SYD1836

SYDNEY HERALD, 08/02/1836
Supreme Court of New South Wales
Forbes C.J., 5 February 1836
On Friday last, an Aboriginal Black named Jack Congo Murrell, was indicted in the Supreme Court for the wilful murder of another Aboriginal Black named Jabbingee, at Windsor, when his Counsel put in the following ingenious and puzzling plea.
In the Supreme Court,
The King v. Jack Congo Murrell.
``And now the said Jack Congo Murrell in his own proper person comes, and having heard the Information aforesaid read, and protesting that he is not guilty of the premises charged in the said Information or any part thereof, for plea, nevertheless saith that he ought not to be compelled to answer to the said Information; because, he saith that the said Territory of New South Wales before and until the occupation thereof by his late Majesty King George the third, was inhabited by tribes of native blacks, who were regulated and governed by usages and customs of their own from time immemorial, practised and recognised amongst them, and not by the laws of statutes of Great Britain, and that ever since the occupation of the said Territory as aforesaid, the said tribes have continued to be, and still are regulated and governed by such usages and customs as aforesaid, - and not by the laws and statutes of Great Britain. And the said Jack Congo Murrell further saith that he is a native Black belonging to one of such tribes aforesaid, and that he is not now, nor at any time heretofore was a subject of the King of Great Britain and Ireland, nor was nor is subject to any of the laws or statutes of the Kingdom of Great Britain and Ireland. And the said Jack Congo Murrell further saith that the said Jabbingee in the said information named, and with the wilful murder of whom the said Jack Congo Murrell is and by the said information charged, was at the time of such supposed murder a native Black belonging to one of such Tribes as aforesaid, and was not then nor at any time theretofore a subject of the King of Great Britain and Ireland; nor at any time was subject to any of the laws or statutes of the Kingdom of Great and Ireland, or under the protection of the same.
And the said Jack Congo Murrell avers that agreeably to and under and by such usages and customs, he the said Jack Congo Murrell if suspected of the murder of the said Jabbingee can and may be made to stand punishment for the same, and can and may be exposed to such and so many spears as the friends and relatives of the said Jabbingee, with the supposed murder of whom the said Jack Congo Murrell is and stands charged in and by the said Information may think proper to hurl and throw against the body of him the said Jack Congo Murrell, may be endangered and brought into jeopardy for the said supposed murder of the said Jabbingee. And the said Jack Congo Murrell also avers that no proceedings may be had or taken against him the said jack Congo Murrell, in the said Supreme Court of New South Wales for the said supposed murder, nor any verdict or acquittal which may be had or follow thereupon will or can operate as a bar, or be pleaded as such to the proceedings which will or can be had against him the said Jack Congo Murrell, by the said relatives and friends of the said Jabbingee, with the supposed murder of whom the said Jack Congo Murrell stands charged in the said Information, agreeably to the before mentioned usages and customs, and this he is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said information specified!

His Honor the Chief Justice said the Plea was a very ingenious one, and asked the Attorney General how he should proceed, when that Gentleman replied that he must take time to consider the Plea.

[*] See also Sydney Gazette, 6 February 1836; Australian, 9 February 1836. Background documents for this case are online among the papers collected by Burton J.: see documents 41, 42, 43, 44, 45, 45a, 46, 47, 48.

See also R. v. Ballard, 1829; R. v. Long Jack, 1838.

This case began when Bowen Bungaree, an Aborigine, requested Rev. Threlkeld to ask the Attorney General to prosecute Murrell and Bummaree: Threlkeld to Attorney General, February 1836, Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, pp 182-184. This Miscellaneous Correspondence file has most of the important documents in the case, including the notes of the initial inquests on the deaths of the two men, the charges brought against the prisoners, Threlkeld's statement on Aboriginal customs including payback, the arguments of counsel, the judgment of Burton J. and his much more extensive notes for judgment. At pp 272-273, there is a list of all Aborigines tried before the Supreme Court since 1827, and at p. 274 a letter about the killing of another Aborigine by a European. On the assignment of counsel to these prisoners, see the law reports of the Sydney Herald, 4 February 1836.There was a similar case in 1834 which did not go to trial. The Australian, 3 February 1834 reported that two Aborigines, Quart Pot and Numbo, were in gaol for murder and had not been brought to trial quickly. The newspaper thought it ``unreasonable, oppressive and impolitic'' to impose our law on matters among themselves. It argued that we should let Aborigines use their own punishments whether for murder or anything else, as they were not protected by our laws. See also Australian, 17 February 1834 on other Aborigines surrounding the gaol while they were there. The Australian, 28 February 1834 said that they were to be discharged by the Attorney General and returned to their own district. A month earlier than the commencement of the prosecution of Murrell and Bummaree, a free white man, Stephen Brennan, had been arrested on a charge of murder of an Aborigine at the McLeay River, but nothing seems to have come of the charge: Sydney Gazette, 5 January 1836. For a description of the capture and imprisonment, without charge, of another Aborigine, see Australian, 6 May 1836.

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

AUSTRALIAN, 09/02/1836

Forbes C.J., 6 February 1836

Saturday. - At the opening of the Court this morning, the Chief Justice gave it as his opinion that the plea put in by Mr. Sydney Stephen on the part of the Aborigine accused of the murder of one of their tribe was perfectly just; as for any acts of violence committed by the natives against each other, even if it amounted to death, they were subject to the custom of their own laws; the plea put in was not what is commonly called a plea in abatement, he was aware of no insufficiency therein, and it must have been got up at great trouble by the learned counsel. The subject was one which called for the earnest attention of the legislature, yet he thought that in the present case the better way would be to try the general issue, and he pledged himself on the part of the court that the accused should have the advantage of any objection that might arise.

Mr. Stephen declined acceding to this proposition as the subject was one of great importance, and in which he wished to have the opinion of the whole court. It was postponed accordingly.

[*] This important, but generally overlooked, passage shows that the initial view of Forbes C.J. was the same as he had expressed in R v. Ballard, 1829. As is evident below, two months later he completely reversed his opinion when the matter was decided by all three judges.

SYDNEY HERALD, 11/02/1836

Supreme Court of New South Wales
Burton J., 8 February 1836
Monday. - Before Mr. Justice Burton and a Jury of Civilians.

JEREMIAH McCARTHY was capitally indicted under Lord Lansdowne's Act, for attempting to discharge a loaded gun at **JOHN COLEMAN**, with intent to kill or do some grievous bodily harm, at Lane Cove, near Sydney.

The Solicitor-General conducted the prosecution; Mr. Stephen defended the prisoner.

From the evidence of the witnesses for the Crown, it appeared that the prisoner had lately been in the employment of Mr. **THOMAS HYNDES** of Sydney, as a sawyer, and resided with a person named **FOSTER**, near Kelsey's public-house, at Lane Cove. On the evening of the Sunday before last Christmas day, he formed one of a party of seven persons who were drinking at Kelsey's, some of whom picked a quarrel with him on the ground of his having shortly before shot a bushranger, in an attempt to apprehend him. The prisoner, it seems was assaulted and severely beaten on this occasion; upon which he left the house and went to Foster's, where he procured a gun, with which he walked about the neighbourhood, and being seen by Mrs. Kelsey, who - apprehending that in his excited state he might do some mischief - requested Coleman and a man named **ATKINS** to go and take the gun from him. When they came up with the prisoner he was standing inside the fence which enclosed the premises where he resided; and immediately upon their attempting to seize him, he, according to the positive testimony of Coleman, pointed the gun at the latter, drew the trigger, and the gun burnt priming. The witness Atkins, however, who was equally close to the prisoner, but at the other side of him, as distinctly swore that no flash in the pan took place - that the only fire produced was the sparks emitted by the flint - and that it was highly probable the lock snapped in the struggle which took place in attempting to disarm the prisoner. Previous to this, **PIMBLE**, the district constable, had been sent for from Kelsey's and on his arrival the prisoner and the gun were given into his custody. Upon examining the gun it was found to be loaded with powder and shot, but none of the witnesses would undertake to say, from the appearance of the pan, that it had recently burnt priming; and several witnesses who, though not so near the prisoner as Coleman and Atkins, were near enough to distinguish what took place, also swore that they saw no flash nor no smoke. The witness Coleman also stated, that after the prisoner snapped the gun at him he (prisoner) said that he had mistaken him for a man named Browne, who was one of the party at Kelsey'; and it appeared, besides, that Coleman was not one of those by whom the prisoner had been previously assaulted.

For the defence it was attempted to be shewn that the charge originated against the prisoner out of malice, on account of his having lately made himself active in the pursuit of bushrangers, and having not long before shot one of those marauders.

The witnesses for the prosecution were brought forward to prove, in addition to the evidence to the same effect which had already been elicited from those on the part of the Crown, that the gun was not primed at the time, and therefore not in a condition to do the injury which the prisoner was charged with having intended. One of these parties (Foster, from whose house the prisoner obtained the gun) swore positively that it was not primed. He stated that, shortly before, he had himself loaded the gun with powder and shot, for the purpose of shooting some fowls which injured a growing crop of young peas in his garden - that in attempting to discharge it, it would not go off, owing to the bad quality or damp state of the powder; that he put it by without any priming in the pan; that he had no powder in the house at the time the prisoner took

the gun with which he might have primed it; and that he had no opportunity of procuring any in the neighbourhood during the time between the commencement and the termination of the series of trnnsactions detailed against the prisoner. Mrs. Kelsey, the wife of the publican, also stated, that her husband had no powder in his house, and therefore the prisoner could not have obtained any there. Mr. Thomas Hyndes gave the prisoner an excellent character for sober, industrious, and peaceable conduct, during eighteen months in his service; that he was zealous in the protection of his master's property; and the witness was going on to describe the general lawless state of the neighbourhood., when he was stopped by Solicitor-General objecting to such evidence, which could only be received under the Insurrection Act in Ireland.

The learned Judge summed up the evidence with considerable minuteness and particularity. His Honor observed, that the case was one of considerable importance to the Public, in consequence of the line of defence which had been adopted, namely, that the charge against the prisoner was the result of a conspiracy formed in revenge, for having made himself active in the apprehension of a bushranger. It would be the duty, therefore, of the Jury, to weigh well the whole of the testimony in the case, which he would lay before them with such observations as might occur to him to be proper for their consideration, in making up their minds as to the guilt or innocence of the prisoner at the bar. With respect to the law of the case, the Jury would have to determine two questions, namely, first, was the gun primed at the time when the prisoner was said to have snapped it at the witness Coleman? and, secondly, if it was primed and had gone off, and death had ensued, would the offence have been committed under such circumstances as would have amounted to murder? because, if it would not, then the prisoner could not be convicted upon the present indictment. Upon the first point, also, they must be satisfied that the gun was primed, or they could not convict the prisoner; for, otherwise, the gun could not be considered, in law, as in a condition to inflict the injury which he was charged with meditating. This was entirely a question of evidence and belief for the Jury. With respect to the question, whether the offence, if completed, would have amounted to murder, he was bound to tell them that it would. Whenever an act of violence might be committed against a person of an individual, and death ensued from a wound inflicted in self-defence, the law, in tenderness to the passions and infirmities of human nature, mitigated the offence to that of manslaughter; but not so when time for deliberation had elapsed - when reason might be presumed to have resumed her throne. Now, in this case, what were the facts proved from the testimony of all the witnesses? There was no doubt that the prisoner had been assaulted at Kelsey's; but, then, he left the house, armed himself with a gun, walked about the neighbourhood with it, and was subsequently found, after no very little time had elapsed, in a situation which looked very like lying in wait for some one; for, after he snapped the gun at Coleman, it was in evidence, that he said - ``I did not intend it for you, but for Brown.'' But, if an individual, in lawfully intending to kill one person, should happen to kill another, he was equally guilty of murder as if he had completed his original design. His Honor was therefore bound to tell the Jury, that if death had ensued in the case, it would have amounted to one of murder; and the only point that remained for their consideration (if they believed the witnesses on the other facts) was - were they satisfied that the gun was primed, and in a condition to inflict the injury which the prisoner was charged with meditating? Upon this part of the case, they had the sole uncorroberated testimony of Coleman, who swore positively that the gun burnt priming - that he saw the flash and smoke. On the other hand, they had the evidence of Atkins, who was as near to the prisoner as Coleman, and who swore that there was no flash; Atkins's testimony was

supported by that of other witnesses, who stated that they were in a situation to see if there had been a flash, and that there was none. The constable and the other witnesses who examined the pan, could not undertake to say that powder had been recently burnt in it; and there was the testimony of the witnesses for the prisoner, who undertook to swear, from circumstances which they detailed, that the gun was not primed. The case, therefore, was one which the Jury had to determine solely upon the weight which they might attach to evidence, which certainly did present strong points of discrepancy.

The Jury retired for about ten minutes, and returned into Court with a verdict of Not Guilty, of which, the auditory seemed inclined to manifest their approbation by applause, but the attempts was very properly repressed by the Sheriff's Officer in attendance.

The Judge, in ordering the discharge of the prisoner, warned him against the use of such weapons as that which had, within a very brief space of time, twice placed his life in jeopardy. His Honor said, it was not his province to enquire the grounds upon which the Jury had formed their opinion, or to dispute the propriety of their verdict; he supposed that they did not credit the evidence of Coleman, respecting the gun having burnt priming, in opposition to the testimony of the other witnesses [the Foreman of the Jury bowed assent]; but it was to be hoped that the prisoner would take warning, and be careful not again to bring himself into such peril.

The prisoner was then allowed to depart the Court.

See also Australian, 12 February 1836. For the judge's notebook account of the trial, see Burton, Notes of Criminal Cases, vol. 23, State Records of New South Wales, 2/2424, p. 123, noting the prisoner's status at the time of trial as ``free by servitude''.

On 9 February 1836, McCarthy was found guilty of forgery: Australian, 12 February 1836.

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

SYDNEY HERALD, 15/02/1836

Supreme Court of New South Wales

Burton J., 11 February 1836

Mr. **GEORGE LOUIS POIGNAND** was indicted for assaulting **JOHN TAYLOR**r, with intent to kill, to maim, or to do some grievous bodily harm, at Sydney, on the 10th of January last.

The particulars of this case have already been fully before the public. Taylor, the prosecutor, was employed as a Sheriff's bailiff, at the time of the alleged assault, and had the prisoner in custody in his house, in Castlereagh-street, while Kingsmill, the principal Sheriff's officer remained outside. The prisoner, who is one of the Attorneys of the Supreme Court, and was therefore well known to the bailiff, refused to accompany him, but told him to return at a certain hour, and that he should be paid the amount of the writ; which he declined doing, and insisted on the prisoner's going along with him in custody. Prisoner refused to do so, and warned the prosecutor at his peril to use force, as the arrest was illegal, he having been previously arrested upon the same writ, and allowed to depart on his promise to pay the amount at a future day. The prisoner then went into another room and brought out a sword, with which he threatened to strike the bailiff if he approached; a struggle ensued, and the latter received a very slight wound on the head.

JAMES KINGSMILL, the Sheriff's officer, stated that during the time the prosecutor was in the house of the prisoner, he remained outside in the street; a delay

of some time took place, but at last he was alarmed by loud cries of murder from within, and forced open the door; he then saw the prisoner with a sword in his hand, and the prosecutor bleeding from a wound on the head which he said the prisoner had inflicted upon his attempting to take him.

Upon the part of the prisoner, it was contended by Mr. Foster, that, inasmuch as the second arrest was clearly illegal, and the prosecutor a trespasser, the prisoner was justified in freeing himself from unlawful custody.

His Honor said that the case was one for the Jury, upon the evidence. [*]

Several witnesses, some of them residents in his house, and others living in the adjoining houses, were then called, who declared most positively that there was no cry of murder on the occasion; and that the wound was inflicted accidentally in the struggle. A number of respectable persons also gave the prisoner the highest character for mild and peaceable manners and disposition.

The learned Judge summed up the evidence, and told the Jury that they must be satisfied, from all the circumstances of the case, that the prisoner really did inflict the wound with the sword, intending to kill or to do the prosecutor some grievous bodily harm, as charged against him in the information because if the wound was given in an attempt to escape from unlawful custody, he would not be convicted. The Jury found the prisoner Not Guilty.

See also Australian, 16 February 1836; Sydney Gazette, 13 February 1836. For the notebook record of the trial judge, see Burton, Notes of Criminal Cases, vol. 24, State Records of New South Wales, 2/2425, p. 42, noting his civil status as ``one of the Attys of the Court".

[*] Both the AUSTRALIAN and the SYDNEY GAZETTE reported that Burton J. overruled this objection. According to the Australian, the judge observed ``that no arrest was legal but that on the 18th, Kingsmill being then present, and his name being the only one in the warrant, the other two arrests even if they did take place, were imaginary."

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

SYDNEY HERALD, 15/02/1836
Supreme Court of New South Wales
Burton J., 12 February 1836

WILLIAM JAMES was indicted for the wilful murder of his wife, by strangulation, at Twelve Mile Hollow, on the Bathurst Road, on the 10th of November last.

The Solicitor-General conducted the prosecution Mr. Therry defended the prisoner.

As this case is to come on again for trial, we do not consider that it would be proper to publish any part of the evidence. The trial had occupied some considerable time, when one of the witnesses for the Crown made his appearance in the box in a state of intoxication. Mr. Justice Burton immediately directed that he should be taken to the General Hospital, there to undergo a course of purgation, by means of the stomach-pump or emetics; and, in the mean time, His Honor adjourned the Court for an hour. After waiting much beyond that time, the witness was again produced, and upon being put once more into the box, was asked by the learned Judge if he though himself sober enough to state what he knew; to which he replied that ``he hoped he was." Mr. Therry, the prisoner's Counsel, then came into Court, and the examination was resumed by the Solicitor-General. It had not, however, proceeded far, when it was made quite evident that the ``course of medicine," or whatever other ``course" the witness had undergone at the Hospital had not been sufficiently powerful to render

him a fitting witness in a case of murder. The learned Judge soon professed his utter inability to understand what the witness meant to convey to the Court; and the Jury, through their Foreman, told the Judge that they could not think of forming an opinion upon testimony given by a person in such a state.

His Honor said that the Court was placed in a situation of great embarrassment in the case, and suggested that the prisoner's Counsel should consent to the Jury being discharged, and the trial commence de novo on the following morning.

Mr. Therry replied that, in such a case, he would not become a party to the course of proceeding suggested by the Court. His Honor, he said must use his own discretion as to the course he would adopt.

The Solicitor General, after a pause, rose and said he would candidly admit that, in consequence of the absence of his principal witness - who he had no doubt, was kept out of the way - he did not expect a conviction in the case; and that he would not be in a worse situation even without the evidence of the witness in the box. He would, therefore, consent that the evidence he had given should be struck out of the case, and proceed with the examination of such other witnesses as he might able to produce.
The Court was willing to adopt that course, but

Mr. Therry contended for his right to cross-examine a witness who had not alone been tendered to the Court, but whose evidence had, in part, gone to the Jury.

His Honor said he would take care that it should form no part of the case for the Jury; it should be struck out altogether.

Mr. Therry replied that, whatever the evidence might be worth, it could not be erased from the minds of the Jury; and was proceeding to draw the attention of the Court to some facts which the witness had stated, as a ground upon which he claimed the right of cross-examining him, when he was interrupted by

The Solicitor-General, who objected to a speech to evidence, and put it to the learned gentleman whether he would proceed with the case, or leave it the Court to dispose of?

The learned Judge, after some consideration said, that as the prisoner's Counsel would not adopt the course proposed by the Counsel for the Crown, he would take upon himself to discharge the Jury from giving a verdict. He was of opinion that he possessed the power to do so; but if upon further enquiry it should be found that he had no such power, of course the prisoner would have the benefit of any advantage to which he might be entitled, owing to the course of proceeding which the Court would adopt. He felt the embarrassment of the situation in which he was placed, without any means at hand of looking into the question raised, and consulting with other Judges upon the point; but as he was quite satisfied that the ends of justice could not be attained by proceeding with the present case, he would assume the exercise of the power which he believed he possessed, under all the circumstances, by discharging the Jury from giving a verdict, and remanding the prisoner.

Mr. Therry again suggested to the Court, that the prisoner had been ``put upon his country,'' that the Jury were charged with him, and he was entitled to insist upon their verdict whatever it might be.

Mr. Justice Burton. - Mr. Therry, the matter is now in my hands. If I am wrong, of course your client will have the benefit of the error into which I may have fallen. I am of opinion that I possess the power to act as I mean to do: and, ``Gentlemen (addressing the Jury) I discharge you from giving a verdict in this case. Let the prisoner be remanded, and brought up again to-morrow morning.''

His Honor then directed the cause of all this scene of confusion and delay - to wit, the drunken witness - to be consigned to the watch-house or gaol till the following

morning, and then to be brought before the Court. [*] For the trial judge's notebook record of the trial, see Burton, Notes of Criminal Cases, vol. 24, State Records of New South Wales, 2/2425, p. 102.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 15/02/1836
Burton J., 13 February 1836
Saturday - Before Mr. Justice Burton.
WILLIAM JAMES was again put to the bar on an information, charging him with the wilful murder of his wife, at Twelve-mile Hollow.

Mr. Therry, Counsel for the prisoner, contended at considerable length, that the prisoner could not be again put upon his trial for the offence charged against him. He had already been placed in jeopardy; and, although the learned Judge had taken upon himself to discharge the Jury without giving a verdict in the case, he (Mr. T.) contended that His Honor had exercised a power which he did not possess; and, that the Jury having been once charged with the prisoner, he was entitled to their verdict one way or the other.

The Solicitor-General replied, and relied upon several authorities to show that the Court did possess the power of discharging a Jury from giving a verdict, in a case of necessity. The learned Counsel adduced the case of the sudden illness of a witness, which had been held as a sufficient reason to warrant the discharge of a Jury, without giving a verdict and argued, that any case of absolute necessity would fully justify the Court - having regard to the ends of justice - in discharging a Jury without giving a verdict, and putting the accused upon his trial again. The present was not one of those cases in which the prisoner might be said to have been put in jeopardy.

Mr. Justice Burton said, that when he discharged the Jury last night, he was satisfied that he had the power to do so, under the circumstances. He had since then, however, taken the opinion of His Honor the Chief Justice upon the point, and he was happy to say that he was fully borne out by that opinion, in the propriety and legality of the act. [The learned Judge read the opinion of the Chief Justice, which was to the effect, that in a case of necessity, and where the ends of justice would be frustrated by proceeding with the trial, owing to the sudden incapacity of a witness to give evidence, the Court might discharge the Jury from giving a verdict and put the prisoner upon his trial again]; the trial must, therefore, proceed.

Owing to the absence of a principal witness for the Crown, and other arrangements which had been made by the Law officers for to-day, the trial was not proceeded with, and the prisoner was remanded.

In the course of the morning the witness, whose intoxication yesterday had led to all the inconvenience which followed, was brought before the Court, and after a very severe reprimand, and serious remonstrance on the impropriety of his conduct, was sentence to a month's imprisonment, for the contempt of which he had been found guilty.
This led to commentary in the Australian, 19 February 1836; and Sydney Gazette, 18 February 1836. Justice Burton lamented that there were three or four public houses in the immediate precincts of the court.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 15/02/1836

Supreme Court of New South Wales
Forbes C.J., 10 February 1836
THE CONVICT SYSTEM.
Wednesday. - Before the Chief Justice, and a Military Jury.
JOHN HARE was indicted for assaulting **W.S. ELRINGTON**, Esq. with a stone, with intent to kill and murder, or to do some grievous bodily harm, at Bathurst, on the 26th December last.
In this case, it appeared that the prisoner was an assigned servant to Major Elrington, and having been found guilty by the Bench of Magistrates of having twice absconded from his service, was sentenced to receive one hundred lashes. On being conveyed to the place of punishment, the scourger was in the act of taking off his jacket, when the prisoner rushed upon him, threw him down, and then seized a large stone which he cast at the prosecutor, whose back was then turned, and struck him in the head. The violence of the blow brought Major Elrington to the ground and inflicted a deep wound on his head, but before he could rise, the prisoner repeated the blow with another stone, swearing he would have the Major's life, and was not secured without considerable difficulty. The prosecutor stated that he suffered severely from the wound on his head, and still felt the effect of the assault in a frequent sense of giddiness and nervousness.
The Jury found the prisoner guilty of an assault, with intent to do some grievous bodily harm. - Remanded. [*] See also Australian, 12 February 1836.
[*] Hare was sentenced to death: Sydney Herald, 25 February 1836; Australian, 23 February 1836; Sydney Gazette, 25 February 1836. He was hanged on 4 March 1836: Australian, 8 March 1836.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 23/02/1836
Forbes C.J., Dowling and Burton JJ, 19 February 1836
The King v. Jack Tongo Murrell, charged with the murder of another aboriginal named Definger, was placed at the bar of the Court. In this case a demurrer had been filed to the indictment by Mr. S. Stephen, who had been appointed by the Court to defend the prisoner. Mr. Stephen now arose to address the Court in support of the demurrer, first putting in an affidavit in support of it, sworn to by the Rev. Mr. Threlkeld, a Missionary to the aborigines at Lake Bathurst. The learned gentleman by his argument contended, that although Windsor, where the murder was committed, was within the territory of Great Britain, still it was not so occupied as to render the prisoner amendable for any offence committed there against any of his countrymen. It was laid down in 1st Blackstone, 102, and in fact in every other work upon the subject, that land obtained like the present, were not desart [sic] or uncultivated, or peopled from the mother country, they having originally a population of the own more numerous than those who have since arrived from the mother country. Neither could this territory be called a conquered country, as Great Britain never was at war with the natives; it was not a ceded country either; it, in fact, came within neither of these, but was a country which had a population having manners and customs of their own, and we had come to reside among them, therefore in point of strictness and analogy to our law, we were bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain were bound by the laws of their own country was, that they were protected by them; the natives were not protected by those laws, they were not admitted witnesses in Courts of Justice they could not claim any civil rights they

could not obtain recovery of, or compensation for, those lands which had been torn from them, and which they had held probably for centuries. It therefore followed they were not bound by laws which did not at the same time afford them protection. If it was held that they were subjects of Great Britain, then they would have a right to come into the Courts, and sue for any property they might possess, for assaults and cases of that kind. Again, providing the Court was to try this man, they would have to follow him with the shield of the law to prevent his being tried by his own tribe according to their laws. How could oaths be framed that would be binding on these men? It had been held in the cases of the men at Norfolk Island, who were civiliter mortuis, that ex necessitate rei, their evidence must be received, how much more in this case, they being free men. He considered the decision of the Court would be in favour of the plea, and the prisoner would be discharged.

The Attorney General replied. In this case the prisoner was charged with murder in a populous part of the King's territory; it was laid in the information to have been committed within the jurisdiction of the Court. The reply to this had been, that the prisoner was not amenable to the British laws, but his principle could not be admitted, the laws of Great Britain did not recognise any independent power to exist in a British territory, but what was recognised by law. This country was merely held by occupation, not by conquest, now was it ceded; and where lands were so taken possession of, the King was bound to protect by his kingly power all parties living in it, or who came to visit it; was it to be supposed that breaches of the peace, and murders, were to be committed within the jurisdiction of the Court, and yet that the Court should have no controlling power? The law would be bound to protect every person who came to this colony, and to it they would be amenable. He, the Attorney General, stood there to protect the whites from the blacks, and the blacks from the whites; the colour made no difference to him. If the man could not be tried, their Honors would be sitting there to say they had no jurisdiction over a case of murder committed within the jurisdiction of the Court.

Mr. Stephen shortly replied. No man, without he was a subject of his Majesty, could be tried by the laws of Great Britain; this man was not so, but had been long residing here before the country was taken possession of.

The Solicitor General wished to reply, but the Court decided that he was irregular. Judgment reserved until this morning. See also Australian, 23 February 1836.

Forbes C.J., Dowling and Burton JJ, in banco, 11 April 1836

Source: Supreme Court, Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, pp 210-216[4]

[210] Judgment of Mr. Justice Burton in the Case of Jack Congo Morral on a charge of Murder.

Inasmuch as the Court is[5] unanimous in overuling the plea which has been filed for the prisoner denying the jurisdiction of this Court over him for the offence stated upon the Record to have been committed by him - thereby deciding that the aboriginal natives of this Colony are amesnable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord the King, - I do not consider it necessary to state at large,[6] the reasons upon which I have founded my individual opinion. But[7] I think it right[8] to state briefly the grounds of my opinion which are these:-

[211] 1st[9] although it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet

the[10] various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a[11] form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.[12]
2ndly, That a tract of country before unappropriated by any one has been taken into actual possession by the King of England under the sanction of Parliament comprehended within the following limits as contained in a proclamation of His Excellency the Governor 24th August 1835, Government Gazette 9th Sept. following - viz, ``extending from the Northern Cape or Extremity of the [212] Coast called Cape York in latitude 10o 37' S. to the Southern Extremity of the said Territory of New South Wales or Wilson's Promontory in the latitude of 39o 12' S. and embracing all the country inland to the Westward as far as 129o East longitude reckoned from the meridian of Greenwich including all the Islands adjacent in the Pacific Ocean within the latitude aforesaid and including also Norfolk Island."-
3rdly, That the English nation has obtained and exercised for many years the rights of Domain and Empire over the country thus possessed and particularly it is designated by an Act of the Imperial Parliament, 9 Geo 4. c. 83. as His Majesty's Settlement and Colony of New South Wales; and Courts of Judicature have been established and the laws of England are declared to be those which shall be administered within it and a local legislature is given to it.
4thly, An offence is stated upon the Record to have been committed by the prisoner within this Colony, [213] a place where by the Common Law and by the Stat. 9 Geo. 4. c 83. the law of England is the law of the land, which if committed by him at Westminster in England, would render him amenable to the Jurisdiction of His Majesty's Court of Kings Bench;- and by 9 Geo 4. c 83 it is enacted that this Court "shall have cognizance of all pleas civil, criminal, or mixed, in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and all and every the Islands and territories which nor are, or hereafter may be subject to or dependent upon the Government thereof as His Majesty's Courts of Kings Bench, Common Pleas, and Exchequer at Westminster or either of them lawfully have or hath in England," and that this Court shall be at all times a Court of Oyer and Terminer and gaol delivery in and for New South Wales and the Dependencies thereof" and that `` the Judges shall have and exercise such and the like Jurisdiction and authority in New South Wales and the dependencies thereof as the Judges of the Courts of Kings Bench, Common Pleas, and [214] Exchequer in England or any of them lawfully have & exercise, and as shall be necessary for carrying in effect the several Jurisdictions, powers and authorities committed to it."
5thly, This Court has repeatedly tried and even executed aboriginal natives of this Colony, for offences committed by them upon subjects of the King, ever since the opening of the Court in May 1824; and there is no distinction in law in respect to the protection due to his person between a subject living in this Colony under the Kings Peace and an alien living therein under the Kings Peace.
The authorities for these positions are Vattel's Treatise on the law of nations B1. ch. 18 sec 203. 204. 205. Ib. Bl. C7. §. 81. ch 18. sec 209. ch 19. sec 213. B2. ch 7 sec 94. Ib. ch 8. sec 100 & 101. 103 104. 108:-
Blackstone's Commentaries 1 Vol. page 254 sec 4. Christian Edition and page 370.
Hawk. P.C. B.l. ch. 2. sec 5.-
Fosters Crown Law Disc. 1. p.188-
Stat. 28 Edw. 3. c 13. sec 2

Lord Coke in Calvin's Case 4 Coke 10 & 11 and the cases of Shirly 3 & 4 W. & M. and Stepheno Farrara de Gamo and Emanuel Lewis Tinoca 36 Eliz. therein mentioned.-

[215]Respecting those difficulties and inconveniences and hardships which have been referred to as likely to arise from this decision, I will briefly say that I think they have been much over-rated. Some which have been stated, as for example the probability of multiplied business to Magistrates and others concerned in the administration of Justice, I look upon as little likely to occur, but if occurring certain to produce the best results as to the[13], Natives themselves: difficulties, it is the business of the local legislature to remove and hardships I doubt not that His Majesty, or those vested with the exercise of His Royal Prerogative of Mercy, will be ready in every case which may justly call it forth, to extend it to people so circumstanced as they.- But I am of opinion that the greatest possible inconvenience and scandal to this community would be consequent if it were to be holden by this Court that it has no Jurisdiction in such a case as the present - to be holden in fact that crimes of murder [216] and others of almost equal enormity may be committed by those people in our Streets without restraint[14] so they be committed only upon one another![15] & that our laws are no sanctuary to them.

4] For an edited law report of this judgment, see (1998) 3 Australian Indigenous Law Reporter 412 (and introduction at 410). This is one of the few cases of the Forbes period to be reported in the nineteenth century: see 1 Legge 72-73, relying on the Sydney Gazette of 23 February and 12 April 1836. The account given here is a fuller version than that in the Sydney Gazette and in Legge's report, and includes important extra details. The Legge version of Burton's judgment omits that Burton found that Aborigines were ``entitled to the possession of those rights which as such are valuable to them,'' and also leaves out that he found that the natives had not attained such numbers and civilisation as to be recognised as sovereign states governed by their own laws. The second point of the judgment was also misreported in the Gazette and thus Legge: it omitted the preamble about the land being unappropriated by anyone at the time it was taken into actual possession of the king. That is, Legge failed to report the important points that Burton made some recognition of Aboriginal rights, and that this is apparently the first Australian case based squarely on the notion of terra nullius. There is even further detail in Burton's Notes for Judgment, which is in Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161. The notes include the following passage giving Burton's view of the claim that Aborigines had their own laws: he thought that their ``practices are only such as are consistent with a state of the grossest darkness & irrational superstition and although in some cases being a show of justice - are founded entirely upon principles particularly in their mode of vindication for personal wrongs upon the wildest most indiscriminatory notions of revenge'' (p. 239). Their so-called laws were merely ``lewd practices'' (p. 240). The notes were not delivered in court (only the judgment published here was), yet they give telling evidence as to his reasoning. Burton's notes are particularly unconvincing on native title questions, as his conclusion that there was no recognisable native interest in land was inconsistent with Vattel. He made more corrections to his manuscript on that point than on any other. Chief Justice Forbes was under immense pressure at the time this judgment was delivered, which may partly explain his drastic change of position since R. v. Ballard, 1829 and even since his initial view of the legal position of Murrell, expressed on 6 February 1836. He had been ill for some time, and was unable to sit from 26 March until 11 April 1836: Australian, 29 March 1836, 1 and 12 April 1836, though he did write his Opinion on Juries, 1836 at this time. He was also under strong attack from the conservative Sydney Herald. The attack had been in place for some time (see notes to Burton's Speech to Jury, 1835), but the Herald appeared to accelerate it as his departure from the colony approached. On 31 March 1836, the Sydney Herald reviewed his career on issues as old as the newspaper tax (see Newspaper Acts Opinion, 1827). As Forbes was about to leave the colony and was ill, it was impossible for him to respond. Forbes had the very good wishes of substantial parts of the community: see the advertisement in the Monitor, republished in the Sydney Herald, 11 April 1836. The Herald followed that with a satirical address supposedly by convicts and emancipists and a

fanciful reply by Forbes. Its main complaint about him was his liberality: in its eyes, he unduly favoured emancipists. The Herald's attack continued in its editorial of 14 April. The Sydney Herald was very candid in an editorial on 28 April 1836: ``We hope he has taken his departure from these shores forever as the Chief Justice and Legislator combined in one person.'' This constitutional point was only one of the reasons it was so hostile to him: the editorial claimed that he was cheered by road-gangs, gaol-gangs, and ironed-gangs of thieves ``that their irons may be struck off through the instrumentality of their champion''. The editorial went on to mention a ``host of transported Jews''. See also Sydney Herald, 9 May 1836 (editorial). (The Australian, which generally supported Forbes, responded to some of these attacks: 3 May 1836, and see 10 May 1836.) One of the Herald's main complaints about Forbes was his role in the enactment of what it called the Convict Jury Law, under which emancipists could sit as jurors: see for example, Sydney Herald, 30 May 1836 (editorial), and see Opinion on Juries, 1836. The same attacks were made by James Mudie in his Felonry of New South Wales (1837), which alleged that Forbes was sympathetic to convicts, a republican and a populist: see Forbes' reply in his letter to Bourke, 1 May 1837, J.M. Bennett (ed.), Some Papers of Sir Francis Forbes: First Chief Justice in Australia, Parliament of New South Wales, Sydney, 1998, p. 258. The Herald's attacks continued well after he left the colony: for examples, see its editorials on Bourke and Forbes on 5 and 16 January 1837.The bar delivered a warm address to Forbes C.J. on his departure: Sydney Herald, 14 April 1836; Australian, 12 April 1836 (followed by Forbes' reply in which he said he hoped to return to office). See also Sydney Gazette, 14 and 16 April 1836; Australian, 15 April 1836 (address by attorneys); Sydney Gazette, 16 April 1836; Australian, 15 April 1836 (subscription for a portrait of Forbes, by trustees of the Sydney College). There was also a general subscription for a service of plate: Australian, 22 April 1836. For Forbes' response to these good wishes, see his letter to Bourke, apparently dated 11 April 1836, in Bennett (ed.), Some Papers of Sir Francis Forbes, p. 242.The Australian, 12 April 1836, gave the best account of Forbes' last appearance on the bench: after the judges delivered their decision in this case and in R. v. Maloney, 1836, Burton J. expressed his regret at his departure and his admiration of Forbes' character. Justice Dowling ``was so overcome by his feelings, that we were unable to catch his observations.'' The Australian concluded with a statement of its own admiration of Forbes.For further evidence of the support Forbes C.J. had in the community, see Wentworth's address to the public meeting held to mark his departure, and the account of the warm reception he had there: Sydney Herald, 18 April 1836; and see Australian, 19 April 1836. An item by ``X.Y.Z.'' in the Sydney Herald, 2 May 1836, attacked the nature of the crowd at the meeting, claiming that it consisted of ``a mere handfull of the very rabble of Sydney''. See also letter to Australian, 12 April 1836.Forbes boarded the Brothers on 16 April 1836, following a public meeting at the race course to mark his departure: Sydney Gazette, 16 and 19 April 1836. The Brothers did not leave immediately, but stayed ``in the stream'' for a few days: Sydney Gazette, 19 April 1836; and see Australian, 19 April 1836.Forbes returned to England in an attempt to restore his health, but though he later returned to Sydney, he did not return to the bench. He retired from office on 1 July 1837, and died in New South Wales in November 1841, aged only 58. For these and other details on his life after retirement, see Forbes Papers, Mitchell Library, A f 10 (Forbes Family); and Bennett (ed.), Some Papers of Sir Francis Forbes, pp 264-268. For his retirement letter (dated 12 June 1837), see A 1275 (reel CY 1055) pp 551- 559. He retired because of ill health, describing his illness as a nervous disability lately ``accompanied with a paralytic affection of my left arm''. He said his illness had been brought on by the arduous duties of his offices as Chief Justice in Newfoundland and in New South Wales. (This letter is also printed in Bennett (ed.), Some Papers of Sir Francis Forbes, p. 257, and see pp 262 and 263 on his affliction, the latter referring to his sciatica.)On his widow's endeavours to obtain a pension, see Forbes Papers, Mitchell Library, A 1267-21 (reel CY 1550), pp 3149-3152; A 1267-8 (reel CY 696), pp 1884-1885. The judges (Forbes C.J., Dowling and Burton JJ) had applied in 1836 for retirement allowances for colonial judges: A 1267-14 (reel CY 811), pp 1556-1561. On Francis Forbes' financial position, see also Lady Forbes to Macarthur, 4 November 1852, A 2923 (reel CY 955), pp 124-125.With the supposedly temporary departure of Forbes, Dowling was appointed Acting Chief Justice, and Kinchela as Acting Puisne Judge, with Plunkett as acting Attorney General: see R. v. Wales, 1836. Justice Burton was keen to be made Chief Justice, but was thwarted when the temporary appointment of Dowling J. as Acting Chief Justice was eventually made permanent. For the response of Burton J. to this, see his letter to his brother Robert date 27 December 1837, in his correspondence. Burton thought that he had an enemy in the Colonial

Office. In Forbes' view, Dowling had the better claim to the office: Forbes to Bourke, 1 May 1837, Bennett (ed.), Some Papers of Sir Francis Forbes, p. 258. For Glenelg's decision to appoint Dowling as Acting Chief Justice, see Glenelg to Bourke, 29 March 1836, Historical Records of Australia, Series 1, Vol. 18, pp 364f, and for Bourke's despatches announcing Forbes' departure for England, see pp 368, 376-378. On Burton's ambitions, see also Bourke to Glenelg, 3 October 1835, Historical Records of Australia, Series 1, Vol. 18, pp 110-112, and see pp 113f, 199.On the retirement of Forbes and the subsequent changes to the Supreme Court, see C.H. Currey, Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales, Angus and Robertson, Sydney, 1968, chaps 51-54. On his earlier application for leave in 1834, see Historical Records of Australia, Series 1, Vol. 17, p 370, 458
.[5] Inserted but crossed out: now
[6] as I should otherwise have found it my duty to do had I remained alone in that view, [7] as I know that considerable doubts, from whatever cause arising, have been formerly entertained upon this subject, although I have entertained none,[8] due to the public [9] Because[10] y[11] settled [12] and as such entitled to retain them even after conquest itself until changed by the conqueror.-[13] m[14] remark[15] to hold indece

SYDNEY GAZETTE, 12/04/1836
Forbes C.J., Dowling and Burton JJ, in banco, 11 April 1836
In giving judgment in this case the Chief Justice remarked that a demurrer had been filed, denying the jurisdiction of the Court, which must be overruled, as the Court had jurisdiction in the case. On a former occasion of this kind,[17] His Majesty's Attorney General had put it to the Court whether he should bring such a case before the Court, and whether it was the description of crime which would be recognised by the laws of England; the Judges had then stated that it was for him to use his sound discretion in the case, but on that occasion no discussion took place as to the authority of the Court - no opinion was given as to their jurisdiction. Judge Burton had put together an opinion in which the whole Bench coincided; he (Judge B.) would read it to them.
His Honor remarked - 1st. That although it might be granted that on the first taking possession of the Colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty.
2nd. The Government proclamation laid down the boundary of the Colony, within which the offence of which prisoner was charged had been committed; the boundaries were Cape York in 10° 37' South, Wilson's Promontory in 39° 12' South, including all the land to the eastward and islands adjacent.
3rd. The British Government had entered and exercised rights over this country for a long period. - 9 Geo. 4 c. 83.
4th. Offences committed in the Colony against a party were liable to punishment as a protection to the civil rights of that party. If a similar offence had been committed at home, he would have been liable to the Court of King's Bench.
5th. If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction in the case. Demurrer allowed.
[*] This report is the basis of the judgments reported at 1 Legge 72. We have decided to reproduce all newspaper accounts of this judgment.

AUSTRALIAN, 12/04/1836
Forbes C.J., Dowling and Burton JJ, in banco, 11 April 1836

April 11. - Yesterday their Honors took their seats on the Bench, and the native Jack Congo Murrels [sic] was put to the Bar. The Chief Justice stated that the, Court were unanimously of opinion that the plea put in to the information in this case, must be over-ruled, and requested Judge Burton to read the grounds upon which the Judges had formed their opinion.

His Honor Mr. Burton then read the judgment of the Court, the main purport of which was, that the Act of Parliament having given them jurisdiction over all offences against British Law committed within their limits, they could not within those limits know any distinction between Natives and Europeans,

(As the decision is interesting and involves some curious points, we shall endeavour to procure and publish it entire, in a future number. [*] The result of the judgment is, that the Native will have to take his trial for the murder of another Native, according to our Law, which was a mere act of justice according to the Law he was born and lives under.)

[*] It is most unfortunate that the Australian did not do this, leaving only the truncated version in the Sydney Herald to be published.

SYDNEY HERALD, 18/04/1836

Forbes C.J., Dowling and Burton JJ, in banco, 11 April 1836

Monday. - Rex v. Jack Congo Murrell. - This was an information preferred by the Attorney-General against the prisoner, an Aboriginal Native of New South Wales, for the wilful murder of one of his own tribe, in the interior of the Colony. A plea to the jurisdiction of the Court had been put in on a former day, in behalf of the prisoner, which set forth, among other matters that he, not being a subject of the King of England, was not amenable to our laws; and that - verdict of acquittal would not relieve him from the consequences of the act charged against him, according to the laws and customs of his own people in such cases. The Chief Justice, who presided on the occasion, admitted the ingenuity, and, in some respects, the force of the plea; but suggested that the case might be tried upon the issue, reserving the objections raised for consideration in another place, and under a different form of proceeding. This being objected to by the prisoner's counsel, who expressed a wish to take the opinion of the full Court upon the subject, the case stood over, and judgment was delivered this day by His Honor Mr. Justice Burton. The learned Judge read a very elaborate review of all the bearings of the case - the principles which it involved - and the consequences which might ensue if it were to be held that the Aboriginal Natives might murder each other uncontrolled by the English law; and concluded by expressing an opinion (in which the other Judges entirely concurred) that the Act of Parliament having given the Supreme Court jurisdiction over all offences against British law, within certain prescribed limits, they could, within those limits, recognise no distinction between Natives and Europeans.

The plea was, consequently, set aside, and the prisoner will have to take his trial for murder.

SYDNEY HERALD, 05/05/1836

JACK CONGO MURREL - THE BLACK NATIVE.

The determination to try this man for his life at the present sittings of the Supreme Court, has occasioned some surprise. He is to be tried for the murder of another

Native according to our law, though the Australian of the 12th instant states, it was a mere act of justice according to the laws he was born and lives under. But be the precise nature of his alledged [sic] offence what it may, his course of life and conduct could not have been regulated by any consciousness of being answerable to our laws; can it, therefore, be just to subject him to be tried by them?

The chief attempt at argument to support this decision, is that the act was committed in a territory possessed by the English. But how was the possession of this territory obtained by them? The act, too, was committed on his own fellow-countryman.

Besides, how can he have a fair trial? in what manner will his witnesses (most likely black Natives like himself) be obtained? or if obtained, how understood? and without their presence and explanations what correct conclusion can be arrived at respecting circumstances, which it is presumed are peculiar to their people? Again, what sort of trial by jury will it be? will black Natives be allowed to sit on the jury, and if they are, would they be likely to avail themselves of the privilege? or, would they not rather run away in affright; or, if here, how could they understand the proceedings? and if tried only by Englishmen how can he be said to be tried by a jury which means his country per patriam or his peers? Again, how will he be made to understand his right of challenge, and if he be made to comprehend it, how will he exercise it? The law of England renders it necessary that the Sheriff or returning officer be totally indifferent, and that where an alien is indicted, the jury should be de medietate, or half foreigners (except in treasons) besides other indispensable requisites, and therefore if other and higher grounds fail him, may he not challenge till this minor point be established of one-half foreigners. In addition to such challenges, for cause, and which may be without stint, in criminal cases, at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors without any reason being assigned.

Another argument which has been put forward in support of this prosecution is the following, viz.- ``Although it was granted, that on first taking possession of the Colony, the Natives were recognized as free and independent, yet the various tribes were found not to occupy that position in the scale of nations as to strength or government which would entitle to sovereignty." What can this mean, unlest it means that might may overcome right? Nor can the argument be admitted on principle, being one of degree and not of kind. It is a mere assumption of the question to say that they do not occupy that position in thh [sic] scale of nations as to strength and government which entitles them to sovereignty - it is not explained why this want of position as to strength and government should incapacitate them from making and putting into execution laws for the regulation of themselves; nor is it attempted to be shown what modivum of strength or government in a people or a tribe should entitle them to such a privilege. It is presumed that the reason why this is not attempted to be shown is because it could not; and because every free and independent body of people, be they what they may, have a right to make laws for the government of themselves. If the black Natives were recognized as free and independent on taking possession of the Colony, as is avowed by those who have determined on this prosecution, why are they not so now? Have not the various tribes their manners and customs? and can their peculiar nature, whether good or bad, justify the trial by foreigners of an act committed by one of their fellow countrymen, and more especially as the life of the person tried will be perilled.

The ``want of position" which has been put so prominently forward, arises doubtless from the unintellectual character of this unlettered people; if such then be their ignorance, how can you expect them to obey the laws of a foreign people, laws which

you have not been able to teach them, and yet for disobedience to which you are about to put one of those poor benighted creatures to death? Blackstone says, ``law is a resolution of he Legislator," and ``it is requisite that this resolution be notified to the people who are to obey it;" adding whatever way is made use of it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who, (according to Dio Cassins) wrote his laws in a very small character, and hung them upon high pillars the more effectually to ensnare the people." Now our laws must be almost invisible to the unenlightened Natives, and certainly far beyond their reach; and yet here is a poor wretch taken by surprise and made answerable to an authority of which he was not aware. The operation of such a law upon him will have almost the cruelty and injustice of an ex-post facto law.

Suppose a black nation were to invade England and they were to put to death one of us for an act done to one of our fellow-countrymen, which would not have been capital with us, should we not think it barbarous? What then shall we call this act of ours - we who are an enlightened people, upon a poor benighted black whose country we have invaded? Is it not a violation of the law of nations? For it is not demanding satisfaction of a foreign people for a wrong done to one of our own nation but usurping the power of judging in an affair of their own - judging, too, on a law which will take away life.

To say that forbearance from interference in such cases would be affording sanctuary, which has been advanced by the supporters of this measure, it is absurd - how can that be sanctuary which would give up a man to be dealt with by the laws or customs of his own people, instead of giving him refuge from them?

It is anxiously hoped that still further consideration may be given to this case in sufficient time to prevent what may be termed a legal murder, being committed upon a poor helpless and unenlightened creature, whose chief crime seems to have been ignorance. - From a Correspondent.

SYDNEY HERALD, 09/05/1836
Supreme Court of New South Wales
Dowling A.C.J., 6 May 1836
Friday, May 6 - Before the Chief Justice and a Civil Jury.

WILLIAM KITCHEN was indicted for the wilful murder of **ANN KITCHEN** (his wife) at Sydney, on the 23rd of February last.

It appeared in this case (a full report of which was published some time back in the report of a Coroner's Inquest held on the body of the unfortunate deceased) that the prisoner had dragged the deceased by the hair of the head along the street, dreadfully beat her, kicked, and dashed her on the grounds, a distance through the street, until he arrived with her at his own house in Harrington-street, when he thew her into the house on the flor repeated is kicks, and as a completion of his brutality, threw a bucket of water on her, of which she almost immediately expired. The case was of so clear and dreadful a nature that the prisoner did not attempt a defence of his conduct, and the Jury retired a few minutes and returned a Verdict of Guilty. The Crown Officer prayed the judgment of the Court on the prisoner, and His Honor ordering proclamation to be made, addressed the prisoner as follows:- ``The awful termination of this day's enquiry you must have long been prepared for; if you have not it is high time now to make the best use of the few hours which remain to you on this side of the grave, that by prayer and contrition you may obtain the forgiveness of your Maker. What man, looking at the evidence on this trial, can doubt but that your heart

was bent on the destruction of the unhappy woman, your wife, who, you were bound by every tie to protect and cherish, instead of, as you now stand before your country convicted of dipping your hands in her blood. I entreat of you when you return to the dismal cell to which you will be consigned, to atone to your God for the dreadful crime you have committed, for there is no mercy for you on this side of the grave."
His Honor then passed the sentence of death on the prisoner, to be carried into effect on Monday, and his body to be given to the surgeons for dissection.
See also Sydney Gazette, 7 May 1836. * Kitchen was hanged: Australian, 13 May 1836.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 10/05/1836
Supreme Court of New South Wales
Burton J., 9 May 1836
Before Mr. Justice Burton and a Military Jury.
JOSEPH FREE stood indicted for the wilful murder of **EDWARD BROWN** by striking him with a tomahawk on the 9th November last at Gingle creek.
Mr. Therry in stating the case to the jury said - It was a case which would would demand a considerable degree of their attention. But in order that they might the better understand the nature of the evidence which would be laid before them, he would give a brief outline of the affair, which was one of the most apalling nature. Prisoner was at the time employed as overseer to Mr. McIntyre, and about the time the fatal deed was perpetrated, a charge of cattle stealing was preferred against him, and he was to have appeared before the bench of magistrates on the Wednesday, two days after the alleged murder. In that investigation two assigned servants to Mr. McIntyre were to give evidence against the prisoner. One was the deceased, the other **TIMOTHY KILFAIL**. Prisoner expecting the police would pursuit of him absented himself on the previous Friday, from the station; on the Saturday the policeman came, and not finding the prisoner, he left he summons for deceased and Kilfail with the latter, requesting him not to allow prisoner if he should return to go near the store. Prisoner did not return to the station until the Monday, the day on which the deed was done. Meeting Kilfail he asked him if he was going to give evidence against him the latter replied that having received a summons, he meant to go and tell the whole truth; he added that Brown (the deceased) was also summoned. Oh! said prisoner, Brown is out of the way, or out of the world, and if he could make it all right with him he should be all right. Now this was a very remarkable expression, for Free to make; he then left Kilfail, and proceeded towards a hut, where another of Mr. McIntyre's, servants named Davis was, and stopped there a short time. On leaving the hut, he took with him a pair of blankets, some clothes and a tomahawk. Davis accompanied him a short distance, when they were about to separate, prisoner said it was likely he would not see him again. Davis was struck at this remark, as well as with the prisoner taking with him the tomahawk. On the same morning Kilfail had asked permission of prisoner to go some little distance for some clothes, prisoner refused, but desired that he would meet him by the mountains on Tuesday night. Kilfail being struck by the remark made by prisoner as to Brown being out of the way, or out of the world, mentioned the circumstance to some other of his fellow servants, who were equally surprised at the observation, and it was determined to make some enquiry into the apparent mysterious matter. In consequence Kilfail went down to the hut where Brown resided, and ascertained that he had slept at home on the previous night, and as

usual had gone out in the morning with his flock of sheep, he (Kilfail) proceeded towards that direction; after having gone some distance, he saw the prisoner hacking as he thought a piece of wood; on approaching more closely he perceived it was the body of Brown that prisoner was mangling. When prisoner saw him, he moved towards him, but such was the fright of Kilfail, that he started off upwards of five miles, until he came to another station; he fainted through exhaustion, when he got to the door; but as soon as he recovered, he related the particulars of the murder he had witnessed.

It appeared there was a high range about 400 yards in height close to where the murder was committed and it would seem to have suggested itself to prisoner, as a fiting place to deposit the body. But finding it was too heavy for one person to carry up, he divided it into two parts, one he wrapped in a blanket, and the other in the trowsers, near to the spot where the body was discovered; the tomahawk and a spade was found. This really was a short outline of the case, and they would perceive a great deal rested npon circumstances, he would then proceed to call the witnesses from whom they would learn the particulars which he had briefly given.

The witnesses called fully established the above facts. The body, when found as described by Mr. Bingle, presented a most appalling spectacle, being completely divided by the small of the back. The front part of the skull was completely stove in as if from a blow with the back part of a tomahawk; the skull behind was almost cut off. There was also a deep gash on the cheek.

The prisoner cross-examined the various witnesses at great length, but elicited nothing favourable to him.

In defence he made a very long rambling address; the witnesses he called proved nothing essential. Mr. Justice Burton went carefully over the whole evidence. The Jury, after having retired two or three minutes, brought in a verdict of Guilty.

Mr. Therry having prayed judgment, proclamation for silence having been made, Mr. Justice Burton proceeded, in a most solemn and impressive manner, to pass the sentence of death upon the prisoner, and ordered him for execution on Wednesday morning, the body afterwards to be given to the surgeons for dissection.[*]

See also Sydney Herald, 12 May 1836; Australian, 13 May 1836. [*] He was hanged: Australian, 13 May 1836. 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 Lnebaugh, ``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, 12/05/1836
Supreme Court of New South Wales
Burton J., 6 May 1836
Friday, May 6. - Before Mr. Justice Burton and a Military Jury.

RONALD MACDONALD was indicted for the wilful murder of **ALEXANDER MACDONALD**, at Bathurst, on the 18th January last.

It appeared on the evidence of **PATRICK CONNELL**, a servant to **GEORGE COX**, Esq., that he was travelling from the Nepean, and stopped at the Macdonalds' house to take refreshment; the deceased and the prisoner, although of the same name were not relations, and both lived in the same house; witness, who had spirits with him, gave the inmates of the house some liquor, and they all had dinner together; after dinner the deceased got on his horse and went out to gather some cattle into the stock-yard, and the prisoner followed him; and in the course of a few minutes, witness hearing a noise in the yard, went out, and saw the deceased lying dead; blood was flowing freely from his head, which had formed a pool close to the body, at which two dogs were lapping; witness returned to the house, and accused the prisoner - who had returned there before the witness - of the murder of the deceased, when the prisoner said - ``devil's cure to him, he got no more than he deserved, let him lie there and be damned;'' witness, accompanied by another man, went to the stock-yard and brought the deceased to the house and laid him on a bed; the prisoner then asked witness's wife to wash the deceased (who was then alive), which she did; witness saw two sticks lying in the stock-yard, but could not identify the two produced as the same; on the following morning, prisoner said that he knew it would happen some time or other, as they had had a quarrel for five years, and that he knew he must suffer for it; prisoner told witness that he had left the deceased once, and he wished he had remained away from him; but, by some fatality he had returned and lived with the deceased; on the following morning, when witness got up, he saw the prisoner walking backwards and forwards before the door; witness asked the prisoner how his mate (meaning the deceased) was, to which prisoner replied, ``he is right enough;'' but on witness going in he found the deceased dead, and immediately acquainted the prisoner therewith, who answered - ``Yes, and I am dead too;'' after the deed, a man named Fitzpatrick called at the house and offered to purchase a horse belonging to the prisoner, but he observed that he would not sell it, as, now, money was no use to him. On his cross-examination, the witness stated the prisoner had told him that a quarrel had occurred about branding a beast, when prisoner had told the deceased that he (the prisoner) lived on the square, but that the deceased lived on the cross, and that the prisoner would not be concerned with him.

Several witnesses were called, who deposed to a quarrel having originated between the prisoner and the deceased, and that the deceased had struck the prisoner with a roping stick, when the prisoner struck the deceased in return with another stick, and repeated his blows on the head when deceased was on the ground.

JOHN KING, a material witness, swore that he arrived at Macdonald's farm on the day after the murder, and saw the deceased lying on a bed with two or three cuts on the forehead and one on the side of the head; prisoner told witness that the deceased had struck him with a roping pole, and that he had returned the blow with a stick which he had in his hand, and that they had struck one another indiscriminately until the deceased fell.

Mr. **LISCOMBE**, Coroner for Bathurst, stated that he got the account of the death of the deceased some days after the reported murder; that he tried to obtain the services of a medical man to proceed to the place where the murder was committed, but could not get one to go thither on account of the smallness of the fee, £2, which no medical gentlemen would take, as the distance was 70 odd miles from Bathurst; witness proceeded to the station and held an Inquest on the body; and had to raise the scalp from the head himself, to arrive at any satisfactory conclusion as to the cause of deceased's death; his examination of the deceased was no way satisfactory, as witness could not perceive any fracture on the skull, and supposed that the deceased's death

had been occasioned by extravasated blood pressing on the brain from the blows; this, however, was merely a supposition as he could only have a private and not a professional opinion.

His Honor observed on the want of foresight in the Coroner, or as it afterwards appeared, the absence of power in the Coroner in getting surgical attendance in such cases; £2, or £3, or any other sum was insignificant when the ends of justice were in question; £30 ought to be given, if required, sooner than injustice should be done.

This was the case for the prosecution, and the prisoner made no defence, but called witnesses.

Mr. **CHARLES CAMPBELL** knew the prisoner for fourteen years, and considered him to be a very quiet, sober, industrious, and honest man; witness had also known the deceased, who was a very passionate, intemperate man.

His Honor summed up at length, and the Jury retired for some time and returned into Court; acquitted the prisoner of the capital charge, and found a verdict of manslaughter. 7 years transportation. See also Australian, 13 May 1836; Sydney Gazette, 10 May 1836.

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

SYDNEY HERALD, 16/05/1836

Dowling A.C.J., 13 May 1836

Friday, May 13 - Before His Honor Chief Justice Dowling and a Civil Jury.

Jack Congo Murrell, and Bummaree, were severally indicted for the murders of other two Aboriginal Natives, at Windsor, on the 21st December last.

When arraigned and called on to plead, the prisoners, through their interpreter (the Rev. Mr. Threlkeld), stated that they had assaulted the deceased men in consequence of injuries they had received from them, which was entered by the Court as a plea of ``Not Guilty;'' and when asked by what Jury they would be tried, they required a Jury of Blackfellows. His Honor stated that they could not have such a Jury; and after some explanation by the interpreter, they chose a Civil Jury.

When the Jury was sworn, it was announced that Mr. Sydney Stephen, who had been assigned to the prisoners, was ill in bed and could not attend, in consequence of which, His Honor requested Mr. Windeyer to act as their Counsel at a short notice, and that Gentleman stated he would do his best for them.

Jack Congo Murrell was then put on his trial for the murder of Pat Carey, at Windsor, on the 21st December last.

Mr. Therry opened the case, and in the course of his address remarked, that although the Crown Officers would wish that the prisoners should have the benefit of Counsel, yet when it was considered that the Judge was Counsel for the prisoner, he thought that in this case the prisoner's friends and advisers would be perfectly satisfied.

His Honor said that Mr. Therry's assertion that the Judge was Counsel for the prisoner, was a most erroneous supposition, which he believed was too generally conceived; the Judge's utmost duty was to see justice properly administered; he held the scale of justice in his hands, and no more.

The case for the prosecution being closed, Mr. Windeyer said the prisoner had nothing to say and had no witnesses to call, as the only witnesses they could have called were Blacks like themselves, who could not be sworn, as they did not believe in a future state.

His Honor said that the point had never been decided, because it had never been mooted; he would not say whether they could be admitted as evidence or not until the

question came before him. If the prisoners had any witnesses they might try the question.
Mr. Windeyer then proposed to call a native named McGill, who was in Court, to speak as to the customs of the Blacks; but His Honor said he could not admit evidence of the customs, which had been solemnly argued and decided by the Court as having no influence on the case. If Mr. Windeyer had any witnesses as to fact he might bring them forward.
Mr. Windeyer said he had not; but contended there was no case for the Jury.
Mr. Therry replied; and His Honor said he should certainly let the case go to the Jury on the evidence.
His Honor then summed up. This was a most important case, being the first of the sort ever brought before the Supreme Court of New South Wales, and which would be a precedent for future proceedings in like cases; until recently it had been the general opinion of the Public and of one or two of the Judges, that the Aboriginal Blacks were not amenable to British law, excepting when the aggression was made on a white man; but the case had lately come under the consideration of the Judges, who had decided that by the Act of Parliament, in strict terms, the Court had jurisdiction of them, and they were amenable to British law; and His Honor stated, that the Jury were legally in charge of the prisoner. If the prisoner, however, was amenable to British law, he was equally entitled to the protection of the law, and to all the advantages that the law gave to other subjects; and although it had been stated in evidence that the Blacks were generally considered as beasts of the forest, he, in presence of the Almighty God declared, that he looked on them as human beings, having souls to be saved, and under the same divine protection as Europeans. With respect to their admission as witnesses, the law which required them to answer for offences, allowed them to defend themselves in the best way they could; and if witnesses of their own nation could not be put on their oaths, yet evidence might be obtained from them in the best manner possible. His Honor then read his notes of the evidence, and the Jury retired a few minutes, and returned a verdict of Not Guilty.
Mr. Therry said he did not suppose the Attorney-General would proceed against the other Black, as the cases were similar, and both depended on the same evidence. The prisoners were discharged.
See also the almost identical report in the Australian, 17 May 1836. The judge's notebook account of the trial is at Dowling, Proceedings of the Supreme Court, Vol. 122(2), pp 125-142, State Records of New South Wales, 2/3306.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 17/05/1836
Supreme Court of New South Wales
Dowling A.C.J., 14 May 1836
Before the Acting Chief Justice and a Military Jury.
WILLIAM DASEY alias CASEY stood indicted for the wilful murder of **PETER HANNS**, at Ballantyne Creek, in the district of Cassillis, on the 12th February, by beating him with a stick. It appeared from the evidence that prisoner was assigned to a Mr. Vincent, and that deceased was a runaway living in the neighbouring bush; both parties were well acquainted with each other; on the day charged in the indictment prisoner invited the deceased into his hut, and after giving him some victuals, produced some run, of which the latter drank until he became intoxicated; he then bound his arms behind his back, and with a thick stick beat him about the head and

body in such a dreadful manner as caused the death of Hanns two days afterwards; after this prisoner absconded, but was subsequently taken about 80 miles from his master's station; when taken into custody, and coming along the road with the constable, he asked the latter if it would not be better for him to tell the truth; the constable answered in the affirmative; when prisoner said that he and deceased had been drinking together, and when he struck the latter he did not mean to hurt him, but was quite willing to die for it. The fact of prisoner having so maltreated deceased was clearly established by evidence independent of prisoner's confession.

Prisoner in defence put in a written statement, which was to the effect that deceased had entered his hut and robbed him, and also threatened to shoot him - a few days before the assault was committed, on the day charged, he met with him and made him drunk in order that he (prisoner) might the more easily secure him, and by that means compel the deceased to disclose where he had ``planted'' the things stolen.

His Honor, in putting the case to the Jury, said - The case was involved in some degree of uncertainty, obscurity, and doubt; inasmuch as many parts were substantiated only by the statement of the prisoner himself. He further observed that by a necessary and salutary local law, all constables and free men were authorised to detain any person whom they had reasonable grounds to suspect were transported felons, or offenders illegally at large; this they might do without warrant, but they were bound to take them before the nearest Justice of the Peace. [*] But the man at the bar being himself a prisoner of the Crown, was not under the local ordnance empowered to take the deceased into custody. But if they believed the evidence, even supposing he had been empowered to take the man, the law did not justify him in beating the deceased in so barbarous a manner when both his arms and feet were tied. If a constable had done so, he would have been responsible for the consequences. Prisoner by law had no right to take the man into custody, and if by blows (when he had such illegal custody) death ensued, it was to all intent and meaning - murder.
The Jury, having a retired a few minutes, returned a verdict of Guilty.

Mr. Carter prayed judgment. Proclamation for silence being made, His Honor, addressing the prisoner, said:- William Dacey, although you might suppose that you were justified in apprehending the deceased, yet the whole of your conduct shows that you were influenced by an unexampled malignity. He was a prisoner of the Crown, you are a prisoner yourself, and might easily have secured him, whatever motive you had for maltreating him in the manner you afterwards did; first seducing him to your hut under pretence of being a friend and protector, yon debauch him, make him a prisoner, and treat him in such a manner as shows you to be devoid of all feelings of humanity; when he applied to you to be allowed to answer a call of nature; when his back was turned towards you, then you maltreated him, first striking him to the ground, and afterwards kicking him in a vital part, which showed a malignant and bloody desire. You now stand convicted before you country of a most dreadful murder, the time of your life draws to a close, in a few hours you must expiate your crime upon the public scaffold. During the short time which yet remains I entreat you by every means to make your peace with God. He then passed the usual sentence of death, and ordered him for execution on Monday morning. Prisoner, who heard his awful doom with apparent indifference, then said he wished to say a few words - he did the murder, but was not guilty of doing it intentionally; he did not take the deceased into custody for the purpose of delivering him up to his master, but merely to get his own things from him. He was then removed from the dock.
See also Sydney Herald, 19 May 1836.

[*] The Sydney Herald, 19 May 1836, recorded this passage as follows: ``His Honor, in putting the case to the Jury, observed that the evidence was not quite clear as to the circumstances charged against the prisoner. The Jury must consider that the deceased was a bushranger, and a local ordinance empowered constables and free men to capture suspicious characters who could not account for themselves; the prisoner, however, being a convict, was not empowered to act, and if he had been, no person was empowered to use unnecessary violence, for which a free man or a constable would be held accountable, much more the prisoner." The Bushranging Act was renewed for a further two years in 1836: 6 Wm 4 No. 17.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 17/05/1836
The soldier **RYAN**, convicted on Friday of the wilful murder at Liverpool, and **WILLIAM D'ARCY alias DASEY**, convicted on Saturday for the same offence, at Vincent's Station, district of Cassilliss, who were ordered for execution yesterday morning, have been respited (we believe) until to-morrow morning (Wednesday.)
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 09/08/1836
Burton J., 8 August 1836
Before Mr. Justice Burton.
The two men **WILLIAM WALKER** and **JOHN GORE**, tried on Saturday, were again put to the bar this morning. - His Honor addressing them, said - ``Prisoners, you are now placed again at the bar in order that a certain part of your sentence may be amended. You were convicted on Saturday, and sentenced to death. There was, however, an informality in that sentence, and the Judges have caused it to be amended. The Court would have been grieved to have brought you here unnecessarily, but you have been given longer time for repentance, of which I trust you make the best use in your power." The sentence of the Court was, that they should be taken to the place from whence they came, and on Wednesday morning to the place of execution, and there be hanged by the neck until they were dead, their bodies afterwards to be given over to the Surgeons, to be dissected and anatomised.
(It was the latter part of the sentence which constituted the informality, it having been omitted in the sentence passed on Saturday.)
[*] 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.
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SYDNEY GAZETTE, 11/08/1836

Supreme Court of New South Wales
Burton J., 6 August 1836
SATURDAY, AUGUST 6.
Before Mr. Justice Burton and a Civil Jury.

WILLIAM WALKER stood indicted for the wilful murder of **THOMAS WOODS**, by shooting him with a pistol, on the 22d May last, in the district of Cassilis; and **JOHN GORE** stood likewise indicted for aiding and abetting in the commission of the said murder.

Mr. Therry, who conducted the case for the crown, without making any statement to the Jury, called

JAMES DRISCOLL - I am assigned to Major Druitt, upon his farm at Cassilis; on the 21st May, I was in the lock up of Mr. Busby, for being in the bush; I was sentenced to corporal punishment, but had to wait; I gave myself up to Mr. Sibthorp, by superintendent; when I absconded, Gore, with Reiley, Field, and Gray, went with me, Gray was with me, and Lipscomb in the lock up; the other prisoner belongs to Mr. Fitzgerald's station; on the night of the 24th May, the two prisoners came to the lock up (we were all asleep at the time) they knocked at the door, the constable Wm. Byrnes, enquired who was that? one of them said he had got a prisoner, whom he had found in the creek; Byrnes went for a piece of wood for a light; when he was putting the wood on the fire, Walker said, don't make a light, I want some tea and sugar; Byrnes point to a box said, there it is; they then put the constable into a corner, and tied him up; they searched the place, Walker enquired how many men he had in custody? he said four; Walker then said you have got a man named James Driscock; Byrnes said yes; Walker then ordered two to come out, and then another, and then they ordered me to come out; we all stood at the fire for a time, the constable remaining tied up; the prisoners then tied Woods and myself together by the hands; Walker stood at the door with a pistol in is hand, his face was painted, and he had on a pea jacket; it was Gore who tied us up; the constable asked what they were going to do with us; they said to carry the swag for them; Walker told Gore to take a bayonet, which was at that tie stuck in the wall; they then opened the door, and were going out, when I said to Walker, young man, I don't want to go into the bush; he put a pistol to my head, and bid me hold my tongue; Woods and me then, by Walker's orders, each took a bundle, Gore walked first, Woods and me in the middle, and Walker behind, with the pistol; they made us walk on the side of the road; we went towards Jones' Road, and halted near to Binnagaray, upon a little ridge; day then was beginning to break, Gore struck a light, and said they would have some tea; we made a fire, Gore put a large tree on the fire. Gore then ordered us to stand up back to back, and tied our four hands together; he then said he would tie an handkerchief round our eyes, so that we could see which way they went; Walker was sitting at this time upon a log with a pistol in his hand; when Gore tied our eyes, he stepped to one side; the pistol was then fire, Woodsfell, and me with him; Walker was about four feet from us; when he fired he came round, and stood over me; he struck me twice with the butt end of the pistol on the forehead, and knocked me down, a little afterwards I got up, and ran away, Walker after me; when I had got a little distance, I fell down over a tree; when I got up I saw Walker returning, and in a little time saw Gore and him standing by the fire; cannot tell whether Woods struggled or not, being myself so frightened; I made for Binngoroy station, when I got there I saw James Ryall, I told him what had happened at the lock up; I stopped there about an hour and a half, when Gore came I ran out of the hut, and concealed myself behind a sheep yard; I was then called in by one of the men; Gore met me at the door, he said to me, ``you are a lucky man, my

life is in your hands;" he asked me if there was any blood on his face; there was not; his face seemed to have been washed; he asked me to say nothing about it, being frightened, I promised him I would not; he then got some water to wash the blood off my face; I had a basin of milk; he then asked me to go into the bush with him, but I refused, and went on to the head station, where Mr. Sibthorp was; I saw him, and told him that two men had come to the lock up, and taken us out; I mentioned the name of Gore, but not that of Walker; I did not know him; that was about seven or eight o'clock in the morning; the next day I was taken to see the body; I then said he was the same that had been tied to me; the body had been brought to Binngenay by those who found it; it was much burnt and shrivelled up; there was a wound on the breast, but it did not show plainly from having been burnt; Walker was facing Woods when the pistol was fired; Gore and I took the bush together; I stopped with him two days, when I gave myself up; during that time we robbed a sheep station belonging to Mr. King; we got some tea and sugar, and a pea jacket; it was by Gore's desire that we separated in the bush? when I met Gore at Binnegoroy, he said that he had heard I told Mr. Busby of the robbery at Mr. King's. [Further corroborative evidence being heard - the learned prosecutor for the crown called.]

LUKE SIBTHORPE. - On the 20th May last, I was at Bennegillaroy; I saw Woods on that day - stopt and searched him, he said he had been robbed of a pistol the night before; I took him into custody and gave him in charge of a constable; on the Sunday morning I received a note from Mr. Busby to muster as many men as I could - to get a black boy and meet him without delay. (He then corroborated part of Driscoll's evidence.) They went to track them. We could not see any tracks, but the black boy ran them easily, and said in his native tongue that there were four. Blacks are so quick in tracking, that he showed us where they had stumbled over bushes in the night, and the cause of their fall. As we were going along Mr. Busby cried out, Good God! here is the body. It was laying on a fire against a forked tree. I recognised it immediately; it was laying partly side ways but not so much consumed as to prevent identification. The black boy got sick and declined tracking any more that day, but said when the sun rose on he morrow he would be able to track the prisoners. We afterwards proceeded to Walker's hut and took him into custody. Thinking that Driscoll had something to do in the murder, I ordered him to go up to see the body. When brought to view the body I said, Driscoll is not that a horrible sight? He put both his hands up to his face and burst out a crying and said, ``Sir, Gore is one of the men who murdered him, I don't know the other man's name." (Driscoll then told him the same story as given in his evidence above.) This closed the case for the prosecution.

Mr. **WINDEYER**, **Junior**, on the part of the prisoners, then took two objections: 1st, that since the issuing of the King's proclamation in November last, making legal counties in this colony, all the legality applied to them, as to counties in England. In all informations at home it was required that the particular country wherein the offence had been committed should be set forth. In this information it merely said in New South Wales to wit, whereas the country also should have been specified.

Mr. Justice Burton said he was quite willing to hear any argument upon the point, but the practice alluded to did not apply here for this reason - that the Supreme Court sitting here had jurisdiction over the whole colony, whilst by the English Common Law the offender must be tired in the county where the offence has been committed. If circuit courts were established here the objection might be good, but at present it was only one large country. He however would take a note of the matter.

Mr. Windeyer said, the next point was that the name of the deceased had not been properly proved, viz.: as to whether it was Wood or Woods as it ought to have been according to 2nd Hale page 181. In support of his opinion he alluded to the case of Sheen for the murder of his child.

Mr. Justice Burton, considered that the question of identity of person was one for the Jury; but even if it were good, it would be of no advantage to the prisoners, inasmuch as he would immediately direct a fresh information to be drawn up against them.

Two or three witnesses were then called, but their evidence contained nothing material.

His Honor, previous to summing up, requested the Jury would stand whilst he was going through the evidence in order that their attention might be kept awake, as no doubt from the length of time they had been sitting, some of them were fatigued. When he had gone very carefully through the whole case, the Jury retired for five minutes, and returned a verdict of Guilty.

His Honor then proceeded to pass sentence, in doing which he observed that it then became his duty to pass upon them that sentence the most awful a Judge could pass, as it was to usher them before the Great Judge of all the world. The Jury had found them guilty after a long and impartial trial. He (himself) had no doubt whatever of their guilt; he could have felt no hesitation whatever in returning the same verdict. There were few cases perhaps in which the guilt of the parties was rendered more plain than their's. It had pleased the Almighty God to place around them such circumstances as could not fail to establish a conviction. They might have thought that the darkness of night would conceal their guilt, but, it was well for all to know that where blood was shed the perpetrator rarely escaped in this world, or if he did, still an awful judgment awaited him in the next. Short was the time between a murderer's conviction, and his groan! He entreated them as they knew they would shortly have to appear before an all seeing Judge, to prepare themselves, by a confession of their guilt, not so much for the satisfaction of their Judges here, but by clearing their own conscience they might be the better prepared to enter into the presence of the Great Judge of all. He then proceeded to pass sentence of death upon them, and ordered them for execution on Monday morning. [*]

See also Sydney Herald, 8 August 1836. For the trial judge's notes of the case, see Burton, Notes of Criminal Cases, vol. 26, State Records of New South Wales, 2/2426, p. 108, noting that Walker was ``bond'' (that is, convict) at the time of trial, and making no note of the civil status of Gore.

By a two to one decision in 1838, the Supreme Court held that the ``Colony of New South Wales'' was not a sufficient description for a trespass. Justice Willis dissented, saying that New South Wales was one great county. (The majority judges were Dowling C.J. and Burton J.): Lewis v Klensendorlffe, Sydney Herald, 13 July 1838.

[*] Walker and Gore were executed on Wednesday, 10 August 1836.

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

SYDNEY HERALD, 15/08/1836

Kinchela J., 12 and 13 August 1836

Before Mr. Justice Kinchela and a Military Jury.

WILLIAM JAMES, a free man, residing at Twenty-mile Hollow, in the district of Bathurst, was indicted for the wilful murder of **MARY** his wife, by strangling her with a handkerchief on the 12th October last.

When the Jury had been sworn, Mr. Foster requested his Honor to take a note of his objection to the competency of the Court to try the prisoner, he having been formerly tried, when through the drunkenness of a witness the jury had been discharged without giving a verdict.

The Judge said that the proper method would have been for the prisoner to have pleaded his former trial; he would however reserve the point.

The Attorney-General briefly stated the case to the jury. The prisoner's wife had threatened to hang herself, and had tied a handkerchief to a rafter for that purpose, when the prisoner not only put it round her neck, but shoved her off the box. If he proved these facts the Judge would tell them it was murder. The prisoner had been arraigned last Session, but a witness being drunk Mr. Justice Burton discharged the jury. Now, he (the Attorney-General) was not very clear whether a Judge had power to discharge a jury; at any rate he should like to have the decision of a full Court. In the present case if the jury acquitted the prisoner on the facts, of course the point of law would be gone; if they found him guilty he would have the benefit of it.

The following witnesses were then called:-

PATRICK CAHAN, private in the 4th Regiment, being sworn, stated, on the 12th October last, I was in company with Corporal Spence at the prisoner's house, at Twenty-mile Hollow; we called in to light our pipes in the afternoon; we remained but a very short time, we saw the prisoner and some children; three or four minutes afterwards a female named Smith called me in to see Mrs. James; I looked between the slabs and saw her hanging by a black handkerchief from the rafters; there was a box near her feet, she appeared to be dead; he hands were up as if she had been trying to lay hold of the handkerchief; I called out to Corporal Spence and told him; the prisoner was in the kitchen, and he came to me when I called out, and said ``go and cut her down,'' I told him to go himself, and I saw the prisoner's son go in the room with a knife to cut her down and I think the prisoner helped him; a publican named Pembroke, who resided near the spot, came up, and him, me, and the Corporal, went into the room, the deceased was lying on the floor, and Mr. Pembroke said he was sure she was dead; the prisoner was sober, he appeared to be melancholy.

Cross-examined - When we first went in we saw the prisoner near the fire; not more than five minutes had elapsed when Jane Smith called me, I went in immediately, James was still in the kitchen; I cannot say whether the door was locked inside; Corporal Spence went to Pembroke's; I did not hear the deceased when we first went in; if she had made any alarm I must have heard it; Creran did not give me the alarm, it was Jane Smith; I saw Creran in the house after Mr. Pembroke had arrived; some time had then elapsed; I saw him come out of another room; there was no time for the prisoner to have hung his wife from the first time I entered until I gave the alarm; no person without peeping could see Mrs. James hanging.

Re-examined - Creran might have got into the house by another door; I do not know whether he was in the house before; I was asking Creran some questions, but he told me I was no magistrate.

By a Juror - Creran said he knew all about it.

PATRICK CRERAN - I have been free three years, I have been ten years in the colony; I was at Pembroke's the day Mrs James was hanged; one of her sons came crying out that his mother was hanging; it was about eight or nine o'clock in the day; I went up to the house; I saw James, and I asked him what was the matter, he said there was nothing the matter and asked me what business I had there; the children were all laughing at the door; I went into the room and saw the woman hanging; I cut her down; James was standing with his back to the fire; he threatened me, and said I had

not right to interfere; there was a dispute between me and James; I got him fined forty shillings, he did not like to see me about the house; I heard James say, ``let her hang and be d--d;" this was before I cut her down; she was hanging by a red handkerchief; when I cut her down she was a long time before she came too; when she did come too she took some rum that James had, but he gave her a push and she fell down; I had seen Mrs. James before that morning; while I was trying to recover Mrs. James, the prisoner was in the kitchen, he gave me no assistance; when Mrs. James came into the kitchen she said she understood I was the b--y rogue that cut he down; she was angry with me; I said I did cut her down, and I asked her if she was not glad of it; she replied no, the prisoner had been long enough trying it on, and that if I had not interfered she would have been in a better world. The prisoner and his wife then had a dispute about Jane Smith, and I went into another room, and by standing on the sofa I was able to see into the room in which the prisoner and his wife usually slept; I saw Mrs. James with a black handkerchief in her hand which she tied to a rafter; she asked the prisoner, who was in the next room, where her eldest son was, and he said he had gone for sugar; Mrs. James then got on a box, and the prisoner came to the room door and asked her if she was as game as she pretended; she said she wanted to see her eldest son; the prisoner said stop a minute, and then put the handkerchief round her neck and pushed her off the box; he then dragged her by the feet; he then left her and went into the kitchen; the son almost immediately came in and cut her down; the sudden jerk he gave her must have hung her; I saw the soldiers come in; I heard the soldier sing out; I was on the sofa and was looking over the wall when I saw the prisoner drag his wife by the feet; I intended to have cut her down, but the son was before me; the boy entered the room almost immediately after the prisoner left it.

Cross-examined - I was drinking at Pembroke's when the son came to me; I was at the door and saw the boy; I got there in time to save her; I was in the house the second time but was not in time then; it was after the soldiers had come in to light their pipes that James acted as I described; I do not know whether the door was locked inside; I did not tell constable Abrahams that the door was locked, I should have made an alarm if I had not been afraid the prisoner would have escaped; if I had done such a deed I should have run away; I knew he had pistols in the house; and I told the magistrates at Penrith that was the reason; the prisoner had threatened to take my life; I thought it was necessary for me to keep my eye on him; there was no time lost before the soldiers made an alarm; I did at one time say I saw the deceased through the slabs, but it was the first time I alluded to; I do not think I said so with regard to the second time; the box was about half a yard high; it might have been more or less; I did not hear Jane Smith call the soldiers; I did not see the soldier from the time he lit his pipe until Mr. Pembroke was in the house; I did not see him look through the door; when I saw the prisoner leave the room; I got down as gently as I could in order that the prisoner might not hear me for fear he should blow my brains out, and I got out of the room as quick as possible but the son was before me.

Cahan re-called, I never left the house from the time Smith called me until Pembroke came up; if Creran had been trying to cut the woman down I must have seen him.

Cross-examination of Creran continued. I laid two informations against James, I convicted him on one of them; I was charged with perjury but it could not be proved; I was in the house about settling one of the informations, the prisoner sent for me and offered me a pound and a pistol; I have just been giving evidence in the other court; I swore that all my clothes were stripped off me, and the man who was with me swore I was not stripped, but it is easy to get people to swear any thing; James was partly

drunk; I was not out of the house from the time she was hanging the first time until the second time; I remained in the room all that time through what I heard amongst them; I wanted to see whether she was for hanging herself, or he was for hanging her; I saw that officer (Mr. Faunce) come in.

Mr. **PEMRBOKE** an inn keeper residing at Twenty-mile Hollow. Corporal Spence called me and said Mrs. James was hanging; I went up to the house; the body was cut down; I recommended James to send to the depot for a medical man, but he refused; the body was quite dead; I saw Creran in the house.

Cross-examined - The prisoner refused to send for a medical attendant; he afterwards appeared to be in great tribulation; the deceased was subject to take a drop; Creran called me on one side and pointed out a place from where he said he saw the prisoner commit the act; I did not know anything about the deceased having attempted to hang herself before; I do not think Creran was at my house that morning; I understood Creran to say he had seen through the slabs; he did not tell me that he had got on the sofa and looked over the wall; I cannot say whether he could have done so; no person came to my house and called Creran to go and cut the woman down.

Mr. **THOMAS BLACK**, surgeon - On examining the body of the deceased, I found one or two slight contusions on the eye, but think they were inflicted by her falling forward after she had been cut down; she died by strangulation, which I have no doubt was caused by hanging.

Cross-examined - Creran said he saw the transaction through the slabs; he never said anything about sofa or bark; he said her feet were about the height of the table from the ground, but that was impossible, as from the position of the handkerchief, her feet could only just be clear of the ground; I recollect Creran was flogger at the station; from the very inconsistent manner in which he gave his evidence I would not believe him on his oath.

The prisoner made no defence, but called the following witnesses:--

District Constable **SAMUEL** - I was sent to the Twenty-mile Hollow; Creran told me the door was bolted inside; he took me into the inside room and shewed me where he said he stood to see James put the handkerchief over his wife's head; I am a taller man than Creran, but when I got on the sofa I could not see over; I could not lift the bark, I was not high enough.

Lieutenant **FAUNCE**, 4th Regiment - I was on the spot with Mr. Campbell the magistrate just after the affair; Creran did not offer his evidence; after all the persons had been examined, Mr. Campbell said as Creran was a constable he would examine him, and then he told this long story; I would not believe him on his oath; The box pointed out as the one from which the deceased was thrown, was about seven inches high.

Mr. Foster said that he had other witnesses, but he did not think it was necessary to call them.

Mr. Justice Kinchela said, that in law, a person who assisted another to commit suicide, was guilty of murder; so that in a case where two disappointed lovers agreed to commit suicide, and went out in a boat for the purpose of drowning themselves, and one of them survived, the survivor was held to be guilty of murder, and the case was afterwards argued before the twelve judges, who were of the same opinion. The present case as it affected the prisoner, stood solely on the evidence of Creran; they had heard his evidence, and they had heard what had been said about him, and it was for them to shew by their verdict whether they believed him.

When the Jury had been absent about half an hour, they returned, and the Foreman (Captain Macpherson) said that they wished to examine James the son of the prisoner,

who cut his mother down. Mr. Justice Kinchela said that they were bound to return a verdict on the evidence laid before them; they could re-examine any witness they pleased, but they could call no new ones; neither the prosecutor or the defendant had called him, and the Jury could not. Captain M. said that there was no likelihood of their agreeing, and they again left the Court which was adjourned for two hours.
Soon after seven o'clock the Jury again returned to Court, and said that they were unable to agree upon which His Honor said that he was very sorry, but he must lock them up for the night. He could not discharge them without the consent of the Crown and the prisoner. If the Crown would forego the prosecution entirely, or the prisoner consent to be tried again, a Juror could be withdrawn, otherwise they were entitled to a verdict. Mr. Carter on the part of the Attorney-General, and Mr. Foster on the part of the prisoner refused to acceded to the suggestion, and the Jury were locked up for the night.

Saturday, August 13. - Upon Mr. Justice Kinchela taking his seat this morning, the jury in James' case, who had been locked up all night, came into Court and returned a verdict of Guilty. Death. Ordered for execution on Monday morning. His Honor stated that he would respite the prisoner until he could take the opinion of the Judges on the point raised in his behalf by Mr. Foster.
See also Sydney Gazette, 16 August 1836; Australian, 16 August 1836. James was respited until the opinion of the Crown Lawyers in England was made known. In the meantime, he was still in the condemned cell in November 1836: Australian, 8 November 1836.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

Burton, Notes of Criminal Cases, vol. 26, State Records of New South Wales, 2/2427
Dowling A.C.J. and Burton and Kinchela JJ, **19 August 1836**
[p. 92] [*The King v Thomas James*]
In the Supreme Court of New South Wales.
19 August 1836.
In Chambers, before Dowling ACJ Burton J. and Kinchela J.
Case
On the 12th January 1836 the prisoner named in the margin was put upon his trial before His Honor Mr Justice Burton in the Supreme Court for the wilful murder of his wife. After the Jury had been sworn and charged with the prisoner and some of the merits of the case were gone into a material witness for the prosecution being put into the box the presiding Judge discovered that the witness was so drunk as to be incapable of giving Evidence. Whereupon the learned Judge adjourns the further prosecution of the case for two hours, and directed that in the [p. 93] meantime the witness should be taken to the General Hospital, for the purpose of having remedies applied to him, as were within the skill of the Surgeon to restore him to a fit state to give evidence. After the lapse of considerably more than two hours the proceedings were resumed the witness then appearing to have recovered he was sworn and proceeded with his evidence far enough to shew that he was a very material witness when he became again incapable of giving evidence from the operation of the healed Court upon his previous intoxication.
It was then late in the day, and the learned Judge was applied to by His Majesty's Attorney General to discharge the Jury from giving any verdict he stating that he had no other witnesses in the case, and that he could not expect a conviction under such

circumstances and the Attorney General proposed to obtain the prisoners consent to that proceeding [p. 94] but it was immediately objected to by the prisoners Counsel that he ought not to be asked for his consent, and the prisoner was instructed by them not to give his consent. The Judge states that in so new and embarrassing a situation as he was then placed in not having the opportunity of consulting either of his brother Judges on the point he should act as he believed to be best for the substantial ends of Justice. That neither a conviction nor an acquittal under such circumstances would be satisfactory to the Public mind. Especially as he found that the minds of the Jury had been disturbed from the grave consideration of the case by what they had witnessed. He would do that which he had the power to do if he had not the power with the prisoners consent he would not put the prisoner to give his consent he would take upon himself to discharge the Jury from [p. 95] giving a verdict and he did so stating that it was like the case of sudden illness and resolved it into a case of necessity; and to prevent the ends of Justice being defeated. There was no proof that the witness had been made drunk by the prisoner or by any person at his instance. Next day, the learned Judge communicated to Chief Justice Forbes the course he had taken, and that learned Judge authorised him to state from the Bench, that the course taken was warranted by the circumstances and that in his opinion a person incapacitated by intoxication from giving evidence, was to be regarded in the same light as a witness becoming suddenly ill, in which case, the Jury might be discharged from giving a verdict, leaving it to the discretion of the Attorney General whether under the circumstances he would put the prisoner again on his trial for the offence. At the last Session of the [p. 96] Supreme Court before His Honor Mr Justice Kinchela the prisoner was tried on the same identical indictment found guilty and sentenced to death according to law. The learned Judge respited the sentence, upon a doubt whether, the Judge having at the former trial discharged the Jury without giving a verdict of Guilty or Not Guilty. The prisoner could be again put upon his trial for the same offence and reserved the question for the consideration of all the Judges.

The case was argued before the Judges at Chambers on the 19 August 1836 by Mr.Foster for the prisoner and J.H.Plunkett Esq. Attorney General for the Crown.

Dowling Acting Chief Justice.

I am of opinion that there is no authority in the law to warrant a Judge in discharging a Jury from giving a verdict under the circumstances stated in this case; and without some authority or express decision to guide me; I [p. 97] should be slow, constituted as the Bench of New South Wales is, in point of numerical strength, in concurring in a resolution so important to the administration of Justice. I have looked diligently through all the authorities bearing on the question, but I can find none either in point or analagous to it. In Kenlocks case Foster 30 all that Mr Justice Foster says is that the question there was "not" whether the court may discharge a jury sworn and charged, where under practices appear to have been used to keep material witnesses out of the way; or where such witnesses have been prevented by sudden and unforseen accidents" That being the question he says "I give no opinion upon it". All that he says is "only let it be remembered that Ld. C.J Hale / Hale 296 296-7 justifieth this practice which he saith, prevailed in his time, & had long prevailed, by strong arguments drawn from the end [p. 98] of Government and the demands of public justice." But Lord Hale is no authority for the precise point now raised. The discharging of the Jury in this instance can only be justified on the grounds of great necessity, which could not have been avoided. All other means must, I apprehend, have been exhausted before the general rule could have been departed from "That a Jury once sworn and charged in a Capital case cannot be discharged without giving a

verdict". No doubt there are a great many exceptions to this rule to be collected from decided cases, but no case can be found in point to the present. Voluntary drunkenness can scarcely be considered as a sudden and unforseen accident within the contemplation of Mr. Justice Foster, even if he had himself given an authoritative opinion on the subject. The fair interpretation [p. 99] of this passage in that learned Judge's decision in Kenlock's case, must be, the incapacity of the witness from the act of God, or some sudden infirmity which could not have been anticipated at the time the witness was tendered to give evidence. The necessity for discharging the Jury must be inevitable arising from circumstances which could not have been previously contemplated Was this a case of necessity? Might the contingency have been guarded against? Before the Jury were charged with the prisoner it was the duty of the prosecutor to have ascertained whether all the witnesses proposed to be called were in attendance and in a fit state to be examined, & if not then to have moved the Court to postpone the trial. Again even after it was discovered that the witness in question was incapacitated by temporary drunkenness, it was competent to the Judge to have adjourned the trial for a longer [p. 100] time than two hours, to enable him to become sober. Be it that this might subject the Jury to some inconvenience, yet it was a lesser evil than that of discharging the Jury altogether, to the infraction of a sacred rule, which ought never to be broken through unless from extreme necessity. Here the point of absolute necessity had not arrived at the time the Jury were discharged. There is a vast difference between the sudden incapacity of a witness from drunkenness and that of a Juryman taken ill during trial. The Jury is a most essential part of the Court, and as much so as the Judge who presides. The hopeless recovery of a Juror taken ill after he is sworn and charged with the prisoner, is a case of absolute necessity for there no verdict of the Jury could be given without the concurrence of the whole twelve. The cases therefore of services being discharged where one or more became ill, are not [p. 101] analagous [sic]. Adverting therefore to the circumstances of the case I think the point of necessity for the proceeding had not arrived at the time the Jury were discharged. At all events the point is too doubtful, without some clear authority upon it to satisfy my mind as to the propriety of discharging the first Jury. James Dowling ACJ; 2d September 1836.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 07/11/1836
Supreme Court of New South Wales
Kinchela J., 4 November 1836
A Military Jury was now sworn in.
THOMAS WALKER, assigned to Mr. **HENRY DANGAR**, was indicted for murdering some person to the Attorney-General unknown, by shooting him at New England, in the county of Brisbane, on the 23d of April. A second count laid the persons name as **JOHN POOLE**.

The Attorney-General in opening the case said, that the murdered man was a bushranger, and the prisoner was in commission with him, and had deliberately shot him. Although by law, any Constable or other free person was authorised to shoot a bushranger if he had no other means of detaining him; if a person in connexion with bushrangers deliberately kill one of them, it was certainly murder.

HUGH O'NEIL. - I am a private in the Mounted Police; in April last I was on duty at Colonel Dumaresq's; I heard that bushrangers used to be harboured at Mr. Dangar's station, about five or six miles from Dumaresq's. I went there in company with

another private and a sergeant. The prisoner at the bar was shepherd there; I found him at some distance from the station with some stolen property in his possession, at eight o'clock in the morning; he had two jackets and a pair of trousers on his arm, with Colonel Dumaresq's marks on, I apprehended him. He said that the bushrangers had given him the things, and that they were to rob Mr. Cory's and Mr. Chilcott's station the day after. These stations were about twelve miles from Mr. Dangar's. We went to Cory's station and remained there all day, at night we left the station and encamped in the bush. We herd of their committing more robberies at Dumaresq's, and as the prisoner was only hindering us, we let him go at large. We came up with the bushrangers on the morning of the 23rd April, when they were robbing Mr. Dumaresq's station a third time. We were in the house when they came up and went out; we had left our horses away from the house; two of the bushrangers had horses; there was one on foot, who went towards Danger's station, we fired at them but they escaped. We proceeded to Dangar's station; on the road we found a jacket. The prisoner had no jacket, he said that the bushrangers had been there and taken his jacket away from him. The next morning we again went to the station; the prisoner had a musket and fowling piece, which he held up as we rode up and said, here they are. We took him into custody again, and he told us he shot one of the bushrangers that morning. He said that one of the bushrangers came to the hut at three o'clock in the morning, and forced him to go along with him to rob one of Mr. John Dangar's stations. On the road, the bushranger, James Poole, was tired and laid down, leaving him (the prisoner), to keep watch and see that the Police did not come down, and that while he was asleep he shot him dead. He said the man never moved. I asked him why he shot him, and he said to save himself. The prisoner accompanied us to the spot where the body was lying in the bush. We stripped the body, the wound was through the heart. He did not tell me he had shot the man until we had taken him in charge. We found two blankets, some powder and shot, and things lying near the body.

Cross-examined. - You told me that that the bushrangers had come to the hut and killed a sheep belonging to your master, but you did not tell us so until we found the sheep in the hut under the bed. You did not say your clothes had been stolen. I never found any bushrangers in your hut, but from my finding stolen property there, and other reasons, I am sure you had connexion with them. **MUNDAY**, the hutkeeper said you were forced away, but he is as big a rogue as your are.

Re-examined - He said that Poole came to the hut and said, Walker, you must come with me to rob Mr. John Dangar's station, and that the prisoner said he did not want to go, but Poole said he must, and he went. Walker told me his name was James Poole, but that is supposed to have been a false name.

Mr. **ADAM WIGHTMAN** - I reside at Colonel Dumaresq's establishment of St. Heller's; the jackets produced at the Invermein Court-house, by the mounted police as having been taken from the prisoner, were the property of Colonel Dumaresq, and had been stolen by bushrangers.

Serjeant **JOHN TEMPLE** corroborated the evidence of private O'Neil.

The prisoner made no defence.

In putting the case to the jury, Mr. Justice Kinchela said that under the circumstances of the case, the only justification would have been that he had killed the man for the purpose of preserving his own life. It was no excuse that he had done so for the sake of procuring a mitigation of punishment for other offences which he had committed. Guilty - Death. Ordered for execution on Monday (this) morning.[2]

See also Sydney Gazette 5 November 1836; Australian, 8 November 1836. The Bushranging Act was renewed in 1836: 6 Wm 4 No. 17; Walker was executed on 18 November 1836: Australian, 22 November 1836.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 08/11/1836
Supreme Court of New South Wales
Kinchela J., 5 November 1836
Before Mr. Justice Kinchela and a Civil Jury.
ALEXANDER LAMBERT stood indicted as an accessary before the fact of the wilful murder of Corporal **HURMAN [HARMAN]**, of the Mounted Police at Flat Land, on the 9th August.

RICHARD CLAYTON examined - I was employed at the Flat Lands after cattle in August last; about a quarter of an hour after the Police came up. I saw the prisoner riding up to the hut; I saw no other person; when Lambert came up he alighted from his horse, and asked me who I was; I made him no answer; I then saw the two police men, who ordered him to stand, or they would blow his brains out; I then went into a room, and immediately heard a shot, and on the instant a police man rushed into the room where I was, and fell; I heard a second shot from the outside after; the police man Hust ordered the prisoner to stand, or he would blow his brains out; he then called on me to assist him to secure the prisoner.

The Attorney General here cautioned the witness to be more particular, and asked him if he did not swear before the Coroner at Bathurst that he saw Lambert, and a second man unknown, galloping up to the hut; in answer he said that he saw two horses, but only one man.

Witness continued - I cannot say who fired the shot that struck Hurman; I told the Police that I thought it was Lambert that shot him with a pistol; he died shortly after.

Cross-examined by the prisoner - I did not hear you give any information to the police man that took you had you done so in my presence I must have heard it.

WILLIAM HAWKER - I am an assigned servant to Mr. Vincent; I was in the hut on the night the shot was fired; I was in the room with Clayton, not in the one that Lambert was in; it was not pitch dark, but it was closing night fast; I heard a shot fired outside and when the police man came in he said he fired it; and that he believed he shot a man; I did not see any one; I saw no arms with Lambert, but when the police man ordered him to deliver them up in another room I heard them fall on the ground; I heard him tell the police man that there was no person with him; I heard Lambert say that the powder was in his eyes, but did not hear him say that he would shoot the police man only for that.

Cross-examined. - I heard you complain of the smoke of the fire, it was green wood we were burning in the hut and it smoked; I never heard you give the police man Hurst any information; I saw you handcuffed behind when Cooper and the other policeman came up; Cooper said you were a damn'd scoundrel; I heard you struck by them outside, but did not see it; I never saw any person in company with you.
Clayton recalled. - I do not recollect swearing before the magistrates that a second man came up to the hut; I fetched up two horses from the swamp one of which the prisoner rode, I do not know who owned the other; both horses were briddled and saddled.

Mr. **HENRY ZOUCH** examined - I command the mounted police in the district of Bathurst; hearing of Corporal Harman's death I proceeded to Mr. Vincent's station at

the Flat Lands, about 60 miles from Bathurst, the prisoner was there in custody of the police, and another bushranger; Harman was lying dead, I examined his body and found several wounds under his left shoulder, one appeared to be from a bullet, the others were smaller and appeared to be from slugs; on asking the prisoner who shot the deceased, he said there was no use in my asking him, he would not tell who shot him, as the man may do well in the colony yet! on seeing my pistol which had a percussion lock, he said it was a similar lock that on the piece with which Harman was shot; I have heard that the prisoner was in the habit of visiting about the Flat Lands and gave directions to the police to concentrate occasionally in that quarter.

Cross-examined by prisoner - I do not recollect ever having the pleasure of your company while you were at large.

This closed the case for the prosecution.

His Honor having summed up at considerable length, the Jury retired for a few minutes and on coming into Court returned a verdict of Guilty. Sentence of death was then passed on the unhappy man, and was ordered for execution on Monday, and his body for dissection.

See also Sydney Gazette, 11 November 1836; Sydney Herald, 10 November 1836.

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

SYDNEY GAZETTE, 12/11/1836

Supreme Court of New South Wales

Dowling A.C.J., 10 November 1836

GEORGE GAUDRY, stood indicted for the manslaughter of **JAMES BISHOP**, at Windsor, on the 26th August last, through a prize fight; and **SAMUEL TAYLOR, JOHN BATES, JOHN ALLCORN, CHARLES GAUDRY, JOHN LUCAS, GEORGE KEYS, and THOMAS MARTIN**, for abetting in the same. A second charged the deceased as being a man, name unknown.

WILLIAM GAUDRY - I live at Windsor, and recollect the 24th of August last, was at a fight that day about two miles from Windsor, my brother George was one did not know the other, but had seen him on the previous evening, took no part in the fight; Dutch Sam (Taylor,) was second to deceased, and **GEORGE RAY** second to my brother, there were bottle holders also, saw Bates, my brother Charles and Allcorn there some one kept time, the fight lasted about an hour, my brother won the fight. Bishop became insensible soon after the fight, I then spoke to Dr. **RUTTER** who bled him he was taken into Windsor but died the same evening, there was a regular ring formed by the crowd, a great number of people were there, saw nearly all the prisoners there.

Cross-examined, this was at the race time, persons at the races could not but see the fight; I never heard Bishop go by any other name than ``Stringy-bark,'' Bishop came up from Sydney and told me he came on purpose to fight; during the fight he threw himself down several times, without being struck.

CHRISTOPHER FLYNN - I am a dealer in Sydney, had an assigned servant named Bishop, gave him a pass in August last to go up to Richmond (pass produced) that is the pass, I have never seen him since.

Cross examined, he had been with me four years, complained sometimes of a head ache.

ROBERT SMITH - I live at Windsor, am a publican, recollect the day of the fight, one of the man was brought to my house, he died in the evening, this pass was found upon him, have no doubt the discription on the pass corresponded with the deceased.

JOHN HIBBERT - I was at the fight from first to last, deceased fell several times, he was very much beaten, Gaudry thew him frequently, the last time thrown he laid on the ground speechless a considerable time; I held his arm whilst Dr. Rutter bled him, he was afterwards put into a chaise and taken to Smith's house, Taylor was there, also Kay, it appeared to me a fair fight, was with Bishop until he died, cannot tell who kept time at the fight.

RICHARD CRAMPTON - I was at the fight in August between Gaudry and Stringybark, I believe Lucas was one of the parties who kept the time, Taylor and Haddygaddy were the seconds.

JOHN EARL - Cabinet maker I was at the fight, saw George Gaudry and Bates there, a person named Dight held the stakes, Bates and Charles Gaudry gave £10 each as the stakes, did not see what became of the stakes afterwards, Allcorn and Lucas both held watches; considered them the time keepers.

Cross-examined, several other people had watches, I considered the money to be put down for the fight.

Re-examined - The fight took place about an hour after the money was put down.

CHARLES KELLY - I was at the fight in August; saw John Allcorn was one of the time-keepers; saw him act as such; a round or two had taken place before he was called into the ring.

Cross-examined - He was not the first time-keeper chosen; he stood alongside the other time-keeper; it is customary to have two time-keepers; he was called in by some persons standing near.

WILLIAM MAUGHAN - I am a constable, and was on duty upon the day of the fight; I tried to prevent it but could not succeed; there were bottle holders, Haddygaddy was one; did not know the timekeepers; Taylor was a second.

Cross-examined. - All the others were strangers to me.

By the Judge. - There was only myself and another constable there.

Dr. Rutter. - I live at Parramatta; was at Windsor on the day of the fight; after the fight I was called to the deceased; he was insensible, labouring under a concussion of the brain; I bled him; the injury I imagine was the effect of a fall; death was occasioned by a profusion of blood on the brain; his head had received an extensive blow, which might produce compression of the brain.

Cross examined. - A fall was more likely than a blow to produce compression; over exertion might produce it.

WILLIAM JOHN WHITETHORN. - Am a surgeon; I examined the body of a man named Bishop, at Windsor in August; death had been occasioned by extravasated blood on the brain; there were several wounds on the scalp which might have been caused by either blows or falls.

Cross-examined. - Over exertion or intense heat of the sun would occasion an overflow of blood on the brain.

By the Judge. - A knock down blow would be sufficient to cause death.

William Henry Gaudry, re-called - I heard Bishop say that he came up to Windsor on purpose to fight somebody, and mentioned the name of my brother in particular; he was about the same size as my brother. This closed the case for the prosecution.

Mr. Foster submitted, that there was not sufficient evidence to go to the jury, the identity of deceased not being established, for any thing which had been proved, Bishop might have lent the pass to the Man called Stringybark, and he himself still living.

The Court overruled the objection.

Prisoners said nothing in defence, but called three or four witnesses as to character. The learned Judge then went carefully thought the whole of the evidence, and the jury retired, when they had been absent about half an hour, they returned with a verdict of guilty against all the prisoners except Martin. Mr. Therry having prayed the judgement of the Court, His Honor proceeded to pass sentence, in doing which he observed, it was extremely painful to the Court to be called upon to pronounce sentence, six of the prisoners being natives of the Colony, but it was absolutely necessary that prize fighting should be put down, it was a brutal practice and tended to disgrace all parties concerned. It was also high time that the young men of this Colony should be taught to respect the laws of their country. [*] With respect to Taylor, he being a prisoner of the crown, his punishment would necessarily be more severe; the sentence upon him was two years to a penal settlement; George Gaudry, six months; Charles Gaudry, Bates, Allcorn, Kay and Lucas, three months imprisonment in Windsor Gaol.

See also Sydney Herald, 14 November 1836; Australian, 15 November 1836.

[*] According to the Sydney Herald, 14 November 1836, Dowling A.C.J. said that ``it was absolutely necessary that prize-fighting should be put down, and it was the duty of the Court to see that the law was put in force to keep down one of the most disgraceful practices that existed in England. In England it had become in a manner sanctioned by usage but it was different in this Colony, and it was necessary that the prisoners should be taught a lesson in wisdom. Gaudry, as principal, was certainly the greatest offender in the eye of the law. Taylor was the worst - for, in addition to the breach of the law which he had committed, he being a Convict, in visiting such a place, he had assumed the name of `Dutch Sam' as a mean of excitement, and had made himself very busy; and it was necessary he should be taught a lesson. The seconds were much to blame, for had they exercised their authority to keep the parties from battering one another's brains out, instead of inciting them, they would not have been there that day. The parties who provided the stakes he looked upon in the same light; and the parties who deserved the lightest punishment were perhaps the time-keepers, who had only seen fair play."

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

SYDNEY GAZETTE, 12/11/1836
Supreme Court of New South Wales
Dowling A.C.J., 11 November 1836
MURDER.
Before the Chief Justice, and a Civil Jury.

JAMES SMITH stood indicted for the wilful murder of **JOHN HAYDON**, by cutting his throat with a razor, on the highway between Bungonia and Murulan, on the 22d of September last. Mr. Therry briefly opened the case, and called

JAMES O'NEALE - I take the mail from Bungonia to Marulan; on the 22d September, was carrying it to the latter place; saw nothing then; on returning I found upon the road a body, thought it was asleep; when I came up to the man I saw a razor laying across his breast, and also a box key; saw the razor bloody on his breast, and his head fairly turned back; he was quite dead; I had passed the same way about an hour before, but then saw nothing; when I perceived the body, I looked and saw some sawyers working near the spot; I brought them to the body and left them in charge of it; I went then for the police at Bungonia; the body was dressed in a blue jacket and fustian trousers; the lining of his left hand pocket of trousers was turned; the breast of the clothes and the ground were all bloody; I think no man could cut his own throat in that manner, and then lay the razor and key in the mode they were upon his breast.

Cross-examined - Have travelled that road for two years alone, and never been stopt.

SAMUEL MAYLOR - Am a rough carpenter; I met O'Neale in September last; he came to the sawyer's hut; we had some tea, and then proceeded to the body; I went first to borrow a blanket; after that searched for a track; found a bloody track 200 yards across the bridge, when there I saw a black hat and handkerchief; at the back of a little bush close to the bridge a dog was lying down near the spot; I went back to the body, and stopt till Dr. Reid came; when Dr. Murphy and Mr. Futter examined the body, but could not recognize him them; the next day when the body was carried to a shepherd's hut, I recognized his face; I believe him to be John Haydon; had seen him often before at different parts and knew him well by person, but not by name until about three months before his death.

Cross-examined - The dog was laying down, but did not follow us; the dog was 200 yards from the body; to the best of my belief the body was that of John Haydon; never saw the dog before that time, nor ever saw it in presence of the prisoner; the dog was within 6 to 10 yards when we found the hat and handkerchief.

RICHARD JAWERS - Am a Settler at Bong Bong; John Haydon lived with me eight years and better; left me about three months ago, had with him then in going towards the New Country a dog a little brindled called ``Turkey,'' but nothing like the dog I have seen to-day; never saw it before; I saw Haydon alive about six weeks ago; saw him dead at the Gaol of Parramarrago, Inverary, near Dr. Reid's about a month ago; am sure it was the body of Haydon.

James O'Neale, -- I saw the same dead body lying at the Inverary lock-up, and saw the last witness (Jawyers), going to recognise the body; spoke to him upon the subject.

Richard Jawers recalled. - When he left me the last time to go up the country, he was riding a black mare belonging to me; have seen the mare to-day, it is the same.

Cross-examined. - I believe I have had the mare for three years; have rode the mare many times; she was branded J; the mare knows me, and I can swear to her; I was once in trouble but Mr. Rowe cleared me out; did not take much trouble about my cattle; I saw the mare again coming down in the custody of the police; knew her directly.

JOHN FOY. - Am a farmer living at Boro; deceased left my house on a Wednesday morning; saw him four days afterwards at Inverary gaol, he was then dead; it was the body of the man, whom I knew as Haydon, who left my house four days before; he had a dog with him, but which was then lost; when he left my place he expressed a determination to look for it; he had a razor and a key with him, also a dark handkerchief; he was about my age; I am about thirty eight; would know the razor, and could swear to the key; he wore such a handkerchief and hat as those now produced; I found them at Lynch's in Bungonia; the hat I bought myself, and can swear to it from the size.

Samuel Maylor. - The razor, key, and clothes now produced, appear to be the same as those I saw near the body.

McCAULEY. - Knew John Haydon; he called at my house on the 22nd September; he was riding a dark-brown mare; went with him to the store of Mr. McGillvray; he wanted change for a £1 note; Mr. McG. could not change it; it was No. 83 upon the Bungonia Bank (note produced); that is the note; prisoner was standing outside the store when we got there; I heard prisoner tell deceased he was going down to Sydney to stand his trial; they appeared to be acquainted; prisoner and deceased went away together; the things now produced I got from Maylor: I knew the jacket; had it from Mr. Hume; the jacket I had seen worn by Smith on that very morning, and several times before; had known prisoner upwards of four months; he was overseer to Mr. Kenny, of Lake George; could recognise the jacket by particular marks it bore; the

murder was reported to me about three or four hours after I had seen prisoner and deceased; I recognised the body to be that of John Haydon; I went in search to Mr. Gray's, a publican at Sutton Forest, and got there a £1 note; I got this note at Gray's house; I picked it out from some others which were in Jervis's hand, who is a butler or waiter to Gray; I took up some of Mr. Barber's men first upon suspicion, but I am now convinced of their innocence; there were wounds on the head, which seemed to have been inflicted by a hammer; might have been done by the handle of a whip.

Cross-examined - Saw other Bungonia notes, but did not look for any other than the one I had seen in possession of deceased.

JAMES LOUGHLIN McGILLIVRAY - I am a store keeper at Bungonia; saw the prisoner on the 22d September there about 9 o'clock in the morning; he was alone; I supplied him two figs of tobacco, he was dressed in a fustian jacket and trousers, straw hat, and laced boots; that is the jacket; whilst he was filling his pipe, I observed a button drop from his shirt, and picked it up, and placed it in the adjoining room of my store; that is the button; I have every reason to believe that is the jacket, it corresponds in every way with that prisoner wore; he had a dog with him; it was the same I have seen this morning; about ten minutes after prisoner left; deceased came in with McCauley; he handed me a Bungonia note, and wished for change; returned it to him saying, I had not sufficient change; he and McCauley went out together, and saw nothing more of them; when prisoner was in the house I enquired if his dog was vicious; he replied, yes, and at nine months old would seize a man, or words to that effect.

Cross-examined - It appears an ordinary jacket but I had not seen many like it up there before; no person except prisoner and the other two came in at the time; directly they went out I picked up the button, say ten minutes after.

JOHN TAYLOR - I am a carpenter at Bungonia; I saw prisoner at McGillivray's store on the 22d Sept.; whilst working at the bench saw two men with a brown mare going away; prisoner had on a white suit, but took no particular notice.

Andrew H. Hume - I am a grazier in Argyle; I received information of a murder being committed there on the 22d September; I saw the body in consequence of information; I went in search, and found the track of a horse, which I followed to a large tree, there saw a check shirt folded up, under the butt of the tree I found a white coatee [sic] or jacket, on the left arm was fresh blood; that is the jacket; I then called a constable, and delivered over the things to him; there was nothing in the pockets; the horse had come in an easterly direction from where the body was found, and from the bridge to where the dog was found; the horse had then turned to the southward about a rod, where the jacket was found; I then tracked the horse into the old road; it had a broad round flat hoof, but without shoes.

Jowers recalled - The horse was shod when deceased had the horse, but worn very thin.

THOMAS MACAULEY recalled - The morning I saw deceased he told me that the mare was without shoes, and that being heavy in foal, he was going to lead her down; observed myself she was unshod.

HENRY JARVIS. - I am a book-keeper, and sometimes wait at Mr. Gray's at Sutton Forest; about four o'clock in the afternoon prisoner came in as if from the stable the back way; he was in his shirt sleeves, with a straw hat and a pair of fustian trowsers; he came with a dark brown mare; he had some refreshment; he asked me if I had a coat to lend him, as he had got into a row at Major's Lockyer's the night before, and lost his jacket; I then left the bar for a short time, in the interim of which Mr. Gray returned home; when I went again into the bar he was trying on a jacket, but did not

buy it; before that he gave me a £1 to pay his reckoning, which was 6s.; I gave him 14s in change; that is the note; it is of the Bungonia Bank; I gave it to my master; it was the only one taken that day; there was another one in the house but it had been taken some days before; McCauley came the same day and picked it out; there was a stain upon it then; that is the same stain; will swear it is the note I got from Smith; when he got his change he rode away without a jacket; the mare he rode was heavy in foal; have seen Smith several times at my master's house.

Cross examined. - I told McCauley, that Smith had paid me a Bungonia note.

JOHN RILEY. - I live at Campbelltown; my father lives close by; on the 24th of September I was at his house; in coming from his place I met the prisoner leading a mare; did not notice how he was dressed; knowing him before, I spoke to, and asked him if that was the mare he had got the horse he had taken up to the new country; he said it was one he had got in exchange for the horse I alluded to; it was a black mare in foal; he went to my father's and had dinner, and when done he proceeded to his father's house about a mile and a half from there; I saw the mare afterwards, about the 8th of October, at Campbelltown Court House; it was the same mare Smith had at my father's.

JOHN McALLISTER - Am chief constable at Campbelltown; had an information against prisoner in October last, proceeded to his father's house, and found a black mare; brought it to Campbelltown to the house of prisoner's sister; Riley afterwards saw the mare and identified it as being the same prisoner rode to his fathers; the mare is now down in Sydney, in Driver's stalls.

Richard Jowers - The mare in Driver's stable is mine.

JOHN DEAN - Am a Sergeant in the Mounted Police; apprehended prisoner near Campbelltown, concealed in the bush at the back of the church; I had a warrant from Captain Allman, upon suspicion he was in the bush; on passing along I heard a stick crack, went forward and seeing the prisoner ordered him to come out; he asked what we wanted; I said come out or I would shoot him; he came out; and in going down the road told her not to fret as it could not be helped; I lodged him then in Gaol; a mare taken at prisoner's father's house; I brought it down this morning; Jowers has seen the mare, and claims it as being his property.

Cross-examined - When his sister saw him; he was in my custody, and could not but go with me.

FRANCIS MURPHY - Am a Surgeon; saw the body of Haydon on the 22d September, lying near Bungonia, by the road side; the throat had been cut by a sharp instrument; all the vessels around the neck had been cut through to the bone; the vertebrae was partly cut; it was quite impossible had he minded for him to have done it himself; there was a wound below the left eye, which had broken the bone; another upon the left ear; these wounds were severe, but not sufficient to cause death; the body was then warm, and the wounds fresh; a razor was lying upon his breast with which I think the wound on the neck must have been inflicted.

Cross-examined - He might have had the wounds inflicted by the claw end of a hammer, and then afterwards had his throat cut. This closed the case for the Crown. Prisoner said nothing in his defence, but called three or four witnesses to character. They could not speak with any degree of particularity, but had generally considered him an honest hardworking man.

The Chief Justice then went minutely though the whole of the evidence, commenting upon each part for and against as he went along, impressing strongly upon them at the same time that the evidence was chiefly circumstantial, yet in the absence of all explanatory testimony, if they believed the prisoner to be guilty, they

were bound in the virtue of their oaths, to say so by their verdict. The Jury then retired, after being absent about half an hour, returned with a verdict of - Guilty.

Mr. Therry then prayed for judgment. Proclamation having been made, prisoner was asked if he had anything to say why sentence of death; according to law, should not be passed upon him. He merely asserted his innocence.

The Chief Justice then proceeded to pass sentence, in doing which he observed that he most heartily wished that the declaration made by the prisoner was true, but he (prisoner) could have no expectation that it could be believed, his own conscience must tell him that he was guilty, a Jury of his country had then found him guilty, and he the (Judge) therefore was not at liberty to think that he was innocent. The whole course of the evidence must have convinced every one that he was guilty. Nothing but the quickness, intelligence, and activity of the Magistrates, could have so clearly developed the various minute circumstances connected with the case. He deeply lamented that prisoner was a native, and the first who had been brought to such an ignominious end not only for prisoner's sake, but for the credit of the Colony, did he lament it. His father, mother, and relations must all deeply feel the disgrace thus brought upon him (the prisoner's) self. What could have been his object so to attack a poor prisoner of the crown, without cause - without offence? except merely for the trifle of money deceased had upon him. He entreated the prisoner if he had any particle of religion within his breast, however dormant it might have been, to call it into immediate exercise, and make the best use of the short time which was then allotted to him. He would not dwell any longer on his unhappy case, but proceed to pass the sentence of the law. He then passed sentence of death in the usual form, ordering him to be executed on Monday morning and the body after death to be delivered over to the surgeons for dissection. The prisoner heard the Judge's address with much composure, except that part which alluded to his parents. He was then removed from the dock. The Court was crowded during the whole of the trial.

See also Australian, 15 November 1836; Sydney Herald, 17 November 1836. On 5 August 1836, James Smith, possibly the same man, was found not guilty of the murder of James Whaling: see Burton, Notes of Criminal Cases, vol. 26, State Records of New South Wales, 2/2426, p. 62.

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SYDNEY GAZETTE, 15/11/1836

Execution, 14 November 1836

Execution. - Yesterday the utmost penalty of the law was carried into effect upon William Smith, convicted on Friday last of a wilful and atrocious murder. Smith was a native of the colony, about thirty years of age, of a very strong and muscular frame. He was attended in his last moments by the Rev. Mr. M'Encroe, being of the Catholic persuasion. He made no public statement as to his guilt, and every arrangement being completed, the drop fell, and he was launched into eternity. His struggles, before animation ceased, were long and violent.

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