pp 271-273.
[6] This letter is annotated 'Approved' in the margin. That is followed by what appears to be "Finch at Sutton House informed 29 Decr 1828 - Sheriff to deliver the Blacks [to] the P.S. of Police 29 Decr/28. Atty Gnl. informed". A photograph of the original document is also online in two parts: part 1; part 2. We thank Kris Harman for her generosity in supplying this particular document and transcribing it for us.

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

AUSTRALIAN, 02/12/1828
Supreme Court of New South Wales
Dowling J., 28 November 1828
Case of Murder.

The Court was considerably crowded this morning - the trial of **MATTHEW MILLER**, the constable, for the alleged murder of his wife, being on the tapis, Mr. Justice Dowling presided. [1] The murder was laid in the information as having been accomplished on the 9th of November last; about which time, as it appeared in evidence, the deceased and prisoner had been married about seven weeks. The prisoner was a constable, and had been employed in that capacity for 16 years past. After marriage, his wife and he, it was observed, frequently quarrelled; and the people of the house, belonging to one Moxam, in which they lodged, in Cockle Bay, remarked that on the day described, whilst the prisoner and his wife were thought to be up stairs at tea, the wrangling was louder than usual, and a hurried stamp, as of a women's foot, was heard, and female screams of murder, murder, followed by the exclamation "Miller, don't strangle me." On hearing the cries and this ejaculation, one of the persons who were below hurried up stairs, and, knocking at the door, and asking it to be opened, the prisoner opened it, and coming outside, bid the person who had knocked, to go away, and take no concern in his business. It was then remarked to the prisoner, that his wife had screamed out murder. This he at first denied, but presently after admitted, declaring she had done so without occasion. Shortly after

this, the prisoner went down stairs, and lighting his pipe at the fire, and taking a few puffs of it, during which he seemed to be quite tranquil, and spoke rationally, the prisoner went up stairs again. On re-entering the room, it was further deposed in evidence, prisoner and his wife had another angry altercation, and the wrangling continued for a full hour together, but nothing particular occurred to excite the attention of the people below, till between three and four o'clock in the afternoon, when the sound of a female voice again became audible. It was recognized as the voice of the deceased, crying, in a smothered tone, "don't strangle me Miller, don't strangle me." This was succeeded by a noise as of a person convulsed, and bursting for breath; to which, after a moment or two, a deep silence succeeded, and no one seemed to be stirring, till the evening had become further advanced. It was between eight and nine o'clock, when the prisoner came down stairs, bearing in his hands a quart pot and a candle, which he lit, and filling the pot with water, from a bucket, returned up stairs with this supply of water and the lighted candle - nor did he make his appearance for that night again. On the following morning, the people who occupied the lower part of the house got up, when, finding neither prisoner nor deceased stirring, they were called to, and the door was knocked at several times, but no answer being returned, the calls were repeated, and silence still continuing to reign within, the neighbours suspecting something wrong, forced open the room door, which was locked on the inside, and the key removed, when the woman was discovered stretched in her clothes on the bed. They called to and felt her body, but her limbs were cold and stiff, and death, it was evident, had been there. Prisoner could not be perceived any where about the room or the house. The neighbours raised an alarm - despatched a messenger for medical aid, and Doctor Bland shortly after came - he viewed and felt the body, and pronounced all human aid needless.. The ill-starred woman was sleeping the sleep of death. There was a constable's staff lying under one of the chairs in the room. The deceased was much younger than the prisoner. One of the witnesses, a female, named **PARROTT**, had known deceased for some time. She always considered her to be a sober, honest, and industrious woman. She could not say whether or no Miller had gone out during the day to buy a Sunday's dinner, but he was never seen in the house after his lighting a candle and carrying a pot of water to his room, on the night of the 9th November.

From the evidence of Doctor **BLAND**, the physician who had been called in to visit, it would appear that gentleman found the deceased laying in bed on her back, rather inclining towards the left side - the face particularly directed so. The fingers of both hands were half clenched, and the frame much discoloured in various parts, and rapidly hastened to a state of decomposition. From every appearance, Dr. B. was induced to conclude that life had been extinct for some hours previously. On the right arm and hip there were several bruises, as if of blows with a stick. The throat and right side of the ear shewed a contusion, and every thing bore evidence of death having been brought about by violent external means, such as strangulation. The body was a good deal bloated, and the intestines bore every appearance of the deceased having been an intemperate drinker.

From the evidence of **CHAPMAN**, lately a runner attached to the Police, whose evidence was in some points corroborated by that of the chief constable, it appeared that the prisoner was taken by a private soldier between Liverpool and Sydney, and confessed to Chapman, as well as by his subsequent admission to the chief constable, that he had been the cause of his wife's death, describing the manner of this, by clapping both hands on the throat, and appearing to attribute it to the effects of jealousy - the deceased having formerly lived with one man, and being suspected still

to have more than one paramour. The prisoner, it was observed by the chief constable, Mr. **JILKS**, had always been quiet and steady, and well conducted, till his marriage with the unhappy deceased, when he became an altered man.

PEARCE, a Sydney constable, described his meeting with Miller about ten days before his wife was found dead, when dispatched in quest of him by the chief constable, at Woolloomooloo, without a hat, in a desponding and broken hearted state - he seemed to court solitude and silence - he was altogether sunk in thought, and was tearing up some small shrubs that grew about. At last, after considerable entreaty, he exclaimed in a tone of anguish, "my wife has been the ruin of me."

Several most respectable witnesses, amongst whom were Messrs. **J.T. CAMPBELL, W.H. MOORE, and SIMEON LORD**, came forward to give the prisoner an excellent character, having known him, some for ten and twelve, and others for fourteen years past, and the case both for and against the unhappy prisoner being closed -

The learned Judge proceeded to charge the Jury upon the evidence - explaining the law of murder - and leaving it with them to deliberate and decide upon their verdict. After about ten minutes consultation in their room, the Jury returned into Court with a verdict of - Guilty.

Upon the announcement of this vidict, silence was proclaimed throughout the Court, and the prisoner being asked if he could plead why judgment should not be then and there passed upon him, and continuing silent -.

Mr. Justice Dowling, having assumed the black cap, proceeded to address the prisoner in he terms following:-

Matthew Miller - You have been indicted for the wilful murder of Mary Ann your wife, and on your trial have put yourself upon God and your country, which country has found you guilty. It is impossible that any dispassionate person who has heard your trial, can entertain a doubt as to the propriety of the verdict which the Jury, after the most patient and anxious consideration of the whole circumstances of your case, have pronounced. No well constituted mind can question the justice of that dreadful sentence which it becomes my painful duty to pronounce upon you. You have been found convicted, upon the clearest evidence, of one of the grossest crimes which human nature can perpetrate. Your crime is one of no less a magnitude than that of wilful and deliberate murder - a crime which, in all ages and in all nations, has been held in the greatest abhorrence; for, however mankind may differ in opinion as to the severity of the laws for the protection of property, or may have differed in opinion on other matters, they have universally concurred in one sentiment concerning the demerits of this atrocious crime - as if all were witnesses to the promulgation of that divine precept, which says, that "whosoever sheddeth man's blood, by man shall his blood be shed." But this crime, great as it is, nevertheless is capable of several aggravations. In your unhappy case there are circumstances developed, which must call forth the strongest emotions of every person who has heard your trial. The unhappy person whose death you caused, was the partner of your bosom - of your bed. You chose her for your helpmate - with all her infirmities and failings on her head. At the altar you swore to protect, to love and to cherish her. Scarce five weeks had elapsed when you dipped your hands in her blood. This woman was your wife and claimed every tender protection and humanity from you, as well as to protect her person from violence at the hands of others. Unhappy man - I hope that I have no need to persuade you, to employ the short time you have to live in this world, to make your peace with God. I fervently trust that you own compunctions of conscience, ere this, have brought you to a proper sense of your awful condition. But should this

unhappily not be the case, and you have not yet reconciled your mind to the awful change which awaits you, by being ushered in a short time out of this into eternity - let me warn you to defer the work of repentance no longer. The laws give institutions to society which, whether in a civil or a savage stage, deem it necessary that your offence should be expiated by nothing short of life. - But I trust you are already sensible of the dangerous precipice on which you stand - a few short hours and your mortal career will terminate for ever. Those objects which deluded your senses and which tempted your passions, will then no longer be visible to your right, or capable of inciting those passions which tempted you to embrue your hands in human blood. That glorious luminary which lights all creation in existence, will no longer light on you. On Monday next you will be ushered into the presence of an all omniscient Being. There no subterfuge will avail - no disguise will answer to screen you from the penetrating searcher of all hearts, to whom every secret is known. If, unhappy man, you have not already warned yourself of the dreadful situation you stand in at this moment, let me now entreat you to shut out from your mind all thoughts of this world - let me advise you to prostrate yourself upon your knees, and endeavour by hearty and sincere prayer to the throne of grace, to make your everlasting peace with an offended Divine Majesty.

In this work of penitence you will have the assistance of a worthy pastor. I recommend you to open your heart to spiritual devotion, which can alone save you from those terrors which we are taught await the wicked. I trust the ignominious example, which justice requires should be made of you, will have a proper effect in arresting guilty passions, and that there will be those who will learn from your unhappy fate, the fatal consequence of setting the laws of God and man at defiance, which not only exposes them to severity of justice in this world, but also to the avenging wrath of Heaven. Unhappy man! I would have saved these admonitions; but a duty to yourself, and the duty I owe to my situation, I could not restrain myself from doing so. I trust you will submit to justice with contrition, and I trust that contrition will meet with forgiveness in a future state. It now only remains for me to pronounce on you the dreadful sentence of the law, which is, that you, Matthew Miller, be taken from hence to the prisoner from whence you came, and that on Monday forenoon next you be thence taken to the common place of execution, and be there hanged by the neck until your body be dead, and that your body be afterwards taken down to be anatomized and dissected,[2] and may God in his infinite mercy have compassion on your soul.

This solemn and eloquent appeal of the learned Judge produced a general sensation of compassion throughout the crowd towards the prisoner, who was removed from the dock to the condemned cells in the gaol, there to spend the interval preceding the last awful act on Monday morning, which is finally to ind [sic] up his concetns [sic] with this world. [3]

[1] On 28 November 1828, the Australian reported that "The trial of Miller, the Sydney constable, is to be brought on in the Criminal Court to day. A plea of temporary insanity has been put in by the prisoner on the side of the defence." This trial was also reported by the Sydney Gazette, 28 November 1828.

[2] Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential contemporary justification for capital punishment was that of William Paley, The Principles of Moral and Political Philosophy, 1785, reprinted, Garland Publishing,

New York, 1978, Book 6, chap. 9. He argued that the purpose of criminal punishment was deterrence, not retribution. As Linebaugh shows, the legislature's aim in providing for anatomising was to add to the deterrent effect of capital punishment. In England, this led to riots against the surgeons: Peter Linebaugh, ``The Tyburn Riot against the Surgeons'', in Hay et al. (eds), Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, Penguin, London, 1977.

[3] The Sydney Gazette, 1 December 1828, thought the jury could "not do otherwise than find the unfortunate man guilty, but there never was a case which excited greater sympathy with the Public, inasmuch as it is pretty universally believed the man never intended to destroy life." It then announced that he had been granted a reprieve.

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AUSTRALIAN, 02/12/1828

REPRIEVE OF MILLER.

MILLER, the culprit, who was convicted in the Criminal Court on Friday last, for the wilful murder of his wife, has been respited from the capital part of the sentence then passed, which directed his execution to take place yesterday morning. [*] The conditions of the message communicated to the unfortunate man, on the visit of the Sheriff and the Registrar of the Supreme Court, on Sunday evening, was, that he was "respited till further orders." The unhappy man has been induced to indulge hopes that this capital sentence will be commuted. He still pays considerable attention to the instructions and exhortations of his clergyman; and, in other particular, exhibits the deportment of a man tottering on the brink of an awful eternity, cheered on by hope, yet prepared to await the worst behests of fate. Miller was, for fourteen years, a soldier in the German Legion; and has spent sixteen years of his life as a constable in this Colony. A petition, very numerously subscribed by signatures, it is said from between two and three thousand, were obtained in six-and thirty hours from the conclusion of his trial. Miller, whilst he acknowledged having been the agent of his wife's dissolution, all along declared it was not his intention to commit murder. - His orderly and peaceful habits of life, of which there has been abundant evidence, go to support the probability of this, and induce a more general feeling of commiseration, on his side, than people commonly allow in respect of men who stand in the situation of a murder. His character and services make the man certainly a subject worth of commiseration and clemency.

[*] On the exercise of Crown mercy, see Sydney Gazette, 24 March 1828. On this case, see also Australian, 9 December 1828.

The governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision had to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645.

Ultimately, Miller was sent to Moreton Bay: Sydney Gazette, 24 February 1829. In a despatch dated 30 July 1829, Murray informed Governor Darling that the sentence had been commuted to transportation for life at a penal settlement, the most severe punishment short of death. In recommending that, Peel nonetheless said that he thought that the sentence of death ought to have been carried out in so aggravated a case of murder. Source: Historical Records of Australia, Series 1, Vol. 15, p. 90.

This suggests that when the colonial governor respited the sentence of a murderer, the British government would not overturn the governor's initial decision not to hang the prisoner even when it thought that the decision was wrong. If this is so then in practical terms, the decision whether to hang a prisoner was made by the governor. In

formal terms, the governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision was in law to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645. Law and practice were not the same.

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