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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.

SYD1832

SYDNEY GAZETTE, 04/02/1832
Supreme Court of New South Wales
Stephen J., 1 February 1832
The Court resumed its sittings this morning for the trial of prisoners. A Jury having been sworn,
John M'Donnel and Francis Miller, prisoners of the Crown, were indicted for feloniously assaulting a fellow-prisoner, with a hammer, at Norfolk Island, with intent to murder, to maim, or to do some grievous bodily harm. The information charged the prisoners, in several counts alternately, as principal and accessory.
On being called on to plead, the prisoners begged the Court would, in consideration of the magnitude of the offence with which they stood charged, assign them counsel.
Mr. Justice Stephen observed that none of the gentlemen of the bar were present; and that, even if they had been, he had no power to order a compliance with the request of the prisoners.
Mr. Therry at this moment entered the Court, and, at the request of the learned Judge, readily undertook the defence of the prisoners, and the trial proceeded.
The circumstances of this case differed in nothing from those of the greater number of Norfolk Island cases which come before the Court. The prisoners met with opposition from the prosecutor, in an attempted escape from the settlement, and committed the outrage charged against them, in endeavouring to effect their purpose; to which, it was urged in their behalf, they had been driven by a series of oppressions.
Mr. Therry contended, very ably, that, in point of law, the prisoners were entitled to their acquittal; inasmuch as there was nothing from which malice towards the prosecutor could be collected; - the wound inflicted was so slight that the prosecutor had not sustained the smallest permanent injury from it - and the whole of the evidence went to show the intention of the prisoners to have been, not to murder, or do some grievous bodily harm, but to escape from the settlement.
The learned Judge summed up the evidence, and told the Jury, if they believed the testimony, he was bound to state to them that, in point of law, had death ensued, it would have amounted to murder, and that the prisoners were therefore amenable under this information.
The Jury retired for about a quarter of an hour, and returned with a verdict of guilty against both prisoners. - Remanded.
See also Australian, 3 February 1832, reporting that the men were goaded by severe punishment, including flogging with whipcord cats ("a terrific sample of which the learned Gentleman exhibited") and excessive labour in chains. The Australian also said that the prisoners wounded the prosecutor severely.
See too, the Australian of 9 March 1832, reporting a similar trial for a murder committed at Moreton Bay, where the prisoner allegedly committed the crime for the purpose of getting away from that penal settlement.
Violence also took place among road parties. See R. v. Hammill, Sydney Gazette, 5 May 1832 (and see Australian, 11 May 1832; Sydney Herald, 7 May 1832). It was a case of murder committed by a convict on an overseer at Grose Farm. He killed him with a spade.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 09/02/1832
Supreme Court of New South Wales

Dowling J., 6 February 1832

**THOMAS BLAKE** was indicted for feloniously shooting at **WILLIAM KEMPTON** with intent to kill and murder, at Sydney, on the 1st of December last. A second count charged the prisoner with an intent to do some grievous bodily harm.

William Kempton examined by the Solicitor-General - I reside in Clarence-street, Sydney; in the afternoon of the 1st of December I was at home, at dinner with my wife and on old man named **WILLIAM DAY**; I heard a knock at he street door, and Day went to open it, and I heard a person ask if Mr. Kempton was at home; Day let him in and my wife went out and said "walk this way;" the prisoner then came into the room where I was sitting, and without saying a word, raised his hand and fired a pistol off, part of the contents of which passed through my left cheek, and came out over the ear on the same side, carrying away part of the ear; my wife then attempted to take the pistol from him, and he said "All I am sorry for is that I have not killed the old b-g-r"; that is all I heard or saw; I believe day took the pistol from him, a constable was sent for and he was taken into custody; I was confined a month from the effects of the wound

Cross-examined by Mr. Rowe - This was in the middle of the day; it is a public street where I live; the evidences were open; the report of the pistol was heard without, and the house fill with people in five minutes; he said nothing when he came in until he fired the pistol; he then said, "Now you old b--g--r I've got my revenge;" I can't say what occurred after the pistol went off; the prisoner lived at my house for years, off and on; he was bred up by me; I turned him out of the house about a twelvemonth ago; I had not unsettled account with him when he went away; I only gave him food and clothing since his mother died; I gave him no wages; I did not hire him as a servant; I never gave him to understand that there was a considerable property to which he was entitled; he used to be in a state of lunacy when he took too much grog; I feel no enmity to the prisoner, nor never did; perhaps I said last night that I would be the first man to hang the prisoner, and I say so today; I have said it since he shot me, not before; the prisoner is not my son, I am sure; I knew his mother, but I undertake to say he is not my son; his mother never had any property; I bought her out of her lodgings four times; I would hang the prisoner now if I could, and the sooner the better.

**MARY KEMPTON** - I am the wife of the last witness; on the afternoon of the 1st of December last, I was at dinner with my husband, when a knock was heard at the door; a man named Day went to open it, and I got up from the table to see who it was; it was the prisoner; he asked me if Mr. Kempton was at home, and I said yes, and asked him to walk in; he walked in, placed himself before Mr. Kempton, and fired a pistol at him; he said something after firing the pistol, but I can't recollect the words; my husband was wounded; I saw the ball after; it passed through the side of his face, and lodged in the door.

Cross-examined - Day was not in the room at the moment the pistol was fired; the door of the room in which my husband was did not open into the street; I asked the prisoner to come in; after the pistol was fire, several persons came in from the street: Mr. Kempton is capable of going out of the house, but not without assistance, either before or since this transaction; I never saw the prisoner in my husband's house before this occasion; I have been married about three months at that time; the prisoner was secured by William Day until the constables came; I did not observe the prisoner's demeanour after he fired the pistol; I was looking after my husband; I think the prisoner was tipsy at the time; he looked so; he looked completely wild; he was very

pale; he looked wild or very tipsy; he must have been tipsy or mad; I never saw him before that time.

**WILLIAM DAY** - I live with the prosecutor; I remember the evening of the 1st of December last; I heard a knock at the door, opened it, and admitted the prisoner; he asked me if Mr. Kempton was in, and I said yes, he was in the parlour; he went into the parlour, said he would have his revenge, and fired off a pistol; I immediately went into the parlour and seized the prisoner with the pistol in his hand; I saw that Mr. Kempton was wounded in the cheek, and bleeding; whilst struggling with me on the ground, the prisoner said he was sorry he had not killed him; I understood him to mean Mr. Kempton; I saw a bullet taken out of a door leading to a back bed-room.
Cross-examined - the prisoner struggled very hard to keep the pistol; I have known the prisoner since he was a child; he appeared at this time as if he had been drinking; the whole transaction did not occupy much more than two minutes; I do not know that the prisoner used to be subject to fits of lunacy.

**JAMES TOMKINSON**, a constable, stated that he took the prisoner into custody on the 1st of December last, at Mr. Kempton's house, in Clarence-street; I produce a pistol and a bullet which I got in the house of Kempton; the pistol was given me by a man named Day, and I saw the bullet taken out of the door by a carpenter.

Cross-examined - My opinion, from the appearance of the prisoner at the time, is that he was intoxicated; he was very much agitated; I am sure he was intoxicated; when I went in I asked where the man was who shot Mr. Kempton? the prisoner was sitting in a chair, and said "Here I am, - I am the man"; he was not mad by in liquor; he was not out of his mind.

By the Jury - I think the manner of the prisoner was occasioned by intoxication, not by mental derangement; when I was taking him to the watch-house he frequently said something about his mother; he said very little in the watchhouse while I remained, which was about twenty minutes; a magistrate came there, and, seeing that he was intoxicated, desired him to be shut up till morning; I perceived no disorder of mind in the prisoner save that occasioned by liquor.

This was the case for the prosecution.

The prisoner declined saying any thing to the Jury,

For the defence, the following witnesses were called:-

**JOHN KELLET** examined by Mr. Rowe - I have known the prisoner for fifteen years; he was apprenticed to me at the business of a cabinet-maker; for the last two years I did not consider him of sound mind; while with us, I have seen him several times take his plane, sweep all his tools and work off the bench, take them up again, replace them on the bench, take them up again, replace them on the bench, and scratch his head; I have frequently observed strange ways with him - different from other persons - and the men used to express alarm at him; I thought he was not right in his head sometimes.

Cross-examined by the Solicitor-General - I keep a public-house now, and still carry on my other business; the prisoner left me about two years ago; what I have related occurred two year ago; from the circumstance of throwing about the work and tools, taking them up again, and scratching his head, I conjecture he was deranged; I have also seen him take his saw out of a piece of wood, and flow the wood with it because the wood would not cut as he wanted it.

By the Jury - a man might knock his tools and work about from being sulky and not liking his work, but I never saw any man have such strange ways; a man sulky and not liking his work might have knocked his saw about in the way I have described, but I never saw a man go on as he used.

**CHARLES ROBERTS** - I am a cabinet-maker in Sydney; I have known the prisoner for 12 or 14 years; he was articled to me for three years, and left me about 12 months ago, after being with me for about 15 months; while he was with me, I used sometimes to think he was out of his mind; he used to throw his work and tools about in a strange manner, and if any one said any thing to him he would act in a furious manner, and knock them down; I used to think, at these times, that he was out of his mind; the men, also, used to complain to me of him; I have often asked him why he got on so, and sometimes he would say that he was cursed in this world, and at others he would speak deliberately and coolly; I thought there was something on his mind about some property; he used frequently to speak of his mother, and talk about his brothers and himself being robbed of their property; he used to speak of Mr. Kempton and say that he had promised to leave him some houses; he would frequently be for a week or a fortnight without any person being able to get him to speak at all; I have known him to bite one of my apprentices one day, and nearly bit his arm off; I think this happened through the boys calling him mad; both before and after that I took him to be out of his mind; I never spoke to him more than once or twice since he left me; he generally walked with his eyes on the ground; I saw him on the day this transaction took place, in the morning and about one o'clock; he passed my shop about three times, and I saw him walking in a manner as if he was out of his mind or had been drinking; his manners were different that day from any other day I had seen him; he would walk quickly for some time, then stop, and seem as if he was talking to himself.

Re-examined - He had not been in my employment above six weeks till I thought him mad, and yet I continued him in my service for upwards of 12 months after; he had access to my workshop in which there are dangerous weapons for a madman to get hold of; he used to get hold of those weapons, but the apprentices would take them from him; at times I used to think him utterly incapable of distinguishing between right and wrong; I do not think, at these times, it was in consequence of taking too much liquor; I retained him in my house, after I discovered he was out of his mind, from knowing him at school, and knowing his parents; I kept him more as a protector than otherwise.

By the Jury - I never saw the prisoner attempt any injury to himself in these fits; he is generally a sober man, but when in liquor, he is quite mad; his mother was in good circumstances at one time, but I do not think she had any property when she died; she is dead about ten years.

Re examined - The acts of the prisoner which I have related were not the effects of intoxication; I have known them take place when he had not been out of the shop for three weeks; I know that, at one time, his mother was possessed of considerable property and houses, and I have heard they are now in the possession of Mr. Kempton, but I do not know it of my own knowledge; I believe his mother lived with Mr. Kempton for several years.

**JOSPEH DANKS** - I am a gunsmith; I recollect the day Mr. Kempton was shot; I did not know the prisoner before that day; he came to my house and asked me to sell him a pistol, between 3 and 4 o'clock in the afternoon; it was after my dinner-time; I dine at 1 o'clock; he asked me if I had a pistol to sell him? I looked at him greatly when he asked me, and told him I thought he wanted to injure himself or some other man; this I said on account of his look and manner; he said he did not, that he was going up the country a-christmasing, and he wanted a small pistol to protect himself; he said he wanted a good one, and I took one down, and said this is a good small pistol; he asked me the price; I said fifteen shillings, and he then gave me a £1 note, and showed me a £5 note which he said he had left to keep Christmas with; he then

asked me to load it, as he was just going to start, which I did, with powder and a single ball, for which I did not charge him any thing; he went away; I then said to my wife "Just look the way that young man goes, for I am rather doubtful of him"; I then watched him down Market-street, towards the water, in the direction where Mr. Kempton lives; about two hours after, a person came to my shop and told me that Mr. Kempton had been shot by somebody; the prisoner looked very wild when he came into the shop, as if he had been drinking; I thought he was not capable of having a pistol in his possession.

Cross-examined - I believed what the prisoner told me, that he was going up the country; he understood my objection to sell him the pistol I have no doubt; to remove that objection, he showed me the £5 note.

Q. - But, notwithstanding he showed you the £5 note you still thought he was insane, and desired your wife to look after him?

The Solicitor-General objected to the witness answering such a question, unless he was fully aware of its tendency; because if he delivered a loaded pistol to a man whom he knew to be mad, he would be liable to be indicted for a very aggravated misdemeanor.

Mr. Rowe said, he merely put the question; it was for the witness to answer it or not as he liked; but it was not open to the Counsel for the Crown to object to it.

The learned Judge said the objection ought rather to come from the Court in the way of caution to the witness. And His Honor had no hesitation in stating, if the witness admitted he had given a loaded pistol into the hands of a man, believing him to be mad, and that an injury came to any one in consequence, it would be his duty to take measures to have the law put in force against him for a high misdemeanour; and, if convicted, he might rest assured that the law was strong enough to inflict a severe punishment. After the intimation, the witness might answer the question if he liked.

Re-examined - I thought he was tipsey; it was after the conversation I had with the prisoner that I told my wife to look after him.

By the Jury - When the prisoner received the five shillings change out of the £1 note, he looked at it and put it in his pocket.

**THIMAS GARRETT** - I am a house carpenter, living in Castlereagh-street; I have known the prisoner six or seven years up to the present time; I remember the time Mr. Kempton was shot; I had seen the prisoner about a week before; I knew him when he was apprentice to Mr. Kellet, and also with Roberts; I always thought he was not right in his head; he worked for me twelve months after he left Mr. Roberts; I used particularly to notice his strange ways at his meals; he lived at my table, and I had an opportunity of observing the peculiarity of his manners; I have also seem him sitting on the bench, when he should have been at work, in a deep study, and have called my wife to observe him; when dinner was done he would take up his chair by the back and front, flourish it over his head, and set it down with violence against the wall; I did not think he was right in his head, and have frequently said so to my wife; I used to think, when he acted in the way I have described, that he was a little lunatic.

By the Court - I felt no apprehension about trusting him with the tools; he made use of them like a madman, but I did not think he would injure himself.

**CHARLES WRIGHT** - I am a carpenter and joiner; I know the prisoner at the bar; I know him for four or five years up to the time Mr. Kempton was shot at; he was at my house between twelve and one o'clock that day; he was in my service, and living at my house at that time; I sent him out about nine o'clock after some chair-legs, and he had returned with them before twelve o'clock; he then went out and returned again at dinner hour, but would not take any dinner; for the last three weeks he was with me

he would hardly exchange three words in a day with me; his manner during that time was different from what I had ever observed before; he was certainly out of his mind during that time; he broke four saws of mine in one day, one after the other, one of which I had used for eight years before; he said something had come over him,, but he did not know what; on that day Mr. Kempton was shot at, the prisoner appeared to be quite in a wild state; he assigned no reason for not taking dinner, but turned himself round and away he went; such a thing I had never saw him do before.

Cross-examined - He was in my service about four months; there was a great change in his manner the last three weeks; he was nearly in the same way before then; the last three weeks he was worse rather than better; before the last three weeks he used to turn himself round in the most silly sort of manner, and then set to work as if he was going to do all the work of the Colony in a day; during the last three weeks he was in a mad state; on the morning Mr. Kempton was shot at, I sent him out for some chair-legs; I used to trust him with money during the last three weeks; on the morning of this transaction I trusted him with money; I trusted him with £6.

Re-examined - The £6 were in a £5 note and a £1 note.

**WILLIAM TAYLOR** - I am a prisoner in the gaol; I was in the watch-house when the prisoner was brought there on a charge of shooting at Mr. Kempton; he appeared to be in a state of derangement; he kept constantly crying out "What have I done?" --- Is it possible that Thomas Blake could have committed such an act? - "My best friend!" and a number of such expressions; I do not think he could have known right from wrong at that time.

Re-examined - I was not close enough to the prisoner to say whether he was drunk; I think he was insane.

Thomas Wright re-called - The acts I have related as occurring on the day in question, I am satisfied, arose from insanity; the prisoner, I am sure, had not tasted a glass of liquor that day.

This was the case for the prisoners

The learned Judge summed up, leaving the case to the Jury to say whether, at the time the prisoner committed the act charged against him, he was in a state of mind to enable him to distinguish between right and wrong.

The Jury found the prisoner guilty, and the learned Judge immediately passed sentence of death upon him.

[*] In 1836, **PATRICK REDMOND** was found not guilty of aggravated assault on the ground of insanity. The Australian, 12 February 1836, reported the following: ``Patrick Redmond stood indicted for assaulting Gabriel Thompson in the vicinity of Sydney, on the 3d Novembe[r] last, with a knife, with intend to murder, or do him some grievous bodily harm. The prosecutor stated that he had no wish to injure the prisoner, who was of unsound mind, but merely brought the charge that he might be protected; Redmond, a vacant looking poor creature, gave an incoherent account both of himself and the transaction. The Jury, under the direction of His Honor, acquitted the prisoner on the ground of insanity, and by the 39th and 40th of Geo. III, he was ordered to be kept in safe custody in the Lunatic Asylum, at Liverpool, during his Majesty's pleasure."

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

SYDNEY HERALD, 27/02/1832
Forbes C.J., Stephen and Dowling JJ, 20 February 1832

**JOHN McDONALD** and **FRANCIS MULLINS** convicted of striking **THOMAS SMITH** with a hammer, at Norfolk Island, with intent to kill him. McDonald addressed the Court, observing, that the prisoner along side of him was quite innocent of the charge laid against him - he would not give sixpence to be reprieved, but he did not wish an innocent man to suffer alongside of him, and the innocence of Mullins he would declare on the scaffold. It was remarked, that the prosecutor, Smith, had no marks of violence upon his person. Yet, no man or ox could have stood before him with the stone hammer be used on the occasion. His striking Smith was for the purpose of getting up to Sydney, that they might have some chance of escaping from the gaol or hulk, but not with intent to murder him. They drew lots who was to commit the offence, and it fell upon McDonald. He hoped the Judges would represent the tyranny of Colonel Morrisset to the Governor. Mullins also declared his innocence. Judge Stephen passed sentence of death upon both prisoners.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 15/05/1832
Supreme Court of New South Wales
Forbes C.J., 12 May 1832
Death by Boxing.
**WILLIAM CARVER** was indicted for feloniously killing and slaying one **GEORGE EATON**, at Richmond, on the 24th of April last.

It appeared in evidence that the prisoner and the deceased - both natives of the colony - had a quarrel, originating in intoxication, when the deceased challenged the prisoner to fight on the following morning. The prisoner, it seems, thought no more of the matter; but, at the appointed hour, the deceased came to his place of residence, renewed the challenge, and upbraided him with cowardice when the prisoner seemed reluctant to accept it. Many provoking expressions were used by the deceased, and the prisoner was, in consequence, induced to go out and fight. The encounter had lasted upwards of an hour, when the deceased, either in recoiling from the effect of a blow, or retiring to avoid it - the witnesses did not speak positively either way - slipped and fell with great force to the ground. He was then carried home and a surgeon sent for, who bled him, and was leaving the house, when he was requested once more to step into the chamber and look at him; he did so, and, to use the words of the witness, "while I was gazing at him the man died." The surgeon stated that the deceased had died from the rupture of a blood vessel occasioned by some severe contusion or concussion. We must add that the evidence of this witness was most unsatisfactory, he not having taken any means to ascertain the precise cause of the death. He, however, had no doubt, he said, that the deceased died from the effects of fighting.
The prisoner put in a written statement in which he alleged the great provocation he had received, and declared "in the presence of the Almighty," that he never entertained the slightest malice towards the deceased. He also handed in certificates of good character and peaceable disposition, signed by three highly respectable gentlemen, magistrates of the territory.

The learned Judge then summed up to the following effect: The prisoner at the bar, W. Carver, stands charged before you with manslaughter on the body of George Eaton, alleged to have been committed at Richmond on the 24th of April last. Gentlemen, the offence charged against the prisoner is one which in its nature admits of a greater or less degree of penal aggravation. In some cases it is mitigated by circumstances, in other it is so aggravated that the law has attached to it the

punishment of transportation for life. These, however, are matters which the legislature has wisely left for the consideration of the Court in awarding the measure of punishment: the only question for you upon the evidence, is, was the prisoner at the bar the cause of the death of the deceased George Eaton. Upon this part of the case it is hardly necessary to lay down the general principles of the law. Wherever one man is the cause of the death of another no excuse can be sat up except that it took place either by accident, in carrying the law into execution, or in defence of person, family, or property. No such defence has been attempted to be set up here; and, therefore, the sole point for your consideration is, did the deceased die form the effect of blows inflicted by the prisoner at the bar? That the deceased challenged the prisoner to fight forms no part of the case which you are to determine. He who offers a challenge is guilty of a breach of the law, and the other is equally guilty who accepts it. And, gentlemen, how much more wise the law is than those mistaken principles of honour which influence men in matters of this description, this case too unhappily illustrates. A fellow creature has lost his life - an aged father has lost his son - a family a protector - I say, therefore, gentlemen, how much wiser is the law which prohibits affrays of this description? Gentlemen, the circumstance therefore, of a challenge having been given is no justification, no excuse in the eye of the law. His Majesty has lost a subject - society has lost a member - a father has lost a son - and the prisoner at the bar is called upon this day to answer for it. All you have to consider then is, whether the evidence has or has not brought home to the prisoner the fact of having inflicted the blows which caused the death of the deceased, should you be of opinion that those blows occasioned death.

His Honor then recapitulated the evidence, and the Jury, after retiring for a short time, found the prisoner guilty, but recommended him to mercy on account of his good character and the very great provocation he had received.

The Chief Justice - Prisoner at the bar, - You have been convicted of an offence which the law ranks among its felonies. I have paid attention, in the course of the trial, to the evidence of character which has been given of you by the witnesses for the prosecution; even the aged father of the deceased has stated that he never knew any harm of you. You have also laid before the Court certificates, from respectable persons, and the jury have recommended you to mercy on two strong grounds - your good character, and the very great provocation you received. I must own that among all the cases of manslaughter that have hitherto come before this Court, I view this in the most favourable light; at the same time I am bound to vindicate public justice, and to communicate to the public, through your case, that the affair in which you were engaged was an unlawful affair. It has been stated in your behalf that you were unwilling to fight, but that you were provoked to it. You should have had the courage to resist the vulgar notion which led you to assert an empty name, in breaking the law, by the commission of an act which terminated in a manner that must embitter every future moment of your life. Let this be a warning to all others not to engage in such combats. I repeat that, in your person, I must show the colonists that affairs of this sort are not to be passed over with impunity; and that although the sentence which I am about to pronounce shall, under all the circumstances, be the most mitigated sentence, I must still vindicate the law whenever a case of this description shall be brought under the notice of the Court. The sentence of the Court is, that, for this offence, you, William Carver, be imprisoned in His Majesty's gaol, at Sydney, for three calendar months, to be computed from this day.

Mr. Rowe begged to suggest to the Court that the Sydney gaol was at this moment very full, and, he need hardly say, of the very worst of characters. Under these

circumstances, perhaps the Court would order the imprisonment to be in the gaol at Windsor.
The Chief Justice - Let it be, then, in the gaol at Windsor, for three calendar months, from this day.
See also Australian, 18 May 1832; Sydney Herald, 14 May 1832. See also R. v. Jacques and others, 1832; and R. v. Eggleton, Sydney Herald, 8 November 1832; Sydney Gazette, 10 November 1832.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 20/08/1832
Supreme Court of New South Wales
Stephen J., 17 August 1832
Friday. - Before Judge Stephen, and the usual Commission.
**WILLIAM JACQUES** was indicted for killing and slaying **JOHN STONE**; and **JOSEPH ROOKEN**, Esq., **HUGH TAYLOR, CHARLES BLAKEFIELD, JAMES ASHMAN**, and **THOMAS BARRATT**, for being present, aiding, abetting, and assisting in the said offence, at Parramatta, on the 14th May. The Attorney General stated the case to the Jury. It appeared in evidence, that on the 14th May, a bull bait took place in the rear of the Cottage in the Grove, near Duck River Bridge, at which many of the fancy were present, after which the deceased Stone threw up his hat, and challenged any man of his weight to fight for a purse. Jacques came up and said he would fight for £10. Stone said he had not got £10, but if any gentleman would back him, he would be carried dead out of the ring before he would give in. A voice in the crowd exclaimed, ``fight for £5.'' Jacques refused, but was afterwards persuaded so to do. A ring was then formed, and to it they went, Mr. Rooken acting as time-keeper, Barratt as second to Jacques, and a man called Bumble, second to Stone, Ashman being bottle holder, and two parties in a gig near the ring, acting as umpires. After they had fought for some time, during which Stone was in the habit of falling on his back, his head always striking the ground, both from blows, and to avoid punishment, he was observed to fall without a blow, when the umpires declared Stone to be beaten. Blakefield came into the ring and was wiping Jacques, when Stone came up in attitude, and declared that he was not beaten, but able to dance a hornpipe. Barratt did not wish them to fight, but Stone was positive, and they closed, when Stone fell heavy, and on being picked up, appeared quite groggy, his head reclining on one side. One of his companions took him to his hut, but no medical man was called in, and he expired about sunrise next morning, without having spoken a word from the time he was removed from the ring. From the opinion of the witnesses as to the fairness of the match, it appeared that Stone was superior in weight and knowledge of fighting, that he had the best of it at the commencement, and drew first blood. Dr. Anderson was of opinion that the death of Stone was occasioned by an extravasation of from 10 to 14 ozs. of blood on the brain, which might be accounted for in various ways. For the defence, Dr. Bland was the only person called, and he coincided in opinion with Dr. Anderson. The learned Judge then summed up, [*] and the Jury acquitted the whole of the prisoners, who were immediately discharged.
Dr. Wardell defended Taylor; Mr. F. Stephen, Mr. Rooken; and Mr. Weightman, Blakefield.
See Sydney Gazette, 18 August 1832. See also R. v. Carver, 1832.
[*] According to the Gazette, the judge asked the jury first to consider whether death was caused by the blow inflicted by the prisoner Jacques. As for the other prisoners,

the jury was to consider how far they took part in the proceedings, particularly as it did not appear by direct testimony that they were even present after the fight was resumed.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 30/11/1832
Supreme Court of New South Wales
Dowling J., 22 November 1832
Thursday, Nov. 22. Before Mr. Justice Dowling – **JOHN PETERS**s, was indicted for killing **DISIRA MOULGUIT**, at Sydney on the 18th of November instant, by striking him on the left side of the head with both hands, and throwing him against the ground, such striking and throwing inflicting a mortal bruise and contusion, of which he then and there immediately died. **JOSEPH LEWIS** deposed to his being a Portuguese, & a seaman of the *Clementine*, to which vessel deceased and prisoner belonged; they had a row and wanted to fight, but the crew would not allow them to do so on board, on which they took a boat. and went to the Wharf. **DENNIS CASEY** deposed that he was on Mr Lamb's Wharf on a Sunday evening, when he saw the deceased tucking up his sleeves crying, I'm going to have a fight with the cook, and I'll knock his black head off," I asked the prisoner if he was going to fight, and he said ``he was going to see about it'', just then, the deceased came up and as he was rising from putting his hat on the ground, the cook hit him a blow on the left temple; he fell and could not get up again; he was somewhat intoxicated; the prisoner was a very peaceable, quiet, good-natured man. Mr **CHARLES BLOOMFIELD**, Surgeon, attended the deceased, about half an hour after death, and examined the head in the evening, when he discovered that death had been produced by the rupture of a blood vessel and there was nearly an ounce and a half of extravasated blood immediately under the temporal artery; the injury was more likely to have been occasioned (he thought) by a blow than a concussion. The learned Judge ruled in all charges of the present nature it was necessary that the manner of death alleged in the Information should be as nearly as possible borne out by the evidence; it would therefore be for the Commission to consider whether the deceased had met his death conjointly from the blow and fall, or from the blow only; if from the blow only, the prisoner would be entitled to an acquittal; if, on the other hand, was the prisoner the person at whose hands the injury was inflicted? The Commission promptly returned a verdict of not guilty, and the prisoner was discharged by proclamation.
For the trial notes, see Dowling, Proceedings of the Supreme Court, Vol. 78, Archives Office of New South Wales, 2/3261, p. 196. See also Sydney Herald, 26 November 1832.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 15/12/1832
Supreme Court of New South Wales
Forbes C.J., 14 December 1832

**SAMUEL RYAN, WILLIAM STEEL, THOMAS M'GRATH, and PATRICK DALEY**, were indicted for the wilful murder of **JOHN M'INTYRE,** Esq. at Kinghorne in the county of Durham, on the 6th of September 1830. The first count laid the manner charging Ryan as a principal, committing he murder with a gun and leaden bullet on the right side of the body and the other, three prisoners, as accessories; The second count charged Steel as principal, committing the murder with a gun and leaden bullet, on the neck and the other three prisoners as

The Attorney general having opened the case.

**EDWARD DOOLAN** was called and examined by Dr. Wardell, after being warned by the Court that any expectation of mercy be held for himself, must depend for realization on the circumstance of his giving nothing but the truth in his evidence.

I am a prisoner of the Crown under sentence; I know the prisoners at the bar; about August 1830, I was a runaway from my master Mr. Edward Wright; I had been sentenced to the tread-mill and absconded on the road; about five days after I ran, I met Steele and Ryan, at the house of a man called Yorkshire Johnny at a place called Long Swamp, about six miles from Newcastle; when I entered the house, I told Yorkshire Johnny, in answer to his question, that I was going to hospital; he asked for my pass, on which he laughed, said I might as well tell at once that I was in the bush, and there were two others there that would be glad to join me; he then sent for Steele and Ryan who came back; Steele suggested a plan to rob Mr. M'Intyre's house, and I agreed to be of the party; about eight o'clock me, Ryan, and Steele, went away, each armed with a musket; a man named ``Paddy the Good, supplied me with my musket; we proceeded toward Mr. M'Intyre's place, which is about thirty-four miles off; this was in September, and we went about eight-and-twenty miles that night, and stopped at day-break close to a creek; we struck a light and made a fire; Daley joined us there, and said he thought the place too strongly guarded for us to stand any chance, but his master would be going to take £750 to put in the Bank next morning, and we could stop him on the road: we agreed to stop and shoot him; we continued there till evening, and then crossed a small river, where we stayed till next morning; about six o'clock, Daley came again to us, said the master was coming, and we were to stop him between his own place and Wolloroba, Daley then left us, and half an hour after we proceeded on the road; it was on a Tuesday morning; we saw nobody till we saw the prisoner M'Grath on the road, and about a quarter of a mile after him, Mr. McIntrye, and Daley about a hundred rods again behind him; our party were about fifteen yards from Mr. M'Intyre; we were all behind trees; when Daley came to us in the morning, he told Ryan and Steele ``they knew what a tyrant Mr. M'Intyre was, and he (Mr. M) was continually getting him flogged; he further said, that if we stopped him without shooting him, he (Mr. M) would get us hanged; We were to share the £750; when we saw Mr M'Intyre come up, I discharged my piece and struck him in the right shoulder, he immediately turned about, and cried out for mercy; the words were scarce out of his mouth, when he received the shots of Ryan and Steele, on the left side, and on the left part of the neck; Mr. M. then dropped on his face and hands; shortly after we went up to the body, and while we were searching it M'Grath and Daley came up; Daley said he was almost sure Mr. M. had the money with him, and told us to search very

closely. We did so, but found only four dollars, a dump, a rupee, an account book, a silver pencil case, a silver watch, two gold seals, and a common seal; as Mr. M'Intyre walked along, I, Steele, and Ryan were standing on his right side; the moment he received my shot, he wheeled round and put up his hand; his exclamation was ``mercy, mercy, Daley. I don't remember what I said when I was examined before the magistrates, as to the side on which Ryan and Steele shot him. When he lay on his face, his face was in the direction from which he had come. After we had searched the body, Steele said he had a great mind to serve Daley the same way; the blue coat which the deceased had on his arm, M'Grath took away with him' Daley told M'Grath not to mention at home that he had seen him. We were for proceeding to the house to look for the money, but Daley said there were too many about it; Steele, Ryan, and myself carried the body about three miles or three miles and a half, when we made a fire and put it on; the body was quite dead before we removed it; it might be ten or twelve minutes after the shots were fired when Daley and M'Grath came up;Daley had agreed in the morning to come after Mr. M'Intyre, and to send M'Grath before him as a sign to us; the wound in the neck was a very deep one with slugs; their muskets were loaded with slugs and balls, and mine with ball only; mine went in at the fleshy part of the shoulder behind, and came out in front; I do not know whether it touched the bone; I know he was shot in the side, because we saw the hole through the waistcoat and shirt, about three inches below the arm; I cannot state which of the shots occasioned his death, but I am of opinion it was the one in his left side; we only stopped long enough to make a very large fire, and place the body on it, without waiting to see it consumed; we took a pair of ancle boots, off the body; Mr. M'Intyre breathed for about a quarter of an hour after we came up to him. Steele wore the boots, after the murder. We proceeded that night about a mile from the place when we, burnt the body, and next morning Steel went early to see whether, it was consumed. When he returned, he reported that everything was destroyed. We took a brown silk handkerchief, with white spots, away from the body, which I retained in my possession about four or, five months, and then gave it in the Sydney gaol to a woman named Mary Connolly. We proceeded along the Wollombi Road, when we stopped a man with a pack bullock, from whom we took some cloaths, and provisions. This is the handkerchief we took away from Mr. M'Intyre; The name was on the corner, but I picked it out, because Ryan said I had better do so; On the second day after the murder we returned to Yorkshire Johnny's : we killed a sheep belonging to Mr. Sparke, and carried it there; We continued there I think about two days; We returned up our arms and ammunition to Johnny's; I know the musket I had, from being lashed with cord near the lock; this is the same musket; with the money we took from the deceased we sent for some rum. Ryan has some blue marks on his arm; we hid the watch about a mile and a half from where the body was burned, but I have not seen it since.

Cross-examined by Mr Rowe; The marks on Ryan's arm were such as seaman make on their arms; I have been in the 10th regt. of foot, and seen marks on the arms of my comrades; both Mr. M'Intyre and the county when he was killed were strange to me; I had scarce fired at him, when the others fired, I could distinguish that they fired after me; the deceased was not staggering when they fired; He had plenty of time to have fallen while he turned round, if my shot had killed him.

By the Jury - It was previously arrainged that I was to fire first, and Ryan and Steele afterwards; Daley was aware of the murder before, but I do not know whether MrGrath was.

Re-examined - I understood from the prisoners that the person shot was Mr. M'Intyre; directly after the shots were fired, M'Grath came up; I never saw him before; Mr. M'Intyre could not see M'Grath before him, on account of the hills and turns intervening; M'Grath had the coat, but I do not know what became of it afterward; Daley was desirous to known what we would do with the body, but we told him to go away.

Mr. **WILLIAM RIVERS** examined by the Attorney General - I now live at Hunter's River, and in 1830 lived at Bulwarra, the estate of Mr. Peter M'Intyre; I knew Mr. John M'Intyre well; he frequently used to stop at Bulwarra; I remember when he was missed, and saw him in company with Major McLeod and two of her gentlemen, on the Sunday before he was missed; I saw this handkerchief in his possession when he was at my house on the Sunday, as he was missing on the Tuesday after; I think it was the 2d of September, 1830; I am quite positive of the handkerchief, because I had taken great notice of it; there was a small hole in one corner; Mr. M'Intyre was missing on the Tuesday, and never came back any more; I sent a man with letters for Mr. M'Intyre on the Monday, and he returned on the Wednesday, saying that Mr. M'Intyre was missing; they had been to all the farms after him, but he could not be found any where; there was a report abroad that Mr. M. had been put on one side; enquiries were made after him for about three weeks.

Cross-examined [sic] by Mr. Rowe - It was not a current report that Mr. M'Intyre had left the country altogether, but there was a rumour of that sort among some of the men; I never heard that he was sued about that time for a large sum of money; he was never seen after the 5th or 6th of September 1830; this hole in the handkerchief is a little larger than when I saw it at my house; I do not remember seeing any name upon it, but it might have been.

**MARY KETLAND, late CONNOLLY**, examined by Mr. Moore - I am the wife of John Ketland; I was in the Sydney Goal above a year ago, and then had a conversation with a man named Doolan; he was a countryman of mine, and gave me a handkerchief under the door; I gave him a half handkerchief as a return keepsake; he did not tell me whose handkerchief it was; it was dark and darned with white silk; this is the same handkerchief.

Cross-examined by Mr. Rowe - A hole had been darned with white silk, and I saw no other hole; at the time Doolan gave me the handkerchief he was under sentence of death, and expected to be hung; this is the man I call Doolan.

Doolan re-examined - I saw Steele put them on, and they were too large for him.

John Butler Hewson, examined by Dr Wardell - I am gaoler at Newcastle; I remember a man who called himself Frederick White being apprehended; this is the man (Doolan); I searched him, and found among other things a handkerchief; the handkerchief was of a chocolate ground, with white spots; there was a hole darned clumsily with twisted silk; I told him I thought he had been taking the name out; this is the same handkerchief; Rouse, the constable, kept it till after his trial, and then gave it up to him after he was cast for death, in consequence of not being owned; I had Steele in my custody at Newcastle but I cannot say that I noticed his boots.

Cross-examined by Mr. Rowe - I have seen the deceased several times, but cannot tell the colour of his hair; I never heard that he left the country; Doolan was tried at Sydney in 1831; and sentenced to death; it was after that that the handkerchief was given to him.

Mr. **GEORGE MUIR**, examined by Mr. Moore - I have a farm about four or five miles from Newcastle, and the same distance from Long Swamp; my farm was robbed in October, 1831, and the prisoner Steele was convicted of the offence; he was

brought in by two native blacks, and I recognised him with my overseer's jacket on his back; he had on a pair of ancle-boots, the lace-holes of which were very neatly worked; they did not appear to have seen much worn.

**JOHN ECKFORD**, examined by Mr. Moore - I was formerly chief constable at Maitland, and remember the prisoners being in charge there; Steele and Ryan were in charge for a robbery at Mr. Muir's; Steele had on a pair of neat-made boots.

John Budge, examined by Dr. Wardell - I keep the lockup-house at Maitland, and had the prisoners Daley and M'Grath in charge for Mr. M'Intyre's murder; M'Grath was allowed to leave the lock-up in charge of a constable, to go to the farm, as he said he might find out something about the murder from some of his comrades; when we returned, two or three days after, he had on a blue jacket, which he said was given him by the over-seer; it had a rolling collar, and appeared altered as if it had been too short for a man, or made from some other clothing; Steele and Ryan were brought to me by some blacks afterwards; I do not recollect Steele's shoes.

Cross-examined by Mr. Rowe - M'Grath requested Captain Allman to let him go to enquire about the murder; it was on the 27th October, 1830, that I received Daley and M'Grath at the lock-up.

**WILLIAM SPARKE**, examined by the Attorney-General - I reside about twelve miles from Newcastle, near the Long Swamp; in the year 1830, there was a man known by the name of Yorkshire Johnny, resident about six miles from me; about September or October of that year I missed about seven or nine of my sheep.

Cross-examined by Mr Rowe - The late Mr. M'Intyre was a tall man, but I do not remember the colour of his hair; it was same time before November that I lost the sheep.

**WILLIAM BOWLES**, examined by Dr Wardell - I live at Williams' River; I remember seeing a person named M'Grath in the lock-up at Maitland, in January 1831; I had a communication with him, and he said that Mr. McLeod had bounced him and gone to the farm and told the servants there that he (M'Grath) had confessed all, and told him where the hoes [sic] were with which they had committed the murder; but, said M'Grath to me, there he was wrong, for those were not the tools we did it with; I swear that this occurred within a week of the lst of January, 1831; it was not at the lock-up at Newcastle, but at Maitland; directly I got liberated, the next day, I went to Captain Aubyn, and made deposition of what M'Grath had told me; It was in a dark cell I had this conversation with M'Grath, an therefore have but an indistinct recollection of him, as I never saw him since.

**THOMAS CHANDLER** - I was an assigned servant to the late Mr. M'Intyre; I saw him on the Monday evening, about two years ago, a little before sundown, and have not seen him since; M'Grath was employed as a cook in the house, and Daley worked on the farm; I remember M'Grath coming to the farm in charge of a constable some time after my master was missing; I was in custody with him, and he told me to tell Michael Clare and Charles James to say that they had not been sworn before any Magistrate, and that they saw the master that morning; I was also to tell them that they might say what they pleased for there was no one to contradict them; at the time my master was missed I was burning off, about a mile and a-half from the house; I went up on the Tuesday morning for my milk, and when M'Grath filled my bottle, saw Daley in the house; when M'Grath had given me my milk he shut the door; I went one night after my master was missing in order to get some tobacco, M'Grath said he had none, and I replied that I would wait then till the master came home, on which M'Grath said that he did not think I should ever see him again, for he was gone to h-, or some other fine place; when we were in custody together, we had a conversation,

and he said he could not get out of it without putting others into it; I don't know what he meant by it.

Cross-examined by Mr. Rowe - That man is the same M'Grath to whom I allude; I know him well; I was in the bush about 2 months back; I do not know whether I was charged with the murder; I was a week in the bush, and taken before a magistrate, but not on suspicion of my master's murder; I took the bush because I was foolish and did not know any better; I was apprehenced by one of Mr. Weller's overseers; I was never promised that I should be exempt from punishment if I came up and told this story; I cannot recollect whether I had any conversation since I was caught in the bush about what I should say here; I did not give evidence before Captain Aubyn at Maitland about this; I was examined once there; I was examined about this matter before Mr. Peter M'Intyre, and told him the same as I do now; I was sentenced to receive 150 lashes for running away, but was placed in the cells instead, where I was for three weeks.

By the Jury. - I saw my master on the Monday when I was at work, but I had not hear that he was going from home; I do not remember ever seeing M'Grath with any jacket except a gray one before the master left; but I saw him wear a blue one after.

**JOHN CAFFRAY**, examined by Dr Wardell - I am assigned to Mr. Peter M'Intyre, and was formerly in his brother's service; I remember when my master was first missed; on the Monday evening I saw him before his house; and on the Tuesday morning between nine and ten, I fetched my bullocks home to yoke them; I went down to the house, and found the door padlocked on the outside; I went away for a short time, and on coming back found the padlock off; I called, and M'Grath opened the door from the inside; I saw the breakfast things lying on the table; on going in for my rings and other hardness, I saw Daley coming out of the master's room, he reddened in the face at seeing me; two or three days afterward I saw a handkerchief, an inside waistcoat, and a shirt, which I knew to be my master's on M'Grath; I have often seen my master wear a blue surtout coat, and after he was missing I saw the tailor inside the master's bed-room window, making a jacket out of a blue coat.

Cross-examined by Mr. Rowe - I know Chandler; and was in the bush with him; we ran away because we were afraid of being beaten by the other men; we gave ourselves up to Mr. Webber's overseer.

**CHARLES JAMES** examined by Mr. Moore - I was an assigned servant to Mr. John M'Intyre; the last time I saw him was on the 27th September, I was shepherd, and saw him about an hour before sunrise, with a blue coat on his arm; he gave me some instructions about the sheep, and I never saw him again; M'Grath asked me that evening and the next to sleep in the house with him, the third night he told me I had better sleep at my own place.

Cross-examined by Mr. Rowe - When Mr. M'Intyre left home M'Grath was at the house, and he remained there for some time afterwards, while I got my breakfast and took my sheep out; it is since I told this to Captain Aubyn that have been put in irons; it was not being suspected of stealing some tobacco, but for stealing it that I was put in irons.

**WILLIAM SHAW**, examined by Dr. Wardell - I have seen M'Grath and Daley before; on the 24th October, 1830, I apprehended M'Grath; in November following, in bringing down M'Grath, a man named Clare, who had been Mr. M'Intyre's tailor, was also in custody, and M'Grath said to him, ``Be aware what you say about altering Mr. McIntrye's clothes to fit me, or it will go badly with me perhaps; they were sitting at my door at the time, and I was about a rod off.

Cross-examined by Mr. Rowe - I was within a few yards of them when M'Grath said this, and yet he made no scruple of saying it openly; I was never examined on my oath before Captain Aubyn; it was not on my testimony they were committed; I was not examined before a magistrate, till the last Quarter Sessions at Maitland; I hear the conversation in November 1830, but I never mentioned it to any person till the last Quarter Sessions at Maitland; I heard the conversation in November 1830, but I never mentioned it to any person till the last Maitland Sessions, three months ago; didn't tell any body, because I was not asked.

**PETER RILEY**, examined by Mr. Moore, in the latter part of 1830, I was constable at Newcastle; Steele was in the watch-house there about two years ago, last October or November, having been sentenced to a penal settlement; I noticed his boots, which were ankle boots, of the best quality, such as worn by gentlemen, and remarked upon them being too long for him.

Cross-examined by Mr. Rowe; I knew the late Mr. M'Intyre; there was a report of his having been murdered; I do not remember the colour of his hair.

**JOHN BYRNE**, examined by Dr Wardell, In the latter part of 1830, I was overseer at Dennis's dog kennel; I keep a weekly report book of my gang; the prisoner Steele belonged to my gang, and absconded on the night of the 2d of September, since which I have not seen him till now.

Cross-examined by Mr. Rowe - There was nothing extraordinary in Steele's getting away from the dog-kennel; many others, who did not like the gang left it; it is about sixty miles from my hut to the place where Yorkshire Johnny lived.

Shaw recalled - It is about thirty-three miles from Mr. M'Intyre's farm to Yorkshire Johnny's.

**JAMES GALLAGHER** - I was a constable at Maitland, and know where Yorkshire Johnny lived; it was at Sandy Flats, about eleven miles from Maitland; I was sent there with a warrant to look for fire-arms and ammunition; we found anything at his place, but at Paddy the Goose's, we found this musket, a cannister of powder, and some slugs and ball; there was a deal of ammunition there; a description of the musket had been previously given to us by Captain Aubyn, to which it answered in every respect.

Cross-examined by Mr. Rowe - Paddy the Goose was a small settler; he was a prisoner of the Crown, and had no right to have fire-arms; he was suspected of harbouring the bushrangers.

**CHARLES MURPHY** examined by Dr Wardell - I was a lent servant to the late Mr. John M'Intyre two years and a half ago; M'Grath was a house servant there, once about three months before Mr. M. was missing, I went up to the house for a bullock chain, and M'Grath asked me if I thought Mr. M. had much money in the house; I replied that I knew nothing about it, and nothing further was said till about three weeks before he was missed, when I was in company with M'Grath and Daley, and then he renewed the subject, and asked me if I did not think we could put Mr. M'Intyre out of the way with the assistance of another, and say he was gone somewhere on business; I asked him if he was so bad hearted as to think of such a thing, and refused to have any thing to do with such a thing; as we were coming back M'Grath asked Daley to lend him some money.

Cross-examined by Mr. Rowe - Mr. John M'Intyre had dark brown hair and sandy whiskers.

**F.N. ROSSI**, Esq., examined by Mr Moore - I am Principal Superintendant of Police; some of the prisoners at the bar were examined before me; I remember a man

named Doolan coming to give his deposition; after he had given his evidence and was going out; Steel struck him, and said something to him.

Cross-examined by Mr. Rowe - There was one of them who went by the name of M'Grath; Doolan did not seem at that time to recollect him on that account: I do not remember whether the question was even put to Doolan, whether that (pointing to M'Grath) was the man he alluded to; Doolan was examined several times before me, and he did not always give the same answers; Doolan did, one day, unsay almost all he had said, and at last he brought out that his reason for so doing was, that his rations were insufficient on all the occasions he was examined on oath; on one occasion Doolan said that he should have thought M'Grath was the person whom he had described as M'Grath, but from the colour of his hair; I think he swore on the first examination that he was not sure whether M'Grath was the man; recollect Mr. Rowe that you have not a common witness to examine; it is of no use for your to shake your paper at me; I do not recollect all that occurred at the first examination; I mean to swear that on Doolan's first examination, M'Grath's name was mentioned as one of the parties concerned in the murder; my impression is, that Doolan said M'Grath was one of the men on one examination; I did not hear what Steel said to Doolan when he struck him; I was too far away to hear him.

Re-examined by Dr. Wardell - I do not remember whether he pointed out Daley as one; Doolan did not complain when he hesitated about his evidence that he was afraid of his life; he attributed it to his short ration.

This was the case for the prosecution.

Edward Doolan re-called for the defence - Part of Mr. M'Intyre's hair was black and part white; I never told Captain Rossi that my rations was the cause of my refusing to give evidence; but I told him it was on account of my life being threatened on board the hulk.

Re-examined by Dr Wardell - I was about seven months at Moreton Bay when sent for to be examined about this murder.

The prisoners being called on for their defence, Mr. Rowe contended that the information was vicious, because the name of Doolan did not appear, whereas the first wound was given by himself; the whole three taking effect, but his first. He would show upon authority, that the wound given by Doolan should have been stated in the information, as adduced by Hawkins, and followed up by 3rd Chitty, p. 736; it is absolutely necessary to state the different wounds, or that the deceased died of the first, second, or third; again in 2d Hawkins, page 330, the same, ``such count ought to show that the party died of the hurt specially set forth''. The learned gentleman continued, he was not calling upon the jury for their opinion on the matter of fact, but upon His Honor on the point of law, and he therefore submitted that the wound given by Doolan should have been inserted as it was in evidence that he had inflicted at first, or it should have seen, that in consequence of the three wounds that he died. If Doolan had told the truth, His Honor would surely not hold that the prisoners were bound to prove the negative. Again it did not appear in evidence that the person said to be shot, was that of Mr. John M'Intyre; the approver spoke only of what he had been told. Lord Hale states that he never would convict a man of murder, unless the evidence proved it to be the same person murdered, as laid in the information, or that the body was found. It must then be in law proved; that the person killed is the same laid in the information. Has the body of Mr. M been found? It was in evidence that Mr. M. was a man of dark brown hair and sandy whiskers, and Doolan described him as a person with grey hair. The Attorney-General maintained in answer, that two distinct shots were laid in the information, and if the jury were satisfied that either of

those shots were sufficient to cause death, it was quite competent to convict the prisoners.

Mr. Rowe replied, and

The Chief Justice decided that, not doubting the authority of Hawkins adduced by Chitty, this was evidently a question of fact for the jury, and it would be the province of the Court to point out to them the bearings of the law on the case. With respect to the second point, His Honor was of opinion that there was abundance of evidence to prove the identity of Mr. M'Intyre.

It being now nine o'clock, and Mr. Rowe stating that the defence would occupy a long space of time, it was mutually agreed that the case should stand adjourned till ten o'clock this morning.

See also Sydney Herald, 17 December 1832; Australian, 14 December 1832.

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

SYDNEY GAZETTE, 18/12/1832

Forbes C.J., 15 December 1832

**Continuation of the trial of Ryan, Steele, M'Grath, and Daly, for the murder of Mr. John M'Intyre.**

The prisoners having been placed at the bar, the defence, had a most important point to submit to the Court, viz, that the whole of the evidence given yesterday by the approver Doolan must be struck out, in as much as he was a convict attaint, and therefore incompetent as a witness. This fact had come out on his cross-examination, when he confessed being a felon under sentence of death, and he, (Mr. Rowe) should therefore first call upon Mr. Gurner, to produce the record of his conviction, and then beg His Honor's reference to his notes of Doolan's evidence. Mr. Gurner however not being at hand, Mr. Rowe called

Mr. Edmund Wright - I am a settler residing at Bargo Brush and Edward Doolan was my assigned servant; he was assigned to me in the year 1828, and continued in my service till the 8th of October, 1830; in August, 1829, he was sentenced by the Liverpool Bench to ten days on the tread-mill for being drunk, after the expiration of which he returned to my service; he was not out of my service from that period till the 8th of October 1830, when I took him before Major Antill for drowning a horse of mine, for which he was sentenced to 12 months' labour in an iron-gang; he did not at any time abscond from my service previous to that, nor was he from under my observation during the whole of that time; I am quite positive of this; I keep a memorandum book, in which I record all the conduct of my assigned servants, and on referring to that, I found, as I have said, that in October, 1830, he was sent to the iron-gang; he was in my service the whole of August and September, 1830; the distance from my house, where he then was, to that of the late Mr. M'Intyre, is, by common report, at least a hundred and fifty miles; I remember seeing a report in the Sydney Gazette of what Doolan said in his examination at the Police Office, and it immediately struck me that he could not have been where he stated at the time, as I knew he was with me; I knew it from my memory, and I referred to my memorandums, which I found to be the same; I went over to Major Antill, and told him, and he consulted his books, where he found that Doolan was convicted by him in October, 1830.

Dr Wardell cross-examined the witness at very great length, during which he repeatedly contradicted himself, but the circumstance appeared rather attributable to the abilities of the learned counsel, and the advanced age and declining faculties of

Mr. Wright, than to any intentional mis-statement on his part. To the fact, however, of Doolan being in his service up to October, 1830, he remained positive.
Mr. John Gurner examined by Mr. Rowe - I am chief clerk of Supreme Court, I hold a document in my hand, from which I find that Edward Doolan alias Frederick White, alias Frederick Wyatt, was tried before the Supreme Court of this colony, on the 18th of January, 1831, for a robbery in the dwelling-house of Mr. Joseph Fredericks at Newcastle, on the 20th of November, 1830, ad putting a person in bodily fear therein. He was convicted of the offence, and sentence of death passed upon him; which sentence has been commuted to hard labour for seven years at Moreton Bay.
Mr. Rowe - Upon this testimony, your Honor, I submit that the whole of the evidence given yesterday by Doolan must be struck out, be being a convict attaint, and incompetent as a witness.
The Chief Justice - If you wish, Mr. Rowe, to argue the point, the Court will hear you patiently , but you are aware that it has already undergone the most earnest consideration in the case of Blackstone, when a majority of the Bench decided it; and such being the decision of the Court, I am bound to abide by it.
Mr. Rowe replied that he was perfectly aware of the point having been most elaborately argued on that occasion, but much has came to his knowledge since, which made him extremely desirous that it should be once more discussed, and the more especially so as there was then a want of unanimity on the Bench; however, if His Honor thought it would be of no service, he would not occupy the time of the Court, by now going into, but merely requested that the point might be saved for future argument if necessary.
The Chief Justice could not undertake to save the point, but would take a note thereof, that if desirable he might avail himself of the abilities and counsel of his learned colleagues.
Henry Colden Antill, Esq., examined by Mr. Rowe - I am resident Magistrate at Stonequarry; Mr. Wright is a settler in that district; he has been there many years, and bears a very good character; he brought one of his assigned servants, named Edward Doolan, before me on the 11th of October, 1830, on a charge of carelessness, by which one of his horses was drowned; he was convicted, and sentenced to be worked in irons for twelve months; he had never been reported to me before that period as a runaway; his master is always very correct with his assigned servants, and I should think would have reported him if he had been absent.
Mr. Rowe here moved that the depositions of Doolan before the Magistrates should be produced and read in Court; but the Attorney-General refusing to bring them forward, the Court replied they had no jurisdiction if that officer refused to product them, it being entirely optional with him.
William Gunn Lilly, examined by Mr. Rowe - was overseer in the employ of Mr. Edmund Wright in the years 1829 and 1830; Edward Doolan was his assigned servant, and I perfectly recollect his being on his farm at Bargo Brush during the whole of the months of August and September, 1830. Her was sentenced to twelve months in an iron-gang in October, 1830, for drowning a horse.
Nothing material was elicited during the cross-examination of his witness.
Edward Doolan recalled, and examined by the Court, at the request of Mr. Rowe - While I was lying under sentence of death in the cells of the Sydney gaol, I had a conversation with a sentinel who was doing duty over me respecting the prisoner, M'Grath; I did not say that ``I should not be able to swear to M'Grath on account of his hair not being of a light colour,'' but that ``I should not be able to swear to him till his hair should come to its growth.

Benjamin Roden examined by Mr. Rowe - I am now a constable in the Sydney Police, but formerly belonged to the 59th regiment; was often centinel over the condemned cells, and on one occasion had a conversation with Doolan, when he was confined therein; we were talking about the murder of Mr. M'Intyre, and Doolan said he would not swear to M'Grath, because the man at the murder had light hair.
Robert Steele examined by Mr. Rowe - I am a constable, and have known the prisoner M'Grath since the year 1827; his hair was always of the same dark brown colour as at present.
Several other witnesses were called who all deposed to the same fact as the last witness, and with them Mr. Rowe closed the defence.
The Chief Justice then proceeded to charge the Jury in a speech which lasted two hours. His Honor minutely and carefully put the case to them in all its bearings, pointing out its various corroborations and discrepancies, and leaving them to decide the important questions; first, whether the prisoners were the parties who committed the murder.
The Jury retired for about ten minutes, when they returned a verdict of guilty against all the prisoners.
The learned Judge then passed sentence of death upon them, awarding execution to take place on Monday morning, and their bodies, after death, to be dissected and anatomized. [*]
[*] The Australian, 4 January 1833, reported that Ryan and Steel were respited and sent on board the hulk for transportation, while McGrath and Daley's execution was postponed. See also Australian, 11 January 1833, for a report of a confession by James.
On 18 March 1833, Governor Bourke wrote to Viscount Goderich (Historical Records of Australia, Series 1, Vol. 17, pp 50-51) advising that the case should be brought before the King for consideration for mercy. The central fact of this advice was the perjury of the approver Doolan, the confession by Charles James, and the discovery of the victim's watch. The governor thought that McGrath was guilty of murder, but had been convicted on false testimony. As a result he recommended life at Norfolk Island for McGrath. Daly could not have been guilty as principal, the governor thought, but only as accessory, so the recommendation for him was a commutation, with power being given to the governor to grant him a pardon within the next two years. The other two (Steel and Ryan) were wholly innocent, said Bourke, and should receive a pardon. Governor Bourke concluded by noting that two of the judges (Stephen and Dowling) had favoured admission of convict evidence, despite attaint, while Forbes C.J. took a different view. The present bench of judges, the governor thought, would reconsider the position and probably either recommend a return to the common law, or a new colonial Act. (By 1833, Stephen J. had been replaced by the more committed Anglophile lawyer, Burton J.)
On anatomising, see also R. v. Worroll, 1827. Under (1752) 25 Geo. II c. 37, s. 5 (An Act for Better Preventing the Horrid Crime of Murder), the judge was empowered to order that the body of the murderer be hanged in chains. If he did not order that, then the Act required that the body was to be anatomised, that is, dissected by surgeons, before burial. The most influential 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.

SYD1833

SYDNEY HERALD, 04/02/1833
Supreme Court of New South Wales
Forbes C.J., 1 February 1833

**JAMES LOCKARD** was indicted for the wilful murder of **MURDOCH CAMPBELL**, Esq. by shooting him with a gun loaded with powder and a leaden bullet, on the left side of the head, near the left eye, at Upper Minto, on the 15th January.

Registrar. - How say you, are you guilty or not guilty?

Lockhard. - Unless the money is returned to me that was taken away, I won't say a b--y word.

Court. - Let not guilty be recorded.

The Attorney-General opened the case.

**JOHN BUTCHER**, examined by Mr. Kerr - I hold a ticket of leave, and was in the service of Mr. Campbell, Harrington Park; I remember 15th January; I was cleaning wheat and loading a dray at sun-down; we heard a noise in a hollow; we looked round, and saw some men running across the field; we thought we heard the cry of ``stop thief;'' Mr. C. sent his servant to fetch his blunderbuss, and when it had been delivered to him, he ran down towards the man that was a-head; Mr. C. told him to stop, to see who, and what he was, and what he wanted on his land; Mr. C. lowered his piece from his should to his hand, and the man turned round, fired, and shot Mr. C. dead; I was about four rod away; I was near enough to swear to and identify him; I saw Mr. C. fall; he never stirred after; he was wounded in the head, just above the left eye; the blood flowed freely, and he was quite dead; after Mr. C. was shot, I went up to the man, and he pulled out two pistols, and told me to keep off, or he would serve me the same; the man kept going up the field; another man fired two shots at him, but he got away among the brush and rocks towards Bringelly; two days after I saw the man at Liverpool; and knew him immediately; when he shot Mr. C. he had on a black jacket; at Liverpool he had no jacket when I first saw him, but he put it on in the Court; it appeared to me like a coat with the tail cut off; I saw that when he was running away; (looking at the prisoner) I swear that is the man who shot Mr. Campbell.

Chief Justice. - James Lockhard have you any questions to ask this witness?

Lockhard. - I have none.

By the Court. - I knew the man at Liverpool by his features and general appearance, as well as his clothes; I had very little doubt when I came to look at him.

**THOMAS ECCLES**Thomas Eccles, examined by the Attorney-General - I am an assigned servant to Mr. Mowatt; he lives at Narralan; a road separates it from Mr. Campbell's farm; I was lying in front of my hut on the 15th January in the evening, when I saw a man coming in the direction from Campbell Town; he had a long gun on his shoulder, and I saw one pistol; I suspected he was a bushranger for whom constables were in search; I followed him up; he turned round and looked behind two or three times; I followed him on to the farm of Mr. Mowatt, and reported to the overseer that I suspected a man, going down the road, was a bushranger; the overseer, I, and the blacksmith followed him; the overseer was armed, and asked who he was, and he said a constable; the overseer told him to show his freedom; he took the piece from his shoulder and cocked it, saying, if he did not keep off he would shoot him; he then made off towards Mr. Campbell's high ground; we followed: he got over Mr. C.'s fence, and presenting his piece told us not to follow; we then made an alarm, and

shortly after one of Mr. C.'s men came down, and made towards the man within a rod, and then turned back; I shortly after saw Mr. C. make towards the man; some discourse passed, but I did not hear what; Mr. C. approached within a few rod, when the man put his long gun to his shoulder and fired; I was distant about sixty yards; I did not see Mr. Campbell move after the shot; it killed him; while we were after the man, he dropped a bundle on Mr. C.'s ground; I picked it up; it contained two small loaves of bread, the skirts of a coat, and some sugar; the skirts were dark blue or black; I gave it up at Mr. C.'s house to a man who was a stranger to me; after Mr. C. was shot, the man crossed into a bush paddock; we followed, but lost sight of him; from the opportunities I had I am able to identify the man who shot Mr. Campbell; that is the man at the bar who shot Mr. Campbell; I did not examine the body of Mr. C. after he was shot.

The prisoner had no questions to ask this witness.

**GEORGE GRAY**, examined by Mr. Moore - I am assigned to **ROBERT SMITH**, at Bringelly; I have known the prisoner at the bar about a twelve month; on the 16th January I saw him in **GEORGE HAMBRIDGE'S** paddock, who was his master; I was at work in the garden, when prisoner called, and said, ``George, I want you;" he had two pistols in his hands, and said ``don't be frightened George, you can do me a kindness;" I said, what is it Jemmy; he said, ``I'm short of ammunition, and will give you ten shillings if you will give me a little;" I told him it was not in my power; he said it was, that he had seen my master go out in the morning with a mounted police man, and he would got to the house and have it right or wrong; I said, ``Jemmy, you had better throw those things away," meaning the pistols, ``and go back to your master;" he said ``that won't do; I shot a man last night, and only one pistol in primed out of two; I said, its easy to take a little out of one and put it in the other; he said ``how's that, I've been trying but can't;" I then caught the pistols out of his hands, and said I will shew you; he replied, ``mind you do'nt shake the priming out of the big pistol;" I then told him he was my prisoner, and must go along to my master's house; he said he never would, and seeing him on the move, I told him if he did not, I would shoot him; he opened his shirt, and said ``shoot away;" he then squared up with his fists, and finding he would not come, I cooed; a boy came down with a tomahawk; I then said, ``Jemmy, will you go up;" he replied, ``No," when I took the tomakawk and hit him with the back part; he fell on the ground, and I fell on him and pinioned his hands, and sent the boy home for a pair of handcuffs; I handcuffed him and made him walk to my master's house; when I got him there I searched him, and took away 13s., a pen-knife, some shot, and an old book; I then put him to another part of the room, and chained him until the Liverpool constables took him away; after I had him in custody, he told me where the gun was, and I found it in his master's paddock, lying by a dead apple tree, and the ramrod in it; it was not hid; I took it to my master's place; the prisoner was dressed in a black coat, with the skirts torn off, a straw hat, and white cord trowsers; (a jacket produced) that is the one he had on.

Cross-examined by prisoner - You told me you shot a man; I never said I would go to my master's house and get you half a dozen rounds of ammunition; if I had said so, I should not have taken you my prisoner.

**EDWIN PARK**, Esq., examined by Mr. Kerr - I know the prisoner at the bar; the first time I saw him was on the road to Bringelly, about the 14th of last month, the day before the murder of Mr. Campbell; he had a gun or musket, and two pistols in his belt, a large and small one; he robbed me of £1 19s 6d., and my coat; (coat without skirts produced) that is part of my coat; I swear to it as such; I was in conversation

with prisoner about ten minutes; he was distant from me about three or four yards, with his musket pointed to me; I am sure he is the man.

Cross-examined by prisoner - I swear that to be my coat; I know it.

Dr. **Wm. ROBERT KENNEY**, examined by the Attorney-General - I reside near Campbell Town; I was on the spot shortly after Mr. Campbell was shot; about half an hour; he was quite dead; a large gun shot wound had been inflicted in the head, over the left eye, that was the cause of death; it was a wound of great depth; I think there must have been more than one shot, or the musket was of large calibre; the wound had penetrated the brain, and would cause instant death.

This closed the case on the part of the prosecution.

Prisoner had nothing to say in his defence, nor had any witnesses to call.

The Chief Justice then put the case to the Jury, in doing so, he remarked, that before he proceeded to read the evidence to them, he would clear the case from one point that might have arisen, if the prisoner had been defended by Counsel. By an Act passed in the 11th year of his late Majesty George IV, for the suppression of robberies and bushranging, and the harbouring of robbers and bushrangers, any person was authorised to apprehend any one with arms in their hands, if there were grounds to suppose him to be a runaway felon; therefore Mr. Campbell had a lawful right to apprehend a man crossing his fields with arms in his hands, it was to his mind quite clear, supposing the facts detailed in the evidence to be true, that he was in the discharge of a legitimate duty; had the point been raised, he should have decided at once that it was not a case in which anything like a justifying principle of self defence could arise, the case was one of evidence and identity. The learned Judge then recapitulated the evidence, and left the case in the hands of the Jury, who, without retiring from their box, pronounced the prisoner guilty. The Attorney-General then prayed the judgment of the Court, and the prisoner having been called up, the Chief Justice addressed him in the following words: - James Lockhard, you have this day, after a fair and impartial trial, been convicted of murdering Mr. Murdoch Campbell; the case was too clear for dispute. You had no defence, because you could have no defence; you had no witnesses, because you could have not witnesses. It was not possible to entertain a doubt of your guilt. A gentleman of this Colony has lost his life from the position in which you placed yourself, and no point of law that could have been raised, would in the slightest degree have justified the act you have committed; it was your duty to have surrendered when called upon so to do by Mr. Campbell. You appear to have connected yourself with those bands of lawless men who go armed about the country, reckless of life, knowing that whenever taken, their lives will be forfeited. Here is a gentleman taken off from his friends and family without the slightest cause, and you are now called upon the pay the small penalty with you life. The learned Judge then passed the awful sentence upon him, and ordered him for execution this morning, and his body to be dissected and anatomized. The prisoner heard his sentence with apparent indifference. [*]

See also Sydney Gazette, 1 February 1833.

[*] The prisoner was executed on 5 February 1833, apparently unrepentant: Sydney Gazette, 5 February 1833.

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 the same Act, 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.

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

SYDNEY HERALD, 11/02/1833
Supreme Court of New South Wales
Dowling J., 11 February 1833

**JOSEPH COLEMAN** was indicted for assaulting **EDWARD GOSTWICK CORY** with a spade, with intent to kill and murder him, at Patterson's Plains, on the 8th October. The second count charged the offence to have been committed with intent to do some grievous bodily harm.

It appeared in evidence that on the morning laid in the information, Mr. Cory's men were allowed half an hour longer than usual, in consequence of their flour not being served out before. Finding the men did not turn out at the sound of the horn, as usual, Mr. C. went to the huts, when the men asked for ten minutes longer, which was granted. When leaving, Mr. C. observed the prisoner in the hut, and knowing that he had had his breakfast in the kitchen, he was ordered out, and desired to follow Mr. C. to his house to receive his orders. Mr. C. directed him to go to the quarries. He went, and returned in about ten minutes, saying there was no spade, and where was he to get one. Mr. C. desired him to go the mill, and there he would get one. In going through the yard a small spaniel dog ran out, and barked at the prisoner, who took up a stone and threw it at the dog. Mr. C. told not to aggravate his conduct, as he had been sufficiently insolent in the morning to justify his taking him before the Magistrates. The prisoner then crossed a fence, and went towards the mill. Mr. C. followed, and passed him, and called out at a hut. A man named Brown came out, and Mr. C. asked him for a spade, which Mr. C. gave to prisoner, who immediately struck him a violent blow with the edge of the weapon, and he fell senseless. Prisoner was then taken into custody, and he told one of Mr. C.'s men that he had done it to get hanged, as he could not stand the tyranny on the farm. He had tried to kill his master, and if he had missed his life, somebody else would take it. He subsequently said he was sorry for the accident, and asked how his master was. In defence, prisoner alleged that it was merely an accident, occasioned by throwing his spade carelessly over his shoulder. The prisoner was found guilty, and having been called up for judgment, the learned Judge passed upon him the awful sentence of death, holding out to him not the slightest hope of any mitigation of his sentence. See also Sydney Gazette, 9 February 1833.

There was also a new statute in 1832 to regulate the summary trial and punishment of convicts in New South Wales: see 3 Wm 4 No. 3, Sydney Herald, 29 October 1832, Sydney Gazette, 6 September 1832; and see a Circular to Magistrates, 24 September 1832, in Forbes Papers, Mitchell Library A 1381, Reel CY 986 (near the end of the Forbes Papers). On these changes, see also Australian, 31 August, 7, 14 and 21 September 1832.

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

SYDNEY GAZETTE, 23/02/1833
Supreme Court of New South Wales
Forbes C.J., 20 February 1833

**STEPHEN STOCK** was indicted for feloniously and maliciously shooting at one **JOHN CONNOR,** with intent to kill and murder, on the 3d of Jan. last. A second count charged the prisoner with an intent to maim; and a third with intent to do some grievous bodily harm, on the day and year last aforesaid.

Mr. Williams, on the part of the prisoner, objected to the jury being composed of officers of the 17th regiment, by a private of which regiment the charge was brought; but withdrew his challenge.

The jury being sworn,

John Connor examined by the Attorney GeneralI am a private in the 17th regiment; I know the prisoner at the bar; on or about the 3d of January 1 was going down King-street, when he called out, ``there goes the bdy soldiersno military government nowit is not Governor Darling's time nowit is General Bourke's;" I said to one of my comrades if there was a watch-house near hand I would put that man into it, and enquired if he knew of one; I said I would keep watch where the prisoner went to, and sent to the serjeant-major to acquaint him of his conduct; I then followed him to a certain house in Pitt-street, and stopped outside till he came out; he went down the street before me; at length I asked him if he were a prisoner or a free man; he said he was as free as my; I asked him what was his name; he answered ``Stephens;" I heard a man whispering that that was not his name, and then asked him where he lived; he said ``I am not afraid to let you know where I lodgecome and I'll show you;" I followed him up Pitt-street; he turned up a passage, and suddenly turning round seized my bayonet and dragged it from my scabbard, but I wrenched it from him; the prisoner then went a few paces further up the passage; there was a man leaning over the fence named Deneen; a woman met us in the passage, who asked, ``what do you want with the soldier?" I asked if she knew the prisoner; ``yes," she replied, ``he lodges with mewhat do you want with him?" I told her he had offended me grossly; she then requested me to come into her house, for the man was drunk, and told me not to mind him; the prisoner said, pointing to the man leaning over the fence, ``this man knows me;" I asked his name, and was told ``Stephen Stock;" I asked where he lodged; he said in the house opposite, pointing to the house; the old woman on this said ``be off out of this, you by soldier, what do you want here?" when she found I would not enter her house, and catching the prisoner by the arm, dragged him into the house, I followed; and an old man coming in his shirt to the door, exclaimed he would blow my brains out if I did not be off out of that; he had no gun in his hand; the prisoner opened a window opposite to me and presented a piece at me, saying ``Be off out of that, or I will blow your brains out;" he drew the gun back again, but coming in the door, the old man told him to give me the slugs in the gun if I did not start out of that; I then left the premises; while my back was turned and at a distance from the prisoner about 100 yards, I heard the report of a piece, and something which sounded like shot struck a chimney near me; I was eighty to one hundred yards when the gun went off; it seemed to come from the house I had left; I turned round, and looking in that direction saw two men at the door, one was in his shirt, and the other dressed; I cannot say whether they were the old man and the prisoner or not; I am certain the gun was loaded with either buck-shot, slugs, or ball; they might have been pebbles;

had the gun been discharged from the door where I last saw the prisoner, the shot would have taken the direction where I stood; I saw the chimney two days afterwards; it was full of marks; pebbles would not have caused those marks at that distance; the plaister was knocked down on several places but I cannot swear that it was caused by slugs; the chimney at the time of the discharge of the piece was about 6 yards distance from me.

Cross-examined by Mr. Williams--The night was not dark; had the prisoner intended to kill me, he might have shot me at the window; the marks in the chimney were examined by myself and the constables; the marks were scattered about the height of my head; the chimney was stone; I cannot swear whether it was the wind or the weather that caused those marks; I cannot swear who fired; it might have been the old man; I was in a yard appertaining to the house when I was threatened; I cannot say whether it was a musket or a fowling piece; I do not know whether a fowling piece loaded with shot would kill at the distance of one hundred yards; I walked away, when the prisoner abused me; I followed him afterwards, and saw him housed; I never said I would have him out of the house; when he came to the door I was a short distance from it, I remained there till my comrade, Higgins returned with a constable; he came before the gun was fired; he had returned to Barracks before the gun was fired; I was not on the premises when my comrade came back; I stopped ten minutes after my comrade had left, but off the old man's premises; the old man threatened to shoot me; I can't swear that it was not the old man who shot at me; there was hesitation on the part of the people present, to inform me where the prisoner lodged; the old woman treated me kindly at first, till I had informed her that the prisoner had grossly insulted me; my comrade and self did not holding the prisoner against the wall draw our bayonets against his breast, and say he should go to the watchhouse, as we would have his life; I can't say whether the old woman was present when the prisoner was requested to come to the watch-house; I might have sworn to the person of the prisoner; I don't know whether, when I left the prisoner, it would have been possible for me to find him again; the shot passed my head; I swear that the contents of the piece did not go over my head; I swear the piece was loaded; I never had any conversation with Colonel Despard about settling this matter; the night was not dark, but too dark to identify a man at 100 years; it is usual to go to barracks at half-past eight o'clock; I remained with the prisoner till this time; I can't swear who it was fired the piece.

**DENNIS DENEEN.** I am a blacksmith, a free man; I reside in Pitt-street; in June last the prisoner at the bar lodged near me, in the next yard; I remember a soldier being on the premises about half, past eight on the evening of that day; he was in the passage leading to the house where the prisoner lived; there were two soldiers; I heard Stock say this man knows me, pointing to me; I told the soldier his name was Stephen Stock; the prisoner went into the house, when Tetty told him he had no business there, and ordered him to be off; the people of the house told the soldier that the prisoner was at home in their house, and he should not leave that; Stock went in, and the door was closed; the soldier remained outside; Tetty, the owner of the house, told the soldier it was his house, and ordered him out of that; the prisoner said, opening a window, if he did not be off out of that he would blow his brains out; the soldier stopped about a quarter of an hour, and then retired, when Stock, coming to the door, fired a piece in the direction of the soldier; I am sure it was Stock fired the piece; I don't think the shot could possibly have hit the soldier; when the piece was fired the angle of a house intervened between the prisoner and the soldier; the shot might have hit him had there been no house in the way; it was moonlight; the door faced the way

in which the soldier went, and the piece could not have been fired in any other way; I did not see the soldier when the gun was fired off; I think when the piece was discharged that Stock could not see the soldier; I don't think the soldier was 100 yards distant; I will swear positively it was Stock fired the gun; I didn't see the barrel; I was never on bad terms with Stock; I was the soldier, Connor, draw his bayonet, and tell Stock he should go with him; I didn't see a bayonet or bayonets held to the breast of Stock; nor did I hear any one say ``You shall go with us, or we will have your by life;'' I don't know whether the gun was fired for the sake of intimidating Connor; I am acquainted with the situation of the chimney which the soldier swore was struck by shot; it was wholly impossible that the shot could have reached the chimney; the prisoner might have shot erroneously, without any malice.

By the Court. The prisoner pointed his gun in the direction of Harts; the soldier went between the two chimneys.

By the Jury. Had the prisoner taken aim he might have struck the chimney.

**EDWARD PETTY**, examined by Attorney General. I live in Pitt-street; the prisoner at the bar lived with me in January last; I remember in the beginning of Jan., seeing a soldier in my yard about 9 o'clock in the evening; the prisoner at the bar was in the house at the time; I saw the soldier going away: after the soldier went away, I heard the report of a piece; I do not know who fired the piece; no one was in the house but the prisoner and I.

By the Court. The piece is my own; I did not load the piece; I had powder in the house; no shot of any description: I missed some powder; I did not see the gun fired; when the soldier retired, I went to bed directly; I asked the soldier what he wanted; he said he wanted a man out of my house; I told him to go to his commanding officer, or get a warrant from a Magistrate, I had no shot, nor lead of any description in the house; I live 60 yards from the street; I heard of a chimney being shot; the shot could not have struck the chimney had it been fired in the direction of Harts's buildings; it was at least seventeen minutes before the gun was fired.

By the Attorney General. I did not see the soldier at the time the shot was fired.

By the Jury. I am not aware that the neighbours are in the habit of discharging the pieces.

Verdict Not guilty. Discharged by proclamation.

See also Sydney Herald, 21 February 1833.

SYDNEY HERALD, 27/05/1833
Supreme Court of New South Wales
Dowling J., 24 May 1833

**JOSEPH FOX** was indicted for the wilful murder of **MARY BURNS**, by shooting her in the head, with a gun loaded with powder and shot, between Sydney and Parramatta, near Burwood, on the 28th March.

There was no evidence to bring any charge home against the prisoner in this case, save his own confession made before the Parramatta Bench, when he surrendered himself, and he stated that while driving his master's cart to Sydney, some person came up to it, whom he took to be a man, as she was wrapped up in a great coat, when he called out to know who was there, and while turning round the gun, which was in the cart, went off, without any act on his part to cause it to do so. This statement being totally uncontradicted, and Mr. Icely, who knew him for five years, giving him a most excellent character for humanity, the Jury found him not guilty, and the learned Judge, in discharging him, observed, that he left the bar a respected man, from the very high character which had been given him.

See also Sydney Gazette, 25 May 1833.

SYDNEY HERALD, 27/05/1833
Supreme Court of New South Wales
Dowling J., 24 April 1833
**EDWARD GREEN** was indicted for the wilful murder of **EDWARD EDWARDS**s, by stabbing him with a knife, at Sydney, on the 21st March.

It appeared in the course of the evidence that prisoner and deceased were servants in the employ of Mr. Pritchard, in Pitt-street; that between 8 and 9 o'clock of the morning of the day laid in the information, when the men and apprentices were getting their breakfast in a room adjoining the kitchen, deceased got up, and went into the front shop, followed by two apprentices; he returned in a minute or two, followed by prisoner; deceased went into the kitchen, and prisoner remained at his breakfast, when one of the men asked him where he had been? he replied, round the market; he then turned short round, and went into the kitchen, a scuffle was heard, and on the men going in, prisoner and deceased were seen scuffling, prisoner, with a knife in his hand, and blood spouting from deceased; one of the men seized prisoner, and another took the knife away; a person said to him that he had done a shocking deed, to which he replied he wanted to be hung, rather than live a life of misery, and he wished to serve one person else the same way. Dr. **BLAND** having been sent for, the deceased's wounds were dressed, and he was put to bed; about twelve that night deceased said he knew he could not live, and wished some one would write home to his wife; he also said, that while stooping at the kitchen fire, the prisoner stabbed him in the side, and before he could recover himself, prisoner pulled out the knife, and stabbed him again; he then turned round, and caught him by the collar; prisoner then stabbed him twice on the other side; he also said he wished the prisoner had done it fatally, and not put him in such torment; about six o'clock the following morning he expired.

The prisoner called no witnesses, nor made any defence. The Jury, without leaving the box, found him guilty, and having been called up for judgment, His Honor proceeded to pass sentence upon him, remarking that the dreadful fate now awaited him, which he must long have anticipated and been prepared for. It was no part of his duty either as a Judge or as a man, to aggravate his case, by calling up all the aggravated circumstances attending it, but he would advise him to prepare for that awful transit which in a few hours he must make to another world, and he hoped that since committing the deed, he had betaken himself to meet the awful event that must have been fully aware that he who sheddeth man's blood, by man shall his be shed. It was the law of nature, the law of God, and the law of mankind. He would not dwell longer on the enormous features in the case; every one present must have been shocked at the ferocity that he had exhibited, lying in wait, and with the implement of his trade, taking away the life of a fellow creature. A Clergyman of his profession would attend him, from whose instruction it was to be hoped he would derive consolation in his last moments. It now only remained for him to pass the awful sentence of the law upon him, which was that on Monday (this day) he was to be hanged by the neck until dead, and his body, when dead, to be given to the Surgeons for dissection and anatomization. [*]

For the trial notes, see Dowling, Proceedings of the Supreme Court, Vol. 81, State Records of New South Wales, 2/3264, p. 178. See also Sydney Gazette, 25 May 1833. See also R. v. Ross, 1833, a contempt case which arose out of this one.

[*] He was hanged on Monday, 27 May 1833. (See Australian, 31 May 1833, and Sydney Gazette, 28 May 1833, both newspapers saying the prisoner seemed

indifferent to his execution). 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. On anatomising, see R. v. Worroll, 1827.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 10/06/1833
Supreme Court of New South Wales
Dowling J., 7 June 1833
Friday. - Before Judge Dowling and the usual Commission.
**WILLIAM HILLYARD** was indicted for the wilful murder of **JOHN SMITH otherwise called JOHN HEYMAN**, by stabbing him in the side with a knife, at Sydney, on the 28th November. It came out in evidence that on the day laid in the information, the deceased threw an iron pot belonging to prisoner at a boy who had been abusing him; the pot broke, and the prisoner asked the deceased what he did that for, the deceased then came up to him and a scuffle ensued, during which a knife belonging to the prisoner entered the side of the deceased, but in what way was unaccounted for by the evidence, the prisoner expressed his sorrow when he found the man was wounded, and said that any expense he would be put to for a doctor he would pay; the deceased was conveyed to the hospital where he got better, and in the month of December was discharged at his own request, he subsequently came back again, and died on the 27th February. On the body being opened it was found that a sharp instrument had penetrated the lungs from which an abscess had formed, and on suppuration taking place death had ensued. A number of witnesses gave the prisoner a most excellent character for a number of years, for humanity and kindly feeling. The Jury returned a verdict of manslaughter, and the learned Judge in passing sentence observed, that taking into consideration the whole circumstances of the case, he considered justice would be satisfied by sentencing him to pay a fine of one shilling, - this being done he was discharged, with an admonition from his Honor to curb his passion in future.
Mr. Rowe defended the prisoner.
See also Dowling, Proceedings of the Supreme Court, Vol. 84, State Records of New South Wales, 2/3267, p. 53.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 05/08/1833
Supreme Court of New South Wales
Dowling J., 2 August 1833
Friday. - Before Judge Dowling, and the usual Commission.
**JOHN DICKENSON**, was indicted for the wilful murder of **MARY SMITH** on the Liverpool road, in the County of Cumberland, on the 1st of June.
**THOMAS TODD** - I belong to the Mounted Police; on the 1st of June, I saw prisoner on the Liverpool road between nine and ten o'clock; **JAMES McNALLY**

and **W. SLATER** were with me; we heard the scream of a female; when we got to the spot whence the voice proceeded, we saw prisoner apparently on his hand and knees, he jumped up and asked what we wanted, Slater asked him what he was doing, he replied trying to get the woman home; there was a woman on the ground between five and six yards from prisoner; she was lying on the ground by the side of the road with her clothes much torn; I saw blood on the ground; we could see it by the light of the moon; it was by the side of the woman; she was insensible; she was spoken to, but made no answer; Slater ordered us to handcuff prisoner, and we did so; McNally carried the woman to the Plough Inn, about five hundred yards from the spot; Mrs. Ireland washed her head in which there were two large cuts, one on the side, the other on the back; she never spoke, but groaned while McNally carried her; a cart was got and she was sent to the Hospital; we went with her; nothing happened to her from the time she was picked up until she was left in the Hospital, that could increase the injuries she had already received; she appeared about fifty years of age; she was left at the Hospital between twelve and one o'clock; I did not hear her name at that time; while her head was being washed, prisoner was in the room, he was not sober nor very drunk, he could speak; prisoner said it was a woman he lived with, but did not say how she came into the state in which she was found.

Cross-examined by Mr. Rowe. - Prisoner appeared to have been drinking a good deal; the woman might have been drunk, but I think she could not speak from the injuries she had received; we came from Sydney that night to look after bushrangers; we saw no stick near the woman.

**JOHN SLATER** corroborated the foregoing witness with this addition - When we came up to the man I observed his clothes were covered with blood, I asked him how it came there, and he replied it was dirt from knocking about the road; at day light next morning, I examined the ground where the woman was found, and there was a circle as if she had been dragged along the ground; I saw a pair of woman's shoes, I observed that the woman had on no shoes; prisoner's face had a scratch upon it, it appeared as if the skin had been knocked off; a woman's nail might do it as well as any thing else.

Cross-examined. - Prisoner was drunk; he jumped up in surprise when we came upon him; I cannot say whether the woman had been drinking; prisoner would not give me a straight-forward answer, which might arise from drink or some other cause.

Dr. **MITCHELL** - On the morning of the 2d of June, a woman represented to be Mary Smith was received in the Hospital, she was brought in a state of insensibility by the Police from the Liverpool road; there were three incised wounds on the head which had penetrated the scalp, and caused considerable hemorrhage; on opening the head I found a determination of blood to the brain, from all the circumstances of the case, the loss of blood, and the determination to the brain, together with exposure to the cold, no doubt caused her death.

**JOHN IRELAND**. - I reside at the Plough Inn, on the Parramatta road; I am a coach proprietor; I was in Sydney on the first Saturday in June; I was inside the coach, and had got as far as the Brickfield Hill when prisoner and deceased got upon the coach; I knew the prisoner but not the deceased; they came together; I did not perceive then, being inside, that they were the worse for liquor; on arriving at the Plough Inn, they paid their fare for coming so far, and went together into the tap-room; they were then drunk; they called for liquor, but none was given them; they had some beer, and bread and cheese; there was a misunderstanding and some words ensued between them; to prevent the rest of the passengers from being annoyed, I shut the tap-room door; I remained behind, and after the coach was gone, deceased called

upon me to protect her, as the prisoner wanted to beat her; he heard this; they had a bundle with them which was given up to me, as they said they wanted to stop; after that, the woman wanted the bundle to proceed on the road, I refused it; it was about seven o'clock; by this time they had got more sober, but not to say sober; they went away together towards the Liverpool road, and were to come for their bundle the next morning; I went to bed; about ten o'clock I was called up, and found the woman lying in the tap-room, and my wife washing her temples, on which there was wounds; I sent her in my chaise cart to the Hospital; she was alive and made a noise in turning her; she was a woman in good health; I don't know her name; I don't remember ever seeing her before.

Cross-examined - It was the usual language of low drunken people that passed between them; the bundle contained a pair of stays, two shawls, and other articles, they were all new and had been purchased that day; I have known the man for several years, he was always considered a hard working man; they went on the road together by mutual consent, the difference they had was made up; he told me he would not touch her.

This closed the case for the prosecution. His Honor then held that there was a failure of proof as to the name of the deceased, of which the prisoner must have the benefit. He was therefore acquitted and discharged, after a caution from the Judge to beware of intoxication.

Mr. Rowe defended the prisoner.

See also Dowling, Proceedings of the Supreme Court, Vol. 85, State Records of New South Wales, 2/3268, p. 1.

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

SYDNEY GAZETTE, 10/08/1833
Supreme Court of New South Wales
Trial, 9 August 1833

**TERENCE BYRNE** was indicted for the wilful murder of **ANN DAVIS**, on the 24th of July last.

The Solicitor General conducted the case for the prosecution, and Mr. Therry for the prisoner.

**SARAH RANDALL** - I live at Lane Cove, North Short; I knew a woman of the name of Ann Davis; I saw her dead at Lane Cove, about three quarters of a mile from where I live; she lived with Terence Byrne as his housekeeper, as it is called; on Wednesday, the 24th of July last, I saw her alive, about three o'clock, at my place; she was then in good health; she came over for a drop of spirits, and I gave her some; the prisoner came about fifteen minutes afterwards; he came in, and began to beat her with a stick about the size of my forefinger; she was sober - the prisoner was also sober; he asked her to go over and mind the hut, she did not jump up at the moment, and then he began to beat her; he dragged her out of the house before he beat her much; he struck her on the head; he then took up the handle of an axe, which was lying opposite my place, with which he struck her across the loins; I got betwixt them, and I received a blow across my fingers, and another across my own loins, with a broomstick, from the prisoner; he had thrown the axe handle away; he then took her away from my place, about three o'clock; she went along with a German who was working with Byrne; Byrne stopped behind at my place for half an hour; I saw the prisoner give her a blow with the axe handle across the loins; he struck her on the head half-a-dozen times with the stick; I said to him, "don't beat her;" he said, "how

can I help it" She made no resistance; I saw no blood; she was quite sensible; she smiled when the German took her away; Byrne, after remaining half an hour, said he was going home; about seven o'clock in the evening the German came for me, and said the woman was dead; I found her on Terence Byrne's arm; he said she was not dead; I put my breath to her's, but there was no life in her at all; the prisoner did not say how she came in that state; he afterwards said she tumbled off a rock 100 yards from his house; the place where he lived is called "Murdering Bay;" it is rocky; they are steep; I saw blood about her; there were several cuts on her head; one at the back of her head, and one at the top, and several on both sides; they appeared to be about half the length of my finger; you might put your little finger in the cuts; she wore a cap; when I saw her dead she had no cap on; I looked for it but could not find it; the prisoner did not tell me what rock she fell from; prisoner said deceased spoke when she heard me and the German coming down the rocks; I did not believe she tumbled off the rocks, I told the prisoner so; there were proper roads to go round without going near the rocks; there was a beaten road; I did not think the woman would be such a fool as to go upon the rocks when she could have taken the road; when I told Byrne I did not believe the deceased had fallen off the rock, he made me no answer; when the constables came up I saw when I supposed he had dragged the body; the tracks were covered with blood in patches, some nearly a yard in length; the blood was close the footpath; if she fell from the rock, she must have gone about three feet further before she could have fallen over; I saw blood at the bottom; I did not then consider she had fallen down; I do not know whether the German accompanied her all the way home, but he went from my place with her; the German was present with me at the prisoner's hut; the blood was a little way from the pathway ; I saw no stick in the house ; I observed plenty of blood on the bed and the pillow; the German went for the constables, who arrived on Thursday, about one o'clock in the day; the prisoner remained at home; there was nothing to prevent his running away if he chosed [sic]; it was dark when I went into the prisoner's hut, there was a candle lighted; the constables saw the blood; I did not see it till next day; I am certain deceased had no blood about her when she left my house.

Cross-examined by Mr. Therry - I had only one glass of rum with the deceased; I said two glasses when I gave evidence before the Coroner's Inquest; I was rather tipsy then; never knew the deceased by the name of **ANN HUGHES**; I do not know she was addicted to liquor; she was in Sydney for a few days before her death; she said she was hurt in the ribs by Byrne throwing her down in the boat; I heard Byrne say the deceased had said she was weary of her life and would make away with herself; did not recollect whether she said at the Coroner's Inquest, that, on the morning deceased came for a glsss [sic] of rum "she said she was tired of her life and would make away with herself;" it might be true that she said so, but I do not recollect it; I saw blood at the bottom of the rock but none on the pathway; can't say whether the wounds were from the sharp edge of rocks or from what they were; the handle of the axe and the broom-stick were free from blood; prisoner remained quiet in my house and promised not to beat deceased any more; the body was taken to a public-house at the King's Wharf; I was examined before the Coroner's Inquest which was held on the 25th July; if the deceased had used the expression attributed to her by me, I could not have invented it; I had no suspicion of the German being concerned; I said to Byrne when I came to see the woman dead, "sure enough she said she would destroy herself."

By the Solicitor General - I said to Byrne, she said she would make away with herself.

By the Court - If she did fall from the rock the wounds were such as might have been produced by her coming in contact with the rocks; the prisoner cried over the deceased when she lay on his arm, and appeared to feel very much.

By the Solicitor General - I do not know how many feet the top of the rock was from the ground; the deceased was a very heavy woman.

By the Jury - I did not examine the wounds; I saw no gravel or stone on the wounds.

**JOHN LACKMAN** - I am a labourer; I live in Lane Cove; I am a German; I lived with the prisoner; I knew Ann Davis; she was the mistress in the house; I know the last witness; she is a neighbour of ours; Ann Davis is dead; last Wednesday fortnight I saw her dead; I had a cup of tea, and went over and alarmed the last witness; I did not go before, because the prisoner was alongside of her, and he said she was all right, and that there was fear of her; on Wednesday morning I went to my work, between 6 and 7 o'clock, and came home about one in the afternoon; when I came back I found no one at home; I made dinner for myself; I thought it strange there was no one at home; I went to Sarah Randall's, and there found Ann Davis and Byrne in the house; I said to Byrne, "It is almost high water, and I want to go to Sydney to load the boat;" he told Ann Davis to go home, at different times, but she would not; at last, through my persuasion, she said she would go home; Byrne said "Go, and I will be close after you;" the road is very difficult, having rocks, brush, and scrub; the woman had no shoes on; I went with her; she sat down on the road for sometime, complaining she was fatigued; while we were sitting there Byrne came up, and said to me "You had better get the wood in the boat and go to Sydney, and I will see the woman home;" I went to load the boat, and had not put a cart load in it when Byrne came to the top of the rock and called to me to come up; when I came up, I said "What is the matter ? what do you want ?" he said "I wish you would go and see if you can get that woman home;" at the same time he and I walked to the spot where she was; I saw her at the bottom of a rock, about 30 rods towards the hut; she was is a shocking state; she was covered with blood; I did not know it was the same woman I had seen three-quarters of an hour before; I called to the woman two or three times; she opened one of her eyes, and said, in a low voice, she wanted a drink of water; I told this to Byrne, when he took up a stick, and said, let her get up, she can get a drink of water as well as you can; I put up my left arm to prevent him from striking her; I said "Terry, Terry, do not strike that woman any more;" I did not see him strike her; I told him not to leave the woman on the ground; the stick was a long as my arm, and two or three inches in thickness; I did not observe where she was bleeding from; he would not give me a hand to bring her home, and, being a heavy woman, I could not bring her home myself; I said "Terry, if you do not lend me a hand to take her home, I'll fetch the barrow and bring her home;" I went and brought it, and put her on it; we were about 300 yards from home; after some time he took the barrow from me and wheeled her up to the hut; he would not put her inside the hut then; he went in and fetched a pair of scissars to cut the hair from the wounds; he now and then put the scissars in the wounds, and I said "Terry do not hurt her;" he appeared enraged, I was afraid of him myself then, there being only two of us there; he cut the hair off; her face was all over blood; I put some water on the fire to wash it; I washed her face; after that, through my persuasions, the prisoner put her on the bed; he desired me after that to make a drop of tea for her, which I did; I brought the tea on the table, and he had his tea, but she was unable to take any; he drank his tea, and he was singing out "Ann, won't you have a drop of tea ?" I had a cup myself; I went to the bed and laid hold of her hand, and felt her pulse; I found her cold and no life whatever; the whole night through he said there was no fear of her; I said I hope not; I went over to our next neighbour,

Sarah Randall, and told her, and she came; she examined her and told Byrne she was dead; the woman, Randall, cried, which made Byrne unhappy; I told Byrne, on returning from the bedside, that the woman was dead; he did not say how she got wounded on the head; I did not hear him say to Sarah Randall that she met with any accident; I left them at a place about three hundred yards from the boat; it was daylight when Byrne told me from the top of the rock to go for the woman; I got to the boat when she was lying on the footpath; she was lying close to the path where she would have to come from Randall's house; when I came out and saw the woman in that condition I did not like to say anything, because I was apprehensive of receiving a blow myself; when Byrne came on the top of the rock he had no stick in his hand; when I came to where the deceased was the prisoner took a stick off the ground; there were plenty lying about; about 15 yards off the rock, near the pathway to the house, there was next day found clots of blood; the de-deceased [sic] asked me for a glass of water in a very low tone of voice; I never heard the deceased speak after she asked me for the water.

Cross examined by Mr. Therry - I have been 17 years in the colony; I came here for 7 years; I had a row with some soldiers and was sent for two years to Port Macquarie; I have always been on good terms with the prisoner; he never charged me with throwing a knife at him; I lived about 6 weeks with him the last time; I never heard deceased say she was determined to make away with herself; the rock is about 30 feet high in some places; she might have tumbled down the rock for anything I know.

By the Court - I think it impossible from the nature of the wounds on the head that she could have got them by a fall from the rock.

**FAYETTE GOODWIN**, conductor of the Water-police - I was called on a warrant to go to Lane Cove to fetch the dead body of a woman, and to apprehend the prisoner; I went to the prisoner's hut; he was outside the door; he said, "Goodwin this is a bad job;" I went to the hut and found the body lying on the bed; I took him into custody, and put the body in the boat; I received from Mr. **JILKS** my instructions to take away the body, and not from Captain **ROSSI**; I brought away the body; before I took away the prisoner, he asked me to come and look at the place where the woman fell over the rock; I set **TOBIN**, a conductor with the prisoner; after, I sent a constable to Sarah Randall, to get the other evidence; I went myself to the spot where the blood was; I saw the marks of some blood on the rocks as if the body had been dragged along; I left the prisoner in custody at the hut; I traced the blood about 5 yards; from the top of the rock I observed no blood, but bout the height of myself on the face of the rock I observed three spots; from the corner of the road where the pathway leads down, I observed the first tracks of blood, about two yards from the corner; further down it is 20 feed high; the greatest quantity of blood I saw was 2 or 3 paces from where the rock was 8 or 9 feet high; after loosing the track of the blood, I observed the track of a wheelbarrow; from Randall's house to where I saw the first blood, may by a distance of half a mile; where I first saw blood there was no rock over which a person might fall and be killed; they might have got a wound in falling, but not to kill; the first spot of blood I saw was on the pathway leading down to the corner of the rock; I traced the blood about five yards; at the end of which the wheelbarrow track commenced; the most blood I saw was off the pathway, on the sand; I found an axe handle in the prisoner's hut; there was some marks upon it which I took to be blood [axe handle produced]; the marks appeared fresher then than now; it appeared as if it had been newly shaved, to try and get the blood off; these are the sticks [sticks produced] which Sarah Randall gave to me, and which she said, in presence of the prisoner, were those he beat deceased with; I found this axe handle close outside the door of the hut, along

with some spades; I spoke to the prisoner about the axe handle; he said he did not know how it came there; I called his attention to the blood upon it; he said he knew nothing about it.

Cross-examined by Mr. Therry - I should not think if a person fell from where I first saw blood, that he would receive such wounds as the deceased had; the German went up with me in the boat; I have known the prisoner for the last two and a half years; always thought him a hardworking industrious man; Randall never told me that the deceased ever said she would make away with herself.

By the Solicitor General - There was only one rock near the marks of blood, and if she had fallen over that rock she could only, I think, receive one wound; I could have gone to the prisoner's hut, from where I saw the blood, in five minutes; when I spoke to the prisoner about the axe handle, he pointed to the spot where I got it from; he did not say whose property it was; the wounds were such as might be occasioned by an instrument of that description; I have seen the wounds; I do not think she could have got them by a fall from the rock; if she had fallen on the three prominencies, so exactly placed as to receive the head, she might have got three wounds.

**JAMES TOBIN**, conductor in the Sydney Police, gave evidence nearly to the same effect as the last witness.

Mr. **JOHN NEILSON**, surgeon, practicing in Sydney - I saw the body of Ann Davis at a public-house at the King's Wharf; I was called to examine it; there were about a dozen wounds on the scalp; most of them penetrated to the skull; on opening the head, under where the wounds appeared, extravasation of blood appeared on the right side and also on the left; I examined the lower jaw and found it fractured in two places; I also opened the chest, and found on the left side extravasation of blood, and three or four ribs fractured; the extravasation of blood on the surface of the brain was the cause of her death; the wounds on the scalp were confused larcerated wounds; in my judgment those wounds ere inflicted by repeated blows with a heavy instrument [axe handle produced]; the one now produced would cause those wounds; I saw this handle at the coroner's inquest; there are marks of blood upon it; I think the marks of blood appeared fresher a the time I saw it at the inquest than it does now; I believe the name of the deceased was Ann Davis.

Cross-examined by Mr. Therry - It is not at all likely the wounds might have been received by falling from the rock; I think the wounds on the ribs must have taken place at the same time as the wounds on the head; I heard some of the jury express a wish to see the place where it was said she met her death.

John Lackman re-examined - I have seen the axe handle at the prisoner's hut, and I know it belongs to him; the marks on it appear to be blood; in carrying the woman on the wheelbarrow blood could not get on the axe handle.

By the jury - When the prisoner called me from the boat his hands were all over blood.

Cross-examined by Mr. Therry - Having blood on his hands might have been occasioned by his assistance to get her home; my hands were marked with it from the same cause.

The case for the prosecution closed here.

Mr. Therry took some legal objections to the offence, as stated in the indictment, not being in accordance with the testimony given.

His Honor remarked that was a question for the jury to decide.

Mr. Therry called the following witnesses for the defence:-

**PETER HILL RAPSEY**, merchant - I know the prisoner at the bar; I have known him nine years; I always considered him a quiet, peaceable man; I waa [sic] on the

Coroner's Jury; Sarah Randall said before the inquest, that the deceased had expressed her intention of destroying herself.

**JAMES FARRELL**, labourer - I have known the prisoner for the last seven years; I knew Ann Davis; I saw her two months ago; she complained of three of her ribs being broken; being at Sydney she got intoxicated, and got her ribs broke,

Cross-examined by the Solicitor General - she did not tell me who broke her ribs; I never asked.

Other witnesses were called, who gave the prisoner the character of being an industrious, sober hard working man.

This closed the defence.

His Honor summed up the case with the greatest minuteness, recapitulating the whole of the evidence, Guilty.

His Honor after a most impressive address, sentenced the prisoner to be executed on Monday morning next, and his body to be given to the surgeons for anatomization. [*]

See also Sydney Herald, 12 August 1833; Australian, 12 August 1833; Dowling, Proceedings of the Supreme Court, Vol. 85, State Records of New South Wales, 2/3268, p. 82.

[*] Byrne was hanged at the Sydney Gaol on Monday, 12 August 1833. He denied his guilt to the end: Australian, 12 August 1833.

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, 1824.

Under s. 5 of the same Act, 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.

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SYDNEY HERALD, 02/09/1833
Supreme Court of New South Wales
Burton J., 29 August 1833
Thursday. - Before Judge Burton and the usual Commissioner.

**HARTLEY SMITH** was indicted for ravishing the person of **MARY RYAN**, an infant under the age of nine years, at Sydney, on the 16th August.

This case exhibited the depravity of human nature in its most appalling form. It appeared that Mary Ryan, **HARRIET MORRIS**, and **ISABELLA SMITH**, a daughter of prisoner, all about the age of nine years, went to the prisoner's house on the afternoon of the day in question to play; while there, prisoner sent his daughter to her grand-mother, who lives at some distance; immediately on her leaving the house he locked the door of the room, and committed the offence on the children Ryan and Morris, and on their going away he offered the children money to say nothing about it, which they refused. The Jury, after a consultation of about five minutes, returned a verdict of - Guilty. The prisoner having been called up for judgment, the learned Judge addressed him most impressively, observing, that the offence of which he had been convicted was most dangerous to civilised society, but when committed on the person of a child it was of the worst description; if there was any difference in the commission of the offence upon a child or a full grown woman, it was assuredly greater on the child then on the woman, in consequence of their tender age and their inability to offer resistance: he had poisoned their minds, it was to be feared, for ever, and it would be fortunate for them if they ever forgot the vicious lesson he had taught them; if they did not, the fault would be his. Public morals must be upheld, and a case like the present must be visited by the utmost penalty of the law, which was, that he should be taken from thence to the place from whence he came, from thence to the place of execution, there to be hanged by his neck until his body be dead. After the sentence was passed the prisoner fainted away, and was obliged to be led down the streets to the gaol by two constables, amid the execrations of a multitude of persons.

Forbes C.J., Dowling and Burton JJ, 3 September 1833

Source: Dowling, Proceedings of the Supreme Court, Vol. 83, State Records of New South Wales, 2/3266

[p. 150] Proof of extension of the vagina being entered & slight penetration of a child of [p. 151] 9 yrs - sufft to support a capital conviction. I am of opinion that penetration has not taken place. 2.d Surgeon.

Case for Council.

Forbes C.J. to Burton J., 6 September 1833

Source: Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2408, vol. 5, loose letter at beginning of volume

Mrs. Forbes is down stairs today - but looking very pale and feeble - God grant that she may recover with care and time, and be restored to us again. I have, before now, felt the same painful anxiety that you do - and I look upon the Judge's duty to be clear, to pause in every case, where he has sufficient grounds for doubt - There has been no positive proof of penetration, and the witness was of sufficient age to have been able to describe the fact - the opinion of the Surgeon was founded in inference, the accuracy of which depends upon many concurring circumstances - the skill of the Surgeon - the accuracy of his examination - the justness of his conclusion, and that again depending upon whether such conclusion was an inevitable result, or whether a different conclusion might not be drawn from the same appearances - whether, in short, the conclusion might not be liable to errors. Dr. Mitchell's evidence, as it is upon your notes, directly negatives the conclusion of Dr. Bloomfield [*] - now the act of Parlt. requires proof of penetration - and there must be such proof - has there been such in this case? -

The text books are silent as to the course a Judge is left to pursue, after verdict and judgment, to satisfy his conscience - the subject itself is too delicate and undefinable perhaps - I should therefore consult my judgment, feelings, and sound discretion how to act - and feeling not only a doubt, but thinking that such doubt might be either removed or confirmed by a careful enquiry, I should satisfy my scruples by adopting that course - if I examined the child, perhaps it would be better that both the mother and surgeon should be present, but without interference - and the Surgeon might then answer any further enquiries you might deem proper to make - I have candidly told you, what I would do - fiat justitia - and that at all hazard - I was too late for the post last evening - but I have communicated our sentiments to the Governor touching the subject of yesterday's conference by post today.

See also Sydney Gazette, 31 August 1833. The judge's trial notes are in Burton, Notes of Criminal Cases, State Records of New South Wales, 2/24078, vol. 5, p. 87. Burton's notes often gave the civil condition of the defendant, whether bond (convict) or free. Smith was a ticket of leave holder. The judge's notes state that Smith was charged with carnally knowing and abusing a female child under 10 years of age.
For other sexual assault cases heard at this time, see R. v. Black and others, 1833; R. v. Hawley, Coghlan and Brickfield, 28 August 1833 Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2408, vol. 5, p. 41; R. v. Hawley, Brickfield and Coglan, Sydney Herald, 2 September 1833. In 1834, Paul Gillon was convicted of violating person of a girl under 12: Sydney Gazette, 13 November 1834.
[*] The notes of the trial judge show that both Bloomfield and Mitchell gave evidence.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 14/11/1833
Supreme Court of New South Wales
Burton J., 11 November 1833
(Before Judge Burton and a Civil Jury.)
Joseph Smith, Henry Lebena, Edward Hammond, Patrick M'Laughlin, Adam Barker, Jonathan Knowles, William Sykes, Alexander Allerson, John Barker, Thomas Prickett, and George Giddons, were then indicted for an assault on the person of Thomas Millbourne, with intent to kill, at Port Macquarie, on the 23d of August last.
Thomas Millbourne, said - I live at Port Macquarie; I was appointed overseer of the goal gang; I remember the 23d of August last; I was standing with a pistol in my left hand by the side of the pitt where the gang were carting the earth away; we had just come up from the barracks; Giddons asked me for the small pieces of paper I had in my waistcoat pocket; he then put his hands round me in a civil manner to give him the paper; I resisted, and three others came to his assistance - Smith, M'Laughlin, and Lebena: I also know the other prisoner, Allerson and Hammond; the others I cannot identify; they then attempted to take the pistol from me, and got me down and struck me with their hands about the head; Giddons at length succeeded in getting the pistol from me; he then struck me four blows upon the head; I think the prisoner Thomas Prickett was one of the party, but I am not quite certain; I have not seen either of the prisoners since their committal; Lebena said, when I was down, "kill the ---- ;" I called out murder; two of the parties said I might call out, they would soon finish me; I cannot say positively which two they were; at that time I lay bleeding on the ground; the pistol was fired by one of the party; I think it was Smith; when I got up I saw a stranger there; I understood his name was Doyle; the men left me when Mr. Doyle came up, and I went directly to Mr. M'Intyre's house; I was then bleeding from the wounds received; I heard Giddons say, when he was going in at the gaol door, that a great many more ought to be served in the same way; there was another constable about thirty feet from me at the same time.
Cross-examined by Mr. Rowe - you have looked at all the men, and you cannot see Smith among them?
A. I cannot identify him; I was standing looking at the men at work when Giddons came up to me.
Q. Do you believe that the last four men who came up to you intended to render you assistance?
A. I cannot say what they meant; I received no assistance until Mr. Doyle came up.

By Mr. Keith - Giddons, you say, was the first person that came to you?
A. He was.
Q. Will you swear that Giddons struck you?
A. I can swear that he did, as my face was towards him when he struck me, consequently I had a good opportunity of seeing him.
Q. Did you lose your senses?
A. I did not lose my senses, but I was stunned.
Q. Was the pistol broken before you were struck?
A. It was not broken.
Robert Wisall, the other constable who was present, deposed, that the was overseer of an iron gang at Port Macquarie; he was about four or five yards from Millbourne when he was attacked; the prisoner Smith followed the cart up; I asked him what he had come up for; he answered, "we shall see presently when we get into the pit; I said "now my lads, we will fill one load more, and then knock off ;" Millbourne at that time had his back against the bank; I then heard a scuffle, and, on turning round, I saw five or six men all upon him; I know them; they are Giddons, Smith, Allerson, M'Laughlin, Prickett and Barker; they had Millbourne on his back; M'Laughlin had got him down, and Giddons was beating him on the head; I ran to his assistance; Smith, Sykes, Lebena and Allerson, then turned upon me; Smith got the cutlass from me, and struck me three or four times; I had also a stick in my hand, with which I defended myself as well as I could; I heard Lebena say "finish him," when they were down upon Millbourne; Smith said so also; I then ran and called Doyle to my assistance; he came directly; the pistol then went off; I distinctly saw Giddons fire it; it was pointed towards me; when Doyle came, I ran for the military, and on coming back saw Millbourne with his head all over blood; I know nine of the prisoners, Giddons, Smith, M'Laughlin, Lebena, Baker, Sykes, Knowles, Allerson, and Pritchett.
Cross-examined by Mr. Rowe - You were near Millbourne at the time this affair happened?
A. I had my back turned towards him at the time the prisoners made a rush upon him.
By Mr. Keith - How many blows did they give him?
A. I cannot say.
Q. How long elapsed till Doyle came up?
A. I think about eight or ten minutes.
By Mr. Unwin - How far were you from Millbourne at the time these men were beating him?
A. I think about three yards.
Q You say that Sykes was one of the men?
A. he seized my arm.
Q. Neither Sykes or Knowles offered you any violence?
A. Neither of them.
Q. You say that there were shovels and spades near; could they have used them?
A. If they liked they might.
Q. Then you think they only wanted to give him a beating, that they did not want to kill him?
A. It appeared like it.
Christopher Doyle said, I live at Port Macquarie ; I am a shopkeeper and dealer; I recollect the 23d of August last; the report of a pistol attracted my attention; I looked out of the window and saw Wisall running towards my house; he called out "Doyle, Doyle, they will murder him;" I then rushed out and took part of a stick he had in his hand, and ran towards the gang; I then saw a man down and two men standing over

him; the man on the ground appeared to be struggling; one man, who was standing over him, I knew to be M'Laughlin; the other I do not distinctly know, but I think the prisoner Hammond was the other that was with M'Laughlin.
Mr. M'Intyre said, I am a surgeon at Port Macquarie; Thomas Millbourne came to me on the 23d of August last; he had received two wounds on the right side of his head, and another on one of his temples; the nail on the left finger was nearly knocked off; one of the wounds was deep; I should say it was done with a sharp instrument; the contusion on the head was done with a blunt instrument; it appeared to have been done with the trigger of the pistol; I examined the wounds, washed the blood off, and sent the man up to the hospital; they were dressed there; I saw them the next day, and they were doing very well; I did not apprehend any immediate danger from what I saw of the wounds; a wound on the head that does not at first appear dangerous, sometimes turns out so afterwards.
This witness was cross-examined by Mr. Rowe and Mr. Unwin, but nothing particular was elicited.
Judge Burton - Mr. M'Intyre, I ask you as a medical man, do you consider the wound that the man received, was one of a grievous, bodily injury?
Witness - I certainly do think it was.
The learned Judge then summed up the evidence; when the jury retired for an hour and a-half, and returned a verdict of Guilty against George Giddons, Joseph smith, Patrick M'Laughlin, William Sykes, Alexander Allerson, John Baker, and Thomas Prickett; the other prisoners, Not guilty. The prisoners were remanded for sentence.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 16/11/1833
Supreme Court of New South Wales
Burton J., 15 November 1833
(Before Judge Burton and a Civil Jury.) [*]
**JAMES FINNEY** was indicted for the wilful murder of a Black Native, called **BLACK JEMMY**, on the 21st of June last; the first count charged the prisoner with a stabbing the deceased with a bayonet, the second count with suffocating or drowning him in the water, and the third count with killing a Black Native, whose name is unknown.

**PATRICK DOWLING** deposed that he was an assigned servant of Mr. Dangar's, stationed at a sheep-fold at Liverpool Plains, I know the prisoner, he was in the employ of Mr. Dangar in June last, he was employed as a shepherd; the prisoner told me he had lost a sheep, which was taken by three black men; he said he knew them all; one was Jemmy, one Wolf, and the other Porter; the prisoner and myself went and looked for the sheep; we found the three blacks; we made an attempt to take them, but two escaped; we caught one, which was Old Jemmy; we took him to the sheep station that night, and the next morning we went with Old Jemmy and another black, and he took us to where there were some blacks encamped, and shewed us some parts of the skin belonging to the sheep; we then took Old Jemmy to the Overseer, and there I left him, the prisoner, Old Jemmy, and the Overseer together, saying I had done my duty, and I would have no more to do with it; I went out about sun-rise; about 12 o'clock I heard the black (cooing) or crying out; I could not see Finney or his flock any where; I saw Finney about three o'clock; I asked him where was Jemmy; prisoner said he cryed out and he let him go; about two days afterwards some blacks made an attack upon us, when we were in our hut; the blacks told us we were very stupid for taking Old

Jemmy, and that they would make us tumble down for it; they then commenced making fires all round the hut, and remained near us all night, in the morning they went away.

**JOHN HILTON** deposed - I was an assigned servant of Mr. Dangar's in June last; I was employed at Liverpool Plains; I was a watchman there; I know the prisoner Finney; I remember prisoner and Dowling bringing a black man to the hut; it was on Monday morning, the 21st June; the black man they called Old Jemmy; they charged him with stealing a sheep; the prisoner insisted upon taking the black man to Mr. Dangar, but he overseer said Mr. Dangar was not at home; the overseer told the prisoner to keep the black until the master came home; there were there the prisoner, overseer, and Dowling; they then tied the black's hands behind him; and the overseer told the prisoner to take care of him till Mr. Dangar came home; about twelve o'clock I heard the cries of a black man, and I said to Dowling, there is Finney beating the black fellow, I suppose he will not go on; the prisoner came home about two o'clock, and I asked him what he had done with the black fellow; prisoner said he had let him go; the day after, prisoner came to me, and said, Jack, I want you to do me a favour; the black jumped into the creek and drowned himself, and I want you to come with me and help to bury him, for fear the other blacks should find it out and kill us; so with that I considered a little, and then went with the prisoner to help to bury him; I saw the body lying in the creek; the black's hands were tied behind him; we got him out, and carried him upon two handspikes to a place and buried him; in burying him I discovered a wound in his side; I said to Finney, look at this wound; how did it happen? prisoner said it was the fish had done it; I said it was not the fish, but I thought it was done with the old bayonet; upon this Finney smiled, and said no more, but buried him; the next evening about ten or twelve blacks surrounded our hut, and make fires, and staid against the hut all night; during the night prisoner and Dowling ran off to Mr. Dangar's, and Mr. Dangar came to the hut next morning, with Finney and Dowling; Finney and myself were going over to the station, two days after, when the prisoner asked me who told Mr. Dangar; I said perhaps it was Patrick; prisoner said he would as soon blow his head off as he would a black fellow's; I had occasion to go every day from the hut to the creek where the black man's body lay; I never observed any blood on the grass or on the bushes, or on the body; I did not show Mr. Dangar where the body lay, for he never asked me.

By the Judge - Hilton, upon your solemn oath, do you know how the man came by his death?

Witness - I do not know how the deceased came by his death.

By the Prisoner - did I not tell you, that the black-fellow had jumped in, and that I had reported it to the overseer, and he had ordered me to fetch you.

Witness - Yes you did.

**JAMES RALPH** deposed, I was overseer to Mr. Dangar in June last; I recollect the prisoner and Dowling bringing a black man to the hut, on the charge of killing one of the shepherd's sheep; the prisoner said, he would take him to Mr. Dangar; I told him Mr. Dangar was not at home; the prisoner said, he would take him into the bush and keep him till Mr. Dangar came home; the black man and the prisoner then went away together, and I went towards my own house.

By the Judge - Did you order the black's hands to be tied.

Witness - I did not.

By the Judge - Had the prisoner a musket or bayonet in his hand when the black man and the prisoner left the hut.

Witness - He had not I am certain, or else I should have seen it.

By the Judge - Is it true, that you, the black man and the prisoner, walked together towards the Creek.

Witness - It is not ; for I went in quite a contrary direction.

Judge - Did you ask the black man any questions respecting the sheep.

Witness - I did; and he told me, that himself and two others stole the sheep and eat it.

Judge - Prisoner, if you have any thing to say in you defence, now is the time for you to speak.

Prisoner - I am as innocent of the crime laid to my charge as a child.

The Judge then summed up the evidence to the Jury, who returned a verdict of - Not Guilty.

See also Sydney Herald, 21 November 1833. The judge's trial notes are in Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2409, vol. 6, p. 18-42.

Another clash in 1833 did not lead to a criminal trial. On 30 November 1833, a Hunter River magistrate, Scott, reported that an escaped convict and bushranger, Herbert Owen, had attacked an Aborigine known as Jimmy. Owen hit Jimmy in the face with an axe, causing serious injury. There seem to have been two motives: robbery plus revenge because Aborigines had helped in the capture of Owen's bushranging mates (Riley and another) through tracking. Jimmy had possession of a gun, which Owen stole. The natives had complained that convicts at several farms had threatened to murder them with an axe. Owen was the last of a desperate gang of ten bushrangers. Source: Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161pp, 134-137.

See also the Australian, 23 December 1833 reporting that a native was shot at Fremantle in the Swan River colony while robbing a store. This was followed by the revenge spearing of two whites by Yagan, brother of the first man shot (Dougan). Yagan's father was then taken and shot at Perth, followed by the killing of Yagan.

For material on similar clashes in Van Diemen's Land, see Historical Records of Australia, Series 1, Vol. 15, p. 446.

[*] This was one of the first cases in which a criminal trial was held before a jury of civilians. Since 1788, all major criminal trials had been held before a jury of military and naval officers. See Australian, 18 November 1833; and see Dowling, Proceedings of the Supreme Court, Vol. 91, Archives Office of New South Wales, 2/3274, p. 187.

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

SYDNEY HERALD, 21/11/1833
Supreme Court of New South Wales
Dowling J., 15 November 1833
[witnesses, non-attendance of - murder - drunkenness] R. v. Carter

**WILLIAM CARTER** was arraigned at the bar, indicted for having on the 18th day of September last, assaulted, cast, thrown, kicked in various parts of the body, **RICHARD WHITE**, which occasioned his death on the 12th day of October following. A Coroner's inquest had sat on the body, and brought in a verdict of ``wilful murder against the prisoner, William Carter." The Coroner had been in Court, but was at this moment absent. When the witnesses were called, namely – **ALEXANDER CUFFELL, RICHARD CARTER, THOMAS SPARROW,** and **WILLIAM DAVIS**, only one of them, Alexander Cuffell, was to be found. His Honor said, let the witnesses be called on their recognizances. Public justice must not

be interrupted in this way. The Attorney General said that the witnesses had not entered into recognizance.
His Honor. - Let the Coroner come forth - ``He is not here." Let him be sent for.
Coroner. - There were three witnesses at the inquest who promised to attend.
His Honor. - This will not do; your duty as a Magistrate should teach you better. I shall fine you, and lay the matter before the Judges. Richard Carter, father of the accused, is not in attendance; and here is life at stake! The other witnesses (who had again been called) are not here. Scandalous! Public Officers paid, and not to do their duty! Not a witness here ! I am not finding fault with you Mr. Attorney General; but I shall fine you all if this occur again; and I beg you to take notice of it. Let the case stand over till to-morrow morning, and let the Officers do their duty, or I will fine them most heavily!
[We are happy to perceive that His Honor is determined to stop the abominable proceeding that have hitherto disgraced our Law Courts.]
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 21/11/1833
Dowling J., 16 November 1833
Source: Sydney Herald, 21 November 1833[1]
Saturday. - Before Judge Dowling, and a Military Commission.
**WILLIAM CARTER** was indicted for the wilful murder of **RICHARD WHITE**, on the evening of the 18th day of September last, at the house of Richard Carter, father of the prisoner. The said Richard White, died at the Hospital on the 12th day of October following, in consequence of alleged injuries at the hands of the prisoner.

**WILLIAM CUTHILL**, surgeon to the Benevolent Asylum, deposed to the deceased having been brought to the Hospital in a weak state; that he found a scar on the left thigh as if from the kick of a man; that he had some obstruction which eventually caused mortification of the abdomen, of which he died on the 12th day of October last; Dr. **BLAND** had been applied to, and attended the deceased, but at too late a period to prevent disolution; there might have been injury from kicks, but he was not aware of it at that time; he performed an operation on deceased, which for a short time relieved him, and he was able to speak; if proper remedies had been applied earlier, they might probably have saved the life of the deceased; there was a mark on the left thigh as from a blow; no marks on the body of the deceased to induce an idea that he came to his death by violence.

**RICHARD CARTER**, father of the prisoner, living on Brickfield-hill, deposed that he was sitting on the sofa in his front room on the evening of the 18th day of September last, about nine o'clock, and Richard White was lying by the fire-place, when his son (the prisoner) knocked at the door; and he refused to let him in, and desired White not to admit him; his son, however, got somehow into the house, and attacked the old man, Richard White, dragged him up by the collar, threw him down, kicked him about the belly, and then jumped on his body with his knees; he was a weak old man, troubled with a rupture in that manner, that he could not but be weak; the old man complained he was hurt, and said ``I will take my bed and go over to Billy Davis', for I am a dead man, I am a murdered man!" he went over to Davis', and took his bed with him; Davis is gone up the country; he let his house, and said I will go up the country; Davis was on the Coroner's inquest; I don't know what White and my son had words. I did not hear any thing said; White refused him admittance; I will not allow any body to come into my house after nine o'clock at night; White did not

open the door I am certain; I cannot say who did; I heard no words, very few words; what I have got to say is this here, ``he told me he would serve him out.''

Mr. Rowe for prisoner. - You seem to have great animosity against your son.

Witness. - There was no words took place between them; I swear that; no angry words at all, not in the least; the angry words were in consequence of his coming in; White wished to let him in; he got into the house so far as to kill old White; no use to put cross questions to me; he was the man that broke into the house and killed White.

Mr. Rowe - Did your son blame White for not letting him in before he commenced the assault?

Witness. - He blamed White for reports about £50; that's the occasion of its taking place; before this I blamed my son for robbing me of upwards of £20.

Mr. Rowe. - Was not your son the means of your going to the Police-office, in consequence of your report in this affair? Did you not charge him with having money in the hands of Bean?

Witness. - No.

Mr. Rowe. - Was he committed? Was he not discharged?

Witness. - No. - he warn't committed eh!

Mr. Rowe. - Was not your conduct such as to cause you to be turned out of the Police-office on that occasion?

Mr. Rowe. - In what room of the house did this affair take place?

Witness. - What - where the murder was committed? Why in the front room, after 12 o'clock at night; be hanged if I know what day of the week; my wife was sleeping in the next room; she cried out ``don't kill your father;'' I saw White twice after in the Hospital; he was not able to speak.

**THOMAS SPARROW** deposed to having known the deceased 14 years; he got his living by making brooms; he staid at Davis's seven days after he returned from Carter's house; no doctor or nurse attended him; I saw him afterwards at the Hospital; he told me he was very poorly; I do not know that he got injury to kill him; I saw him the day before he died, but was not at his funeral; I think he was about 60 years old; he complained years before of a stoppage of urine.

By a Juror. - Richard Carter, do you know if your son knew that the old man was ruptured?

Richard Carter. - No; but he was the occasion of his death; I don't know how much I drank that night; I was sober; I had not drank more than two glasses; I might perhaps two or three glasses; perhaps six or seven; it might be so; it might be ten; not twelve to my knowledge that night; never mind, I am cautious; I'll swear that I did not drink ten glasses; I think about three or four glasses; I don't recollect the quantity; I cannot - how can I tell how many glasses I take.

Several witnesses were called who gave the prisoner a good character for a mild and unoffending disposition; some of whom stated that Robert Carter, father of the prisoner, had been almost constantly drunk for many years past - that he would frequently take twelve or fourteen glasses of neat rum before breakfast; and that since this accusation of his son, he had often been heard to swear that he would get him hanged, and would rather see him hanged than his greatest enemy.

**MARY CARTER**, step-mother to the prisoner, stated that she had gone to bed about 9 o'clock on the night the affair was stated to have taken place; that she was dead drunk; that Richard Carter, her husband, was about half drunk or so when she went to bed, and he was lying on the sofa, where he generally laid when he was drunk; that she heard no noise, and knew nothing of the matter; we had no spirits in

the house; I went to fetch it; we might have had two half-pints or four half-pints, or it might be eight half-pints, or I don't know how much; I went to bed blind drunk.
The prisoner, on being called on for his defence, said he knew nothing about the matter.

His Honor in summing up, dwelt upon every point of the evidence, and expressed his horror at the feeling exhibited by Richard Carter towards his son in this case. On his testimony alone rested the alleged guilt of the prisoner, and looking to the character of the accused, the Jury would decide as to his credibility.

The Jury, without retiring, immediately pronounced the prisoner not guilty. [*]
See also Australian, 18 November 1833, noting that the trial excited considerable interest because the father of the prisoner was the principal witness. The audience in the court approved of the verdict of not guilty, being "horror struck at the malignant and diabolical feeling which actuated the Father both before and during the trial. It was altogether an exhibition which, truly, for the honor of human nature, is seldom to be witnessed in a Court so generally depraved as this is."
See also Dowling, Proceedings of the Supreme Court, Vol. 90, State Records of New South Wales, 2/3273, p. 161; Vol. 91, p. 187.
[*] The Australian, 30 December 1833, reported that Carter was almost murdered about a month after this. He had been carrying a large sum of money, and was very drunk, when he was attacked with brickbats. He was rescued by a neighbour. Several pieces of brick were taken from his head, but he was not dangerously ill.

SYD1834

SYDNEY HERALD, 13/01/1834
Supreme Court of New South Wales
Burton J., 10 January 1834
Friday. - Before Judge Burton, and a Military Commission.
**BRYANT KYNE**, was arraigned at the bar, charged with the wilful murder of **JAMES GEVAN, alias JAMES GAVAN, alias JAMES GAVANAGH**, on the 26th day of December last, in the house of the Solicitor-General, at Water View near Sydney. The prisoner pleaded not guilty.
(A Coroner's inquest had been held on the body of deceased, at Water View, on the 27th December, when the prisoner was committed under the Coroner's warrant.)

The prosecution was opened by Mr. Therry, and Mr. Rowe defended the prisoner.
It appeared that Mr. Therry had been originally intended to conduct the whole of the case for the prosecution, but by some subsequent arrangement of the court, the Solicitor-General completed the case, and Mr. Therry conducted a prosecution in the adjoining court.

**MARGARET DONOLLY** deposed, that she was servant to Mrs. Plunkett at Water View, the residence of Mr. **PLUNKETT**, Solicitor-General; that her master and mistress, were absent at the time this occurrence took place; that several servants were left in the house besides the prisoner, who was overseer, and that deceased was one of them; on the 26th December, deceased went to Sydney on his master's business, and returned the same evening; prisoner told her, before the return of deceased, that the drawing room and parlour, had been broken open, and on his shewing them to her, she saw that the bolts of both doors had been forced off; she had said this was singular, as there were no other persons then in the house, but the prisoner and an old man; she had herself been walking with a fellow-servant to the water-side; soon after this, deceased returned home, and on being told of the affair, said, that if he had been at home, it would not have happened; when the prisoner replied, that if he did not hold his tongue, he would send him on board the hulk; the deceased said that prisoner could not do that; prisoner said he would, and send him there in irons; deceased said, I did not come out with a man's blood on me; prisoner then swore, that if deceased was not silent he would blow his brains out; prisoner then went out of the kitchen into the passage, and deceased followed him; she heard reports of fire arms a minute afterwards; a man of the name of **HORPING**, ran out to see what was the cause, and then she heard another fire, and went into the passage herself, and saw the prisoner lying on the floor, and deceased leaning against the wall; another man servant named **WORRICOTT**, took a gun and a pistol down to the water-side, and fired them off, to alarm the persons on board the hulk; she (the witness) accompanied him; shortly after, a boat came off bringing Mr. **McKEIG** and Mr. **KECK**, officers of the hulk, and some soldiers; witness went to the house with them, and found the deceased moaning and lying on the floor; did not hear him speak; he died soon after, and she saw him after his death; in her cross-examination by Mr. Rowe, she stated, that the house was left in charge of the prisoner, who had gone out for a short time in the afternoon; that she was not aware the doors had been broken open until informed of it by the prisoner, who then appeared to be in a great passion; that after returning with the persons from the hulk, she saw the prisoner in the kitchen with his face bleeding; at the time the deceased followed the prisoner into the passage, the deceased was also in a passion.

Mr. **HENRY KECK** stated that he was Assistant Superintendent of the Hulk; that about 8 o'clock in the evening of the 26th December he accompanied the Superintendent of the Hulk, Mr. McKeig, in a boat to Water View; Mr. McKeig went into the house and witness followed; he saw the boatswain's mate seize the prisoner, and ordered him to tie prisoner's hands; he then went to the passage and saw deceased lying there, who caught with both his hands, the hand of witness, and appeared to be sensible; witness took the prisoner to the serjeant of the guard and delivered him into his custody; witness returned with the hospital attendant and found the deceased in a much worse state, who said ``I am dying", witness replied, ``James I am afraid you are"; (witness had known deceased for some time previous;) witness asked deceased if he would say any thing to be conveyed to his master and mistress; deceased said he could not speak; on witness desiring him to rouse himself, he asked for a Clergyman, and said, he and the prisoner had quarrelled; that prisoner declared he would blow out his brains, and went for a pistol; met him in the passage and shot him - murdered him; the deceased spoke with difficulty; he died in about an hour and a-half after witness and the other persons from the hulk arrived at the house; witness by when he died; two pistols being handed to witness, he said he knew them; they were lent to Mr. Plunkett by him; that they appeared to have been recently discharged, and one of them seemed as if it would go off when half cocked; witness afterward informed prisoner of the death of deceased, and he said he could not help it. On cross-examination, prisoner had said to witness that the pistol went off accidentally when scuffling with the deceased; prisoner had several cuts on his head which witness ordered to be dressed; prisoner did not say that deceased had done it, but witness was informed so by other persons then in the house.

**DANIEL HORPING** stated, that he resided near to Water View, that deceased came back with him on the night of the 26th December from Sydney; that he went into the house with deceased, and in a few minutes after, heard some dispute between deceased and the prisoner at the bar, in the presence of other servants of Mr. Plunkett's; witness could not detail the whole conversation being rather deaf, but heard something about prisoner's threatening to put deceased in irons and sending him aboard the hulk; witness was about to go home when he heard a report of arms; went into the passage and saw prisoner lying on the floor and deceased leaning over him; they were both holding a pistol, and scuffling, apparently each to get it from the other; witness with difficulty wrenched it from them and fired it through the floor; witness had no doubt there was a bullet in the pistol as he picked up a flattened ball near the spot; he threw the pistol away, and saw the prisoner in getting up from the floor receive two kicks from the deceased, and afterward two blows over the head with the butt end of another pistol, which witness succeeded in getting from him and snapped it, but it did not fire, and he threw it away; the pistols were much alike; the deceased then fell crying ``Oh! I am shot Mr. Horping;" prisoner denied this - but deceased exclaimed, ``I am shot, you villian [sic]," (or you murdering villian [sic]); witness to secure other fire-arms, shut the prisoner's room-door, where he wanted to enter, but witness prevented him; prisoner had said the pistol went off by accident when deceased knocked him down; witness then examined deceased and saw a wound, where the intestines came through near the groin; the wound appeared as if made by a shot; witness could not recollect any conversation between the parties until the person arrived from the hulk; prisoner and deceased were both in a passion when they left the kitchen to go into the passage.

Several other witnesses were examined, whose testimony corroborated the foregoing depositions. During the examination of William Woricott, a servant to Mr.

Plunkett, who accompanied the deceased to Sydney and back, - Mr. Rowe alarmed the Court by being taken suddenly ill. He was removed into the open air, and by the attention of Dr. Moncrieff (who was present as a witness, having been Surgeon to the Inquest), he soon recovered; went home for a short time, and returned into Court. His Honor said, he would adjourn the Court for an hour, when Mr. Rowe might be able to proceed with the defence. In the interval, however, Mr. Foster officiated for Mr. Rowe, and conducted the defence to the close.

When the case for the prosecution had closed, Mr. Foster took an objection to the indefinite name or names of the deceased, as stated in the information - but His Honor over-ruled it, observing, that there could be no doubt of the death of a person as charged in the information, although there might have been some difficulty as to the correct manner of spelling the name.

The Solicitor General and John Weston, Esq. Both spoke to the general good conduct of the prisoner prior to this unhappy affair.

His Honor addressed the Jury, expounding the law of the case and recapitulating the evidence with great precision. [*]

The Jury retired, and after consulting some time, returned, and pronounced the prisoner - Guilty.

The judgment of the Court being prayed by the Solicitor for the Crown,

His Honor, placing on his head the dread cap used on such occasions, addressed the prisoner in the most touching and solemn manner, describing the enormity of his offence, and intreating him to take all possible advantage of the few moments left him in this world, to appease an offended Maker; and to prepare himself for eternity. The sentence of the Court was, that he should be taken back to the place from whence he came, and on Monday morning next be hanged by the neck till he was dead, and then his body be given over to the Surgeons for dissection - and ``the Lord have mercy on his soul."

See also Sydney Gazette, 11 January 1834; Australian, 15 January 1834. The judge's trial notes are in Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2411, vol. 8, p. 96.

[*] According to the Sydney Gazette, 11 January 1834, Forbes C.J. left three possibilities to the juror: premeditated killing, which was murder; manslaughter; and accidental killing.

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

AUSTRALIAN, 13/01/1834

Execution, 13 January 1834

Execution. - This morning at nine o'Clock, at the usual place, the last dread penalty of the law was inflicted up **BRYANT KYNE**, who was tried on Friday last for the murder of **JAMES GAVANSH**, when a verdict of guilty was returned. The said procession moved from the Press room, in the Gaol, at a few minutes before nine o'Clock; the unhappy man was attended by the Rev. W. Cowper. At the reading of the warrant for his execution - at the earnest solicitude betrayed by his spiritual attendant, and on ascending the fatal platform, Kyne betrayed not the least emotion of tremour or agitation, but perfectly resigned to his dreadful fate, appeared rather to desire a speedy termination of the awful ceremony. The executioner having completed his duties, this wretched man was launched into the presence of his Maker. Kyne died almost without a struggle.

The fate of this unfortunate man affords a sad example of the fatal consequences which result from the indulgence of a hasty and vindictive temper. We are informed that he has left with the Editor of the Monitor a statement in writing, in which he denies any intention of killing the man, for whose life his own has now atoned, alleging that he merely took up the pistols with a view of intimidating his adversary, who was aggravating him by the use of very abusive language, and that when he pulled the fatal trigger it was an act of necessity to prevent the deceased from wresting it from his hands and firing it at himself. It is impossible to say whether this account is true or not, but it is in some degree satisfactory to think (however melancholy may be the reflection) that the previous history of the wretched culprit affords just ground to believe, that under the influence of the ``furor brevic," he was intent only upon the destruction of his victim, and consequently that the verdict which has consigned him to an ignominious death, has done justice to the laws of God and man.

It is lamentable to record that the station in life which the deceased once held, afforded a very different presage of it after tenor and conclusion, than what this day has witnessed. Kyne was, we are told, born of a respectable family, and succeeded on coming of age to an estate of £2000 per annum. His name was placed in the Commission of the Peace at an early period of his life, and he was a Magistrate of three Counties in Ireland. Of this office, however, his habits of life soon deprived him, and the violence of his temper led him into several duels, in one of which he shot his antagonist dead upon the spot. It was for this, we believe, that he was transported to this Colony; and it was only a day or two after the event which occasioned his fatal end, that we are told a sum of £200 had been received for him in the Colony from his friends in Ireland. See also Sydney Gazette, 14 January 1834.

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

AUSTRALIAN, 15/01/1834

Supreme Court of New South Wales

Forbes C.J., 10 January 1834

Before His Honor the Chief Justice and a Civil Jury.

**EDWARD BRENNAN**, stood indicted for the wilful murder of **MARTHA CONDRON**, at Parramatta, on the 18th November last. The indictment contained 3 counts, severally charging the prisoner, with having caused the death of the deceased in a variety of ways, to all which the prisoner pleaded not guilty.

Mr. Therry appeared on behalf of the prosecution. …

The case of Brennan then proceeded.

**ANN UNWIN** examined - I live in Parramatta; I was there on the 18th November last; I recollect being in the house of Martha Condron, on the morning of her death; I went there voluntarily; she was not dead when I first saw her on that morning, she lived some hours afterwards; I had been at her house on the Thursday preceding; I was called upon by the prisoner, who told me that Mrs. Condron had sent for me, he said she had received a wound on the Wednesday night, but she would not tell him who had inflicted it, but he observed she might probably tell me; the prisoner desired me to take a pair of sharp scissors, to cut the hair from the wound; he said Isabella Cooper had been there, but her scissors would not cut; the prisoner said he ought to have come for me at an early hour in the day, but he had met with a friend and had been drinking and forgot to call; the prisoner then went away; I immediately went to Mrs. Condron's house; on my way I met the prisoner in company with a man named **EVANS**, who had lived opposite to the house of the deceased; Evans observed that I

was going to Mrs. Condron's; I said, pointing to the prisoner, that he had told me of Mrs. Condron's having received some serious wounds on the preceding night, when Evans replied ``pooh, pooh, she got drunk and fell down;" I then went on to Mrs. Condron's house; I found her sitting under a window; she appeared to be very poorly, and said she had been expecting me since morning; I observed I was afraid she had been drinking, when she said had? I asked her if she had been hurt, when she told me to look at her head, which she said she had dressed herself, as **BELLA COOPER**, when she came, did not offer to look at it; I asked her how it happened, when she said ``never mind, I know who they are, God will forgive them, and I shall tumble up again," an expression she commonly made use of; the house appeared to be in a state of disorder, to which she directed my attention; I observed marks of blood on the wall and on the floor; she said she had washed up the blood herself; on Friday morning I examined her head? the wound was a very small one; a man named **PETER MURRAY** came in while I was washing her head, I sent him to Mr. Ellison's for a little brandy to wash the wound with, but Mr. **ELLISON** did not send it, saying he would come over himself; after I had washed her and put things to rights, I went away, I went again on the following Sunday; I saw Sergeant **HAMILTON**, who said `` I am very glad to see you have come, this poor old woman has been falling about on the stones, and I fear she will dash her brains out; she has been vomiting very much; ``I found her very sick, and complaining of being unwell, and made her a little toast and water, which she took; I went away and returned in the afternoon; while I was in the act of washing her head, the prisoner was coming in, when Mrs. Condron said, ``here he comes, d--n him let him go;" Mr. Nichols, who appeared on behalf of the prisoner, objected to the words of the deceased being received as evidence, and quoted various cases in support of his objection. Mr. Therry, for the prosecution, contended that there was evidence to offer, that the deceased was, at that time, conscious of her approaching dissolution.

His Honor observed that the words of the deceased, in the absence of the prisoner, could not be taken in evidence, but the witness must be allowed to proceed, if nothing further was elicited to prove the deceased's consciousness of being past recovery; the evidence might be rejected.

Witness in continuation - Deceased said ``I am much worse than you take me to be, I cannot live very long, I hope you will attend to me in my last moments, and see me buried;" I promised I would; I live near her; she said a man who lived opposite would buy her a coffin; I asked her if she would like to hear me read to her, when she said she would; I read a Chapter in John to her; she said she hoped she would be able by the next Sunday to go with me to a place of worship, as she long wished to change her life; arrangements had been in contemplation, that I should go to live with her altogether, which I was to have done on the day following on which she died.

Mr. Therry observed, there has been abundant proof elicited, that the deceased thought seriously of her approaching end, her conviction of her dangerous state expressed to witness, her anxiety to hear the gospel, the coffin, her wish to be able to go to church, and her review of her past life, were all conclusive testimonials that she felt her recovery impossible, without however going so far. Mr. Therry was of opinion that her words were admissible as evidence, and quoted cases in support of his argument.

By the Court. - I did not think she was dangerously ill; she was certainly poorly; I cannot say whether it was her intention to go on the following Sunday to Church; she said she would wish to go if she were able; she observed she would wish to alter her course of life, particularly with regard to drinking, which she said she knew would kill

her, if she did not; she had been vomiting very much, but I cannot say it was the effect of drinking: I feel convinced she had not been drinking then, or I must have perceived it; I had some further conversation with her; we were speaking about Mrs. Macarthur, she was then sitting in the outside room; after this we went to take a walk in the garden; the subject of the conversation about Mrs. Macarthur was, the deceased said she would go on the following morning to complain that Mr. Ellison had not used her well: **BRENNAND** was then present, he said there will be no occasion Mrs. Condron, for you to complain to Mrs. **MACARTHUR**, for Mr. Ellison is going to make an arrangement to allow you so much a week, and was glad to hear that this woman (meaning me) was going to live with you; I cannot say that at this time she was conscious of her approaching end.

Mr. Therry- Deceased used the expression ``here he is, d--n him let him go;" on the approach of the prisoner, he had a vessel in his hand containing beer, which he said had been sent to her by Mr. Ellison; I said, my friend she shall not drink either beer or spirits; the prisoner Brennand, asked me if the cut was deep, when I replied it was too deep for those who done it, if she has not done it herself, the wretches should be brought to justice; I must remark, the neighbours were of opinion she had been drinking, and had fallen and cut her head; the prisoner observed, that she would not tell him who had done it, or he would look after them; the deceased observed, it was not very likely she had done it herself, or how could the window come out on to the floor without breaking; the prisoner hereupon observed that the window had certainly been out, as himself and Evans had nailed it up; the deceased did not seem to be under any apprehension in the prisoners presence; when he went out she said ``that is the man who has done it;" after some other conversation, I went away; on the following morning about I o'clock, I went to the house of deceased; I went to the door and found it bolted; I then went to the window and heard a noise as of some person snoring; I thought the sound differed from that of a person asleep, I shook the window shutter, and it flew open; in looking in I saw the deceased lying on the floor, with her head towards the door of the room; I then ran to Mr. Ellison's to tell him that the deceased was lying on the floor, and asked them to lend me an axe to force the door with, I informed a person named Henry Incle and his wife, who reside in the neighbourhood, when he brought an axe and forced the door; when we went in, the deceased was lying on the floor, apparently in a dying state, but not quite dead; her hand and foot seemed to be drawn up, black and red marks also appeared on her throat; I thought they were occasioned by a band which she always wore under her neck; her cap and the band were under her head on the floor; a great deal of moisture came from her mouth and nose; I did not observe any additional wounds, she was insensible and did not speak after I went in to the house; I took her hand in mine, and putting my mouth close to hers I asked her if she knew me, she did not answer me; I had not sufficient presence of mind to go round to the back door, to get in in [sic] the first instance, when I found the front door bolted, the sound attracted me to the window, which flew open on my touching it; when, on seeing the deceased in a dying state, I immediately ran for assistance; her feet were towards the foot of the bed, and her head towards the room door; she could not have fallen out of bed in that position; myself, Bella Smith, and **HENRY SNELL** went in, lifted the deceased on to the bed; I frequently saw the prisoner backward and forward at the house of deceased: I have also seen him at Ellison's; I do not know where the prisoner resided constantly; I knew that he brought deceased her food daily from Mr. Ellison's; who supported her; I did not see the prisoner on the morning of her death; I lifted the deceased on the bed from my own wish, and not at the suggestion of any other person.

Cross-examined by Mr. Nichols. - I thought the marks on the throat of the deceased were occasioned by the band which she used to wear; it was not on her neck at that time; I thought the contraction of her arm and foot were occasioned by a paralytic stroke; I tried to straighten it, but it remained in a contracted state until she was put in the coffin: on my first seeing her she lay with her linen about her neck, as if she had been kicking about, her hair was all about in disorder; I thought from her first appearance, that she had fallen into a fit; I never recollect her to have been in a fit before; I am sorry to say she has been frequently in a state of intoxication; I saw the prisoner frequently at the house of the deceased, he used to carry her victuals daily from Mr. Ellison's; I am certain the back door was closed when we entered, but I cannot say it was bolted; the wound on her head was not very long, nor very deep; I cannot say that she might have received such a wound from falling out of bed; Mr. Evans said that she had been so drunk, she had drawn the cupboard down upon her; the cupboard appeared to have been down; when I saw it it [sic] was lifted up again, but it was not fastened; on the Thursday when the prisoner came for me, he said that some person had cut the head of the deceased, but she would not tell him who it was, but she might probably tell me; if any person had been in or about below Howell's Mill, I think they might have heard a cry of murder from deceased's house, if it had been very loud.

By a Juror - I thought the deceased's motive in pulling my apron on the approach of the prisoner on Sunday when I was dressing her head, was merely to draw my attention to his coming; when she was found in that state described on Monday morning, her bed had certainly the appearance of having been lain on.

**JOHN BROOKS** - I lived on the premises of the deceased until the Wednesday prior to her death; I rented the skilling near the stable; I left on that day because the rain used to come through the roof; I left about 9 o'clock, and bade her good night; I then went to sleep in my own boat which was moored near Mr. Howell's Mill; I was in the habit of sleeping there, I was just dozing off when I heard her crying out ``John, John, won't you come, won't you come,'' I heard no cry of murder, she cried very loud; I thought she cried for assistance; I pulled my boat to the side, and went towards her cottage; on approaching it I saw some person in white go across the road from Mrs. Condron's gate; I could not tell who it was; I could not say who was the person who came out of the gateway; I cannot say it was a female; I afterwards saw the prisoner Brennand cross the road, he came out of the deceased's yard; this was about 11 o'clock; he went between Mr. Ellison's and the next house; I am positive it was out of her yard by the cart gateway; the bed-room window of the deceased looks into the yard towards the gate; I went to the window and asked the deceased if she was in bed, she replied she was; I then asked her if she had called me, she said she had, but I did not come, she said she would have been killed but for my coming, but I put them past it; I I [sic] then asked her if I could do anything for her her [sic], when she said I could not, and had better go to bed, as she could make shift by herself, which I did; on the following morning I went to the deceased's house to return the key of the house I had quitted; I saw a quantity of blood on the window; she then told it was occasioned by the persons who had cut her head on the previous night; the prisoner Brennand was bringing some fire into the house, when I asked her if she knew who the persons were who done it, when she said it was Brennand, the prisoner was at this time quite close to her; I though he could not help hearing her; he might have been at the distance of five yards, not more; he looked on and said nothing; there appeared to be a good deal of blood on the window and on the floor; I had been robbed in the house I left many a time; I am not aware that I accused the prisoner of robbing me, I may have done so; I

know he was one of the party; I felt aggrieved at the prisoner for taking my property I never told him I would serve him out for it; that is not the cause of my appearing here to day; I neither like him nor dislike him; I never said that I would get him hanged; I have had no conversation with any person on this matter; I did not give evidence privately to Mr. Macarthur; the only evidence I gave was at the Police Office; I cannot say what the distance from the deceased's to my boat is; the mill was not going on that night; I swear that it was about 11 o'clock; I could hear her cries very plainly; I only went to her window; I did not go into her house, she was not drunk; I am not aware that the deceased was a woman of weak mind; I am positive I saw Brennand; I did not speak to him; I knew he was in the habit of going there; the deceased shewed me the blood, she did not shew me her head; I did not see the person who came before the prisoner from deceased's house, I believe it to have been a man; I don't know the dress that prisoner wore on that occasion; I know he was not in his shirt; I saw his face; it was a star light night; it was not quite dark; the distance from the person who went before the prisoner was about forty yards; I cannot swear whether it was a man or a woman; the deceased spoke audibly, when she said the prisoner had done it; I am of opinion that he must have heard her; she did not seem to be afraid of the prisoner hearing her; she did not say she would go to a Magistrate; I was not aware that an inquest was held on the body after her death; I gave evidence on that occasion; I gave no evidence on that; I have known deceased to be fresh; but I never heard her sing out John before.

By the Court - I used to sleep at the deceased's house before I went to my boat. I rented a house from her the evening of this day; was the first time I slept there; my sleeping place from that of the deceased's was about 10 yards: I was a protection to her when I slept there; a person named Snell and his wife used to sleep there after the death of her husband; I think I gave deceased notice that I was about to leave; I am positive I told prisoner of my intention to do so on that day; I never saw the window of deceased's bed room open before that night, it was always shut; when I went to the window I found the window sash lying on the floor inside, appearing to have been forced in.

Cross-examined by Mr. Nichols - I was a protection for deceased sometimes; I was absent sometimes all night down the river, sometimes two days collecting ashes and shells; I was nearly as much out of Parramatta as in it.

By a Juror - The reason why I did not stop the persons whom I saw going from the deceased's house, I was not aware what was the matter; I told the decased [sic] that one of the persons who had been there was Brennand; I don't think he heard the whole of the conversation when he was carrying the shovel of fire by the deceased, but I have no doubt he must have heard her mention his name.

By Mr. Therry. - The reason I asked her if she knew who had done her the injury, seeing the prisoners in the habit of going backwards and forwards; I did not imagine it to be him.

**ELIZA NEWMAN**. - I remember going to the house of the deceased on Sunday the 17th November; I knocked at the front door; it was bolted, the prisoner came and opened it; the deceased did not appear to have been drinking; she said she was very poorly; after a little conversation I went into the garden to gather plumbs and roses, and again returned to the house; when I was leaving, the prisoner opened the front door, and remarked as I went out, that he expected to find her dead some morning, the same as her husband; It had been generally reported that her husband had been found dead a few months before; when I left the house the prisoner bolted the door. The prisoners' remarks might have been made in allusion to her habits of intoxication; the

deceased had been ill used by a man and woman on the Wednesday evening, and they had given her a black eye; but she did not say who they were; the bed on which she lay was a kind of stretcher; the distance from the residence of deceased to Howell's mill, is about 30 or 40 yards; If the mill were going, I don't [sic] think a person below the mill could hear a cry from the house of the deceased, she only complained to me of a black eye, and said a man and a woman had come in at the window.

By a Juror - there had been no conversation with the prisoner that could lead to this remark; I know this woman; I did not hear that she had dressed a wound on the head of the deceased; I saw no cuts or plasters on her head; I heard of nothing farther than the black eye; I do not know the prisoner; I had never seen him there before, his appearance excited no surprise; his remark made no impression on me, I scarcely noticed it; I never mentioned the remark to any person until the time of the Inquest, when I mentioned it to Mr. H. Taylor.

**THOMAS SHAW**. - I am a stone mason, I was in the employ of Mr. McArthur on the 18th November; I cannot speak to the exact time in the morning; I think it was a quarter of an hour before five o'clock, when I passed Mr. Ellison's, the house was not then open; I saw the prisoner the prisoner cross the road from Ellison's gate; I knew the deceased she lived nearly opposite; I made no particular remark to the prisoner on that occasion, nor he to me; I was examined before the Magistrates on this subject; I remarked to the other men, the prisoner had a down look, and was after no good at that early hour in the morning; I don't [sic] know that he heard me say any thing; he held his head down and passed on making no reply: on the following morning at about half hast 5 o'clock, he crossed in the same direction; he was in conversation with a sergeant of the Regiment.

Cross-examined by Mr. Nichols. - I am not on bad terms with the prisoner; I had some words with him about his appearing against me in another court; but I would not swear a lie against him on that account. I have certainly threatened to indite the prisoner and Mr. Ellison for perjury on that occasion.

**ROBERT CHAMPLEY RUTTER**. - I am a member of the Royal College of Surgeons, London; I was callen to attend the deceased on the 19th November, I found her in convulsions, there were two females present when I arrived; I stated that it was of no utility to administer any thing to her, as she could not survive an hour: she was very violently convulsed: there was a slight contusion on the forehead, also a slight contusion the back part of the head; but it appeared to have bled freely: a slight discolouration of one of the eyes; and a very slight discoloration on the anterior part of the throat; It had escaped general observation until I pointed it out. I opened the head, I discovered the exterior wound had not perforated the skull; the membranes of the brain were perfect on that part of the head; had the blow been a serious one this could not have been the case; I am of opinion that the death of the deceased was not caused by that wound; there was about six ounces of fluid in the ventricles of the brain, which caused the vessels to be unusually turpid; the appearance of the brain was otherwise healthy; I made an incision in the throat, and discovered an effusion of blood in the celular membrane, which stopping the circulation, was the proximate cause of death, these facts led me to the conclusion that the deceased died by strangulation; the appearances of the fluid on the brain are not caused by strangulation, I attributed that circumstance to long previous decease.

Cross examined by Mr. Nichols - I am of the same opinion now, that I was at the Inquest, I recollect the contractions of the arms and legs of the deceased; these were the effect of convulsions and not delirium tremens, the marks on the throat were not a the marks of the fingers extending round the neck; there was a narrow contusive mark

of about four inches in length across the trachea; the band which I saw would not produce such a mark, nor would the application of the fingers for the purpose of strangulation have caused such a mark; - I am of opinion that it is attributable to accident, and not to design. The wound in the head was not in itself sufficient to cause death; there were several discolourations on the body, all the parts of culact were much discoloured by the escudative of the deceased, and the heart.

Edward Webster. - I am a Surgeon, I live at Parramatta; I have been regularly admitted in London as a Surgeon, I was called on to visit the late Martha Condron; she was not alive when I saw her it was while the inquest was being held; she lay in her own house on a kind of sofa in a bed room; I examined the wound on her head and was of opinion that the blows and profuse bleeding might have caused her death; at the inquest I was asked if on examining the neck, I had any cause to suspect that strangulation had taken place; I said I had not examined the neck, and went back again to the deceased; I was not aware that Dr. Ruther had been there on my first visit; I considered the wound on the head to be an incised wound and sufficient to cause death, on returning to the inquest, I gave up my opinion as to the wound being the cause of death, and came to the conclusion, that the deceased died by strangulation; I cannot say she had been addicted to liquor : I saw nothing that could warrant that opinion,

By a Juror. - If strangulation had been effected by the fingers; it is still possible she might have lived for a short time; had the strangulation been effected by means of the band usually worn by the deceased, it would not produce a mark similar to that on the neck of the deceased, it would have been much broader; a cord would produce a similar mark.

**MARY GROUNDS**. - I am a married woman, I knew the late Martha Condron; I saw her on the morning of her death. I heard she had been dreadfully beaten, I went in and could not help saying, O my God Mrs. Condron who has been murdering you in this manner, she appeared as if great violence had been used, hearing my voice she turned round and appeared to endeavour to speak to me, but she could not. I observed a dreadful black eye and two or three black marks on her throat. I thought the marks were occasioned by some person choaking her; there was a great deal of blood about and it appeared as if some person had been attempting to wash it out, and pipeclay had been rubbed over it. I called aloud for Henry Ellison that she was dying and went towards home, Mrs. Unwin and several other persons came in at the time.

Cross-examined by Mr. Nichols. - I thought that the marks on the throat were occasioned by the finger and thumb of some person, I think so now. I don't [sic] know that deceased was foolish, she used to get drunk frequently, I went back again to the deceased's house, but Mrs. Unwin would not let me in, I dont know the distance from the house of the deceased to Howell's mill.

**ISABELLA SMITH**. - I live at Parramatta, I know the deceased, I saw her on the day she got the cut on her head, I was called in to see the state she was in. She shewed me some blood on the window and asked me to cut the hair from a cut on her head. I said in the name of God how did you come by this, she said a man and a woman came through the window and done it, the prisoner said she would be the better of a little spirits, I gave him three pence and he brought a gill of rum, he gave me a glass and the deceased held in her hand she said ``Oh the villian, the villian,'' and drank the rum, she did not look at the prisoner, nor appear to address those words to any person in particular; I did not understand it to have reference to what she had told me. On the following Monday morning Mrs. Unwin came for me to my house, I was cutting wood, she begged me to go with her to Mrs. Condron's, the deceased, as

she was dying, I went accordingly and found her lying in in [sic] an indelicate state, I saw some marks on her neck.

Cross examined by Mr. Nichols. - I asked her on the Thursday, if she would know the persons again who had injured her, she said she would if she saw them.

**JOHN LACEY**. - I reside at Parramatta. I knew the late John and Martha Condron, I dont remember how long it is since they died. I saw the deceased Martha Condron, previously to her death when she was in a state of convulsion. I did not take particular notice of the marks in her neck, it was much swollen, I saw the prisoner a very short time prior to this at a public house kept by a tenant of mine where I was; he asked me what I would take for the mortgage I had on Condrons property, he was not sober at the time.

Cross-examined by Mr. Nichols - There is no dispute between Ellison and I about a farm, no law suit; it is at the Cowpastures it was given to Ellison by John Condron, I heard so from the Coroner, I don't [sic] know that Ellison was to support her while she lived, I had no conversation with deceased.

**JAMES BROWN**. - I am a constable, I recollect the night of the death of Martha Condron, I saw the prisoner on the evening of that day in George street, he was then unarmed, he went to the house of a man named Evans, opposite to the deceased's, I saw him take a piece and load it, when he had done so, he observed that if that were not sufficient he would put something extra in it, he then went towards the Military Barracks, he was absent about half an hour when he returned, as he passed me he said, the first constable or other person who would attempt to stop him, he would put the contents of the piece through him, I could not leave my post, I dont know that he was suspected of Martha Condron's murder, I was not at the inquest, I do not know that he was aware I am a constable, I had my staff in my hand, when he went away he went towards the inquest which was held at Mr. Armstrong's he was rather in liquor.

By a Juror. - I have known him for two years, he has been frequently employed by Mr. Mackie as a bailiff, I do not know how long he lived at Mr. Ellison's.

**AUGUSTUS HAYWARD,** Esq. - I am the coroner of Parramatta, I presided at the inquest held on the body of the late Martha Condron, the prisoner attended the inquest, I told him that he was suspected of being the person who had caused her death, that was before he gave his evidence, after which I was told he was gone, I received a letter from him stating that he would be forthcoming in the morning, I considered his absenting himself as merely to avoid going to the watch house for the night.

**ANDREW HAMILTON** - I am a Sergeant of the 17th Regiment; I live near the house of the deceased; I remember speaking to her on Sunday the 17th November, about two o'clock; I saw the prisoner on the Thursday previously; he asked me if I had not been over to Mrs. Condron's; I said I had not; he then told me she had been robbed last night; I then went to my lodging, and pulled off my belts, and went into Mrs. Condron's house; she told me that a man and woman had broken into the house, but she did not know the man Brennand, the prisoner, and Evans, were present at the time they came to nail a window which had been broken into; the deceased said she knew the woman; she said in the presence of the prisoner and Evans she did not know the man she told me the same after they had gone away; if she had known him I would been the most likely person in the street for her to have told it to; Brennand and Evans went away together, they took no part in the conversation.

Cross-examined by Mr. Nichols - The distance between Mrs. Condron's house and the mill is 80 or 90 yards; if the mill had been going, I dont think a person near the mill could hear the cry of murder at Mrs. Condron's house.

**CHARLES LALLY** - I am acting corporal in the 17th Regiment; I recollect mounting duty on the main barrack on the 17th November; I went on at 11 eleven o'clock on that day, and remained on duty until eleven o'clock on the 18th (Monday;) I don't know where Mrs. Condron's house is; I know Mrs. Ellison's; I passed it on the morning of the 18th, about day break; the drums had not beat rivalie [reveille]; it was about half past four o'clock; I saw the prisoner standing exactly opposite the house where I afterwards understood the murder had been committed; Ellison's house is not exactly opposite that house; I saw him standing in his shirt leaning against a paling on the opposite side of the way, and as he was not smoking, or any thing it struck me as being rather curious; I thought he looked somewhat confused more so than when I had seen him in the Catholic Burying Ground a few days before; I don't know where Evans the human lives, but I know there is a tinman lives near them, as I once took a letter there to a dyer; the prisoner was standing on the inside of the paling; it is at some short distance from Ellison's house.

The case for the prosecution closed here.

Mr. Nichols begged leave to submit to the Court that there had not been a particle of evidence adduced touching the means by which the deceased had met her death, as laid down in the various counts in the indictment, and there was therefore no case to go to the Jury.

His Honor was of opinion that it was certainly unfortunate that the two medical gentlemen had not consulted together, in order to enable them to come to a definite conclusion as to the means by which the death of the unfortunate deceased had been effected; but he was of opinion that there was sufficient evidence, independently of that of the medical gentlemen, to send the case to the Jury. There was strong circumstantial testimony, the best testimony which can be probably relied on in cases of this nature, where the perpetrator naturally shuns throwing himself into the way of direct evidence of his guilt, he could not therefore take the case out of the hands of the Jury, to whom it is properly referable.

The prisoner being called on for his defence, protested his innocence of the charge on which he was arraigned, he declared he was in bed when the injuries were received by the deceased, and he had always acted more like a son to her than a murderer. Indeed he declared he had done more for her than he had for his own mother in Ireland.

His Honor addressed the Jury at some length, and patiently recapitulated the evidence, drawing their attention to the most important points for and against the prisoner. The case being submitted for their consideration. they retired about twenty minutes, and returned a verdict of not guilty, and the prisoner was discharged by proclamation.

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

SYDNEY HERALD, 10/02/1834
Supreme Court of New South Wales
Dowling J., 7 February 1834

**JAMES CAVENAGH** was indicted for the wilful murder of **ROBERT STEWARD**, at Bathurst, on the 30th of November last, by striking him on the head with a ``throw,'' (an instrument used in splitting shingles) and **BLETZER CHESTERFIELD**, and **CHARLES SERGEANT**, for being present aiding and abetting in the said murder, and **JAMES FARREL** as an accessory after the fact, he

well knowing them to have committed the murder, and harbouring and maintaining them after the same.

**PATRICK WALLACE** had run away from No. 11 iron gang, on the 28th November last, and arrived at Bathurst on the 30th, the day laid in the indictment; he went to the house of Mr. Hawkins, on the estate of Major General Stewart, where he met the prisoners Cavenagh, Chesterfield, and Sergeant, and Farrel came in during the evening: they had some rum together; Cavenagh, Chesterfield, and Sergeant in course of conversation said they intended to rob Mr. Blackett's store; they then blacked their faces, as did witness also, and went out together leaving Farrell in the house; instead of going to Blackett's store as at first intended, they went to the house of Robert Stewart; Cavenagh and Sergeant went up and knocked at the door, which was opened, and they both rushed into the house; two men immediately came running out, Cavenagh pursuing Robert Stewart, and striking him over the head with a throw; Stewart (who was seventy-four years old) begged for mercy, and witness cried out `don't murder the man;' witness relented and ran off to inform Lieut. **DARLEY**, of the mounted police, which he did, and described all the particulars to him; Lieut. Darley then went with witness towards Stewart's house, they saw at a distance a man coming with a bundle, and witness said `here they come with the swag'; the man turned off toward the bush; Lieut. Darley hailed, and desired him to stop, which he refused to do, dropped his bundle, and was fired at, but missed. On getting near the house of Mr. Hawkins, (to whom all the prisoner's were assigned convict servants) Charles Sergeant was seen naked, creeping along under the fence into a stable, and when subsequently found, had blood on his person, and had wrapped himself up in a blanket; he accounted for the blood by saying that he was shot at by a bushman, and next, that he had cut his finger in cutting some bark to get a light, this was at half-past two o'Clock in the morning; on going near the house of Robert Stewart, which was in the immediate neighbourhood, his body was seen with the head horribly disfigured, the brains scattered about, and one eye forced out, and fallen on the cheek; the body was still warm, and appeared to have been dragged some distance after the murder was committed; Lieut. Darley going then into the house, saw near the door, the body of John Waters, who had also been murdered, apparently outside the house, and afterwards dragged into it; Waters and Stewart had lived together. The prisoner Cavenagh, who was the man that dropped the bundle, when first seen, was captured about ten o'Clock of the same morning, by corporal Crane, of the 17th Regt., and when his clothes were examined, two spots of blood were found on his shirt, near the shoulder, which he said came from a bullock, his shirt sleeves were quite wet, which he said was occasioned by his stooping down to drink in a brook, when both his hands slipped into the water, in his pocket was found seventeen shillings and six-pence in silver coin, which had apparently been cleaned or washed; and on one of the pieces of money there were marks of blood. Chesterfield was afterwards found in bed with Farrel, who had harboured and concealed him at the house of Mr. Hawkins. On the clothes of all the prisoners blood was found except Farrell's.

**GEORGE BUSBY**, Esq., assistant surgeon to the establishment, at Bathurst, deposed to his having examined the body of Robert Stewart, on the 30th November, which was quite dead. There were a great many wounds on the head; he saw a `throw' produced at the Inquest with two or three grey hairs adhering to it, and some marks of blood on it; such an instrument would produce wounds similar to those he had seen on the head of the deceased.

The prisoners called several witnesses who were brought into Court heavily ironed, and when the Solicitor General objected to their being examined in that state, it was

found that their irons were rivetted on, and could not then be removed; the objection was therefore over-ruled. The object in calling these witnesses, was to throw discredit on the testimony of Wallace, the principal witness, but had no relation to the horrid case then before the Court.

His Honor then addressed the Jury, and said that although they were not much accustomed to the fatigue of Courts, and probably felt exhausted, he should read over the whole of the depositions, and remark on the leading features of the case. The principal witness, Patrick Wallace, was transported here, and had since been in trouble; but there was nothing in his testimony disproved by other evidence. All the circumstances connected with this horrid affair, concurred to corroborate his statement. Farrell was charged with aiding and abetting in this case; but the Jury would understand that the law made him a principal where there was a guilty knowledge of the facts. If many persons conspire to commit a robbery, and murder should ensue, which was not originally designed, all the parties to the robbery would be amenable to the law as principals, and would suffer death for the offence. His Honor recollected a case in illustration of the remark when he was practising as a Barrister in England, where he was engaged to defend the prisoners; six of whom were hanged under the circumstances described. The Jury in the awful and diabolical affair before them, would consider well all the evidence, and come to their decision accordingly.

The Jury retired for about half an hour, and on their return pronounced James Cavenagh, Charles Sergeant, and Bletzer Chesterfield, Guilty - and James Farrell, Guilty as accessory after the fact.

Farrell was remanded.

The Solicitor General prayed judgment of the Court.

His Honor putting on the black cap, proceeded to pass sentence of death on the prisoners. After an anxious and laborious investigation, the offended laws of the country had found them guilty of foul and deliberate murder, marked by greater atrocity then he ever recollected. When the poor old man Stewart looked up, and pitifully begged for mercy, their wicked hearts did not relent, but went on in their horrid work of destruction. Their disgraceful end would be marked by public execution. They had but a few short hours to live, and he beseeched them to use every moment in imploring that mercy from an offended God, which they had so recently denied to their victims. The sentence of the Court was, that they should be taken back to the place from whence they came, and on Monday morning next, be hanged at the place of execution by the neck, till they are dead; and then their bodies be given over the public surgeons for dissection and anatomization, and the Lord have mercy on their souls!

This trial occupied great time, and did not close till half-past ten o'clock at night. [*]

See also Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3275, vol. 92, p. 51; Sydney Gazette, 11 February 1834. See also Australian, 10 February 1834, stating that the prisoners were defended by G.R. Nichols.

[*] The Sydney Gazette, 11 February 1834, reported that the court room ``was crowded to excess during the trial of these wretched men, who betrayed not the slightest symptoms of emotion, neither when the verdict was announced, nor the awful sentence delivered. A feeling of horror seemed to pervade the minds of every one present, during the details of the inhuman deed."

This may have been the man whom Roger Therry wrote about. A man named Cavenagh had often been flogged. When the judge asked him whether there was any reason why death should not be passed on him, said ``if I have been bad, your honour, what has been done to

make me better?" (R Therry, Reminiscences of Thirty Years' Residence in New South Wales and Victoria, 1863, reprint Sydney University Press, Sydney, 1974, 43.)
Cavenagh and Sergeant were hanged on 10 February 1834: Australian, 10 February 1834; Sydney Gazette, 11 February 1834. Chesterfield was respited due to new information from the scene of the crime. He was hanged on 13 February 1834: Sydney Gazette, 15 February 1834; Australian, 14 February 1834.
James Farrell was convicted as an accessory after the fact of this murder, and sentenced to transportation for life: Australian, 17 February 1834; Sydney Gazette, 18 February 1834.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 11/02/1834
Supreme Court of New South Wales
Dowling J., 7 February 1834
(Before Mr. Justice Dowling, and a Jury of Civil Inhabitants.)
**NICHOLAS CURRAN** was indicated for the wilful murder of **FRANCES PERRING**, at Goulburn Plains, by striking her on the head with both his hands, and throwing her violently on the ground, on the 11th November last, from the effects of which she died on the 13th following; and **THOMAS CURRAN** and **MARY CURRAN** were charged as principals in the second degree, for aiding, abetting, and assisting the first named prisoner in the commission of the said murder.

The second count charged the offence as having been committed with a piece of wood, of no value.

The third and fourth counts differed only from the first and second, in charging Thomas Curran as principal, and Nicholas Curran and Mary Curran as abettors in the said crime.

The prisoner pleaded not guilty.

The Solicitor General conducted the case for the prosecution; Messrs. Rowe and Nichols appeared for the defence.

The deceased met her death under the following circumstances: - The female prisoner is the wife of Nicholas Curron; he is the brother of the other male prisoner; and all are neighbours of John Pering, the husband of the deceased, who lives at Goulburn Plains. On the day laid in the indictment, the prisoners brought a gallon of rum to Perring's house, where two or three other persons were assembled; drinking then commenced until all the parties became more or less intoxicated, and a general fight was the result. John Perring was so much beaten by the two male prisoners, that he was compelled to leave the house, in order to avoid worse consequences, and during his temporary absence the deceased received her death blow. None of the witnesses produced on the trial saw the fatal stroke given; but John Smith, who appeared to have been the most sober person of the party, deposed, that when he last saw the deceased, before she received the injury, she was standing out side the door of the house, where the two male prisoners were fighting with the legs of a stool which they had broken up for the purpose. This witness had occasion to retire to the back part of the premises for a few minutes, and at his return found the two male prisoners still fighting with the stool legs inside the house, the deceased lying on the floor, and the female prisoner standing by, and looking on. The deceased was raised up by Smith, but she was insensible, and continued so until her death, which occurred two days afterwards. Mr. **WILLIAM JOHN KERR**, a Member of the Dublin College of Surgeons, examined the body of the deceased some hours after her death: the external part of the back of the head was very severely contused; on removing the skull-cap, a large quantity of

extravasated blood was found on the surface of the brain, the membraneous covering of which was excessively vascular. The principal extravasation of blood was under the left temporal bone, upon which no external injury appeared, but that, the medical gentleman observed, frequently happened in cases of contusion from blows and violent falls. The deceased seemed a stout low-sized woman, but exhibited no predisposition to apoplexy, of which there was no appearance whatever. The injuries on her head were quite sufficient to have caused death, and might have been occasioned by a blunt instrument, such as a stick. They might have been caused by frequent falls, and the head coming in contact with some hard substance.

The learned Judge, in his charge to the Jury, observed that, in the absence of all positive evidence as to the manner in which, and from whom the deceased met her death, the presumption was as strong as otherwise, that it was occasioned accidentally while the two brothers were fighting with sticks: perhaps the deceased went between them to prevent worse consequences ensuing, and met the fatal blow in that manner: but the fact of the male prisoners themselves fighting, seemed to rebut the allegation of intended malice to the deceased, and rather favoured the idea of the blow having been accidental. - His Honor was about to go through the whole of the evidence, when the Jury expressed themselves satisfied, and without hesitation acquitted the prisoners. The prisoners were discharged by proclamation.

See also Sydney Herald, 10 February 1834; Australian, 10 February 1834; Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3275, vol. 92, p. 26.

SYDNEY GAZETTE, 11/02/1834
Supreme Court of New South Wales
Dowling J., 7 February 1834
(Before Mr. Justice Dowling, and a Jury of Civil Inhabitants.)

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absence the deceased received her death blow. None of the witnesses produced on the trial saw the fatal stroke given; but John Smith, who appeared to have been the most sober person of the party, deposed, that when he last saw the deceased, before she received the injury, she was standing out side the door of the house, where the two male prisoners were fighting with the legs of a stool which they had broken up for the purpose. This witness had occasion to retire to the back part of the premises for a few minutes, and at his return found the two male prisoners still fighting with the stool legs inside the house, the deceased lying on the floor, and the female prisoner standing by, and looking on. The deceased was raised up by Smith, but she was insensible, and continued so until her death, which occurred two days afterwards. Mr. **WILLIAM JOHN KERR**, a Member of the Dublin College of Surgeons, examined the body of the deceased some hours after her death: the external part of the back of the head was very severely contused; on removing the skull-cap, a large quantity of extravasated blood was found on the surface of the brain, the membraneous covering of which was excessively vascular. The principal extravasation of blood was under the left temporal bone, upon which no external injury appeared, but that, the medical gentleman observed, frequently happened in cases of contusion from blows and violent falls. The deceased seemed a stout low-sized woman, but exhibited no predisposition to apoplexy, of which there was no appearance whatever. The injuries on her head were quite sufficient to have caused death, and might have been occasioned by a blunt instrument, such as a stick. They might have been caused by frequent falls, and the head coming in contact with some hard substance.

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See also Sydney Herald, 10 February 1834; Australian, 10 February 1834; Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3275, vol. 92, p. 26.

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

SYDNEY HERALD, 20/02/1834
Supreme Court of New South Wales
Forbes C.J., 18 February 1834

**WILLIAM ELLIOT** was charged on an indictment of three counts - first, for shooting with an intent to murder; second count, to do some bodily harm to Corporal **JAMES McNALLY**, of the Mounted Police, on the 10th day of December last; and the third count charged him with making resistance against his legal apprehension.

James McNally deposed that on the day above named, he was employed to carry despatches from Long Bottom to Parramatta; on his return he heard a rush amongst some Bush, on the road side, near the corner turning to the Concord road; he leaped the fence, and saw a man making off with a musket in his hand; he called out to him to stop, but without effect; he fired, and the man fell over a tree; prisoner at the bar

then jumped up and fired at witness, and wounded him severely in the neck; he was subsequently unhorsed, and a dreadful scuffle ensued, during which one of his pistols was broken, and he received many blows from the parties, whom he states to have been three in number, and all armed with muskets; the villians [sic] managed to get possession of his ammunition, in consequence of the brass on the shoulder giving way, the pouch fell to the ground; witness then retreated to his horse, which during the affray, had leaped the fence, and was standing in the road; on going away, prisoner presented his piece, which he had re-loaded, and making use of the most deadly threats to shoot him, snapped it two or three times; witness returned to Long Bottom, and from thence to Sydney, and was confined in the Hospital for eleven days, in consequence of his wound.

Two witnesses were called by the names of **BATES** and **MACKINTOSH**, who captured the prisoner in a hut; and they spoke of the determined resistance he made. A pistol was found on him, which McNally swore was his, as it was marked 64, the number of his horse appointment.

The evidence adduced for the prosecution, was given in a clear and positive manner.

The learned Judge then summed up, explaining that the Colonial Act, 11th Geo. 4, No. 20, authorised the apprehension of all suspicious persons found with arms on their hands. The prisoner at the bar was charged under the Statute with a capital offence. It was for them to consider whether that charge had been substantiated by the evidence by witnesses for the prosecution.[2]

The Jury then retired for a short time, and returned a verdict of Guilty.

The Judge immediately passed sentence of death on the prisoner, and advised him to make his peace with an offended God, by contrition and sincere repentance, as there were no hopes of mercy for him in this world.[3]

A more hardened wretch, though only twenty one years of age, was never put to the bar. On leaving the dock, he desired the constable to fetch him some peaches. This is the same man who was convicted yesterday, with Smith, of highway robbery.[4]

[1] See also Sydney Gazette, 20 February 1834; Australian, 21 February 1834. For another apparent prosecution under the Bushranging Act, see R. v. Maroon and Inglis, Sydney Gazette, 12 May 1835.

[2] This was apparently a reference to the Bushranging Act (1830) 11 Geo. 4 No. 10. Section 3 of that Act provided that when a person was found on the roads or elsewhere with firearms affording suspicion of intention of robbery, that person could be apprehended and taken before a magistrate. The onus was on the arrested person to disprove the intention. The Act was in force only two years, but was regularly re-enacted. On the 1832 re-enactment, see R. v. Ryan, Troy and others, 1832. The Australian, 9 March 1832, opposed that renewal.

The Act was renewed twice in 1834 (see 5 Wm 4 No. 9), but Burton J. stated that the Act was repugnant to the laws of England. His protest and the reply of Forbes C.J. are reproduced below.

The Australian, 3 June 1834 recorded Governor Bourke's argument in 1834 for the second renewal:

``I have lately had occasion to call your attention to the Colonial Act of the Governor and Council (11 Geo. IV. No. 10), for suppressing Robbery and Housebreaking. The Council then considered the necessity for renewing the Act to be clearly established by the Reports from the Magistracy laid upon your Table, but extended the duration to the 31st August only, with the view in the mean time of maturely weighing whether any, and what alterations might be effected in its enactments, to remove as far as should be found practicable, without defeating the purpose of the law, the objection made to it by the Judges on account of its repugnancy to the law of England. A Bill now to be laid before you modifying some of the provisions of the 11 Geo. IV. No. 10, and asserting the necessity for its enactment in terms more suited to the present comparitively [sic] tranquil state of the Colony than those which are found in the preamble of the Act now in force. Whilst it must be admitted however, that the necessity of

the case can alone justify the Council in passing a law at variance with the law of England, it should be borne in mind that the state of society in this Colony, so widely different from that of the Mother Country, does not permit a perfect similarity in its laws to be at all times preserved. If it be alleged that the provisions of the Colonial Act against Bushranging are altogether dissimilar to the law of England, it must be also allowed that there have been periods at which by the repeal of the Habeas Corpus Act and by other restrictive measures, the state of the law in England has varied essentially from its ordinary free character. It cannot then be said to be repugnant to the English Constitution to enact laws restricting the usual liberty of the subject, when the public safety demands the innovation. In the present mixed state of the population of New South Wales, it is required to give ample protection to His Majesty's free subjects, although in order to afford this protection it is at the same time necessary to subject them to a restraint unknown to the ordinary administration of English law. This necessity is now declared to exist, and will exist in some degree or other as long as the population of the Colony continues to be of this mixed description. The Bill now to be presented varies little from that which it is intended to replace. I recommend its being sent to a sub-committee for report."

The Bill was sent to a subcommittee of the Legislative Council, which unanimously recommended its renewal after considering a report from the magistrates. See Bourke to Stanley, 15 September 1834, Historical Records of Australia, Series 1, Vol. 17, pp 520-521.

The Australian continued its opposition to the legislation: Australian, 6 June 1834, and on the legislative history, see Australian 11 April, 17 June and 4 and 8 July 1834. On the background to the bushranging legislation, see C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, ch. 39.

[3] According to the Sydney Gazette, 20 February 1834, Forbes C.J. stated: ``Prisoner at the bar - you have been convicted this day of a determined attempt to murder, by shooting at a policeman, who was endeavouring, in the exercise of his duty, to apprehend you. You were also convicted yesterday before me, of a highway robbery, committed under violent and daring circumstances. This is therefore the second capital offence of which you have been convicted within these two days. Young as you appear to be, it is necessary for the public welfare, that your wicked career should be stopped, and I have therefore the painful duty to discharge, of pronouncing upon you, the sentence of an ignominious death. It becomes my task also, to warn you, that the determined nature of your crimes, does not warrant me in holding out to you the most remote prospect of clemency from the government. Let me entreat you therefore, not to employ the few remaining days of your existence, in careless, and hardened indifference of your approaching fate, but earnestly to seek the welfare of your immortal soul, by due penitence to that offended God, before whom you must shortly appear. His Honor then passed sentence of death upon the prisoner in the usual manner."

The Australian, 21 February 1834 added a further detail: ``While prisoner was being removed from the dock, he with utmost nonchalance handed sixpence to a constable, and desired him to purchase 6d. of peaches, and to let them be good!"

[4] See R. v. Elliot and Smith, 1834. Elliot was hanged on 6 March 1834: Sydney Gazette, 6 and 8 March 1834; Australian, 7 March 1834. He tried to appear ``game" and declared that the policeman had shot at him first.

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

SYDNEY HERALD, 24/02/1834
Supreme Court of New South Wales
Burton J., 21 February 1834
Friday. - Before His Honor Judge Burton, and a Military Jury.

**JAMES SHIELD, WILLIAM FITZGERALD, HENRY O'BRIEN, STEPHEN FITZGERALD, EDWARD LYNCH, and EDWARD CARROLL**, were indicted for the wilful murder of **JOHN HUGHES**, on the 25th day of December, 1833, with a piece of wood of no value, inflicting sundry wounds and bruises, of which he died. The first count charged Shield as principal, and the others accessaries; second count

charged Stephen Fitzgerald as principal, and the others accessaries; and the third count charged Edward Carroll as principal, and the others accessaries.

Messrs. Allen and Nichols, for the prosecution - and Messrs. Therry and Williams for the prisoners.

**CHARLES LEONARD** deposed that he was in company with Hughes on Christmas day, and had been drinking with him the day before; Hughes did not return to his master's, and witness went to Blackwattle Swamp, to persuade him to come home, but he refused to do so until the evening, on the plea of being dirty; they then went to the Sportsman's Arms, where they met with **ENNIS**, or, as he is called ``**Billy the Bull**;'' they sat there some time, when word was brought that a man by the name of Walker, an acquaintance of witness, was killed in a row at the Spinning Wheel; they all three immediately went towards the spot to get him away, the witness stopping about five minutes at the Lame Dog, to strip and leave his clothes; the first thing he saw on arriving at the Spinning Wheel, was Hughes fall, but he could not see from what cause, as there was no person near enough to strike him with a stick; witness was struck down himself by some persons, and was insensible for some time; he was taken to the Hospital to get his head dressed, and on his return, he saw Hughes lying dead, under the verandah of Mr. Flynn's house; he did not see any stick in Hughes' hand when he went into the Lame Dog, but he had plenty of time to procure one whilst witness was stripping.

**SILAS PEARSON** deposed that he lives opposite the Cheshire Cheese, on the Parramatta road; he was returning home from Sydney on Christmas evening, and when he got near the Spinning Wheel, about eight o'clock, he saw a man standing opposite the house with a piece of railing over his shoulder; he saws several persons standing near the door, and some in a paddock; he heard James Shield, the man he first saw, or, as he is called ``Tom the Piper,'' challenge the people in the paddock to come out and fight, and he would make miserable men of them; one of the men then came out, and told the prisoner he would fight him if he would put down the rail; several other persons then joined them, and the man fell from the blow inflicted on him, and was carried away; Shields afterward struck down another man, and called out to Carroll to come and finish him; Carroll struck the man several severe blows on the head and breast; the prisoner then pursued another man, and struck him down, and beat him unmercifully; witness went towards the last man that was struck down, and found from the gurgling noise that was in his throat, that he was alive; he asked the people why they did not lift the man up, or he would be choked with his own blood; one of the persons present, said, ``that if he did not make off, they would choke him also,'' witness immediately rode off to Sydney, and told Mr. Jilks at the Police-office, what had occurred; constables were sent, and Shield and Carroll were secured; the only two of the prisoners at the bar, witness could identify as being present.

**JOHN SHEPHERD** deposed that he was at the Spinning Wheel on the evening of the row, in company with a man by the name of Cochrane, and saw Hughes lying dead; Cochrane also, was struck down, receiving some severe blows from Shield and another.

**ZACHARIAH PAMMENT** remembers seeing Stephen Fitzgerald at the Spinning Wheel, and saw him throwing brick-bats. This evidence corroborated what was before stated.

**JOHN COCHRANE** stated the same.

**CATHARINE KEITH** examined - That she was near the Spinning Wheel on Christmas Day; saw Lynch, one of the prisoners at the bar, strike a man by the name of Bennett several times, and also received a blow herself on interfering.

James Barnes was examined, but his evidence was not exactly clear.

The Judge here ordered that William Fitzgerald and Henry O'Brien should be discharged, as there was no proof against them.

Dr. **BLAND** examined - Deposed that he was called in to see the body of Hughes, and found a wound in the forehead, and a contusion over the left ear; considers that he died of sanguineous apoplexy, which might be produced by a violent blow on the head, when deceased was in an excited state.

Several witnesses were called on part of prisoners, but their evidence was not strong enough to shake the testimony of witnesses for the Crown.

The learned Judge then summoned up, and stated to the Jury that there were two material points for their consideration. The first was, whether John Hughes met his death in the way and manner laid in the information; and secondly, whether James Shield gave the blow, the others aiding and abetting. The act of one in this case is the act of all, inasmuch as they were all present at the row, and have been identified by several witnesses, as using great violence towards several persons. If the Jury considered that it was a drunken affray, the prisoners must be found guilty of manslaughter; but if they thought that the affray was not a drunken row; but arising from malice aforethought, then their verdict must be, guilty of murder.

The Jury retired for about 10 minutes, and returned a verdict. Guilty of manslaughter.

The Judge then addressed the prisoners, and told them that he had come to the conclusion, that he ought to pass sentence immediately, on seeing the immense concourse of people in the Court, who had been drawn together by the interest which this trial had excited. They had been convicted of a crime very near murder. The sentence of the Court, therefore, was, that they should be transported for the term of their natural lives. [*]

See also Sydney Gazette, 25 February 1834. The Australian, 24 February 1834, reproduced the Herald's report in preference to that of its own reporter. The trial judge's notes are in Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2413, vol. 10, p. 105. Some of the defendants were convicts, and some free.

[*] For a comment on the sentence, see Australian, 24 February 1834.

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

SYDNEY GAZETTE, 25/02/1834
Supreme Court of New South Wales
Burton J., 22 February 1834
(Before Mr. Justice Burton, and a Jury of Military Officers,)

**SARAH McGREGOR** and **MARY MALONEY** were indicted for the wilful murder of **CHARLES WALDRON**, Esq. at Springhill, Illawarra, by violently throwing him on the ground, and beating him on the head and face with their clenched fists on the 14th January last, from the effects of which he died on the 28th following. A second count charged Sarah McGregor with inflicting the injuries, and Mary Maloney with being present, aiding and abetting.

The Solicitor General stated the case. Mr. Rowe defended the prisoners.

Mrs. **JEMIMA WALDRON** being sworn, said the deceased Captain Waldron, was my husband; on the 14th January last, I resided at Springhill, Illawarra; my family then consisted of my husband, myself, and twelve children, nine of whom were living with us; the prisoners were our assigned servants, and had been with us only eight days; my husband had lain rather later than usual on that morning, but he went out

about half-past 7 o'clock, to give some directions to the men on the farm; he returned in about half an hour; it was the first morning I had ventured from my bed since my last confinement, and my husband felt rejoiced at seeing me rejoin the family breakfast table; shortly after coming out of my dressing room, I observed that the verandah had not been washed; my husband was then sitting in it, smoking his pipe, which he had been recommended to do by his medical adviser; the two prisoners were to have performed this duty alternately, in order that it might not fall too heavily on one; it was the duty of Sarah McGregor to wash the verandah on that morning; she was putting wood on the parlour fire; I said to her, Sarah, the verandah has not been washed this morning; she answered, it has; Mary Maloney came into the parlour at the moment, and I told her also that the verandah had not been washed; Sarah observed, yes, Mary has done it; I said to Mary Maloney, I do not call you to account for not doing it, as it is not your duty, but Sarah's; my husband overhearing what passed, called out, Jemima, don't let them persuade you it has been done, as I will take my oath water has not been on it; he then called Mary Maloney into the verandah, and said, look at the ashes which I knocked out of my pipe last night, and the carpet upon which I placed my feet; she replied, those are not the ashes of your pipe but of mine, as I was washing the place; she then commenced the most horrid imprecations, and calling Capt. W. a b--old soldier, said, ``may h--and d--b--you all in the house; my husband then said, this is not language for me or my family to hear, and he followed her out towards the kitchen, which is detached from the back part of the house, by a small yard between them; by this time, Sarah McGregor had got up from the parlour fire, and I smelt spirits upon her; I asked her respecting it, but she denied having drank any, and went towards the kitchen where Mary Maloney was making a great noise; I followed to the back hall door, and saw my husband leaning with his right arm against the kitchen door, and holding his pipe in his left hand; he said, Mary you shall go to the Beach, meaning the Police Office as it is usually called; her language was at this time a continuation of the most horrid cursing; Sarah said, if Mary goes I will go too; we came together, and we will go together; Cat. W. replied, Sarah you have done nothing to induce me to send you, and you shall not go; she said, I will, and you shall see that I will give you reason to send me; she then rushed at my husband, and struck him with great violence on the right side of the neck; he fell immediately on his left side; there was a descent of about 14 inches, where he was standing, and he fell with great force on some rough stones, with which the yard is paved; Mary Maloney then followed him up, and struck him repeatedly with her clenched fists, while he was lying on the ground; the hat which he had on was much bruised in the fall; they both repeatedly struck him in the face and neck, with all the force they could command; he could not extricate himself, and I repeatedly called out to the men about the place to come and help him, but none came; two of our men, named Rawlings and Logan were unloading wood from a dray at the back of the house; from the noise of the women, and the cries of my children who flocked around me, these men could not perhaps have herd the call of my husband, but they must have seen him lying on the ground, and they did not come to save him from the fury of the women; my son Charles, who is 12 years of age, came from an adjoining servant's hut, to his father's relief; I was making a feeble effort to go towards him, but by this time he had risen from the ground; two more of our men who were in a work shop under the same roof as the kitchen, and who must also have witnessed what occurred, came at last to my repeated calls for help, and one of them, a carpenter, laid hold of Mary Maloney; my husband then came towards the hall door; his arms fell, as he attempted to raise them; I said my dear, you are hurt; he looked at me with a fixed stern countenance, and

feebly answered, oh! no; I then said to Mary Maloney, you vile and wretched woman, what have you done to my husband; she replied, you call me a wretch, do you know what a wretch is? and immediately turning round, she exposed her person to my view, that of my husband, our family, and servants; I said my dear, I shall never be able to look up again in presence of the men on the farm; my husband said come in, and shut the hall door; he placed our men servants round the house, to prevent the prisoners offering us farther violence; the prisoners were in a most ungovernable rage, and made use of the most dreadful language, such as I had never before heard; they both wished short life to the b--old soldier; they also called my husband a b--old b--; the men might have prevented the blows he received on the ground, if they had jumped from the dray; I perceived an instant change in my husbands eyes; I saw no marks of violence on the head, but I knew at once that he was seriously injured; the prisoners called out, we will have our clothes, and Sarah McGregor made her way to my daughter's bedroom window, in which she broke three panes of glass; my daughter jumped from her bed, and begged for her life, and I , in order to pacify their rage ordered their clothes to be given them; my husband wrote a few hurried lines to Captain **ALLMAN**, the Police Magistrate of the district, who came remarkably hasty; he also dispatched a short note to a neighbour named **SHOUBERT**, who came to our assistance; my husband said, ``is the tea made? give me a cup, for my tongue is dry;" I was handing him the cup and saucer, when he said, ``Jemima, my head is falling," and I immediately perceived his head to be violently shaking; the right side of his mouth was contracted towards the eye; he also said, ``look at my hand - I can't touch the tea, and I then saw that the whole right side was paralysed; this sensation came on about 25 minutes after the assault took place, and immediately after the messenger was dispatched for Captain Allman; his voice was imperfect; the prisoners threatened to run the b--old soldier through with a carving knife, and I therefore sent one of the men into the kitchen to secure the knives, which was done; my husband by this time could not move; he did not complain; he seemed to have no inclination to speak; I spoke to him repeatedly, bur [sic] he did not answer me; when Captain Allman, came the tears came in my husband's left eye, but none in the other; the entire right side was dead; he faintly articulated; ``my dear friend, I have not a hand to give you," when he feebly raised his left hand; Captain Allman went to secure the prisoners; after they had gone I put my husband to bed; Captain Allman advised a medical man to be sent for, and Dr. **MONTAGUE GROVER** arrived about noon; my husband had not been as well as usual for some time, but he was not seriously indisposed; Dr. Imlay had before recommended smoking; he was not in an infirm state of health; he was 53 years of age; he had never before been affected with paralysis; he was an active and a healthy man - none in the colony more abstemious, and not given to sudden bursts of passion; he was the best of husbands, fathers, and masters; he was not in a great passion with Mary Malony, but on the contrary was very calm; I saw no blood, nor any external injury on his head; he continued in a state of continual dosing; there was no noise in his throat, but a redness and swelling on the left side of his face and head; he continued in that state until the 28th of the month, when he expired a little after 4 o'clock in the afternoon; he never left his bed from the 14th, and his articulation was imperfect, and only occasional ever after; he seemed only once during his illness perfectly to recognise me, and he then spoke of his children, for whom he hoped the Lord would spare him for a few years; he knew his case required great attention, and great assistance, and he therefore sent for Dr. **IMLAY**, who arrived eight days fatal occurrence; he seemed to know Dr. Imlay whose name he pronounced imperfectly.

Cross-examined by Mr. Rowe - The kitchen is on the left side of the back hall door; it is about 24 yards from the verandah to the kitchen, the door and window of which were wide open, and fastened back; my husband was standing at the door with his pipe in his left hand; James King was in the work shop which is only temporarily separated from the kitchen; he is a carpenter, and must have heard and saw all that passed, but he did not give any assistance; there was nothing to prevent my both hearing and seeing all that happened; I did not see him raise his clenched fist; if he had done so in the position in which he was standing, I must have seen it; he never entered the kitchen door, nor did he make use of any ill or provoking language; from the very great rage the prisoners were in, I judge they must have been drinking spirits; I never quitted my husband's side; the fall was on his left; and the paralysis was on the right side; the blows were given with the greatest possible violence; he was lying at least ten minutes on the ground; there was a bruise on his right thigh extending towards the hip; the prisoners had no shoes on at the time; I never knew my husband to lift his hand to a servant since I married him; he did not attempt to strike Sarah McGregor.

(Mrs. Waldron gave her tedious testimony in an impressive and distinct manner, and her coming into Court in a deep mourning dress, with her infant in her arms, tended to increase that sympathetic feeling, which the melancholy detail seemed universally to excite.)

The testimony of Mrs. Waldron was mainly corroborated by that of her son; with this trifling exception, that his father betrayed slight symptoms of anger and excitement, two or three days prior to his decease, at hearing mention of his son being about to be sent on horseback for some meat. Opposed to their joint evidence, two witnesses who were produced for the prosecution, swore positively that Captain Waldron repeatedly called the two prisoners d--b--, and threatened, and even shook his fist at them; these men, however, (**WILLIAM WADE**, and **JAMES KING)** were the two who were at work in the carpenters'; shop, while the assault was being carried on, and who refused to come to the assistance of their master.

Francis Allman, Esq. being sworn, said I am Police Magistrate at Illawarra; I was sent for hastily to Captain Waldron's residence on the morning of the 14th January; I arrived there about half-past eight o'clock; Captain Waldron and I were brother Magistrates; I found him lying on a sopha [sic] in his parlour, in a very agitated state; he had lost the entire use of his his [sic] right side; we were old brother officers, and he shed tears when he saw me; I advised a Medical gentleman to be sent for; the last time I heard him speak, was I think, the day before his death; he faintly articulated ``Allman,'' on my presence being announced to him; I took the affidavit of service of the subpoena in this case, on Dr. Montagu Grover; I do not know the reason of non-attendance; I believe his wife is considered in a dying state.

[The witness Grover was three times called on his subpoena, and not answering, an attachment was granted against him.]

This closed the case for the prosecution.

On being called on for their defence, the prisoner McGregor handed in a written statement, which was read by the officer of the Court. It was to the effect that reports of a most injurious tendency, had been industrously circulated to their prejudice, respecting the injuries they had inflicted on their deceased master, but they entreated the gentlemen of the jury to dismiss this from their minds, and dispassionately to weigh their case, which they reposed with confidence in their honour and integrity.

Francies Allman, Esq. being recalled by Mr. Rowe, said I saw Captain Waldron frequently after his illness; almost every day during it, and sometimes twice a-day; he

never spoke to me after the first day, except on the occasion I have before mentioned; from the seventh day of his illness, I did not entertain the slightest hope of his recovery; the deceased was a very thin spare man; I am of opinion he could be provoked to sudden and violent bursts of passion; he was the very contrary of an intemperate man in his living; he was a most humane good man; there were no marks of violence whatever on the head; Dr. Grover attended the deceased on the first day of his illness.

Mrs. Waldron recalled by the Court - I did not leave my husband from the time I first say him on the ground, until I got him into the house; he never after walked either in the yard, or the garden; what the witnesses Wade and King have sworn in this respect is absolutely false.

This concluded the prisoner's defence.

Mr. Justice Burton proceeded to charge the jury. His Honor stated, that he lamented there was not the evidence before the Court, of the medical gentleman who attended the deceased in his illness. The law officers of the Crown however, were not to blame for this circumstance; as they had done their utmost to procure his attendance. It was usual, in cases of murder to have the evidence of a medical man, but he did not apprehend that it was necessary. He would however read over his notes of the evidence, and in the mean time send for a surgeon whose opinion he would recommend the jury to hear, before they arrived at a conclusion in the case. With respect to the facts of the case, as they bore on the law of murder, he would inform the jury, that if the death of a human being was occasioned by violence inflicted from any unreasonable revenge of an expressed, or implied provocation, the act amounted to the highest degree of culpable homicide. There was a case on record in a book with which every member of the legal profession was conversant, of a boy having been taken by the owner of a field, in the act of stealing wood from it, who inflicted the severe punishment of tying the lad to the tail of a cart, and dragging him over the field. Death was the consequence that ensued, and the law judging the correction used, as an unreasonable mode of revenge, the offender was held to be guilty of murder, and he was executed. His Honor mentioned this fact, to direct the jury, should they arrive at the conclusion that a case of provocation had been established.
The learned Judge then went through the whole of the evidence, commenting upon such parts of it, as had a direct bearing on the case.

It being intimated that Dr. **HOSKING** was in attendance, Mr. Justice Burton stated to that gentleman the particulars on which the Court required his professional opinion, but the jury interrupted His Honor, and hinted that they could decide without the evidence of the medical gentleman.

Mr. Justice Burton - I take it upon myself to recommend the jury to receive the medical opinion of the person who has been provided for that purpose. His Honor then again read over his notes of the evidence of the symptoms which appeared in the deceased's case.

Mr. **PETER HOSKING**, being sworn, said - I am of opinion that the dryness of the deceased's tongue merely indicated fever in the system, without having any reference to the paralytic affection under which he was labouring; paralysis might have been induced by anger, or by other cause of mental excitement; I collect nothing extraordinary from the vomiting of the deceased, which follows in cases of paralysis arising either from external injury affecting the brain, or by the natural rupture of a vessel, with effusion of blood on the surface of the brain; a blow must be sufficiently severe to rupture a blood vessel in or upon the brain to cause paralysis; paralysis arises from compression, not from concussion of the brain; I never knew, nor heard of

a case of paralysis induced from concussion of the brain; compression may arise from fracture of the skull, or from the natural rupture of a blood vessel on the brain; paralysis cannot occur in my opinion, except in cases where the brain is materially injured; I cannot conceive that paralysis could arise from a blow, of which there was not considerable marks of external violence; I do not conceive that paralysis could be occasioned from a blow, which did not manifest itself, until 25 minutes after the injury had been received.

Cross-examined by Mr. Rowe - I do not conceive that a person could be cool, and collected for 25 minutes after the infliction of a blow sufficient to cause paralysis; a person so situated, must have suffered considerable external injury; cases of this nature require the patient to be kept with the utmost care and quietness; disturbance might increase the symptoms; it might induce a greater effusion of blood from the ruptured vessel; anger or excitement after paralysis might aggravate the symptoms, and produce fatal consequences.

Mr. Justice Burton suggested to Mr. Rowe that there was no necessity to protract the present investigation, enough had perhaps been proved for the object. His Honor then left the case for the consideration of the jury, directing them not to decide hastily, but to weight the case with deliberation.

The jury retired for about a quarter of an hour, and returned with a verdict of Guilty of Murder, but recommended the prisoners to mercy, on the ground, that when they committed the offence, the fatal effects were not contemplated. [*]

The learned Judge told the jury, that if their opinion was formed that the death had ensued from the unlawful and unprovoked violence of the prisoners towards their master, he was of opinion that the crime amounted to the legal definition of murder. But he would advise them to reconsider their verdict, and say whether their recommendation coupled with his explanation would reduce the offence to the milder one of manslaughter.

The jury persisted in their verdict, which was recorded.

The Solicitor General, having prayed the judgment of the Court.

Mr. Justice Burton passed sentence of death upon the prisoners, awarding public execution on Monday morning next, and their bodies to be delivered to the surgeons for dissection.

On the sentence being pronounced, the prisoner Maloney loudly denied all intention to murder the deceased, and put it to the Judge and Jury, whether two unarmed females could have foreseen the awful consequences of their attack. The prisoner McGregor dissolved in tears, and pleaded pregnancy. They were then removed from the bar.

His Honor ordered William Wade and James King, to stand committed to take their trials for wilful and and [sic] corrupt perjury.

The trial excited a lively interest, from the circumstance of the accused, being young women of prepossessing appearances, one of them of such mildness of countenance, as to render a conclusion of her disposition to commit so horrid a crime quite irreconcileable [sic]. The Court was crowded to excess, and the adjournment did not take place until 8 o'clock.

See also Sydney Herald, 24 February 1834; Australian, 24 February 1834. The judge's trial notes are in Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2413, vol. 10, p. 145.

[*] The Australian, 24 February 1834, said that the jury returned a verdict of guilty with a recommendation of mercy. After reporting that the foreman told Burton J. that the reason was that the fatal result was not contemplated, the Australian stated: ``Judge Burton wished to put

the Jury clear upon one point, if they considered the blows were given without provocation, and that they caused death it was murder as the law presumed the animus in the act; if they considered the blows had been given and were not more than any provocation that might have been received, then it would only amount to manslaughter; but if they were of opinion the blows had not been given, or if given, were not the cause of the death in that case they must acquit the prisoners." The jury then reconsidered their verdict and pronounced both prisoners guilty.

Attached to the judge's trial notes (Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2413, vol. 10, at p. 145) is the following letter addressed to ``My Dear Judge'':

``You will pardon me for enclosing to you a Petition which I received late last night from the Jury of yesterday - the Medical Man being mentioned in it I feel should not be discharging a duty were I not to observe that I am credibly informed the whole of his Deposition went to shew that the Death of Capt: Waldron was occasioned by, - not the act of the Prisoners in his case but - the bursting of a blood vessel in the head subsequently.

``Shall I leave the Petition in your kind care, or should I cause it to be presented? In adding that you may command me to wait upon you at any moment if necessary, - which I shall consider a Pleasure, - Believe me in the Honor I feel in subscribing myself My Dear Sir, yours very sincerely and obediently,

``Thos. D. Rowe''

The Australian of 24 February 1834 thought that the verdict was wrong, and that this was manslaughter at most.

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

SYDNEY GAZETTE, 25/02/1834

Burton J., 24 February 1834

MONDAY, FEBRUARY 23th,

[*] As it often did, the Gazette had the wrong date: the 23rd of February 1834 was a Sunday.

About 12 o'clock, Mr. Justice Burton took his seat on the Bench, and Sarah McGregor being placed at the bar, His Honor observed, that the prisoner having pleaded pregnancy in rescue of execution, sentence of which was pronounced against her on Saturday, a jury of matrons had been summoned; and directed that they should be sworn forthwith. Mrs. Curtis (forewoman), Mrs. Leburne, Mrs. M. Byrne. Mrs. S. Byrne, Mrs. Gordon, Mrs. Chandler, Mrs, Bolton, Mrs. Levey, Mrs. Bayley, Mrs. Hawthorn. Mrs. Carroll, and Mrs. Dowling, were then sworn to ``search and try the prisoner at the bar, whether she was with child or not; and thereof a true verdict to give, according to their skill and understanding."

His Honor having told them that they were sworn to try the simple fact, whether or not the prisoner was enceinte, they withdrew to the jury-room, where the prisoner was sent to them, and in about half an hour returned into Court, with a verdict that ``the prisoner was with child, but not with quick child." In answer to some questions from the Court, the forewoman observed, that it would require a fortnight or three weeks to decide the case. His Honor then told the jury that unaccustomed as they were to public duties of this nature, they had returned a verdict which the Court could not receive. They had better therefore again retire, and take into their consideration, whether the prisoner was pregnant at all or no; - if the former, they would humanely give her the benefit of any doubt they might entertain. After a further absence of about 20 minutes, the jury returned into Court, finding that ``to the best of their opinion, she was not with child." His Honor having thanked them for their attendance, and informed them that an order would made out for their expenses, they were discharged.

See also Australian, 28 February 1834. On the same date, the Australian claimed that this was the first time a Jury of Matrons had been empanelled in the colony. A woman named

Ann Sheridan was subsequently placed in the stocks for six hours for getting drunk and using violent language to one of the Jury of Matrons: Australian, 28 February 1834.
On 27 February 1834, the Sydney Gazette reported that ``The two women Maloney and McGregor, who were convicted on Saturday of the murder of Captain Waldreon, and ordered for execution on Tuesday morning, did not suffer according to the terms of their sentence; the Sheriff arriving at the gaol on Sunday morning, with a respite deferring their fate until to-morrow. A very considerable degree of interest has been excited by this case, many persons being of opinion, that the justice of the case would have been fully met by a verdict of manslaughter. The conduct of M'Gregor since her condemnation, has been penitent and becoming; but it is to be lamented that her wretched companion continues to manifest the most disgusting levity." The Executive Council decided that they should be respited until the King's pleasure was known. It recommended that they should be imprisoned with hard labour for three years: Australian, 28 February 1834; and Bourke to Stanley, 26 February 1834, Historical Records of Australia, Series 1, Vol. 17, p. 379.
The governors had discretion to exercise Crown mercy on behalf of all prisoners sentenced to death except those convicted of murder or treason. In the latter cases, the final decision had to be made by the King on the advice of the British government: see Historical Records of Australia, Series 1, Vol. 12, pp 644-645; correspondence between governor and judges, 1828, Chief Justice's Letter Book, Archives Office of New South Wales, 4/6651, pp 190ff.; and see R. v. Dwyer, Kinnear, Madden and Blewit, 1825.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

DOWLING, 25/02/1834
Dowling, Proceedings of the Supreme Court, Vol. 83, State Records of New South Wales, 2/3266
Forbes C.J., Dowling and Burton JJ, 24 February 1834
[p. 163] The prisoners were tried on the 22nd inst. before Burton J. for the wilful murder of **CHARLES WALDRON** Esq at Spring Hill by casting & throwing the deceased upon the ground, & with both their hands striking him on the head & shoulders, thereby giving unto him divers mortal wounds, bruises & contusions in & upon the right side of the head & shoulder, of which he languished from the 11th until the 20th January & died.
There was evidence that the prisor. had thrown the deceased down on the ground, & that while down they struck [p. 164] him with repeated blows. He afterwards arose, & being ill, he went to bed, apparently affected with paralesis & died on the 20th January.
There were no external markings of violence on his head & shoulder as alleged in the indictment - no wounds, bruizes, or contusions sufficient to cause death. No surgeon was examined to shew that the violence used by the prisoners was sufficient cause death, & the case was left to the jury to presume that the death arose from the casting & throwing & the blows given by the prisoners, & they found the prisoners guilty of murder but they were recommended to mercy on the ground that probably they did not contemplate the fatal consequences.
The Judge reserved the case for the consideration of his brethren.
[p. 165] The Judges were unanimous that whether the prisr. contemplated the fatal consequences of their act made no difference as to the legality of their conviction. - It was no less murder, -- though the consequences of their illegal act might not have been anticipated.
Forbes C.J. thought the case properly left to the Jury, & was of opinion that there was no need to prove that the Deceased was, as alleged, wounded, bruized & contused on the head; but he thought the conviction not satisfactory for want of sufficient evidence

of the surgeon, that the death was really occasioned by the acts of the Prisoners; for as he died of apoplexy, non constant, but it might be a natural disorder.
[p. 166] Dowling J. I am of opinion that the prisoners ought to have been acquitted, there being no constat of evidence, to shew clearly that the death was occasioned by their acts. First I apprehend, that the allegation, that the prisr. had given by the means alleged, ``divers mortal wounds, bruizes & contusions in & upon the left side of the head & shoulder of the deceased,'' was a material allegation, requiring proof, because it went to shew primia facia, that by reason of such wounds, bruizes & contusions death had ensued; & secondly a malto fortiori, that there ought to be clear & distinct proof that the proximate cause of the death, was the violent acts of the Deft, though there were no actual wounds, [p. 167] bruizes & contusions as alleged.
Burton J. himself seemed to doubt the propriety of the conviction, &
It was agreed that he should state the opinions of the Judges upon the case, when he came to report it in the Executive Council.
A surgeon, who had been subpoened, but was prevented from reaching Sydney time enough to attend the trial, by an accident to his horse, produced an affidavit after conviction, stating that in his opinion the deceased had probably died from apoplexy, he having a predisposition to that disorder, & that in his opinion there were no marks of violence externally sufficient to have caused death.
*The decd had been buried without an Inquest* [MY ITALICS; COMPILER] & the widow would not allow the surgeon to [p. 168] open his head.
It was understood that the prisr. would be recommended to the crown for a pardon.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 10/03/1834
Forbes C.J., Dowling and Burton JJ, 8 March 1834
Mr. Therry begged to take the opinion of the Court on the case of **STEPHEN FITZGERALD**, who had been convicted during the late criminal sessions, and was now on board the hulk, about to be sent, as he was informed, to Norfolk Island. He was free when tried, and according to the Act of Council - - - - - -
The Chief Justice observed, that when free men were sentenced, the Judges made a practice of sentencing them merely to be transported, and they were then sent away under the provisions of the law, - in case of convicts again convicted, they always added to such Penal Settlement as His Excellency the Governor should be pleased to appoint.
Mr. Therry said this was a peculiar case, for the prisoner had originally been transported, had become free, and went home, whence he had returned as a free emigrant. The words of the Act were persons who had arrived free in the Colony, now he had arrived free.
Mr. Justice Burton stated he would write to the Governor at the rising of the Court, as he had tried the prisoner, to prevent his being sent to Norfolk Island.
[*] On 8 March 1834, the court also had to decide whether to detain a convict on board the hulk rather than sending him to Norfolk Island. His evidence was needed in a trial. The court ordered that he be examined de bene esse rather than the detention being ordered. The Sydney Herald, 10 March 1834 reported the prisoner as being Stephen Fitzgerald. The Australian, 10 March 1834, reported the name as Edward Carroll, the cases concerned being against a defendant called Fitzgerald. The Herald seems to have confused two cases, and two distinct applications.

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

AUSTRALIAN, 06/05/1834
An aboriginal native named **JACKY JACKY**, who stands committed to take his trial for the murder of a white man at Mr. Mossman's farm on Williams's River, arrived by the steamer William the Fourth, on Thursday. The unfortunate black was entirely naked, and the irons on his legs had lacerated them in a dreadful manner. He appeared to feel the situation, and cried most bitterly on leaving Newcastle. A stockman at Mr. Parke's station, on William's River, has been speared by an aboriginal.
[1] See also, Australian, 16 May 1834; and see Australian, 29 July 1834.
On 19 August 1834, the Australian reported a formal fight, with seconds, between two Aborigines at the cattle market. The newspaper admired the skill and fairness of the fighters. See also Australian, 8 July 1831 saying that an Aborigine accused of murder at Hunter River, had arrived in Sydney for trial. Nothing came of it, apparently.
The Australian was sometimes sympathetic to native issues. In its issue of 16 December 1834, the newspaper criticised the Legislative Council of the Cape colony for attacking the freedom of aboriginal peoples there, and stated that there was ``no probability'' that the ancient settlers would establish their boorish sway or that the King would allow the virtual repeal of the enactment of liberty to the Aboriginal natives.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 08/05/1834
Supreme Court of New South Wales
Dowling J., 2 May 1834
**THOMAS CLARKE** stood indicted for the wilful murder of **FERGUS CUNNINGHAM**, by shooting him with a pistol, loaded with powder and ball, on the 22d March, at Paramatta.
The first witness called was **WILLIAM DAVINE**. - Remembers the 21st March last; was coming from Sydney, in company with the deceased, who had a dray, of which he was the owner, laden with stores; we slept at Tom Kain's that night, and started on the road on the following morning between 9 and 10 o'clock; there was also a man named **JERRY NOONUN**, who had a horse and cart, besides others; I was riding on the cart, when about a-quarter of a mile from Kain's, the cart upset, in consequence of coming in contract with a hillock on the road side, I fell out and was much injured; at starting, we had had a glass of run each; the deceased and Noonun called in at a public house at Duck river Bridge, but I believe they had nothing to drink; they remained about 20 minutes; on coming to Lacey's on the top of the hill, I heard Cunningham say that the people of the house once did him a service, by obliging him with some coppers to pay the toll, and he would spend a few shillings; we all went in there; when we had been in about three-quarters of an hour, I asked the girl to allow me to lie down on the form, as I had fallen and hurt myself; I lay down and fell asleep; I was awoke by the servant, who came in, and said, `You are a pretty fellow to lie there asleep while your comrade is being shot by a constable at the door;" I went out and saw Cunningham lying on the ground; there was a hole through his face, near the corner of his eye; there was a hole, also, in his hat; his breath came violently, I did not see the prisoner until I saw him at the inquest; the deceased, Cunningham, was an able bodied man, between 30 and 40 years of age.

**BROWN FAVELL**, Esq. - I am a surgeon, and reside at Parramatta; I was riding along the road on the day in question, when I saw deceased lying on the ground opposite Littleton's public house; I was called to examine the wound of the deceased; I was informed by the persons that deceased had not been dead more than two minutes; when I first saw the body, there was a wound through the head, which penetrated the brain; it had the appearance of a gunshot wound from a large ball.

**MARY HOUGH**. - I reside near the old turn-pike road; I was ironing at my window when I saw the prisoner pass by and go into the public house; he afterwards came out and stood with his back against the front of the house; Cunningham came out also and went towards his bullocks; he had a small piece of batten in his hand, and laid hold of his bullocks' horns in a playful manner; he then turned round and went towards the house; he met the prisoner, and they stood face to face for the space of a minute; Cunningham flourished the batten, but not in a striking position; the length of the batten is from my elbow to the tip of my finger; prisoner held up his arm with the pistol and let it off in a moment; Cunningham dropped on the ground, and the prisoner stepped forward towards the corps, and put his hand up to the back of his head; I swear the deceased never struck him in my sight; I saw the whole transaction; I waited a moment to see if the prisoner would run; when I went out and said, what have you done you villain, you have murdered the man; I told the woman of the house of the transaction, and said he ought to be secured; at that time he did not complain that deceased had struck him; deceased did not strike him in my view; from the time they came out of the house until Cunningham was a dead man, did not exceed five minutes; the distance from the public house to my window is not more than twenty yards; the window was shut, but the door was open; there could not have been any high words or I must have heard them; I saw the prisoner at the public house in the morning in charge of women.

Cross-examined by Mr. Stephen. - I swear the deceased did not strike the prisoner; I might have the flat iron in my hand during the time; I never took my eye off them; the deceased held the batten like a child; prisoner held up the pistol instantly and fired it off; they were only arms length from each other at the time; did not see the batten in the hands of the deceased when he went to the bullocks.

By a Juror. - The window is a glazed window, and was clean on that occasion; I saw no blows struck; I have three children, my eldest girld is 13 years old; the part of the road on which I reside is not particularly dusty; the prisoner did not attempt to run away; if there had been loud words I must have heard them.

**HENRY BELL**. - I am servant to Mr. Lacey; my master and I were at the Irish Arms, when this occurrence took place; I saw the deceased there; he was neither drunk nor sober; he was capable of knowing what he was doing; he was called out to go after his bullocks which were going astray; having brought them back and secured them he returned to the house; all that I saw him drink was a pot of beer; he went out again some time afterwards; he had not been absent above five minutes when the report of a pistol was heard; I ran out to learn the cause, and saw the prisoner in charge of Mr. Lacey; he ordered me to lay hold of the prisoner, and take the pistol out of his hand; a constable was sent for, and the prisoner was delivered up to him; I saw the deceased lying on the ground; the prisoner did not say how it had happened.

Cross-examined. - A piece of batten lay beside the deceased, it was better than a yard in length, three inches in breadth and half an inch in thickness; I saw the prisoner in the house previous tot he accident; I was in the kitchen; some quarrelling might have happened, but if there had been loud words I must have heard them; I do not remember seeing Mrs. Hough there; she might have been there; I know her house; I

was not aware that deceased had been quarrelling; I was acquainted with him; he was a quiet man not given to drink; whilst in company he was quiet man not given to drink; whilst in company he was quiet and very sociable.

**CATHERINE CAVENAGH**. - I am an assigned servant to Mr. **TITTERTON**; I saw deceased at my master's house on the morning he met his death; he came between 9 and 10 o'clock, and was in the house about two hours and a half; I first saw him after cleaning the parlor and dusting the furniture; I was placing some chairs near the parlor window when I saw deceased coming from his bullocks towards the house; the prisoner walked hastily towards him, and as deceased was turning round the prisoner held up his pistol and shot him. The window was up; the prisoner turned round and looked at deceased as he lay on the ground and put his hand to the back of his neck; he still held the pistol in his hand; the window was on the ground-floor; I heard no words - no previous quarrelling; deceased was about a yard and a half from the prisoner when he fired; they might have had words but I did not hear them; I did not take particular notice whether deceased had batten in his hand; I did not see deceased offer to strike the prisoner; I had been about four weeks in Mr. Titterton's service at that time; I was never in the custody of the prisoner; I did not see the prisoner drink any thing in the house; he was not drunk when I saw the man fall; I ran to the door and said to the prisoner, oh! you are an unlucky man; I said so on account of his having killed the man; I told the same story at the Inquest that I do now; I had first come into Mr. Titterton's from the Factory, where I had been sent from Mr. Morris's for one month to the third class; the prisoner did not attempt to escape, because there were too many persons about him to let him escape; it would have been of no use for him to run; I saw Mrs. Hough on the road; did not see the batten in the hand of the deceased when he went towards the cattle; did not see Clark drunk; had a glass of peppermint; took half a pint of rum from the kitchen into the bar, saying he would take it another time; the prisoner did not hesitate, but rose the pistol and shot deceased, the prisoner was not more than two yards distance at the time; if he had not had his finger on the trigger it could not have gone off; he walked up quickly to deceased; after deceased fell, the prisoner put his hand at the back part of his head, but did not complain.

**THOMAS LACEY**, I live next door to Mr. Titterton's Public-house, and was in there on the occasion in question, I sat with my back towards the front; when I heard the discharge of the pistol, I thought it was some traveller discharging his piece, in order to reload it; I went out and saw deceased on the ground, the prisoner was standing by him, with a pistol in his hand; I accused him of murdering the man, and detained him till a constable took him into custody; he seemed much agitated, and made no resistance; I had seen the deceased before, but I do not remember to have seen the prisoner before that morning; I heard that he was a constable who had women in charge; there was a man named **MALONEY** who had offered the women something to drink, he is an irritable character.

Sir **JOHN JAMISON**, Knt. - The deceased had been my assigned servant from April 1831: he was highly recommended by Major Innes, of Port Macquarie; I always found him to be a remarkably good man, so much so, that I allowed him indulgences enjoyed by no other man on my estate; during the time he was in my service, he maintained the character of a peaceable, quiet, sober man. Mr. Stephen in his cross-examination put some questions to the witness, tending to degrade the character of the deceased, but was stopped by His Honor, who observed, that the moral character of the deceased could not be gone into, though he were the worst character in existence, it was no reason why he should be shot. Examination continued: the deceased lived

close to my house, I always entertain strong feelings in favour of well conducted servants - I was not at the Coroner's Inquest; when I saw the prisoner I asked him what caused him to commit the act? I do not remember the answer he returned; I do not know of my servants being at public-houses - If I had heard from good authority that the deceased was in the habit of getting intoxicated, I should have believed it - I know of his being flogged at Parramatta in September last, but I am satisfied that the punishment was most unjustly awarded by the magistrate at that place. His Honor objected to a continuation of enquires as to these matters, as tending to involve a question as to the magisterial conduct of Captain Wright, he had only acted on the evidence before him unnecessarily. The case for the prosecution here closed.

The prisoner stated in his defence, that being a constable of Liverpool District, four female convicts under sentence for the Factory, were put under his charge, for the purpose of being escorted to the Factory; on the way thither he called into the Irish Arms for the purpose of leaving a bonnet belonging to one of the women, a constable's wife, which she requested him to take back with him on his return; when he went into the house, the deceased and other persons were there drinking, one of them offered the women half a pint of rum, but he objected to their having it, being against his orders; the men seemed very angry with him for his refusal, and after some altercation, he departed with his charge for the Factory; on his return, he had to call for the bonnet, and when near the house he saw the prisoner coming towards him, he had a stick in his hand, and appeared to be intoxicated; he tried to avoid him, but he pushed up against him, called him an old scoundrel, and gave him a kick, striking him at the same time a blow with the stick; seeing him so violent and not wishing to have any further quarrel, he tried to appease him, and begged him to go away, but received a blow on the head with the stick, when he (the prisoner) put up the arm in which he held the pistol, to save himself, when deceased made a blow at him again, and the pistol went off; he could not say whether it went off by being struck with the stick, or whether in his agitation his finger had come in contact with the trigger; he most solemnly averred it was accidental; the deceased was a powerful man, nearly six feet high, and upwards of fifteen stone weight; and he appealed to the Jury whether it was reasonable that he should so deliberately as had been stated by the female witness, go and destroy a fellow creature, who was quite a stranger to him; he had used his utmost endeavours to pacify him, but without effect; there was no person present during the melancholy transaction, or it would have been prevented. His Honor observed that the statement of a prisoner could have no weight against that of a witness on oath; but where it was found consistent with other evidence, and supplied certain links in the chain of circumstances, it might be fairly taken into consideration for his benefit.

Several respectable witnesses were called who gave the most favourable testimony as to the character of the prisoner for humanity and peaceable conduct.

His Honor summed up the evidence, remarking that from the very nature, temper, and habits of women, too great caution could not be exercised in weighing their testimony in a matter of such importance as the life of a prisoner; they were naturally prone to give a high colouring to such transactions; the evidence for and against the prisoner were feelingly commented on by His Honor, who left the case in the hands of the Jury. The Jury after an absence of half an hour, returned a verdict of Not Guilty.

See also Sydney Gazette, 6 May 1834. The trial notes are in Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3279, vol. 96, p. 27.

SYDNEY HERALD, 15/05/1834
Supreme Court of New South Wales
Trial, 9 May 1834

Friday. **PATRICK FARREL** was indicted for the wilful murder of **CHARLOTTE FARREL** his wife, at Brisbane Water, on the 25th of December last, by striking her on the head and various parts of her body with a bludgeon, inflicting divers wounds and contusions, of which she languished until the 28th December, when she died. Mr. Therry appeared on behalf of the prisoner.

**ROBERT CHITTY** examined. - I am a constable at Brisbane Water, Broken Bay; I knew the late Charlotte Farrel; she was the wife of the prisoner; she lived with him at Brisbane Water; I saw her dead on the 28th of December last; I saw her about two o'clock on that day, she was lying on her back, with her hands by her side; there was a lump on her breast, she had the remains of a black eye, and her nose appeared to have been broken; she was not dead then but speechless; I reported the condition in which I had seen her, to Mr. **DONNISON**, the Magistrate, who sent me back again in the evening to see if any person had been ill-using here, and to report he facts to him; when I went to the prisoner's house the second time, she was dead; I examined her person as far as decency would permit; I found a cut of about an inch and a half long on her right arm; her hair was wet and much matted; I tried to examine her head but could not; I cannot say whether it were wet with blood, it might have been water with which her face had been washed; I saw her on the 22nd, the Sunday before Christmas day, she then had two black eyes, and the bridge of her nose had then the appearance of having been broken; she appeared to be at that time in general good health, but seemed to have been beaten. The prisoner is a sawyer.

Cross-examined. - Deceased was not sensible on Saturday while I was there; I did not hear her complain of a sick stomach; I head that a man named Stewart had given her a beating; I head him say himself that he had struck her, and would rather take seven years transportation, than face the Court for what he had done to her; I never heard the deceased say she had been bled in Sydney for any disease in her chest; deceased did not open her mouth; I thought she tried to do so; I thought she had a locked jaw; I cannot say that it struck me as being the cause of her death.

**MARY ANN PIERCE**. - I live at Brisbane Water; I knew the late Charlotte Farrel, the wife of the prisoner; he sent for me on the 28th December last, to lay her out; it was on the Saturday after Christmas day; I stopped there all night, and washed her on Sunday morning; I examined her person, and found a lump on the side of her head, about the size of a hen's egg; there was a cut on her left arm; I cannot say whether it were a cut or a scratch; it was very deep for a scratch; there was no blood in her hair; her shins appeared bruised; I know that she had a bad leg of long standing; there was a lump on her chest about the size of an egg when I first saw it, but it decreased; I heard deceased complain of a pain in her side on the Sunday before Christmas day; she then had two black eyes, which she said her husband had given to her; [this latter statement was objected to by Mr. Therry, as being no evidence.] about six months before her death she complained of a pain in her chest, and I went with her to Sydney, where she got bled for it, I think at Dr. Hosking's; when I laid her out I saw her bleed [a good deal] from her nose; she was a pleasant corpse, that is, she did not appear like a person who had been murdered, but looked as if she had died a natural death; I do not know at what hour she died on Saturday; I saw her in her coffin on Monday morning; I lifted up the corner of the sheet but I saw nothing but her forehead; I could not then examine her; I had observed marks of violence in laying her out; I washed her clothes

after death; there were marks of blood on a great many of her things which lay under her bed; I head Steward say that he had bled her; as far as I know the prisoner evinced all the natural kindness and attention of a husband towards her; he seemed in no way agitated, but appeared to feel very much for her condition; when I first went on Saturday night, he desired me not to mind the body until the following morning, but to wash a few things to lay her out in; I have seen Steward since her death; I have heard him say that he had beaten her, but he did not say it was on her head; I have heard him say that rather than face the Court for what he had done to her, he would take seven years transportation; I though it a strange expression. I should think no innocent man would say so; I have frequently heard her complain of a pain in her side; I was not very frequently in her company; I have heard her say she had been bled three or four times for a pain in her chest; I am not aware that such pains are accompanied with swellings.

**JAMES SMITH**. - I am in the occupation of Mr. Robert Cox's Estate, at Brisbane Water; I knew the late Charlotte Farrell; I remember the 25th December last; I saw her on that day; she came to may house for protection against the violence of her husband; she expressed apprehensions that he would kill her if he could; the prisoner when excited is a most violent man, and loses all controul over himself; I have heard them frequently quarrel before; I cannot say whether the prisoner and her had any words or not on that occasion, he might have been at the distance of 15 to 20 paces; she appeared to be very ill or very frightened; she could not speak very loud; she came in the direction of her own hut; I took her under my protection and fastened the door to keep the prisoner out; she went into a back room where there was an empty bed place and sat down; a man named **ACKROYD**, and a female named **ELEANOR LOGAN** were in my house at the time, the deceased trembled very much, and had sat but a few seconds when she fell backwards as if in a fit; I thought she was dying; the female Logan said, she was fainting; the prisoner came to the door and demanded admittance which was refused, when he broke the door open; he had a bludgeon in his hand which had been the leg of a table, with which he had wrenched off the upper sill of the door when it fell in; I took the club out of his hand and threw it in a store; he then seized a broom handle and commenced an attack upon the deceased as she lay on her back; he struck her three or four times but I cannot say where the blows fell; I then stooped to pick the door up; the blows appeared to be severe and were given in a longitudinal direction; on our interference the prisoner desisted, and after some time deceased got up and went out; I requested her to go to her own hut, hoping by retaining, the prisoner in my house for a time to overcome his excitement. I stood between him and the door; he remained a minute or two and then followed her; after he went out I almost instantly heard her call out again; I heard several persons' voices, they were the voices of contention; I heard the voice of a man named **JOHN PRICE**, and I looked out and saw the deceased lying on the ground; I heard Price tell the prisoner he should not strike her any more in his presence; the prisoner stood close to her at the time; he had a stick in his hand, I think it was the same broom stick with which he struck her in my hut; the prisoner asked Price if he could not do what he liked with his own? Price answered, not in his presence; I then took the prisoner in my arms and rushed him into my house; the deceased was then led away by Price and a lad named **DUNCAN**; I heard deceased complain on the following day that she had a stiff neck and a locked jaw, and that she could not open her mouth; I saw her on Friday, she appeared to be severely suffering under paroxyms of pain; she was in bed when I first saw her, she was reclining on a bed place in the front room with a blanket over her; the prisoner appeared to be rendering her every assistance in his power, she

complained of a pain on the upper part of her chest; there was a large lump under her breast bone: she said she felt the pain move downwards towards the pit of her stomach; I sat up with her all Friday night in consequence of her illness; the pain finally settled in the region of the lower part of the stomach and a swelling arose about the size of a small saucer; she begged met to press upon the swelling as it gave her ease; with the pressure the protuberance sunk inwards and seemed to be dissipated, relieving her from pain, but when the pressure was removed the protuberance returned, and with it the pain; I saw her on Saturday; she complained principally of the pain and the swelling at the pit of the stomach; she died on Saturday evening; I have no doubt whatever of the cause of her death; it is hard for me to say that she died from the effect of blows given by the prisoner as I did not see them struck, but I am of opinion she died from the effect of blows inflicted by some person; there is no surgeon in that district.

Cross-examined. - I heard of another person having struck the deceased; the lump I have spoken of did not appear until Friday when it arose gradually; was soft, and when pressed went inwards; I attribute it to a suffusion of blood inwardly determining to that particular part; it appeared to give her the greatest agony; I have no pretensions to surgical knowledge; the prisoner was very attentive and exhibited that solicitude natural to a husband; he seemed to feel a great deal of distress on her account; I never heard her complain of inflammation of the bowels; soon after her death prisoner asked me to write to her mother, and acquaint her that deceased had died from a pain in her bowels, stating as a reason that he did not wish to shock her feelings by stating the manner of her death; deceased was about twenty-five years of age and had no children; I know a man named **STEWARD**; I have imagined he has felt uneasy since the death of the deceased; he was accused of having struck her; every one on the establishment was ordered before the Magistrate, but he was not called in; he was suspected of having caused the death of the deceased; sufficient evidence could not be adduced to warrant his apprehension; he seemed very uneasy and wanted to give information; he told me that he had seen the whole transaction at the time Price was defending her, but I have ascertained most satisfactorily that he was asleep at the time and knew nothing of it; I have heard that he had been tampering with the men to conceal what they knew of the transaction at regarding him; he has been very quarrelsome with all the men in the establishment; I don't know of my own knowledge of Steward's having struck deceased; if I had I should have sent him to the watch-house; the broom alluded to was of the ordinary size; the deceased did not return again to my house; there was a little rum drank in the establishment but not much; there was some rum stolen from the prisoner and he went to a hut in search of it but could not find it, the people were all sober; the Magistrate ordered if sufficient evidence could be obtained, that Steward would be apprehended; I did not hear Steward say anything about suffering transportation rather than face the Court on account of the deceased.

**JOSEPH ARKWRIGHT** corroborated that part of the testimony of the last witness which related to the assault that took place in the house; the cause of the prisoner's excitement on this occasion was, as stated by this witness, that the deceased had fallen asleep and a keg of rum had been stolen out of the hut; during the time witness worked with Steward, has heard him express a wish to be admitted evidence against the prisoner, he could state the whole transaction; did hear the deceased say that she feared she would have a locked jaw from blows inflicted to this line of cross-examination, as it was going into a charge against a person not before the Court; His Honor said it was certainly competent for the prisoner to shew in the best manner he

could that another person had been in a capacity to commit the offence of which he was charged.

**ALLAN DUNCAN** - I am an assigned servant to Mr. **ROBERT COX**; I reside at Brisbane Water; I remember Christmas day last; I saw the deceased on that day, she asked me to cook a bit of dinner for her; I heard her and the prisoner quarrelling together; I saw him strike her twice on the back of her head, and once on her arm with the leg of a stool; she ran up to the overseer's hut, and prisoner followed her with the stick in his hand, which was a large one, as much as I could grasp, and about a yard long; I followed them and saw her go into Smith's house; after she got in the door was fastened; the prisoner had the stick in his hand, and he desired the overseer to send his wife out, or he would break the door open; the door not being opened, he forced it with the stick; this is the stick to the best of my belief; the prisoner went in and I followed; the deceased and prisoner came out shortly after, and went towards their own hut; when I went out the deceased was lying on the ground; Price asked me to assist him in taking the woman to her hut; she asked me for a drink of water, which I gave her; the blows which I saw the prisoner give her were severe; I did not see her knocked down; the blows were given between their own hut and that of the overseer; she did not run very fast.

Cross-examined. - Nothing occurred after I went in; I saw Mr. Smith there, Arkwright, and a woman; I did not see any marks on her arm.

**JOHN PRICE**. - I am a sawyer, residing at Black Head, at the base of the Illawarra Mountains; I knew that late Mrs. Farrel; I remember Christmas day; I saw her run out of Mr. Smith's hut, and the prisoner followed her; he had a stick in his hand, it was a small walking stick; it might be a broom stick; I saw the prisoner strike the deceased on the head or arm, will not be positive; he struck her once across the loins, in consequence of which she fell backwards; I ran up and prevented him from striking her any more; the overseer came up and pushed the prisoner away; I lifted her up, and the blood fell from her head on my arms and on my trowsers; she complained of her arm as I was lifting her up, and begged me not to hurt it; I called the witness Duncan to assist me, and we carried her to bed; she complained of her head, and asked me to look at it; she said Steward had given her a blow on her arm, and it was very sore; she was a very active young woman, and had challenged me to run a race with her; the prisoner strove to get to her to ill-use her, when I prevented him; I have known prisoner and his wife a long time, I thought they lived on good terms with each other; I do not know Steward, I heard that he was suspected of beating the deceased; I did not hear deceased complain of Steward on the evening before she died; the Attorney-General again objected to these questions, and appealed to His Honor, who said that he could not stop them, they were relevant questions; Mr. Therry contended that he had a right to shew that the deceased, when under the apprehension of death, at a time when the mind is relieved from all human influence, attributed the injuries she had received, to Steward, and not to the prisoner, whose conduct in her last moments were most becoming his situation as a husband, and evincing the warmest sympathy man is capable of.

His Honor enquired if the Attorney-General had deemed it prudent to invite the attendance of some gentleman of the medical profession, in order that the Court might have the benefit of his opinion as to the symptoms spoken of by the witnesses, and how far they might have a connexion with the violence attributed to the prisoner; the Attorney-General said he had not, but would send for one; after waiting some time, however, the gentleman sent for did not attend, and the case proceeded.

**WILLIAM SMITH** - I am senior constable at Brisbane Water; I heard of the death of Charlotte Farrel; it was reported to me on the Sunday after Christmas day, by constable Chitty; I went round to the inhabitants to institute an inquiry into the cause of her death; I went to the prisoner's house on the Monday; when I saw him I said it was a bad accident, and that it was reported she had died by violence, he answered that persons were fond of carrying stories, and that they lost nothing in carrying; he expressed a wish to have her buried, but I informed him that the body could not be buried till the Inquest sat; he said he would have the body interred if it cost him his life, as it was impossible to keep it any longer in the house; persons had left the house in consequence of the bad smell; the body was in a very advanced stage of decomposition; the weather was very hot at the time; three persons only assembled, only one of whom would look at the body; the prisoner asked me to inspect the body; his anxiety to have it buried I consider to have proceeded from its bad state, and not from a wish to prevent an examination; when I found the Inquest did not attend, I consented to its interment. This closed the case for the prosecution.

**PETER ALCOCK** examined. - I live at Brisbane Water; I remember Christmas Day last; I saw the deceased, Charlotte Farrel, on that day; I heard a man named Charles Steward ask her for some clothes which she had in her possession belonging to him; she said that she would not give them up until he paid her what he owed her; he said he would have them or the black wh--`s life, meaning deceased, that very day; he had a piece of rough edging in his hand, with which he gave her one severe blow; this was about six o'clock in the morning; I saw her afterwards; she had a lump on the left side of her head, about the size of a pullet's egg. Several other witnesses, on behalf of the prisoner, spoke of the circumstance of the ill usage she had received from Steward. On the objection of the Attorney General to these questions, His Honor again repeated that the prisoner was perfectly at liberty to shew that deceased had received her injuries at other hand than his.

A respectable witness was put in, who spoke of the prisoner as a kind, indulgent husband, he had been employed under him for some time and lived in the same neighbourhood; he admitted however, that he had never seen him in liquor, nor in any way excited.

Mr. Robert Cox spoke of him as being a hard-working man; he had never heard any thing prejudicial to his character; but he was rather irritable.

His Honor recapitulating the evidence, regretted the absence of medical testimony and put the case to the Jury as it stood. The Jury retired for about half an hour and returned a verdict of Not Guilty, observing, that they had come to that conclusion as a consequence of the absence of medical testimony.

See also Sydney Gazette, 13 May 1834; Australian, 13 May 1834. For commentary, see Australian, 13 May 1834, which argued that Farrel should have been charged with assault after being acquitted of murder, and that a medical man should be brought in for all cases of suspicious death.

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

SYDNEY GAZETTE, 17/05/1834
Supreme Court of New South Wales
Dowling J., 14 May 1834
(Before Mr. Justice DOWLING, and a Jury of Civil Inhabitants.)

**RICHARD HERRING** was indicted as principal, and **JOHN LAHEY** and **MICHAEL LAWLESS** as accessaries, for maliciously presenting a loaded musket at

Constable **JOHN CHRISTIE**, on the Botany road, on the 26th of April, and snapping down the cock thereof, with intent to kill and murder him. There were several other counts in the indictment varying the intent.

It appeared in evidence that the three prisoners at the bar, together with a man named Smith, and four others, were sent on shore from the hulk, where they had been confined, to procure wood for the vessel, under the charge of the boatswain (Sims), from whom they effected their escape, and committed several depredations at the North Shore, and Parramatta and Botany roads. Four constables, named **CUNNINGHAM, CHRISTIE, LAWLESS, and JONES**, were sent by the Police Magistrate, on the evening of the 26th of April last, in pursuit. Having arrived within a few yards of the Botany bridge they came up with the prisoners, and the man, named Smith, whom they challenged. Smith snapped his musket at Christie, which flashed in the pan, and Christie shot him dead on the spot. The prisoners each endeavoured to shoot the constables, but owing to the wetness of the night their pieces would not go off. Herring and Lahey, having fallen to the ground, on being rushed by Constable Cunningham, they were secured. The prisoner, Lawless, ran away, closely pursued by Jones and Lawless: he turned twice round, and tired to shoot the constables, but his piece each time missed fire. Jones shot at him while running, but without effect. Lawless subsequently gave himself up to the Chief Constable. All the fire arms in the prisoners, possession were loaded with powder and ball. It appeared throughout the whole of the evidence that these misguided men were entirely led away by Smith: deluded by his promise of getting them out of the country, through the assistance of a brother he stated to be living on the sea coast, they were first tempted to abscond; and throughout the whole of their career of crime Smith only was the person who led them on to deeds of plunder. Indeed it was most satisfactorily proved, by the witnesses for the prosecution, that on the prisoners shewing a reluctance, - in fact refusing, - to plunder the poor man of his hard earnings, their life was, on two occasions, threatened by this monster in the most determined manner. All the parties robbed stated if it had not been for the interference of the prisoners at the bar Smith would have taken considerably more than he did. Their object seemed to be merely to get wherewith to satisfy their cravings of hunger - his to goad them on to the deepest crimes, at which their hearts revolted. - Mr. Keck, of the hulk, gave them all excellent characters, and stated his conviction that, if it had not been for Smith, they would never have been in their now awful situation.

The jury found them Guilty, but recommended them strongly to mercy, on account of their previous good character, and their being led away by the deceased Smith.

His Honor, in passing the sentence of the law on them, remarked that the jury's recommendation should be laid before the Governor in Council; at the same time he felt it his duty to state he could not conscientiously second the recommendation. Offences of the nature of which they had been convicted required the utmost penalty of the law to be strictly enforced for example, to deter others from falling into the same error. He could not, nor did he think they ought for a moment to entertain the slightest hope in this world. He implored them to make the best use of the short time allotted them to make their peace with an offended God, and to prepare themselves for that awful change which shortly awaited them. Sentence of death was then passed upon the prisoners, ordering them for execution at such time and place as His Excellency the Governor should appoint.

The prisoners seemed to feel deeply their awful situation. [*]

See also Australian, 16 May 1834. For the trial notes, see Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3280, vol. 97, pp 49f and

102f. On the previous day, the three prisoners were convicted of stealing from a dwelling house: Sydney Gazette, 17 May 1834.
[*] Herring, Lahey and Lawless were hanged on 5 June 1834: Australian, 6 June 1834.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 08/08/1834
Forbes C.J., 8 August 1834
(Before the Chief Justice, and a Jury of Civil Inhabitants.)
**JACKEY**, **alias Wong-ko-bi-kan**, an aboriginal native, was indicted for the wilful murder of **JOHN FLYNN**, by wounding him with a spear at William's River on the 3rd April last, of which wound he lingered until the 6th following, and then died.

The Reverend L. E. Threlkeld was sworn interpreter between the Court and the prisoner at the bar. The Reverend gentleman was assisted by another aborigine, who could understand English, but who being of no religion at all, could not be sworn as an interpreter. On being asked by what jury he would be tried, the prisoner replied by ``black-fellows;'' but this of course the Court was not empowered to grant. A military officer (Lieutenant McAlister), in uniform, was then shown to him, but the prisoner said ``no soldier,'' upon which a jury of Civil Inhabitants was empannelled [sic]. The Solicitor-General stated the case for the prosecution; Mr. G. R. Nichols defended the prisoner.

**THOMAS RODWELL** being sworn, said - I am a free man residing at Mr. Mackenzie's establishment at William's River, Mr. M. is resident magistrate there; on a Thursday morning in April, about two o'clock, I was awoke by two of Mr. Archbald Mossman's men, who informed me on the previous night they had been attacked by a party of blacks and that they expected before they returned to the station, the remainder of the men there would be murdered by them; the distance between the two stations, is about seven miles; I acquainted Mr. M. of the circumstance, and he gave me some arms and ammunition, and told me if I could find any men on his or Mr. Mossman's stations, to take them with me, and apprehend two or three of the depredators; I mustered seven stand of arms and ammunition; I and the two men, who came with the information there, went to Mr. Mossman's, where we obtained six other men, making in the whole party nine persons, all of whom were armed save two, and we then went to the blacks' camp, which was about two miles from Mr. Mossman's station, near a small creek; when we arrived there, we saw about 20 black men; we divided ourselves into two parties; a black boy, called ``Lumpy,'' who we took with us, pointed out the blacks to us; we had seven stand of arms, which we did not conceal from the blacks; the deceased John Flynn, was not in the same party with me, but both parties were to meet before we went up to the blacks, with whom we intended to speak peaceably; the first thing that I saw when our party came up with the black camp, was the deceased speared; he was armed with a fowling piece; he stood a little in front of his party, and I saw the spear thrown at him from the left, which struck him under the shoulder blade; there was only one black man on his left side; the deceased plucked out the spear, and followed the black who had speared him; he was assisted by two others of the party in the case, and they captured him about a quarter of a mile off; neither of those two men are here; I did not see the black man taken; I had seen the prisoner before on Mr. Mackenzie's farm, but I was not near enough to distinguish him before he was captured; there was no other black man in the direction where the prisoner was taken; I followed afterwards, and went up to where he was taken; the

prisoner used to fetch me wood and water; although I did not recognise the prisoner when he threw the spear, yet I saw Flynn and the other two men pursue the black man who threw the spear (the only one in that direction), and I afterwards saw him in their custody; he was the prisoner at the bar.
(It was here intimated to the Court, that the prisoner wished to retire for a short time, and he was therefore directed to be removed in charge of a constable. On his return into the dock, the reverend interpreter stated, that the constable in charge of the prisoner had just been using him with unnecessary roughness; upon which the constable (**JOHN PROCTOR**) was interrogated from the bench, and he stated that the prisoner made an effort to free himself entirely from his clothes from which he was apprehensive it was his intention to escape, and he therefore seized him by the back of his neck; upon which the learned Judge observed, that the constable having apparently acted under a misapprehension, he would not pursue the enquiry any farther.)

The trial was then resumed.

Examination of Rodwell continued - I am certain the prisoner is the man who threw the spear at the deceased; it was not more than a minute after we came up to their camp, that the blacks threw their spears, and boomarings [sic] at us; they attacked us without any provocation on our part; after they threw their spears, four or five shots were fired from our party; I fired, and the deceased fired also I think at the man who wounded him; the blacks still continued to throw their spears at us after they had wounded the deceased; I considered myself called upon to fire in self-defence; I did not see the prisoner throw more than one spear; the blacks did not all retreat at once; after the black man had thrown the spear at the deceased he ran away, making his way up a small mountain, where he was taken; the prisoner had had an opportunity of seeing the use of fire arms on the establishment before this; Flynn pulled out the spear first, then discharged his fowling piece, and followed the prisoner; the deceased called out to me that he had been speared, and pointed to the black who had speared him; I afterwards took off Flynn's shirt, and examined the wound in presence of the prisoner; the wound bled very little; I did not think it a dangerous one; the deceased did not complain of much pain; he walked the first day after he had received the wound, I should think 13 or 14 miles; on the next day he walked to the Court-house at William's River, which was about eight miles distance; on the following morning he left the Court-house to go to the General Hospital at Newcastle, but on the way I heard that he was taken ill, and conveyed by one of the drays of the Australian Agricultural Company to Paterson's River, where he died on the same day; if the spear had had force enough, from the direction which it took, it must have gone through the deceased's body.

Cross-examined by Mr. Nichols - Mr. Mackenzie gave us powder, and small and buck shot, and the arms were loaded with this ammunition; our object was to get two or three of the ringleaders to bring them down to the police bench; I was about 20 yards from the black, and Flynn 15 yards from him, when he was speared; there were none of the guns presented at the blacks before Flynn was speared; none of the party had an opportunity of speaking to the blacks before any of the spears were thrown; it was about half an hour after sun-rise that we came up with the blacks; it was quite light; my instructions from Mr. Mackenzie, which were verbal, were to capture the blacks, and not to fire upon them unless in our own personal defence, and these instructions I communicated to the rest of the party; we captured the prisoner and four women, and five children; I do not know whether the prisoner was one of the party who attacked Mr. Mossman's hut on the previous night; I did not examine the spear to

see if there was any blood on it; the deceased ran upwards of 50 yards in pursuit of the prisoner; I cannot give any idea of the depth of the wound, but it appeared to be in a slanting direction; if the prisoner had not been captured, I should not have been able to identify him; Flynn was the assigned servant of Mr. Archibald Mossman, and I have heard him say he knew the prisoner, but I do not know it of my own knowledge; I considered myself the leader of our party.

By the Solicitor-General - I am sworn constable, and was so at the time the affray took place; I knew from the information I had previously received, that it was the tribe to which the prisoner belonged that had attacked Mr. Mossman's men on the previous night.

By Mr. Nichols - I had no warrant to apprehend any of the blacks; I know that some of the stockmen in the interior cohabit with the black gins (women) but I do not know whether Mr. Mossman's stockmen did; I have visited their station frequently as a constable, but have never seen them with any of the women.

By a Juror - The deceased repeatedly told me after he had been speared, that he was certain it was the prisoner who had speared him.

**JONATHAN WEBSTER** being sworn, said I am a free man, and was working for Mr. Mossman, on the 3d April last; constable Rodwell called upon me about 2 o'clock on that morning to accompany him in pursuit of a party of blacks, who on the previous night had attacked the men at Mr. Mossman's sheep station; I and several others went with the constable; we all had fire arms except one or two; we took with us a black boy called ``Lumpy,'' who brought us upon the blacks shortly after sun-rise; I saw a spear let fly, and afterwards saw it in the body of the deceased, who told me he was speared, but he thought not deeply; shortly afterwards I heard a shot fired; a boomaring nearly struck me; I fired also, but cannot say whether I hit any one; I saw the prisoner taken by Flynn and two other of Mr. Mossman's men as he was ascending a hill, and Flynn told me that he was certain the prisoner was the man who had wounded him, as he had never lost sight of him from the time he was wounded until he was taken, and there was no other black man on that side of him; I am positive the spear was thrown before any shot was fired, and the blacks seemed prepared for an attack.

Cross-examined by Mr. Nichols - The blacks saw our fire arms, and they sent their women and children into the brush as we came up to them, which is their usual custom when they are bent on mischief; Flynn was about fifteen yards off from the black man when he was wounded; I saw the black man's arm upraised to throw the spear, but I did not see deceased at that time, and it was about a minute afterwards that the shot was fired; I saw two blacks with their spears raised, and I am positive the prisoner was one of them; I think it was possible for Flynn to have mistaken the prisoner for the man who wounded him, as I saw three of the blacks running in that direction; ``Lumpy'' did not belong to the prisoner's tribe; the prisoner denied that it was he who threw the spear; he said it was thrown by others; I have known the prisoner for some time in that district; he was considered a quiet and domesticated man, and one who I should have thought was not likely to spear a white man; there were three or four blacks standing in the direction where Flynn was wounded, and I cannot say which of them it was that threw the spear.

**JOHN CHISHOLM** being sworn, said I am free, and I went to the blacks' camp in April last with constable Rodwell and several others; (this witness, not appearing to know anything material of the circumstance, was withdrawn.)

Mr. **ISAAC SCOTT NIND** being sworn, said I am a surgeon, and in April last I examined the body of a man named John Flynn, at Mr. Jones's public-house, the sign

of the ``Settler's Arms'' at Paterson's River; I was called on to attend him; he was alive when I first saw him, but was in a dying state; I did not know him personally, but I afterwards was told his name was John Flynn; he had a small punctured wound under his left shoulder; it was deep; I traced it and found it had passed between the ribs into the chest, slightly wounding the lungs; it was not a wound necessarily fatal, but in this instance I have no doubt it was the immediate cause of his death.

Cross-examined by Mr. Nichols - I cannot say whether the inflammation which existed in the lacerated parts, was occasioned from the wound itself, or from excessive travelling after it; I think it might be produced from either.

By the Court - I am decidedly of opinion the wound was the cause of his death; and the cure of such a wound would entirely depend upon the nature of a patient's constitution, as well as the mode of treatment pursued.

Mr. **EVAN WILLIAM EVANS** being sworn, said I am a settler, residing at William's River; I knew John Flynn; he was a servant of Mr. Mossman's; I saw him in April last, at Mr. Jones's public-house, at Paterson's River; he was wounded under the shoulder; he died of that wound; I saw him after he was dead.

**GEORGE MACKENZIE**, Esq., being sworn, said I am a Magistrate of the Territory, John Flynn, an assigned servant of Mr. Mossman's, came before me in April last, and made a deposition, which I now hold in my hand, in the presence of the prisoner at the bar; I saw him make his mark to it, and it is attested in the usual manner; he was wounded in the shoulder; two native blacks were there to explain to the prisoner the nature of the accusation against him, which is all the means of interpretation I had within my power.

Cross-examined by Mr. Nichols - I do not think the prisoner had anything like the same means of understanding the nature of the proceedings against him, which a white man in his situation would have had; I issued no warrant to the constable to apprehend the blacks, nor had I received any information on oath of the outrage they had committed.

Mr. Nichols objected to having the deposition read against the prisoner, he not having had the benefit of cross-examination upon it.

The Chief Justice thought that all had been done which the act required, and that there was consequently no legal objection to having the deposition read in evidence, but he would recommend that such part only of it be read as related to the identity of the prisoner.

(The deposition was then put in evidence, and a portion of it was read by the officer of the Court, from which it appeared that the deceased John Flynn, swore positively to the identify of the prisoner at the bar, as being the man who had speared him.)

This was the case for the prosecution.

Mr. Nichols rose to make an application to the Court, certainly a novel one in its nature, but one which he thought from the peculiarty of the case, would meet the sanction of the bench. It was manifestly a mere mockery to call upon the prisoner to make his defence before persons by whom he could not be understood, and he therefore hoped His Honor would grant him (Mr. N.) permission to address the Court and Jury upon the facts of the case. He made this application with the greater confidence, seeing that the Court had formerly ruled as proper, a departure from one of the first principles of the British law, on the plea of ex necessitate; and he therefore trusted that the Court would now grant an indulgence, (which some of the most learned of the profession in the mother country, had lately discused as a right) where the apparent necessity was so much greater. He alluded to the case of the robbery of the Bank of Australia, where contrary to the spirit of the law, the evidence of a

convict attaint, laboring under a capital conviction, had been received against free men.

The Chief Justice said in the absence of any precedent, he must refuse the application; in granting he it, should incur a responsibility for the exercise of which he was not warranted. He did not think the case for the prisoner would suffer anything from his inability to address the Jury in his defence.

Mr. Nichols then submitted that the prisoner was entitled to his acquittal in point of law. The aboriginal natives were the primary tenants of this soil; they subsisted in the woods by fishing and hunting, and it was illegal for any one to disturb them in the possession of these natural rights. The attack of the party from the station of Messrs. Mackenzie and Mossman upon the tribe of black natives, to which the prisoner belonged was not covered by a legal proceeding of warrant or other instrument, and it could therefore only be considered as the attack of one armed party against another in open warfare, whose acts it was well known were not indictable by their civil law.

The Chief Justice was of opinion that there was a sufficient case made out to put to the jury, and that there was nothing in the objections just made, to arrest the proceedings in their present stage.

In answer to an enquiry from the Solicitor General, Mr. Nichols said, he could not produce witnesses for the defence, because he was unable to converse with the prisoner as to the merits of the case; and if he could produce any, their evidence would not be received. The Solicitor-General denied that this was a necessary conclusion, upon which Mr. Nichols put into the witness box the aboriginal native, who was assisting Mr. Threlkeld as interpreter. A conversation then took place respecting the capability of the natives imbibing any religious impressions, or of their believing in any future state of rewards and punishments. Mr. Threlkeld stated, that the black man in the witness box believed in the existence of a divinity and a future state, because he had told him so, and not from any belief of his own on the subject. The court enquired whether the man tendered as a witness could speak to any of the facts? Mr. N. replied in the negative - his object was to prove by illustration the impossibility of tendering witnesses for the defence. The discussion then ceased.

The Chief Justice then addressed the jury, to whom he remarked, that before he should say anything on the facts of the case, he purposed making a few general remarks applicable to it. His Honor said, that cases had already occurred before him in the Supreme Court, where the aboriginal natives of the colony had satisfied with the loss of their lives, the infraction of our laws. He should put the case of the prisoner at the bar to them in the same manner so against any of his Majesty's subjects, because he knew of nothing to prevent these people being considered as such. It was necessary to treat them in this manner on many grounds, but on this principally. The enjoyment and protection of life is as much the law of nature as the law of England. If in a newly inhabited country, there be no municipal law, then the law of nature comes into operation; for if it were not so, the law of retaliation or self-defence would be acted upon. It was then as much for he benefit of the black as the white portion of the community, that the protection of the law should be equally afforded them; it was a reciprocal protection, founded on the dictates of policy, justice and humanity. The learned Judge next proceeded to explain the various degrees which the law attaches to the crime of homicide, in their several relations of wilful murder, manslaughter, and excusable homicide. After an elaborate view of this subject, coupled with the summing up of the evidence in the case, His Honor remarked, that in the present instance it was not perhaps too much for him to say, that the offence of which the prisoner stood charged was not one of murder, because there

was that shew of hostility in the armed party going in pursuit of the tribe of natives, which would give it the appearance of provocation; neither was it a case of excusable homicide, because there was no disposition on the part of the natives to avoid the encounter, or to fly away from an attack, but, as it would appear from the evidence, rather a preparation for it. He should therefore leave the case with the jury as one of manslaughter only, of which they were to form their judgment of the guilt or innocence of the prisoner, from the evidence adduced.

The jury after having retired for considerably upwards of an hour, returned with a verdict of Guilty of Manslaughter, but recommended the prisoner to mercy, from the peculiar circumstances under which the offence was committed.

The Chief Justice. - A very proper verdict gentlemen: your recommendation shall be forwarded to the proper quarter.

The prisoner being ordered to stand remanded, Mr. Nichols rose to state a circumstance regarding the unfortunate man which had come under his personal observation. He was a passenger in the steamer by which the prisoner had been forwarded from Newcastle, and the latter was then not only in a complete state of nudity, but the irons with which he was fettered had, from neglect, cut his ancles to the bone, and rendered his situation both painful and distressing. Mr. N. hoped that the Court would give some order as to his comfort during the time the prisoner might remain in custody. The Chief Justice recommended the prisoner to the Sheriff's humane attention.

In important cases such as this, both newspaper accounts are included. The Sydney Gazette gives a much better account of the legal arguments, but there are some details in the Australian's version that do not appear in that of the Gazette. The Sydney Herald did not report this case.

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

SYDNEY HERALD, 11/08/1834
Supreme Court of New South Wales
Dowling J., 8 August 1834

Friday. – **FRANCIS MANLEY** stood indicted for the wilful murder of **WILLIAM COOK**, by striking him on the head with a stick, at ----, in the county of St. Vincent, on the 14th day of May last.

-- I am overseer to Dr. Reid; the prisoner was an assigned shepherd; I knew a man named William Cook; he is now dead; he lived only twenty-five hours after receiving a blow from the prisoner at the bar; this occurred at one of my master's sheep stations, about fifty miles distant from his residence; on the day laid in the indictment, I and the prisoner were in one of the sheep-folds, when the deceased and another man, who were removing from one station to another, came up; some words took place between deceased and the prisoner, respecting a robbery alleged to have taken place three or four days before, the prisoner observing that deceased had been blamed for the robbery, and that had it not been for John (meaning himself) he would have been blamed for more; deceased told him that if he repeated those words he would knock him down; the prisoner replied, ``No, you won't,'' when he made a blow at the prisoner, who ran out of the sheepfold; deceased ran after him with a hurdle-fork in his hand, when the prisoner took up a hurdle to defend himself with; deceased made two or three blows at the prisoner, when the fork broke over the hurdle; he prisoner and the deceased then closed, when I ran up and parted them; I turned my back towards the deceased to speak to the prisoner, when deceased struck the prisoner

several blows on the head with the remaining part of the fork, which he still held in his hand, on which the prisoner fell down senseless; I raised him up, and told him to go away; I returned to the sheepfold; when the prisoner had got about sixteen yards from the deceased, he observed, ``I can't get satisfaction now, I won't be allowed - but I'll be revenged in less than twenty-four hours," deceased answered, ``If you do I'll have your life - I'll murder you;" the prisoner immediately returned, and struck deceased a blow with a hurdle-pole which knocked him down, and he never rose afterwards; he died next day; I was present at the inquest; he had a wound over the right temple which bled very much; prisoner did not offer to run away, and the same day was taken into custody; the deceased appeared to have an ill feeling towards the prisoner; I have known the prisoner about three years, and always considered him an inoffensive man; deceased had been told that the prisoner was in the habit of taking his vegetables; deceased was about twenty-two, and the prisoner I should take to be about thirty-four or thirty-five; deceased was a stouter and more robust man; there was another man present, but he has since been drowned; the deceased and the prisoner were so close together that deceased might have been more violent than I saw; he was in a great passion; his conduct was sufficient, indeed, to irritate the prisoner; if the prisoner had not held the hurdle over his head in order to defend himself, the deceased would have inflicted a severe blow on him; the hurdle pole was a heavy weapon, about three inches in diameter and three feet and a half in length; such an instrument would inflict a mortal wound; deceased struck at prisoner with that weapon, and knocked him down senseless; there were two large cuts in his head; he was bleeding as he went towards his hut; from the time he recovered till he struck deceased was about a minute; I think the prisoner would have gone to his hut, as I ordered him, if deceased had not expressed himself in the manner before stated; before the prisoner struck deceased he said to him, ``For God's sake go away, I want nothing further to do with you;" I asked him what he meant by threatening to be revenged of deceased, when he said he would go to Captain McKellar, the magistrate; I did not understand him to mean that he would take the life of the deceased; deceased made use of several expressions of that nature, but I cannot say particularly what they were; deceased was a quarrelsome man, and I had had occasion to remove two shepherds from him, being apprehensive that something serious might occur from his violence; when deceased said he would have the prisoner's life, he (the prisoner) was in the act of going away; the deceased had a stick in his hand when he was struck by the prisoner, the point of which was in the ground, and he was in the act of raising it; the prisoner was about twelve or sixteen yards distant when he returned and struck the deceased; deceased did not strike the prisoner at that time.

**DUNCAN McKELLAR**, Esq. - I am a Magistrate of the Colony; in the month of May last, I, as a Magistrate, held an inquest on the body of William Cook, an assigned servant to Dr. Reid; I examined two witnesses, one of which has since been drowned; on examining the body, a wound appeared above the left temple, the eye was much discoloured from the effect of the blow, which appeared to have been inflicted by a heavy blunt instrument; the prisoner had three wounds on his head, had bled much, and appeared to be suffering from ill-treatment; I am of opinion that, if the blows on the head of the prisoner, had been inflicted on the same part as those of the head of the deceased, they would have had the same effect.

Dr. **REID**. - The prisoner has been in my service about two years, I never heard any thing against his character for humanity; I reside about fifty miles from the sheep station, and have not seen much of the prisoner, but if his conduct had been ill, it would have been reported to me by the overseer.

In putting the case to the Jury, his Honor observed, that in point of law, he felt warranted in directing them to return a verdict of Not Guilty as to the charge of murder - but, it would be fore them to consider whether, under all the circumstances of the case, the prisoner had not been guilty of manslaughter, in returning to inflict a blow on the deceased, when he might have escaped from his reach. The Jury returned a general verdict of Not Guilty. His Honor then informed the prisoner, that had a verdict of manslaughter been pronounced against him, he would merely fined him one shilling. The prisoner who expressed to the Court his sincere regret for the fatal occurrence, was discharged, and handed over to his master.
See also Sydney Gazette, 12 August 1834; and for the trial notes, Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3283, vol. 100, p. 130.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 12/08/1834
Friday. - Before His Honor the Chief Justice, and a Jury of Inhabitants.
**JACKY**, an aboriginal native, was indicted for the wilful murder of John Flinn, at Williams's River, on the 3d April last, by inflicting on him a wound on the shoulder, with an instrument called a spear, which would was the cause of his death.
The Reverend Mr. Threlkeld, and an Aboriginal native, attended to act as interpreters .
The prisoner, on being asked whether he would be tried by a Civil or Military Jury, answered, he preferred a Jury of Black Fellows. He objected to the trial by the soldiers, and a Jury of Civil Inhabitants was impannelled.
**THOMAS RODWELL** - I reside at Mr. McKenzie's, J.P. at Williams's River; on Thursday, about 3 o'clock, the 3d April, I was awoke by two of Mr. Archibald Mossman's men; they informed me that on the previous night they had been attacked by a party of blacks, and their hut robbed, and that they expected before we could return to the station, that the men left there would be murdered; it is about 7 miles from Mr. McKenzie's; I told Mr. McKenzie; he gave me arms and ammunition; he told me if I could find any men either on his station or Mr. Mossman's, to take them with me, for the purpose of bringing in some of the blacks; I got John Chisholm and John Webster to go along with me; went in company along with two of Mr. Moisman's men; when we got to Mossman's, six of his men joined us; we then proceeded to the camp of the blacks, about two miles from the station; it was near a creek; there were about 20 male Aboriginal natives there; I took 4 women and 5 children to Mr. McKenzie's; we divided ourselves into two parties, directed by an Aboriginal boy called Lumpy; John Flinn and two men of Mr. Mossman's went round by a bush; we were all armed; we had seven stand of arms altogether; they were not concealed; we were about 40 yards from the blacks when I saw them first; I had orders not to fire upon them unless they molested us first; one party went round the bush, and the other through it; we intended to go up and speak to them first; the first thing I saw when we came in view of the camp, was Flinn speared; he was in front of the others at the time; he was armed with a fowling piece; the spear went through his left shoulder; I saw the spear thrown; I knew the black who threw the spear; Flinn took the spear out himself, and followed the man who threw it; I saw them chase the prisoner; I did not see the prisoner taken; there was not another black in the same direction where prisoner was taken; I was not close enough to know prisoner when he threw the spear, but I have not the least doubt the prisoner is the man; when I came up to him, he was in charge of Flinn and Mossman's two men; I am sure the prisoner is

the man who threw the spear; when we came up to the camp they all threw their spears and boomerings at us; it was not a minute after we came up, that they did so; this was done without any provocation whatever; when they threw their spears, we fired at them; Flinn fired after he was speared; when we fired, the blacks were throwing their spears; there were several thrown at us after Flinn was wounded; when we fired, our object was to hit them; my piece was loaded with small shot and buck shot; some of the blacks were wounded, the prisoner was not wounded; when Jacky threw the spear at Flinn, he ran away from his party, and made up a small mountain; it was Jacky that Flinn fired at; the party did not all discharge their fire arms; Flinn said to me he had received a spear in his left shoulder; pointing to prisoner, he said, that is the man that speared me, and then fired; Flinn could walk very well; I saw the wound; I took off Flinn's shirt, and it did not bleed much; Flinn walked home to Mr. McKenzie's, and then to Mr. Rookins'; it was about 13 or 14 miles; the following morning he walked with me to Williams's River to the Court House, which was about 8 miles; next morning he went to the General Hospital; he was taken ill on the road, and conveyed on a cart to a cottage at Paterson's River, where he died; I saw him the day before he died; it was on the 5th April; the wound was a small one under the left shoulder blade; none of the other weapons thrown by the blacks took effect.

Cross-examined by Mr. Nichols - Mr. McKenzie gave me arms and ammunition; our pieces were loaded before we came up to the blacks; we divided into two parties; Flinn was in front of me when he was wounded; the prisoner was on Flinn's left hand; we wanted to get one or two of the ringleaders to take them to the Bench; Flinn was about 20 yards from me when he was wounded, and about 15 yards from the prisoner; there was not a piece presented by any of our party until after Flinn was speared; when we advanced we had our pieces over our shoulders; none of our party spoke to the blacks; it was half an hour after sunrise when we came to the camp; the blacks were all alarmed when we came up; it was 7 or 8 miles from Mr. McKenzie's to the camp of the blacks; our intention was to capture one of two of them; we went solely with this intention, and went armed; the blacks know the use of fire arms very well; on arriving at the damp, I desired my party not to fire on any account, unless in their own defence; I do not know whether the prisoner is one of the party who robbed the hut; I did not examine the spear after Flinn drew it out; if the man who threw the spear had got away, I should not have been able to identify him; I have heard Flinn say that the man who threw the spear knew him.

By the Solicitor General - I am a constable; I know the prisoner to be one of the tribe complained against for robbing the hut.

By Mr. Nichols - I cannot swear that the prisoner was at the hut; I had no warrant to apprehend them.

By one of the Jury. After the black was captured and brought in the presence of Flinn, the deceased said repeatedly that he was the person who speared him.

**JONATHAN WEBSTER** - I was along with Mr. Mossman in April last; Rodwell called upon me then to look for some blacks who had robbed Mr. Mossman's hut; a man of the name of Chisholm went with us, and two of Mr. Mossman's government men; we got to the camp at day break; we took an Aboriginal named Lumpy along with us; he belongs to a different tribe to the prisoner; when we came to the camp they were gone; the boy showed us their track, and we found them; I was of Rodwell's party; when we came up I saw the spear fly, and immediately after Flinn said he was wounded; I saw him pull the spear out of his body; there was no spears thrown at our party; the blacks ran away; I called on them in their own language to stop; they ran faster; I then fired; I do not know if any of them were wounded; Jacky was then

pursued by Flinn and another, and overtaken by myself; I brought him to Rodwell; Flinn said he was the man who throwed the spear; Flinn said he never lost sight of the prisoner from the time he threw the spear until he was taken; when we came up to the blacks they seemed quite prepared for us; there was no mention made as though we seemed to attack them, until such time as Flinn was wounded.

Cross-examined by Mr. Nichols. - I cannot say what made the woman and children go away. The natives generally send them away when they are bent on mischief. It might have been our appearance with fire arms, that induced the blacks to throw their spears. I cannot say whether the prisoner was the man who threw the spear, there were two or three blacks around the prisoner at the time, and ten or a dozen at a little distance. Flinn might have made a mistake in the black. I cannot say whether any of the blacks belonging to the prisoner's tribe robbed Mr. Mossman's hut. I always thought the prisoner a quiet man, he was much about our huts, tand [sic] always conducted himself well. I should not think him likely to commit such a crime as that for which he is now at the bar. Flinn did not complain much of the wound till next day.

**ISAAC SCOTT NIMIL [NIND]**. - I am a surgeon, I saw the body of John Flinn at Mr. James's, the settlers arms, Paterson's River. I saw him when alive. I was called to attend him a few hours previous to his death. He was wounded under the left shoulder. It was a small punctured wound and deep, he was in a dying state when I saw him, he died that evening, he died of inflamation, the lungs had been wounded slightly; I opened the body, the wound was beneath the skin about 3 inches, and entered the chest between 6th and 7th rib; such a wound might not be a necessary cause of death, but in this instance, it was; the lungs were lacerated externally, but not deeply penetrated; I have no doubt it wad the cause of his death; he stated to the bye-standers that he expected to die.

Cross-examined by Mr. Nichols. - The travelling 14 or 15 miles might have occasioned the inflammation, and it might have arisen without that exertion.

By the Court. - I have no doubt he died of the wound; in many cases, such a wound might not be fatal, but in this it was, it depended upon the constitution of the patient.

**GEORGE MACKENZIE**, Esq. J. P. - I know Flinn, I saw him with a wound under his left shoulder. He came before me on the 3d April, with a constable and a black native; the prisoner at the bar is the person, he was charged with having inflicted a wound on John Flinn with a spear, the prisoner was present, Flinns evidence was taken down truly. This is the deposition taken on the occasion, which I now hold in my hand, this is his signature, also mine, I endeavoured to impress upon the prisoner, the nature of the offence with which he was charged by getting two aboriginal natives to explain it to him.

Cross-examined by Mr. Nichols. - The deceased did not express any fears of dying at the time the examination was taken before me. When I sent the men to capture the blacks, I did not issue any warrant. I did so without any information on oath, I ordered them to arm themselves. It is likely the blacks would throw spears if they saw their opponents coming against them with fire-arms.

**EVAN WILLIAM EVANS**. - I am a settler at Hunter's River. I know the deceased, he was a government servant of Mr. Mossmans. I saw him before he was dead. I saw him after. He was insensible when I saw him first.

Cross-examined. - There may be more than one John Flinn; part of the deposition of the deceased taken before George Mackenzie, Esq. was then read by the registrar - which stated ``that the deceased, accompanied by others, went to the camp of the blacks, on coming there, he went before the rest, for the purpose of speaking to the

blacks, when, without any provocation, a spear was thrown at him and wounded him in the shoulder, he was positive it was thrown by Jacky the prisoner."

Mr. Nichols - From the singular situation in which he was placed, by not being enabled to call any of the brethren of the prisoner as witnesses, in consequence of their not understanding the nature of an oath, trusted, that His Honor, would, on the present occasion so far travel out of the usual course, and permit him to address the jury for the prisoner.

His Honor could find no precedent to warrant him in granting Mr. Nichols' application, and not being prepared to break through a rule of law, and take a degree of responsibility upon himself which he was by no means inclined to do, he was under the necessity of refusing the application. He did not think the prisoners case would suffer by being left in the hands of the Court. His Honor summed up.

The Jury retired for nearly two hours, and returned a verdict of guilty of manslaughter, with a recommendation to his honor on behalf of the prisoner, which his honor said would be attended to.

The Aboriginal name of the prisoner, is **Wong ko-bi-Han.**

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

Supreme Court of New South Wales
Forbes C.J., 15 August 1834
(Before the Chief Justice, and a Jury of Civil Inhabitants.)

**HENRY MILLS**, and **WILLIAM CHAPMAN**, were indicted for the wilful murder of **SAMUEL PRIEST, otherwise CHAPMAN**, near Waterview, on the Parramatta River, in the harbour of Port Jackson, on the 10th November, 1831; and **JULIA PRIEST, otherwise CHAPMAN**, was charged as an accessary after the fact, in afterwards harbouring, comforting, and maintaining the two first-named prisoners, well knowing them to have committed the said felony and murder. The information contained four counts, charging the prisoners in the same way; namely, Mills as principal in the first, and Chapman in the second degree in the crime, and the female prisoner as an accessary after the fact; but alleging the deed to have been perpetrated by the different means of striking the deceased on the head with a piece of wood, by drowning him in the river, and by cutting his neck with a knife.

The Solicitor General stated the case for the prosecution; the prisoners were defended by Mr. Williams.

**CHARLES BAYLES** being sworn, said - I live at the back of the barracks in Clarence-street; I knew Samuel Priest, who was also called Chapman; I saw him alive a few days before his death; I afterwards saw him dead lying by the water side of Darling harbour; I saw the coroner and Mr. **JILKS**, and two or three hundred people there; I could not identify the body; one of the deceased's legs were shorter than the other in his life time, but I could not distinguish that in the dead body; the body was in a horrid state; the head was off; the neck looked as if the head had been cut off with some sharp instrument; the bone did not seem to have been cut, but the flesh did; the bone appeared to have been wrung off; I cannot swear that it is the body of Samuel Priest; it might or might not be his body; the deceased was a small man, about 5 feet 5 inches in height; the body was that of a smallish man; it was I think about four or five days from the time the deceased was missing, that the body was found.

Cross-examined - I knew the deceased for eight or nine years, but I could not recognise the body as his; part of one of the thighs appeared to have been eaten by fish; it is not impossible but the neck might have been gnawed in the same manner,

but it appeared to have been cut; I am a butcher; one man could wrest off the head of a bullock after the neck being previously cut round.

**PETER HOSKING**, Esq., being sworn, said - I am a surgeon; I was called to attend the coroner's inquest on the body of the deceased; I gave a certificate after I had viewed the body; it bear the date of the 23rd November, 1831; the body which was a mere skeleton was contained in a coffin; I examined the neck; the head was taken off at the first vertebrae of the neck in a very smooth manner; the flesh of the neck was nearly all off, I could count every vertebrae; the articulation was very smooth; my impression was that the head had dropped off from putrefaction, or from being bit off by the fish; it was apparent that the bone had not been cut off, but it might have been wrested off; I was told it was the body of a man named Chapman, but I did not know anything of the man.

Cross-examined - If I had not heard of this alleged murder, I should have concluded the man had been drowned, that the flesh had been bitten off the neck and other parts by fish, and that the head had dropped off after putrefaction, but its own gravity; there was nothing apparent however, to rebut the position that the flesh of the neck had been previously cut through; one man could easily wrest off the head of a human being, after the neck being cut through; from the state the body was in, I should say it was impossible to identify it unless it had some peculiar mark.

**JOSEPH WILKS** being sworn, said, I am free, and live in Argyle; in 1831, I lived with the deceased, Samuel Chapman, in Clarence-street; he was married to the female prisoner at the bar; I never heard him called Priest; I know the two male prisoners; William Chapman was the reputed brother of the deceased; he lived with the deceased at that time; Mills, I do not think had any regular employment then, but he used to come backwards and forwards to the house; I was the deceased's hired servant; on Thursday the 10th Nov., 1831, I and the deceased went from the Market Wharf in Mr. Anderson's boat to Kissing-point, on the Parramatta river; we set off about 6 o'clock in the morning and arrived at Kissing-point between 9 and 10; we went to serve a law process on a person named Warman who lived there; it was an execution from the Court of Requests; an arrangement was made between deceased and Warman to receive 10 dollars, and take a bill at three months for the remainder and stay proceedings; on the previous day it was arranged at Chapman's that I should be placed in charge of Warman's goods; William Chapman persuaded the deceased not to settle the affair unless Warman paid the whole of the debt, but to sell of his goods; we left Warman's on our return a little before sun-set; we stopped at Mr. Small's, and in presence of Warman had two pots of porter and three gills of rum; the deceased and I then proceeded on our way to Sydney; on reaching the police station at Longnose, which is about six miles, the deceased complained of the effects of the liquor, and I advised him to lay down in the boat, and I would pull the oars by myself; on arriving at Longnose, I was hailed by another boat lying on the shore at Birch grove; it was William Chapman who called out; he said is that you Sam; I said no; I knew his voice; I said it was myself; both boats then met; the male prisoners were the persons in the other boat; they asked me what I had done with the deceased; I told them he was drunk, and lying asleep in the boat; both boats pulled together till we reached the middle of Birch grove bay; I was sober; I could see the house at Birch grove, I do not know that it is called Waterview; it was when we arrived at this place that William Chapman proposed for me to exchange boats, his being a smaller one, and I could more easily pull it by myself; I accordingly got into their boat, and they got into mine, I leaving the deceased with them; I asked what made them come to meet us; they said they did not think the deceased would be able to get the boat home by himself; they

did not know I was to come with him; William Chapman then asked why I had returned; I told him how the business had been settled; he said I had d--y disappointed him; I asked how; he said it was not his intention to have let the deceased every return to Sydney; I dissuaded him from doing anything like that threat seemed to convey, telling him it would be sure to be found out; when we arrived at the point were the Phoenix hulk is now stationed, a bottle of rum was produced by Mills, who asked me if I would have a ball; I said I had no objection; we both stopped rowing, and we all three drank of the rum; I drank out of the bottle, about one glass full; it was just getting dark, between seven and eight o'clock; both boats were close together; Mills was rousing up the deceased, saying Sam, come get up and have a ball; the deceased rose up and asked what the devil brought him there; Mills said they had come to look after him; the deceased leaned over the gunwale of the boat and began scooping some water into his face with his hand to refresh himself; Mills then laid hold of a tree-nail made of iron-bark about a yard in length, which was lying in the boat, and made a blow at the deceased with it, saying he would be d--d if he would be disappointed; the blow struck him on the back of the head and stunned the deceased, who scarcely spoke or moved afterwards; he fell with his head in the water; Mills laid hold of him by the trowsers and threw him into the water, holding him by the legs; he kept him in that position for about five minutes; the boats were drifting at this time quite close in shore towards Birch Grove; in the house I think I have heard called Waterview, but I am not sure; as the deceased was held in the water, I could perceive his arms move in the water like a man swimming, but very gently; I began to scream out as soon as the blow was struck, and threw the bottle overboard; William Chapman called me a chicken-hearted b--r, and asked what I was afraid of no one was going to hurt me; William Chapman then struck the deceased twice with one of the oars, two violent blows between the neck and shoulders as he lay in the water; the prisoners then got out of the boat and dragged the body on shore in Waterview Bay; they unbuttoned his clothes, and in the waistband of his trowsers they found two folds of bank notes, one of which they presented to me; a person could tell what they were if they had them in their hand, but it was not light enough to read them; I said I would have nothing to do with it, as it would get us all in trouble; I did not go ashore, but both boats were aground and lying close together; I was afterwards prevailed upon to accept one note, which in the morning I discovered to be a £5 note; they were not more than ten minutes on the shore; Mills produced a butchers' knife and said he would black him; the male prisoners are both butchers by trade; Mills took the deceased by the hair of his head and cut the neck all round; William Chapman then kneeled on his body, while the other wrung off his head; I was not more than four feet from them at this time; I saw the head taken off; it came off at one twisting; the head was then tied in a yellow silk handkerchief that the deceased had worn round his neck; I then told William Chapman it would be the means of all of us being hanged, as it would be plainly seen the man had been murdered, when the body came to rise; Mills said he would prevent it rising again; with that he shoved his knife into the middle of the stomach, and ripped it up to the breast; he said that would prevent him from every rising; this was before we left the shore; the prisoners then took the painter off the boat, and tied it round the deceased's feet, making it fast to the stern of their boat; the deceased's head in the handkerchief was placed on the bow of my boat, I mean the boat I left Sydney in; we then rowing out into the midst of the stream they towing the body after them; it was then proposed I should make for Sydney and they would follow me; we separated, they pulling for Goat Island, and I for Sydney; they were to let the body go in the stream; they had not left me many minutes when I heard the

approach of another boat from the direction of Sydney, upon which I shoved the head off the bow of my boat into the water; this was in the middle of the river; shortly after, the prisoners overtook me in their boat; we had not been apart more than ten minutes; they asked if I had spoken to the boat which passed; I said I had; it was then proposed by William Chapman that on my arrival in Sydney I should report that the deceased had fallen overboard in rising to attempt to make water, and he said nothing could hurt any of us so long as I kept my own counsel; at the same time saying, that if I mentioned it ever so much, nothing could save me, as no one knew they had left Sydney, and that there would be plenty of proof that no one was in company of the deceased but me; I told then not to be afraid of my saying anything about it; William Chapman said if I told nothing about it, he would see that I should have £50; when we got near the Miller's Point the prisoner left me, telling me to mention to the first constable I should meet, the story we had concocted; they wished to be at home first, that no one should be aware of their having been away; they landed in some of the small bays about Jack the Miller's Point; I went considerably lower down, to the Market Wharf, where when I arrived, I saw a constable named **COCKRANE**, to whom I represented that the deceased William Chapman had fell overboard and was drowned; I asked him what steps I was to take; he requested me to go with him; we went to the Coroner and acquainted him that the deceased was drowned; I said the deceased had accidentally fell overboard in rising to make water; I begged of Cockrane to go with me to the deceased's house to communicate the news to his wife; I went in after Cockrane, the three prisoners and a person named Anderson were sitting together drinking; after I had related what he had agreed upon, the female prisoner seemed a little affected, and walked into the bed room; I think she was weeping; I saw her tears, but she said nothing; she remained in the bed room about half an hour; we all drank together; Cockrane soon went away; the table and glasses were then cleared away, and the neighbours began to assemble; I delivered up the execution and the ten dollars to the deceased's wife in presence of the constable, agreeably to a previous wish of Wm. Chapman's, as I feared that Warman had seen the deceased deliver it over to me; I laid them on the table before the female prisoner went into the bed room, and Wm. Chapman carried them in to her shortly afterwards; I told the same story to the neighbours, as I had told the constable; the prisoners appeared as if they knew nothing about the matter; I think it was on the 25th of the month, I was ordered to attend the Coroner's Inquest; I am not positive as to the precise date, but I think it was about a fortnight after the death of the deceased; I saw the body; I knew it by the shoes on the feet; the deceased was lame in his life time; before I saw the body, the male prisoners came to my lodgings, and told me that a body had been found with nothing on it but shoes; I said I should know it by the shoes; they said whether it was, or was not the body of the deceased, it would be better for me to say it was his body, and then the subject would soon die away; I then went with the two prisoners to see the body, and I said it was the deceased in presence of many persons; I knew it by the shoes, from the cuts which the deceased had made in the toes of them with a knife which Mr. Warman lent him, as they hurt his feet; the body was lying at the water side near the ``Cat and Mutton," public-house in Kent-street; I attended at the Coroner's Inquest; I saw the body there; I was committed from the Inquest; I saw the prisoners there; Wm. Chapman told me not to be afraid, as nothing could hurt me, if I kept my own secret, and he would take care I should be provided with Counsel at the trial; I was sent to prison, where the prisoners supplied me with provisions; they were brought to me by a person named **ROBERT HESKETH**; I lived with the prisoners at the bar in the deceased's house, until I was

sent to gaol; I slept at my lodgings, and went to the house in the day time; I was in prison until the month of February following; I received £15 from Wm. Chapman, on the day that the body was found; it was given to me as a part of the £50, that I was to receive; Mr. Rowe, I understood, was paid £10 to defend me at the trial; I was told so by Hesketh; the prisoners did not visit me in gaol; the provisions were brought to me as from Mr. Anderson, the prisoners not wishing to have their names mentioned; I had been about a week in gaol when I wrote to Chapman, saying I was determined to disclose what had happened, and I received a visit from Mr. Anderson in consequence of it; the prisoners were not present at that interview; this letter is in the handwriting of William Chapman, it was sent to me in the month of March last, when I was again in gaol under commitment to take my trial for forgery; it was not connected with the former charge; about a week after I received this note, I wrote to William Chapman, telling him I intended to disclose the particulars of the murder; he afterwards came to see me in gaol, and told me not to be afraid, everything should be done to get me out of trouble, and to make me comfortable afterwards; the deceased and the female prisoner did not live on good terms; they used to quarrel when she got intoxicated; about a month before the murder, the deceased fell out of his cart and pitched on his head; when I told the prisoner, William Chapman of this, he said I wish he had broken his b--y neck; I would not grudge £50 to any one who would make away with him; I have no reason to believe that the female prisoner knew any thing of the murder; she once told me afterwards that she thought there was something very mysterious more than she was aware of in the death of her husband, and pressed me to tell her if I knew anything about it; I desired her not to bother me about it, and did not tell her anything on the subject; I believed then that she did not know anything of the murder, but I thought differently before; I do not know what was done with the deceased's property; when I came out of gaol it was all made away with; I believe, that since the murder William Chapman and the female prisoner cohabited together as man and wife, but I do not know whether they did so immediately after the murder; I believe there was an intimacy between them during the lifetime of the deceased; when I screamed out as the deceased was struck, I made a great noise, such as persons generally make when they are frightened; I cried loud enough to be heard by the people at Waterview; the deceased wore a black beaver hat on the night of the murder; the hat was not missed until we arrived home; I think it was myself who first discovered the loss of the hat; the two male prisoners, myself, and several of the neighbours went on pretence to search for the body; it was at the inquest that I first saw the hat; I know that Mr. Middleton found the hat; the deceased had two small books on his person at the time of the murder, in which he kept some meat accounts; these are them; part of the entries in them are in my handwriting; the deceased always owned William Chapman as his brother; the boat that we borrowed, belonged to Mr. Anderson, the same person who was drinking with the prisoners on the night of the murder, and who afterwards brought me the message from William Chapman to the gaol; when we went pretending to search for the body, they did not separate from me to search in Waterview Bay; the tree-nail with which the deceased was struck, was thrown overboard, or left at the place where the head was taken off.

Cross-examined. I am still under commitment to take my trial for forgery, and I was so when I made the present disclosure; I first disclosed it in the month of May last; I wrote several notes to Chapman after my commitment; I wrote to him for money to obtain a counsel for me and pay for my bail bonds; I signified in my letter that I thought a curse had been hanging over my head ever since the murder; I sent this letter by a messenger in the gaol, the letter I have sworn to as the hand writing of

the prisoner William Chapman, I swear to the best of my belief is in his handwriting; I did not know of the two rolls of bank notes being on the deceased's person until I saw them taken by the prisoners; I did not keep the deceased's books; I was in his service for seven weeks; I do not know of the deceased receiving any money the day before his death; I was about the premises all that day; the deceased often said he had more money than his wife or any one suspected; the day before, I was on the Parramatta Road with the deceased selling his meat; on his return home he always gave the silver and copper coin to his wife; William Chapman cut the notes out of the waistband of his trowsers; the money was in between the waistband of the trowsers and the lining; I persuaded the deceased to settle the execution rather than distress the man for his few goods; Warman wished to accompany us to Sydney in the boat, but the deceased would not permit him; I did not attempt to prevent his coming; I was sober but the deceased was drunk; Warman had not paid the 10 dollars to the deceased when he arrived at Small's; I was accused of murdering and burning a man once, but I was proved to be innocent; the black natives did it; I was induced to keep the secret so long a time from the promises that were made to me by William Chapman' the tree-nail was brought from Small's place to make handles for the deceased's cleavers and knives; I never gave Mrs. Chapman £12 to keep for me; I returned £6 to William Chapman out of the £15 he gave me at his request, he fearing that if I should be searched at the Inquest, and so great a sum discovered in my possession, it might create suspicion against me; the deceased bled very freely when the head was cut off, and the blood flowed on the ground.

[This witness underwent a lengthened cross-examination, but he remained unshaken in his testimony.]

Re examined - I was not placed on my trial for the murdering and burning of the man I have alluded to; it was merely an investigation before the Magistrates, and I was discharged from the imputation.

**WILLIAM EDNEY** being sworn, said I live in Kent-street; about two years and a half ago I found a human body on Goat Island; an Inquest was held on that body at the ``Cat and Mutton'' public-house, and I heard that it was the body of Chapman, a butcher; I never saw the body after it was removed by the Constables from Goat Island; I was fishing at Goat Island with a few friends when I first discovered the body.

**THOMAS RYAN** being sworn, said I am a tailor, and resided in York-street some time ago; I know the prisoner Chapman and the female prisoner; I knew the deceased; I only knew him by the name of Chapman; I saw the body; I cannot swear to its identity, it was so disfigured; I know that the deceased and his wife quarrelled occasionally; when they quarrelled, they abused one another and sometimes fought.

[A long desultory conversation here took place between the Solicitor General, Mr. Williams, and the Court, relative to a question proposed by the former to the witness, respecting a conversation alleged to have taken place between the female prisoner and another person on the expression of her feeling towards the deceased, her husband. After considerable and renewed argument between the parties, conducted with much legal ingenuity, the Court ruled that the law was imperative in the matter - the female prisoner was charged as an accessary after the fact - her crime could only commence after the deed was perpetrated - and no evidence of any former expression of feeling against the deceased could operate against her as having comforted the murderers after the commission of the crime. The testimony proposed to be elicited from the witness was therefore rejected as irregular.]

Examination continued - I was understood that the deceased and William Chapman were brothers; I do not know whether William Chapman and the female prisoner cohabited with one another as man and wife, after the murder; I heard that he was lost overboard out of the boat, I think the morning after it was reported to have happened.
Robert Hesketh being sworn, said I am a free man residing in Sussex-street; I know all the prisoners at the bar; I recollect Wilks being in gaol for trial of this murder; I visited him several times there, with provisions from the female prisoner; she said she did not like to go near the gaol; Mills used afterwards to bring provisions to me to take to Wilks; I was on friendly terms with the prisoners; the female prisoner desired me to see Mr. Rowe to procure him to defend Wilks for the murder; I enquired and told her the fee was £10 10s.; she gave me £8 on account of it, and the remaining £2 10s. I gave Mr. R. my note for; Mr. Rowe afterwards sued me for that amount, and I paid it; I have never been repaid it; after the deceased's death, the prisoner William Chapman still continued to manage the business as before; I do not know whether William Chapman cohabited with the female prisoner.

Cross-examined - I never told Wilks in the gaol, that the provisions I took to him there came from Mr. Anderson, neither in gaol nor out of it; for aught I know to the contrary, the £8 Mrs. Chapman gave me, may have belonged to Wilks.

**SAMUEL HILL** being sworn, said, I am a prisoner of the crown, and came here from the Phoenix hulk, where I was sent for absconding from my service; I lived with William Chapman and Julia Chapman about a twelve month since; I was out of a situation, and remained with them for about three months; they seemed to cohabit as man and wife; they quarrelled when they used to get in liquor; one evening I recol- [sic] they had a great quarrel; the male prisoner beat her, and while she was on the ground she called him a murdering b---, and said, who cut the man's head off; I have seen Wilks once at the house.

Cross-examined - The female was intoxicated and under much excitement at the time; it was about last August; I thought the words related to the murder which had been committed; it was after the Cornoner's inquest, and when the female prisoner had heard of her husband's head having been cut off; the words were used tauntingly; Chapman made no reply to them.

**EDWARD CHOCHRAN** being sworn, said, I was a constable in 1831; I recollect a man named Wilks telling me on the Market Wharf one evening, about the latter end of November, in that year, between 7 and 8 o'clock, that the deceased Samuel Chapman was accidentally drowned by falling out of a boat in which he and the deceased were coming from Kissing Point; I accompanied Wilks to the Coroner, and afterwards to Chapman's house; Wilks reported the same story he had told me to Mrs. Chapman, in presence of William Chapman, Mr. Anderson, and to the best of my opinion, the prisoner Mills; the female prisoner seemed a little alarmed, but not so much as I think a virtuous woman ought to be for the loss of her husband; Wilks reckoned out some money which he said he had received on account of an execution; she told William Chapman to take it up and he did so; at 12 o'clock that night, I met the female prisoner, I think with Wm. Chapman and Mr. Anderson, in King-street, a very few rods from their own house; the female appeared to be in a state of intoxication; I thought it was rather a surprising circumstance for one in her situation; I was present at the inquest; I saw William Chapman there; Wilks was taken into custody on the day the body was found; after the inquest I saw William Chapman shake hands with Wilks, and say never fear, you shall want for nothing; this was said as I was conducting Wilks to gaol; I brought the body from Goat Island; the Coroner committed Wilks, and I conducted him to prison.

Cross-examined - I did not see the female shed tears when her husband's death was announced; she said, ``Oh, my God! is my Sam gone?'' I am sure it was William Chapman that was with Mrs. Chapman when I met her in King-street on the night of her husband's death.

**PETER HANSLOW** being sworn, said, I live in Clarence-street; I know the prisoners, and also the witness Wilks; I received a letter four or five months ago addressed to Mrs. Chapman in another letter from Wilks, which I delivered to the female prisoner, and I received another letter from her in return, which she requested I would forward to him; I sent him the letter by my little boy; Mrs. Chapman told me that she had had the bailiffs in her house that week for £10 due for rent, and that she was distressed, and could not assist him.

**ARTHUR LITTLE** being sworn, said, I reside in King-street, Sydney; I knew the deceased Samuel Chapman; I also knew him by the name of Priest; at the time of his decease he was a tenant of mine; for a short time afterwards his widow and William Chapman lived there; thoy [sic] have both of them paid me rent.

Cross-examined - I went with several others to try to discover the body of the deceased; William Chapman went also, and appeared as anxious as any one to discover the body; we went in the neighbourhood of Birch Grove and Longnose to search for the deceased, in consequence of the information given of his accidental loss by Wilks; I have heard the deceased called by both the names of Priest and Chapman; I knew him four or five years.

**JAMES WARMAN** being sworn, said, I resided at Kissing Point in the month of November, 1831; I am a schoolmaster; I knew the deceased Samuel Chapman; he came to me on the 13th November, 1831, with the witness Wilks, in a small boat; he said he had an execution against me; I paid him some money before he went away; I went with him to Mr. Small's, and left him about 3 or 4 o'clock; I wanted to go to Sydney, and I asked him to give me a passage in order to get the money there from my wife's relatives; the witness Wilks, who seemed to have great influence over the deceased's mind, opposed my going, by offering many frivolous excuses against it; he appeared very desirous that I should not go in the boat; he said I should be neglecting my public duties if I went, and expose myself to the censure of the government by doing so; my wife was very uneasy at the time; she was afraid of my losing my situation through the execution being enforced; I got 10 dollars from Mr. Bray, which I paid to deceased; my impression is that my wife did not wish me to go to Sydney; I am almost positive that she did not tell Wilks that she did not wish me to go to Sydney; I think it very improbable that she did so; the deceased borrowed a knife out of my kitchen to cut one of his shoes which he said hurted him; they had something to drink at Small's, but not to excess; they were both perfectly sober when they left Small's, which was between 3 and 4 o'clock.

Cross-examined - I think they were about an hour in my house; I do not recollect Wilks saying I should be put in gaol if I went to Sydney; if Wilks had allowed me, I should certainly have gone to Sydney; after I heard of the murder, I suspected Wilks for it from his conduct in wishing to prevent my going in the boat; Priest was fresh, but not so much so, as not to be perfectly able to know what he was about; I think I told Wilks that if I were to come to Sydney, I should be able to pay the whole of the money.

**MARY BRADY** being sworn, said, I now live in Kent-street; in the year 1831, I lived with the Reverend Mr. Middleton, at Belmain, which is now called Waterview; I recollect a man being reported to be drowned; on a Wednesday night in November, 1831, before dark, I heard a noise from the direction of Goat Island; it seemed the

voice of some person saying oh! oh! in a moaning manner; I do not know the distance, but the voice seemed to come from Goat Island; I took the noise to be made either by some black-fellows, or bushrangers; we had no man about our place at the time; my master returned home that night, and I told him what I had heard; I said I was afraid to stop any more on the farm without there was some man here; I afterwards saw a hat in the kitchen; my master said Mary you are quite right, there has been some row, I have found a gentleman's hat; there were some papers in the hat.

Cross-examined--It was quite light when I heard the noise; I was walking under the verandah with three children, and Miss **MIDDLETON**; there were only two groans, that I heard; I heard a noise before the groans; it seemed as if two persons were quarrelling.

The Reverend **GEORGE AUGUSTUS MIDDLETON**, being sworn, said in November 1831, I lived at Waterview; on the 10th November, in that year, I dined from home; when I came home, my servant, Mary Brady, seemed under great agitation, from having heard a great noise and altercation between two persons at least; one person seemed to be pursuing another, and she heard an exclamation several times repeated; on the second morning after, I observed something dark from my verandah, near the landing place, and on proceeding there, I discovered a hat, and a portion of papers, some in the hat, and some at a little distance from it, which appeared to belong to it also; I am satisfied the papers produced, are those I found in the hat; I have not the most distant doubt of it; I felt satisfied these papers would throw a light upon the noise to which my servant had alluded; on the second morning, after I found the hat, I had reason to believe a person had been drowned there, from a conversation with the male prisoners at the bar; I had previously watched them for some time, evidently looking after some object in the bay of Birch Grove; no individual was present, but the two prisoners at the bar; they told me that they were seeking for the body of a friend of theirs, who had been drowned a few evenings before, as he was coming down the river from Kissing Point; I then enquired what description of hat their lost friend had worn, when they most minutely described the one I had found, so that I was induced to send my son to the house for it; they said nothing whatever about papers in it; I allowed them to examine the hat and they immediately identified it as belonging to their deceased friend; they did not undergo the slightest change of tone or colour, when they saw the hat; they afterwards returned to Sydney, without continuing their search in the rest of the bay; I said nothing whatever to them about the papers, which I had already forwarded into Sydney; I kept the hat in my possession for some time, and then delivered it up to the police; this occurred between 7 and 8 o'clock in the morning; I attended at the Inquest; the hat was produced there.

Cross-examined - My servant described the noise, as if made by one person pursing another; the pursued party making a noise, which grew louder, as it seemed to approach her, and then suddenly ceased; there was not any trace of blood, or feet marks, where the hat was found; there was only a very slight portion of the hat wetted, and it seemed to have been thrown upon the shore, by the last effort of the tide.

(A plan of the estate and bay at Waterview, was handed up for the inspection of the bench.)

The Solicitor General, here proposed to read in evidence, the deposition, before the Coroner's Inquest, of a person named **HENRY JACKSON**, who he was unable to produce before the Court, on account of his having been since transported to Van Diemen's Land. This evidence was alleged to be material, in-as-much as Jackson had made the shoes for the deceased, which were found on the feet of the mutilated body.

After much discussion on the subject, the Court felt bound to act strictly under the rule of evidence. The production in evidence of a deposition, on which an accused party had not enjoyed the benefit of cross-examination, was held to be inadmissible with three exceptions - which were, the death of a witness, his inability to travel for the purpose of giving evidence, or his being kept out of the way by the contrivance of the accused. In the present instance, none of these causes seemed to exist, and the Court would not therefore be justified in sanctioning a departure from an established rule, where the exceptions were so explicitly laid down. It was incurring too great a responsibility to establish such a dangerous precedent; a responsibility which the Court was not warranted in using. The evidence was consequently rejected.

[The letter sent to Wilks, and sworn to as the handwriting of the prisoner William Chapman, was read in evidence, from which it appeared that the writer pleaded distress as the cause of not being able to furnish the witness with any pecuniary assistance; but he promised to do every thing in his power towards his comfort at some future time.]

This was the case for the prosecution

Mr. Williams submitted that there was no evidence affecting the female prisoner sufficiently to place her upon her defence, but this point was overruled by the Court.

**ROBERT HENDERSON** being sworn, said, I am a farmer, and live at Brisbane Water; I recollect the time the deceased disappeared; I knew him when he was alive; I was at his house when the news was bought of his death; I saw William Chapman a few minutes before this at his own door; I had also seen him in the course of the day; Cockrane told the news of his death; the widow seemed very much affected; it was about 9 o'clock when the report was brought; I had been in the house from about 7 o'clock, and I saw William Chapman at home a few minutes before that time; I saw no drinking at the house; Cockrane first, and Wilks afterwards explained to the widow that her husband had been drowned; William Chapman seemed vexed at the deceased's death; he went with me and several others to seek for the body, and every exertion seemed to be made by Chapman to recover it.

Cross-examined - I was at the deceased's house three or four hours on the day the death was reported to have occurred; I knew William Chapman lived at that house for months before; I had also seen Mills there; I used to go frequently to the house; I visit Sydney regularly every week or fortnight; I was at the deceased's house for three hours before the constable came with the report, and I saw William Chapman standing there when I got there; there was no drinking going on there at the time; I went to my lodging in Kent-street soon after Cockran came with the report, and I did not see the female any more during that night; I have no recollection of seeing Cockran afterwards on that night; I did not meet him in King-street, in company with William Chapman and the female prisoner; I swear that I did not see the female prisoner intoxicated on that night.

**JOHN NOBBLETT** being sworn, said, I have known William Chapman for several years; I am a barber; (this witness not appearing to know anything of the circumstance, was withdrawn.)

**WILLIAM BELL** being sworn, said, I know William Chapman; I recollect the circumstance of Samuel Chapman being reported to be drowned; I was in Sydney that day slaughtering cattle; the prisoner William Chapman was playing skittles with me from 12 to 4 o'clock that day; I did not see Mills that day; we played at skittles next door to Chapman's shop.

Cross-examined - I came from the gaol where I am serving a fine from the magistrates; I am a butcher, and a free man, and was so at the time I am speaking of.

**GEORGE MARTIN** being sworn, said I live at the corner of Market and York-streets; I lived next door to the deceased; I kept a skittle-ground; (this witness not appearing to know any thing of the matter, was also withdrawn.)

**DAVID ANDERSON** being sworn, said I am free, and reside in Kent-street; I recollect the report of Chapman or Priest being drowned; I owned a boat at that time; I lent William Chapman my boat every day from the first day after the deceased was drowned, until the body was found; he paid me a dollar for every day I attended with the boat; he ordered me to use every exertion to find the body, and he seemed to use every exertion himself for the same purpose; we took grappling irons with us to drag for the body.

Mary Brady recalled by Mr. Williams - The noise I heard seemed to increase until it approached near to me, and then suddenly died away.

Edward Cockrane recalled by the Solicitor General - I swear positively I met Robert Henderson with the female prisoner intoxicated, and William Chapman about 12 o'clock on the night the deceased's death was reported; I think it impossible that I should have mistaken Mr. Henderson.

The prisoners severally protested their innocence, and here closed their defence.

The learned Judge summed up the evidence in a manner not less laborious than luminous, of which we regret exceedingly our want of space will not allow us to take any notice, and left the case with the Jury, who after a short consultation, returned a verdict of guilty against the two male prisoners, and acquitted the female prisoner. Sentence of death in the usual manner was passed upon Mills and William Chapman, awarding execution on Monday morning next; Julia Chapman was discharged by proclamation. The Court was crowded to excess during the whole day: among the throng we noticed many females, who anxiously assembled to hear the recital of the atrocious and inhuman deed; and the buzz of the crowd increased to such an extent during the latter part of the proceedings, that the learned Judge was obliged to interpose his authority, and threaten to clear the Court, if order was not better observed. The male prisoners seemed unmoved, and left the dock protesting their innocence. [*]

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We have devoted a more than usual space in our columns this day, and been necessarily obliged to leave out other matter, in order to make room for the above extraordinary trial for murder. The Court was densely crowded, and during the day it was surrounded by a multitude of people anxiously awaiting the result.

See also Sydney Herald, 18 August 1834; Australian, 19 August 1834.

[*] The report in the Australian, 19 August 1834 states that Wilks was committed from the Coroner's inquest, charged with murder, but was subsequently discharged. It also states that Forbes C.J. commented in his charge to the jury that this was the most horrid murder he had tried: ``The recital was so appalling, it was enough to freeze one's blood, and make one shudder to think there were such monsters in existence." The same newspaper said that when Julia Chapman got outside after her acquittal, ``she was very roughly handled by the crowd, and was obliged to take shelter in an adjoining house." The Sydney Gazette, 18 August 1834, said that the trial did not conclude until past eleven o'clock at night, and that it was the most crowded court since the foundation of the colony.

Mills and Chapman were hanged on 18 August 1834, just a few days after the trial. Before ascending the scaffold, Chapman confessed that he had lived in adultery with the wife of the deceased before his death, but had played no role in the murder. Mills

also denied his liability, which the two of them repeated on the scaffold: Australian, 19 August 1834. [For the trial of Joseph Wilks for forgery, see R. v. Wilks, 1834.]

SYDNEY HERALD, 24/08/1834
Supreme Court of New South Wales
Forbes C.J., 22 August 1834
Before His Honor the Chief Justice, and Jury of Civil Inhabitants.

**WILLIAM VIALS** stood indicted for the wilful murder of **JOHN SCOTT**, at Airds, on the 31st May last, by striking him on the head with a stick, thereby inflicting sundry wounds and contusions, of which he then and there died.

The Solicitor General laid a brief statement of the case before the Jury, which he submitted to them as one of circumstantial evidence, but which they would find, with the aid of the positive testimony which he would adduce, sufficient to carry the fact satisfactorily to the prisoner.

The Prisoner being unprovided with Counsel, Mr. Sheehy humanely consented to appear professionally in behalf of the prisoner.

**WILLIAM ROBERT KENNEY** examined - I am a Surgeon; I knew the deceased John Scott in his life time; I saw him dead in the bush, within a few hundred yards of my residence, about the end of May last; I saw the place where the body was found - it was a small hollow place, around which, for the distance of twelve or fifteen feet, there were foot marks and marks of blood, altogether affording strong proofs of a violent struggle having taken place; in my opinion, his death was occasioned by an extensive fracture of the skull; there was a wound above the left eye, and also on the left side of the back part of the head, which penetrated the substance of the brain, which injuries, if unattended to, were sufficient cause death; the upper and lower jaws were dreadfully fractured; there were various minor wounds and contusions on the head, face, and several parts of the body; I should suppose, from what I saw, these wounds were occasioned by violent blows from a bludgeon; I saw a large heavy stick near the body, part of a sappling, which appeared to have been dressed for the purpose - the bark had been stripped off, and it was covered with blood; this I saw on the 31st May, the body appeared to have been dead scarcely twenty-four hours. The place where the body was found is called Smeaton, and is situated in the district of Airds; when I first saw the body, it was between the hours of twelve and one o'clock; I knew the deceased by sight; several of the men belonging to the road party worked on the road near my house, whom I had occasion to pass - the deceased was of the number; I had no difficulty in identifying the body.

Cross-examined. - The ground where the body lay presented an appearance as if two persons had been fighting; the stick I saw on that occasion, was a heavy stick - there was nothing peculiar in its appearance, further than its having been cut in something of a fanciful manner, as if to secure it in the hand; it appeared to have been recently cut.

By a Juror. - It was not broken; it was sufficiently strong to inflict such a wound as appeared on the head of the deceased; the bark which had been left on it appeared broken, as if it had been struck repeatedly against something hard.

**JOSEPH PHILPOTS**. - I am attached to No. 3 road gang, situated between Campbell Town; I knew John Scott, he was a tailor, and belonged to the same party; I knew the prisoner, he also belonged to the party, but one half of it was detached, and at a distance of about three miles from the branch to which I belonged; I last saw the deceased alive, near the huts of our party; a man, named **JOHN HOUGHTON**, came to me and told me that deceased wanted to speak to me; I went and found him at a

short distance in the bush, standing near a fire; I saw no one with him when I first went; I asked him where William Vial was; the reason of my going to deceased, Houghton told me that the prisoner and deceased had absconded from their party, and wished to have some provisions; I carried a piece of bread, which I gave to them; Vial appeared in a few seconds after; I went and gave the bread to him, the deceased sat down and partook of it, I did not remain more than three minutes with them; John Scott wore a straw hat; Vail had an old black hat, which had been a beaver; the deceased had his hat on his head when I went there; I don't remember whether it was taken off his head or not while I was there; I don't think I should know the hat again; I cannot say whether I had it in my hand or not on that occasion; I know it was a new one; I had never seen it before; there was a narrow black ribbon round the edge of it; it was on a Thursday, a littler after dusk; that was the last time I saw him alive; I saw him dead on the Sunday morning following, lying about three or four yards from the place where the fire had been; I did not see Scott with a stick in his hand on Thursday evening, but Vial had one in his hand; it seemed to be a heavy stick with bark on it; I did not see Vial again before Sunday morning; I heard the men say the body was there and I went to see it; there was a black hat near the body; I can't say what hat it was; it was like the hat which Vial wore on Thursday evening; I saw blood around the place; there appeared to have been a great deal of blood; I saw the stick the Constables had after the body was found; there was blood on it; I took very little notice of the stick Vial had in his hand; I did not see the body until after the Constables came; it was between ten and eleven o'clock; I saw Vial on Monday morning in the same place; it is not easy to distinguish one straw hat from another when they are new; I will not swear that I did not take it in my hand; I cannot say that the hat produced at the inquest is the same.

By a Juror. - I gave the bread to the prisoner, and the deceased sat down and partook of it; I cannot say that the stick the prisoner had in his hand on Thursday evening was the same as I saw at the inquest; the hat found near the body was certainly like that worn by the prisoner; I can make straw hats, but I cannot tell that it was the same hat; I do not know whether it was split or whole straw, as it was dark, except the light of a small fire.

Cross-examination continued. - I never knew or heard of any previous quarrel between the prisoner and the deceased; a man named Patrick Shepherd first informed me that the body was in that place.

**PATRICK SHEPHERD**, examined. - In May last I belonged to No. 3 road gang; I knew the prisoner and the deceased, John Scott, they belonged to a detached part of the same gang; I had a bad leg, and had been to the residence of a settler who lives about half a mile from our gang for some milk to make a poultice; on my return I saw a man lying on his hands and face, which I apprehended to be a bushranger, and told some of my hut-mates to go and see him but they refused, and I then went and informed my overseer, who accompanied me to the place, and desired him to get up, but not receiving any answer, he turned him on his back, when his face presented a shocking spectacle; a man named Houghton told the overseer, that that was the tailor, and going to a little scrub a few yards distance, pulled out a short waddy, and an old black hat covered with blood; the deceased had a shirt, waistcoat, trowsers, and one boot on when found.

Cross-examined. - I came to the Colony in November last; Houghton instantly recognized it as the body of Scott; the stick I saw was about the length of a walking-stick; one branch of the party is situated at the distance of about five miles from that to which the prisoner and deceased belonged; I frequently saw the prisoner and

deceased before, they always appeared on friendly terms together, they both bore a very good name in the gang, we were all surprised to hear that the prisoner was taken for the Murder; I was present when the prisoner was brought to look at the body, he appeared as he usually did.

By a Juror, The hat and stick found by Houghton were not much concealed, they were behind a small bush near the body.

**WILLIAM FRAY**, I am a special constable on the Estate of Mr. Mowatt; I apprehended the prisoner a day or two before I heard of the body of John Scott being found; it was found on Saturday night, the prisoner came to one of our men, to whom he wished to give himself up, the man would not take him but called to me, and I took him to the watch-house; when I first took the prisoner, he was about half a mile from where the body was found; I asked him what made him take to the bush? but he would not tell me; he said he thought there was something else against him besides taking the bush; I asked him what it was? but he would not inform me; he said there was time enough for that; he said there was another man in the bush with him, but he thought he was taken and put into Campbell Town gaol, but he would not tell me who it was; when I took him he had a straw hat on; I have him into the custody of the chief-constable.

Cross-examined, I knew **GEORGE HARRINGTON**; that is the man to whom he wished to give himself up; he was acquainted with Harrington, they came to this Colony together; I am positive he said there was something else against him; he had a straw hat on when I took him, I should know that hat again.

**ROBERT BURKE**, I am chief-constable of Campbell Town; I produce a hat, and a stick which was found near the body of the deceased; the hat was found on the prisoner's head; the prisoner was brought in custody of Fray, as a bushranger, and was punished and returned to his gang; he was again apprehended in the evening, and lodged in custody on suspicion of murder; the body of the deceased was found on Saturday evening.

**ROBERT STEWART**, I am Police Magistrate of Campbell Town; I received information that a body was found at seven o'clock of the evening of the 31st May, I afterwards saw the body on the Monday morning following; I saw the prisoner a little before eight o'clock on the evening on which the body was found; I proceeded to the prisoner's camp and apprehended him in consequence, with the assistance of the chief-constable; I told him that I should put certain questions, but cautioned him that he was not bound to answer them, that I would commit his answers to paper, which would be produced against him, I therefore cautioned him not to say anything that might criminate himself; the prisoner had a straw hat on, on which I observed marks of blood, which I now see; they appeared to be fresh at that time; I asked him when he had last seen Scott? He answered, at this time on Thursday evening last; where? at the back of the old camp, on the Cowpasture Road; was any one in your company? no; did you see any one? I saw several of the prisoners of the gang about six o'clock, but they did not see me; is that your hat, does it belong to you? I made it, but it belonged to Scott, mine was a black hat, which Scott took for the purpose of disguising himself with, as he was going to commit a robbery, he left me his; I never saw him afterwards; I waited at the place where he left me until ten o'clock on the day following. Several other questions and and answers were read from the document in question, in the course of which it appeared that the prisoner stated, that deceased had a stick, which he took with him when he went away, the prisoner also taking his stick along with him.

Cross-examined, I gave testimony at the Inquest; I did not read my evidence from the document produced? I merely refreshed my memory by occasionally referring to it, I have a recollection of the circumstances without the memorandum, but not of the distinct questions and answers; there were three or four distinct traces of blood on the hat, which are still discernible.

**AUGUSTUS HAYWARD**, I am Coroner for the district of Parramatta, since the death of Mr. **HORSLEY**, I have had his duties also to attend to; I held an Inquest on the body of John Scott, the prisoner Vial was present; I recollect Mr. Stewart being examined on that occasion, he gave his testimony orally, occasionally refreshing his memory, by a reference to the document produced; the prisoner was asked if he had any questions to put to Mr. Stewart, he declined putting any questions, and admitted the statements to be correct.

Fray recalled, the prisoner's person presented no marks of violence when I took him into custody; there was no blood on him, his trowser appeared to have been washed; he did not appear to have been fighting. The case for the prosecution closed here.

Mr. Sheehy submitted that the written document produced at the Inquest by Mr. Stewart, should not be admitted as evidence.

The Chief Justice observed, that although it was not the proper course for magistrates to adopt by examining a prisoner in the way of question and answer, yet, as the Magistrate had not made the examination a judicial one, but merely for the sake of reference, and as due caution had been given to the prisoner not to say anything which might criminate him, he thought it might be received as oral testimony if he could see that there had not been held out in consequence, he should reject it; Magistrates should not seek to elicit statements in that way, though he was not attributing any blame to Mr. Stewart, he had no doubt acted from the best of motives, the plain statement of the prisoner was all that was required to be obtained.

The Solicitor-General observed, that he wished the magistrates would make it a practice in all cases to take down the statements of prisoners in making their defence, it would, in a material point of view, assist in furthering the ends of justice; he regretted to observe, that in many cases it was not attended to.

For the defence.

**THOMAS HOWARTH**. - I am Overseer of the Road-party to which the prisoner and the deceased belonged; I knew the deceased; he joined the party in February last, and lost his life in May; the prisoner and deceased were always on the most friendly terms together; they were like two brothers; where one was there the other was sure to be; they took the bush once before together; I do not consider the prisoner to be a bad tempered man; I never saw any thing about his conduct which would give rise to such an opinion, I considered the contrary; they absconded on the 29th, and the body was found on the 31st May; I had occasion to go to Campbell-town, where I found the prisoner in custody, he had been apprehended by Mr Mowatt's overseer for absconding; he was punished for that offence, and he returned to the gang with me; I asked him where Scott was, he said he thought he had been apprehended and was in Campbell-town jail; I did not know of his death at that time; he said he went to rob a house, and he never saw him afterwards; the prisoner said he remained at the fire, when I heard that the body was found, I called the prisoner into my hut and handcuffed him; I put some questions to him about the murder of Scott, but he said he knew nothing of it; he said he went away from him for the purpose of robbing some house on the hill, but he did not name the house, and he waited at the fire expecting his return; he did not say why they did go together on that occasion.

Cross-examined - The deceased was a much stouter man than the prisoner, about the same age; Scott was not to my knowledge a quarrelsome man.

His Honor summed up the evidence, in the course of which, he remarked, that circumstantial evidence, when complete in all its parts, was frequently more conclusive, satisfactory and safe than positive testimony, the latter frequently being subject to perjury, from the effect which the former was free. His Honour described the line of distinction to be drawn between the crime of murder and that of manslaughter, leaving it to the decision of the Jury how the evidence bore on these charges. The Jury retired about two, and came into Court about six, returning a verdict of Guilty of Murder when sentence of death was passed on the prisoner accordingly, to be carried into effect this morning. [*]

See also Sydney Gazette, 23 August 1834 (calling the defendant Viall); and Australian, 26 August 1834 (calling him Ogil).

[*] The Sydney Gazette, 23 August 1834 reported that the prisoner ``both during the trial, and whilst receiving the awful sentence, exhibited the completest apathy.'' The Australian, 26 August 1834 said that in sentencing him, Forbes C.J. ordered that his body be given for dissection, and stated that he had no doubt as to the prisoner's guilt, although in his charge to the jury he had left that to their consideration.

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, 1824.

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

SYDNEY HERALD, 01/09/1834

Forbes C.J. and Dowling J., 27 August 1834

(Before His Honor the Chief Justice, and Mr. Justice Dowling.)

The following prisoners convicted during the Sittings and remanded, were brought up for Sentence.

``**JACKEY**,'' an aboriginal black, for the murder of **JOHN FLYNN** at Williams River, was sentenced to be transported from the Colony for the term of his natural life. The prisoner appeared quite ignorant of what was going on in the Court.

See also Sydney Gazette, 2 September 1834; Australian, 2 September 1834.

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

SYDNEY GAZETTE, 25/09/1834

Supreme Court of New South Wales

Forbes C.J., Dowling and Burton JJ, 20 September 1834

The Solicitor General, in the absence, and by the desire of the Attorney General moved the Court, to fix an early day for the trial of certain persons, now under commitment for the wilful murder of the late Dr. **ROBERT WARDELL**. He would

beg leave to propose next Friday as the day of trial, and he would at the same time acquaint the Court with some of the grounds upon which he made the application. The magistrates had examined on oath at the Police Office, an accomplice in the crime, and his evidence had been circulated through the public press. The case would wholly turn on the evidence of this person, and from the confined state of the gaol, as well as from the publicity which the particulars of the case had gained, it was absolutely impossible to guard against the approver being tampered with by the rest of the prisoners, or other persons employed for that purpose. Independently of this, the approver might die before the criminal sitting of November next, and by this means justice would be frustrated. He trusted that before their Honors should decide against fixing upon an early day for this trial, they would hear him upon the point, as he contended for the requisition he had just made, as a right to which his colleague, (and therefore to himself, in his absence) was by virtue of his office entitled.

The Chief Justice, after some deliberation, said, his learned brethren had agreed with him that there was no particular fact shewn to induce them to grant the application just made to the Court. The local enactment had provided that the criminal sittings of the Supreme Court should be held in the respective months of February, May, August, and November in each year, and if the Judges were to depart from that rule on the present occasion, he would at once say, without making any more pointed allusion to the matter, that the Court would be justly chargeable with yielding that concession from the personal eminence of the unfortunate individual with whose name the application was identified, which they would have denied under more ordinary circumstances. It would be establishing a precedent, extremely inconvenient to the despatch of public business, which might with equal justice be pleaded on every other occasion. The learned Chief Justice then stated it was entirely new to him to hear that the Attorney General was possessed of the royal prerogative to call upon the Court to sit whenever he thought proper: circumstances might occur, and indeed had occurred to require the Court to sit specially for the trial of cases of insurrection at the distant settlements of the colony, or from the crowded state of the county gaols, but in this instance there did not appear to be any thing which could be pressed upon the Court as in the other cases, and they therefore did not feel themselves called upon to depart from the rule laid down for their guidance.

The Solicitor General observed, that he applied on behalf of the Executive, who could, if necessary, issue their mandate to the Court in this respect, and he therefore claimed the granting of his motion as a matter of right on their behalf.

The Court remarked, that it had always been customary hitherto, in such matters, for the Executive to communicate direct with the Judges.

The Solicitor General said he had been instructed to pursue the present course; and he would take this opportunity of pointing out to their Honors the bad precedent a refusal on their part would furnish on any future Bench, who might not preserve so good an understanding with the Executive, as was at present happily the case; and induce them, at some future time, to place a veto on the wishes of the government.

The Chief Justice said, he had the greatest possible wish to preserve a good understanding with the Executive, and any proposition which might be submitted by them to the Bench, would be treated with respectful consideration. Allusion had been made with regard to the precedent which the decision of the Court on this occasion would furnish, but what was to be said of the precedent established in the present motion of the Attorney General to the Court?

The Solicitor General observed, that he for himself was not disposed to give up the privileges attached to his office, and he should therefore, though with the utmost respect, beg leave to enter his protest against their Honors' decision.

The Court enquired how they could possibly sit as a Court of Oyer and Terminer, apart from one of General Gaol Delivery, which under the enactment were inseparable? The discussion then ceased.

See also Australian, 23 September 1834 (stating that Burton J. said ``that every Special Commission may hold a Court, which his Majesty, by virtue of his prerogative, could institute in any part of his dominions"); Sydney Herald, 25 September 1834. On the role played by Justice Stephen's servant, William Stapleton, in the capture of the defendants, see Australian, 6 January 1835; he received a reward of £20: Australian, 27 February 1835. On 2 February 1835, Governor Bourke also recommended to Rice, the Colonial Secretary, that Stapleton should be pardoned. He had been convicted too recently for Bourke to be able to do so himself: Historical Records of Australia, Series 1, Vol. 17, p. 647.

For commentary on this case, see C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, pp 467-470. Currey notes that Jenkins had been convicted of 15 offences in England and had twice been severely punished for misconduct in New South Wales. After he escaped he lived with an 18 year old fellow escapee, Emanuel Brace, and the two lived by theft.

Wardell was hated by some convicts: see Convict's Tour to Hell.

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

Australian, 26/09/1834

Forbes C.J., 20 September 1834

His Honor stated that the King was the fountain of justice, and might institute Courts for its administration at what time, and in what part of the dominions he pleased - but such Courts must proceed according to the source of the common law - that is by the intervention of grand and petty juries, in the presentment and trial of offences - that in exercise of this constitutional prerogative His Majesty was guided by the Counsel of responsible advisers - that the Lord Chancellor, as the King's highest legal officer, was in the Council, before which the expediency and propriety of issuing a special commission for the trial of crimes, on any particular public emergency, was of course deliberately considered, before such an extraordinary measure was resorted to - but it would be quite new in the history of Courts, if it were in the power of the Attorney and Solicitor General of England to call them into existence whenever they thought proper - it would be something not very unlike assuming to themselves the exercise of one of the most important prerogatives of the Crown of England. If His Excellency the Governor should communicate to the Court the particular circumstances, and state his opinion as the head of the Executive, of the case, calling upon the Court to proceed as in a case of emergency, the Court would give it every consideration and attend to the suggestions of the Government - but it could not depart from its rules at the requisition of the Crown Lawyers.

This passage from the judgment of Forbes C.J. was included in a commentary on this failed application for an early hearing: Australian, 26 September 1834.

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

SYDNEY HERALD, 10/11/1834

Supreme Court of New South Wales

Dowling J., 7 November 1834

Before His Honour Mr. Justice Dowling, and a Civil Jury.

**PATRICK McCORMACK** stood indicted for the wilful murder of **MARIA McCORMACK** his wife, by beating her on the head and various parts of her body, thereby inflicting divers mortal wounds and contusions, of which she then and there died, at Sydney.

The Jury, after a consultation of half an hour, returned a verdict of guilty of wilful murder. His Honor the learned Judge, in addressing the prisoner preparatory to passing sentence, was moved even to tears at the enormity of the offence, - that of dipping his hand in the blood of the partner of his bosom, whom, by a most solemn obligation he had bound himself to comfort and protect. At the conclusion of the address, which was one of the most affecting we had heard for many years; the prisoner was sentenced to be executed on Monday morning next, and his body to be given to the Surgeons for dissection. During the trial, the Court was thronged with females, such was the excitement which the case had produced on the female sex. This was the case in which the prisoner was set at liberty by the verdict of seven Jurors, who were assembled at the Inquest held on the occasion, the remaining five feeling warranted in persisting in a verdict of guilty of wilful murder; and for which act of their consciences they were subjected to the reproachful animadversions of a reporter to one of the Sydney Newspapers, who figured very conspicuously on that occasion. Colonel Wilson however felt induced to take the matter into his own hands, warranted by the very ample body of evidence which had been adduced, and the prisoner was committed. His conduct was arraigned for performing this act of his duty, and severely reprobated by the reporter, with how much justice the public will be able to determine. The practice of immoderate spirit drinking, and assaults with loss of life consequent upon it, has arrived at such a pitch, that public Justice demands some sacrifice, as a means of giving a check to the horrid scenes of depravity and crime, which present themselves with frightful aspects on all sides; and we trust that the example of the wretched man Patrick McCormock will stamp an impression on the minds of the votaries of intemperance not to be effaced.

The trial notes are in Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3288, vol. 105, p. 9. At p. 59, after Dowling J. recorded the verdict, he wrote ``qu. Murder or manslaughter''. For commentary, see Australian, 11 November 1834.

[*] The prisoner was hanged on 10 November 1834: Australian, 11 November 1834.

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

SYDNEY HERALD, 10/11/1834

Forbes C.J., 7 November 1834

TRIAL OF THE MURDERERS OF THE LATE DR. WARDELL. [3]

Friday. - Before His Honor the Chief Justice, and a Jury of Civil Inhabitants.

**JOHN JENKINS** [4] and **THOMAS TATTERSDALE** stood indicted, for that they, not having the fear of God before their eyes, but being moved and instigated by the devil, did, on the 7th September last, at Petersham, in the Colony of New South Wales, with a gun or pistol, shoot one **ROBERT WARDELL**, inflicting on his left breast a mortal wound, of which he then and there died. The prisoners pleaded Not Guilty.

The Chief Justice enquired if they were defended by Counsel, when Mr. **KINSMAN** rose and informed His Honor that he had received a brief through an Attorney, and had undertaken their defence.

The Solicitor General rose and said, that on a solemn occasion like the present, it was to him a matter of extreme regret, that under any circumstances he should feel himself obliged to object to Mr. Kinsman's appearing at that Bar as an Advocate; but it was a duty which he owed to himself and the profession, of which he would indeed be unworthy a member, if he made such an objection without proper grounds.

The Chief Justice said, that he then sat there for the purpose of trying a criminal case, and could not entertain the objection made by the Solicitor General; he would however enquire if Mr. Kinsman had enrolled himself as a Barrister of the Court; Mr. Kinsman answered in the affirmative.

The Solicitor General said, that he would not press the objection farther on the present occasion, which was the first opportunity which had presented itself; but he intended that, on the first day of the next term, he would move this honorable Court that Mr. Kinsman's name be erased from the list of Barristers of the Court. [5]

Mr. Kinsman said, he was sure that no Gentleman who had the honor of being acquainted with the Learned Solicitor General could more admire the character and public spirit of that Gentleman than himself; and he felt much happiness in stating, that whatever motion the Learned Gentleman might be induced to press on the attention of the Court, as to himself, it would be answered in the most satisfactory manner; the case then proceeded.

**JOHN NEILSON**. - I am a Surgeon; I knew the late Robert Wardell in his life time, by sight; I saw him dead, about the 8th September, at his house at Petersham; I was called upon professionally; I opened the body; on examining the body I found a gun shot wound on the left breast which, on being probed, was found to take a direction upwards towards the throat; I traced it to its utmost extent, it was a mortal wound; on laying it open, and taking off the collar bone, it was found that the left subelavian artery was ruptured - that was sufficient to cause death; I should think that a person would not live above a minute after from loss of blood, in the wound a third of a leaden bullet was found at the mouth of the ruptured artery; I considered that to have caused the wound; from the time of the death of the deceased until I saw him, from the appearance of the body, might be about twenty-four hours; it was on the 8th day of September, on a Monday.

**EMANUEL BRACE**. - I am eighteen years of age; I am a prisoner of the Crown; I have been nearly two years in the Colony; I was assigned to Mr. Adam Wilson; he lives on the Cook's River road; I was in his service nineteen months; on Saturday my master gave me a pass to go to Court; he wanted to keep me in the watch-house; the pass stated that all constables were directed to take me into custody; I did not go to Court, I absconded and crossed the river; I stopped about Mr. Wilson's place until the following Tuesday; when I was standing on a rock, and a man appeared whom I at first thought was a constable, he told me he was in the bush, and had absconded from George's River iron-gang; we stopped together a short time, when he went away and returned in the afternoon with a musket; he did not say where he got it from; we stopped about that place a day or two; we had some powder and ball; on Wednesday we went to Reuben Hannam's place, where we saw an old man, his servant; Jenkins had a musket and a cutlas; he bid him to stand; he asked him to deliver up his key, and lay down on his face; he gave up the key, and I went into the hut, and took a fowling-piece, some tea, sugar, bread, and wearing apparel; Jenkins remained over him with the musket cocked; after I came out, he marched him in the house, and he told me he tied his legs together, and one of his hands behind his back; it was in the morning; we proceeded across the creek, and clambered over some very high rocks; we sat down and had something to eat; Jenkins discharged the old man's fowling-piece, and threw

the old musket behind a dead log, together with a white hat, cutlass, and powder-horn; the musket taken from the old man appeared to have been cut down; we travelled down the creek, and near Mr. Thorpe's we made a raft, floated our clothes across the creek, and swam over ourselves on the Dr. Wardell's ground; I don't think it was called Petersham; I knew Dr. Wardell's estate extended to the river; after crossing, we proceded [sic] through the brush as far as a fence, where we made a fire, and having a kettle, we boiled some tea, and took our dinner; after that we went within about three quarters of a mile of Cooper's Distillery, towards the Old Race Course; we returned home to the place in the evening; we had left our things there covered with bark and leaves; we stopped there all night; we did not make any place of shelter that night, but on the following day we made a bark hut, and stopped there about a fortnight, until we saw a man coming through the swamp with a gun and dogs, when we removed; it was on Friday, to a kind of valley, where we stopped that night; we fell in with Tattersdale, who is a shipmate of Jenkins, opposite his master's house; Jenkins wanted him to join us, and Tattersdale wanted sadly to join us himself; I told him not to do so, but he would come, and packed up his clothes and provisions, and went along with us; we built a third hut of boughs and leaves, at the distance of half a mile from the second hut; I think it was on Dr. Wardell's ground; after Tattersdale joined us in the evening, we stopped at the hut all night, and built the third hut on the following morning; we removed our things to it, consisting of provisions, clothes, and fowling-piece; after making the hut, we lay down and slept, and went to the creek and washed our shirts; we remained there until Saturday, when Tattersdale told us where we could get some money and clothes of an old quarryman; it was at the back of Mr. Turner's, Tattersdale's master, nearly opposite the Distillery, on the Ultimo side of the road; when we went to the quaryman's, Jenkins sent me in to light my pipe; Tattersdale stopped behind, because the man knew him; Jenkins told me if any person was there to call him in; there was a man there in bed, and Jenkins came in; the old man was going to get up, when Jenkins was going to knock him on the head with the butt-end of his gun; Jenkins asked him for the key of his box, which he gave to him, when Jenkins opened the box, and took therefrom a velveteen jacket and trousers, some tea and sugar, about three pounds of powder, and part of a leg of mutton; Jenkins told me to go and take his clothes from under his head, where we found about one pound in money; Jenkins tied his hands and we went away; Jenkins put a black silk handkerchief on his neck which was taken from the old man, and the rest of the things were put into a bag and concealed under a tree; there were a velveteen jacket and trousers, lined with flannel, two light waistcoats, a silk handkerchief, and three razors in a case; the tree was at a distance of about twenty yards from where the hut was; there was also a towel which Tattersdale brought with him, and a pair of scissors which had been taken from the old quarryman; they were with the rest of the things on Sunday morning; we made some tea and had breakfast, after which we amused ourselves by firing at a target on a red gum tree; we had cut a square piece out of the tree for the purpose of mixing our flour upon, in the centre of which we put a black mark; none of the shots went within the square; after we had so amused ourselves we lay down and slept; I was between asleep and awake when I heard the sound of a horse's feet, and looking up to see who it was, I saw a gentleman on a white horse, who asked me who I was, but I made no answer; Jenkins looked up, and on receiving the same question answered, ``I am a man;" he asked, who are the other two? when Jenkins answered, they are men; the gentleman then stooped a little from his horse, and took up a small stick which was leaning against a tree, and flourished it over his head as if beckoning for assistance; he said, you are only three poor run-aways, you

had better come along with me; he pranced about the hut, and Jenkins dodged him and took up a rock-stone and told him to go away, but he would not; I heard Jenkins whisper to Tattersdale, to go and fetch the musket, when I said, we need not do that, it would be better to go and receive fifty lashes than to risk our lives; Tattersdale moved towards the bush and got the musket, when Jenkins took it out of his hands, which, on the gentleman observing, he said, Oh, for God's sake don't do that, Jenkins answered - By G-d I will! The horse was prancing back and Jenkins proceeded up to the gentleman, presented the piece and fired, when the gentleman said - Oh dear, I'm killed the horse turned short round, and started off at full speed, and went a great distance, over some rocks; we packed up our things and went towards the river, which we crossed at Mr. Thorpe's, near the place where we crossed before; I thought he was not hurt, but had rode away to bring the police; we had some flour, which we threw away after going some short distance, we took several articles with us, Jenkins had the black handkerchief taken from the quarryman on his neck; we swam across the river, carrying the things on our heads, Tattersdale was nearly drowned with a load of things on his head, but Jenkins swam after him and saved him; we proceeded as far as Pickering's Punt, near Mr. Prout's place, in a hut on whose Farm we stopt on Sunday night; on the following morning we made a fire with brush, a short distance off, and cooked our breakfast; we then went off towards King's Grove, and went again towards the River, on the banks of which we waited until the tide was down, when we swam over to Mr. Sparke's Farm; we crossed Mr. Charles Smith's Paddocks, and crossed the Parramatta Road, near Flinn's, public-house, sign of the Lame Dog, at the back of which, in the bush, we stopped all night, on Tuesday morning we went into Sydney, and went as far as ``The Sailor's Return,'' on the Rocks, where we got our breakfasts and something to drink, after which we roamed about Sydney, up one street and down another, and getting something to drink, until evening, when we went back again and met Tattersdale, who had been afraid to go with us into Sydney, as the constables knew him, they did not know us; I read in the newspaper at ``The Sailor's Return,'' that Dr. Wardell had been murdered, until that time, I did not know that it was Dr. Wardell who had been fired at; this was on Tuesday or Wednesday morning, we crossed Cook's River, where we crossed the first time; we went through the brush and forest, and went on the to the Seven-mile Beach, about four miles from where we crossed the River; we proceeded a considerable distance, when we met an old man, an oyster-gatherer, whom Jenkins asked for some tobacco, which he was about giving to him, when he heard some money rattle. Jenkins took his hat off, and found three shillings which he took, saying he was pushed; Jenkins also took a shirt out of his bosom; Tattersdale begged Jenkins not to leave him miserable, when they returned his shirt and a shilling, and the old went in; we then went along a creek where there was some fresh water, and got something to eat; we then went on and came to a house where I entered, and asked the way to Port Aiken; the man said he hoped we were not in the Bush, and we told him not; we asked the man to sell us some provisions, which he refused, but cut us off some bread and beef; Jenkins stood outside, as he had the gun, we then went away; it began to rain, and we travelled over rocks until we came to a rock which hung over, under which we made a fire, and dried our clothes; we then came to a fence which we ran down until we came to a hut where no one lived, and seeing a footpath, we followed it until we came to a farm, where several men were at work; we lay in the Bush until they went to work from their dinners, when we went into the hut and and [sic] asked for something to eat, when an old man inside, said ``yes, my lads,'' and went into an inner room and brought out a musket, when Jenkins knocked him down, and told me to take the musket, which I did, and we then

took to our heels and ran off through the Bush; there was a great alarm, and we thought we were closely pursued; we met a man on a white horse, and Jenkins went up to him and asked him to give him some tobacco; he said he had none; Jenkins took his hat off his head, but when the man gave him a shilling to buy some tobacco, he returned it to him; Jenkins tried the fowling-piece which we took from the hut on Friday, and not being satisfied with the charge, put five balls into it; we got as far as Judge Stephen's farm, when Tattersdale left us for the purpose of getting some provisions, as there was a man there who knew him; we stopped in the Bush at some distance from the house, when the Police came and took us; when I was taken into Sydney, I was taken to the Chief Magistrate, where I made a confession; I did not tell any thing to the Policemen.

Cross-examined. - We were in the bush five weeks before I was taken; we used to get provisions from Sydney; I used to go into Sydney for that purpose; I went along the road, I never was molested, I never met any of my old acquaintances; I had seen Tattersdale before, but I did not know Jenkins; I never had been into Mr. Turner's house; I did not know the Petersham Estate; I don't know how far the third hut was from Dr. Wardell's house; I had heard Dr. Wardell's character, but I was unacquainted with his person; I never was at his house; the night on which the robbery was committed on the old quarry-man was perfectly dark, there was a light in the old man's hut; we got up early on Sunday morning; it might be about ten o'clock when we were firing at the target; I thought that it was dangerous as we might give the alarm; it is not the usual way in which we amused ourselves in the bush; I never loaded the musket, Jenkins always loaded it himself; after we had done firing, Jenkins cut a musket ball into four quarters, and loaded the gun with two pipes full of powder, that is the usual charge; we had been asleep before the gentleman had rode up; he had a glazed or black hat on; I don't recollect his other dress; I was so frightened I did not know anything; I read the account of the murder to Jenkins, at the Sailor's Return, I did not read anything about a reward;[6] the policeman said to Jenkins that there was a murder against him; Jenkins seemed anxious to get out of the Country.

Re-examined. - When I read the account in the papers to Jenkins, he laughed it off; I had no doubt but it was the Gentleman that was shot by Jenkins, from the description of the horse; I could then recollect the days and months on which the various occurrences took place better than I can now.

By a Juror. - I am sure Jenkins charged the piece with four slugs after having fired at the target; the kettle in which we boiled our tea was left in the bush.

**JOHN CHESTER**. - I was in the Mounted Police in September last; I went along with Corporal **PATON** to Judge Stephen's on the 12th September; we put our horses in the paddock, and I went into the kitchen to bake some bread, when the prisoner Tattersdale came into the kitchen, and I told him to sit down and consider himself my prisoner; I then began bouncing him, and asked him who the men were that I saw with him, when he acknowledged that they were two men in the bush, and pointed out the direction in which they lay, but cautioned me how I approached them, as they were armed, and had threatened to shoot the first man who would go near them; I then went along with Corporal Paton, and apprehended the prisoners, Jenkins and Brace, concealed behind a log; the fowling-piece produced is the same which I found in their possession - there is an owner for it.

Cross-examined. - The prisoners stood up without their arms and readily surrendered themselves; there was nothing said on the road with the prisoners about a reward; while Brace was in Colonel Wilson's house, I had charge of Tattersdale outside; I asked him if he knew anything about the murder, he said he did, and if he

had a chance to turn King's evidence, he would tell all about it - but he thought he should not have the chance.

Re-examined. - He meant by saying he thought he should not have a chance, that the other man would tell all about it, meaning the murder of Dr. Wardell; Jenkins was left in No. 5 watch-house; I told him if he knew anything about it, he had better tell.

By the Court. - I did not offer him any reward or hope for telling.

Re-examined. - The bag containing the ammunition is in the same state in which it was found.

**PATRICK BURNS**. - I was assigned to the late Dr. Wardell; I do not recollect the day of the month on which he was missed, but it was on a Sunday, after we had returned from prayers, and while we were at dinner, that the alarm was made of his being missing, and we were all ordered out to look for him; Mr. Taverner and Mr. Hearn accompanied us; we continued our search until the moon went down, when we gave it up; on the following morning we found the horse in the paddock; I was not present when he went off in the morning; when the horse was found all hands were called into the paddock, as it was inferred that he must be somewhere near the place; the overseer found the master's hat near a hut made of boughs, and the body was found about half a mile distant; I found the body myself, when going from the hut where Mr. Johnson left us, for the purpose of getting some provisions; the body was in the head of an oak tree; one of his legs was bent under him, and one hand was in the fall of his trousers, I called to a man named George Bell, and told him the body was there; we then called, and Mr. Johnson and Mr. Taverner came up; we never touched the body before they came up.

Cross-examined. - The body was lying in the branches of the oak tree; he was lying flat on his back; I did not perceive any rent in his coat; there was a deal of blood on his clothes.

**DAVID JOHNSON**, Esq. - I remember the day on which the body of Dr. Wardell was found; it was on the 8th September; I was in company with my brother and several other persons; we were searching the enclosures in order to discover the body; after searching some time, we were informed by Mr. Abraham Hearn that a hat had been found near a hut, who expressed his belief that the Doctor was no more; we proceeded towards the hut spoken off, where we observed evident marks of some men being there; in searching about the place I discovered, concealed in the hollow trunk of a tree, several articles of wearing apparel, a velveteen shooting coat, two waistcoats, a pair of trowsers, and a neck handkerchief; we observed a tree which appeared to have been fired at, as at a target; my brother and Abraham Hearn proceeded to Sydney for the purpose of informing the police, and left us to search for the body; we searched about three hours, when I saw one of Dr. Wardell's men, who said he thought he heard a moan, which we found to be the lowing of a cow at a great distance; I saw a track on the ground which, from its size, I took to be that of Doctor's horse, and, in following the track, I saw two of the men whom I had left at the hut, they called, and on going to them, they pointed out the body of the Doctor by the side of an oak tree; I traced the horse to within about fifteen yards of the tree, there was a find of foot mark from the horse track to the tree about five strides, which I took to be the mark of the Doctor's foot, he having fallen off the horse from exhaustion, and had risen and attempted to run on, when he had fallen on the head of the tree; there were no marks of blood about the place where I observed the foot-marks; the ground was rather soft and might have absorbed it; I took some trouble to discover traces of blood, but could not; from the hut where the hat was found, the body could not be seen, nor

the tree; there was a hill or rising ground between; I would know the things again which were found in the tree.

Cross-examined - I should imagine that Dr. Wardell was shot at the hut, rather than at the tree; there were spots of blood on the loins of the horse at the rear of the saddle; the bridle was never found; I never heard of it being found; on examining the clothes of the deceased, they were found to be saturated with blood; his coat was torn as if in a scuffle.

**GEORGE PLUMRIDGE** - I was assigned to the late Dr. Wardell; I was employed as groom; the last time I saw him alive, he was in the stable; it was on a Sunday morning; he was dressed in a fustian coat; he went away down the estate; he was mounted on a white entire horse; I think I saw the horse the same evening, but the night was dark; I went towards him, but he ran away; I saw the horse on the following morning, the saddle appeared to be much knocked about, and there were spots of blood on it.

**JOHN TACO** - I am a servant to Mr. Rouben Hannam; I was in charge of his house at Cook's River; I know the prisoner Jenkins; I was down in a piece of ground at work, and having to remove a root, I had occasion to go to the house for an axe, and I had to cross over a stile; I saw the shadow of a man going round the house, when the prisoner Jenkins came up to me and said ``good morning,'' and I returned the salute; I was proceeding to cross the stile, when he levelled a musket at me, and desired me to lie down; I asked what was I to lie down for, when he repeated his command, I lay down on the ground; he asked me to give him the key of my house, and desired me not to look up, for if I did he would blow my brains out; he said I wanted to take his life away, but if I did not mind myself, he would take mine; he gave the key to the other man, and stood over me while the other man went away; I had a few good clothes which I used to go to Church in, and I begged of him not to take them away from me, as I was an old man; they said they were distrest [sic] and must take wherever they could find it; after taking every thing I had, the prisoner made me walk into the house, when he made me put my hands behind me, which he tied, and also fastened my left leg behind my back; I drew myself along the ground, and got a knife, with which I cut the rope, and gave an alarm to the neighbors.

**THOMAS BETTERSON** - I am a quarryman; I reside under a rock at the Ultimo Estate; I remember being robbed, it was on a Saturday evening; a man came to me and asked if there were any lime burners about? I told him he was astray, as they were on the other side of the water; he then asked me for a light of a pipe, when I pulled some strips of bark, and gave him a light; I then saw a second man near the entrance of my residence, when I said - there's two of you, the second man answered - yes, you'll know it before we go; he then asked me for the key of my peter, meaning my box, which I handed to him, he then took everything I had out of my box, that was worth taking; I would not swear to the persons of the men; the smaller man took thirteen half-crowns out of my trowsers' pocket, which were under the head of my bed, the prisoner Tattersdale was not present; I knew him, and would have recognized him immediately if he had been there; he used to draw the stone from the quarry, he was assigned to Edward Turner, of whom I rent it; I know the articles produced, they were my property; I also lost some razors and scissors, and some blasting-powder; this bag was taken from me.

**THOMAS McCAFFRY**. - I reside at Saltpan Creek, near the Punchbowl; I remember having some unpleasant visitors in September last, I remember seeing the prisoner Tattersdale, he was servant to Mr. Turner; I remember one of the men coming to my door, and presenting his musket at me demanded some victuals; I said,

``Very well, my lad, don't be in a passion, I'll give you some provisions,'' when he replied, ``Don't stir a toot, you b- old b-, or I'll blow your brains out'' and made a blow at me with his musket which knocked me on the bedside, Jenkins called one of the men, when the approver came in and knocked me down with a waddie, and while falling the stout man gave me a blow which laid me insensible; while I lay on the ground the third man came in and took my musket, which had been knocked out of my hand; when he held his piece to my breast I put up my hand and pushed it aside, and he struck me with the butt; my fowling-piece was standing behind the door, and I seized it for the purpose of defending myself, when I was knocked down; Jenkins called the prisoner Tattersdale in to take my piece, and it was then that I recognised him; I was then lying on the ground, but had recovered myself; I should have known him before if I had not been knocked senseless; prisoners then took my piece and ran away; my men had just gone out from their dinner, and when I gave the alarm they came down to my assistance; the prisoners crossed the paddock in front of my house, but they could not be overtaken; my gun was loaded with small shot to the depth of four fingers, for I had heard they were about, and was determined to give them a warm reception; this is my piece.

**JAMES SMITH**. - I was overseer to Dr. Wardell; I went in search of him on the morning that he was missing, and found his hat near a hut on the estate, and also saw the tracks of his horse's feet; when I found the hat I knew it to be his, as it was the one in which he usually rode out in wet weather.

**W.C. WENTWORTH**, Esq. - I saw the body of the late Dr. Wardell when it was brought in from the bush, before the post mortem examination; I saw a wound on the throat which I at first thought was the cause of death, but which on a more minute examination I found to be a mere abrasion, a shot having glanced off the left shoulder in the direction of the throat - it was merely superficial; the wound that caused death was in the left breast.

This closed the case for the prosecution.

The prisoners being called on for their defence, Jenkins called the following witnesses, **THOMAS JONES, GEORGE ARMSTRONG,** and **ALFRED INNES**, none of whom were present.

**WILLIAM SMITH**, examined by Jenkins. - I am assigned to Captain Biddulph, I heard of the murder of Dr. Wardell, I don't remember the day it took place; I don't remember the day it took place; I don't remember the 7th of September, I never remember seeing you and Brace together on that day or any other day.

Jenkins. - Come now Bill, you have nothing to be afraid of speak up like a man, no harm can come to you, was not I and Bruce in your company together on that day?

Witness. - I never saw Brace before the present time in my life; I never saw you and Brace together; you were never in my company.

Jenkins with the most fiend like expression of countenance - I see its no use to ask him any further questions, he's afraid to speak the truth in my behalf - no witnesses present, no one can come forward for Jenkins - never mind, I can do it like a dog.

Brace recalled by the prisoner Tattersdale. - I met you first on a Thursday, I don't remember the particular day, it was opposite to your master's house, I was in company with your shipmate Jenkins. You called us into the kitchen, and said you wished to join us, you knew we were in the bush, we told you so; I persuaded you not to think of joining us but attend to your master's business, and keep a comfortable life while you could; you said you were determined to join us, and you then packed your things up; we took tea together, and then we left the house, and crossed the ground to where we

made the hut. This witness was cross-examined at great length by the prisoner, but with no visible object that would be of service to his defence.

**EDWARD TURNER**. - The prisoner, Tattersdale, was my assigned servant for upwards of eighteen mouths; never knew any dishonesty by him; he was industrious, and his character was generally good; he quitted my house on the night of the Thursday previously to the murder of Dr. Wardell; I saw him about nine o'clock, and missed him on the following morning.

Brace underwent another cross-examination by the prisoner, Jenkins, when the case for the prisoners closed.

His Honor the Learned Judge summed up perspicuously, pointing out the nature of the evidence of an accomplice, and shewing how far it recommended itself to credibility. In the present case, the evidence of the approver was corroborated in many important particulars. - The law for the purpose of the greater facility in bringing offenders to justice, had made accomplices competent to give testimony, their credibility being a matter for the consideration of the Jury. Where he was corroborated in one or more important points, the law assumed that the whole of the testimony was true, for it was not necessary that the approver should be supported along the whole chain of his evidence; if such other testimony could be obtained, the evidence of the accomplice would be unnecessary.

His Honor went through the evidence very minutely, and put the case to the Jury, who returned a verdict of Guilty against both prisoners.

The prisoners were then called upon, in the usual way, to make their statements in arrest of judgment, when Jenkins vociferated that he had a good deal to say on the subject; he considered that he had not had a fair trial; in the first place, that b--dy old woman, had been shoved in upon them for the purpose of leading them to their destruction he could have conducted his own case with a better chance of justice; and to shew the manner in which the feeling was against him - the Jury were not out a second, when they brought him in guilty; but he did not care a b--dy d--n for either Judge or Jury, or the whole b--dy Court, when he would shoot with the greatest pleasure if he had his gun here; he became very violent and struck the dock with his hand quite infuriated.[7] When his excitement had subsided, His Honor proceeded to pass sentence of death on the culprits. To Jenkins His Honor addressed very few words, his extraordinary depravity rendered such a course unavailing, which it could be observed had affected the Learned Judge in an extreme degree; and there were few person in Court who did not participate in the feeling of disgust, which the conduct of the prisoner had excited, except some few ruffians, who we observed to exchange smiles with the prisoner during the trial, who seemed gratified at the apparent approbation manifested by them of his ferocity of conduct; indeed, one ruffian was heard to say, what a pity such a fine fellow should die such a death. Tattersdale expressed his consciousness of his innocence of the crime for which he was about to suffer, and begged to be allowed a few days respite to make his peace with God for his sinful life. His Honor fervently exhorted him, as a man of mind, happily unlike his depraved companion in guilt, to make the best use of the few remaining hours which the law had left to him in this world. With regard to the prayer of the unhappy culprit, he had no clemency to exercise, his only hope was in reconciling his offended maker by a sincere repentance.

The culprit Jenkins addressed His Honor; he stated that he wished to disclose the circumstances of several robberies of various descriptions which he had committed, in order that after his death innocent persons might not suffer for the same; he could furnish ample proof of his being the depredator. His Honor informed him, that he

could not entertain any further application of the prisoners, the Clergymen of their respective religions who would attend them for the purpose of affording them religious instruction and consolation in their last moments, were the proper and the only person who could communicate with them on such matters.

His Honor had scarcely finished the last sentence, when the culprit Jenkins with a ferocity unparalleled, rushed forward towards his unhappy companion who stood at some distance from him in the dock, and struck him two violent blows; and in all probability would have added another victim to his murderous appetite, but for the police, who rushed into the dock and with much difficulty secured him.[8] From the sudden and unlooked for movement of the prisoner, those, whose eyes were not directed towards him at the time, and did not observe the blows he inflicted upon his wretched companion, imagined that his object was to effect his escape; and a scene of indescribable confusion then presented itself from the anxiety felt, of the probability of his effecting his purpose with the assistance of the mob, many of the worst description of blackguards who infest Sydney being present. That portion of the police who were not engaged in securing Jenkins, under the direction of the Under Sheriff cleared the Court; such a scene of tumult and excitement, we will venture to say never presented itself in any Court of Justice for the last fifty years as we witnessed on the occasion; and many were the anxious enquiries of persons in the crowd, as the prisoner was dragged along through the dense mass. ``My God, my God is he off, is he off," such was the panic which his conduct excited; he was however borne away in perfect security, and lodged in the gaol. In passing along Hunter-street, the melancholy cavalcade were met by the Chief Magistrate, when Jenkins vociterated [sic] with dreadful imprecations, that he would visit him on Monday night certain, and have that vengeance which he could not now obtain, Jenkins seems to be a man of a naturally blood thirsty disposition; from the moment of his capture, we recollected that he had been sent to the iron-gang, from which he absconded for two desperate assaults, with evidently murderous intentions, on Mr. F. Bedwell, Superintendent for Mr. Manning, to whom the prisoner was assigned, and Captain Biddulph respectively, for the first of which he received a corporal punishment, and for the second, twelve months to an iron-gang; he has been but a short time in the Colony, the whole period of which has been filled up with crime, which, fortunately for the Colony, is now brought to a termination. The motive which prompted Jenkins assault on Tattersdale, at the conclusion of the trial, was, most probably, the acknowledgement [sic] of the latter, that had he had the chance, it was his intention to disclose the particulars of the murder to save himself; Tattersdale seems to be a man of mild disposition, but very ignorant, and likely to be led, under the control of such a villain as Jenkins, to anything; his conduct throughout the proceeding, before and after the murder, did not seem to partake of that marked ferocity which characterized the conduct of his depraved companion. They are both in the morning of life, and we trust that their example, holding up to public view, the result of a short course of crime, which consigns two young men to an ignominious end, unpitied, may have the effect such a spectacle is well calculated to produce.[9]

Notes

[3] See also lengthy accounts of the trial in Sydney Gazette, 8 November 1834; Australian, 11 November 1834.

Dr Wardell, with W.C. Wentworth, was one of the founding editors of the Australian, and a leading barrister.

The murder of Dr Wardell was announced by the Australian on 9 September 1834. The funeral was held on 11 September 1834: Australian, 12 September 1834. At first, no will could be found and as Wardell had no relatives in the colony, the Attorney General moved

that letters of administration of Wardell's estate should be granted to Mr Manning, the Registrar of the Supreme Court: Australian, 16 September 1834; Sydney Herald, 18 September 1834; Sydney Gazette, 16 September 1834. Eventually a will was found, and as the executor and beneficiary were not in the colony, Wardell's oldest friend in the colony, Wentworth prayed to be granted administration of the estate: Australian, 20 September 1834. For litigation concerning the estate, see Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3287, vol. 104, p. 39.
Wardell had 10 convict servants, whom Mr Manning returned to the government: Australian, 19 September 1834. Wentworth later moved that Wardell's pending suits be handed to Mr Robert Foster, a solicitor: Sydney Gazette, 25 September 1834.
[4] The National Library contains a fine online portrait of the young John Jenkins.
[5] See Division of the Legal Profession, 1834. For Kinsman's further professional difficulties, see In re Kinsman, 1835.
[6] The Australian, 18 November 1834, pointed out the inconsistency that there was a reward offered in this case, but not in that concerning a much less prominent murder victim, a shoemaker named Fannon.
[7] The Sydney Gazette, 8 November 1834 reported that ``Jenkins addressed the Court and jury with the most blasphemous curses, protested he had an unfair trial by the Judge; that the jury had come into Court pre-determined to convict him; and that the counsel officially assigned to him, was a b--y old woman; and concluded by vowing if he had his will he would shoot every b--r of them." Tattersdale, the Gazette reported, protested his innocence, prayed for a long day, and begged the judge to order Brace, the approver, to be at the execution.
The Australian, 11 November 1834, said: ``Jenkins said he had a good deal to say, and throwing himself into a threatening and unbecoming attitude, remarked, that he had not had a fair trial, a b--y old woman had been palmed upon him for a Counsel; he did not care a b--r for dying, or a d--n for any one in Court; and that he would as soon shoot every b--y b--r in Court." The Australian gave a similar description of the conduct of Tattersdale to that of the Sydney Gazette.
[8] According to the Australian, 11 November 1834, the judge ``sat in mute astonishment" while this happened, and ``it took a dozen constables to secure and handcuff him. He was eventually taken down the street, venting the most horrid imprecations against the Judge, Jury, and every thing in the shape of humanity."
[9] Jenkins and Tattersdale were hanged on Monday, 10 November 1834: Australian, 11 November 1834. The Australian said that Jenkins retained his appearance of brutal recklessness to the last. He was first to ascend the scaffold, ``running up the fatal ladder, and pulling one of the ropes" either to ascertain its strength or to ``exhibit another proof of his hardihood." The Australian continued: ``He addressed his fellow prisoners as follows: - Good morning my lads, as I have not much time to spare I shall only just tell you that I shot the Doctor for your benefit; he was a tyrant, and if any of you should ever take the bush, I hope you will kill every b--y tyrant you come across. He confessed having committed many robberies whilst in the bush, and concluded by requesting the people to pray for him. On being requested to shake hands with his accomplice Tattersdale, he at first refused but subsequently consented to do; Tattersdale appeared much affected - Jenkins desired him not to cry, that in ten minutes time he would be happy enough. It was painful enough to witness the brutal apathy of this unfortunate wretch, who died as but history tells us, he lived - without hope or fear."
The Australian then noted that on the Saturday before his execution, Jenkins sent for the governor of the gaol, and expressed regret for his conduct during the trial. He asked that his apology be made to the judge, but then ``declared most fully his diabolical intention of adding crime to crime, viz. - Having drawn out a tolerably correct plan of the Court, he said `just before me, there were four Military Officers sitting, and the sword of one of lay upon the table in front of where I stood; I measured my chances; made up my mind to the attempt, but did not like loosing an opportunity of being avenged on Tattersdale, or else I would have jumped on that table, muzzled the sword, fought my way up to the b--y Judge, and served him out then you would have had some fun.'" Jenkins died almost without a struggle, though it was harder for Tattersdale.
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, 1826.
Among other crimes, Jenkins confessed to have committed a robbery at the house of Mills, but this took place two days after he was in custody. Jenkins' aim was to deflect blame from a fellow bushranger: see R. v. Maher, Sydney Herald, 20 November 1834.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 17/11/1834
Supreme Court of New South Wales
Forbes C.J., 14 November 1834

**ANN SMITH alias WALSH** stood indicted for stabbing **JOHN TAYLOR**, at Sydney, on the 23d Oct., and inflicting a mortal wound on the left side of the abdomen, of which mortal wound he languished until the 30th, when he died; the offence was laid in a variety of ways. The prisoner was undefended by counsel. On the part of the prosecution, the following witnesses were called:-

**CHARLES DANIELS**. - I am a shoemaker, residing in George street; I knew the late John Taylor - he lodged in my house; I know the prisoner at the bar; she lodged there also as his wife; I remember seeing the prisoner and the deceased together at my house; it was on a Thursday; I was laying down in bed, I was very ill; the prisoner and deceased were standing near the door; it was about eight o'clock in the morning; my working tools were near them; we were all in the same room; I heard a few angry words between them; she called him ill names; I saw a knife in her hand as she was standing near the seat; she had the knife in her hand when I first saw her out of my bed; it was the knife belonging to my working tools; she was standing at the end of the seat where the tools were; the deceased went away from the door; he returned in about two minutes, and went to the ladder to go up stairs, and said he was stabbed by Ann Smith; she was then present; she did not say anything at the time; she did not contradict him, she said nothing; he went up the ladder to a room above; the prisoner went up after him, and shortly came down again; she went into the yard, returned into the house, and went up stairs again where Taylor was; I had no means of sending for medical assistance, but a person in the yard, who attended me, gave him some castor oil as a purgative; he had been recommended to me; I assisted the deceased to the General Hospital on the following day, where I left him; I saw him dead a few days afterwards; I heard Ann Smith say, at the time they were disputing, that deceased had struck her with a bolt that lay by the side of the door; deceased was present; deceased did not deny it; he did not say a word; he might have given her a blow without my seeing it, when I lay on my bed; I was examined at the Coroner's Inquest; I think I made the same statement; I cannot speak as to the general habits of deceased, I was but slightly acquainted with him; he had been but three days in my house.

By the prisoner. - You and deceased left the house in the morning to go to the market, in friendship with each other, and returned the same; I saw no rum brought in, nor did I hear any argument about it; I did not drink any rum with you that morning.

By the Court - The first I heard pass between them, they were calling each other ill names; there was a small iron bolt laying near the door; I think it was that she meant, when she said the deceased had struck her.

By the Prisoner. - I did not see a pipe or tobacco in your hand when deceased went out; I think you shut the door and put your back against it; that was the first time he went out; he did not say he was wounded; I don't know why you shut the door.

By the Court. - When the deceased went up the ladder, the prisoner was standing close by; the prisoner said deceased had struck her with a bolt, before deceased said he was stabbed.

By Prisoner. - I did not hear deceased say, when the door was shut, that he was stabbed, and begged you to let him in; I did not see deceased pull you by the hair; I did not see him strike you with the bolt.

By the Court. - My wife was lying in the room drunk - she was quite insensible.

By a Juror. - I was quite sober; I had not drank any spirits.

**JAMES MITCHELL**, Esq. - I have charge of the General Hospital; about the 24th October, I remember a man, named John Taylor, being brought to the Hospital; he was brought in consequence of a wound in the left side of the abdomen; it was a punctured wound, which had penetrated the inner cavity of the abdomen; he was in a very dangerous state; in consequence of that wound he died on the 30th; after death I examined the body, and found that the intestines had been injured and a blood vessel punctured, which had caused a great extravasation and inflammation of the parts; the wound appeared to have been inflicted with a knife; if the knife had been thrown, it might have inflicted the same wound; I have no doubt the death was caused by the wound.

**JOHN HUGHES.** - I am overseer at the General Hospital; I remember on the 24th, last month, that a man, named John Taylor, was admitted; he complained of a pain in his side, and that he had been stabbed; he appeared to be suffering very much; on the first night of his admission, he did not seem to entertain any idea that he would die; he did afterwards.

By the Court. - How did you know that he entertained the idea that he would die?

Deceased, about two days before his death, requested me to send for a man, named Thompson, whom he wished to go the Police Magistrates and lodge an information against a woman, named Smith, and have her apprehended, as she had been the cause of his death; I sent for Thompson; I believe he afterwards attended him; I considered that he was then apprehensive that he was dying.

By the Attorney General. - He died on the 30th instant, on the day of the Inquest; I think Thompson was sent for on the Thursday previous to his death; he died on a Saturday.

**GABRIEL THOMPSON**. - I am a bricklayer; I live near Ultimo; I knew the deceased John Taylor, he was in my service; I knew him about nine years; I employed him as a clerk or overseer; I employ several men; I never saw him the worse for liquor; I believe he cohabited with the prisoner at the bar; in the end of October last, I heard he was in the General Hospital; a communication had been left at a building which I was erecting, that a man, lying in the Hospital, wished to see me; I found him very ill; he said, Thompsom I'm no more; I told him to keep up his spirits, but he said, it was no use, as he found himself dying; he said he wished me to go and see him on the following day if he were alive, but he feared he would not; I considered that he imagined he was dying; he requested me to go to Colonel Wilson and lodge an information against a woman named Ann Smith, who had been the cause of his death, and have her apprehended and brought to justice for it; he pressed me two or three times to go to the Police Office; he said that Ann Smith asked him to fetch half-a-pint of rum, which he did, after which she wanted him to send for another, which he refused, when she took up a knife and stabbed him in his belly; I went to the Police Office and stated the circumstance to Colonel Wilson, but he appeared to be in a hurry, and took no notice of my statement; he made me no reply; I waited about for some time, and asked the constable what I was to do, when I was told I might do what

I liked; finding I could not succeed in my endeavour to get the case entertained, I went away; I saw his body after death.

By the Prisoner. - The last word deceased said were ``Thompson, remember me - don't forget to go to Colonel Wilson, and have that woman apprehended.

The case for the prosecution here closed.

The prisoner called -

**JOHN SKINNER**. - I am attached to the Police Department; about the 23rd of last month, I heard that a squabble had taken place, and that a woman had stabbed a man in Goulburn-street, and I went to enquire into the circumstances; I went to the house of a person named Daniels, and enquired if there was not some man who had been stabbed by his wife - he said that there had been some words, but it was a family affair, and had been done away with.

**STEPHEN JEFFREY**, by the Prisoner. - I heard the last words of the deceased; he said that he wished to have Ann smith taken, as she was the woman who had stabbed him with a knife; he said it was in a dispute; he expressed a wish to see the prisoner, Ann Smith, before he died. The Court advised the prisoner not to put any further questions to this witness.

The prisoner had no further evidence to call on her behalf, and his Honor summed up the evidence, making suitable remarks for the guidance of the Jury, as to what constituted the legal difference between murder and manslaughter, with the manner in which they respectively bore upon the case. The Jury returned a verdict of Manslaughter against the prisoner, and she was remanded for sentence.

See also Sydney Gazette, 15 November 1834; Australian, 18 November 1834. For another case in which Ann Smith was charged with robbery, see Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2414, vol. 11, p. 154. Verdict: not guilty.

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

SYDNEY HERALD, 20/11/1834

Forbes C.J., Dowling and Burton JJ, 18 November 1834

**ANN WALSH alias SMITH** convicted of manslaughter. His Honor the Chief Justice observed, that it appeared on the trial of the prisoner, that the fatal result arose out of a disagreement with the deceased, who had previously used violence, when the prisoner, having a deadly weapon in her hand struck the deceased a violent blow on a vital part of the body; taking all the circumstances of the case into consideration, the Court was of opinion, that it was one in which a sudden impulse of passion had prevailed over discretion, and one which did not call for the extreme severity of the law - which would subject the prisoner to transportation for life. The Court was of opinion that justice would be awarded, and an example held out against yielding to such impulses, by inflicting on the prisoner the sentence of transportation for seven years. See also Sydney Gazette, 20 November 1834; Australian, 21 November 1834.

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

SYDNEY HERALD, 12/02/1825
Supreme Court of New South Wales
Burton J., 11 February 1835
Wednesday. - The following Aboriginal Natives were arraigned for a burglary in the dwelling-house of Mr. Alfred Hill Jaques. of Brisbane Water, and taking therefrom a quantity of tea, sugar, beef, and sundry articles of wearing apparel [sic]:- Monkey, Major, Whip'emup, Legamy, Charly, Mussel, and Little Dick, four of whom were found Guilty; the others are detained on another indictment. The Rev. Mr. Threlkeld, of Lake Macquarie, Missionary to the Aborigines, was sworn as interpreter, and Messrs. Therry and Poole, at the suggestion of the Court, acted as their Advocates.
See also Australian, 13 February 1835; Sydney Herald, 16 February 1835; Sydney Gazette, 14 February 1835.
Once again, the Sydney Herald had the judge and date wrong. The trial was held before Burton J. on 11 February 1835: Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2418, vol. 17, p. 25-35. The defendants were recorded in this source as Little Dick, Whip-em-up, Monkey, Charley Muscle, Little Freeman, Leggamy, Major, Currinbong Jemmy, and Tom Jones. Jaques gave the principal evidence, and said that the Aborigines had also raided some convicts' huts nearby. He said that when they came to his property (on 25 October 1834), he presented his fowling piece (small gun) at them. Three groups of Aborigines joined together and began throwing stones and a spear (which hit the second witness, William Rust, a convict). Jaques said he was driven out of the house, and it was filled immediately and the things were stolen. There were about 60 of them in the first group and they were later joined by another 20 or 30. The confusion of their names was because they were sometimes called by the place where they were born, and sometimes by the place where they reside. The main problem was identification, the witnesses, including Threlkeld, saying that they looked alike and had changed since the time of these events. Whip-em-up, Monkey, Currinbong Jemmy and Tom Jones were found guilty, and the rest not guilty.
This same attack on 25 October 1834 led to a second trial before Burton J. On 5 August 1835, Hobby and Maitland Paddy were tried for robbery in the dwelling house of Jaques (Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2420, vol. 19, p. 1). In this, Jaques said that he saw a party of 50 or 60 Aborigines approach his house and demand meat in a hostile manner. He and Rust closed up the house, barricading themselves inside. This time, he said that the spear hit Rust in the side. Jaques said that Hobby boasted that ``black fellow was best fellow'' which he took to mean the most powerful. Eventually they escaped to another farm for refuge, leaving Jaques' to be ransacked. He also claimed that the Aborigines had told him that they came from different tribes; they had gathered together to commit robberies. Jaques denied that any whites had committed violence on them. Rust said he asked Hobby why they were stealing: ``he said Black fellow master now rob every body - white fellow eat bandicoots & black snakes now''. Rust estimated that there were 150 Aborigines involved altogether. Hobby was found guilty, and Maitland Paddy not guilty. Hobby was sentenced to death recorded (p. 6).
Death recorded meant a formal sentence of death, without an intention that the sentence would be carried out. Under (1823) 4 Geo. IV c. 48, s. 1, except in cases of murder, the judge had considerable discretion where an offender was convicted of a felony punishable by death. If the judge thought that the circumstances made the offender fit for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved (s. 2). In effect, it usually meant a sentence of transportation for life.
In this particular case, the original intention was to send the eight Aborigines to Van Diemen's Land where they would be assigned to settlers, but the Lieutenant Governor of Van Diemen's Land objected to that plan. Instead, they were confined on Goat Island in Sydney harbour, where they were employed in cutting stone but kept separate from other prisoners. They were to be taught ``Christian Religion'' and ``English Education'': Bourke to Secretary of State, Historical Records of Australia, Series 1, Vol. 17, p. 718.
There was another trial, R.. v. Toby, on 12 February 1835, before Burton J. (See Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2418, vol. 17, pp 63-69.) Toby was another Aborigine, charged with robbery in the dwelling house of John Lynch, at Sugar Loaf Creek on the Wollombi in the Hunter River district. The robbery took place on 5

November 1834. According to Lynch, eleven Aborigines went to his house when he and his wife were there. After feeding them, he said, they robbed his house. Toby struck Lynch with a waddy; he was later stabbed in the thigh with a spear. Lynch had a scythe in the fight and the Aborigines a gun. Lynch cut three of them with the scythe, one of whom later died. He owned the property by grant and had been there for nine years, but his nearest neighbour was five miles away. He had one free servant girl (who was raped: see R. v. Mickey and Muscle, 1835).

Whip-em-up, Monkey, Currinbong Jemmy, Tom Jones and Toby were all sentenced to death recorded on 12 February 1835: Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2418, vol. 17, p. 69.

Without stating which of these cases was in issue, the Australian, 1 May 1835 reported: ``The sentence of transportation for life to Van Diemen's Land, passed upon the Brisbane Water Blacks, has been commuted to 2 years labor [sic] in irons on Coal Island; they are kept separate from the rest of the prisoners, under charge of one of their own kindred, and employed in stone cutting, in which they have already become tolerably expert."

On 22 August 1835, another Aborigine, known as Charley, was convicted of murder, and sentenced to death: Australian, 25 August 1835. The governor sought to have him hanged in chains at the place of the crime (the Hunter district), but Forbes C.J. pointed out that an English Act of 1834 (4 & 5 Wm 4, c. 29; and see 2 & 3 Wm 4 c. 75) had abolished that punishment and that it had not formed part of the original sentence against Charley. However, C.H.Currey points out that the English Act was adopted in New South Wales only in 1837: Sir Francis Forbes: the First Chief Justice of New South Wales, Angus and Robertson, Sydney, 1968, p. 470; and see Australian, 28 August 1835. Charley was apparently hanged in the normal way at Dungog, after being forwarded by the steam-packet: Australian, 4 September 1835. The correspondence between Forbes C.J. and the governor on this point is recorded in the Chief Justice's Letter Book, 1824 - 1835, 4/6651, State Records of New South Wales, pp 405-407.

The trial of Charley was not reported in the newspapers. The fullest details of the case are in the brief, at Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, pp 145-157: two Aboriginal accessories were also charged, known as Tom and George. The victim was called Alfred Simmons, and the crime took place at the Williams River. The evidence suggested that it was part of a general attempt to get rid of all of the Europeans in the area: ``They said there were plenty more Blacks in the Bush that they would kill all the White men in the neighbourhood" (James Smith, p. 156). For archival correspondence on this case, see p. 142.

For other cases concerning Aborigines in this period, see also R. v. Mickey and Muscle, 1835; R. v. Lego'me, 1835; R. v. Long Dick and others, 1835.

See also Sydney Herald, 27 November 1834 on allegations of Aboriginal depredations [sic] on stock at Brisbane Waters. The newspapers were not always unsympathetic to Aborigines: see Australian, 10 January 1834, for its recognition that there had been an invasion by the British and of the need for land to be reserved for Aborigines. See, too, the letter from Glennie to Scott, 22 June 1835, about these Aboriginal attacks in the Hunter district: Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, p. 168.

As the British expanded their effective occupation of New South Wales, violent clashes continued: see for instance, Bourke to Glenelg, 22 December 1835 (Historical Records of Australia, Series 1, Vol. 18, pp 235-237) reporting the death of Cunningham, the botanist, at the hands of Myall Aborigines. Three Aborigines were apprehended by the Mounted Police on suspicion of murder, but two escaped and Bourke thought it unlikely that there would be sufficient evidence for a conviction.

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SYDNEY GAZETTE, 12/02/1835
Supreme Court of New South Wales
Dowling J., 11 February 1835
(Before Mr. Justice Dowling and a Military Jury.)

**THOMAS WEATHERWICHE**, a prisoner of the crown was placed at the bar, charged with the murder of one **JOHN SMITH**, on the North Shore, by striking him with a stick.

**JEREMIAH SHEENY [SHEEHY]**, a youth of 14 years of age sworn - I am assigned to Mrs. **FINNIS**, on the North Shore; I knew the deceased John Smith; he was also a servant to Mrs. Finnis; I saw the deceased when he was dead at the hospital on the 31st Jannary; I saw him alive on the 27th of January, at the North Shore in my Mistress's kitchen; from his hut he came about 20 yards from my Mistress's house, on the Tuesday morning before he died; I was going to call the deceased to breakfast, when I saw the prisoner come out of deceased's hut and wipe his hands, which were covered with blood, on the door of the hut; he ran up to me and laid hold of my wrists, and told me there were two men inside the hut, and told me if I came down to the house with him, he would not harm me; upon which I roared out, and he put his hand on my throat; we then had a scuffle and both fell down to the ground together; at this time two of the dogs came up and began to fight each other; another came up and went to the prisoner and leapt upon him; he then let me go; he picked up my hat which was on the ground and went away; I saw blood on his hands, and I saw him wipe them on the door; I then ran home and said there were bushrangers about; and locked myself up; there were two young ladies who then ran to the water side to call a boat; Miss Talbot and a child; my mistress then called a boat which was going by with two men in it, and they came ashore; I then went and called some of Mr. Mossman's men, they came with me and we then went to the hut and saw John Smith lying under his bed, covered with blood; his eyes were open; he appeared sensible, but could not speak; he was then taken to the hospital; I saw a stick in the hut; there was no blood on it, but the stick was broken, and there were bits of it lying about the hut; the stick now produced is the identical one, I saw in the deceased's hut; I saw some boxes in deceased's hut broken open by having the hinges taken off, and the sleeve of a jacket was out of one of the boxes; the hat now produced is my hat, the one prisoner ran away with; I never saw the prisoner before that day; the deceased was about 30 years of age.

Examined by the prisoner - You asked me to tell you where the money was; there was no biscuit in the hut; there was biscuit in the kitchen; I never saw you before.

Miss **JULIA TALBOT**, sworn - I was living with Mrs. Finnis at Robinson's Cottage, on the North Shore; I remember the morning John Smith was murdered; it was yesterday fortnight; I heard the boy Sheehy making a noise, and thought it was some of the men beating him; the noise continued, I and Mrs. Finnis went out; we then met the boy, and he said there was a bushranger; at the time, I thought: it was not a bushranger, till the boy told us Smith's hut was all over blood and Smith was in it; I then went to the hut, not believing what the boy said, and saw the deceased lying on the floor covered with blood; I spoke to him and he turned his head two or three times towards me, as if he knew me, but he could not speak; I looked round the hut and saw the lamp on the ground, as if it had been thrown down in a scuffle; I was too much alarmed to take any further notice and ran to the house; I also saw a man run away before I went to the hut, and saw the same man have hold of the boy's throat; at the time I thought it was one of our own men and not a stranger; I went down to the hut after the deceased was removed to the hospital, and I there saw some biscuit rolled up in a towel, and a box broken open; we thought it strange there should be biscuit in the hut, as the deceased had been living with Mrs. Finnis a year, and was a gardener; I never saw the prisoner at the bar before; I was close to the prisoner, but thinking he was one of our own men took no notice of him; he was dressed as one of our men.

Cross examined by prisoner - There was a box broken open; the hut stands about 100 yards from the house; no one could get out of the hut without my seeing them; there was a window in the hut; no one could get out of the window without being seen by me.

Dr. **MITCHELL** sworn - I am Colonial Surgeon; I remember the day Smith came to the hospital; he was brought there on the 27th January last, in a state of insensibility, from wounds in the head; he lingered there till the 29th of January, 8 o'clock in the evening, when he died; he died from a fracture in the skull, and extravasation of blood in the head; the wounds I should imagine were produced by a sort of club; the stick now produced would inflict such wounds; the deceased appeared to have several blows in the head; he was quite insensible from the time he was brought to the hospital to the time he died; I never had any hopes of his recovery.
William Pearce sworn - I am a servant to Mrs. Finnis; I know the hut where Smith was murdered, and remember the day well; Smith was alive at 5 o'clock in the morning of that day; I returned at 20 minutes after 3 in the afternoon; when I went into the hut there was a great quantity of blood under the bed, and my box was broken open; I lived in the same hut with deceased; I did not know of any biscuit being in the hut; I missed a pair of trowsers and a check shirt, and in lieu thereof I found a red shirt and three parts of a pair of duck trowsers; I went to see Smith at the hospital before I went home; I had crossed to Sydney on the morning of the day deceased was murdered; his face was so much disfigured that I could not identify him, except by his breast and hands; the boy Sheehy told me the man who had murdered deceased was about 5 feet 10 inches high, with light eyes and brown hair; the trowsers now produced are mine; the red shirt does not belong to any one in the hut.

Cross-examined by prisoner - I never saw you before in my life; I did not give you the shirt and trowsers now produced (upon this the prisoner at the bar said, ``you are a false man''); the stick supposed to be the one deceased was beaten with might have been in the hut for the purpose of lighting the fire; I never brought any biscuit into the hut; the hut is 100 yards from the house; there is a door in the front, and a window in the side of the hut; a man might get out of the window while another was approaching and secrete himself in the bush at the back of the house, without being seen, Smith, for the last few weeks preceding his death, was dissatisfied with his place, on account of my having £10 a year, and he being allowed nothing; I recollect Mrs. Finnis giving deceased a pair of trowsers, and getting them back from him; I also recollect deceased having a hat given him; an old one of Mr. Finnis's.

(The examination of this witness by the prisoner, and the perfect knowledge prisoner appeared to have of the place, and the circumstances that transpired there, plainly evinced that the prisoner was on intimate terms with some person connected with that establishment although this witness denied ever having seen him before.)

**THOMAS CLARKE**, Esq. Police Magistrate sworn - I have some land at the North Shore; on hearing of the murder at Mrs. Finnis's, I proceeded to the hut, accompanied by some of the police; I saw the stick now produced, but there was no blood on it; I saw the deceased after the accident, the first time, at a public-house on the King's Wharf; the hut appeared to have been the scene of a recent scuffle, the things therein, appeared much disordered.

Cross-examined by the prisoner - There was a window in the hut, but I did not take much notice of it; I think it was shut at the time I went into the hut; a man might get out of this window while a person was approaching, without being seen.

Colonel **WILSON** , Chief Police Magistrate, sworn - I heard of an outrage being committed on the North Shore, on the 27th January, I immediately sent constables

over, and proceeded there myself the next morning; I supposed, from the man's clothes being found in the hut, and the clothes being recognized as belonging to the man who had escaped from the hulk, that he was the man who had committed the outrage; he was apprehended on the following Thursday and sent to the Barracks, and from thence to the Hospital to John Smith, to see if Smith could recognize him, but Smith did not by any sign appear to have the least knowledge of him, being perfectly senseless at the time; he (prisoner,) told me, after he was committed, that he went to a certain place after he had escaped from the hulk, to a hut, which I found out, where he was harboured by two men, that it was here the robbery was contemplated, but no murder; at Mrs. Finnis's he said, he had gone himself a few days before the murder was committed, to Mrs. Finnis's, making himself acquainted with the servants and the way of the house; he told me the boy Sheehy had given him the waistcoat, that Pearce had given him the shirt and trowsers he had on when he was apprehended, and also that the boy had given him the biscuit, and that he was maintained for two days by Mrs. Finnis's servants; he said that the boy Sheehy told him that the biscuit was kept in a loft, and that he couldn't get any, till he had a good excuse to go to the loft, which he said he would do. He said that the prisoner of the Crown who had harboured him was with Smith in the hut the morning that the murder was committed, and the prisoner on going outside, saw the boy Sheehy coming towards the hut; he said he had no doubt the murder was committed by the other man who was with him, in his own defence, to prevent his being taken, while he, prisoner, was outside the hut. He adduced, by way of argument, that his hands were not bloody, or he should have stained the lad's clothes when he grappled with him; and also, that the man who murdered deceased, got away by the window of the house; the man's name, whom prisoner said was his accomplice, and murdered Smith, was Patrick Brennan, who is now in custody; I did not observe any marks of blood on the door of the hut. All this conversation passed between the prisoner and me, in the jail, after his committal.

**GEORGE JILKS**, Chief Constable - I was directed by the Chief Police Magistrate to strip the prisoner at the bar; the trowsers, shirt, shoes, and hat, now produced, are the identical articles I took off the person of the prisoner; I took the boy, Sheehy, into the room where the prisoner and 8 or 10 more prisoners were standing, and he picked him out directly, with the clothes on now produced.

Miss Julia Talbot, recalled, by the Court - I went into the hut after I head the boy, Sheehy, cry out; when I went in the window was shut; I cannot say whether the window was secured inside or not; I am sure no person went through the window from the time I left the house to the time I opened the door of the hut; when I saw the man whom I suppose to be the prisoner and the boy struggling, I though they were only playing together, and the man was one of our own men, and therefore was not alarmed; the hut is situated at the side of the house, and is in sight of the kitchen, from whence I saw the man and boy struggling; if any person had jumped out of the window I must have seen him; when I first saw the man and boy struggling I returned to the parlour; five minutes elapsed before I saw the hut again, and then, from curiosity, I went directly to the hut, and saw Smith in the manner before described by me, lying on the ground weltering in his blood.

**ELIAS HIBBS**, sworn - I am a boatswain of the hulk; I know the prisoner at the bar; he was a prisoner on board the hulk; I missed him on New Year's Eve; he was sentenced to Norfolk Island for 7 years; he got away from the hulk by lowering himself into the boat; I did not miss him till the boatswain's mate came and told me he was not to found; I then went and made enquiry myself, and found he was gone; the sentinel then went and examined, and found the painter of the boat cut, and the boat

gone; the next morning I found the boat at Milsom's Point; there were four oars in the boat when she was fast to the vessel; when she was found there was only one oar in her; witness could not swear to any of the clothes produced.

**LUDAVINA FINNIS**, sworn - I remember the morning Smith was murdered; I saw a man and the boy, Sheehy, struggling.

Cross-examined by the prisoner - Some one went up stairs to the loft where the biscuit was kept that morning (Tuesday), and took some biscuit; there was a melon stolen one morning, and the boy Sheehy was accused of the theft; I dept the dinner warm for Pearce, my house servant, on the Saturday before the Tuesday the murder was committed; the knowledge the prisoner displayed of every transaction that took place in Mrs. Finnis's establishment, even to family matters, was truly astonishing; so much so, as to leave no doubt on the mind of this witness that he was acquainted with some person in her establishment.

This closed the case for the prosecution.

The prisoner made no defence, but called Mr. Weston as to his character, who gave him the character of being a very quiet man whilst in jail.

This closed the case for the prisoner.

The Jury, after retiring for a few minutes, returned a verdict of guilty against the prisoner.

The Judge, in the most impressive manner, pronounced sentence of death on the prisoner, and sentenced him to be executed on Friday morning.

[*] For the trial notes, see Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3289, vol. 106, p. 187, continued at 2/3290, vol. 107, p. 1. See also, Australian, 13 February 1835. The Sydney Herald, 16 February 1835, complained that Dowling J. treated a female witness with undue warmth and harshness.

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

AUSTRALIAN, 13/02/1835

Burton J., 12 February 1835

Amongst the sentences passed by Judge Burton in the Supreme Court yesterday, was one of transportation for life to Van Diemen's Land upon five of the Aborigines, who had been tried for the murder of a shepherd near Brisbane Water; it was a melancholy sight, and called up feelings of a painful nature; it could not but occur to us, that, the prisoners being as ignorant as the beasts, it was almost a mockery to bring them to the unintelligible formality of a trial.

The observations made by His Honor in passing sentence were not intended, of course, to have any influence upon either the prisoners or their countrymen; on the contrary, His Honor expressed a hope that it would be generally received amongst them that the five prisoners had been put to death - thus preserving one great end of punishment, and that not at the expense of an outrage upon humanity.

The above proceedings might teach a lesson to the Swan River Government - under certainly not greater provocation than the above murder - the Governor, and a chosen band went out with sword and spear against the Aborigines of that quarter - killed as many as they could, and parted with the kind promise of repeating their visit on the same term, if they speared any of their cattle!

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

SYDNEY HERALD, 16/02/1835
Supreme Court of New South Wales
Forbes C.J., 13 February 1835

Friday. - Serjeant **THOMAS EDWARDS** and private **JAMES SLATER**, of the mounted police corps, stood indicted for the wilful murder of **WILLIAM MACDONALD**, at Bathurst, on the 25th January last, by handcuffing him to the stirrup of a horse on which Slater was mounted, and which, being a spirited animal, kicked and dragged the said Macdonald along the road, thereby inflicting various wounds and contusions on his body, of which he instantly died. It appeared that a warrant had been put into the hands of Slater and another of the mounted police for the apprehension of Macdonald, who resided about fifty miles from Bathurst, on a charge of cattle-stealing, and he was apprehended accordingly; the other man drove nine head of cattle, while Slater took charge of Macdonald; during some part of the way, Macdonald proceeded without giving any trouble, but, during the second days' journey, became refractory and would not proceed, stating that he was as free as the Governor of the Colony, was apprehended on a false charge, and had no right to be in custody at all. Slater and his companion remonstrated with him on the inconsistency of disputing the matter with them, who were only acquitting themselves of a duty they could not avoid, entreating him to proceed in an orderly manner, which after some persuation he complied with; but frequently acted in the same way along the road, saying he was fatigued and could not proceed; some times he would become clamorous for water, although he was aware there was none to be had, without going several miles out of the road; in their way they called at the house of a Mr. **HAYES**, of Eastern Creek, who has a station in the vicinity of Bathurst, who deposed that the conduct of the prisoner Macdonald was most refractory; he abused the policemen who had charge of him in a manner not proper to express, during which they exercised the most praiseworthy forbearance and endeavoured to humour him; he would have some spirits which they were unwilling to let him have dreading its consequences, but as he begged hard to be allowed to take a glass and promised to go along quietly, in consideration of their indulgence, he got a dram of spirits; but had scarce swallowed it when he recommenced his abuse; in this way, according to evidence, did he act along the road, when at length they arrived at Bathurst; Macdonald begged to be allowed to go to a friends house for a clean shirt in which he was indulged, first treating Slater to some rum at the house of a Mrs. Dillon; after furnishing himself with a clean shirt they proceeded to Kables public house, where more rum was called for; the man who had assisted in bringing him to Bathurst had gone on with the cattle to the place appointed for them; Sergeant Edwards seeing Slater at the door of the public house and knowing he was on duty, told him he had no business there and ordered him to be off and mind his duty; Slater said he could not go without his prisoner who was not yet ready to start; when Edwards asked who he was, he was pointed out in the tap room; Sergeant Edwards went to him to order him off with Slater and found him with a glass of run in his hand which he offered the Sergeant to drink; but the Sergeant immediately threw it on the ground and seeing a tumbler on the table containing rum he threw that out also; Macdonald being vexed at seeing his rum spilled, said if he was then as he had formerly been he would give him a hit in the eye; some scuffle then took place and the tumbler was broke; the Sergeant ordered him to go along, but as he refused to do so, he went for a pair of handcuffs saying he would let him see whether he could not be made; he at first secured his hands cross ways when Macdonald said he had now done his worst and he should have ten minutes fun to himself, on saying which he lay down on the ground and would not rise; Sergeant

Edwards raised him up and taking the handcuffs from both wrists secured his right hand to the left stirrup of the horse on which Slater sat, and he (Slater) was ordered to proceed leisurely towards the goal, which was at the distance of a mile from Bathurst; Macdonald said he would make him go along for he would kick him in the belly; a Sergeant Evans who was standing by said he had better not or the horse would kick his brains out. One witness gave a different version of this; according to his testimony, the Sergeant said if the B--r does not go along quietly make the horse kick his b--y brains out. The horse proceeded about ten rods when he gave a sudden plunge and threw Slater from his saddle; the man Macdonald was thrown down and the horse kicked him several times, dragging him along the road, until at length the saddle came off. Several persons who saw the occurrence ran to the assistance of the unfortunate man but he was then insensible, in which state he remained about ten minutes, when he died. The body being examined by Dr. Busby was found to be much contused in various parts particularly the head, and the neck was dislocated; on opening the head a considerable quantity of extravasated blood was found on the brain; either of these injuries were sufficient to cause almost immediate death. One witness stated that Slater was quite drunk and had spurred the horse; whilst others stated he was perfectly sober, and attributed the death of the deceased to mere accident, Slater's heel being drawn into contact with the horse by the deceased in following. His Honor in putting the case to the Jury, animadverted in strong terms on the dangerous practice which it appeared was adopted by the mounted police in escorting prisoners from place to place; a practice from which such results as the one then before them might readily be anticipated. In the present case that practice was less called for than the generality of cases which for the better security of prisoners suggested themselves, as the gaol was found to be not more than a mile distant, an available force was at hand for the escort of prisoners, without resorting to so dangerous an alternative. There appeared, however to be no malicious intention on the part of the prisoners, the occurrence being accidental, which might be presumed from the fact of the prisoner Slater's having been thrown by the sudden plunging of the horse, which proved it was not foreseen. His Honor summed up most elaborately pointing out for the consideration of the Jury the parts of the evidence, if credited, which involved the liability of the prisoners to a charge of manslaughter. The Jury returned a verdict of Not Guilty. Before quitting the Court his Honor again admonished them against adopting so dangerous a mode of escorting prisoners in future. See also R. v. Hagan, 1835.

According to the Australian, 17 February 1835 ``The Chief Justice observed the impropriety of handcuffing to the stirrup, and directed that that practice should be disused. We have since been informed that orders have been given to that effect by the commander of the mounted police, Captain Williams." See also Sydney Gazette, 14 February 1835.

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

AUSTRALIAN, 17/02/1835

The late trials of the Aborigines for their different offences, together with their sentences have caused a good deal of discussion; public opinion appears to be somewhat divided on the questions of justice of trying them by our laws, and according to our forms, and of that of their punishments.

With respect to the first question - as to the justice of trying them by our laws and forms - it is clear that offences against person and property can no more be suffered to pass unreprehended when they are committed by the aborigines, than if the offenders were of any other nation; there is nothing to excuse outrage on their parts, for our usurpation, as it is sometimes termed, of the soil, has been attended with no outrage or violence upon them; of

course we only speak generally; particular instances there may have been, and there may be still, of that inattention to humanity and justice which has in other countries invariably followed the collision of the sons of civilization with those of nature; but generally, we repeat, they have suffered no wrong at our hands; we have occupied spots upon which they have been accustomed to find subsistence; but over the nearest hills they have found spots equally suitable to their habits, and varying in no particular from those from which they have been compelled to retire; it would be difficult to shew any real injury that they have sustained at our hands, at least of a nature to rouse their passions, or to incite them to the infliction of injuries.

The question then is, how are these outrages to be stopped? The law of retaliation is one which no man of reflection would suffer to exist, except as a dernier resort; he would know too well the cruelty and wrong to which the unbridled revenge of man would certainly lead him.

In this case then, as in that of the civilized man, we must have recourse to the laws- and unless it can be shown that the object would have been better accomplished by some other means than a trial in our Courts and according to our forms, the proceedings of the Authorities have been just and politic. As to saying that, from the circumstances of their ignorance of our laws and language, they should be held guiltless, or at least suffered to escape without suffering a penalty, these considerations may have an effect upon their punishments, but cannot be reasonably suffered to work the future detriment to ourselves which would ensue from their impunity.

It has been said that a tribunal should have been erected at the seat of their outrages, where they might have been tried and punished in the presence of their countrymen; this, it is urged, would have made a greater impression upon them than their trial, and subsequent punishment, however more severe the latter might have been, in Sydney; the observations of Judge Burton satisfy this objection; it is not the forms of the trial that form the impression - it is their removal from their tribe for ever, and the idea that will prevail amongst them that they have been put to death; their execution at Brisbane Water could scarcely have a greater effect upon their minds than the dim uncertainty of their fate, which will, perhaps, preserve the circumstance as a tradition, long after the lives of the present generation.

It is however, probable that, notwithstanding the benevolent intentions of the Authorities, they will not be suffered to exist long amongst the aborigines of Van Diemen's Land, whither they are sentenced; the natural, or perhaps more correctly speaking, the universal feeling of animosity that prevails between members of different and strange tribes, will render their lives as insecure as if they were sent to the Five Islands, or any other hostile Territory.

It has been supposed by some persons, but we have reason to believe without foundation, that these poor wretches are to be worked in irons - or at least subjected to some species of ``prison discipline;'' the idea is too monstrous for belief; we are persuaded that not only useless and uncalled for severity will be avoided, but that all that can be done to render their situation bearable, will be the aim of both Governments.

We may be allowed to observe, by the way, upon the singular contrast which is exhibited between the interest that is felt for the future comfort of these men, and the barbarous indifference with which transportation in its worst shape, is seen inflicted upon those at home, whose situation strikingly resembles that of these aborigines; it is urged that these latter are ignorant and unenlightened - that they are incited by new wants, and opportunities, and that, from circumstances, they cannot have a fair trial; now take those classes of men who are transported for agrarian disturbances in England or Ireland; here you have almost equal ignorance, and a pressure of poverty which reduces the wants of the natives to absolutely nothing; and in the case of Ireland, if not of England, in addition to their ignorance, you see them so completely the victims of agitators and designing men, that they positively think themselves not only justified in their excesses, but even meritorious and patriotic.

As for the fairness of their trial, we should be glad to know how many persons in Ireland have been falsely accused, and convicted through bad management on their own parts, or perjury on the part of others? The well authenticated tales of such unfortunate convictions in that country, are numerous, and occur, we fear, much oftener than is suspected by those who are not fully acquainted with the Irish character; how far the accused in England have always a chance of being tried fairly, may be learn't [sic] from the following :--

Extract from the Enquiry of the Commissioners
into the Affairs of the Corporation of London;
Mr. Clarke is the Clerk of the Peace for the City
of London.

``Mr. Commissioner Drinkwater enquired of Mr. Clarke, whether the statements publicly made of the hurried manner in which the trials at the Old Bailey, for minor offences, took place, had any foundation. Mr. Clarke stated, that not only minor offences, but even those for which the prisoners were sentenced to transportation for life, were conducted in a manner extremely discreditable to the administration of justice. He had known one Middlesex Jury convict seventy-three persons at one sitting ! ! !

``Mr. Alderman Harmer presented himself to the Commissioners and stated, that it was his intention to bring forward the present extremely objectionable practice of trying prisoners against time, before the Court of Aldermen, and if he could not obtain reform there, to carry the subject to a higher tribunal. The system, both at the Old Bailey and at the Middlesex Sessions in all cases except where the Judges preside, was calculated to bring the administration of criminal justice into odium. `The verdict of the Jury was the mere dictum of the Recorder - hundreds of innocent persons had been transported -- females especially.' His long experience in the practice of the Old Bailey enabled him to know, that the present system required thorough purgation."

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

AUSTRALIAN, 17/02/1835
Supreme Court of New South Wales
Dowling J., 13 February 1835
FRIDAY, FEBRUARY 13.
(Before Mr. Justice Dowling and a Civil Jury.)

**Wm. PHINEASE BOWLES** was indicted for the murder of **SARAH BOWLES**, his wife, by stabbing her in various parts of the body with a knife.

**MARY ANN WILLIAMS**, a child of about ten years of age, was examined by His Honor as to her knowledge of the responsibility of an oath, her religious and moral education, to all of which she gave satisfactory answers, proving her competency to give evidence:-- I am in the service of Mrs. Hoddle, in Bathurst-street; remember having Sarah Bowles' baby in my arms on a Saturday morning, about 7 o'clock; while Sarah was cleaning the verandah, prisoner came up and said, ``how are you Sarah," she said she did not want any thing to do with him; he went away and then came back again, and offered her a letter; she would not take it; somebody rapped at the window inside, and called deceased in; she was going in, when prisoner caught her; she ran up to the end of the verandah and screamed murder; she wanted to get over the rail but could not; prisoner got her into a corner, he took a knife out of the left sleeve of his jacket, and stabbed her, I could not well see where; he then knelt down upon her and stabbed her again in other places; I called to Mr. Flood, and George, the butcher, came up and took the prisoner away; deceased pulled the knife from out one of her wounds and threw it down; a painter picked it up; some women took her to a doctor; I know no more, I saw her once after, when she returned to the house, and when she was dead.

Cross-examined by the prisoner - I took away the things deceased was cleaning the verandah with; I saw no knife; only a flannel, brick, and bucket of water.

By His Honor - I once saw the prisoner before, it was on the Tuesday, he came to the door, deceased went to open it; Mrs. Hoddle came out, he wanted to give her a letter, but she would not take it, Mrs. J. told him to go about his business.

**THOMAS LEGGATT** - I am in the employ of Mr. Dargin, coach proprietor; I was starting the coach on a Saturday morning before Christmas, from the Elephant and Castle, about seven o'clock; it was next to Mrs. Hoddles house; I saw a scuffle in Mrs. H.'s verandah, between deceased and the prisoner; he had a knife in his hand, covered with blood; I said to him, ``are you going to murder the woman, you villain?" I was

rather timid at taking him, but picked up three bricks that lay by me, and threw it at him; but before I could get assistance to take him, he gave the deceased three stabs, the last one he gave, he had his hand upon the knife, the blow from the brick made him let go, he left it in her side; Mr. Flood and some more people came up and took him to the watch-house; I saw the knife at the inquest - this is it (the knife was produced, it was stained with blood.)

Cross-examined by the prisoner - I believe this is the knife; it was the blow from the brick that made it go into the side of she deceased; I know nothing of any other knife.

Henry Feltham - I am a carpenter, I sleep at Mrs. Hoddle's house for its protection, I know the deceased, I saw her about 2 o'clock on the day she was wounded lying on her bed in Mrs. Hoddle's house - also, on the Wednesday following, she spoke to me about two hours before her death, she said it was a hard struggle to die, she said she wished to state something respecting her character before she died, which she would state to the persons present - she said she had been accused of perjury, and that she was married to another man before she was married to the prisoner. She added on her oath she was never married to any but him.

Cross-examined by prisoner - I never knew any thing about another knife in the verandah, never saw her using one while cleaning there.

By the Judge - Deceased was 33 years old, she came to the Colony in the *Bussorah Merchant*; she was confined after her arrival and before her marriage to this man.

**EDWARD FLOOD** - I am a builder, live in Bathurst-street, remember about 7 o'clock on the morning in question I was sitting in my house, (with my back to the window) opposite Mrs. Harrels I heard a female scream, I saw the prisoner and a woman retreating from him to the far end of the verandah, he gave her a blow and she fell, he with her, she still kept screaming, a minute after, Mr. Dargin's servant came up, I then armed myself with a stick and went over to deceased's assistance, she was in the verandah and prisoner about a yard off her; I seized prisoner by the collar, he said that ``I might now do my own duty, for he had done all he wanted,'' I called for assistance and took him to the watchhouse, whilst going there, some one called out that the woman was dead, he said ``he hoped not, and trusted she would linger'' - a person also called to me by name and gave me a knife, saying, this was the knife he stabbed deceased with - one of the persons who accompanied us said - ``this is a pretty instrument I'm sure'' - prisoner answered, ``yes, I borrowed it for the purpose this morning'' - this is the knife produced.

By His Honor - I was excited at first, when I saw the blood flowing from the woman's breast, but at the time I speak of, whilst taking prisoner to the watchhouse, I was perfectly cool and collected, as much so as I am now; I am perfectly sure the conversation was as I have stated.

Cross-examined by prisoner - When I returned from the watchhouse I went to my house, I believe I made the same statement respecting your conversation about the knife at the Police Office.

Doctor **ROBERT BAND** - I am a surgeon residing in Bathurst-street, I was called to attend the deceased, I examined her, and found four wounds upon her, apparently inflicted by some sharp instrument -- the wounds were as follows: one in the left breast, two in the left side, one in the back at the bottom of the right side of the spine. I probed them, found them to penetrate about two or two and a half inches her death was occasioned by cramp or lock jaw, which was caused from the irritation consequent on the wound. In conjunction with Doctor Bland, I attended her till the day of her death, she died on the 14th December, was a healthy woman in the prime of life, the baby was about eight or ten months old.

Cross-examined by prisoner - Carrying her about the streets might make matters worse in one respect, and beneficial in another - as if much blood came from her it would reduce the inflammation which might arise from the wound. I never heard Doctor Bland say I would be hanged. This was the case for the prosecution.

The prisoner when called on for his defence, commenced by stating, that not to prolong life, but to explain to the jury, and to his friends and the public generally, that he was incapable of the attrocities which had been alleged against him - some persons had publicly said he would be hanged - the newspapers had pronounced him guilty - one had gone as far as to hang him - had it been a person of no education and moving in a still humbler sphere, it would not have excited so much interest, but occurring in the house of a lady - (here prisoner impugning the conduct of Mrs. Harrell, when he was very properly stopped by His Honor) the public seemed to view him with additional horror. He threw much odium upon his deceased wife, stating that she had imposed herself upon him as a widow, after the marriage he discovered her child to be illegitimate, and herself inconstant, he had used various means to reclaim her, but unsuccessfully, he would prove that it was her who commenced the attack, and he struck her in defence only of his own life, he would prove that she had frequently endeavoured to induce him to assault her, that she might have him bound to the peace, which eventually was done. He would prove that on one occasion she ran at him knife in hand, threatening his life; she had said he was jealous - he had no occasion for being so through the young man with whom she cohabited had found her incontinent, and on one occasion took her out of a notorious brothel. After seeking her seven days, he (prisoner) found her at Mrs. Howell's - he entreated Mrs. H., to bring about a reconciliation, likewise of the Rev. Richard Hill - he had continually exerted himself to keep her from prostitution up to the day he struck her. He had been told she was to be sent to England, and he left here a married man without a wife. Prisoner then proceeded to call the following witnesses, but in his examination of them, he evinced so much malice against the deceased wife, that His Honor on more than one occasion stopped him.

**JAMES THOMSON**, shoemaker - I lived in Elizabeth-street in Dec., prisoner called at my house on the 6th December, borrowed a knife, he appeared depressed in spirits, said he wanted it to trim the holes in his dulcina - the knife produced is the one - I thought at the time that a pen-knife would be better.

Mrs. **MARY HODDLE**, Bathurst street - Deceased lived with me as servant, did not know her before she lived with me, I knew she was married, she had an infant, her first cousin, she said, was its father, remembers prisoner calling at her house on 5th Dec. made himself known as her husband - prisoner offered me a letter, I declined taking it, I desired him to be gone, and threatened him with the police if he again came to my house - I remember having said his wife should be sent to England - I received a letter from prisoner since he was in jail - don't know what has become of it. I tapped at the window on the morning of the 6th, called prisoner in - don't know which was most irritated.

Rev. **RICHARD HILL** - I married prisoner to deceased, I received a letter from him, enclosing one also for Mrs. Hoddle - prisoner desired an interview with me, which, at that time, I could not give him - he afterwards called and left a letter for me containing most gross charges against his wife, accusing her of cohabiting with others before and after her marriage, I returned the letters, stating my reason for declining to interfere, that if she was so bad as he represented her, she was unworthy of his solicitation,

**ELIZABERTH CHEPWOOD** lives at Mr. Solletts in Goulburn-street, lived once in the same house with prisoner and deceased 3 weeks - deceased appeared pleased at having prisoner bound down to the peace - I saw deceased with a knife in her hand in a great passion, demanding a letter from him - it was a letter from the father of her child in England to her, which was then in prisoners possession; remembers on one occasion deceased tore prisoners clothes as he was going down Goulburn-street - have heard deceased say she lodged at a Mrs. Laverick's in Phillip-street, she admitted she had connexion with one John Farthing - I have kept the baby ever since.

Elizabeth Brown, assigned to Mr. Moore, Pitt-street - Deceased acknowledged she had taken a knife to her husband about 3 months since, and that she would provoke him to strike her, she said he was too fond of her.

Colonel **WILSON**, Chief Police Magistrate - Deceased was examined at the Police Office before me, in a charge of assault against the prisoner. Prisoner was a constable in the Police when taken up upon this charge - bore a good character, or I should not have taken him into the constabulary.

Rev. Mr. **JARRATT** knew but little of prisoner, that only from one interview, believed him to be a good character.

Conductor **ABBOT** - I met prisoner about six o'clock on the morning in question, I thought he was returning from duty. I knew prisoner 16 years ago in Ireland, he always bore a good character, his father was a magistrate for the county of Roscommon, and he an only son.

This was the defence - The learned judge before summing up, desired the jury to dismiss from their mind any opinion they might have formed previously, and to drive from their recollection any statement which they might have heard or read. His Honor went minutely over the evidence, both for prosecution and defence - pointing out the connecting parts of the evidence and its descrepancy - begging them to act fearlessly and conscientiously, to do their duty in upholding the laws of their country, but to do so mercifully - to give the prisoner the benefit of any reasonable doubt they might have. The jury retired for a few minutes, when they returned with a verdict of guilty. The prisoner was sentenced to be hung on Monday.

[*] The trial notes are in Dowling, Proceedings of the Supreme Court, State Records of New South Wales, 2/3290, vol. 107, p. 14. Dowling added the following marginal note at the end of this record: ``Ill assorted marriage - after so short a courtship. Violated the solemn compact of marriage. Divine commandment. Fulfilling." See also Sydney Gazette, 14 February 1835.

On his execution, witnessed by Aboriginal prisoners, see Australian, 20 February 1835.

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

SYDNEY HERALD, 07/05/1835
Supreme Court of New South Wales
Forbes C.J., 4 May 1835

**JOHN BALL** and **JOSEPH PEARSON** stood indicted for aiding and abetting the prisoner **JOSEPH KEYS**, who had pleaded guilty to an indictment charging him with shooting at, with intent to kill, **CHARLES FISHER SHEPHERD**, at Long Flatt, Menaroo Plains, on the 14th December last.

Mr. Sydney Stephen appeared on behalf of the prisoner Ball.

Charles Fisher Shepherd examined. I am superintendent of the establishment of Mr. **J. CATTERAL**, at Long Flats, Menaroo Plains; I remember the night of the 14th December; I recollect the night on which the bushrangers paid a visit to the

establishment; I was lying asleep in my tent, which for the benefit of the cool air, it being very warm weather, I had erected a short distance from the hut where I usually slept; about the middle of the night, I was awoke by the sound of numerous voices, which I at first took to be those of the servants of the establishment; I had littler time for conjecture, for suddenly several men entered my tent, one of whom directed the muzzle of a musket towards my breast and threatened, that if I made the least resistance, he would lodge the contents in my body; one of them said ``So you thought we dare not come down to the flats, we are to get a benefit on the vents of so doing it;" the taunt was in allusion to some expressions I had before made on the first hearing that bushrangers were in the neighbourhood; and which must to have been communicated to them by some person belonging to the establishment; one of the party was sent to secure the servants, who were taken from their respective huts, and put together under a guard; they searched the huts, taking thence all that was worth their consideration, consisting of provisions, wearing apparel, &c. together with all the fire-arms they could find, some of which they destroyed on the spot, taking the remainder with them; with the exception of my double barrelled fowling piece, which they returned to me, on condition of my teaching them the use of a small pocket compass, which in searching my clothes they found in one of the pockets, and I complied with their proposition; after pillaging the whole establishment and destroying such of the arms as they did not choose to be encumbered with they departed, and I heard no more of them during the night; as soon as day dawned, I ordered the groom to get my horse ready as I was determined to go in pursuit of the ruffians and proceeded to charge my double barrelled piece, but discovered to my chagrin, that in their pillage of the preceding night they had taken the balls with them which I had provided as ammunition, leaving only a quantity of small No. 4 shot with which I charged, having no alternative; I was just about to proceed from the hut with my piece in my hand, when I observed two men armed approaching me near the hut, who on observing me prepared as I was, slunk behind the hut and went round it; one of them immediately fired and missed me, and perceiving the other bring his piece to the present for the same purpose, I levelled my piece and fired when he dropped dead at my feet; the other man who had fired but missed me, threw down his pistol, and falling on his knees screamed for mercy; with my piece levelled still having one barrel loaded, I ran up to him when the prisoner Ball suddenly appeared and said, ``Don't fire, Sir, don't fire, Sir!" I replied by God I will, the rascal has just fired at me for the purpose of taking away my life, and he can expect no mercy; the prisoner Ball then said ``by God, Sir, if you shoot him, I will shoot you," to which I replied, if I had the other barrel now loaded, by God I would shoot you both; the prisoner said there was no occasion for any more shooting and proposed that the bushranger, whose name I afterwards learned was Boyd, should be given into his custody and he would secure him; I agreed to the proposal, and made him strip to the skin in order to ascertain whether he had any offensive weapon concealed about his person; I then ordered him to go into one of the huts and placed him in a corner, charging him not to stir, and gave Ball a strict injunction to take care of him; I shut the hut door, and was proceeding in the direction of the spot where I had shot the man, to ascertain if there was any chance of his recovery, and had not proceeded more than a few yards when I saw another of the party, Keyes, approaching me with a double barrelled gun in his hand; there was a water cask stood at distance, which with the tent and my hut formed a triangle; being nearer to the cask than to either of the other two points, and considering it a good cover from the enemy's fire, I strove to gain it, but Keyes being nearer than I was, availed himself of it and I retreated to the tent, the nearest cover in

safety; I kept my piece levelled, and anxiously awaited a shot at the delinquent, but all I could see of him as he crouched behind the water cask was his eye and the barrel of his piece, ready to take aim at me if a chance offered itself; as the only alternative left me, I conceived that the best means of drawing him from his cover, would be to risk an occasional exposure of my person from behind the tent which might induce him to fire, and if he missed me he would then be on an equal-footing, I having only one of my barrels charged, or it would give me a chance of bringing him down; with this view I sprung gently backwards and forward on my foot, shewing myself now and then, when Keyes fired and lodged seven slugs on the upper part of my left arm, exclaiming at the same time exultingly, ``ah, you b--r you're down!'' I replied ``not yet my lad;'' Keyes then changed his position, and took his station at the other side of the cask which rather discomfited me, as being wounded, I was unable to lodge the stock of my piece against my left shoulder, and could not get a fair shot at him from the other, in the direction in which he stood; feeling unsafe behind the tent, as some of the shots had gone through, I retreated behind the hut. I then saw the prisoner Pearson approaching, with a musket in his hand and sword buckled round him; on coming up he said ``don't fire, Sir; don't fire, Sir;'' I thought Pearson had come to my assistance, and was going to have a shot at Keyes, as he cautiously approached the corner of the hut opposite to the water cask, but he returned to me and said ``don't you fire, Sir;'' Keyes still remained under cover and would not shew, when I resorted to my former hazardous stratagem, and had shewn myself two or three times, when he again fired, the shots whistled past my ear, but missed me, and I sprang forward saying ``Now I have you Joe,'' and run to attack him; he presented the barrel of his piece and made a feint to fire, but I told him it was then no use, and told him to put his gun back, and was just in the act of closing with him, when Boyd, whom I had left in custody of Ball in the hut, run out, and took the musket out of Pearson's hand, presented it at me and fired; the ball caught the corner of my eye, and went through my ear; I was stunned by the wound, and caught hold of the wheel of a cart, near which I was standing to save myself from falling; on being shot by Boyd I had dropped my piece, and having nothing in my hand to defend myself with, and on recovering myself seeing the ruffians approach me, I ran towards the hut where Mr. Catteral was standing at the door; it was about two hundred yards from where I had been skirmishing; I said ``My God Mr. Catteral, how could you see me murdered in this manner and not render me assistance; here have I been fighting for my life with a number of ruffians for nearly an hour, and no one to step out to assist me;'' he said ``What assistance could I give you;'' I then ran towards a hut that stood a littler farther off, but on looking back, I perceived the ruffians Boyd and Keyes approaching and apparently loading their pieces, one of them was knocking the butt on the ground by way of ramming the charge. Ball was also coming up behind them; fearing I would be unable to reach the further hut, I ran back to the hut where Mr. Catteral was, and ran into a room behind; I looked upon death as then certain; in a second the ruffians entered the passage leading to the rooms in rear of the hut, but being uncertain of which room I had gone into, as there was one at each side of the passage, they stood at a short distance from the doors, with their pieces crossed, the muzzles pointing to each of the doors; giving myself up to my fate, I resolved upon one desperate effort, and suddenly rushing out of the room where I had taken shelter, I seized the barrels of their pieces, and held them with extended arms so as to prevent their injuring me in case they fired; they endeavoured to wrest the pieces out of my grasp, but I held them firmly and rendered their efforts abortive; the struggle became violent, and finding themselves unable to disengage their pieces from my hold, they forced the stocks violently against my face

and head, until nature, sinking under the excessive torture of the wounds and contusions thus inflicted, I fell insensible at their feet; the last traces of consciousness, were, the feeling the ruffians inflict several violent kicks on my body after I had fallen; I cannot say how long I lay in that state, but on recovering my senses I felt a pain in my left fore arm of a rather singular nature, and on raising my head to look at my wounds, I perceived that I was on fire, my coat and trowsers being in a blaze; I got up as well as I could and extinguished the fire, discovering another wound, which to my mind explained the cause of the fire, - the ruffians, after the infliction of the tortures already described, on leaving me, had, as a coup de grace, discharged one of their pieces at my body, which, instead of destroying me finally as they had intended, had lodged its contents in my thigh near the groin, and from the nearness of the muzzle of the piece to my body, had ignited my clothes; such was my impression; as soon as I recovered myself a little I walked as well as I could to my hut; I saw Mr. Catteral, and uttered something in the way of a gentle reproach for his not having sent me some assistance under my wounds; when he replied that he thought it would have been then no use; he had given me up for dead, and was about to send the men to bring my body up; I don't know how long I might have been there, I thought it was then about noon; I never saw the bushranger who fell, after I shot him, but I was informed that he died in about an hour afterwards; I also learned that Boyd was afterwards shot in the Snowy River by a mounted policeman. A Mr. Bowman, from Goulburn, came up to the establishment about 12 o'clock; I was then sensible; my wounds were at that time crawling with maggots. I was in a very bad state and despaired of life. I was conveyed to Goulburn, where I lay thirty-six days confined to my bed, and was obliged to walk on crutches for some time; Dr, Arnat extracted nine slugs from my wounds, and I have extracted one more since I came to Sydney. When the bushrangers went away, Ball said the rascals had taken away his certificate of freedom, and an order for the payment of money; the certificate was afterwards found on Ball as also the order; he impression on my mind was, that he had merely made this statement, to clear himself of the suspicion of being connected with the bushrangers; that suspicion was materially strengthened by the circumstance of an observation made by me a few days previously among the sheep-shearers, having been repeated by the bushrangers; on that occasion, the prisoner Ball, who was a sheep-shearer, observed, that it was reported the bushrangers were in the neighbourhood, and it was likely that they would visit the ``Flats,'' the name of the place where the establishment stands, before they went away; I replied, ``that they might come as soon; as they liked, as I was fully prepared for them, and would give them a benefit when they did come''; these words were repeated by the bushrangers on their entering my hut; Ball is a free man and hired as a sheep-shearer from Mr. Ryries station, which was also attacked by the bushrangers a short time previously; Pearson is an assigned servant to Mr. Catterall; he had no means of getting the arms he had in his possession, unless from the bushrangers, as they had either taken or destroyed all the arms on the establishment; after the bushrangers disappeared, Pearson also was missed from the establishment and remained away some time.

By the Prisoner Pearson. - I was standing near the hut when I first saw you; I had said a considerable time before that, that if I had any one to assist me I would take the three bushrangers; but as I could see no such relief, I was obliged to fight my way among them as well as I could; the man Cleary also came up, but he was intoxicated and spoke loud, as if he and you wished Boyd, who was in the hut, to hear what I had to say to you on the subject; Cleary went away and I was glad of it, as I had no faith in him; I began to suspect you of infidelity when you allowed a chance to escape you to

bring Keyes down, who had his piece directed against my life; I thought at first that your requesting me not fire, was from an idea of precaution, against putting myself in Keyes' power, in the event of missing him, you having a better command of the position he maintained behind the cask.

The Prisoner Ball was defended by Mr. Sydney Stephen, who proceeded to cross-examine the witnesses: - the door of the hut in which I had confined Boyd in the custody of Ball, was secured by means of a latch only; Boyd was not a powerful man, he was a young man about the middle size; he was given into the custody of Ball at his (Ball's) request; there was no great difficulty in holding him in consequence of his being in his skin, as he had his trowsers on, by which he could have been held; there were other persons present when my observations, communicated subsequently to the bushrangers, were expressed, who had an opportunity of conveying them as well as Ball; certainly there was nothing remarkable in Ball's saying that he bushrangers would in all likelihood be down, as it was a matter of general report, that they were in the neighbourhood; my suspicion of Ball's agency is further strengthened by the fact of their coming directly to my tent on their arrival at the establishment, and instantly reiterating the observations before alluded to; it is therefore evident that I was their principal victim, and they must have derived their information as to which hut I occupied, from some one connected with the establishment; in fact, from the prisoners, Ball particularly; he might certainly have dropped the certificate, said to have taken by the bushrangers on the ground during a struggle with Boyd to keep him in the hut, but I do not believe it; he said he had lost an order also; the prisoner usually kept his certificate in a tin case and could not readily lose it without being aware of it; I can scarcely suppose that he had deposited the order with the certificate; he had other money which was found on searching him, and it is likely that he would keep the order with his other money; I believe it is usual for individuals to keep their money in one plaae [sic], I do so; Ball said, when the bushrangers were gone, that he had found his certificate again, which he thought he had lost.

By the Court. - On Boyd's first appearance he had a pistol, which he threw on the ground on my running up to him, and called for mercy. I do not know what become of it afterwards.

**WILLIAM BOWMAN**. - I live at Bong Bong; I have a station at Menaroo, at the distance of about eight miles from that of Mr. Catteral; I was there in December last; I visited Mr. Shepherd on that occasion; I recollect receiving a communication from Mr. Catteral, requesting me to go up there; I went accordingly; I arrived there about twelve o'clock; it was on a Sunday morning; on my arrival I was informed of the situation of Mr. Shepherd, whom I found lying in a tent; he appeared to be suffering from several wounds which he had received in various parts of his body; he was lying on his clothes; I opened his shirt and saw several wounds; his body was covered with blood, he seemed to despair of life; his wounds required immediate attention, as they were blown by the flies and full of vermin, it being warm weather; he appeared not to have been washed, the blood was all over his face, and in his hair and whiskers which were clotted with it; his shirt was completely saturated with blood; he appeared not to have had the least attention paid to him whilst in that state; I saw the body of a bushranger who had been shot; it was extended in a cart; it was cleanly washed and shaved, and a clean sheet thrown over it; that attention which might have been reasonably paid to Mr. Shepherd, seemed to have been directed to the dead body of the bushranger; I said as there was a probability of Mr. Shepherd's surviving, no time should be lost in obtaining medical aid; I said that for that purpose I would send my covered cart immediately, which would preserve him from the inconvenience of the

heat of the sun; Mr. Catteral complained of the want of servants for that purpose, having, as he said, none to spare; I obviated that difficulty by a tender of my own servants, and Mr. Catteral then furnished horses.

Cross-examined - I think it would have been prudent to remove the bloody shirt from Mr. Shepherd, and to have washed him and cleaned his wounds; the blood being suffered to remain about his wounds only encouraged the flies to swarm about his person; his wounds were crawling with vermin; I admit that if a surgeon could have been obtained in a short period, it would be the more proper course to leave the wounds in their original state, for the inspection and treatment of the surgeon; but in a case like that of Mr. Shepherd, the extreme warmth of the weather at that season, and the great distance to the nearest surgeon, none being nearer than Bong Bong, the necessity of washing Mr. Shepherd's wounds, and removing his bloody clothes, must have been apparent to any man of ordinary observation; I do not think it would have been attended with danger to the life of Mr. Shepherd to have done so; I do not think that such a result could have been anticipated by any person from a prompt and careful attention; he seemed to have been wholly neglected.

**GEORGE SMITH** - I am attached to the Mounted Police; I heard of Mr. Shepherd being shot; I was sent in pursuit of Joseph Keyes and Edward Boyd; I traced them to the Snowy River; on observing my approach they ran towards the river, and plunged into it to gain the other side; Keyes succeeded in crossing; I fired at the other who was swimming, and the ball took effect, as he made a plunge in the water; I saw nothing of him afterwards; Keyes was taken in three days afterwards at Amos Crisp's cattle station; he had the dagger now produced, buckled round his body, which he admitted to have taken from Mr. Catteral's station; they were both armed when we surprised them at the Snowy River, but on seeing us, they laid down their arms and plunged into the river; these are the arms produced.

Mr. Shepherd re-examined by the Court - When Pearson came down he was armed with a gun and sword similar to those now produced, taken subsequently from the bushrangers; I cannot say they are the same; I believe the sword was taken by them from Mr. Ryrie's, when they plundered his station; a handful of slugs, thirteen in number, taken from the body of Mr. Shepherd, was produced, which excited a sensation of astonishment in the Court, which was crowded to excess.

Mr. **MANNING**, as Clerk of the Arraigns, produced the record of the plea of Guilty made by the prisoner Keyes, on his being arraigned with the prisoners Ball and Pearson. This closed the case for the prosecution.

For the defence.

Mr. Joseph Catteral examined. - I reside at Parramatta; in December last I resided at Menaroo: I remember the morning on which Mr. Shepherd received his wounds; I saw the prisoner Ball on that occasion; I did not see that he had a gun in his hand; I am of opinion he had none; he went to the bushranger apparently for the purpose of preventing him from firing; Mr. Shepherd commenced scuffling with the bushranger outside the hut door, in which I was placed; I did not see Ball go to Mr. Shepherd to assist him; when Mr. Shepherd fell I was ordered away from the hut; from the violent and desperate conduct of the men I was much alarmed, and thought my own life was in danger; I remained on the spot all the next day and sent for Mr. Bowman; I was not able to assist Mr. Shepherd, or prevent the bushrangers from using the violence they did towards him; they left him for dead; I considered he was dead when they went away; any other person would have considered the same; Mr. Shepherd's face was washed when Mr. Bowman came up; it was certainly no neglect of Ball's that his wounds were not washed.

Cross-examined by the Attorney General. - After the bushrangers went away the second time I missed Pearson, but I saw him again in a short time; he came down to the hut where I was; I enquired where he had been, but received no satisfactory answer; in fact he returned me no answer; he appeared to be intoxicated and went away; he again returned and told me he had secured the property that was stolen; I understood him to mean that he had got possession of it by some means, and had brought it back; I did not see him return the property; I heard that it was returned from some of the servants, and also from himself; the greater part of the property taken was returned; Pearson remained in the establishment, and did his duty as usual, until taken by the Police; I recollect when Mr. Shepherd came up to the hut and asked me why I did not assist him; Keyes came down upon us; I did not see Pearson at any time armed; Boyd was armed when I saw him; I did not see how he got his arms.

Attorney General. - There were eight men, it appears, on the station at the time the bushrangers appeared; is it not rather unaccountable that you, well furnished with arms, suffered two men to rob your establishment, and teat Mr. Shepherd in the manner they did? Allow me to ask you, was not the property, for which Mr. Shepherd risked so much personal danger to defend, solely yours, and in which he was not at all interested as regarded himself?

Witness. - The bushrangers desired me to go away; not being in a capacity to resist their command, I was obliged to comply; I went behind the hut; Mrs. Catteral was at the establishment at the time and was thrown into such a state of alarm, that she stood in need of my particular attention; I could not leave her under such circumstances; I saw the last shot fired; they ordered me to be off; I can't say Ball followed them when they went away, he left the hut a few minutes after they did; I did not see Mr. Shepherd after they went away; I thought of sending the servants down to bring his body up conceiving him to be dead; I was about to do so when I saw him walking up towards the huts; he did not lie there after the Bushrangers left, more than ten minutes; he was desperately wounded; but was able to speak; after he was moved to the tent the wounds that were visible were washed; particularly those about his face; I did not remove his clothes from the other wounds, as I thought it might be dangerous to interfere with them until a Surgeon inspected them who could render immediate Medical assistance; I saw the bushranger that was shot lying in the stock yard; he was washed and laid out when I saw him; I believe by an old fellow servant of his named **EDWARD WILLIAMS**, who is now in my employ; I found my servants all drunk after the departure of the bushrangers; I was informed that Pearson was found asleep with arms in his possession at some distance from the establishment by one of the Mounted Police; I saw Boyd go to attack Mr. Shepherd with a musket in his hand; he might have got it in the hut for aught I know to the contrary; I cannot say that I am a good deal interested for the prisoners at the bar; they being my servants. I went to see them on my arrival in Sydney; I did not go to Mr. Shepherd's lodging's to enquire after his health; I was not aware he was in Sydney; I did not employ Counsel to defend the prisoner.

Juror. - Did you at any time previously to the attack of the bushrangers tell Mr. Shepherd, that if they did come he might fight it out by himself, for he would have no help from you?

Witness. - I never made any such observations.

Re-examined by Mr. Stephen. - It was dark when they came the preceding night; there had been rumours some time previously of their being about the neighbourhood; it was expected that they would act desperately, and I was apprehensive of having but a bad chance with them if surprised; I should not think a man so well prepared to meet

them without arms as if he were armed; the slightest movement in such a situation, and under such circumstances, is of course attended with considerable risk.

This was the only evidence offered for the defence.

His Honor before proceeding to put the case to the Jury, remarked most emphatically that of all the cases that had been presented to his conderation in his judicial experience, so remarkable an existence of cool and determined bravery as had displayed itself in Mr. Shepherd, he had never found; indeed it equalled, if it did not surpass anything he had ever heard of or read of; how his life was preserved under these most extraordinary circumstances of attack, such a quantity of metal as he then held in his hand having been lodged in various parts of his body, one single piece of which being sufficient to destroy life if lodged in a vital part, was altogether beyond human comprehension, and could only be attributed to the interposition of Divine Providence. In deliberately recapitulating the evidence, he thought the case against Ball appeared to be in a legal sense very slight; but it would be matter for the consideration of the Jury, how far the escape of Boyd out of the hands of Ball, taken in conjunction with the expressions, ``by God sir, if you shoot him, I will shoot you,'' he being at the time without arms, serves to identify him with the acts of the bushrangers. How Boyd did effect his escape, did not appear; the question for their consideration was, did Ball release him for the purpose of enabling him to assist in the attack on Shepherd? unless they could arrive at that conclusion, His Honor was of opinion that the prisoner Ball must be acquitted of the charge of aiding and abetting; there was no proof offered that he had been in actual communication with the bushrangers, although some expressions were used by them which had been made by the prosecutor in the presence of Ball and other persons. Against the prisoner, Pearson, the case stood much clearer; it was in evidence, that after the attack by the bushranger, Keys, Pearson appeared with arms; which, as the prosecutor was about to secure Keys, he delivered up to Boyd, who fired, and shot the prosecutor, wounding him in the eye; how Pearson got the arms, was a matter of conjecture; it was in evidence, that all the arms had been destroyed or carried away by the bushrangers, and therefore Pearson could not have got possession of the arms, unless by immediate communication with the bushrangers; that was a material point for their consideration; how did Pearson get the arms, or for what purpose? was it to assist the prosecutor or to encourage the bushrangers in this attack; were the words ``don't fire sir,'' to be taken as a command from Pearson, or were they spoken as a prudent suggestion of caution against he consequences of missing his aim. From the evidence of Mr. Gatteral, the prisoner, Pearson, recovered part of the property; was his apparent friendship for the bushrangers in following them after the robbery, the result of a meditated connexion with them, or did it arise from a judicious policy on his part, for the purpose of recovering from them the property of his master.

The Jury retired for some time, when His Honor sent for the foreman, and enquired if they were likely to arrive at a decision within a short period; if not, he would adjourn the Court until seven o'clock, as he felt he required a short relaxation after so long a case; he did not wish to hurry them, but if they were not likely to agree, he would meet them again at seven o'clock. The foreman observed, that he thought their deliberations were likely to occupy some time, and His Honor ordered the Court to be adjourned until seven o'clock. A little after seven the Jury returned into Court, His Honor being in attendance, and pronounced the prisoner, Pearson, Guilty; Ball, Not Guilty.

This amazing story was also told in the Australian, 8 May 1835. After pleading guilty, Keys was remanded for sentence: Sydney Herald, 7 May 1835. Some bushrangers were killed in

the bush. See Australian, 2 January 1835, graphically reporting the deaths of the Macdonald gang, some of whom were killed by Aborigines.
On aiding and abetting, see also R. v. Rizley and Hayes, 1831, Dowling, Select Cases, Archives Office of N.S.W., 2/3466, p. 60: ``Where a prisoner was indicted as being present aiding and abetting another for discharging a loaded pistol & wounding a constable, and it appeared that the prisoner was at the time in the Custody of another Constable but in sight of the transaction Held that he could not be convicted."
[*] Keys and Pearson were sentenced to death: Sydney Herald, 18 May 1835; Sydney Gazette, 19 May 1835.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 12/05/1835
Supreme Court of New South Wales
Forbes C.J., 8 May 1835
Friday. - Before his honor the Chief Justice and Civil Jury.
**PATRICK KILMARTIN** was charged with the wilful murder of **JAMES HAMILTON** on the Botany-road, on Friday the 24th of April last.

**WILLIAM CHRISTIE**, wardsman in the police, knew late James Hamilton - saw him last on 24th April, about 11 o'clock dead on the Botany-road, he had a bruise on the left side of the neck, apparently by strangulation, or the mark of a knee - the body was naked, except a pair of socks on the feet. I observed a long cut on the belly and a cut on the penis; I was ordered to take the prisoner in charge; I know prisoner, he was an assigned servant to Mr. W. Dowling; he was reported as a runaway; I apprehended him in Denman's booth on the Botany road; the booth was about 50 chains from where I saw the body next day; when I apprehended the prisoner he had on a blue jacket and waistcoat, which I never saw upon him before; I took a bundle from him, after sending him in charge to Sydney I sent for him back again to Duncan's booth, thinking he had robbed some one; I made him pull off his jacket and waistcoat, having some knowledge of the jacket and waistcoat, I asked him how he came by them, he said they were his own; I did not take the hat which prisoner had on until the following morning, Friday; J. S. Hamilton was written in the lining of the hat; the hat produced is the same prisoner had on; I knew the prisoner well, and he knew me; upon finding these clothes, I thought it best to send for deceased's wife; when I took the prisoner he had a bundle of clothes with him, he told me upon asking him, that he was bound for the bush; I knew Hamilton wore a jacket much like this; I knew it because it was a coat cut down jacket; 1 pair trowsers, 1 pair drawers, 1 pair boots, 1 shirt, 1 waistcoat, were tied in the bundle; I took from his person 1 black handkerchief and pad, jacket and waistcoat; I sent for Mrs. Hamilton on Friday 24th, she came; I asked her where her husband was, she said she had not seen him since Wednesday 22d; I asked her if she would know any of her husband's clothes, she recognised all the articles except 1 waistcoat, handkerchief, 2 laded knife, and cross barred handkerchief in which the clothes were tied; I took the knife from prisoner's pocket; the case knife produced was given up to me by a boy who follows Joe Love, a blind man about the town, there was blood upon it, and fresh when delivered up to me.

Cross-examined by prisoner. You told me when I apprehended you, the clothes were your own, I was first up to you, and apprehended you.

By a jury. The clothes fitted prisoner very tight.

**SARAH HAMILTON**, widow of James Hamilton, saw my deceased husband on Wednesday, the 22d last, he was going to the races; I know the dress he had on there; the jacket, waistcoat, trowsers, drawers shirt, hat and boots were his, on which he was

dressed on Wednesday; I saw my husband dead when the jury sat upon him; I did not know prisoner.

**JAMES STEWART**. I am a surgeon; I was called to examine a body on the 25th April, by the Botany-road; deceased's name was Hamilton; I found the body naked except a pair of socks; I observed a mark of injury on left side of neck, and on the left jaw, appeared to have caused by pressure by some heavy body on those parts; there was a wound in the abdomen 6 inches in depth, 2 inches in breadth; 1½ inches depth, sufficient to cause death, but not immediate; I observed an injury in the private member, apparently as if an attempt had been made to sever it from the body; I am of opinion that strangulation was the cause of death, and that the wounds were inflicted before vitality had ceased; I did not open the head to examine the brain; I consider the injury on the neck quite sufficient to cause strangulation; the pressure on the neck caused respiration to be intercepted; the knife produced would inflict such wounds as I saw on deceased; the deceased certainly came by a violent death; the pressure of a strong man might produce that death.

**JOHN BROWN** - I keep the Edinburgh Castle, corner of Bathurst-itreet [sic]; I had a booth on the Race Course, during the Sydney races, on 22d April; I knew the deceased, James Hamilton, in my booth on 23d April in the evening, the prisoner was with him; I saw them drinking together, Hamilton had been drinking, prisoner called for the liquor, they left my booth together, about 7 o'clock in the evening, prisoner proposed going, deceased rather wished to stay; prisoner him to go, and they went in company, they did not say where they were going; I supposed they were going to Sydney; the booth was about 3 miles from Sydney; prisoner was dressed in a blue shirt and no jacket; and I think a straw or cabbage-tree hat, not a black hat; deceased had on a blue jacket and black hat; after they left my booth, I did not see the deceased; on the following morning I heard of his death.

Cross-examined by prisoner - When you asked for a gill of rum, I was near to you and barefaced you; afterwards you pressed me and I ordered my boy to give it to you; I did not see you give deceased any rum.

Cross-examined by a Juror - I am positive it was a blue shirt prisoner had on; they did not remain in the booth more than half an hour.

**RICHARD CAINBURN** - I am a constable in the Sydney police; I gave constable Christy information about bringing the deceased body of Hamilton; I saw about 10 o'clock, on Friday morning, on one side of the Botany Bay; it was naked, except a pair of socks; when I found it; I covered it with bushes.

**JOHN LOVE**. I was with **ANDREW GOODWIN** on the morning we saw the dead body; it was 7 fathoms from the road, Goodwin found a knife, he gave it to me, I gave it to my brother who gave it to a constable; the knife produced is that found by Goodwin.

**GEORGE LOVE [?]**. I was with my brother J. Goodwin when we saw a dead body; Goodwin found a knife, this is the knife, I gave to constable Armstrong.

This closed the case for prosecution.

Prisoner in defence. Had no way of getting a counsel; I was unfortunate to find the clothes mentioned; I tied them up in a bundle.

Ch. J. in summoning up, remarked that in this case, the evidence is entirely circumstantial, but expressed his opinion that circumstantial evidence where it lead but to one conclusion is the strongest of evidence.

Verdict Guilty. Ordered for execution on Monday.

See also Sydney Gazette, 9 May 1835. Kilmartin was hanged on 11 May 1835: Sydney Gazette, 12 May 1835; he was a Roman Catholic, about 25 years old. In this, as in many other murder cases in New South Wales during the period in office of Forbes C.J., the trial

was held on a Friday and the prisoner condemned to die on the following Monday. This was consistent with the provisions of a 1752 statute (25 Geo. III c. 37, An Act for Better Preventing the Horrid Crime of Murder). By s. 1 of that Act, all persons convicted of murder were to be executed on the next day but one after sentence was passed, unless that day were a Sunday, in which case the execution was to be held on the Monday. By holding the trials on a Friday, judges gave the condemned prisoners an extra day to prepare themselves for death.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 06/08/1835
Supreme Court of New South Wales
Burton J., 3 August 1835
THE WORKINGS OF THE JURY SYSTEM. [*]
Monday. - The criminal department of this court commenced its proceedings this morning; the calendar exhibits one hundred and twenty-six cases of crime for trial.
Before his Honor Mr. Justice Burton, and a civil jury.

**PATRICK CASSIDY** and **WILLIAM BAGLEY**, stood indicted for assaulting **HUGH McINTYRE**, with intent to do him some grievous bodily hard, at Maitland, on the 28th of April last. It appeared that the prosecutor was overseer of the chain gang to which the prisoners were attached, and were employed in the quarries. On the day laid in the indictment, as he entered the quarries, the two prisoners, each having a pick handle in his hand, struck him violently about the head, which knocked him down; the blows came from behind; when on the ground, he saw the prisoners near him with the bludgeons in their hands; there had been no previous quarrel with the men; the assault was wanton and unprovoked; prosecutor had only had charge of the gang nine days when the assault took place.

A corporal and private of the 4th Regiment, on duty at the quarries, had their attention called to the circumstance by the cries of the prosecutor; he was then on the ground and the prisoners were near him, with the bludgeons in their hands; when the prosecutor gave the alarm by his cries, the remainder of the gang ran towards the spot; the corporal's impression was, that they were going to join the men who had made the assault; he desired them to stand back or he would fire upon them; they did not approach; the distance from which he first saw the men was about twenty-five rods; he could not at that distance recognise the prisoners; on arriving at the place where the overseer lay, they found him bleeding profusely from a wound in his temple; the prisoners who were near the spot were secured, and the prosecutor was conveyed to the hospital.

Dr. **BROOKS**, in charge of the hospital at Maitland, remembered the day on which the prosecutor was brought to the hospital in a state of insensibility; he had a severe wound on the left side of the forehead above the temple, of about an inch in length; he seemed to have had other blows in various parts of the body; he was considered in danger for three days after being received; it was ascertained that no fracture had taken place.

A witness was now put in the box who was in the gang, under sentence for nine months, at the time the assault took place, but who left it on the 9th May.

**GEORGE LANG** examined, remembered the 28th April; was at work in the same part of the quarry as the prisoners when the overseer was assaulted; saw him lying on the ground, but did not see the blows struck; did not see by whom; the prisoners were near him when the corporal ran towards them and stabbed Cassidy with his bayonet; Cassidy threw up his hands and told him he surrendered; witness told the corporal not

to ill use the prisoners, as they surrendered; there were a good many men working in the same part of the quarry at the time.

By the Court. - Did not know the reason of the assault; heard no conversation amongst the men as to who should commit the assault; saw no lots drawn; the overseer was not a favorite among the men; he had been in the habit of taking a good many men to court; does not think he took the prisoners to court; he had been there but nine days in charge of the gang.

By the prisoners Cassidy. - He frequently took men to court whether right or wrong.

**JOHN STEPHENS**, also attached to the chain gang at the period, spoke to the same effect; saw the assistant overseer standing on a bank above Bagley's head with a large stone in his hands, which he was about to throw on him, when witness desired him to desist, saying it was a shame when the man had surrendered; for this he was taken to Court, and received on hundred lashes, [this was not strictly correct; the witness having used mutinous expressions on that occasion, was taken before the Magistrates, and sentenced to twenty-five lashes, but having told a lie in his defence to the Magistrates, in which he persisted, tending to cast an imputation of the overseer, he was sentenced to an additional seventy-five lashes.]

His Honor, in putting the case to the Jury, in the first place directed their attention to the evidence, as to how far it fixed the charge laid in the indictment on the prisoners at the bar; if they could arrive at the conclusion, that the blows had been inflicted by the prisoners, they would consider, taking all the circumstances into their view, whether, in the event of the death of the prosecutor, it would have amounted to murder; on this point he would direct them, that the evidence fully established that fact; there was a total absence of any of those circumstances which the law views as a justification or mitigation of the crime of murder; that the prosecutor did not die of the wounds so inflicted, offered nothing in extenuation of the guilt of the prisoners; for the law held, that though the completion of the offence was prevented by the interposition of a superintending Providence, still they stood in the same situation, as to moral guilt; the character of the offence then depended on the consideration, whether the crime could be viewed as one of murder if the prosecutor had died; the law presumed the animus in the act; what was the intention of a man who took a loaded pistol and fired at another; he who with a knife or other deadly instrument plunged into the body of a fellow creature, or with a heavy bludgeon inflicted a blow on his head; these were instruments having a tendency to destroy life; that they sometimes fail to do so is dependent on the will of Divine Providence. The information charged one of the prisoners as being present, aiding and abetting, but the law viewed them as equally guilty of the offence. His Honor observed that, from the mystery in which the cause of the assault appeared to be involved, he felt induced to put a question to the witnesses for the defence, which had been answered in the negative; the prosecutor had rendered himself obnoxious to the gang by having taken them before the magistrates for offences for which they received punishment; yet it did not appear that the prisoners had been of the number, the idea, therefore, readily suggested itself that a conspiracy had taken place, in which it was arranged that the prisoners should inflict the assault, but there was no proof before them to that effect; the act still stood unexplained, the witnesses for the defence who were at work in the part of the quarry where the assault took place, deny having seen the blows struck, but it appeared scarcely possible that a circumstance of that nature could have occurred without having been seen by the whole of the party. His Honor recapitulated the evidence and left the case to the jury, who retired for about an hour, and returned a verdict of Guilty, and the prisoners were remanded. [Cassidy and Bagley were sentenced to

death on 19 August 1835: Australian, 25 August 1835; Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2419, vol. 18, p. 113. They were executed: Australian, 4 September 1835.]

See also Sydney Gazette, 4 August 1835. For the notes of the trial judge, see Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2419, vol. 18, p. 100: both prisoners were ``bond,'' that is convicts, at the time of the offence.

For another case of assault by a member of a chain gang, see R. v. Gibbons, Sydney Herald, 12 November 1835; and see Sydney Herald, 23 November 1835; Australian, 24 November 1835; Sydney Gazette, 26 November 1835. See also R. v. Daley, Sydney Herald, 12 and 23 November 1835; Sydney Gazette, 10 November 1835.

[*] This title may be related to the Sydney Herald's editorial on 30 July 1835, where it berated Governor Bourke and Forbes C.J. for their advocacy of ``Convict Juries.'' The Herald's fierce opposition to emancipist rights, and with it, to Forbes C.J., was becoming apparent. See also Sydney Herald, 30 July and 24 August 1835; Australian, 28 August 1834 (on juries as judges of both fact and law); Sydney Herald, 9 November 1835 (letter to editor); Australian, 5 May 1835; Sydney Herald, 7 May 1835.

This case was tried before a civil jury: Sydney Gazette, 4 August 1835.

On 21 June 1835, Governor Bourke wrote to the Secretary of State about the problems of jury trials in criminal cases: he was seeking a response to his request for instructions on the subject. He had found it necessary to renew the 1833 Jury Act due to the lack of guidance from London. The question whether emancipists could sit on jury was dividing the colony, Bourke said. The Legislative Council was opposed to it, but it was dominated by what he called the Emigrant Party (that is, the exclusives). The Council agreed to a renewal of the previous Act, however, pending instructions. Bourke said that he still favoured jury trial, as did the great majority of the people. If the Council refused to allow emancipists to sit on the juries, he said, it would be better to revert to military juries until ``a Legislative Body, representing more fully the opinions of the People, shall be in readiness to decide the question''. Source: Historical Records of Australia, Series 1, Vol. 17, pp 741-742. Glenelg wrote to Bourke on 10 December 1835, explaining that the delay was because the colony's imperial Act for the administration of justice was under consideration: in the meantime, he approved of the renewal: Historical Records of Australia, Series 1, Vol. 18, pp 226-227. On the draft bill for a new constitution, see Bourke to Glenelg, 26 December 1835, Historical Records of Australia, Series 1, Vol. 18, pp 246-250, and see pp 286-289. For the views of Forbes C.J., expressed after he returned to England in 1836, see Forbes Papers, Mitchell Library, A 745 (Petitions and Reports). The latter includes his history of the legal change to trial by jury in the colony.

On civil juries in criminal cases, see also Australian, 24 February 1834; 15 March 1834 (twice). Viscount Goderich told Governor Darling, in a despatch dated 29 March 1831that it was not yet the time to introduce civil juries in criminal cases; he agreed with Darling on the point (Historical Records of Australia, Series 1, Vol. 16p. 223). The first civil jury in a criminal case was in November 1833: Australian, 18 November 1833.

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

SYDNEY HERALD, 13/08/1835

Supreme Court of New South Wales

Forbes C.J., 7 August 1835

**WILLIAM VARNEY** stood indicted for the wilful murder of **THOMAS HUGHES**, at Windsor, on the 1st July last, by striking him on the head with a spade. It appeared that the prisoner and the deceased were in the service of Mr. **FITZ**, at Windsor, and as the day laid in the indictment, the deceased having been sent on a message returned in a state of intoxication and was very quarrelsome; after being in the kitchen a short time, some words occurred between the prisoner and the deceased, when the prisoner ran into the yard, brought a spade into the kitchen and made several blows at the deceased, which were warded off by the interposition of a third person, a stranger to

the house, the prisoner leaned on the spade for some time without speaking, when the mediator thinking quiet was restored, turned his back on the prisoner, and was about to leave the room, when he heard a blow given, and turning his head saw the deceased lying on the ground with the blood flowing from a wound on his head, apparently inflicted by the spade; the head of the deceased was dressed and he was put to bed, where he languished until the 6th ultimo, when he was removed to the Hospital where he died on the following day. The Jury found the prisoner Guilty of Manslaughter.
[Compare this verdict with that in R. v. Collins, 1835, heard on the same day. For another case of manslaughter where the original charge was murder, see R. v. Dorr, Sydney Herald, 4 May 1835; Australian, 5 May 1835.]
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 13/08/1835
Supreme Court of New South Wales
Forbes C.J., 7 August 1835
Friday - Before His Honor the Chief Justice and a Civil Jury.
**SAMUEL COLLINS**, a native of the Colony, stood indicted for the wilful murder of **JAMES HILLAS**, at the Murrumbidgee River, on the 3rd March last, by shooting him with a pistol loaded with powder and ball, which inflicted a mortal wound on the body of the said James Hillas, of which he instantly died. The prisoner pleaded Not Guilty. Mr. Wentworth was retained by the relatives of the deceased on behalf of the prosecution; and in an impassionate address to the Jury, detailed the circumstance of the melancholy case, as it would be laid before them in evidence; observing, that painful as was the duty which devolved upon them, they would find no alternative but to pronounce the unhappy prisoner guilty of the dreadful crime of Wilful Murder. The following witnesses for the prosecution were then called.

**JOHN PURCELL**. - I remember the 3rd March, the day on which Mr. Hillas lost his life; I was then in the service of the deceased, and resided with him at the Murrumbidgee; on the evening in question, a few minutes after tea, it being then between eight and nine o'clock, the dogs suddenly began to bark; there was no person present but the deceased, Mrs. Collins the prisoner's wife, and myself; I got up on hearing the dogs, and went to the door, where I was met by the prisoner, who had a pistol in his hand; I said ``hello Sam,'' and put my hand upon his shoulder, he told me to stand back; the deceased was sitting near the door and rose up to shut it, when the prisoner fired; the bullet entered the body of the deceased who exclaimed, putting his hand on his breast ``Oh, my God I am shot,'' he went towards the bed, and almost immediately expired; I stayed by him until I saw him die, I then went out to ascertain how many persons there were, when I saw the prisoner standing at the distance of about 30 yards in front of the hut, he had a brass barrelled pistol in his hand; as soon as he saw me, he pushed towards me, and I being apprehensive that he wanted to take my life also, I ran away as fast as I could and he ran after me; the river crossed the direction in which I ran, and having no alternative to save my life, I plunged in, at a great risk of drowning, as the river in that place was very deep, about four or five rods wide, and I could not swim; I was too much agitated by the fear of being shot to consider the danger of crossing the river, at that place, though the risk I ran of being drowned was as great as that of being shot, I had not time to look for a suitable crossing place; I got over the river somehow or the other, I was so frightened I cannot tell how; I did not see the prisoner follow me, I ran as fast as I could without looking behind me to Mr. Thorn's station, which is about two miles from Mr. Hillas's hut; I

found four or five men there who were strangers, and gave the alarm of the murder of Mr. Hillas, they took two muskets and accompanied me back towards Mr. Hillas's; we had not got above a quarter of a mile from Thorn's when we met the prisoner coming towards us with the pistol in his hand, the men hailed him but he made no answer, but rushed towards us presenting his pistol, one of the men fired; the ball struck him in the breast and he fell, I then ran up to him as he lay on the ground, and took the pistol out of his hand; it was then loaded, and appeared as if it had been snapped as the hammer was down and the priming was on of the pan, it was loaded with ball, two charges; don't know when the pistol was snapped, I took him in custody and gave him up at Goulburn; I had no conversation with him as to where he got the pistol, I never saw it before; there was some mention made of his having got it at Mr. Rose's, but I cannot swear it was the prisoner who said so; the distance from Rose's to the residence of the prisoner is about twenty seven miles, 15 from Rose's to Hillas's, and about 12 miles from Hillas's to the prisoners, he said he had come from Shelley's and Mr. Rose's that day, in a conversation I had with him on the way to Goulburn.

Cross examined. - The dogs barked and I went to the door and met the prisoner coming in, I knew who he was; I did not tell the deceased that ``Collins was coming,'' I only spoke one word ``hello Sam,'' the deceased did not tell me to keep him out, he never opened his lips about it, at that time, nor anything to that effect; it was not in consequence of such directions, and my effort to put him out that he presented his pistol, I did not see him until my head was against his breast at the door; from the time the dogs first barked until the deceased was shot two minutes had scarcely elapsed; I did not attempt to push him back before the pistol was presented.

Mr. **WENTWORTH**. - I would ask what that has to do with the case; there is no apparent relevancy whatever.

Mr. **S. STEPHEN**. - A great deal to do with it, I wish to shew the Jury, that it was on consequence of the expressed determination of these parties to oppose by force his attempt to recover possession of his wife, that he assumed an appearance of hostility.

Cross-examination continued. - I don't know that deceased knew who was there when I said, `hello Sam;'' there are other ``Sams'' in the Country besides him; I don't know any more of that name in the neighbourhood; I did not use the expression ``don't shoot me,'' the deceased got up from where he was sitting, for the purpose of shutting the door, which he was in the act of doing with his left hand when he was shot; the prisoner's wife had been in the habit of going backwards and forwards to the deceased, for about two months before the transaction took place; the prisoner is a stockman to Mr. Jobbins, and lived about fifteen miles from the residence of the deceased, he had the care of a good many cattle, but he might have looked over the whole in twenty-four hours; I am not aware that Mr. Jobbins is in the habit of purchasing lean cattle and driving them to his run for the purpose of fattening them, I was never employed by the deceased to go to Collin's hut in his absence, and bring Mrs. Collins to the deceased; I was never asked by deceased to do so; I never returned in company with her to Mr. Hillas, I was never seen with her; I was at Mr. Hillas's when she came there, she was brought by the stockman; I was once married, it is nothing to me what a man does with another man's wife, so he does not touch mine; the first time the prisoner came to the hut on the first occasion of his wife's absence from him, he came in a great passion; I don't know that he went to the station the second time to look for his wife, he told me so afterwards when my prisoner; on the first occasion, he saw his wife, and took her home with him, he put his arms round her neck and kissed her, saying, that if she would go home and be a good woman, he would never upbraid her with what had happened; she went with him and Mr. Hillas

accompanied them out of my view; they went the short road through the bush, a person may be seen at the distance of a quarter of a mile from the hut, the dogs might not see a person approaching, if he came ``on the sneak;'' he called at the hut a second time in search of his wife, and asked Mr. Hillas if she was there; Mr. Hillas said she was not; he then said that if he saw his wife there, though Mr. Hillas was a stronger man than he, he would have blood; I never heard Mrs. Collins say, if Collins came there, there would be bad doings; I saw Collins with a cow of Mr. Hillas's bearing his brand; I don't know under what circumstances he got possession of that cow, I don't know whether he bought it from Mr. Hillas or not, I don't know that Mr. Hillas made him a present of the cow; I never saw her bring anything with her but her own cloathes [sic]; I don't know whether the prisoner crossed the river in following me or not; I can't say whether his clothes were wet, he might have crossed at a shallow place; if he crossed where I did he was well wet, he was in the neighbourhood by Thorns nearly as soon as I was.

By a Juror. - Mrs. Collins employed herself at Mr. Hillas's principally in washing and repairing her own clothes; I slept in the kitchen, there is only another room besides the kitchen in which Mr. Hillas slept, there was but one bed in the room, Mrs. Collins also slept there.

**JOHN RYAN** examined. - I am an assigned servant to Mr. **GEORGE SHELLY**, I can't say what distance Mr. Shelly's station is from the prisoner's residence, our station being beyond the boundaries of the Colony, we have no correct method of ascertaining distances; I would say as near as I can guess, seven or eight miles; I have seen the prisoner before, he stopped one night at our station; I remember hearing of Mr. Hillas being shot, I cannot say it was on the same day on which I saw the prisoner, it was somewhere about the same time; he came to my hut to deliver me a pound of tea and a new pipe, I induced him to take some dinner, and I put the kettle on and prepared some tea; I had some conversation with him about his wife, he told me he was going to Hillas's to bring her home; he suspected she had been with a man named McDonald, but he had ascertained that he was mistaken; he expressed himself certain that she was at Hillas's as he had decoyed her once before; he said he would be a laughing stock for the country no longer; Hillas had been going round the country singing songs about him and holding him up to ridicule, and threatening that if he ever found him about his place he would knock his d-d head off; I told him that I would not be annoyed with such a worthless woman; but that I would report her conduct to Government and have her sent to the Factory [*] he said he had reported her to the Bench of Magistrates at Yass Plains, but nobody ever went to look after her; and as he had heard of a plot between the deceased and her to get him transported at the first convenient opportunity, he though he might was well lose his life in an attempt to get his wife for the purpose of returning her to Government, as to have it sworn away by perjury; he understood that the plan proposed, and which was speedily to be carried into execution was to obtain some person's cattle, brand them in his name, drive them into his herd, and then give an information against him, and thus, by getting him transported for cattle stealing, put him out of their way for the remainder of his life; he seemed very much distracted in his mind, and in the midst of the most serious conversation would frequently jump up and dance in a frantic manner about the room, and distressed me to sing the song which the deceased had set going about the country concerning the infidelity of his wife; I told him I could not sing it, and that I had never heard it, he would not believe me, and commenced singing a verse of it himself, which ran thus -

When Sam went home and found his wife gone,

He mounted a horse, and off he did ride,
It was funny to see how he scampered along
With Jobbins's butter knife slung by his side;
Across the plains he did caper and quiver,
And swore he'd surprise all the lads on the river.

In concluding the song, he said he expected to get a d--d good beating when he got there, as all hands would ``pitch into him; he knew that a man called ``Red Jim'' would be there, and would assist Hillas in beating him; he pulled a pistol out of his pocket and said he would ``bounce'' them with that, as it was good for nothing else; he would put no confidence in it, but would cut a bludgeon on the way which would enable him to defend himself against them; I don't know where he got the pistol; I have not been long resident at that part of the country; he said he once expected that Hillas would be the last man in the country who would serve him in that manner as he had rendered him many services, had supplied him with provisions for three months at a time, and had even lent him money out of his pocket which had never been repaid; that his wife - the most cruel of women, he had given her the most satisfactory proofs of his love for her by having frequently risked his life in crossing the river when the torrent was raging by floods, for the purpose of procuring comforts for her; he felt he had not merited the cruel treatment to which he had been subjected, and would put an end to it; he stopped at the hut three or four hours; it was after the conversation that I heard that Hillas was shot and buried; it was reported that a person named Swindells had lent him the pistol; when I found he was intent on going there, I told him that it might prevent their molesting him if he had an old letter about him which he might produce as an order from the Magistrates at Yass to deliver her up; he left my hut, and I did not see him again until the present time.

Cross-examined. - I understood that the prisoner had forced McDonald's hut in his search for his wife; I had heard Mr. Hillas singing the song mentioned by the prisoner six or seven days before that time; I believe it was composed by a man called ``**Gundigy Bobby**'' the prisoner appeared to consider his life in danger in attempting to get his wife back; he did not seem to be in possession of his senses; he frequently appeared to forget that there was victuals before him, and jumped about as if he had suddenly lost his reason.

By the Court. - He did not appear to be intoxicated; his conduct was not like that of a man who had been drinking.

Mr. Stephen wished that the first witness might be called, as he had an important question to put to him which had escaped his memory in his cross-examination.

His Honor said that it was rather travelling out of the rule of evidence; he might, however, put it through the Court.

Mr. Wentworth observed that although extremely irregular, he had no objection to the question being put, the case being one which affected the life of an individual, he would not deprive him of the benefit of the question.

Purcell. - Was never punished, neither in this country nor any where else for perjury of prevarication, I was flogged for being of an obstinate temper, and not submitting to the orders of my master.

**HENRY STUCKEY**. - I reside at the Murrimbidgee, distant about twenty miles from where Mr. Hillas was shot, one of Mr. Thorn's men came to my house and informed me of the circumstance of Mr. Hillas's death, and wished me to go down, and I did so; I saw the deceased lying dead, the hut keeper and the prisoner's wife were present; I examined the body and found the ball had entered below the left breast, and had passed through the back, where it remained being perceivable under

the skin; the body was washed, a grave was dug, and it was buried; I am not a medical man, but I have no doubt that the wound I saw was the cause of his death; there was no Inquest held on the body; I examined orally, the hut keeper and the prisoner's wife on the subject; the station is 60 or 70 miles from Yass, and 130 or 140 from Goulburn; I do not know the reason why no Inquest was held, I do not think it was because it was considered too far; it became necessary to inter the body as it was becoming offensive.

Cross-examined. - I had known the prisoner Collins abut two years, and always considered him a quiet harmless good sort of man; I have heard the deceased sing a song which held the prisoner up to ridicule as a cuckold.

This was the case for the prosecution.

The prisoner offered no defence, and the following witnesses were examined.

**REUBEN HANNAM**. - I have known the prisoner thirteen or fourteen years, he resided a considerable time near the Brick-yard at Woolloomoolloo, at which I was the Principal Overseer; I always considered him a peaceable, harmless man; I am acquainted with all his family, and have found them all to be quiet, peaceable persons; he is a native of the Colony.

**JOHN PRESTON**. - I knew the decease Mr. Hillas, I lived at the prisoner's hut when deceased went up there; he complained of being ill while at Jobbin's station; the prisoner was stockkeeper there; a man called ``Red Jim,'' used to take the cattle away to a distant part, and then tell the prisoner that he had seen them going astray; he was frequently absent on this account, at which times Mrs. Collins slept with the deceased; his bed used to be put before the fire to make me think he had slept there; she told me on one occasion that if I reported to her husband anything I saw, that she would swear a rape against me.

Cross-examined. - I was not living there when deceased was shot, nor am I living there now.

This was the evidence for the defence. His Honor in putting the case to the Jury expounded the law of murder; it was an established rule of law, that when one man killed another it constituted the crime of murder until the contrary be made to appear; it therefore lay on the accused to shew that it took place under such circumstance, as would reduce the offence to what the law designated manslaughter. It was clear if they believed the evidence of Purcell, that James Hillas, the deceased, had been killed by the hand of the prisoner; had he therefore made out any such case of extenuation, as the law recognised as a reduction of the nature of the offence; the evidence was of a mixed nature, partly positive and partly circumstantial, and mainly dependent on the degree of legal provocation had been given as would extenuate or justify the crime; he felt bound to tell them that nothing had been adduced which could establish one or the other. That the prisoner had received the greatest provocation which one could receive at the hands of another there was no doubt, but to what extent does it go? Mrs. Collins had eloped and was living in a state of adultery with the deceased; the prisoner follows in five days afterwards and deliberately shoots the deceased. The law making an allowance for the infirmity of the human mind has laid it down as a principle, that when a man finds his wife in the act of adulterous intercourse with another man; if he at once slay them it will not amount to murder, because the human passions are assumed to have triumphed for a time over reason, but if sufficient time had elapsed to allow the judgment to resume its empire the act becomes wilful murder, malice being implied; the mere fact of elopement will not do, no man can be the avenger of his own wrongs; revenge being the attribute alone of the Most High.
His Honor cited the law of Murder from a work of eminent authority.

The exclusive possession of a wife by an individual is derived from the usages of Society and cannot be considered as mere matter of law: and taking into consideration the frail characters of the chief portion of the females who arrived in the colony under sentence of transportation, if the law paced the lives of individuals who might be suspected of criminal intercourse with them, at the discretion of others under such circumstance, it would effectually go to take away that security which the law exercises over the lives of the community. The nature of provocation, is clearly laid down in the law books, shewing that no words or acts of insult, will amount to that degree of extenuation of palliation which the law recognizes as reducing the crime of murder. Where a man takes away the wife of another and further becomes the publisher of the disgrace to which he has subjected the individual by his act, it cannot be viewed but as the greatest provocation a man can receive, and is a painful circumstance is the history of the case, but although the provocation be great, he felt bound to tell them that it was not that degree of provocation which was recognized by law in mitigation of the offence. It had been attempted to be shewn that the prisoner was not right in his mind about the time the murder took place; no doubt a man so circumstanced cannot beheld responsible for his acts, because he is deprived of that reasonable faculty which guides the mind in the choice of right from wrong, but there had been nothing to establish such an assumption in behalf of the prisoner; he was no doubt somewhat excited from the nature of his visit to the residence of the deceased then labouring under a strong sense of injury as shewn in some extravagant acts as detailed by the witness Ryan; but they did not offer any evidence which they were warranted in receiving, as to his insanity. He had gone over the evidence as minutely as possible, and had shewn them the law regarding the crime of Murder in the clearest manner he could, and he now rested the case in their hands. The Jury retired for about half an hour, and returned a verdict of Guilty.

His Honor, after a short but impressive address passed the sentence of death on the prisoner, to be carried into effect on Monday next, (this day.) See also Sydney Gazette, 7 August 1835. The devastating result of this case should be contrasted with that in R. v. Varney, 1835, heard on the same day.

[*] The reference is to the Female Factory, which was simultaneously a prison, a barracks for female convicts, a factory, and a marriage bureau. See A. Salt, These Outcast Women: the Parramatta Female Factory 1821-1848, Hale and Iremonger, Sydney, 1984. On the management of the factory, see Historical Records of Australia, Series 1, Vol. 12, pp 524-528.

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

CJA, 1/31, 17/08/1835

Colonial Secretary's Office,
Sydney, 11th August, 1832.

His Excellency the Governor has been pleased to appoint Mr. **AMBROSE WILSON,** of Endenglassie, to be Coroner for the District of Penrith, in the room of Mr. **JOHN DIGHT,** resigned.

By His Excellency's Command,

ALEXANDER M'LEAY.

SYDNEY GAZETTE, 03/11/1835
Supreme Court of New South Wales

Burton J., 2 November 1835

**THOMAS NOCTON** was indicted for assaulting **GEORGE FORSHAW** with an axe on the head and shoulder, at Berrima, on the 10th September last, with intent to kill and murder him. A second count described the intent to do some grievous bodily harm. The prosecutor and prisoner were both inmates of an ironed gang, and were employed together working at the stump of a tree. The prosecutor was struck by the prisoner with a shovel on the shoulder and knocked down, without any provocation on his part, and without making any observation. The prosecutor then went away to another stump, and commenced working there by himself, upon which the prisoner followed him and the prosecutor falling from weakness, the prisoner struck him on the back with an axe when on the ground. The prosecutor was not greatly injured by any of the blows; that given with the spade, being given with the flat part of it, and that with the axe with the blunt end. He was repeating a third blow when the prisoner was secured. On being taken into custody by the sentries, the prisoner called the prosecutor a b--y dog, and said he had ``come it'' about some meat that had been stolen, and brought to the gang. The prisoner was conveyed before Lieutenant **WADDY** who commanded the military detachment stationed at Berrima, prior to his committal to take his trial for the offence, on which occasion he made a statement which was not at that time reduced to writing. The prisoner told Lieutenant Waddy that he was tired of his life and wanted to get hanged, and that he was sorry he had not killed Forshaw. He said he had no personal animosity to the prosecutor, and that one man was as good to him as another. In answer to a question put to Lieutenant Waddy from the Court, in consequence of the prisoner's stating that he only received five ounces of bread for a meal, and that he was half starved - Lieutenant W. stated that if he were to give his opinion, he should say that the allowance of provisions to the men in the ironed gang at Berrima was no sufficient for men employed at such hard labor as they are employed at - but it was all the Government allowed them. The learned Judge hereupon prevented any further discussion on the subject. An assistant overseer named Henry Wise detailed the circumstances of the case, from which it appeared that Forshaw was more hurt then he described in his evidence, having received a cut in his shoulder with the spade to the extent of half an inch. The overseer swore that the prisoner struck Forshaw on the head and wrist - this, however, the other denied. The overseer also stated that the prisoner was in general a good working man, and that he had never had any occasion to find fault with him since he had been in the gang, which was about nine months. The overseer likewise corroborated the testimony as to no previous quarrel having taken place between the parties, and that the prisoner said he would have his life before he went home. He said he was tired of his life, and that he (the overseer) knew of no reason for his striking him. There was a very great discrepancy between the evidence given by the prosecutor, and the overseer, the former making it appear the injury was of a very trivial nature, and the latter describing it as more severe, rendering Forshaw unfit for any thing like adequate labor for the next two or three weeks. The jury returned a verdict of guilty, on the second count of the indictment; and not guilty on the first. Remanded for consideration of sentence. (This case affords a melancholy proof how the insufficiency of food granted to convicts, under durance, will excite them to commit crimes to be executed, rather than submit to evils which they are unable to bear. We are of opinion with the learned Judge who tried this case that an adequate sufficiency of food must have been allowed; but that through some unexplained cause, the customary allowance must have been curtailed. Ed.) See also Australian, 10 February 1835.

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

SYDNEY GAZETTE, 07/11/1835
Supreme Court of New South Wales
Forbes C.J., 6 November 1835

**NICHOLAS HAYDEN** stood indicted with wilfully, maliciously, and malice aforethought, kicking and beating one **JAMES HONY**, in the month of July.

**JOHN O'LAUGHLIN** sworn - James Hony was my servant; he died on Friday the 10th of July; he was unwell the previous night; he complained of being very soer [sic] from the blows he had received from the new sawyer; I asked him on the morning of his death whether he would take some tea, as I though his illness might have proceeded from hard drinking the day previous.

**PATRICK HARNETT** sworn - I am a surgeon; was called to examine the body of the deceased on the 10th of July; I reside at Goulburn; I found a slight embrasion [sic] on the right knee; the right eye was blackened; there was also a contusion on the forehead; the brain was perfectly healthy; not the slightest appearance of inflammation; on the upper part of the stomach there was a slight contusion; four of the ribs on the left side were fractured, at a distance of three or four inches from the breast bone; one of the ribs protruded through the cavity of the chest, and appeared to have injured the left lung; the inflammation of the pleura, and the left lung, I believe to have caused the man's death; I am positive that violence was the cause of the man's death; he was a very old man.

Cross examined by Mr. Kerr - A fall might have caused the injury; there was a quantity of sawed wood near the hut where the deceased lived; he had been dead about 10 hours when I saw him.

**JAMES KERSHAW**, sworn, I reside at Goulburn Plains; I knew the deceased; I saw him the day before his death; he appeared to me to be as well as I had seen him for some time past; he said he had been shamefully used, I have a shocking pain in my left side now; I believe he died the next morning; when I saw him he was a little in liquor.

**JAMES RYAN**, sworn, I hold a ticket of leave at Goulburn; I knew the deceased; I slept at O'Laughlin's house on the 8th July; there were five of us slept in the same hut; the prisoner at the bar was one; we all went to bed together, about 11 o'clock; I was awaked by the screams of the deceased; I asked the prisoner at the bar what was the matter; he said the deceased wanted to commit an unnatural crime; he then kicked the deceased in the side, and was going to strike him with a stool, but I would not let him; when I went to bed, the prisoner and two of the men remained up by the fire; they had not quarrelled before going to bed; we all left the public house together; there could have been no quarrel, without my knowing it; we were all apprehended for the murder; the prisoner owned kicking the old man, and said he would kick any one, that would be guilty of the like offence; the deceased was in bed, on the ground, when the prisoner struck him.

The learned Judge in putting the case to the jury, very carefully explained to them the difference between murder and manslaughter. They after a short consultation, returned a verdict of not guilty.

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

SYDNEY GAZETTE, 10/11/1835

Supreme Court of New South Wales
Dowling J., 6 November 1835
Before Mr. Justice Dowling and a Military Jury.

**WILLIAM JEFFRIES** was indicted for the wilful murder of **RICHARD SOMERVILLE**, at Port Macquarie, on the 24th of August last.

The prisoner was attached to one of the government gangs at Port Macquarie, and on the day in question was at work with the deceased and two other men, named Wilkes and Taylor, splitting posts and rails. Prisoner and deceased worked together at one log; Taylor and Wilkes at another, a short distance away. A short time after they had been at work, Wilkes, looking in the direction of the prisoner's log, saw the deceased extended on the ground, with his face downwards, and called the prisoner, who was standing unconcernedly by, to enquire what ailed deceased. The prisoner said he did not know, and Wilkes continued splitting the log on which he and Taylor were at work, until they had driven the wedges home. Wilkes then went over the deceased, Taylor followed him, and raised his head from the ground, when he saw a stream of blood flowing from a deep cut on the back part of the head. Wilkes called out to Taylor that deceased was dead, and Taylor went forward quickly, felt deceased's pulse, and replied, ``No, he is not yet dead, but appears to be very near gone." The prisoner stood by during this scene, and when Taylor said that deceased was still living, said, `Not dead - let me come to him, and I'll b--y soon finish him." At this time prisoner had a double headed axe in his hand. Wilkes and Taylor procured some water and bathed the deceased's temples without effect. He ceased to breath shortly after. Wilkes then turned to prisoner, saying, ``You surely cannot have done this;" to which the prisoner replied, ``I have, and I must die for it." When he was asked what motive had induced him to commit the murder, he replied, ``he drove me to it, and I must die for it." Prisoner then said he must go to the lake, meaning a lake at a short distance from where they were working, and where there there [sic] was a station, at which he had left some cloaths [sic]. Wilkes and Taylor advised him to go direct to the settlement and give himself up, but, as he was determined, they would not oppose him. Taylor accompanied him to the lake. On their journey thither, prisoner said he wanted a hat from the station to be hung in; and on his arrival, he got a hat and some things from a friend of his, as he had represented to Taylor and Wilkes. Upon being questioned by the man at the hut, relative to his visit, prisoner related the circumstance of the murder, and said that he would then go to the settlement. Taylor procured assistance, and conveyed the prisoner to the settlement, where he was delivered over to the custody of the police.

The prisoner cross-examined the witnesses, but could not alter the consistency of their evidence.

His Honor summed up at length, and the jury found the prisoner guilty. When the proclamation was made - previous to passing the sentence of death, the prisoner in the most hardened manner turned his back to the judge, and resisted the constables who endeavoured to keep him to the bar. His Honor ordered the constables to desist, and passed the sentence of death on the prisoner, who heard it without the least concern.

See also Australian, 13 November 1835.

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

AUSTRALIAN, 17/11/1835
Supreme Court of New South Wales
Dowling J., 13 November 1835

Friday, November 13th. - Before Mr. Justice Dowling and a Military Jury.
**JOHN HAGAN**, a private in His Majesty's 4th regiment, stood indicted for the wilful murder of **MICHAEL DRISCOLL** at Solitary Creek in the District of Bathurst, by firing a musket at him loaden with ball, on the 23d of September last.

It appeared on the day mentioned above, Hagan, with other soldiers were escorting a party of prisoners from No. 2 Stockade, at Cox's River, to Bathurst. On their way they stopped at White's Inn, Solitary Creek. They placed the prisoners in a shed and Hagan was appointed centry over them. There was a dray accompanying the escort, upon which a quantity of Rum was being conveyed to Bathurst. One of the kegs leaked and was taken off, for the purpose of being put into empty bottles; whilst this was being done the two Privates, (unknown to the Sergeant) had got to the Rum, and on Hagan being relieved, he had gone to the stable and drank some; he had also drank some rum at the Stockade, previous to their starting in the morning, enough to make him intoxicated. When he had been to the stable, he resumed his station as sentry. Hagan asked one of them for a pipe, who answered he had not go one, when Hagan cocked the musket, and said ``d--n your eyes, I'll shoot you,' and fired at the same moment. The Ball entered the left breast of Driscoll between the first and second rib, and came out at the back between the eight and ninth rib. Driscoll fell back and died instantly. Hagan then fell on his knees, and prayed to God to forgive him for having taken an innocent man's life.

The Prisoners had been perfectly quiet during the journey, no angry nor malicious feeling had been exhibited, but the witnesses all agreed that Hagan was very drunk, owing to which he had fired the musket. He had no malice nor any previous intention of injuring the deceased. A sergeant of the Regiment spoke as to character; he had known him four years and during that time he had been a very orderly soldier.
The Jury retired for nearly an hour, when they returned a verdict of Guilty. Mr. Attorney General having prayed for judgment, the Learned judge addressing the prisoner, said, the jury after having taken a long time to deliberate on your case have returned a verdict of guilty. There were few who had heard the case, but would be satisfied there had been no previous malice. It is true you were in a state of intoxication, but that in the eye of the law was no excuse, but on the contrary, you holding a place of trust sent for the purpose of taking charge of others, allowed yourself to get drunk and to kill one of those placed under your charge - it is my painful duty to pass sentence upon you. Your expressed sorrow, at the time, is certainly a manifestation of contrition, but that cannot avail you here; use then the few short hours which now remain in preparing yourself to meet that judge who alone can show you mercy. He then passed sentence of death in the usual manner and ordered him for execution on Monday Morning. See also Sydney Herald, 16 November 1835; Australian, 17 November 1835, for comment on the case: the prisoner was reprieved pending an inquiry. The alcohol was the property of two small settlers who were hawking it around the country illegally. It was forfeited.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 17/11/1835
Saturday. - Before Mr. Justice Dowling and a Civil Jury.
**WILLIAM BEANE** an assigned servant to **Sir John Jamison**, was indicted for the wilful murder of one of the aboriginal natives at Tungee, in the County of Bligh.

It appeared from the evidence of Mr. **ALEXANDER BUSBY**, the Magistrate, that the prisoner went before him and acknowledged to have killed the said black; under the following circumstances.

In consequence of the murder of two of Sir John Jamison's men, about 12 months ago, he caused enquiry and search to be made for this aboriginal black, named six toed jackey, and issued a warrant and sent it to his overseer to place in the hands of one of his stockmen, who gave it to the prisoner. Bean captured the said black, handcuffed him, and took him a distance of twenty five miles, where he stopped, un-handcuffed the prisoner, and gave him his breakfast, shortly after the black attempted to escape up the chimney of the hut, and Beane pulled him back, when he seized a large knife and made three attempts to stab prisoner - the third attempt, prisoner shot him.

His Honor Mr. Justice Dowling, in summing up, pointed out to the jury that the prisoner was not legally entitled to capture the said black, the warrant not being directed to him, and that this therefore was a case of murder, as the blacks were as much entitled to protection, as any white man. They were amenable to our laws, and in case of infringement, were liable to punishment - when therefore assailed, they had a right to legal redress, but there were some circumstances in the case which the jury might think reduced the charge to manslaughter, it was therefore entirely a matter for their consideration.

The Jury retired for about half an hour, and returned a verdict of justifiable homicide. - Mr. Sydney Stephen, counsel for the prisoner.

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

SYDNEY GAZETTE, 17/11/1835

**WILLIAM BEAN** was indicted for the wilful murder of a native black, commonly called **six toed Jack**, at Tongee, in the county of Bligh, on the 4th of April, 1834.

This case rested solely on the prisoner's voluntary confession before Mr. Busby, J.P. in which he stated, that he received instructions from his overseer, who had been commissioned by Sir John Jamison, J.P., to apprehend the deceased, who had murdered to of Sir John Jamison's servants some time before. He was supplied by his overseer with a musket, a brace of pistols, with ammunition, with which he proceeded in search of the deceased. The prisoner apprehended the deceased, and took him to his hut, a distance of twenty-five miles; some time after they had been at the hut, deceased seized a knife, rushed at the prisoner, and made several attempts to kill him, and then attempted to escape up the chimney, which he would have easily accomplished, when the prisoner presented, and fired a pistol at deceased, which wounded him a little above the left eye, of which wound deceased shortly after died.

Sir John Jamison deposed to having sent a warrant to his overseer for the apprehension of the deceased, and authorising him to send the stock keepers to capture him.

His Honor in putting the case to the jury remarked, that by the Laws of England the aboriginal natives were amenable to, and necessarily were entitled to the protection of the laws of England, so far as their connection with British subjects; had the deceased been in the custody of an authorised officer acting on a legal warrant, and had he then tried to make his escape, such officer would have been justified in restraining him by any means in his power. In the present case the legal authority, and the deceased, who was a free man under unjustifiable duresse [sic] had a right to make his escape, and the prisoner must answer for his actions. The jury in taking the voluntary

confession of the prisoner, must receive every part of it, both to the condemnation and exculpation of the prisoner. He thought he might safely direct them to acquit the prisoner of the charge of murder, but he was certainly guilty of manslaughter.
The prisoner received an excellent character from Sir John Jamison, who stated him to be a humane kind man.
The jury retired, and after some time his Honor sent to enquire if they were likely to agree, when they returned answer by their foreman, that there was no chance of their agreeing. The jury returned into Court in half an hour, and returned a verdict of - Not Guilty. The prisoner was discharged.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

Supreme Court of New South Wales
Dowling J., 14 November 1835
**WILLIAM BEAL** stood indicted for the murder of an Aboriginal Black, called **Six-toed Jackey**, at Tagagree, in the County of Bligh, by shooting him with a pistol laded with powder and ball, which passed through his head near the left eye on the 4th April, 1835. It appeared that the prisoner was an assigned servant to Sir John Jamison, and employed as a stock-keeper at a distant station at Mamoye at the distance of four hundred miles from Sydney. In consequence of the numerous reports which reached Sir John Jamison about the period named in the endictment [sic], of repeated murders and robberies by the Native Blacks in that part of the country, he addressed a communication in His Excellency the Governor, requesting that a Military force might be sent out for the purpose of apprehending the offenders and protecting the lives and property of the settlers, he having had two stock-keepers barbarously murdered within a short period; but His Excellency returned an answer, stating that there was none of the Military to spare, and observing at the same time, that if Gentlemen graziers chose to go beyond the ordinary protection of the Country they must of necessity protect themselves. In consequence of this communication, Sir John Jamison sent several stand of arms for the protection of his stock-keepers, together with a warrant addressed to his Superintendent, authorising him to apprehend and lodge in custody such of the Blacks as had been concerned in these transactions of whom Six-toed Jackey was reputed as principal. In the early part of the same month, the prisoner surrendered himself to **A. BUSBY**, Esq. Magistrate for the County of Bligh, as having shot the deceased, and made a voluntary statement which was read in Court, to the effect, that he had captured the deceased about twenty-five miles from Taragree, to which place he had brought him in handcuffs; on reaching Sir John Jamison's station, he released him from handcuffs and permitted him to go at liberty about the hut; while the prisoners attention was drawn from the deceased, he seized a knife from the table and rushed at the prisoner, attempting to stab him which he avoided; he made a second attempt which the prisoner again avoided, when deceased made a rush towards the chimney for the purpose of escaping, it being constructed of bark only, when the prisoner seized a pistol and shot him, considering himself authorised in preventing his escape. The other Blacks hearing he was shot, went to the hut, took away the body and buried it. Sir John Jamison give the prisoner a character, as an orderly humane man. The Jury being asked if they found the prisoner guilty of murder, they returned a verdict of Not guilty; they were then asked if they found him guilty of manslaughter, and they again returned a verdict of Not guilty.

The Australian, 17 November 1835, recorded this trial as being held on 14 November 1835, before Dowling J. and a civil jury. It called the defendant William Beane, though it is clearly the same trial. The Sydney Gazette, 17 November 1835, gave the same details as the Australian, though it called the defendant Bean.
There is a striking difference of tone between the three newspaper reports, thus the three reports are reproduced here.
The Australian, 14 April 1834, noted that Sir Edward Perry three months ago pledged to explain alleged cruelties against Aborigines, and stated that it was now time he did so.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 19/11/1835
Supreme Court of New South Wales
Forbes C.J., 17 November 1835
(Before His Honor the Chief Justice and a Civil Jury.)
**EDWARD WILLIAMS** was indicted for the wilful murder of **ANN FOSTER**, at Bathurst, on the 6th of August last.

The prisoner lived at Bathurst, a short distance from the deceased's house; on the day laid in the information the prisoner was robbed of £10 in money, a saddle and bridle, and having reason to suspect that the robbery had been committed by some of the persons who frequented the deceased's house, he went thither and accused the deceased of having advised the robbery; a scuffle ensued between them, and the prisoner shoved deceased down, and went out; a short time afterwards he returned to the house, and second quarrel took place deceased saying to the prisoner, ``get out you sweep,'' and using other abusive language to him; deceased took a knife, and attempted to stab the prisoner, who seized her by the arm, and pushed her against the wall, and she fell a second time; prisoner struck deceased several times; after the first scuffle ensued, deceased took a tumbler, with about three glasses of rum in it, and drank it off, and at another period of the quarrel, she filled a tumbler with rum, and drank it off all but a glass and a half, after which prisoner and deceased commenced quarrelling again, calling each other abusive names, and prisoner knocked deceased down a third time, her head falling against a stool; she was much hurt, and prisoner went away for a doctor, and a man named **CROSSLEY**, who, with his son, lived in the deceased's house, lifted her up, and laid her down by the side of the bed, not liking to put a woman to bed; some time after a man named Stephens, who was also drunk, went into the bed room, lifted her from the floor, and threw her carelessly on the bed; after the third knock down, and when deceased complained, the prisoner went away to get a doctor; at a very late hour at night, or early in the morning, the younger Crossley said he was sleepy, and told his father that he would go to bed; his father said that they would go and see how Mrs. Foster was before they retired for the night, and having lit a candle, they went into her room, and saw her lying on her face on the bed, in the opinion of the younger Crossley, in a position that was likely to smother her; her face was black, but it recovered its natural hue by the morning; when Crossley went into her, the body was warm, and having lifted her, and placed her in a convenient position, the younger Crossley felt her pulse, which had stopped beating; he then lifted the eyelid, and touched the pupil of the eye, which remained motionless; finding that she was dead, they gave information in the proper quarter; when the doctor arrived, deceased was dead. The Surgeon deposed to having examined the body of the deceased, and found a contused wound on the back part of the head; the bone was not at all fractured; a quantity of extravasated blood was on the brain immediately under the wound on the head, which from its pressure on the brain

produced the death of the deceased; was of opinion that death did not ensue from suffocation.

His Honor summed up at length, and read through the whole of his notes.

The jury retired for a quarter of an hour, when they returned into Court, and informed His Honor, through their foreman, that there was no probability of their agreeing on the verdict; they acquitted the prisoner on the charge of murder, the difference of opinion was on the minor offence.

His Honor directed the Jury that they were not bound to find the prisoner guilty of manslaughter, although it was usual to find a verdict of manslaughter when a case of excusable or justifiable homicide was not deducible from the evidence. It however was a matter of fact, which it was for them to decide. His Honor would state that the present appeared to him a clear case of manslaughter - this was only his opinion, and the Jury were not to be controlled by it.

The Jury again retired for ten minutes, and retuned a verdict of Not guilty. The prisoner was remanded. See also Sydney Herald, 23 November 1835.

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

SYDNEY HERALD, 19/11/1835
Supreme Court of New South Wales
Burton J., 12 November 1835

**DAVID PRESTON, WILLIAM HARVEY, THOMAS HIGGINS, THOMAS TAYLOR, LEWIS WINGFIELD, JOHN ROBINSON, RICHARD LYNCH, THOMAS WATERMAN, and THOMAS WRIGHT,** Convicts attached to No. 10 Road Party commonly called Thorpe's Gang, stood indicted for breaking and entering the dwelling-house of **THOMAS BARNES**, at Honeysuckle Flats, on the night of the 15th July last, stealing therefrom various property of the value of £10 and putting the inmates of the house in bodily fear. It appeared from the evidence of Mrs. Lydia Barnes, that on the evening of the day laid on the indictment, she was awoke by the barking of the dogs, and loud and repeated knocking at the door; suspecting that they were bushrangers who had come with the intention of robbing the house, she called a person named **TOMS**, a traveller who slept in the house that evening, hoping, that finding she was not alone, they would depart; Mr. Toms rose and came into the room, at which moment three men entered by the window which they had forced open, one of whom struck Mrs. Barnes a violent blow on the head which stunned her and she fell, and another struck Mr. Toms; on recovery a little from her insensibility, she saw the prisoner Harvey and two other men standing opposite the window; Harvey took her up in his arms, threw her on the bed, and attempted to violate her person; the two other men who were in the room with the prisoner Harvey, demanded where the money was kept, and was informed that it was in the box; they took the box away, and Harvey not satisfied put his hand under the pillow in search of more money, at the same time saying, he had a great mind to despatch her out of the way; she begged him to spare her life, and not leave a small family motherless, and told the ruffians that she would not know them again; they took the box into the verandah; Preston whom she knew by his voice, came to the window and asked for a few bottles of rum; she told him to take it but spare her life; Preston, a free man, had been employed by her husband to split shingles, and had been visited in the afternoon previously to the robbery by four of the prisoners whom he had treated with liquor, having borrowed the money from Mrs. Barnes for that purpose; by the agency of Preston, they became informed of the absence of Mr. Barnes from home on that evening; on the following

morning, she communicated the circumstance to a military escort who arrived with prisoners, and expressed her opinion, that the men who had committed the robbery were attached to Thorpe's Gang, whither they proceeded for the purpose of apprehending them; it appeared from the evidence of Mrs. Barnes' servant, that hearing a noise at the house on the night of the robbery he got up, when he saw Havery and two other persons standing near the gate; Harvey came to him with a pistol in his hand, and told him if he did not go into the stable he would blow his brains out; he knew Havery, but could not distinguish the counternances of the other men; they remained in the house some time, leaving one man sentry on the stable where he was confined; when they went away he went into the house and found Mrs. Barnes and Mr. Toms bleeding from the injuries they had sustained; he dressed their wounds, and went into the verandah were he found a box, the contents of which had been taken away; he proceeded with the military on the following morning to the Road Gang, and picked out Harvey, Berwick, Waterman, and Robinson, as the men who had committed the robbery; Harvey and Waterman with two others had been drinking at Mrs. Barnes' in company with Preston in the afternoon of the same day; from the evidence of two prisoners attached to the Gang, one of whom was the watchman, it appeared that Harvey, Wingfield, Berwick, and Waterman, had been drunk and fighting in the Camp on the afternoon of the robbery, and that four men belonging to the Gang, had left it after the evening's muster and had been joined by two others strangers from the Stockade; Overseer Thorpe stated, that Harvey and Wingfield were absent on the night of the 16th July; Harvey when in the custody of Corporal **ALLEN** of the Military Guard at the Stockade, confessed that he was the man who had entered the house and had knocked Mrs. Barnes down; Taylor made a confession which was handed in by the Crown Solicitor, who stated that he had been cautioned not to make any confession under the hope of mercy, as there was sufficient evidence without him, which would be used against himself; he said he felt it necessary to make the confession in order to place the proper parties in the hands of justice; several of the men in custody of the charge were innocent of it, whilst guilty parties had escaped; the confession of Taylor was then read to the Court, and to the following effect: - The prisoner Higgins had been at the Junction for the purpose of seeing the Doctor, and on his return he informed Taylor that a party of men were coming from the Junction Stockade, for the purpose of robbing Mrs. Barnes' house; when they arrived at Thorpe's Gang, Higgings asked Taylor to accompany them, but he refused, stating that Mrs. Barnes knew him; he was told that would make no matter as he could remain outside and the property could be handed to him; he then consented to accompany them; the part consisted of Burns, Higgins, Quigly, Gatly, Mullins, and Taylor; Higgins was the man who snapped the pistol at Mr. Toms, and Quigly committed the violence on Mrs. Barnes. The Jury returned a verdict of Guilty against Higgins, Preston, Harvey, and Taylor, cautioning them against entertaining any hopes of mercy, particularly Harvey, whose offence had been marked with gross atrocity. [For the notes of the trial judge, see Burton, Notes of Criminal Cases, State Records of New South Wales, 2/2421, vol. 20, pp 141 (rape) and 151 (robbery in dwelling house). Harvey, Preston and Wingfield were charged with rape (Harvey as principal) and all were found not guilty of it.]