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AUSTRALIAN, 10/03/1829
Supreme Court of New South Wales
Forbes C.J., 6 March 1829
This morning his Honor the Chief Justice took his seat on the Bench, when **ARTHUR HUGHES** was arraigned for the wilful murder of **MARGARET**, his wife, on the 18th day of December, at Windsor.[1]

The Attorney-General appeared for the Crown, and Mr. Rowe for the prisoner.

It was stated, by the several witnesses, that the prisoner and deceased did not generally live on the most friendly terms - that, on the day laid in the indictment, the deceased used language of a violent and provoking nature towards her husband, accompanied by blows - that, in consequence of repeated furious attacks, he was obliged to repair to a back-house to work, in order to be out of her way - that, thither the deceased followed, and threw a stone at him, exclaiming, "you murdering villain, are you there?" - on which the prisoner rose from work, laid hold of the deceased's arm, and said, "my dear, you had better go into the house." This solicitation not being complied with, the prisoner attempted to force the deceased into the house, when she struck him a violent blow, which he resented by knocking her down, dragging her by the hair of the head along the yard, and, finally, throwing her on some logs. - This treatment was repeated, with the addition of certain opprobrious names, whereupon the deceased, seizing a tomahawk, ran towards the prisoner, and said, "you murdering villain, was I ever a w- to?" The deceased, after some difficulty, was deprived of the tomahawk, and went into another room, where plates, &c. were all decomposed in the course of a very short time. The prisoner again seized and knocked her down, her head coming with great violence against the surbase of the room, which he immediately left, saying, "I'll leave the house to yourself altogether." The deceased followed, and, lifting a brick, threw it at the prisoner, who had then resumed his work in the out-house. He then approached, which the woman perceiving, attempted to retreat and fell down, when the prisoner raised his foot, apparently with the intention of kicking her; but after viewing, for a few minutes, the deplorable state in which she was then placed, proceeded to another part of the yard. When the deceased recovered a little, she expressed an intention to go to Mr. Bell, and complain of the ill usage she had met with. At this time the woman appeared to be in a state of derangement, brought on by hard drinking; but, after returning from Mr. B.'s, she was more so still, and fell down on the floor in an apparently weak and exhausted state.

After death, the body was examined by Mr. **RICHARDSON**, who gave it as his opinion, that the inflammation in the small intestines was the predisposing cause of death; but whether the blows caused the inflammation he would not say, altho' the internal appearances might have been caused by excessive drinking, without any external violence.

The evidence was summed up by the learned Chief Justice, at great length to the Jury, who, after a short deliberation, found the prisoner guilty of Manslaughter, recommending him to the humane consideration of the Court. - Remanded.

See also Sydney Gazette, 7 March 1829.

[*] He was sentenced to imprisonment for six months: Sydney Gazette, 7 April 1829.

AUSTRALIAN, 21/04/1829
Execution, 18 April 1829
EXECUTIONS. [**1**]
On Saturday morning -- Burgen, Thomas Allen, and Thomas Matthews, paid the forfeit of their lives upon the gallows. The latter two were tried on Thursday for a murder at Moreton Bay, and Burgen was also convicted in the early part of the week of a similar crime at the same place. Owing to the violent conduct of Matthews on his trial, it was expected something out of the common would occur during the scene of execution. Accordingly, a considerable crowd of spectators assembled on the heights outside adjacent to the gaol, as well as within the walls.
During the latter part of the trial on Thursday, Matthews continued tossing about the floor of the dock, reiterating that he was murdered, or about to be, and uttering imprecations against all concerned in his trial, not excepting Judge and Jury. [**2**]
Upon the evidence of several witnesses, however, the appalling crime for which both Matthews and Allen were indicted, was conclusively proved. It was not one of these cases resting upon circumstantial evidence. It was deposed that Matthews and Allen were two of a gang of six laborers employed at Moreton Bay in clearing ground. One of the gang named Connolly, had been punished and smarting and enfeebled from the effects of the scourge, when Matthews was seen to lift the spade with which he was working, and strike the poor wretch Connolly on the head. Connolly fell, and Allen finished the tragedy by a second blow, with a mattock, which struck into scull. This happened on the 2d of February last, and Connolly shortly after expired. What occasioned this bloody and apparently merciless act, has not been declared, but from various circumstances which have come within our knowledge, it would not at all surprise us, had the massacre been executed at the murdered man's individual request!
Matthews was less hardened at execution than was anticipated. He exhibited a sort of nonchalance. His companions were more composed to all appearance. Matthews, on mounting the ladder, threw a handkerchief and some other article from him to the gaol gang, ranged alongside the gallows. Whilst the hangman was preparing the nooses, Matthews expressed a wish to make his dying declaration, which not being objected to by the Sheriff, he began by accusing the Commandant at Moreton Bay of severity and cruelty. He cautioned the prisoners to avoid Moreton Bay. "If you go to Moreton Bay, (said the culprit,) you are ruined beyond redemption. You are either flogged to death, or worked to death. I have known many bright men murdered - completely murdered by the ill-usage of overseers, constables, and those above them. Take warning by me - take warning - never run from your road gangs or iron gangs. It may perhaps send you to Moreton Bay, and then you are a lost man. The last time I was flogged was for stealing a few grains of wheat. I received a hundred severe lashes. Oh, fellow prisoners, avoid Moreton Bay." The culprit was told of the futility of such talking. Burgen spoke a few words. He said his fellow sufferer had so clearly related the ill-usage at Moreton Bay, he could say nothing more than this , that it was true - quite true. "I die innocently before you all, and now about to suffer. I declare my innocence. Had I been allowed to have my witnesses up from Moreton Bay, I should have been cleared. I now solemnly declare my innocence, but I am willing to suffer." Allen said nothing. Matthews added he was sorry, very sorry, for the life he had led, and were his existence to begin afresh, he would be a better man. Allen eat a hearty breakfast of eggs, nearly a loaf of bread & butter, & drank tea. He appeared very unconcerned in the early part of the morning, but on the gallows his demeanor underwent an alteration. The Rev. William Cowper attended Burgen, and the Reverend Mr. Therry, with his usual assiduity, Matthews and Allen. Mr. Therry

interrupted Matthews repeatedly, when he was speaking of the Commandant and Moreton Bay, advising him to direct his thoughts to a different world. Matthews said he freely forgave every one, as he hoped to be forgiven, but he must warn his fellow prisoners against Moreton Bay, which was a hell, he assured them, upon earth. Allen being a heavy, corpulent man, it was supposed, would die easily, but his muscular strength was superior to his weight, and between parting life and death, he struggled hard. A few convulsive quiverings and death terminated the mortal career of the other two. After hanging the usual time, the corpses were lowered down, and given over for dissection. [**3**]

Patrick Sullivan, the remaining culprit of the four brought up from Moreton Bay, for murder, was also hanged yesterday morning. Sullivan was attended by the Rev. Mr. Therry. He appeared resigned to his fate, as the phrase goes, and penitent. A minute or two before the drop fell, he said, "Good bye, lads, pray for me." He was subsequently launched into eternity, and after hanging the accustomed time, his body was cut down, and delivered up for dissection.

[1] In 1831, a prisoner called Macmanus was hanged for attempting to murder a fellow prisoner at Moreton Bay. The Sydney Gazette, 12 July 1831, claimed that his intention was to get to Sydney, where he would be hanged, but that he bitterly repented this when the day of his execution arrived. See also Sydney Herald, 18 July 1831; Australian, 15 July 1831. The Australian said that Macmanus had pleaded guilty, saying he preferred death to being sent back to Moreton Bay. His trial and execution were both reported in the same issues of the Gazette and the Australian. See similarly, a report of the execution of John Walsh, Australian, 22 July 1831.

The problems of some convicts commenced even on the voyage to Moreton Bay. An expression of dissatisfaction with rations on one voyage led to two convicts being shot dead by soldiers: Australian, 12 August 1831.

[2] For reports of their trial, at which they claimed that vital witnesses were in Moreton Bay, see Australian, 15 April 1829; Sydney Gazette, 18 April 1829 (trial report and commentary).

The Sydney Gazette reported these executions on 21 April 1829.

[3] 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.

The contemptuous treatment of those who were hanged went further in New South Wales. They were buried in the sands outside the walls of the burial ground in Sydney, and a cart road was made over the same land. In many instances, their bones could be found strewn about: Australian, 24 July 1829.

Forbes C.J., 21 April 1829

In the Supreme Court, on Tuesday last, the Attorney General applied to His Honor the Chief Justice, for his opinion on a subject involving a question of national law, with respect to the Aboriginal natives of the Colony. It may be in the recollection of our readers, that a black native, known about Sydney by the soubriquet of "**DIRTY DICK**," was murdered sometime since, near the heaving-down place, under the Domain, by some natives, of another tribe. The murderer was discovered, and committed to gaol, to take his trial, where he has remained for some time past, and the question as to his amenability to the English law, for the crime with which he is charged, was the subject of the Crown prosecutor's application to the Court. The Chief Justice observed, that, sitting alone, he should not like to pronounce any opinion upon a matter of so much importance; and, indeed, it would be much more adviseable that an opinion should not be rendered necessary. He would state, however, that he could easily imagine cases in which the Aboriginal natives would clearly come within the provisions of the municipal law, and in which he did not consider that they would. If, for instance, a dispute arose amongst a tribe, and that they decided it according to their own customs, and what was, in fact the ancient law of England - namely, by battle, and that one or more of the combatants were slain, such a case would, clearly not be cognizable by our law. If, on the other hand, a native, living in the town, and who, by such residence, had placed himself within the protection of the municipal law, was attacked and slain by any other native, then he conceived the native by whom he was slain would be rendered amenable to our law. These remarks, however His Honor stated, were only made in passing, and upon mere general principles. Should the case require to be raised in a formal manner for the consideration of the Court, he would have an opportunity of conferring with, and taking the opinion of the other Judges on so novel and so important an enquiry. The Attorney General stated that he would make further investigation into the circumstances under which the death in the present instance took place, and be guided in such a course of proceedidg [sic] as he should think necessary to be adopted, by the opinion which had been expressed by the Court.

AUSTRALIAN, 02/06/1829

Supreme Court of New South Wales

Stephen J., 29 May 1829

Mr. Justice Stephen having taken his seat at one side of the Court this day, and Mr. Justice Dowling the other.

PATRICK VENABLES was indicted before the former Judge, for the wilful murder of his wife, **MARGARET**, on the night of the 5th of May, at Cobberty, Cowpasture River, district of Cook. Venables is a tall, strong built, thick-set man. He had been in the employment of Mr. Samuel Terry, of Pitt-street, for sixteen years, during which he had borne the character of a quiet, sober, industrious person. It appeared in evidence, that on the above day, Venables having procured some wine in the morning, had a few friends to his hut in the evening, who retired at a seasonable hour, leaving Venables alone with his wife and children. Ere day broke next morning, Venables called in at a neighbour's house, saying his wife was dead. The news soon spread about -- people visited the dead body, and one person observing the marks of bruises on it, made Mr. Coghill, J.P. cognisant of the circumstance. Mr. C. proceeded to the hut, and found deceased lying on a bed or berth place, her body completely checquered with bruises, which were more severe about the loins on the left side, as if from kicks of a foot. The unfortunate woman's hair appeared to be singed off her

head -- her left shoulder betrayed the marks of fire. The body was in an utter state of nudity. It had all the appearance of having been washed and laid out mechanically, for though the head was mangled, yet no blood was perceptible on the sheet thrown about her. The ground floor was moist, and every circumstance proved the body had been washed with water. A broken stick was also found in the house, variegated with spots of blood. Besides external bruises, on examination of the head and body, a considerable extravasation of blood was discovered on the brain, and the left kidney was found incommoded, and even burst, as if from the infliction of violence outwardly. It was possible these symptoms might have proceeded from apoplexy, in a heavy fall through intoxication, &c.; however, death, it was evident, had been accelerated, if not caused by weighty blows.

The learned Judge summed up minutely, humanely leaving it to the Jury to say whether the fatal act was the effect of premeditation, which the state the prisoner and his wife, who was rather addicted to drinking, had lived in for many years, as well as the general good character given of the man by his employer, from a sixteen years' experience would seem to deny, or an ebullition of temporary rage, in which latter case the crime of the prisoner should be softened into manslaughter.

The Jury, after being out of Court for about a quarter of an hour, returned, finding the prisoner not guilty of murder, but guilty of manslaughter; upon which the prisoner, whose countenance and figure portrayed all the agony of suspense and doubt, and apprehension, was ordered to be remanded.[*]

See also Sydney Gazette, 2 June 1829.

[*] He was sentenced to transportation for seven years: Sydney Gazette, 9 June 1829; Australian, 9 June 1829.

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

Forbes C.J. and Dowling J., 13 June 1829

Dowling, Proceedings of the Supreme Court, Vol. 22, Archives Office of New South Wales, 2/3205

[p. 98]

Saturday 13th June 1829.[1]

Present Forbes C.J., Dowling J. & Stephen J. was ill

[The King v Dirty Dick an aboriginal native][2]

An aboriginal native of this territory called Dirty Dick had been committed for trial by the Sydney magistrates for the wilful murder of another aboriginal native called **ROBERT BARRETT**, who [p. 99] was killed in an affray between two tribes of his countrymen, under circumstances of great cruelty. The prisoner Dirty Dick was now put to the bar, and

The Attorney General prayed the direction of the Court, whether by the law of England he could be prosecuted for the alleged murder of one of his own countrymen; both having been in a savage state at the time of the transaction in question. In his own judgment he was disposed to consent to the discharge of the prisoner from the difficulty of coming accurately at the merits of the case; but he would submit to the direction of the court as to the course to be pursued.

Forbes C.J. Certainly this is a case sui generis, and the Court must deal with it upon general principles, in the absence of any fixed known rule upon the subject. According to the view which the Court takes of the case, the Court is of opinion that the prisoner ought to be discharged for want of jurisdiction. The facts [p. 100] of the case, are, as represented to us, simply these: - The prisoner is accused of the murder of

one of his own tribe - one of the original natives of this Country, in the same state as himself - wandering about the country, and living in the uncontrolled freedom of nature. In some way or other he has caused the death of another wild savage. The precise circumstances under which the act has been committed, have not been brought before the Court; nor indeed was it necessary that the Court should look into these circumstances. The Court knows no further than what has been stated, namely that the deceased came by his death in consequence of some difference that arose between him and the prisoner. I believe it has been the practice of the Courts of this country, since the Colony was settled, never to interfere with or enter into the quarrels that have taken place between or amongst the natives themselves. This I look to as matter of history, for I believe no inst[p. 101]ance is to be found on record in which the acts of conduct of the aborigines amongst themselves have been submitted to the consideration of our Courts of Justice. It has been the policy of the Judges, & I assume of the Government, in like manner with other Colonies, not to enter into or interfere with any cause of dispute or quarrel between the aboriginal natives. In all transactions between the British Settlers & the natives, the laws of the mother country have been carried into execution. Aggressions by British subjects, upon the natives, as well as those committed by the latter upon the former, have been punished by the laws of England where the execution of those laws have been found practicable. This has been found expedient for the mutual protection of both sorts of people; but I am not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime. Indeed it appears to me that it is a wise principle to abstain in this Colony, [p. 102] as has been done in the North American British Colonies, with the institutions of the natives which, upon experience will be found to rest upon principles of natural justice. There is one most important distinction between the savage & civilized state of man, namely that amongst savages there are no magistrates. The savages decide their differences upon a principle of retaliation. They give up no natural rights. This is not merely matter of theory but practice. In the civilized state, man gives up certain natural rights, in exchange for the advantage of social security, & other benefit arising from the institutions of civilized life. It may be a question admitting of doubt, whether any advantages could be gained, without previous preparation, by ingrafting the institutions of our country, upon the natural system which savages have adopted for their own government. It is known as matter of experience [p. 103] that the savages of this part of the globe, have a mode of dressing wrongs committed amongst themselves, which is perfectly agreeable to their own natures & dispositions, and is productive, amongst themselves, of as much good, as any novel or strange institution which might be imparted to them. In the absence of a magistracy which is an institution peculiar to an advanced state of refinement, the savage is governed by the laws of his tribe - & with these he is content. In point of practice, how could the laws of England be applied to this state of society? By the law of England the party accused is entitled to his full defence. Then how could this beneficent principle be acted upon, where the parties are wholly unacquainted with our language, laws & customs? I am not prepared to say, that the mode of administering justice or repairing a wrong amongst a wild savage people, is not best left to themselves. If their institutions, however barbarous or abhorrent [p. 104] from our notions of religion and civilization, become matured into a system and produced all the effects upon their intercourse, that a less objectionable course of proceeding (in our judgment) could produce, then I know not upon what principle of municipal jurisdiction it would be right to interfere with them. The most important object of all human associations is to

procure protection & security from internal as well as external aggression. This principle will be found to influence the associations of some of the wildest savage tribes. They make laws for themselves, which are preserved inviolate, & are rigidly acted upon. However, shocking some of their institutions may be to our notions of humanity & justice, yet I am at loss to know how, or upon what principle this court could take cognizance of offences committed by a barbarous people amongst themselves. They cannot be supposed to be acquainted [p. 105] with our laws, & nature prompts them to disdain the interposition of a race of people whom they find fixed in a country to which they did not originally belong. There is reason & good sense in the principle that in all transactions between the natives & British subjects, the laws of the latter shall prevail, because they afford equal protection to all men whether actually or by fiction of law brought within their cognizance. But I know no principle of municipal or national law, which shall subject the inhabitants of a newly found country, to the operation of the laws of the finders, in matters of dispute, injury, or aggression between themselves. If part of our system is to be introduced amongst them, why not the whole? Where will you draw the line: the intervention of our courts of justice, even if practicable, must lead to other interferences, as incompatible as impolitic, in the affairs of [p. 106] harmless inoffensive savages. - With these general observations, I am of opinion that this man is not amenable to English law for the act he is supposed to have committed.

Stephen J was absent.

Dowling J. This point comes upon me entirely by surprize, & therefore I have had no opportunity of considering it in a manner satisfactory to my own mind. It appears to me however that the observations which have fallen from his Honor the Chief Justice, are most consentaneous with reason & principle. Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us [p. 107] in interfering with their institutions even if such an interference were practicable. It is an undoubted principle that a Colony of Englishmen settled in a new found country shall be governed by the laws of the parent state so far as those laws are applicable to the condition of the Colony. This principle is carried a step farther, where the new found country is inhabited by aborigines. If the inhabitants hold intercourse with the new settlers then the laws of the settlers shall be appealed to in case of dispute injury or aggression, arising from the one side or the other. This rule is founded upon principles of equal justice, inasmuch as the law of England will not endure wrong or injury. The savage, or the foreigner is equally entitled to protection from British law, if by circumstances that law can be administered between Britons & the savage or foreigner. Amongst civilized nations this is the univer[p. 108]sal principle, that the lex loci, shall determine the disputes arising between the native & the foreigner. But all analogy fails when it is attempted to enforce the laws of a foreign country amongst a race of people, who owe no fealty to us, and over whom we have no natural claim of acknowledgment or supremacy. We have a right to subject them to our laws if they injure us, but I know of no right possessed by us, of interfering where their disputes or acts, are confined to themselves, and affect them only. Most undoubtedly it is murder in an Englishman to kill an aboriginal native without excuse or reason. So the law of England would hold the native amenable for destroying an Englishman, where the injury was unprovoked. The same principle of protection applied to the preservation of property, although the notions of property may be very imperfect in the native. [p. 109]. The Englishman has no right wantonly to deprive the savage of any property he

possesses or assumes a dominion over. On the other hand the native would be responsible for aggressions on the property of the Englishman. It is however, unnecessary to follow this principle any farther. These are general observations suggested on the occasion, without meaning them to have the effect of judicial determination. Cases have repeatedly arisen in this court where the first principle has been acted upon, both where an Englishman has murdered a native, and where a native has murdered an Englishman. Beyond this, the doctrine has not been carried; & therefore, as it seems to me, it would be most unjust and unconscionable to hold the prisoner amenable to the law of England for an offence committed against one of his own tribe.

The prisoner was therefore Discharged. [*]

The Sydney Gazette, 26 and 28 November 1829, reported that another Aborigine was committed for trial on 23 November 1829 on a charge of murder. His name was Broger or Brogan. The Archives Office of New South Wales has a file called Miscellaneous Correspondence Relating to Aborigines (5/1161), which contains a list of all Aborigines tried before the Supreme Court between May 1824 until February session 1836 (pp 271-273). Broger or Brogan was the first on the list after Tommy, who was tried and executed in 1827. His alleged accessory, another Aborigine called George Murphy, was held in custody in Argyle, but escaped. He was later found drowned: Australian, 4 September 1829; Sydney Gazette, 28 November 1829. Broger was convicted and hanged, but the victim was a European: see R. v. Broger, 1830.

[2] As their trial reports show, both the Sydney Gazette and the Australian reported that Dirty Dick (or Borrondire) was the person killed. According to the Australian, the defendant was called Ballard, and the Gazette called him Barnett on one occasion. It appears that in his notebooks, Dowling J. incorrectly reversed the names of the people concerned.

This is reported as (1829) R v Dirty Dick N.S.W. Sel. Cas. (Dowling) 2 (TD Castle and B Kercher (eds), Dowling's Select Cases 1828 to 1844: Decisions of the Supreme Court of New South Wales (Francis Forbes Society, 2005) p 2).

This decision was cited by McPherson JA in Stevenson v Yasso [2006] QCA 40 at [85].

[*] Eventually, a decision was take to send him to Port Macquarie: Sydney Gazette, 5 July 1829.

Ballard's case was in the newspapers again in 1830. The Sydney Gazette, 11 May 1830, reported as follows: "The chief of the tribe about to proceed to Van Diemen's Land, to aid the police in discovering the retreats of the hostile natives is Bob Barrett, who was in prison some time since on a charge of murder, committed in melé, on an aboriginal native called Dirty Dick. Our Readers, we have no doubt, well remember this case, and the luminous decision of the Supreme Court, delivered by the Chief Justice, with respect to the liability of the natives to British laws for the result of quarrels among themselves. Those who had the good fortune to hear it will not easily forget that masterly appeal to the reason, illustrated by the principles of international law, which Mr. Forbes delivered on that occasion."

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

AUSTRALIAN, 16/06/1829

The aboriginal native known by the name of Bob Ballard, who has been kept in gaol ever since the murder of another native, "Borrondire," or "Dirty Dick," to which he is

believed to have been a party, has been discharged from custody. The principle which actuated the Judges in restoring this native to his liberty, deserves the warmest commendation. They did not go upon the presumption of the native's innocence, but upon the injustice, the inconsistency, the absurdity of subjecting to the laws of civilized society, a savage, who, it was possible, might in his own estimation, and in the estimation of his countrymen, have been but conforming to some act of duty to his tribe, in imbruing his hands in the blood of his enemy.

At all events it would be contrary to the principle of natural international justice, to meddle in the quarrels of the aborigines, so long as they be confined to themselves. It would be far more prudent, as well as more equitable, to leave the aborigines to adjudicate their disputes according to their own settled customs. This certainly was the most liberal, enlightened, and proper conclusion, in such a case, that could b[e] arrived at.

This is such an important case that the Gazette and Australian versions of the judgments are included here, as well as the most complete, and presumably most accurate versions, those in Dowling's notebooks.

[*] Dowling gave a short summary of this decision in his Select Cases, Vol. 2, Archives Office of N.S.W., 2/3462. The full text of the short version is:

"[p. 198]

[An Aboriginal Native of N.S.W. is not amenable to the British laws for an offence committed against one of his own countrymen.]

June 13th 1829

Rex v Dirty Dick

Forbes CJ

Dowling J

An Aboriginal native of this Territory called Dirty Dick had been committed for trial by the Sydney Magistrates for the wilful murder of another aboriginal native called Robert Barrett, who was killed in an affray between two tribes of his countrymen, under circumstances of great cruelty the prisoner Dirty Dick was now put to the Bar, and

The Attorney General prayed the direction of the Court whether by the law of England he could be prosecuted for the alleged murder of one of his own Countrymen; both having been in a savage state at the time of the transaction in question. In his own Judgment he was disposed to consent to [p. 199] the discharge the prisoner from the difficulty of coming accurately at the merits of the case; but he would submit to the directions of the Court as to the course to be pursued. Vide.Vol.21.p.99."

The latter reference is to the full version of this case, but wrongly states it as vol. 21, p. 99 rather than vol. 22, p. 98.

The Sydney Gazette, 6 June 1829, reported a similar clash between two groups of Aborigines at George's River, in which ten died.

The Sydney Gazette, 26 and 28 November 1829, reported that another Aborigine was committed for trial on 23 November 1829 on a charge of murder. His name was Broger or Brogan. The Archives Office of New South Wales has a file called Miscellaneous Correspondence Relating to Aborigines (5/1161), which contains a lits of all Aborigines tried before the Supreme Court between May 1824 until February session 1836 (pp 271-273). Broger or Brogan was the first on the list after Tommy, who was tried and executed in 1827. His alleged accessory, another Aborigine called George Murphy, was held in custody in Argyle, but escaped. He was later found

drowned: Australian, 4 September 1829; Sydney Gazette, 28 November 1829. Broger was convicted and hanged, but the victim was a European: see R. v. Broger, 1830.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University
SYDNEY GAZETTE, 16/06/1829
The Attorney General here intimated his desire to have an Aboriginal native, named Robert Barnett, for some time in custody on a charge of killing another native, brought up in order to his being discharged.
The Chief Justice - It being understood that this man is to be discharged from custody, I would just make a few observations on his case, and indeed on all cases of a similar nature, which may occur. It is within the knowledge of this Court, that an aboriginal native, called Robert Barret, has been for some time confined in gaol, on a charge of murder committed, as alleged, upon another native, in an affray between two tribes, or in a dispute amongst several parties of the same tribe. It never has been the practice in this Colony to interfere in the quarrels of the aboriginal natives; and as far as history goes, it has not been the policy of the Governments of other colonies to interfere with the savage tribes, whose countries we have taken possession of. In occupying a foreign country, the laws that are imported have reference only to the subjects of the parent state; I am not aware that those laws were ever applied to transactions taking place between the original natives themselves. This is founded on a wise principle. The savage and the social state are widely different. In the former there is no magistrate, the want of which, indeed, forms the most important distinction between them. It is not a matter of mere theory, that every individual in the social state gives up a part of his natural rights in return for the protection, which society affords him --- it is a fact. In the social state every individual sustaining an injury has the benefit of the collected wisdom of society to afford him redress. But it is not so among savages; and I am not prepared to say but that, in such a state, the passions become the ministers of justice. They have no magistrate to resort to, and therefore act upon the original principle of self redress; and, indeed I am not aware but that amongst themselves the greatest injustice would arise, if that brute force to which they have recourse were to be restrained by the laws by which civilized society is bound. Besides, if we interfere in cases of acts of oppression on the persons of the aboriginal natives, committed amongst themselves, we must also interfere in question of property, which very often give rise to those disputes, and thus have to administer justice in all their matters. For these reasons, I do not think it just to apply our laws in cases arising solely between the natives themselves, and am of opinion that this man should be discharged from custody.
Mr. Justice Dowling, coincided in the view taken of the subject by the Chief Justice, and the native was ordered to be liberated, with a recommendation that, not as a punishment, but as a matter of prudence, and for protection, he should be sent to some other part of the country.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 30/09/1829
Supreme Court of New South Wales
Dowling J., 25 September 1829
Before Mr. Justice Dowling and seven Miltary Officers.

JAMES PARKER was indicted for the wilful murder of **JOHN HASELTYNE**, at Bathurst, on the 30th Sept. 1828, with **GEORGE DONAVON**, as an accessary before the fact.

The evidence in this case rested principally on the confession of the prisoner Parker to a companion who had been in the bush with him, but who surrendered to the mounted police, and now came forward to give evidence. The first witness, **BERNARD SMITH**, a prisoner of the Crown, employed in a road party on the Bathurst road, from which he absconded in March last, deposed that he went to Dr. Redfern's station at Mount York, where, in about a fortnight's time, the prisoner Parker came. Smith told him that it was rumoured among the men on the farm that he killed **Kangaroo Jack**, by which name the deceased was known; prisoner replied, ``if you knew how it was, you would think nothing of it;" Smith said ``he must be a very poor man to let you kill him;" Prisoner then said, ``after you left the employ of Dr. Redfern, I got six months to an iron-gang, and I took the bush from there, and went to a station where George Donovan, and Birmingham were shepherds, and Kangaroo Jack was hut-keeper: the shepherds were out with their sheep, and we consented to kill a bullock, and accordingly roped one which Kangaroo Jack knocked down, and I stuck with a knife; whilst we were cutting it up, the blacks came and took some of the meat, and went towards Mr. Grant's station; we then went to a station of Mr. Norton's, and there heard that the blacks had informed Mr. Grant about the bullock, and that he had sent for the soldiers to Cox's river; at Mr. Norton's station a man told me that Kangaroo Jack was a shipmate of his, and wondered that I would have any thing to do with him, as he hanged one man at home, and transported two; after this he went to another station of Dr. Redfern's, and stole some cattle, and hearing that he was suspected, and likely to be punished, he took to the bush; I went in search of him, and told him it was better that one of us should turn King's evidence about the bullock than both of us be hanged; Kangaroo Jack said we could not be hanged, as we had put the skin and brand away; I said the blacks' word would be taken before ours, and that we had better kill another bullock and produce the hide as that belonging to that which the blacks saw us cutting up; Kangaroo Jack said he did not care if we did so, and I then knew what he would do; in the evening we made a fire with some leaves and dry wood, and whilst Kangaroo Jack was on his knees blowing it with his mouth, I struck him on the head with a tomahawk; I did not kill him with the first blow; but I soon settled him after; there was no one in the bush at the time but him and me."

A second witness deposed to a similar effect, and others to the finding of the fractured skull and bones which were produced in Court. To affect Donavon as a participator in the murder, there was no evidence. After retiring for about five minutes, the Commission returned Parker as guilty, Donavon not guilty. Sentence of death was then pronounced upon Parker in the usual form.
See also Sydney Gazette, 26 September 1829.

AUSTRALIAN, 30/09/1829
Execution, 28 September 1829
On Monday [*] morning three victims to offended justice graced the gallows erected in rear of the County gaol in George-street. One a lad of about 19, named **PARKER**, was tried in conjunction with another on Friday last, and, as described elsewhere, found guilty of murdering **JOHN HAZELDINE**, a fellow prisoner, who commonly passed under the name of **Kangaroo Jack**. Parker's conviction, it will be seen, rested almost altogether on the testimony given by two men of questionable character, as to a confession being made of the foul deed by Parker himself, and a conversation stated

to have been overheard betwixt him and Donovan, in which some deed of blood had been adverted to. There was nothing to shew that Donovan had taken part in the act. Parker, almost to the last moment of his existence, persisted in denying the accursed deed; and indeed there were sufficient circumstances to raise a strong suspicion that the very two who had sworn Parker's life away were themselves the murderers. The idea of his innocence produced a pretty general feeling in favor of the culprit. For our part, various circumstances concurred to cause us to differ totally from this opinion. The other two culprits were named respectively Grier and Penson -- the former being a tall athletic man, apparently about 30 years of age -- the later short of stature, sinewy, and rather bulky, did not seem to exceed 29. Friday evening, and the whole of Saturday and Sunday, till the fatal morning, were passed by the three culprits, in the cell, (to which they were confined by strong and heavy chains round the ancles) with the penitence, prayer, and tribulation usual on such occasions. Before nine on Monday morning, their irons being struck off, the three condemned wretches quitted the condemned cell, and proceeding along the platform in front of the felon's strong room, accompanied by the Clergymen, Under-Sheriff, Gaoler, and officiates in the gaol, with the executioner bringing up the rear, the awful train turned off through the central door, and parading the short passage which leads into the gallows yard adjoining, passed under the drop, where three coffins lay ready to receive the bodies, and halted when opposite the fatal pile -- in front of which a strong military Subaltern's guard was drawn up with fixed bayonets -- whilst other parts of the yard were occupied by a tolerably numerous group of spectators, and on the heights without the gaol, and overlooking the melancholy spectacle, was assembled, a dense crowd. We were pleased to find that the ordinary attendance of the confines'-gang in irons, or out of irons, was judiciously dispensed with upon this occasion. The frequent sight of capital punishments has invariably a tendency to harden the human heart rather than to lead it to reform. After hearing their warrants read over, the culprits fell upon their knees. The Reverend Mr. Hill, who attended in the absence of Mr. Cowper, read aloud such parts of the Church service as were peculiarly applicable to the gloomy occasion, and the Reverend Doctor Lang, Presbyterian Minister, who also attended, followed with the repetition of suitable extempore prayer. It was an affecting scene, and drew tears from more than one spectator. Grier's devotion was the most fervent and impassioned; Penson's, thought not less so, apparently expressed more of hope and confiding resignation; whilst Parker, whose youth and the idea which prevailed as to his probable innocence of the foul deed of murder, seemed rather to fix his thoughts upon this world than the next, and even to look forward at the last to a reprieve. Rather strange to say, on the very morning of his fatal exit, we chanced to light amongst our English files upon the following record of Parker's former conviction. At the Hertford winter assizes, before Mr. Baron Vaughan, in December 1827, ``**CHARLES PARKER**, a lad of seventeen, was indicted for a highway robbery on the person of John Crane, a lime-burner, of Ware, as he was returning from Hertford, on the night of the 20th of August. The prisoner effected the robbery by the aid of another man, under circumstances of great violence, and stole the purse and watch of the prosecutor. It was stated that, notwithstanding the prisoner's youth, he was an old offender, and at the head of a desperate gang who infested the neighbourhood of Hertford. The Jury found him guilty, and he was sentenced to transportation for life."

When the extempore prayer had closed, the culprits rose from their knees. Grier, with some emphasis, and not an inappropriate gesticulation, repeated aloud some verses of a hymn. ``In mercy Lord to thee I pray;" which all three joined in

chaunting, with voices rather musical than otherwise. The executioner and his assistant now proceeded to tighten the pinions which held their arms, and the culprits turned to ascend the fatal ladder, which they mounted slowly and deliberately. Having gained the drop, and communed for a few minutes with the Presbyterian Clergyman, the ropes were put over their necks, and tardily adjusted. Before Doctor Lang quitted the fatal drop, Parker at length confessed his guilt of the murder -- his inexpressive countenance undergoing a perceptible alteration, and, for the moment, assuming a demoniacal turbidity and darkness. As the finishers of the law were closing their preparations, and as the sound of their retreating footsteps died away on the ears of the condemned wretches, there was an awful pause. At length, on a signal from the Under-Sheriff, the executioner laid hold of the protruding lever, and with a sudden movement withdrew the supporting prop. Down fell the drop, with one short loud clap, and the culprits swung in pendulous agony. The limbs of Grier, who was a tall muscular man, quivered horribly for some mintues [sic], owing to the shameful negligence, or inexpertness of the executioner's assistant, it would seem, for the rope had twisted round towards the nape of his neck. Parker, to borrow the ordinary phrase, ``died easy; and Penson, after twirling round rapidly for a few moments, shewed but few contortions of limb. The fatal ceremony over, the guard trooped away, and the assembled group gradually dropped off.

After hanging nearly an hour, the bodies were lowered into the rude coffins prepared for them -- those of Grier and Penson being conveyed away for interment. Parker's to be anatomised. [*] On removing the covering from the face of the latter, the countenance did not seem to have undergone any considerable change. There was a frothing about the mouth, which remained slightly opened, and a livid hectic in the cheeks; but the agonised eye, though it exhibited the fixity of death, was open, bright, and keen. The pericranium was not such a one as would induce us to turn converts to Gall or Spurzheim.

Three culprits are still in the condemned cells, and on the chain, the day of their awful exit not being yet announced to them. The heavy chains which the legs of condemned malefactors are ordinarily loaded with, we think might very well be dispensed with, without offending justice or humanity.

See also Sydney Gazette, 29 September 1829.

[*] In this, 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.

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.

AUSTRALIAN, 14/10/1829
Supreme Court of New South Wales
Dowling J., 9 October 1829
AFFAIR OF CLINCH AT NORFOLK ISLAND.
CRIMINAL COURT. FRIDAY.

Mr. Justice Dowling having entered and taken his seat about ten o'clock in Court, which gradually became much crowded, a considerable proportion of the audience being military, the usual formula of swearing in a Commission, reading over indictment, and so-forth, ensued. Three officers of the 57th, two of the 39th, and two on half pay, composed the Commission. [1]

The Clerk of the Court next read aloud the indictment of

EDWARD WRIGHT, Captain in his Majesty's 39th regiment of foot; for the wilful murder of **PATRICK CLINCH**, a prisoner of the crown at Norfolk Island, on 20th October, 1827; and for aiding, abetting, assisting, and councelling **DENNIS TUNNY**, serjeant, and **DENNIS REID**, private in the same regiment, to slay the said Patrick Clinch, --- to which in a firm tone of voice the prisoner pleaded not guilty.

Mr. Wentworth opened the case for the prosecution in words pretty nearly as follows:-

``May it please your honor and gentlemen of the Jury, I cannot address you on the present occasion without feeling it to be the most difficult task that ever devolved upon me through the whole course of my professional career. The duty which devolves upon you, gentlemen, is equally unpleasant, but I am sure it will be discharged faithfully. The offence of which the prisoner stands charged, is one of the gravest character. Gentlemen, I am not afraid of any bias on your minds, but the fear of being suspected of such bias may be injurious to the prisoner. The only object of the prosecutor is to attain the ends of public justice. If after the evidence has been gone through with, you should entertain any doubts, you will give the prisoner the benefit of them. The evidence to be produced in support of the necessary allegations will prove, notwithstanding the prisoner was not present, that the death of the prisoner Clinch originated through his orders. It will appear by evidence that a few minutes after the prisoner Clinch had been taken into custody, the prisoner ordered two of his corps to go and do their duty, asking them if they knew what their duty was. It will also be made to appear, that they went to the place where the prisoner was lying, surrounded by men, and shot him. Gentlemen, if I prove these allegations, with them I am confident you will not swerve from the discharge of your duty.

I shall now lay the case more fully before you. It will appear in evidence --- the prisoner Clinch, some days previous to the transaction in question, ran away from he settlement, and while at large made some desperate attempts on the lives of several people, and that while the prisoner at the bar was walking out, Clinch made a charge upon him, no doubt, with an intention of causing him bodily injury, or of taking away his life. On prisoner's returning home, it will be proved, that he was heard to say, blood required blood, and he would have it. The attempt on prisoner's life, no doubt, excited a bad feeling against the man. A few days after, while sitting in the government-house with Lieutenant Cox, they heard a disturbance, and called out the guard. Prisoner taking a party with him went to ascertain the cause of riot, and left Lieutenant Cox with orders to come to his assistance, if he heard a bugle blown. At the time this alarm was given, I will prove (continued the learned gentleman) that it

proceeded from the hospital where the prisoner Clinch had come, and where he frightened a man named Gorman, and that it was he who shouted. The object of Clinch's going there, was, he stated, to take some government property, perhaps a blanket, to shield him from the inclemency of the weather. But, gentlemen, it is immaterial whether he went to rob or to kill Gorman. Several men were present at the death of Clinch. Among them was a man named Smith, since dead, and others, severally named McCabe, Howell, and Burke. They saw Clinch endeavouring to escape from the hospital, when a running fight took place. Clinch was armed with a pole, bearing a knife at the end of it. To effect his escape, he had to cross a creek. The pursuing party was therefore enabled to intercept and arrest him alive. In securing him they cut off two fingers, and beat him on the head and body so desperately, that he roared for mercy, and fell completely exhausted. Gentlemen, I take it if the man had met his death in the hurry of pursuit, the killers would have been justified, but yielding and being killed afterwards, the offence has become murder. McCabe will prove that he told he prisoner, Captain W. of the capture Clinch, upon which the prisoner dispatched Daniel Tunney and Daniel Reid, saying to them, `do you know your duty' - that they replied `yes,' and then that prisoner said `mind you do it.' They then went (continued the learned Counsel) to where Clinch was lying, and ordering the people out of the way, who surrounded him, fired at him, first one shot, and then the other. A short time after the prisoner came up and applauded them, saying they had done their duty, and ordered the body into a barrow to the hospital, and when arrived, said jocularly to the Doctor, `can you do any thing for him.' After the deed had been done, the prisoner, it would be proved, had returned quite elated to the garrison, and in high spirits, on the death of the man, and said we have done for him in the swamp - no doubt feeling happy that the man who had attempted his life was dead. Gentlemen, the prisoner took care he would not be present at the transaction. He said when he saw the body, `it is better you had done it than I.' I will prove that after he had given his orders to the two soldiers, he proceeded to the quarters of the civil officers, which, by the plan I hold in my hand, lay towards the further end of the Island. It is impossible to conjecture what his object could have been, unless to impress on their minds that he had no hand in it, and he even asked them what shots had been fired, feigning not to know the meaning of the firing. The next day he said to Lieutenant Cox, `I have given a pound to Meehan to create a diversion.' Lieutenant Cox said `they say he is not the man.' `O,' (replied the prisoner) `never mind, never mind.' This, with his conduct at the civil officers quarters, shews on whom he wished to throw the onus. Gentlemen, these are the simple facts of the case. It is not contended, nor can it be, that a mutiny existed on the Island. It will, however, be impressed upon your minds, that such was the case, and that such an example was necessary. Gentlemen, do not think that would make out a justification for such an act as this, to instil terror into the minds of these persons. Why not have sent Clinch to this Court to have taken his trial. There were officers enough even there to have tried the man, at such a period. When the man's fingers were cut off, when he cried for mercy, and was knocked senseless, what pretence did there exist for shooting the miserable being like a dog. Gentlemen, I am satisfied from evidence and from affidavits, that no mutiny existed. I shall call Lieutenant Cox, who was at the time second in command to prisoner, who will prove that there was even no disposition to mutiny. I am satisfied the statements which I shall lay before you will have due consideration. Gentlemen, the case of the prisoner at the bar appears more like the case of Governor Wall than any other to which I can at present refer you. Gentlemen, I shall only add, if after a due consideration of the case on one

side and on the other, you are of opinion there was any immediate danger of a mutiny; that Captain Wright had not time to give the man a trial. If you are of opinion the circumstances were so cogent, then you will be bound to give the prisoner the benefit of such an opinion."

Having nearly thus stated the case, the learned Counsel proceeded to call witnesses.

Lieutenant **CHARLES COX** deposed, that he was at Norfolk Island on the 20th October, 1827, in the capacity of Magistrate and Assistant Engineer, where he messed with prisoner. While they were sitting after dinner on the evening in question, between eight and nine o'clock, hearing a noise in the prisoner's camp, and a shot fired in the stockade, witness said what's that. Captain Wright got up, and took the candle, which went out, requesting witness to light it, which witness did. Three times witness said I will not light it any more. I must go to the soldiers, to whom witness went, and found them turned out. Captain W. came up a short time after, and after making some enquiries, ordered 30 men to file off from the right, to fix bayonets, and load, and proceed to the place whence the noise proceeded. Witness heard no noise in the camp at the time, but there was a report abroad that the prisoners were surrounding the place. Witness heard a buzzing, when Captain W. ordered the men to load. Witness said don't waste the ammunition, but if you will let me go I will see what's the matter. Witness was not allowed to go. Captain W. ordered him to remain, and if he heard the sound of a bugle, which he carried with him, witness was to come to his assistance. Witness went out in front of the government-house to listen, and about half an hour after prisoner left him, heard four shots fired, and saw the flash. About half an hour after this witness saw prisoner, who said they had settled Clinch, and that he had had him wheeled off to the cell yard. Captain W. mentioned Clinch's name, and appeared to witness rather pleased that the man was killed. After this witness and prisoner had some punch together, and talked over the affair. Prisoner told witness that Clinch had made resistance. Next morning witness saw the body of Clinch brought out and placed on a platform in an area used for church service. The body was pierced with four gun shot wounds. The head was bruised and battered, and the left hand nearly cut off. Captain Wright addressed the prisoners as follows: ``Prisoners, you see the body of Clinch before you. You see what he has brought himself to, through his conduct. What, even if you were to take the Island, what benefit would you get by it. All the benefit you would get would be an idle life for two or three months. A vessel would then arrive - the signal would not be answered - the vessel would return to Sydney, and a force sent that would take you all prisoners and you would all be hung." Before this event, Captain W. had told witness that Clinch had made an attempt upon his life, and that he had great difficulty in escaping, and that he had sent a party in chase of him, and was about telling witness the orders he had given them, when witness told him he had better not, as if any thing happened he might be brought up as a witness against him, and that if he shot the man he would have to answer for it in the Supreme Court, for although the man was a prisoner of the crown, he (Captain Wright) was not justified in shooting him; owing to which prisoner did not tell witness the orders he had given. After the death of Clinch, prisoner told witness that he had given Meehan a pound note. Witness enquired for what? he was answered because he had done his duty so well. Witness replied, I understand Meehan is not the man. Prisoner said, ``O never mind, it will throw it off the shoulders of the right person." Witness never observed any appearance of insubordination amongst the prisoners on the Island. If one man only had been opposed to Clinch, witness, thought it might have been justifiable to have shot him but with the number of prisoners that had been ordered out against him, it was

certainly a most extraordinary measure. Witness told prisoner that shooting men in the way described would not answer. Witness and prisoner had frequent misunderstandings.

On cross-examination by Mr. Rowe, witness stated that an examination respecting the death of Clinch had taken place at Norfolk Island, but that no person was committed for trial. That the minutes of the case ought to have been forwarded to the Governor, or Attorney General. That witness in consequence of the representation of prisoner, respecting Clinch, advised him to tar the body of Clinch over, and hang him at the yard-arm, and not to think that witness would give him any advice that he would not take himself, and be equally responsible for the act. Witness further persisted, that he did not believe the Island to have been at the time alluded to in a state of mutiny, and that he never taunted prisoner about taking his trial or holding up his hand. Witness would not injure prisoner by giving false testimony. He and prisoner differed on legal points, but witness persisted that he did not suspect any mutiny on the part of the prisoners.

JOHN CAVENAGH, a prisoner of the crown, was at Norfolk Island in 1827. Knew Pat. Clinch, and saw the constables in pursuit of him on the night in question, observed several of the military pass, and a short time after heard a voice say stand clear, when some shots were fired, but could not say how many; saw the body next; it was bruised and battered, and some of the fingers were off.

On his cross-examination by Mr. Norton, witness stated that he did not consider the blows and bruises would have caused death --- that he had been ten months in the hulk, and did not know what he had been brought up for.

EDWARD McCABE, [2] another prisoner of the crown, had been an overseer at Norfolk Island at the period of Clinch's death - apprised prisoner of Clinch being in the hands of the constables who were in pursuit of him, upon which prisoner ordered serjeant [sic] Tunney to take a file or two, and obey his orders. Went in obedience to the commands of prisoner to ascertain what had been done. Heard the report of a musket, and presently after a second. Subsequently beheld the dead body of Clinch, whose fractured skull a soldier struck with the butt end of his musket, for which prisoner called the soldier a scoundrel, and commanded the party to fall in and do things soldierly. Heard prisoner ask if all were satisfied. The affair occurred within twenty yards of the camp, the prescribed distance beyond which a garrison order directed no prisoner to venture without due leave, under pain of death - in his (witness's) opinion, this place was double the distance. Prisoner said the distance need not be measured if witness was satisfied. On cross examination witness, admitted he had been repeatedly flogged. That his lashes never equalled four hundred at a time. That he never conversed with Lieutenant Cox about Clinch's death, and that he had seen an instrument resembling a club, about three and a half feet long, armed at one end with a knife seven inches in haft and blade, reported to have been used by Clinch, but could not find out that any of the military had been wounded by means of it.

ADAM OLIVER, a constable at Norfolk Island during the above period, swore he assisted a corporal of the 57th, to capture Clinch, who was armed with the club already described, and defended himself with vigor till after being struck at and knocked down several times, when utterly defenseless, sergeant Tunney and two privates appeared, and calling to witness and the others to stand back, fired at Clinch, who fell in a sort of creek, about twenty rods from the camp, and fifty from the house of the Commandant.

WILLIAM BRUCE, watchman, was one of the party who captured Clinch. When quite secured, from five to seven minutes after being disarmed, and as he lay entirely at the disposal of the party, the prisoners on the Island not having shewn the slightest disposition in the world to interpose for him, the soldiers appeared as described, and crying out if that was Clinch, bid the party stand clear, when they fired, and shot the defenceless wretch.

CHARLES DAVY was a patient in the hospital, whither the dead body of Clinch was brought, and tumbled out of a barrow on the floor. Prisoner said, addressing the Surgeon, Doctor, if not too late, restore him, and let him take the course of law. Another witness, named William Holt, deposed that the prisoners on the Island had evinced no disposition whatever to mutiny.

JEREMIAH GALLIVAN, a private soldier of the 29th, deposed that it was he who called on Clinch surrender, to which the latter replied with threats against the life of witness, some of whose comrades he could not swear who, seeing witness's danger, shot Clinch then and there. Heard prisoner, who was about three hundred yards behind, exclaiming - ``sergeant do your duty,'' and on coming up in about ten minutes, ask how far distant they were from the camp; on which, and ascertaining it was beyond the prescribed distance, prisoner added that the soldiers had done their duty, and warned them, that any prisoner taking to the bush should be served in a similar way; and that about a fortnight previously, the garrison had turned out under arms, expecting a mutiny and attack from the prisoners.

-- **TUNNEY**, sergeant of the 39th, deposed, that finding Clinch contending against Corporal **MEEHAN**, whose life he considered was in danger, and not knowing the people who stood round were constables, but that they were assisting Clinch against the corporal, called --- ``stand away rascals, or I'll shoot you,'' and instantly, with the private, Daniel Reid, who accompanied him, fired within eight yards distance at Clinch, who fell dead. After this Captain Wright came up, and ascertaining the deed was done within more than fifty yards of the camp (thirty being the forbidden distance) applauded the soldiers for having done their duty, and hoped the prisoners would take a wholesome caution from it. Understood the order of the prisoner to witness to attend to the admonition --- ``You know your duty,'' referred to the established rule of firing on a runaway resisting or refusing to surrender, and that under this order, and conceiving one of the soldier's lives to be in danger, he had shot Clinch. McCabe had not told prisoner in witness's presence that Clinch had surrendered. Thirty men, witness was sure, had not been ordered off by the prisoner. Daniel Reid, private in the 39th, on setting out with Sergeant Tunney, heard prisoner say, sergeant, ``do your duty - you know your duty.'' Saw Clinch fighting with Corporal Meehan, whose head appeared to be cut, and tussling against the whole party, sometimes kneeling, at other times groping on his hands and feet amongst the rushes. There did not seem to be any chance of his escaping. Heard no caution from Tunney to the constables to stand off, but fired at Clinch, as witness thought, in execution of his duty.

Here Counsel for the prosecution, Mr. Wentworth, agreed to close the case, and sat down.

Mr. Justice Dowling having complimented the learned Counsel on the extremely delicate, proper, and able manner in which he had conducted the case, put it to the officers in the jury-box, without going into evidence, which he deemed conclusive for the prisoner, to record their verdict. [3]

NOT GUILTY was pronounced, with scarcely a moment's hesitation, and Captain Wright was instantly discharged from the bar. The Court then adjourned, it being nearly eight o'clock. [4]

[1] For commentary, see Australian, 14 October 1829: Hall, the editor of the Monitor, made the initial complaint about this killing. A sergeant and a private soldier were first charged and held to bail, until Wright, the commanding officer at Norfolk Island, came forward to be tried in their stead. The soldiers had merely followed his orders, Wright said. The Australian noted a number of oddities in the trial. Wright had been a member of the criminal jury many times even after the death of Clinch, including being a juror on a prosecution against Hall, who was his own virtual prosecutor. Two members of Wright's own regiment were on the jury for his trial. The witnesses were also men who had previously been held to bail for manslaughter, and were the immediate instruments of Clinch's death. Hall later sued the editor of the Sydney Gazette for libel over this issue: see Hall v. Mansfield (No. 3), 1830.
In its usual way of favouring authority, the Sydney Gazette, 10 October 1829, described Wright as a "gallant officer". On 13 October 1829 it said "never was so grave a charge so miserably supported". On 15 October 1829, commented on the case again, saying that it had placed Wright under unnecessary stress, only to break down when a witness "bears down all that had been previously brought against him …The prosecution broke down with its own weight of trash." The fact that the prosecution barrister admitted that it had broken down was Wright's victory. There could be no suspicion of a biased jury, the Gazette claimed. The Gazette's report of the case was published on 13 October 1829.
See also Historical Records of Australia, Series 1, Vol. 15, p. 245 (British government requesting information about the case). Governor Darling sent a despatch to Murray about this case on 21 July 1830 (pp 594-599). The Monitor had published an adverse article about it, claiming that there had been a cover up. The governor, however, said that "the Trial of Captain Wright was the result of as foul a conspiracy as was ever engendered." The conspirators included Lt Cox and the convicts. Cox had earlier been brought to a Court Martial by Wright. Governor Darling said that Cox was a tool of a faction which included Hall, the editor of the Monitor, Wentworth and Robison, and that Cox was not of a sound state of mind. Dowling also sent a report of the trial, which was much longer than those published in the newspapers. See also Darling to Murray, 27 July 1830 (pp 626-627). On behalf of the British government, Viscount Goderich replied to the despatch of 21 July 1830 on 23 December 1830. He said that Wright should be informed that the British government considered him completely free from the remotest suspicion of wrong doing in the death of Clinch (p. 863).
In 1830, three other soldiers were tried and acquitted of murdering a man in custody: Sydney Gazette, 14 August 1830.
[2] McCabe was committed by the magistrates to stand trial in the Supreme Court for perjury over his evidence in this case: Sydney Gazette, 31 October, 26 November 1829; Australian, 21 November 1829. The Sydney Gazette thought that the magistrates should have had jurisdiction to try him themselves: 26 November, 1 December 1829.
[3] The Sydney Gazette, 13 October 1829, said that the "Learned Judge then told the Jury that Mr. Wentworth had done himself infinite honour by the manner in which he had presented this case to their notice. He now candidly admitted that the evidence

did not sustain it, that it had broken down under him, and it was their duty to dismiss the accused with honour from the bar by saying he was Not Guilty."
[4] For a similar, quick acquittal of a fellow officer by a military jury, see R. v. Lowe, 1827.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 16/10/1829
Supreme Court of New South Wales
Dowling J., 12 October 1829
MURDER BY A MANIAC.
CRIMINAL COURT. MONDAY.
Before Mr. Justice Dowling, **JAMES MACMANUS** was indicted for the wilful murder of **EDWARD VALES**, at Parramatta, on the 4th of October. [That is, the trial took place only eight days after the death of the victim. On the insanity defence, see also Sydney Gazette, 4 September 1830.]

Dr. Wardell, for the prisoner, urged that the man was unsound in his mind at the time of committing the murder.

Seven officers were then sworn to determine whether the prisoner was sane or insane at the time charged.

Rev. **SAMUEL MARSDEN** deposed, that he had known the prisoner, but was not aware of his derangement till within the last ten days. On the 3rd of October he observed the man pulling at the tomb-stones in Parramatta church-yard, by which he tore off two of his finger nails, and on the Sunday evening subsequently, about five o'clock, he again beheld prisoner, who then betrayed a deranged state of intellect, and seemed to be incapable of judging right from wrong.

Mr. Marsden's coachman, **GEORGE SAVAGE**, deposed, that he went to bed on Sunday evening, Oct. 4, about nine o'clock, and shortly after heard the prisoner walk out of a house opposite, and begin counting the stars as far as nine; the man continued after this walking up and down for about an hour and a half, talking all the time most incoherently; about twelve o'clock, hearing a crash of broken glass, Savage continued to depose, that he got up and alarmed the chief constable, who dispatched a sub-constable with him to the church yard, when after climbing over the gate, and glancing an eye about, he spied the maniac in a small lodge, sprinkling water about him; on getting nearer the door, the maniac was heard to cry, ``I'll wash my hands, and wash them clean;" as he turned to wash his hands, Savage ran up to the door, and pulled it to -- then opened it a little, and peeped, when the maniac flung water in his face, saying, ``thou art saved;" Savage said, ``Jem, come along with me, and I'll take you home to your brother's;" Macmanus replied, ``Ah, do you know me, I have conquered the devil;" on looking round the room Savage beheld a dead body stretched along the ground, the neck and face of which were desperately lacerated, an axe lying near it appeared to be covered with blood; Savage exclaimed to the constable outside, he's killed old Neddy, meaning deceased, who was 74 years of age, and both secured Macmanus in the church-yard a short time, after being obliged to knock him down, as he defended himself furiously.

Mr. Justice Dowling having put it to the Commission to say, whether from the evidence that had been adduced, they could consider the prisoner as a madman, or one in possession of his intellects. Without retiring, a verdict was returned, that the panel [sic] was of unsound mind at the time of committing the act described.

The Judge then directed, that the prisoner should be kept in close confinement till his Majesty's pleasure be made known upon the subject, which in all likelihood will be a period of 10 months.
The prisoner did not exhibit any symptoms of insanity at the bar.
[*] According to the Sydney Gazette, 15 October 1829, the court sentenced him to confinement at the Lunatic Asylum during His Majesty's pleasure.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University