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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

SYD1830

MAITLAND MERCURY, 2/84, 10/08/1844.
DEATH.
On the 5th instant, at the residence of her son, Andrew Lang, Esq., of Dunmore, in the 75th year of her ager, Mrs. Mary Dunmore, relict of the late **Mr. WILLIAM LANG**, of Dunmore, **who perished at sea on his way from Paterson's River to Sydney,** by one of the small coasting vessels that were then the only means of conveyance by water between this district and the capital, **in the year 1830.**

SYDNEY GAZETTE, 29/05/1830
Supreme Court of New South Wales
Dowling J., 28 May 1830
FRIDAY MAY 28th.
(Before Mr. Justice Dowling.)
HENRY MUCKLETON was indicted for the wilful murder of **MARK KING**, and **PATRICK CUFFE, THOMAS WALSH, and WILLIAM BROWNE**, as accessaries present aiding and assisting, at Moreton Bay, on the 19th of February last.

Mr. W. H. Moore, conducted the prosecution.

From the evidence adduced in this case, it appeared that the prisoners, from what motive could not be collected, concerted together to take away the life of the deceased, a fellow prisoner at Moreton Bay. On the day preceding the commission of the murder, the prisoners were seen in the barrack room, to which they had been confined for refusing to go to work, consulting together for some time. One of them (Cuffe) had a falling axe with the handle cut short, so that it could be used like a tomahawk, which he gave to Walsh, who concealed it underneath his bed. Neither this circumstance, nor that of the axe being transferred to Muckelton in the course of the same evening, excited the particular attention of the witnesses, as a plan appeared to have been in agitation among the prisoners to break out of the barrack, and it was supposed the axe was to be used in the attempt. Between two and three o'clock in the morning, however, the prisoners being at that time all in bed, and the greater number asleep, one of them who had occasion to get up saw Cuffe and Walsh in a corner of the room in conversation, and heard Cuffe say that he would ``have nothing to do with it; they must do it among themselves.'' Walsh had an axe under his arm at the time. Shortly after the witness returned to bed, he heard a noise of blows, and on directing his attention to the quarter whence the sound proceeded, saw a hand moving up and down over the bed of the deceased, as if striking a number of successive blows. The witness kept his eyes fixed on the spot, and distinctly saw the individual by whom the blows were given lie down in the bed next to that of the deceased, and in which the prisoner Muckleton slept. About the same time, another witness who also had occasion to rise in the night time, passed the bed of the deceased, and saw the prisoner, Muckleton, striking the deceased on the head with an axe, as if he was chopping wood, while another man, who, from circumstances, he had no doubt was Walsh, held him down in the bed. The cry of murder was immediately raised, and upon the Superintendent entering the barrack, accompanied by the guard, one of the witnesses immediately pointed out Muckleton as the man by whom the deceased had been wounded. Upon examination the axe was found in the prisoner's bed, and several traces of blood on his person. Browne was taken into custody in consequence of having been seen in conversation with the other prisoners on the day previous to

the murder; but none of the evidence otherwise affected him in any way, but for his confession taken before the Commandant, Captain Logan, and made also, when in the cells, to Dr. Cowper, that he, together with the other prisoners, had concerted to murder the deceased. The deceased had thirteen incised wounds on his head, one of which penetrated to the brain just above the ear, and another nearly seperated the upper from the lower jaw; notwithstanding which he lingered three days in hospital before he expired. When called upon for his defence, the prisoner, Muckleton, said he was guilty, but that the other men knew nothing of it. The other prisoners denied the charge, and called two witnesses for the purpose of impeaching the witnesses for the Crown.

Mr. Justice Dowling minutely recapitulated the whole of the evidence, pointing out those parts of it which most materially affected the several prisoners. With respect to the prisoners charged as being present aiding and assisting, His Honor told the Jury they must be satisfied that they were so before they could be brought within the scope of the present information. It was not necessary, however, that there should be an actual presence. If they were in a condition to know what was doing at the time, although they were not actually looking on at the commission of the murder, they were constructively present. Thus if one man stood at the door of a house while another went in and committed a murder, he who remained outside, would be properly charged as being present aiding and assisting; - as, an in indictment for killing a man in a duel, the seconds were equally principals with him who actually pulled the trigger, as being looking on at the time. But if, in consequence of a preconcerted plan formed among several others, one of the party should commit a murder without the others being in a condition to know when it was perpetrated, then, although they would be equally amenable to the law as accessaries before the fact, they could not be found guilty on an information charging them with being present aiding and assisting. Bearing these observations in minds the learned Judge invited the particular attention of the Jury to the evidence as it affected the prisoners, Cuffe, Walsh, and Browne; for, with respect to the guilt of the prisoner, Muckleton, His Honor apprehended no doubt could exist if they believed the witnesses, independently of the avowal which he had made in the dock.

The Jury retired for about half an hour, and returned into Court with a verdict of Guilty against Muckleton, and acquitted the other prisoners.

The learned Judge then pronounced the awful sentence of the law on the prisoner, Muckleton, and ordered him for execution on Monday next.

The other prisoners were remanded on the motion of the Crown Officer, who, it is understood, will present another information against them as accessaries before the fact. [*]

See also Australian, 4 June 1830.

[*] These three prisoners were subsequently acquitted of this offence as well: Australian, 4 June 1830. Muckleton was hanged on 31 May 1830: Sydney Gazette, 1 June 1830.

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

AUSTRALIAN, 03/09/1830

Execution, 30 August 1830

On Monday, **BROGER**, a black native, was hanged at Campbell Town, for the murder of a stockman [**JOHN RIVETT]**, some time ago, in the interior of the country.

Four other culprits suffered the day following; and the two men, McGibbon and Maas, [*] who were not many days ago found guilty of various forgeries on the Commissariat Department, paid the penalty of the law at Liverpool, on Wednesday. This expenditure of human life is appalling, and doubly so, when the little amelioration produced by the frequency of capital punishments, generally on the surviving part of the depraved, and the exhibition of those spectacles in particular, is considered, ``Whose sheddeth man's blood (unrighteously) by man, shall his blood be shed.'' Murder merits death by the hands of the hangman; and arson and highway robbery, when attended with aggravated outrages. There are few other crimes, we think, the odds against the commission of which will be much augmented by the terrors of capital punishment. The stoutest safeguards against rapine will lose their force and influence by a too common use. What diminution of crime did the common spectacle of criminals, hanging in gibbets at the sport of the elements for years, as was once the fashion of the law, in the realm of England, ever produced? The very crow stuck up daily, without intermission, to scare away interlopers from the corn field, soon becomes an accustomed sight to the tribe of winged free-booters. And so is it with Jack Ketch and his noose. Hard labor and solitary confinement have terrors in prospect for the generality of offenders, who would not unwillingly exchange the pleasure of a feat, for the chance of escaping intimate connection with ``JACK,'' and a ''cist of his office.''

For another account of the execution, see Sydney Gazette, 31 August 1830.

The Sydney Gazette, 26 and 28 November 1829, reported that Broger was committed for trial on 23 November 1829 on a charge of murder. The Gazette reported the trial on 26 August 1830 (the trial having been held at Campbelltown on 20 August) as follows: "Broger, an aboriginal native, was indicted for the wilful murder of John Rivett at Shoalhaven, on the 6th of February, 1829 - Guilty, Death. Ordered for execution on Monday the 23d instant." His execution was then postponed for a week.

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. 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.

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 (R. v. Tommy, 1827). Broger's alleged accomplice, 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. See also R. v. Ballard or Barrett, 1829.

The Sydney Gazette reported the following on 27 July 1830: "A black native, known in Sydney by the name of Bumble, who was formerly sentenced to death for his murderous exploits, but obtained his Excellency's pardon, has recently been committing some most daring and attrocious depredations at Brisbane Water. He has placed himself at the head of a party of his tribe, and from his warlike threats, and known ferocious character, the persons residing on the spot, have been deterred from pursuing him. A request for the assistance of the Police was sent to town on Sunday, and we hope soon to hear that this furious gentleman, on whom conciliation has produced so little effect, is in safe custody." No one of this description appears on the list of Aborigines tried between 1824 and 1836, though the list may not be complete. This may be a reference to the Aboriginal Defendant case, 1827, to R. v. Binge Mhulto, 1828, or to a case decided before 1824. It is also possible that the Gazette did not get the story right.

On 17 November 1830, Governor Darling announced that Captain Logan, commandant at Moreton Bay, had been killed by natives: Sydney Gazette, 18 November 1830.
[*] For an account of their trial, see Sydney Gazette, 17 August 1830; and see Sydney Gazette, 4 September 1830.
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SYDNEY GAZETTE, 04/09/1830
Supreme Court of New South Wales
Dowling J., 3 September 1830
JOHN KILLIGREE, was indicted for the wilful murder of **DANIEL SULLIVAN**, at Sydney, on the 14th July.

JOHN SHEA, a private in the 39th regiment, said, I know the prisoner; he was a soldier in the same regiment with me; on the 14th July, I saw him in the Sydney barracks, between the hours of 8 and 9 o'clock at night, very drunk; he slept on the same hammock-pole with me; on the 14th July, I was a picquet on duty that night; I knew the deceased; he was in bed when the prisoner came in, and asleep; another soldier undressed the prisoner, during which time he was very outrageous, and kept shouting out, so that two men were obliged to put him to bed; I think he had his side arms on when he came in; he said several times that he would ``kill,'' but named no person; he remained quiet in bed for a few minutes, and then made a plunge up, and reached his hand to a belt which hung over his head, and drew a bayonet which was suspended in it, out of the scabbard; it was his own bayonet; when I saw it in his hand I was near the door; he waved the bayonet over his head, and fearing that he would do me some mischief, I got under my own hammock, and immediately after heard the deceased groan; I went to his berth, and saw the bayonet stuck in the side of his head; I called out that the man was killed; the prisoner still remained in his bed, and I pulled the bayonet out of the deceased's head; there were two hammocks between that of the prisoner, and the one in which the deceased lay; if the prisoner was the man who wounded the deceased, he must have thrown the bayonet; he could not have seen the deceased from where he lay; the two hammocks between the deceased's and the prisoner's were empty; other soldiers were in bed, and some moving about the room; I did not see the bayonet leave the hand of the prisoner; I saw him wave it once over his head; he had no bayonet in his hand when I saw one in Sullivan's head; I afterwards ascertained that the bayonet belonged to the prisoner by the number; the deceased died about 11 o'clock the same night in the hospital; no one had been ill-using or abusing the prisoner in the barrack room before he went to bed; he came in angry; I, being on duty, did not like to have my belts pulled about, and called a man named **RANDAL McCARTHY** to assist me in putting him to bed; other persons saw the affair; after the deceased had received his death wound, the prisoner lay very quiet in bed, until ordered out to the guard house, I never knew of any quarrel between the prisoner and the deceased; I saw the prisoner the same evening, about 6 o'clock, in the barracks, and he appeared to me to be then sober.

Other Witnesses were called, who merely spoke to the same facts, and stated their belief that the bayonet had accidentally left the hand of the prisoner.

Several soldiers of the same regiment gave the prisoner an excellent character for good temper and humanity when sober.

The learned Judge minutely recapitulated the evidence, and left it to the Jury to say, whether the prisoner, intending to do some mischief, had thrown the bayonet, or whether it had accidentally flown out of his hand when flourishing it over his head. If

they should be of opinion that, intending to hurt somebody, no matter whether the deceased or any other person, the prisoner had thrown the bayonet, then his Honor was bound to tell them, that death having ensued in consequence of his illegal act, the prisoner, in the eye of the law, was guilty of murder. If, on the other hand, they were satisfied, under all the circumstances, that the bayonet had accidentally left his hand, the offence would be reduced tot hat of manslaughter.
The Jury found the prisoner guilty of manslaughter, and the Court, after a suitable admonition, sentenced him to be imprisoned for three calendar months.
See also Australian, 10 September 1830.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 11/11/1830
Supreme Court of New South Wales
Forbes C.J., 30 October 1830
BATHURST - 30th Oct.
Special commission.
(Before His Honor the Chief Justice, and a Jury of Military Officers.)
RALPH ENTWISTLE, WILLIAM GAHAN, MICGAEL KERNEY, PATRICK GLEESON, THOMAS DUNN, and JOHN SHEPHERD, were indicted for the wilful murder of **JOHN alias JAMES GREENWOOD**, at Bartletts, on the 23rd of September last, by shooting him with a loaded gun or pistol. The information contained four counts varying the offence to have been committed by some of the prisoners, the others being present, aiding and assisting therein.

It appeared from the evidence of an assigned servant of Mr. Evernden (the police Magistrate at Bathurst), that about the latter end of September a party of armed men, some having muskets, and others pistols, came to the farm of his master at Bartletts, a distance of about 10 miles from Bathurst, where the deceased was engaged as overseer; and after desiring all the men upon the farm to turn out and follow them, applied to the deceased and told him that he must accompany them; upon his refusing to do so, the prisoners, most of whom had arms, said, it would be much better for him to go, as they would shoot him if he did not. He still refused, and told them they were not game enough to shoot, at the same time opening his breast to them. Upon this the prisoners, Entwistle and Gahan, fired at the deceased immediately after each other. The deceased put his hands to his breast and called out ``Oh Lord!'' and then staggered into the house. While he was going in at the door, a third shot was fired at him by Michael Kerney, which penetrated his back. The deceased then laid himself down before the fire, and never spoke. The whole of the prisoners were identified as being present, by two of the assigned servants of Mr. Evernden, whom they pressed and took with them. Part of the deceased's cloaths was found on the persons of some of the prisoners; two shots were received by the deceased about the region of the heart and one in the back.

The evidence of the two assigned servants was confirmed in several circumstances by the testimony of Mr. Everndon and a ticket-of-leave man in his service.

The Jury found all the prisoners guilty, and sentence of death was immediately passed upon them and execution awarded on Tuesday, the 2d of November. [*]
[*] On the same day at the Bathurst assizes, other members of the same gang were convicted of stealing in a dwelling house. They, too, were sentenced to death: Sydney Gazette, 11 November 1830. All the prisoners were executed on 3 November 1830: Sydney Gazette, 13 November 1830.

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SYDNEY GAZETTE, 27/11/1830
Supreme Court of New South Wales
Dowling J., 26 November 1830
(Before Mr. Justice Dowling.)

THOMAS JONES was indicted for the wilful murder of **LLEWELLEN HOPKINS**, at Sydney, on the 29th October last. The information charged the prisoner with having, on the day above stated, inflicted sundry mortal wounds, fractures, and contusions, on the head of the deceased, with a paling, from the effects of which he died on the following day.

Mr. W. H. Moore conducted the prosecution; Mr. Therry was of counsel for the prisoner.

It appeared in evidence, that the deceased, who was upwards of 60 years of age, lived with the prisoner, who is a milkman, and, at the time the fatal occurrence took place, resided in Upper Pitt-street, there being no other persons living in the house. - According to the testimony of several witnesses, the prisoner and the deceased always lived upon the most friendly, and even affectionate terms, with each other; and from the whole of the circumstances developed on the trial, there can be no reason to doubt that the prisoner was incited to the commission of the rash act which deprived a fellow-creature of his existence, by the effects of intoxication, possibly rendered more violent from some ill-timed provocation given by the deceased; of which, however, there was no actual proof.

On the evening of Sunday the 29th October, the prisoner was seen in a state of intoxication, and engaged in an altercation with a neighbour, about some trifling milk score. At this time a paling was observed in his hand. Shortly after he was noticed lying down in the yard outside his house, and, after a little time, the deceased came out and seemed to be endeavouring to persuade him to go in doors, but not succeeding returned himself into the house, closing the door after him. Presently the prisoner arose and went in, and after a short time had elapsed a noise was heard about the premises, which attracted some constables to the spot, and the deceased was found standing in the yard, with the blood flowing from a wound in his head; the prisoner being all the time shut up in the house, and behaving in a very riotous manner. After examining the deceased, it appeared to the constables that the cut then on his head was very slight; and, as he declined making any charge against the prisoner, they went away, first advising the deceased not to go near him, nor to sleep in the house that night; - a caution which, unfortunately, he neglected to take. About an hour after, the uproar was renewed, and where they found a number of people assembled, and the deceased reclining against he wall, in the yard, bleeding copiously from several fresh wounds on the head, and quite insensible. The prisoner was among the persons present, and, upon its being asserted by several that he had inflicted the wounds, he asked the deceased if he had beaten him, who, at first distinctly replied ``Yes,'' and then, as if recollecting himself, ``No.''

The unfortunate man was conveyed in a cart to the General Hospital, where he lingered, in a state of total insensibility, till the following morning, when he expired. Dr. **MITCHELL** proved that the fractures on the skull, and the consequent extravasation of blood caused death. He also stated, that he believed the wounds to

have been inflicted with a blunt weapon, probably that set forth in the information, to which very considerable force must have been supplied.

The jury, after a minute recapitulation of all the evidence, together with such comments as the learned judge deemed it proper to make, found the prisoner guilty of manslaughter.

Mr. Therry here rose and stated that he had to submit to the court a point of law which suggested itself to him in the course of the trial, namely, that the jury had not the power to find a prisoner guilty of manslaughter, on an indictment for murder. The learned gentleman then proceeded to state that the power formerly exercised by jurors in returning verdicts of manslaughter, in cases where the indictments were for murder, was given them by statute - the 43d, Geo. 3, c. 113. Now, he contended, as that statute was wholly repealed by Mr. Peel's Acts, and no similar provision in cases like the present being to be found in the existing criminal code, that a verdict of manslaughter could no longer be supported on an indictment for murder.

The learned Judge overruled the objection. His Honor stated, that juries had the power of returning verdicts of manslaughter on indictments for murder, at common law. The Act of Parliament referred to by counsel, had reference merely to the punishment of the offence of manslaughter.

His Honor, then, after a most impressive address to the prisoner, sentenced him to be imprisoned for twelve calendar months.

See also Australian, 3 December 1830.

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SYD1831

AUSTRALIAN, 14/01/1831
Supreme Court of New South Wales
Forbes C.J., 7 January 1831
FRIDAY, JAN, 7th. **JOHN COOK, JAMES MURPHY, and WILLIAM BUBB**, were indicted for the wilful murder of **ADAM OLIVER**, at Norfolk Island, on the 25th October, 1830; and **JOHN WILSON** as an accessary before the fact.

EDWARD MAGENNIS, a prisoner of the crown, and called as a witness for the crown, said, "My Lord and Gentlemen of the Court, when my examination is over, I wish to say something."

Chief Justice State what you have to say.

My Lord, When this transaction took place, I was in the gaol-gang loaded with heavy irons, and almost starved to death. A man named Gascoigne, one of the overseers at the time, and who is here to-day as a witness, called me on one side, and told me, that if I did not implicate Wilson, and Murphy, as well as Cook, he would have me up to court and get me flogged; so, my Lord, as I was nearly at death's door at the time, I was afraid to refuse. I thought it better to say nothing about it there, but to wait 'till I came up to this court, to expose the treachery and perjury of Gascoigne.

The Chief Justice Then you mean to say, that what you swore against these men at Norfolk Island is false?

Witness I do, my Lord, and I hope God will forgive me, as I did it out of fear, and intended to tell the truth when I came up here.

HENRY GASCOIGNE an overseer, among others, deposed In Oct. last, I was an overseer of the gaol-gang at Norfolk Island; the prisoners were in the gang; deceased was assistant overseer; on the evening of the 25th Oct. when the gang were returning from work, I was walking with the deceased behind, when he observed that the men were walking out of order, and said he would go forward and set them right; he did go forward among the gang, and shortly after I heard a noise, upon which I went up, and saw the deceased on the ground, and Bubb striking him as hard as he could with a spade; after this, I saw Murphy strike the deceased, somewhere about the head with a reaping hook; I went forward to strike him with a stick, when he ran after me; I escaped, and he threw the reaping-hook after me; after Murphy struck the deceased, he said, several times, "You b-----r, I've settled you now."
This testimony was corroborated generally by other evidences. [2]

Mr. **ROSS**, asst. surgeon of Norfolk Island, examined the body, and found a deep wound, extending from ear to ear, at the back of the head, which wound must have caused immediate death; there were several punctured wounds in other parts of the body.

The learned Judge summed up, concluding that Wilson was entitled to an acquittal, as there was not a tittle of evidence to affect him. Bubb and Murphy, guilty. [3]
Cook, Murphy, and Bubb were accordingly hanged on Monday last. [4]
Notes
[1] See also Sydney Gazette, 8 January 1831. See also R. v. Welsh, Australian, 14 January 1831; Sydney Gazette, 11 January 1831. Welsh was found guilty of an assault committed at the island on the same day. He said that it was notorious that prisoners on the island did not care what they said or of what they accused one another, in order to get to Sydney. He was sentenced to death for this assault. He had been convicted of a street robbery a year earlier, which led to his transportation to Norfolk Island.

[2] See Sydney Gazette, 8 January 1831 for details.
[3] According to the Sydney Gazette, 8 January 1831, Murphy declared that he was innocent, and Bubb also insisted on Murphy's innocence. The Chief Justice said in his summary to the jury that Bubb and Murphy would have been guilty even if Cook's blow had been the cause of death, so long as they were engaged in one common object with him.
[4] For an account of their execution, see Sydney Gazette, 11 January 1831.

SYDNEY GAZETTE, 15/01/1831
Supreme Court of New South Wales
Dowling J., 14 January 1831
CHARGE OF MURDER.
ROBERT YOUNG and JOHN HOOPER, were indicted for the wilful murder of **JOHN MASON**, by strangling him with a rope, at Newcastle, on the 6th of July last; and **FRANCIS BATTY**, as accessory before the fact, at the time and place aforesaid.

PHILIP JOSEPHS - In July last I was a turnkey in Newcastle gaol; I remember a man named John Mason being received into the gaol on the 6th of July last; I received him from the prisoner Hooper; he was to undergo a corporal punishment of 100 lashes; he had not been in my charge long when I missed him, and suspected he had gone down into the privy; I sent for assistance, when a man named **PATRICK KELLY** came round, and I mentioned the circumstance to him; Batty, at this time, was in the gaol-yard, and I told him what I suspected; while we were talking, Mason spoke in the privy, and asked to be assisted to get up, which we afforded him, and he was then taken out of my charge by Hooper; in about an hour after, I saw him in the strong-room, hanging to a beam by a rope round the neck, and handcuffed; I ordered him to be cut down, which was done by a man named **BURTONSHAW**; he appeared to be dead, for I threw some water in his face, and he never moved; I immediately sent off for Dr. Brookes, who shortly after arrived, and said the man was dead.

Cross-examined by Mr. Rowe - I was in the room when Dr. Brookes arrived; he endeavoured to bleed the deceased; Dr. Brookes has been subpoenaed, but is not here to-day; I can't say what the deceased's intention was in going into the privy; I do not know that his intention was to destroy himself; when he was taken out of the privy, he said he intended to get away; I think he could have hung himself to the beam where I found him; I tried and found I could, in the same way, had I wished; I tried with handcuffs on, in the same way I found the deceased; and satisfied myself that I could effect self-destruction in the same way I found the deceased; Hooper was turnkey in the in the gaol for about three years, and was particularly attentive and strict in doing his duty for the last nine or ten months; I mean that he was more attentive to his duty than formerly.

By Mr. Williams - The vault of the privy into which the deceased man went was a place where a man might have suffocated himself; it was necessary to remove one of the boards, and hand him a rope to enable him to get out; he could not make his escape that way; formerly, when prisoners were to receive 100 lashes, the surgeon used to attend, but latterly not; Young was the scourger, and came to the gaol that day to flog the deceased; I do not know that a message was sent to Dr. Brookes to attend; in the room where the deceased was, there was a post to which persons sentenced to be flogged are tied; it is in the middle of the room, and the deceased was found three or four feet from it; they could not flog a man at that place with any propriety; I have seen prisoners flogged at the post, but never where the deceased was found; I had known the deceased for three or four years, and I believe he was flogged once or

twice before, but I did not see it myself; I always considered him sane, but some persons used to call him ``Cranky Jack;" I have known Young about six years, but I do not know much of his habits one way or the other.

By the prisoner, Batty - The deceased was hanging two feet under the berth-boards, and suspended from a beam above; I cannot say where you were when I found the deceased.

By the Court - I told Mr. Batty at the door of the strong room that the man was dead; ``Dead!" said he, and seemed very much surprised; I believe he sent for Dr. Brookes directly; I have known him as gaoler, and always considered him a very feeling man; I do not think he would any ill-treatment to a prisoner if he knew it; the deceased never received a lash.

By a Juror - The deceased could have saved himself from strangulation where I found him, by standing on the berth: if the man had been flogged, it was the duty of the gaoler and one of the turnkeys to have been present; I could have heard an outcry in the room where I was, had a man been suffering; I could have heard the cry of ``murder" had it been made.

Re-examined - If the deceased had wished to commit suicide, he might have done it in the privy; the soil was deep enough to have smothered a man.

HENRY CANNY said, I am overseer to the General Hospital at Newcastle; on the 6th of July, I examined the body of a man named John Mason; he was confined in the gaol at the time; he was lying in a bottom berth in the strong room, with his head supported by some people about him; I endeavoured to bleed him but could not succeed; Dr. Brookes arrived shortly after, and I went away; a mark, which appeared to be that of a rope, was round the neck of the deceased, but I saw no rope at that time; I saw a rope afterwards, but I do not know that it was the one used, or where it came from; the deceased died of strangulation; his face was dark and livid.

Cross-examined by Mr. Rowe - When I first saw the deceased he was surrounded by some persons who were supporting him; the eyes were swollen, but I cannot say whether they were closed; the tongue was not out; the teeth were firmly closed, but the lips were not; I have been five years and a half overseer at the hospital; I have known Hooper more than four years, constantly employed about the gaol; I never heard any person complaining particularly of him till after this affair.

By Mr. Williams - Dr. Brookes came three or four minutes after me; a message came to me on the 6th of July, for Dr. Brookes, stating that the deceased would not be flogged without he was present; a man named **HALFPENNY**, an attendant at the gaol, brought the message; it purported to come from Mr. Batty; I delivered it to Dr. Brookes, who immediately left his house to go to the gaol; I have known Young upwards of five years, and, as far as I know, he has always acted humanely in his office; I know nothing against his character.

Re-examined - The message was, that the deceased would not be flogged unless Dr. Brookes were present.

By the Court - The deceased had not been punished, for I examined him to ascertain that fact.

By Mr. Rowe - I will not swear positively what was the actual cause of the death.

STEPHEN COLLETT - I am an indented servant to the Australian Agricultural Company; on the 6th July last, I was in the gaol at Newcastle; on that day I saw a man, called John Mason, in the gaol-yard, alive; the next time I saw him was in the strong room; I was walking in the yard, and went to the window of the strong room, where I heard a great outcry from Mason; I saw him in the room; together with the prisoner Young and Hooper; Young had a rope in his hand; which he put over

Mason's head and round his neck; Mason was handcuffed at this time; when Young put the rope round his neck, Mason put up his hands to prevent it tightening round his neck; Young snatched the rope and pulled it tight round his neck, and then pulled him across the room towards the post; he could not get him up as Mason pulled against him; he then sent up to Mason, put his hand on his shoulder, and said ``you b-------- I'll knock your brains out;'' Hooper at this time was standing on one of the top berths, and told Young to hand him the rope and he would pull the b-------- up; Young did so, and Hooper pulled the deceased up to the post at the edge of the berth, and held him there two or three minutes, and when he let him down he groaned; I saw no more, I might have been standing at the window about ten minutes or a quarter of an hour; I saw no one in the room but Young and Hooper, and a man named Burtenshaw, but I cannot say whether he was present all the time, for I could not see the whole of the room from the window; Burtenshaw was a prisoner in the gaol; I saw two ropes put round the deceased's neck by Young; the first rope was taken off; the second was a larger rope, and had a noose at one end through which I saw Young draw the end of the rope before he put it over the deceased's neck.

Cross-examined by Mr. Rowe - A man named **BENJAMIN DAVIS** was looking in at the window with me, and I left him there after me; I did not complain to any one of what I saw, as I did not consider it my place to do so; there were upwards of twenty prisoners and a turnkey in the yard at this time, but I told no person what I had seen; I never told any one what I had seen until Dr. Brookes came; I then told him how Mason came by his death; I also mentioned it to Mr. McLeod; I was not examined on the inquest; I did not see the deceased dragged off the ground; I saw him fall, and the rope fell with him; Burtenshaw was in the room at the time, looking on; I was under sentence in the gaol for six months at that time; I never had any conversation with Burtenshaw since about this transaction; the gaol-lodge, in which was a turnkey, was not above half a dozen yards from the window where I was looking in; I did not inform the turnkey of what I had seen; Hooper threatened to put me in the cells once, but he never behaved amiss to me in the gaol; he never threatened to put me in the cells more than once, that I remember; I have never seen Burtenshaw since I left the gaol; I might have spoken to him about this business in the gaol, but to the best of my knowledge I never have; I never asked him the reason he stood by while a murder was being committed; I was as good friends with him after this transaction as before.

By the Court - I did not send to the Coroner to inform him of what I had seen; the inquest was held in the goal; I was not examined; I told some constables what I had seen.

By Mr. Williams - I have seen persons punished, but I never saw a rope used in that way before; I cannot swear whether the deceased put up his hands to prevent the rope tightning round his neck, or to prevent its being brought down round his body; he was very refractory.

By a Juror - The rope was put round the top of an upright post which supported the berths; It was not over a beam, when Hooper let go the rope, the deceased fell flat, either on the ground or on the bottom berth; I did not see what took place after.

WILLIAM BURTENSHAW - I am a private in the 57th regiment; in July last, I was confined in Newcastle gaol for a breach of discipline; I remember a man named John Mason being brought into the gaol, on the 6th of July; I saw him in the strong-room; I was called in by Hooper to assist in tying up the deceased to get his punishment; Batty and Young were present; I refused to assist, and Batty said he would get me 14 days in the cells for it; I remained in the room; I saw the deceased handcuffed, standing with his hands across a pole; Hooper struck him a blow under

the neck, with his fist, which did not knock him down; Young then got a rope and put it round his neck; the deceased pulled back, and Young used to let go the rope and suffered him to fall several times; Young said, he would either tame him or break his heart; Batty again desired me to assist, and I went out of the room; Batty followed me and said he would have me punished if I did not assist, and I again returned to the room; when I went in I saw Young put a small cord round the neck of the deceased, and give the end of it to Hooper, who pulled the deceased up to the pole; Batty was not there when I went in the second time, nor did I see him there afterwards; I saw Hooper and Young both pull the rope up to the post; blood came from the nose of the deceased, and he was quite black in the face, when a voice at the window of the strong-room said ``The man is chokeing,'' upon which they let go the rope, and the deceased fell; I then went out to look for Mr. Batty, but could not find him; I went back again into the room and found Young standing in the midst, and Hooper near where the deceased fell; Young told me to go out as I was not wanted there; I went out and the men in the yard were then coming into the strong-room, but the prisoners, Young and Hooper, sent them up stairs; after this I went to the door of the strong-room to get some water, when I met Josephs, the turnkey, who sent me for a knife with which I cut down the deceased, who was then suspended from a horizontal beam above the berths, and seemed to me, at first, as if he was sitting on the edge of one of them; he was quite dead; neither of the prisoners were in the room.

Cross-examined by Mr. Rowe. - I saw a man named Davis, and the wituess, Collett, standing at the window outside; I think it was Collett who called out ``The man is chokeing;'' I never had any conversation with him about it after; the strong room is not very far from the lodge; I did not inform the gaoler or turnkeys of what I had seen; I talked to Davis about what I had seen; it used to be talked about by some of the confines in the room, but I always walked away, as I did not like to hear it mentioned; I though that a murder would be committed, from what I saw; there were more than twenty prisoners in the yard, and a turnkey over them, but I did not mention what I saw to any one; I swear positively that a man outside could not see the deceased fall, in the direction where he was; it was up to the post that the two men pulled up the deceased, and not to the beam; I did not see him at the beam till afterwards, when he was dead; I saw both the prisoners pulling him; it was not Young alone, or Hooper alone, they both pulled; his feet were not pulled off the ground at all when I was present; the deceased was very black in the face, and his tongue out; I swear that I heard Collett call out that the man was hanging; I was sent to Newcastle gaol for three years for having words with the serjeant; I was 24 hours in a cell there, before this transaction, and 14 days since, for making a report against the present gaoler, for giving liquor in the gaol, but which report the magistrates held to be groundless, though they did not send for my witnesses; Hooper was on the top berth, and Young gave him the end of the rope, which he pulled until he got one turn round the post, and then put his feet against the post to give him more power; Young at that time, held the rope by the neck, to pull the noose tighter.

By Mr. Williams - Mason was very violent before the rope was used; I refused to assist in tying the deceased up, because I did not want the name of an assistant flogger; I saw him attempt to strike the two prisoners; I heard Young say, ``Mr. Batty, send for Dr. Brookes, for I'll not punish him before he comes;'' about five minutes after, I saw him dragged as I have stated; the post he was pulled up to was perpendicular; I afterwards saw the body hanging about two feet from the post; I never saw the deceased after I saw him fall, as I have described, till I cut him down; I

never said to any person that I saw him rise after he fell; the beam to which I found the deceased hanging was not above five feet from the ground.

By a Juror - When the deceased fell, he pitched his head through the bottom berth, where there was a board out; before the rope was brought the deceased struck at the two prisoners; I did not see any one tie up the deceased to the place where he was found dead; Collett was at the window, but I am sure he could not see the post, to which they were pulling him up from it; I am positive he could not.

Re-examined - I am sure it was Collett who called out ``The man is chokeing [sic];" I saw him at the window; he could not see the post from where he stood, but he might have seen the deceased as he was pulled about; the deceased was nearer to the window than to the post at times.

JOHN BUTLER HEWSON, district constable at Newcastle, said, I went into the strong-room in the gaol, where Mason was lying dead; I took possession of this piece of rope, which was hanging on a beam under the top berths, about give feet from the ground; these other pieces I found lying in the middle of the room; I heard there was another rope which I asked for, and I got this from Mr. Joseph Batty; there was a mark of fresh book on it; I asked Batty how it came there, but I did not hear him account for it; I saw a mark on the neck of the deceased, as if make by a rope; I also saw an incision in the arm where he had been attempted to be bled; I was present when Dr. Brookes was there, and saw him cut the deceased, but he did not bleed at all; he was also cut in the temple, but no blood flowed, at least no quantity, not half of wine glass full; I know the witness, Burtenshaw; I spoke to him on the subject, but only when looking for the witnesses; he told me that he was present and saw the transaction, but did not describe it to me; I heard him give evidence on the inquest; before he was brought before the inquest he told me nothing particular, that I can recollect; he said it was a foul murder.

By a Juror - I was present at the examination of the deceased, when he was sentenced to receive 100 lashes; it was for threatening the life of his overseer; Dr. Brookes was on the Bench at the time.

This was the case for the prosecution.

On behalf of Batty, the following witnesses were called:-

Mr. **R.C. PRITCHETT**, merchant in Sydney, has known Batty nine years, and considers him a humane, kind-hearted man; he is married and has children.

Mr. **GEORGE THOMAS GRAHAM**, a settler at Hunter's River, has known Batty for three years, and as far as the witness could judge, has always found him a man of the utmost humanity and kindly feeling, and always heard him spoken of as such.

T. McQUOID, Esq. High Sheriff of the Colony, has known the prisoner, Batty, for two years, as bailiff at Newcastle, and subsequently as gaoler, and formed a very favourable opinion of his character for kindness and humanity; believes he was not disposed to do injury to any body; I appointed him gaoler at Newcastle, and should rather have been inclined to remove him for too much softness and lenity.

Mr. **EDWARD SPARKE**, of Sydney, has known Batty for 6 years, during which time, his general character for humanity and kindness of heart, has been excellent; witness never heard or knew any thing of him to the contrary.

On the part of the prisoner, Young, Mr. Williams called **PETER RILEY**, a constable at Newcastle, who said, I know the deceased; I was present at his examination when he was sentenced to receive 100 lashes; he said he would rather be hanged.

Captain **HENRY STEEL**, Keeper of Sydney gaol, said I remember an instance since I have been in office, when I found it necessary to put a rope over a man's person, from his violence.

BARNY DORAN, I know the deceased. I remember when he was brought to the gaol to be punished, on the 6th of July; when he was taken into the yard, he asked among the prisoners for a knife, and said he would stick Bob Young, or any person who came to flog him, as he would sooner be hung than receive 100 lashes; he seemed that day as if he would do any thing.

JAMES WALSH, said, I was in the gaol at Newcastle on the 6th of July; I remember the day, Mason was dead in the gaol; I met Young coming out of the strong room, and asked him what they had done about the flogging; he said they could not tie him up he was so violent, and that they were waiting for the doctor to come.

Mr. Rowe called no witnesses on behalf of his client, Hooper.

The learned Judge then minutely recapitulated the whole of the evidence, - leaving the case to the Jury to say, first, whether they were satisfied that the deceased came by his death in the manner charged in the information; secondly, if so, whether the prisoners were the persons who put the rope round the neck of the deceased; and, thirdly, if the jury were satisfied that they did so, under what circumstances was it done? - whether with the deliberate design of destroying life, or, with a bona fide intention of drawing him up to the post to receive his punishment? In the latter case, although the act was criminal, the offence would be mitigated to manslaughter.

The Jury found the prisoners, Young and Hooper, guilty of manslaughter, and acquitted Batty, who was discharged by proclamation.

The other prisoners were remanded. [*] See also Australian, 21 January 1831.

[*] Justice Dowling sentenced the prisoners to a further three months imprisonment, noting that they had already endured seven months there: Sydney Gazette, 25 January 1831; Australian, 28 January 1831.

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

SYDNEY HERALD, 12/09/1831

Supreme Court of New South Wales

Dowling J., 7 September 1831

THOMAS LUCAS was indicted for the wilful murder of **CHARLES WATERWORTH**, at Parramatta, on the 20th of July, and **JOHN ENGLAND** as an accessary after the fact.

The Attorney General and Mr. Crown Solicitor Moore conducted the prosecution, and Dr. Wardell, Mr. Therry, and Mr. Rowe defended England.

The evidence having been gone through, which principally rested upon an approver, **JOHN MONAGHAN**, and several witnesses having stated that the deceased was known to them by the name of **WATERSWORTH**. The Jury having retired for some time, came into Court and informed the Judge, that as there appeared a variance between the name of deceased as laid in the information, and that which he was known by the witnesses, they could not agree upon a verdict. The learned Judge ordered the prisoners to be remanded, and a fresh indictment to be framed against them.

[*] The Sydney Gazette, 10 September 1831, reported this trial at greater length. Evidence was led as to whether the deceased was known as Waterworth or Watersworth. It appears that he answered to both names. For Justice Dowling's notebook version of the trial, see Dowling, Select Cases, Archives Office of N.S.W., 2/3466, p. 82; Proceedings of the Supreme

Court, Vol. 58, p. 112, 2/3241. In the former, Dowling summarised the point as follows: "Where an indictment charged the prisoner with the Murder of Robert Waterworth and it was proved that the name of the deceased was Watersworth the jury who could not decide what was his true name were discharged from giving any verdict."

An inaccurate name of a victim was also in issue in R. v. Roberts, Sydney Gazette, 3 and 6 September 1831; Sydney Herald, 5 September 1831; Australian, 9 September 1831. The indictment named the victim as James Michael Roy, whereas he was in fact James Mickellroy. Rowe, for the defendant, urged that this was fatal to the indictment, but Forbes C.J. disagreed. He said that the "deceased was described with sufficient certainty to inform the prisoner of what he stood charged, and to enable him, had there been an acquittal, to plead the verdict in bar of another information." (Source: Sydney Gazette, 6 September 1831.) The Australian reported that Forbes said that the ends of justice would be defeated were such quibbles as to name sufficient to allow a prisoner to be discharged. None of the newspapers reported this judgment at length. The Gazette and Australian said that the prisoner was hanged for murder.

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

SYDNEY GAZETTE, 17/09/1831
Forbes C.J., 9 and 12 September 1831
FRIDAY, SEPT. 9.
(Before the Chief Justice.)

THOMAS LUCAS and JOHN ENGLAND, charged, the one as principal, and the other as accessory after the fact, in the murder of **ROBERT WATERWORTH**, being placed at the bar.

The Clerk of the Court proceeded to read the information, when he was interrupted by Mr. Rowe, who enquired if that were the information upon which the prisoners had been already tried?

The Attorney General said it was the same information.

Dr. Wardell submitted that it was contrary to all practice, after a Jury had been discharged, to empanell [sic] a new Jury, and retry the prisoners upon the same information.

The learned Judge having taken a note of the facts of the case, as they occurred upon the former trial; the finding of the Jury, and their discharge, by consent of the Attorney General, said he was ready to hear such arguments as Counsel might have to offer against the present proceeding.

Mr. Rowe - The prisoners, may it please your Honor, state that, having already been arraigned and tried, they are not liable again to be arraigned and tried upon the same information. A jury has been once charged with the prisoners on this information; and it is an established rule of law, that a Jury having been once so charged, particularly in a capital case, cannot be discharged without giving a verdict. [Bacon's Abridgment; title ``Juries'' G.] In this case the Jurors who by the constitution of the Court in this Colony, are empanelled namely seven military officers, instead of twelve civilians indifferently chosen from among the people - continued during the whole of the trial till the evidence was gone through on both sides. A preliminary issue was put to them by the learned Judge who presided, upon which they retired from the Court to deliberate; and, on their return into the box, stated, through their Foreman, that they could not find the issue so put to them - not that there was a difference of opinion among them, but that they could not arrive at any conclusion, one way or the other, on the question left for them to determine. Upon this they were discharged without giving a verdict. Now, I contend that it was incumbent upon the prosecutor to show

that the name laid in the information was the right name, and not upon the prisoners to shew that it was not the right name,; and if, from any circumstance, he failed in so proving the name as laid, and that the Court and Jury were satisfied that it was not so proved, why then, I contend, according to all the authorities upon the subject, that the prisoners were entitled to an acquittal. In no case has a Jury, after being once empanelled in a criminal case, been discharged without giving a verdict, except in consequence of an act of God, or in some extreme cases, by consent of the prisoner. If a juror die in the course of a trial, or be taken so ill as to render it impossible for him to sit, the Court may empanel another juror, or discharge the Jury altogether. If the prisoner take ill during the trial, the Court may discharge the Jury; but in no other cases than those of such extreme necessity, that no human foresight could guard against, can the Court discharge the Jury, without obtaining a verdict of guilty or not guilty. In this case, the evidence was gone through on both sides - the Jury could not find the issue put to to [sic] them by the Court - they were discharged without the consent of the prisoners being had, or even asked - and, with the discharge of the Jury, I contend, the prisoners were discharged also, and cannot again be upon their trials, on the same information. As I am to be followed by the two learned gentlemen who are with me in this case, I shall not take up the time of the Court by any further argument, and shall now briefly refer to a variety of decided cases on the subject. The learned Counsel here cited several cases from the works of Mr. Justice Foster, Chitty, Leach, &c. and concluded by once more submitting, with confidence to the Court, that the prisoners could not be again arraigned on [t]he same information.

Mr. Therry said, there was no legal proposition of which he was more satisfied than this: - that no legal conviction of the prisoners at the bar could take place on the information on which they were arraigned, and called upon to plead. The nature of the offence with which the prisoners stood charged was not now a legitimate topic of discussion; suffice it to say, that the information contained the charge of a capital felony. To that charge they had pleaded not guilty. Evidence at the former trial was fully fully [sic] heard - the case for the prosecution and for the defence had closed, and the Judge had actually charged the Jury on an issue, which he proposed as preliminary to the main issue of guilty or not guilty. The Jury could not agree upon that preliminary issue, and the learned Judge who tried the case thereupon discharged the Jury, the Attorney-General consenting to their discharge; but no consent being either given by either of the prisoners, or of the Counsel on their behalf. The question then was, could they be legally called upon to plead to the information, charging them with the same offence? He confidently replied, they could not. What said the authorities from the earliest to the latest time upon this point? There was an uniform maintenance of the doctrine in accordance with the passage cited by Mr. Rowe from Chitty's Criminal Law, Vol. I. p. 630, ``That in order to let the prisoner into a ground of defence, which he could not otherwise have taken, before evidence given, the Court may by consent discharge the Jury, and that circumstance cannot bar any subsequent proceeding. But it does not seem that without such consent, the prosecutor has any right to bring the defendant twice into peril of his life." In support of this doctrine, Mr. Chitty referred to several decided cases, of which he would bring a few leading ones under the notice of the Court. First, however, he would notice, that there was one, and only one passage, in a book of any considerable authority, adverse to the doctrine as laid down by Mr. Chitty, that book was, Lord Hale's Pleas of the Crown, which very passage was condemned by all subsequent writers on Criminal Laws. In a note upon this passage, Mr. Sergeant Wilson, himself no mean authority as a Criminal lawyer, writes thus: ``The reason given for this practise, if it were law (which yet

without the prisoner's consent is unwarranted by ancient usage) seems to hold as strongly in behalf of the prisoner as of the King: and yet I do not find any instance where a Jury once sworn was ever discharged because the prisoner's evidence was not ready; on the contrary, in Lord Russell's case, the Court refused to put off the trial until the afternoon of the same day, pretending they could not do it without the consent of the Attorney-General, although in that case the Jury were not sworn, and the prisoner urged that he had witnesses who could not be in town till night, in which case it certainly was in the discretion of the Court to put it off or not. It hath however been since holden for law, that a Jury once charged in a capital case, cannot be discharged till they have given their verdict." See Lord Delamere's case, and Rockwood's case, State Trials, Vol. IV. p. 659. Great indeed would be the hardship upon the subject if a contrary doctrine were to prevail - if the Counsel for the Crown had the power, by his mere consent, to discharge a Jury once, why may he not exercise that power twice, or thrice, or ten times, and thus bring the prisoner's life into peril and jeopardy as often, and whenever he pleases? When they come into Court, the prosecutor and the prisoner should be then at least on equal terms; - the Crown Counsel have many advantages prior to trial - they alone are in possession of the depositions - they shape the information as they think proper, and the first knowledge that the prisoner has of the information against him is the moment that he is called upon to plead to it. These surely were sufficient advantages without superadding any unnecessary, unusual, and illegal straining in favour of prerogative for the oppression of the prisoner, against which the humanity of British law has provided. But to proceed - he would now advert to the invariable rule adhered to and upheld by a long stream of authorities from the earliest to the latest period upon this point. It would be sufficient for this purpose to cite the following passage from Hawkin's Pleas of the Crown, Vol. II. p. 619, ``It seems to have been anciently an uncontroverted rule, and hath been allowed even by those of the contrary opinion to have been the general tradition of the law, that a Jury sworn and charged in a capital case, cannot be discharged without the prisoner's consent, till they have given a verdict." Nothing can be more plain, intelligible, and conclusive than this, unless it be the judgment of Mr. Justice Foster; one of the first, perhaps the very first authority in matters of Criminal law, that ever adorned the Bench of English Justice. In Sir John Wedderburn's case, the leading one upon this point, Mr. Justice Foster anticipates the character of the very case the Court has this day to deal with. This case occurred in 1746, when the two Kinlochs were arraigned on a charge of high treason, for being engaged in the Scottish Rebellion; and the indictment had been opened on the part of the Crown, when the Chief Justice (Wills), before any evidence was given, told the prisoners' counsel that he was informed they had some objection to make in behalf of their clients grounded upon the Act of Union, which objection he said was proper to be mentioned before the counsel went into their evidence. As the plea, which was one to the jurisdiction of the Court could not be made on the issue of ``not guilty," and be therefore proposed that a Juror should be withdrawn. Accordingly, a Juror was withdrawn, and a new indictment was prefered [sic], whereupon the prisoners were tried and convicted. But mark the difference between that case and the present - First, the discharge of the Jury took place, not merely by the consent of the Attorney General, but with the consent of the Attorney General backed by the motion of the prisoners' counsel. Here, however, there was no motion of the prisoners, not any consent given by them. Secondly, in Kinlochs' case, the discharge of the Jury took place before evidence was given. Here however the discharge of the Jury took place after evidence on both sides had closed. Thirdly, the discharge in Kinlochs' case took place in order to let the prisoners into a

defence, which, in the opinion of the Court, they could not otherwise have been let into. Here there was and could be no such object; for, wherefore should the prisoners desire a discharge, when, from their disagreement on a point, it was manifest a verdict of acquittal must be pronounced in their favour. The Judge is presumed to be counsel for the prisoners, and it is upon this principle that Mr. Justice Foster justifies the propriety of the course adopted in the case of the Kinlochs, for, says he, - ``The discharging the Jury in this case was not a strain in favour of prerogative, it was not done to the prejudice of the prisoners; on the contrary, it was intended as a favour to them." That great and eminent man (Mr. Justice Foster) anticipating as it were the events of this day, more immediately meets and disposes of the point which is the material one in this day's argument. ``It is not now a question," he writes, ``nor I hope will it ever be a question again" (unfortunately however, his prediction was not verified, as it happens to be the very question now before the Court); ``whether in a capital case the Court may in their discretion, discharge a Jury after evidence given and concluded on the part of the Crown merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial when the Crown may be better prepared." This was done in the case of Whitbread and Fenwick, and it certainly was a most unjustifiable proceeding; I hope it will never be drawn into an example. He would only trespass on the attention of the Court by citing one other passage from the judgment of the same eminent Judge; it pointed out the course which the learned Judge who tried the late case; he spoke with deference yet with confidence, should have pursued. After propounding the question which he leaves undecided, ``whether the bare consent of the prisoner, unassisted by counsel, and consenting to his own prejudice, will render the Court quite blameless in discharging a Jury after evidence given on both sides?" Mr. Justice Foster proceeds, ``The Jury (in the case of Mansel) were not agreed on any verdict at all, and therefore nothing remained to be done by the Court, but to send them back, and to keep them together, till they should agree to such verdict as the Court could have received and recorded; and the prisoner ought not to have been drawn into any consent at all; for in capital cases I think the Court is so far of counsel with the prisoner that it should not suffer him to consent to any thing manifestly wrong, and to his own prejudice." After such quotations as he had cited from the best writers on criminal law, he felt it unnecessary to support them by any tedious and unnecessary process of argumentation, unless along-established principle of criminal law were set aside altogether, and unless a precedent - a most perilous precedent were to be set, whereby the Counsel for the Crown might at any time mend his hand, and come better prepared when his prisoner was worse prepared, or perhaps altogether unprepared; unless, in short, it were intended that hereafter, it should be settled law, that the Crown prosecutor were to be empowered to put their lives in peril and jeopardy, as often as he pleased: unless all this, and more than this, and worse than this were intended, he was satisfied the prisoners could not be called to plead to the present information.

Dr. Wardell said, - The case before the Court is not a novel case, in its chief features; and if there be anything which renders it different from a stream of decided cases, the difference is one which ought to press upon the mind of the Court in favour of the prisoners. In all the cases which have already been cited, the Courts acted upon the general principle of law, that where a Jury has been once charged, they cannot be discharged without giving a verdict, except by consent of the prisoner. Acting upon that rule of law, we also find a string of cases, which seem to form distinctions, but which distinctions, in fact, uphold the main principle. If, by discharging a Jury and empanelling a new one, the prisoner stands indifferent as to his defence; or, if he be

favoured and any way by the alteration, then, and only then, are exceptions allowed to prevail against the general rule; these exceptions also we find invariably arrising at a stage of the proceedings different from that in the present case, and when, in fact, the prisoner could not be prejudiced, and might be benefitted [sic]. In all the cases to which I allude, the reasons for empanelling new Juries, arose in the course of the trial, when the evidence had not been gone through, and when no opinion could have prevailed among the Jurors. One of the excepted cases is, where a Juror or a witness should die, or be taken ill, pending the proceedings, and before the Jury has been charged by the Judge. But where is there any case to be found, in which jury has been discharged on account of a difference of opinion existing among them, unless something of misconduct could be shewn on the part of the Jurors themselves? In the present case, what was the decision of the Jurors? They return no verdict, but they say they are agreed. In what? Why, to declare that they cannot find the prisoners guilty. That is in fact, the amount of what they stated to the Court. There was, then, but one alternative, and that, I submit, ought to have been pressed upon them - namely, that where a doubt arose, they should give the prisoners the benefit of that doubt. Here was a doubt of the prisoners' guilt - such a doubt as to prevent the Jury from bringing in a verdict of guilty. They could not find the prisoners guilty of the offence with which they were severally charged - namely of being principal and accessory in the murder of Robert Waterworth. Then, if they could not find them guilty, what was the alternative - which, I contend, ought to have been pressed upon them by the Court - but to find them not guilty? The Court could not even have asked the consent of the prisoners to the discharge of the Jury without giving a verdict, under such circumstances. It would have been the duty of the Court to have protected them from giving any such consent; but even if this were one of those cases which have been taken out of the general rule of law, and in which the Jury might be discharged without giving a verdict, at all events the prisoners ought to have been asked for their consent. Is not such a course of proceeding of every day occurrence - not in capital cases, but in the most trumpery cases of misdemeanour? - and shall it be held, that the law looks jealously upon the exercise of the power of the crown in cases of misdemeanour, but extends no protection to men charged with a capital felony? I ask how that rule of law laid down in Hawkins, Foster, Chitty, Blackstone, and all writers of any authority on criminal law, that a Jury once sworn and charged with the prisoner, cannot be discharged without giving a verdict, except by consent of the prisoner, can ever be upheld in any case, if it be not allowed to prevail here? There are exceptions to this rule; but upon what principle, except upon that which I have already urged to the Court? The course pursued in this case may be taken when it is either favourable or indifferent to the party indicted. I stand or fall on that authority. Is it favourable or indifferent to the prisoners at the bar to undergo another trial? I will suppose the possibility of a new Jury finding a verdict of guilty. If so, will that principle of law be upheld, which only allows a new Jury to be empanelled in cases of favour or indifference to the prisoner? But I contend that, in this case, there has been a virtual acquittal; and if the parties can now be tried again, I ask what defect in an indictment, however great, can be taken advantage of by a prisoner? or what predicament soever may not a crown officer extricate himself from, if a Jury can be found to say, ``We can't find that the property stolen belongs to A. B, thoug [sic] we can't find that it does not belong to A. B.'' Here the proof did not satisfy the Jury that the offence was committed as laid in the information; and if a new trial were allowed in such a case, merely because the evidence fell short, in the estimation of the Jury, of what the prosecutor expected, there would be, I contend, an end of that rule of law by

which a Jury cannot be discharged without giving a verdict, unless by consent of the prisoner, or in cases of indifference or favour towards him. Here the Jury retired, they considered the evidence, and their opinion amounts to - what? That it was not sufficiently strong to convict. If not, it was their duty, under the direction of the Court, to acquit: they ought to have been ordered to return and reconsider their verdict, when they might have satisfied their minds as to which way that verdict should be given. If they had even delivered a special verdict, it would have amounted to an acquittal. Suppose their verdict had been that they could not find that the deceased man's name was Robert Waterworth, there must have been an acquittal. But, in place of taking that virtual acquittal, what was done with reference to the prisoners? The crown prosecutor steps in and says, ``As I am not able to convince the Jury that Robert Waterworth was slain, I suggest" or ``I order, that a Juror be withdrawn; that the Jury be discharged, and the prisoners be remanded. I rule the destinies of the destinies of the prisoners, and order what course shall be adopted in this Court"! This is, in fact, the language of the Attorney General in this case. Circumstances, I admit, may arrise to compel a different line of acting from that which we would pursue, if we had the ordering of matters as we pleased. Circumstances like these, however, are the exceptions, not the rule: but where no such casualties do arise - where the party has been put in peril - where the evidence has been closed on both sides, and the case has gone to the Jury - I contend it is out of the power of the Court to order a new Jury to be empanelled, but that the Court is bound by the law; more especially in a case like this, where no difference of opinion existed amongst the Jury, (even admitting that one of their number holding out would be a reason for empanelling a new Jury) and a virtual verdict has been given.

The Attorney General replied at considerable length, and contended, on the authority of a number of cases, that the learned Judge who presided at the trial, had the power to discharge the Jury, without the consent of the prisoners, under the circumstances. In this Colony, which had not yet been parcelled out into counties and other defined boundaries, and where, in the absence of Circuit Courts, the Judges were not itinerant, as in the Mother Country, those forms which were prescribed by law to be gone through before Juries could be discharged, for not agreeing on their verdict, were neither necessary, nor indeed, practicable. The Judges of this Court had the power of adopting such laws, which were, in fact, but mere points of form adopted in the administration of Justice at home, to the circumstances of the Colony - a principle which had been upheld by the decision of the Court in a very recent case; he alluded to the case of the King against Dingle and others, for a robbery in the Bank of Australia.

Dr. Wardell replied

The Chief Justice - I have doubts - indeed something stronger than doubts - whether, the Jury having been once discharged, the prisoners can again be tried upon the same information. At the same time, the point is not one so clearly settled as to enable me to decide it without some deliberation. The question is one involving a sound principle of law, having for its foundation the protection of the subject; and the principle being laid in the law, I must regard it as coercive on my conscience, and come to a consideration of it, as if I sat with the Judges at Westminster Hall. I cannot consider that I, sitting in this Court, possess any more power over the fundamental principles of the law than any of the Judges at home. Awful, indeed, would it be, if His Majesty's distant subjects in this territory, were held to be subject to laws finding only on the consciences of the Judges, on which they, in their wisdom, might consider adapted to the circumstances, and condition of the Colony. I, for one cannot believe

that I am vested with any such power by the Act of Parliament. I repeat, that I entertain great doubts with respect to this case; and the only question with me now is, whether, as a matter of convenience, it would be better to proceed with the trial, reserving the point for future consideration, with the assistance of my learned brethren, should I find it too much for me to decide alone, or to postpone the trial until I am prepared to deliver my opinion.

After some observations by Counsel on both sides, it was agreed to put off the trial to Monday next, at which time the learned Judge said he should be ready to give judgment upon the point raised.

The prisoners were then remanded.

MONDAY, 12th.

Shortly after the Chief Justice entered the Court this morning, his Honor asked the Attorney-General, if he had any business to proceed with, or whether he called for judgment in the case which stood over from Saturday last?

The Attorney General said he would not press for the opinion of the Court in that case. He would withdraw the information for murder, and proceed against the prisoners for other and distinct offences.

The Chief Justice - Do I understand, Mr. Attorney-General, that you decline calling for the opinion of the Court in the case of the King against Thomas Lucas and John England?

The Attorney General - I withdraw that information, your Honor, and shall proceed against the prisoners on other charges.

Mr. Rowe contended, that the Attorney-General could not be permitted to sink the judgment of the Court in that way. The prisoners' Counsel had attended to hear the opinion of the Court on a point of the utmost importance; and he submitted that the prisoners were entitled to call for that opinion.

Mr. Therry followed on the same side, and said it was not treating the Court with respect to attempt to get rid of an opinion which was called for after a solemn argument.

The learned Judge said, he could easily see why the Attorney-General, in the exercise of his discretion, might very properly decline calling for the judgment of the Court upon the point. As the opinion which his Honor was about to pronounce, however, would perhaps clear the case of further argument, he would at once deliver it.

The prisoners having been placed at the bar,

The Chief Justice then delivered his opinion as follows:- The prisoners, Thomas Lucas and John England, were arraigned upon an information presented by His Majesty's Attorney General, on the 7th of this present month, and pleaded not guilty, and were immediately placed upon their trial. The information charged Thomas Lucas, as principal, with the wilful murder of Robert Waterworth, and John England, as accessory after the fact, with receiving, comforting, and assisting the principal. A Jury was duly empanelled and sworn to try the issue; the whole of the evidence, for and against the prosecution, was closed; but some doubt arising upon the evidence, whether the sirname [sic] of the deceased were Waterworth or Watersworth, the learned Judge who tried the case put it, as a preliminary issue, to the Jury to find whether the name of the deceased was Waterworth or Watersworth. The Jury retired from the Court, and after some deliberation returned and said, by the mouth of their senior officer, that they could not find whether the name of the deceased was Waterworth or Watersworth: whereupon the learned Judge asked the Attorney General replied, that he would consent to a Juror being withdrawn; and the Jury were

then discharged, and the prisoners remanded. It is alleged that the prisoners were not asked whether they would consent to the discharge of the Jury, and that no consent to the discharge of the Jury, and that no consent was given by Lucas, the principal, who was unassisted by Counsel, nor by the Counsel for the accessory, England, to the discharge of the Jury. On Friday, the 9th instant, the prisoners were again placed at the bar, and a new Jury was about to be sworn, when the prisoners objected tot heir being tried a second time upon the same information, upon the broad legal principle, that a Jury sworn and charged in a capital case, and the evidence closed, cannot be discharged, without the consent of the prisoners, until hey have given their verdict. The learned Counsel for the prisoners were heard at length, in support of the objection; and the Attorney General was fully heard on the other side. The point for me to determine was, whether I could proceed to swear a Jury upon the second trial. I deferred ruling it then, because it was of the deepest importance to the prisoners; and I did not see my way so clearly through the case, as to enable me, upon the spur of the occasion, to determine how far my proceeding with the trial might not occasion some prejudice on the one side or the other. I am now prepared to deliver my opinion, not upon the general question of law, however, as it may apply to the present case, but upon the course which it appears to me, on mature consideration, I am bound to pursue. The law I take to be settled at the present day, that a Jury charged in a capital case cannot be discharged without giving their verdict, excepting only in cases of necessity. It was formerly holden more strictly, and even necessity was not admitted as a sufficient ground to justify any departure from the inveterate principle of the law. A variety of instances, however, may be cited from the books, in which it has been held that the principle must be taken with reference to circumstances; and inevitable necessity has been held to be sufficient to warrant the discharge of the Jury already charged with the prisoner, and swearing another Jury to try him upon the same, indictment, after evidence given. Mr. Justice Foster, in his treatise on criminal law, has exhausted all the arguments upon the subject; and the leading cases of the King against Scalbert, in Leach C. C, 620. I have carefully consulted the reported cases, and I find the result to be as it is comprehensively stated by Sir W. Blackstone (Commentaries, vol. 4. p. 360) in the following manner:- ``When the evidence on both sides is closed, and indeed when any evidence hath been given, the Jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict." - In the case of the King against Edwards [5 Taunt. 309], the rule, as it is laid down by Blackstone, is referred to by Lord Ellenborough in terms of acquiescence; and I apprehend that it may now be considered as the settled text law upon the point. But still the question of necessity is left undermined. What are the circumstances which will amount to a case of ``evident necessity? These, I apprehend, cannot be laid down a priori, but must depend upon the facts of the case, and should be left to the discretion of the Judge, at the time of the trial; - subject of course to the superior judgment of the Court, or the collective opinion of all the Judges, in case it should become necessary to have reference to them in any of the forms appointed by the law for obtaining their deliberate determination. Now it appears that the learned Judge who tried the case saw occasion to discharge the Jury before they had given their verdict. If the Judge conceived that the circumstances of the case before him required that course of proceeding, he had undoubted authority to discharge the Jury and remand the prisoners. Sitting as I now do, I have no legal power to enter into any consideration of the grounds upon which his authority was exercised. I am bound to assume that it was upon due and sound discretion. As this case is now situated, I have

no alternative but to proceed, if the Crown Officers press the case - leaving it open to the prisoners to take the future opinion of the Judges, if the case should require it.
The Attorney General rose, and said he would not proceed further on the information before the Court, but he had another to present against Lucas, for a distinct offence, which he should be ready to proceed with, and also a charge against England, with which he was not ready to proceed, but moved that he be remanded, which was ordered accordingly.[3]

After some delay, Mr. Moore intimated to the Court, that he should not be ready to proceed against Lucas till the following day, on account of the absence of witnesses.

The prisoner, Lucas, also stated that he was unprepared to take his trial in this case; several material and necessary witnesses for his defence being absent at a considerable distance from Sydney.

The Court directed that subpoenas should issue to such witnesses as the prisoner should name, and the trial was postponed, by consent of the Attorney General, till Friday next.

See also Sydney Herald, 12 and 19 September 1831; Australian, 9 and 16 September 1831.
[*] The Australian, 16 September 1831, noted that Lucas and England were to be arraigned on a charge of robbery, and continued as follows: "Mr. Justice Dowling's ruling in this case, has been the most anomalous we ever knew."
Lucas (together with John Moyland and Henry Knowles) was convicted of highway robbery, and sentenced to death: Sydney Herald, 19 September 1831; Australian, 23 September 1831.