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

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.

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

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.

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

SYD1837

SYDNEY GAZETTE, 09/02/1837
Supreme Court of New South Wales
Dowling A.C.J., 7 February 1837

CATHARINE JANE DAVIS stood indicated for assaulting at Bathurst, on the 10th of October, 1836, one **JOHN COOPER MURPHY**, by stabbing him with a knife on the left side, with intent to murder, or do him some grievous bodily harm.

John Cooper Murphy, examined - I am clerk at Bathurst; I first saw the prisoner at a person's house named **ENRIGHT**; I was after procuring half a gallon of rum at Mrs. Dillon's; I was then quite sober; lying asleep on a bed in one corner of the room; I lay down, but before so doing, Enright, his wife, and another man, drank some of the spirits; Mrs. Enright made a bed for me in the room with herself and husband; the prisoner slept in the outer room; I rose early, having occasion to go outside; Enright, on my return said the young woman is without a bed fellow; I approached the bed, and she made room for me; I laid down two half crowns; on rising the prisoner jumped out of bed, seized me by the jacket, and said I should not go; I then sent for another half gallon of rum; I proceeded to Sheldon next morning, and on my return to Bathurst on passing Enright's prisoner followed me, and enquired if I had any money; I replied in the affirmative, and produced two £1 notes, and a shilling; the female and Mrs. Enright, during Enright's absence, enticed me into a small room, where I drank about a gill of rum; at the invitation of Enright I remained at the house during that night; the prisoner did not sleep there on that night; she was there next morning, and I overhead her tell two men that I had money, having seen two pound notes with me the day previous, on turning round on hearing this observation, and observing Enright sharpening a knife, I struck prisoner; the blow drew blood; in about ten minutes after prisoner came out, and stabbed me with all her force under the left arm; in a little time after the prisoner came to me, and said ``she was sorry for stabbing me and that she should abide by the result." I proceeded as far as constable Regan's, and on my arrival I fell on my face; the prisoner was not perfectly sober; she had been drinking; the knife that I saw Enright sharpening was the one with which she stabbed me.

Mrs. **ROCHE** examined - I am a constable's wife residing at Bathurst; my residence is about ten minutes walk from Enright's; on the 10th of October the prisoner came to my house in search of my husband to surrender herself, she having stated that she stabbed a man; on going outside I saw Murphy and Enright, the former was bleeding; the woman remained at my house about an hour and a half, until the return of my husband, who took her into custody; she appeared to be very sorry for what had happened, and made no attempt to get away; both Murphy and the prisoner were the worse for liquor.

Dr. **BUSBY**, examined - I saw Murphy outside of Roche's door, near Bathurst, on the 10th of October; he was lying, and appeared to be much exhausted from loss of blood; I examined the wound; it was about an inch in breadth, and a quarter of an inch in depth; it was a flesh wound, nothing more. The prosecution closed here.

The prisoner in her defence stated, that when Murphy struck her she had the knife in her hand cutting tobacco, and that she followed him on the instant, and stabbed him.

The Chief Justice summed up at considerable length, pointing out to the Jury the full bearing of what is termed ``Lord Ellenborough's Act," and the further improvement of that Act by Lord Lansdowne, the allowance made by the Legislature for the frailties of human nature in retaliating a blow which may produce death provided that it was done on the instant, under excitement, and without reflection and commenting with

merited severity on Murphy's conduct, in going about the country with half gallons of rum &c. The Jury, after a moment's consultation, acquitted the prisoner.
On the announcement of the verdict, His Honor directed that Murphy's expences should be withheld. [This seems to us a most extraordinary verdict. - Eds.]
See also Sydney Herald, 9 February 1837; Australian, 10 February 1837; and see Dowling, Proceedings of the Supreme Court, Vol. 131, State Records of New South Wales, 2/3315, p. 51.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 11/02/1837
Supreme Court of New South Wales
Dowling A.C.J., 10 February 1837
RAPE.
Before Acting Chief Justice Dowling and a Military Jury.
PATRICK BRADY, stood indicted for a rape on the body of **MARTHA EMILY CADMAN**, at Sutton Forest on August 20 1836, and **GEORGE NUTTER** for aiding and assisting thereat.

Martha Emily Cadman Examined; I am 16 years of age, I was brought up in the Orphan School. Mr Crawford of Prospect took me out about two years ago, to act as nursery maid in his family, I remained in his family about 12 months, I then went to Mr. Grays in York Street, and was there employed at needlework when his daughter was married, I went with her, and her husband to the New Country about 200 miles from Sydney; I remained there for six months, and in consequence of my masters, ill treatment of me, I left my service, for which he brought me before the magistrate Major Elrington, who sentenced me to the house of correction for three months and forwarded me on foot with a constable of his, named McCarshy, who accompanyed [sic] me 30 miles, and then gave me over to constable Nutter, the elder prisoner; he conducted me to Sutton Forest and we stopped at Gray's public house, where as bed was prepared for me, Nutter said, I should go down to Brady's hut, although I requested that I might be allowed to remain at Mr. Gray's, he Nutter said that if I did not go down Brady would report him; I had to comply, on my arrival I found 3 or 4 male persons there; there was a second room in the hut, which was filled with potatoes, and other things; I lay down in my cloths, on the sofa, the men lay on the floor; Brady asked me several times to lie down on the bed beside him; I refused, observing that it was not a proper place for me, after being on the sofa about half an hour Brady dragged me off the sofa, and pulled me on to his bed; I was full dressed at the time, Nutter was on the same bed; I screamed out (here the poor girl described the nature of the assault, her appearance is mild and unobtrusive, and she appeared much affected during the painful recital) next morning I proceeded in company with Nutter on the road to Bong Bong; A man named **SCHOLEFIELD**, who slept in Brady's hut, that night said that he would have come to my assistance, only that Brady was a constable; on the road down from there to Liverpool, I did not mention the circumstance, having heard that I would only subject myself to ill usage from the constables had I mentioned it; there were two women in the goal at Campbell Town where I was put, and I was afraid to mention it to them, as they were going to the Factory; in consequence of an illness originating from the assault I had to be put into Liverpool Hospital, from whence I was conveyed to Sydney in a cart; on my arrival at Sydney Goal I communicated the circumstance to my mother; and in less than a quarter of an hour after Doctor **MONCRIEFF** and another gentleman visited me; I

reside at present at Mr. Walker's, wheelwright, near Burwood, on the Liverpool Road; I slept at Mrs. Bigge's last night.

The witness then went through a long cross-examination by Brady, in which she had to repeat the Lord's prayer; to tell the number of lock ups she was in; and the time that was occupied in her removal after the committal by Major Elrington, until she arrived at Sydney. She also declared firmly, that previous to, or subsequent to the outrages perpetrated on her, by Brady, she never had improper connections with any person.

Nutter also cross-examined her at considerable length, on various topics unconnected with the matter at issue; the poor creature from the length of time they had her in their power, called them by name occasionally, and even that circumstance was commented on; she went through a painful unassisted cross examination; and further stated when she left her master's she went to reside at a carpenter's; there was a second man residing in the house; she slept in a bed separated from the men's by bark; there was a married woman lived close at hand, with whom she resided, but they had not the second bed; another constable named Johnston attempted to take liberties with her at Campbell Town, for which he offered her 4s. but she rejected his proposal.

JANE BRIAN examined - I am the mother of Martha Cadman, by my first husband; I reside in Philip-street; I obtain my living as a char-woman, and by washing and ironing; my present husband is a fencer; I was in the Sydney Gaol at the time of my daughter's arrival; she communicated the circumstance to me as soon as she saw me; she was then unwell; she said there were three invalids in the room when she was injured, beside Brady and another; she also said that she was afraid to tell what happened to her con consequence of a female having told her that she would be murdered on the road did she mention it; she said the reason she left her service up the country was, that he master placed her in a chair, and compelled her mistress to hold her hands while he cut her hair off; in answer to a question by Nutter, she stated that her daughter was born at Woolwich, that her former husband belonged to the Artillery, and that she had seven children in that garrison.

HENRY MADDEN, medical attendant at the Sydney Gaol, proved that on his examination of the prosecutrix he found her labouring under a loathsome disease. In answer to a question by the Judge, the witness said that the prosecutrix made a charge against him of making an attempt on her virtue; her conduct while in Gaol way highly unbecoming; she wished at one time that he was in bed with her.

The Attorney General - Pray, sir, why did you not tell that at the Police when you were there? I was not asked. You are a prisoner of the Crown? I am until Monday next. I have given her a few shillings occasionally in consequence of her poverty.

His Honor - have you made any improper overtures to her? No, I have not. Where did you get the money? I had remittances from home.

The Attorney General - Pray, sir, why did you not tell the Governor of the Gaol that she was the lewd character you represent? She was not when she came first, but she may be corrupted by the women of the Gaol.

Dr. Moncrief stated, that he examined the girl, and found her ill; her conduct from his observation was that of a quiet, well behaved girl; she was for some weeks in the gaol, during which time she had to associate with the most abandoned characters.

Mr. **WESTON** - I am Governor of the Sydney Gaol; I know the prosecutrix; she has been some weeks under my charge; I considered her a very mild, inoffensive girl; I never saw any thing loose either in her conversation or habits; I never heard that she was so disposed; she was very ill while under my charge.

This closed the case for the prosecution.

For the defence, **THOMAS SCHOLFIELD**, a prisoner of the crown, was called, whose testimony in favour of the prisoners was of the most doubtful description, according to his own account of himself, elicited by the Attorney General; he went through the different ordeals of his class, iron gangs, &c. &c.; he had known the prisoners previously, and they him, and under different circumstances.

Another prisoner of the crown named **WILLIAMS** was also examined his testimony went to prove any thing, or nothing, he unfortunately for himself being troubled with fits; he stated, that in consequence of the disease under which he laboured, he had a bad memory.

Mr. **GRAY** publican at Sutton Forest, proved the arrival of the prosecutrix at his house on the day laid in the indictment, she appeared much fatigued, and in consequence he said that she might remain at his house during the night, and sleep with his female servant, to this constable Nutter objected, without he Mr. Gray would be accountable for her appearance next morning, this witness declined doing, and she proceeded in company with Nutter to Brady's hut, heard no complaints next morning on the subject now before the Court, as she passed next morning, she spoke to a female servant of mine, a native, and shook hands with her at parting.

Martha Cadman was again put in the box; and examined by the Attorney General and cross-examined by the prisoner Brady; her testimony, was straightforward, as in the early part of the trial there was no prevarication, nor yet the most remote appearance of disposition on her part to withhold information, or to evade answering the numerous questions put to her.

His Honor, in addressing the Jury, repudiated in the strongest terms, the treatment which young free females, who may have erred in service, or otherwise, are subjected to, on their commitment to Sydney Goal; or in fact, to any other goal in the colony. ``They are," says Mr. Justice Dowling, ``compelled to associate with the most depraved and abandoned of their sex, whereby they are hurled into a vortex of misery on their departure from prison."

The Jury, after being out of Court a short time, returned with a verdict of Guilty against both prisoners. Remanded.

See also Sydney Herald, 13 February 1837; See also Dowling, Proceedings of the Supreme Court, Vol. 131, State Records of New South Wales, 2/3315, p. 152, (continuing at Vol. 132, 2/3316, p. 1). For another rape case which raised the character of the woman, see Australian, 10 August 1838; Sydney Gazette, 11 August 1838; Sydney Herald. 10 August 1838.

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

AUSTRALIAN, 17/02/1837

Supreme Court of New South Wales

Dowling A.C.J., 13 February 1837

Monday, February 13. - (Before His Honor the Acting Chief Justice and a Civil Jury.)

ANDREW GILLIES stood indicted for the wilful murder of **JOHN KELLY**, at Yass, on the 20th day of April, 1835.

JAMES DANNAGHER deposed - I was Chief Constable at Yass in 1835; I recollect John Kelly; he had been in the employ of Gillies (who travelled about the country, selling rum, sugar, tea, &c.) and came to the Yass Bench to give information of his (Gillies) retailing spirits without a license; an information having been filed, Kelly was sworn in as constable, and received arms to go with me to seize the prisoner's teams and the spirits; we went to Russel's, about forty miles from Yass,

where we found a cask, a small keg, a tarpaulin, and the teams, in charge of a man named **HOY**; seized the casks and teams and took them to the Bench at Yass; a man named **AIKIN** was with us driving a team; I gave Kelly orders to go and serve the summonses on the people whom he mentioned as having purchased spirits of Gillies; he went away, and I never saw him afterwards; he wore high-low shoes, a black hat, brown jacket, and nankeen trousers; he was about five feet four inches in height, of a sandy fresh complexion, about thirty-five years of age; there were a good many people at Russell's, but it was not a public-house; after parting from Kelly, I proceeded towards Yass with the two carts and horses, and the driver; Kelly should have been back on the Tuesday-week following, to have given evidence against the prisoner; when the day came, Kelly was still absent, and the Court adjourned; the prisoner attended, as did Hoy; the effects were held in custody for some time, but Kelly not appearing, they were ordered to be delivered to the prisoner; I was not chief constable when Hoy turned approver; I was never sent to where the grave was found, nor have I since seen any clothes of the deceased; it was suspected that Hoy was interested in the sale of spirits by Gillies, but there was no information against him.

By a Juror - One of the persons for whom Kelly had a summons, named Flinn, appeared at the Court.

EDWARD BURKE ROACH, sworn - I am chief constable at Yass; I remember receiving a warrant from Mr. O'Brien, I think in September or October last, to attend Hoy in the apprehension of Gillies, for the murder of John Kelly; I proceeded to the station of prisoner at Coiah Creek, where I apprehended him; I read the warrant to him; Hoy was outside the door; prisoner did not appear at all agitated, but said ``very well;'' I proceeded to the spot where the body was said by Hoy to have been buried; Hoy pointed out the place, and assisted in raising the body; his recollection of the place was not perfectly accurate; the body was lying alongside of a log of wood; he found a shoe and dug up the feet first; when I told the man to dig at the other end he did so and found the skull, which I put in a bag and brought away, leaving the rest of the body; the remains were three feet below the surface; it was about three feet from a running stream of water which, at times, is very wide, extending over the spot on which the body was found, with very deep water-holes; there were some stones on the body which appeared to have been accidentally placed there; I went to the spot again last Friday, and examined the remains, the bones of which were kicked about; I could only find one shoe, or a lace-boot, a piece of brown cloth, apparently a sleeve of a jacket, a button, and three-and-sixpence in money; there is no place for crossing the water near there; it is a clear stream of running water, the chain of holes or ponds are very deep, and in fact, in winter, form a wide river.

Cross-examined by Mr. Foster - I did not hear that Gillies was about to give information against Hoy for cattle-stealing.

JOHN HOY, deposed - It will be two years ago in March since I left Mr. Roberts' employ as stockman, and went to Phil. Ward's, at Cunningham's Creek, where I found Gillies' teams - two horses and two carts, and a man and a boy; in the cart were quantities of rum, tea and sugar; prisoner was away looking for cattle, but a day or two afterwards I saw him, and was drinking with him at Ward's; Gillies had two casks in a cart nearly full of rum; prisoner left Ward's and went to Harris's; I went after him on the following day, and saw him selling rum; Kelly was not at Phil. Ward's, but he came up while we (prisoner and I) were at Harris's, which was the first time I saw him; Gillies asked what made him stop so long away - words ensued - and Gillies paid him his wages and sent him away; the teams were then sent to a water-hole ten miles from Harris's, and when we had been there for a few days, word came by a man

named Dacey; that a constable was coming from Yass to seize the rum, in consequence of information given by Kelly; the rum was then hid in the bush, about a miles from the water-hole; Gillies swore that if he met Kelly he would shoot him; a constable and Kelly came and seized the teams and property belonging to Gillies, and took them to Yass, next morning the prisoner and I started for Yass, where we learned that Kelly had gone to the Murrumbidgee to serve summonses on those persons who had purchased rum of Gillies; the following day, the trial came on, but Kelly was not to be found; Billies said he would go and endeavour to find Kelly to make it up with him, as if the case was tried, Mr. O'Brien would not only fine him, but seize upon all he had, which would ruin him; we started to go to Bogolong, to a Mr. Connor's, and met Kelly, armed with a musket; when he came up he stood aside from Gillies, who got off his horse, and threw himself on his knees and said to Kelly, he hoped he would not ruin him - that he would sooner give him the amount of money in which he should be fined than give it to Mr. O'Brien, as in the latter case every thing he had would be seized, Kelly said, "If I make it up what will I do with Mr. O"rien" musket?" The prisoner said, "he musket is easily planted in the bush, and if you consent not to go to Yass, I will give you 30l;" Kelly consented and Gillies paid him 30l. in notes; we started on there, and when we came to the Creek, Kelly and the prisoner went down to drink, while I held the horses; Gillies first drank; then Kelly went, leaving his musket on the bank; when he (Kelly) stopped to drink, I saw Gillies pick up a stone of about two or three pounds weight, and threw it sideways at Kelly; I know it struck Kelly, because he immediately fell on his mouth; Gillies then rushed down and seizing him by the collar, struck him several blows towards the back of the head with a stone which would weigh perhaps seven or eight pounds; I let go the horses and rushed towards him, crying out, ``In the name of God, what the devil are you doing?" he told me if I did not stand back, he would shoot me; I ran back and about to ride away when he called out, ``Jack, Jack, for God's sake, come back;" I said, ``I dare not while you have that piece;" he then took out the flint and endeavoured to draw the charge, but could not, when he threw the musket into the water-hole; Kelly was then lying dead on the bank; when I went to him, he said, ``Jack, my life is in your hand; he's done - he'll never put any more money in the pocket of government;" he then took the 30l. out of the pocket of the deceased; he took the handkerchief off his neck, and that of the deceased and tied his legs and arms, and fastened a stone to the body, and rolled it into the water-hole; I gave no information of the murder until about a year after the occurrence; I thought if I did that it would be endangering my own security in that part of the country.

JAMES CONNOR, sworn. - In the month of April, 1835, the prisoner called on me to request that I would not appear to a summons which he said was issued for my appearance to give evidence respecting having purchased some rum of him; he told me he would give the informer 30l. if he would settle it.

In his defence the prisoner strongly protested his innocence of the charge, and stated that the approver Hoy was himself the murderer of the man Kelly.

After His Honor had summed up, which duty was performed in a luminous manner, the Jury retired for a few minutes, and on their return, pronounced a verdict of Guilty. The prisoner was then sentenced to be executed on Wednesday morning, at the usual place.

See also Sydney Gazette, 16 February 1837, noting that the prisoner's body was to be dissected after execution. See also Dowling, Proceedings of the Supreme Court, Vol. 132, State Records of New South Wales, 2/3316, p. 54.

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

AUSTRALIAN, 07/03/18347
Supreme Court of New South Wales
Dowling A.C.J., 3 March 1837
SUPREME COURT. - (Criminal Side.)
Friday. - Before His Honor the Acting Chief Justice, and a Military Jury.
JOHN HENRY WHITEHEAD was indicted for the wilful murder of **JURAKOI**, an aboriginal black, at Port Philip, on the 17th day of October last.

EDWARD FREESTONE - On the 17th day of October last I was assisting the prisoner in unloading a dray of hurdles, when he cried out, ``here is a black fellow,'' and appeared to be very much alarmed; we had no fire-arms; the prisoner said he saw some spears with the black; on the black coming up I enquired his name, he said it was Kilgoran; on the overseer coming up some short time afterwards, however, I discovered that he had given me a false name, as the name by which he was known, both among the settlers and his own tribe, was Kuragoi, a notorious character; he recognised me, and on my giving him to understand that I did not know him, he brought circumstances to my recollection by which I knew that we had on one occasion travelled together; I went away in a short time to a place about a quarter a mile off; I had been there some time, when I heard a wild cry like that of a native, which lasted for about ten minutes, then a shot was fired in the direction of the tent where I left Whitehead and the black; then there was hallooing, and another shot, which alarmed me, as I thought the natives had come down, and we had no fire-arms with us; I was then leaving the cattle to proceed to the tents when I heard a third shot fired but no more crying out. I saw Taylor, the overseer, coming towards me, and we went together to the tent; before I got there I saw the prisoner coming from the river; on coming up he said the black fellow had run away; Taylor asked why he let him go; prisoner said he let him go because he made such a noise, and he was frightened lest the natives should come down upon him, as he was alone; I then went towards the tent; on one side of the tent was a large tree, near which I saw lying the opossum-skin rug that was worn by the black when I last saw him, on which, and on the trunk of the tree was blood; Taylor walked about as if much agitated, and said to the prisoner, -- I fear, Jack, you have murdered the man! There was a piece of cord round the tree which Taylor took off, and with a spade commenced taking off the blood; it was then dinner-time; while at dinner the conversation was almost entirely respecting the native; I said I knew the rug as one that belonged to Mr. Fergusson, and that it was taken from the persons who had been murdered by the blacks four months before; I had mended it for Mr. Fergusson, which made me recollect it; I wanted the rug that I might return it to its original owner, but Taylor would not let me have it, saying it should be burnt; the prisoner afterwards told me that he shot the native because from his shooting he was afraid of his tribe coming down to murder him; I said as the fellow was tied to the tree he could not have injured him; in reply to my question on the subject, he said he threw the body into the river; I do not know of any search being made for the body; I never saw it.

Cross-examined - When I heard the black crying out, I imagined that he was calling upon his tribe to come out of the forest close by; when I left the black at the tree there were four men there; it is only known that the aborigine was shot by the prisoner's own statement to that effect, and he always said he was induced to do so by the cries of the man (as he supposed) for his tribe; I did not consider it at all unreasonable that

he should have been alarmed under the circumstances, as the cries alarmed me who had been accustomed to the natives for some time, and prisoner was almost a stranger to them, and the tribes were generally very numerous in that neighbourhood from its being their hunting ground.

JAMES FLIT - On the 17th of October last, about ten o'clock in the forenoon, two men (Jemott and Wilson, on Captain Swanston's establishment) called to me across the river at the bottom of my garden, saying that they had got Kurakoi, and wished to know what I would have done with him; I went directly from my house to Captain Swanston's establishment, where I saw Mr. Taylor, the person in charge, and enquired to see Kurakoi; in consequence of information communicated by Taylor, I went down to the river and found a string of native manufacture lying along the bank of the river; on pulling it I hauled at length a dead body of a native to the surface; I examined it; it was the body of Kurakoi; in half an hour afterwards I saw the prisoner in conversation with Taylor; prisoner said he was sorry, but he could not help it, or he would have had to abide the consequences.

Cross-examined - I do not know where Jemott and Wilson are; they came up to Sydney in the Rattlesnake to give evidence on this trial; I understand Taylor is in Van Diemen's Land; I saw him in Launceston in January; I have good reason to know Kurakoi; he had been living at my station for fourteen days on the 6th September, when he came to me and said that as he had been unsuccessful in kangarooing there, he would now go to a wood where he knew there was plenty, and in eight or ten days he would return and pay me for my kindness to him and his wife; he went away; the next morning, about nine o'clock, I was coming out of the door of my hut, having no idea of any person being there, and in the act of stooping to the door, when I received a blow on the back of my head from a tomahawk which cleaved my scull; I saw it was Kurakoi; on recovering from the stun, I made a rush at him, but he being naked and his body greased, he eluded my grasp, and turned the corner of the hut; I returned into the hut and took a piece, which I levelled at him, but it snapped and he got away; I have every reason to believe that there were other blacks in the vicinity; it was in reference to this affair that Jemott and Wilson came to inform me they had secured Kurakoi; it must have been from a suspicion that he would be detained, if discovered, that he gave himself a false name when interrogated at the hut; if I were alone with him, and he were making a great noise, I should consider myself in danger, although he were tied up, because a party of blacks may be within twenty yards of a person, and yet be completely out of sight; I believe that if any one had him in custody, and he managed to loose himself, that he would kill his keepers unless he were first disabled; prisoner told me that when he shot Kurakoi, he was fearful of being himself killed by either him or his party; I have known several instances at Port Philip of a single native coming to reconnoitre a place while a large party were waiting in the vicinity.

The case for the prosecution being closed, Mr. Windeyer submitted to the Court that the name the aborigine gave himself, which according to the evidence they had heard was Kilgoran, must be taken to be his true name, and on this ground, the prisoner must be acquitted, as he was indicted for the murder of a man named Kurakoi. If, however, Kurakoi be his true name, there was good ground to suspect his intentions when he assumed another.

Prisoner put in a written defence, stating that the witnesses he had subpoened had been in attendance, but as the trial was postponed, it was not expected to come on before the next Sessions, and they had all gone away he knew not where.

Mr. Windeyer recalled Mr. Freestone, who deposed that the deceased black was treated with the greatest kindness both by the prisoner and the other men, until Taylor discovered that Kilgoran was an assumed name; Taylor knew him to be the Kurakoi who was renowned for his outrages upon the settlers, and who had attempted the life of Captain Flitt; Taylor then had him bound to a tree with a kind of cord of native manufacture, and sent Jemott and Wilson to inform Captain Flitt of his capture.

His Honor summed up very minutely, and left the case in the hands of the Jury, who pronounced a verdict of Not Guilty, and the prisoner was discharged, with a caution from the Judge how he comported himself towards the Aborigines for the future; as, if he had been convicted by the Jury, he would inevitably have suffered the utmost penalty of the law.

[*] This report was reproduced by the Sydney Gazette on 9 March 1837. See also Dowling, Proceedings of the Supreme Court, Vol. 133, State Records of New South Wales, 2/3317, p. 127, spelling the victim's name as Curacoine. At the end of this judge's notebook account of the trial, at p. 151, there is a short statement written by the prisoner:

``May it please Your Honor

``Gentlemen of the Jury.

``The lonely situation in which I was placed at the period of this transaction leaves me but little to adduce in my Defence. I am even without the common aid of being enabled to call Evidences in my behalf in consequence of this trial having been postponed, they were in attendance before the Court adjourned, but since removed to their residence.

``It is to be hoped there has been enough shewn by the prosecuting witnesses to establish my plea of Justifiable Homicide, as the deceased was of a most ferocious character. I was left in charge of him, among his own wild tribe, and in a lonely and unprotected place, by what means he unbound himself I cannot describe but on removing my eyes from him, and replacing them, the act almost of a moment, I discovered the deceased unbound and in the act of approaching me with an axe in his hands, and uplifted, dreading my life, the first impulse was to raise the loaded piece I had in my custody with a view of intimidating him, when the piece exploded without a full intention on my part. [lines deleted] the agitation of mind, and the apprehension of his Tribe having heard the shot and coming to the spot and murdering me caused me to remove the Body as well deny the occurrence to my party, till I considered myself and them, out of their reach. Gentlemen, the place of the transaction at that time, was not as the protected parts of this Colony, and the character of the deceased bore, and other Circumstances I trust in the absence of all testimony but my own statement will be sufficient to exonerate me [lines deleted, including signature of John Henry Whitehead] from any imputation of maliciously or feloniously committing the act to which I was impelled by the necessity of the moment. The blood upon the tree was occasioned by the deceased's rubbing his back to get loose."

On 22 April 1837, the Sydney Gazette claimed that Whitehead's conduct led to the subsequent killing of two whites in revenge for the death of the Aborigine.

For the details of the Aboriginal missions in the Port Phillip district (and a proposal for a native constabulary), see Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, pp 294-304.

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

SYDNEY HERALD, 03/04/1837

Dowling A.C.J., and Burton and Kinchela JJ, 31 March 1837

Friday - In Banco - Before the three judges.

At the opening of the Court, **PATRICK BRADY** and **GEORGE NUTTER**, convicted, the former of rape, and the second for being accessary thereto, were placed at the bar. The Attorney-General having prayed the judgment of the Court, the prisoners were called on to shew cause why judgment of death should not be recorded against them.

Brady said that within the last few days, the master of the girl had come to Sydney, and had promised to communicate with the judges on the subject; if his witnesses had been down at the time of trial he would not have been convicted.

The Acting Chief Justice said that in consequence of the circumstances which had transpired at the trial, he had thought it his duty to enquire into the character, manner of life, and conversation of the girl, and the result had been, that he felt himself justified in telling the prisoners that their lives would be spared, but still their conduct had been such as rendered an exemplary punishment necessary. Judgment of death was then recorded against both prisoners. [*]

See also Sydney Gazette, 1 April 1837; Australian, 4 April 1837.

[*] Death recorded meant a formal sentence of death, without an intention that the sentence would be carried out. Under (1823) 4 Geo. IV c. 48, s. 1, except in cases of murder, the judge had considerable discretion where an offender was convicted of a felony punishable by death. If the judge thought that the circumstances made the offender fit for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved (s. 2).

Justices Burton and Kinchela wrote to the Colonial Secretary on 22 May 1837 in response to an inquiry concerning the practice of sentencing prisoners to death recorded rather than pronouncing the sentence of death. They said that they agreed with the Attorney General that in legal construction there is no difference between the two, but that did not require death recorded cases to be placed before the Executive Council for consideration of mercy. The governor's instructions required a written report when prisoners were ``condemned to suffer death''. Under the statute (4 Geo. 4 c. 48), they said, judges were granted power to refrain from pronouncing judgment of death in capital cases whenever they were of opinion that the offender was a fit and proper subject for a recommendation of Royal mercy. In such cases, death was to be recorded and not pronounced. Justice Burton and Kinchela argued that such cases were not within the spirit or terms of the King's Instructions. (Source: Chief Justice's Letter Book 1836-1843, State Records of New South Wales, 4/6652, p. 37.)

On this interpretation, the judge's power to sentence prisoners to death recorded mitigated the harshness of capital punishment by extending the power of mercy to the judges as well as to the crown via the governors. The judges' decisions to pronounce the sentence of death recorded could not be reviewed.

The Sydney Herald, 6 February 1837 claimed that the judges of the Supreme Court were now commuting sentences illegally: they may order death recorded, it said, but they commuted it to punishment for a brief period in an iron gang. The Herald appears to have misunderstood the legislation. See for instance R v. Halligan, Australian, 7 February 1837.

See also Execution of Criminals Act, which received royal assent 14 July 1836 and was in force from that day: it enabled judges to extend a term of life to criminals convicted of murder as well as other crimes: Australian, 13 December 1836.

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

SYDNEY HERALD, 11/05/1837
Supreme Court of New South Wales
Dowling A.C.J., 5 May 1837
Soldiers and Convicts.

Friday, May 5, 1837. Before the Acting Chief Justice and a Civil Jury.

JOHN M'CAFFERY, JOHN JONES, and JOHN MOORE, were indicted for the wilful murder of **THOMAS O'BRIEN**, a private of the 50th Regiment, on the highway, near Berrima, on the 19th of February, by striking him on the head, face, neck, and body with sticks, so that he then and there instantly died.

JAMES HAYES - I am a private in the 50th Regment [sic]; I was at Atkinson's public house on the 19th February; it is two miles from Berrima Stockade; I was on guard, and should have been on duty; I was in company with Thomas O'Brien of the 50th; we left the stockade about three o'clock; two young women went with us to Atkinson's; the prisoners were in the house; I had known then before; Jones had been

in my charge; I knew M'Caffery well; before we got to the public-house the young women gave us two bowls of wine, which they had in a dray; while we were standing outside, Jones came out and asked me if I would have a glass? I went in and had several glasses; some time after, the deceased came in, and Jones asked him if he recollected getting him twenty-five lashes in the gang? "I mind it very well," said O'Brien; "Well," said Jones, "there's no animosity between you and me;" - "not the least," was O'Brien's reply, and they drank together; we sat down in company, and after about an hour O'Brien was intoxicated, and he said he would fight any man in the room; I said, "O'Brien, do not make a fool of yourself," and I prevented him from taking his jacket off; Mrs Atkinson heard the noise, came into the taproom, and shoved him out of the door, which she shut; in a few minutes afterwards, the prisoners went out, and returned in about twenty minutes, and commenced drinking; in about half an hour, I left the house to go home, and M'Caffery followed me, and said it was time I was home; I said I would go home when I pleased, on which M'Caffery struck met; when I had gone about fifty yards, I went on one side, when I saw Moore and M'Caffery going through the wood, and I was on my way home, when I saw three men going away from the body of O'Brien, which was lying on the road; M'Caffery was one of the men - to the best of my knowledge, the other two men were the other prisoners. - M'Caffery had a large stick in his hand; they were about ten yards from the body when I first saw them; M'Caffery wheeled to the right about, and looked at O'Brien; he then looked at me; I was from ten to twenty yards from him; he did not speak; I went over to O'Brien, the deceased man, and the body was naked; his jacket was under his head; there was a large stick covered with blood broken into three pieces; there was another small stick covered with blood lying by his side, which I took to the barracks; the man was warm, but dead; his face was covered with blood. I went home as fast as I could, and reported that O'Brien was murdered, and M'Caffery was the man that killed him, as he was one of the men that was going away from the body; I was in the guard-room on the 19th of February, when I saw Patrick Conolly take off Moore's hat, and take a handkerchief out of it, which I saw O'Brien wear on the day in question; Moore was in custody of the guard. That is all I know about the murder.

Cross-examined by Mr. Windeyer for M'Caffery and Moore. - The handkerchief was between a red and yellow; I do not know what had become of the shirt; I did not see O'Brien take it off;;I was not so drunk as he was; M'Caffery was not dead drunk, but I think Jones was more sober than he; when O'Brien came in to Atkinson's, Jones gave him liquor; the prisoners left the house together; they appeared sober enough, much soberer than O'Brien; the body was about five hundred yards from the public house; I spoke to Jones the same as the other men in the company, not more with him than with the other men; he is Mr. Atkinson's servant; I was not surprised at the friendly feeling shown by Jones; the words used by Jones were not "you got my back cut, and I will cut you head the same way;" I cannot say whether O'Brien was murdered the time the prisoners left the public-house the first time; when I first went to the barracks, I said O'Brien was dead; I did not say "he will be dead before you get to him," when we came out of the public-house, I was not to say drunk altogether; M'Caffery was not very drunk; the three men were, in my opinion, the prisoners; I did not see Jones's face, but there was a man of his size; it was daylight when I got to the barracks; I did not move the body; it was between five and six o'clock when I saw the body dead; I told the officers that M'Caffery was the murderer; Mr. Thompson, of Bong Bong, was one of the magistrates that investigated the matter; the body was brought to the barracks by some of the men; when the body was at the barracks, I saw

a wound over the eyebrow; his chest as beaten; when I first saw the body the blood was running.

Re-examined - The prisoners were absent about twenty minutes, and returned to the public-house they might have been absent long enough to have committed the murder. Cross-examined by Jones - You were in my charge for twelve months; you have been in the barracks since you left the gang; I do not recollect your being in my company; if I had seen you face I should have known you; you were not with M'Caffery and Moore when M'Caffery struck me; I am well aware you are the man that got O'Brien murdered for getting you flogged; I heard no words pass concerning Egan.

JOHN NEILLY, private in the 50th regiment - I was at Atkinson's the day the murder was committed; Jones said to me about five or six o'clock, "do you recollect O'Brien getting me five and twenty in the gang?" I said I did not recollect who got it him, but I knew he received it; he then said, O'Brien's head was sore as ever his back was, which I would see as soon as I turned the corner of the road; I had not gone twenty yards before a man told me one of my comrades was murdered on the road, and as I was the first he met, to go back and give the alarm, which I did; Jones was alongside of me when the man gave me the alarm; as soon as I had given the alarm I went to the corpse; he was stripped of his shoes and shirt, and had been murdered rascally, his head was covered with blood; he was lying mostly on his right side; I saw a stick broken into three pieces; I left the corpse, and came on to barracks to give the alarm.

Cross-examined by Mr. Windeyer - I did not see Hayes in the public-house; I did not put my hand on the body; it was very plain it was dead; his whole face was covered with blood, the blood was running, and the murder must have been committed very shortly before; when I first saw Jones he was under the verandah; Hayes had told them that the murder was committed before I got to the barracks, but they did not believe him; he was on sentry when I go there; Jones was drunk when he spoke to me, but not too drunk to beat a man that was laying on the ground asleep; when I got to the barracks, Hayes was tolerably sober.

DANIEL WHITEHEAD, medical attendant at Berrima Stockade - I was sent by Lieutenant Briggs to see the body of Thomas O'Brien; I found it about a quarter of a mile from Atkinson's, the body was quite dead; he had no shirt or boots on; his death was caused by violence, inflicted by a bludgeon; there was a blow over the left eyebrow, sufficiently large to admit the fore finger; the scull was fractured; four of his teeth were nearly out; he had received some blows on his breast, and his arm was bruised, as if he had been defending himself; there were three pieces of wood, forming one stick; there were marks as of teeth, and there was blood and hair on the stick; it was nearly as think as my arm, and between five and six feet long; it was a stick likely to cause the wounds I saw, and those were sufficient to cause death.

MICHAEL FLINN - I am district constable at Berrima; I went to examine the hut of Jones on the 19th of February; his hut was on the farm of Mr. Atkinson, to whom Jones was assigned; I found a handkerchief concealed between the sacking of the stretcher, it was a black silk one; there were two other men in the hut; I gave the handkerchief to the Police Magistrate at Bong Bong; it was Jones' berth.

RICHARD BOSTON - I am a private of the 50th regiment; I examined the hut in which Jones lived; I found Jones there and took him into custody; I saw a handkerchief in the Stockade, it had been my property; Mr. Briggs showed it to me in the Police Office; I had sold it to O'Brien about three months before the murder took place; it was said that Jones and big Jack had done it; big Jack (M'Caffery) is assigned to Mr. Barton; it was on Neilly's information I took Jones.

Cross-examined by Mr. Windeyer - When Hayes came to the barracks, he said O'Brien was murdered; Neilly I should think was half an hour after Hayes; Hayes mentioned the name of Jones; he told Corporal Wilton that Tom O'Brien had been murdered by big Jack and Jones; at the time big Jack was confined, he said he would crush any b--y soldier.

PATRICK CONLEY - I am a soldier in the 50th regiment; on the 19th February, I was sent to enquire into the truth of Hayes' report of O'Brien's murder; I went to Atkinson's and getting a pistol. I went in pursuit of big Jack, whom I found speechless drunk, or pretending to be so; I could get no assistance until some of my comrades were passing that way; the next morning I had the prisoners in charge at the guard room; on Moore I found a handkerchief, which I think belonged to O'Brien; Moore did not deny it was O'Brien's property, but said he might have picked it up.

This closed the case for the prosecution, but the following witnesses, whose names were on the information were called, at the request of the prisoners' counsel.

ROBERT JONES - I am a free man, employed by Mr. Boston; on the 19th February, I was at Atkinson's house with Moore; on out way to Atkinson's, I saw two soldiers and two girls with a tilted cart; I made the remark, when Jones said, that the big man once got him twenty-five lashes, when he was in the ironed gang, and his b--y oath he would make his head sorer than ever his back was, and Moore said he had better have nothing to do with the like of them people at all; when we got to Atkinson's, Jones called in one of the soldiers to treat him, and he too part of some brandy that was on the table; shortly afterwards, O'Brien came in, when Hayes was asked if it was comrade? he said yes, and he was then asked to drink; M'Caffery then came in; several tumblers of brandy were drunk: O'Brien was getting very tipsey, Hayes was not so tipsey; O'Brien got very drunk and quarrelsome, and was turned out; Mrs. Atkinson said she would draw no more, and told Jones as he had no pass, to go home and not go off the farm any more that day; she gave him half a pint of brandy in a bottle, and he left the house; I cannot say how long O'Brien had been out; I do not know whether M'Caffery and Moore went with him.

Mrs. **JANE MASON** - About four o'clock in the afternoon I saw M'Caffery coming from Atkinson's; he was very drunk; when I saw him he was about a quarter of a mile from the spot where the man was murdered.

The prisoners were now called on for their defence.

M'Caffery said noting in his defence, but Jones handed I a written statement of the usual tenor of document of that description drawn up in gaol. - It denied the principal part of the evidence against Jones, but admitted that the handkerchief was O'Brien's, which he had purchased of him that morning. Moore stated that he picked up the handkerchief in the house, and did not know to whom it belonged.

On behalf of Moore and M'Caffery, the following witnesses were called:-

Mrs. **ATKINSON** - I recollect Hayes and O'Brien coming to my house on the 19th February; I saw O'Brien making a disturbance, and had him put out of the house. Moore and M'Caffery were there; they went out about half an hour or twenty minutes after him; some time afterwards I went to Smith's, and soon afterwards M'Caffery came and asked for me, but Smith denied me to him, when M'Caffery said he wanted some drink, and did not know where I was gone to; he stopped at Smith's short time, and then I saw him going towards his own house. It was after Robert Jones had left the house that I left it, and locked up the liquor; M'Caffery always bore a good character.

By Jones - When you left my house I desired you to go home, and you went towards home; it was about a quarter of an hour before I shut the house up.

Mr. **RICHARD SMITH** - I reside near Berrima, about one hundred yards from Atkinson's; I remember Mrs. Atkinson coming over; I saw M'Caffery and Moore coming from the house afterwards; they asked for Mrs. Atkinson, but I denied her; M'Caffery was rather drunk; I heard Mrs. Atkinson say there goes O'Brien up the road - this was before M'Caffery came to the house; Moore turned off towards Oldbury, where he resides. About three quarters of an hour afterwards I saw M'Caffery leave the public house with a bottle in his hand, towards Oldbury; I saw him fall, and a man named Scott picked him up; about half an hour after O'Brien went pass another soldier went the same road; there was no one went between the time O'Brien went along the road and the other soldier of an hour after the second soldier had gone by that I heard a soldier was murdered.

Cross-examined - There was an interval of half an hour between the first and second soldier passing my house; persons might have passed without my seeing them, by going forty or fifty rods to the back of my house.

Mr. **JAMES WELLING** - I was going to Berrima to look out for a piece of ground to make bricks; was in company with a man named Patten; we met a soldier named Hayes - he did not speak to us; he had a bent stick in his hand with the bark bruised off it; Hayes looked very white in the face; we passed Hayes without speaking to him.

By Jones - I never told you I thought Hayes was the murderer.

His Honor carefully recapitulated the whole of the evidence, and the Jury, after an absence of a few minutes, returned a verdict of M'Caffery and Moore, Not Guilty; Jones, Guilty.

When called on to say why the judgment of the Court should not be passed, Jones called God to witness that he was innocent, and hoped the witnesses would be in the same situation as himself before a twelvemonth.

His Honor, in passing sentence on the prisoner, observed that no reasonable man could have any doubt of his guilt, and said, that from information he had received, he was afraid this was not the first time he had embued [sic] his hands in blood. Sentence of death, in the usual form, was then passed on the prisoner, who was ordered for Execution on Monday morning.

Jones, still violently exclaiming that he was innocent, asked the Judge to let him be executed on the spot where the murder was committed, but His Honor would not comply.

See also Australian, 9 May 1837; Sydney Gazette, 6 May 1837; Dowling, Proceedings of the Supreme Court, Vol. 136, State Records of New South Wales, 2/3320, p. 38.

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

SYDNEY HERALD, 03/08/1837
R. v. Doyle
Supreme Court of New South Wales
Dowling A.C.J., 1 August 1837
Tuesday, August 1. - Before the Acting Chief Justice.

EDWARD DOYLE late of **New Zealand** and Sydney, was indicted for that he at New Zealand, within the jurisdiction of the Court, on the 25th June, laid his left hand on the trigger of a pistol and did attempt to kill and murder one **JOHN WRIGHT** a British subject. The prisoner pleaded not guilty, and chose a civil jury, but applied to have his case postponed, as his witnesses who could prove an alibi were at New Zealand. The Crown Solicitor said that the prisoner had handed him a list of four

witnesses all residing at New Zealand. One of the witnesses who was named he could answer would attend, but there were no means of compelling attendance. The prisoner said he had no doubt the witnesses would come up if they were subpoenaed, and the Attorney General offering no objection, the case was postponed to next session.
Edward Doyle was indicted for breaking into the dwelling-house of John Wright at New Zealand, and stealing therefrom sundry articles. This case was postponed on the same grounds as the former.
See also Australian, 4 August 1837. See also Sydney Herald, 3 August 1837. On New Zealand see also Sydney Herald, 18 May 1837.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 04/08/1837
Supreme Court of New South Wales
Dowling A.C.J., 1 August 1837
HENRY WISE was indicted for maliciously stabbing **WILLIAM BURSELL**, at Woollongong on the 21st April last, with a knife on the left side of the back, with intent to kill and murder him. A second count laid the intent to do the prosecutor some grievous bodily harm. It appeared from the evidence of Bursell, that the prisoner, who is an orphan lad, aged about 14, was apprenticed to him about two and a half years ago, to learn the shoemaking and tanning trades. On the day laid in the indictment, the prisoner was saucy to the prosecutor's son, and also to a journeyman, upon which Bursell in the heat of passion seized a pair of new bridle reins, and struck the boy with all his force on the back, as he was sitting at work. The lad was parting the sole of a boot with his knife at the time, and he immediately rose up and a scuffle ensued between him and his master, who being frightened at the knife, immediately left the room, not knowing at the time that he had been wounded. Mr. Osborne a magistrate happening to pass Bursell's house at the instant, the prisoner was interrogated as to the cause of his disagreement with his master, when he replied that his master ill-treated him, and did not teach him his trade, upon which Mr. Osborne observed that under those circumstances he had better leave Bursell, and took him away with him. After the lad was gone, the prosecutor felt an itching sensation on the left side of his back, and putting his hand to the part, he discovered a moisture as if of blood, upon which he asked his wife whether he was wounded, and she replied he was. His clothes were cut through, but the wound was a mere scratch. Bursell then ran after Mr. Osborne, and showed him h wound, and the result was that the lad was committed to take his trial on the capital charge. Bursell admitted that he struck the lad in a immoderate manner while he had only his shirt on, and that the wound was of so trifling a nature, that he never took any further notice of it. The learned Judge stopped the case, observing that the injury complained of was not of sufficient extent to come within the meaning of the words in the Act of Parliament upon which the lad was being tried. Independently of this, sufficient evidence had already been shewn to entitle the prisoner to an acquittal on the present indictment even on the facts of the case. The Jury under His Honor's direction, returned a Verdict of ``Not Guilty.'' His Honor suggested to the Attorney General , that under the circumstances of the case, it would perhaps be advisable to cancel the lad's indentures, but it was ultimately thought it would be better to leave that to the discrimination of the magistrates of the district. The learned Judge told the prisoner he must accompany his master home; and then addressing Bursell, recommended him to treat the lad with kindness, and

when he found it necessary to chastise him, to do it in a temperate manner. The lad was as much under the protection of the law, as he, Bursell, was. The prisoner was then discharged. At the request of the learned Judge, Mr. Windeyer undertook the lad's defence, he being unprovided with counsel.
See also Sydney Gazette, 3 August 1837 (which estimated his age at 15); Sydney Herald, 3 August 1837 (which thought he was 16); Dowling, Proceedings of the Supreme Court, Vol. 134, State Records of New South Wales, 2/3318, p. 93.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 14/08/1837
Supreme Court of New South Wales
Dowling A.C.J., 11 August 1837
Friday. - Before the Acting Chief Justice and a Civil Jury.
JAMES HALL was indicted for discharging a pistol at one **BILL WILL, otherwise BILL WELL**, and wounding him in the belly and side with intent to murder him, at Marrabarrandi, on the 24th February. Other counts charged the prisoner with intending to do some bodily harm, to maim, &c.

The prisoner is assigned to Dr. Wilson, and has charge of some of the Doctor's cattle, near Twofold Bay. On the day laid in the indictment, he went to the hut of a servant of Captain King's, named Ward, who resides in the neighbourhood. Soon after he had gone into the hut, Ward heard a noise, and found the prisoner in dispute with a black fellow named Bill Well, whom he accused of having killed his cattle, and said he would take him to his master. There was an old black fellow in he hut who went out with Ward; Hall endeavoured to tie the hands of the black fellow, who said ``altogether white fellows b--- rogues,'' and soon afterwards Ward heard the report of a pistol, and saw Bill Well run away, and the prisoner said he had got away from him and got on his horse and rode after him; in abut twenty minutes afterwards, Bill Well came back to the hut, when Ward found that he was wounded in the belly. In cross-examination Ward said that he thought the black fellow was endeavouring to call the other blacks in the neighbourhood. In his defence the prisoner said that the black fellow made a rush at him with his tomahawk, and he shot at him in his own defence, he endeavoured to apprehend him because he had detected him in the act of killing his master's cattle. Mr. Cobban, a stipendiary Magistrate, deposed that he called at the prisoner's hut soon after he had shot at the black fellow, when the prisoner came to him and told him that he had endeavoured to apprehend Bill Well, and that in consequence of his making a rush at him he had fired at him. They proceeded together to the black camp, where Bill Well was lying, intending to apprehend him, but when he got there he found that he was so badly wounded that he could not take him over the mountains, and being in a hurry to proceed to Maneroo to investigate a case of murder, he left him there. He was aware of the character of Bill Well as a notorious cattle killer, and heard that since he had recovered from the effects of the wound he had killed several head of cattle belonging to Mrs. Bunn. His Honor in putting the case to the Jury observed, that the prisoner was justified in apprehending the black fellow if he was aware that he had injured his master's property; that the blacks were equally under the protection of the law with the whites; and if they were of opinion that the prisoner had maliciously shot the black fellow with intent to kill him, they were bound to return a verdict of guilty. On the other hand, His Honor pointed out the different circumstances of the case that were in the prisoner's favor, and told the Jury if they considered the prisoner, under the circumstances, was

justified in firing for his own defence, they must acquit the prisoner. Without retiring from the box, the Jury returned a verdict of Not guilty.

See also Dowling, Proceedings of the Supreme Court, Vol. 141, State Records of New South Wales, 2/3326, p. 1, which stated the victim's name as Bill Will or Bellwell.

On the same day, 11 August 1837, George Green was found not guilty of ``the wilful murder of a native black, called Diamond, on the Paterson River, on the 3rd January, 1836, by discharging a pistol at him." He was tried before Kinchela J. and a military jury: Sydney Herald, 14 August 1837.

The Australian, 15 August 1837, reported the latter case as follows: ``George Green was indicted for the wilful murder of a native black named Diamond, at Patterson's River, on the 3d January, 1837, by discharging a loaded pistol at him. The prisoner called a witness to character, who considered him a moderately honest man. The Jury returned a verdict of `Not Guilty,' and the prisoner was discharged."

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

AUSTRALIAN, 15/08/1837

Dowling A.C.J., 11 August 1837

FRIDAY. - Before Acting Chief Justice Dowling, and a Jury of Civil Inhabitants.

JAMES HILL was indicted for discharging a loaded pistol at an aboriginal native named ``**BILL WILL**," or ``**BELL WELL**," at a place near Twofold Bay, on the 24th February last, with intent to kill and murder him, or to do him some grievous bodily harm. The circumstances of the cases were these. Bill Will was a powerful man, and an active depredator among the cattle in the Twofold Bay districts. He had speared three head of cattle on that very day, belonging to Dr. Wilson, in whose service he was, and the prisoner rode after him to apprehend him; he was brought into the prisoner's hut with another old native black, and told to hold up his hands, that straps might be put on them, for the purpose of conveying him before Dr. Wilson, who was a Magistrate. Bill Will escaped out of the hut, and the prisoner went after him. When at some distance from the hut, the native turned upon the prisoner with his tomahawk, and the latter then shot him in the belly. He was very ill for some time in consequence of the wound, but he had since recovered, and had renewed his depredations among the cattle. Dr. Wilson had read to the neighbouring stock-keepers, a letter he had received from the Attorney General, to the effect that the Aborigines were as much under the protection of British Law, as any of the European inhabitants; before which time it seemed to have been the prevailing opinion, that they might be summarily disposed of with impunity. The prisoner rested his entire defence on the assertion that he fired the pistol in self-preservation, and while he was endeavouring to secure Bill will in lawful custody for spearing his master's cattle. He denied that he had shot the black while running away, as had been imputed to him, and alluded to the wound itself being in the belly, near the navel, as confirmatory of his statement. The prisoner called upon Lieutenant **COBHAM** of the Mounted Police, who stated that the prisoner himself had told witness he had fired at Bill Will in the manner he now alleged in his defence; and Lieutenant Cobham also said that he knew that native to be a notorious cattle spearer. Dr. **WILSON** gave the prisoner, who had been in his service for nearly four years, an excellent character for humanity. The learned Judge told Jury that if they believed the prisoner had fired the pistol in self-defence against a more powerful man than himself, who he was endeavouring to secure in lawful custody, and not from any malicious, or wanton motive, the prisoner was entitled to an acquittal. The Jury returned a verdict of ``Not Guilty," and the prisoner was discharged. Mr. Foster defended the prisoner.

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

SYDNEY HERALD, 17/08/1837
Supreme Court of New South Wales
Burton J., 16 August 1837
Wednesday. - Before Mr. Justice Burton and Military Jury.

HENRY KIRKWOOD, a Convict ``medical assistant," was indebted [sic] for manslaughter. The information set forth that one **ESTHER QUIN alias WALTERS**, being about to be delivered of a male child, the prisoner assaulted the said child and caused his death. [The assault of the prisoner was described in language such as we cannot publish.]

When the prisoner was arraigned, His Honor asked Mr. Foster if he would address the Court on a point that occurred to him, which was, whether the information for manslaughter could be supported, it appearing on the face of it that the child had not been born.

Mr. Foster submitted to the Court that the information was not maintainable: it was clearly established that murder could not be committed but on a reasonable being in the King's Peace. If a prisoner did any thing, either by administering potions or otherwise to cause abortion, he was punishable; but it was under a statute and not for murder. If a child received injury in the womb, from which it died after it was born, it was clearly murder in the person who inflicted the injury. In the case of Senior, where an injury was inflicted on the head of a child as soon as it appeared, of which it died as soon as it was born, an objection was made that the information could not be supported, the child not being born when the injury was inflicted; the judge overruled the objection, and afterwards, at a meeting of ten of the twelve judges, they unanimously agreed that the conviction was right; but in that case the child was expressly stated to have died as soon as it was born, whereas the information in the present case alleged that the child was about to be born.

The Attorney General said, that the objection had struck him in the same view as it had struck the judge, but as there was some analogy to the case of Senior, where the child had been injured before it was born, he though, it his duty to bring it before the Court; but he had not intended to call for judgment without bringing the matter under the express notice of the Court. The evidence went to shew that the prisoner, who was a medical assistant at one of the stockades, and stated that he had been sixteen years in a lying-in hospital in England, had unnecessarily interfered and acted in the manner stated in the information; and it would be a great omission in the law if, under the circumstances, the indictment was not maintainable. The learned gentlemen then said, that it was necessary the public should be protected from the mercenary impudence of men who, without the least authority, act as medical practitioners. He had intended to suggest a law on the subject, but the duties of his office had hitherto prevented him.

Mr. Foster said that the information alleging that the child was about to be born, it was quite evident that it could not stand; the offence rather appeared to be that the prisoner prevented the child being born.

Mr. Justice Burton said that he was quite satisfied that in case of a conviction the judgment must have been arrested; the principle on which he formed that opinion was very simple; that neither murder nor manslaughter can be committed, except on a living being that has had the breath of life in its nostrils. The prisoner was certainly punishable for a misdemeanor, if though his criminal negligence he prevented the

child from being born. His Honor said that he could not allow the case to pass without expressing from his seat on the bench, his entire condemnation of the practice of permitting prisoners of the Crown to act as medical practitioners, whether over their fellow prisoners or other people, Three cases had occurred before him, where it was evident that the grossest impropriety had existed from allowing such people to practice; and he trusted that His Majesty's Attorney General would take some steps to do away with it. If the law of England preventing grossly ignorant men from practising did not apply here, he thought that it should be made to apply immediately. He knew the over-whelming duties that oppressed the Crown Officers, and he could feel for them at every step they took; but if the duty of preparing such an act did not rest with them, it rested with some one else. He did not consider there would be any infringement of the liberty of the subject, were obliged to come before a board properly constituted and prove their ability to undertake what they pretended to. If the Attorney General agreed with him he would return a verdict of not guilty.

The Attorney-General said he entirely concurred with His Honor.

There being no evidence, the Jury returned a verdict of Not Guilty.

The Attorney General then preferred an indictment for a common assault, but at the suggestion of His Honor it was withdrawn, and the prisoner was remanded.

See also Australian, 18 August 1837 reporting the case as follows: ``Henry Kirkwood was indicted for manslaughter. The particulars of this case are wholly unfit for publication. The prisoner is a convict, employed in the capacity of medical attendant at one of the Stockades. He was sent for to attend the accouchement of the wife of a laboring man; and the gist of the offence was, that by the unskilful means he used, he prevented the birth of a male child. At the suggestion of the learned Judge, Mr Foster moved the point as to whether that form of indictment would lie, the child not having been born alive. His Honor concurred in the objection, and the information was withdrawn. The learned Judge expressed himself in strong terms against employing persons in the situation of the prisoner in a medical capacity - and of allowing any unqualified person to practice as a medical man."

This case was also recorded in Burton, Notes of Criminal Cases, vol. 32, State Records of New South Wales, 2/2432, p. 49. Burton noted that the Attorney General referred in argument to 3rd Just. 50; 1Hawk. P.C.; and Chitty's Medical Jurisprudence.

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

SYDNEY HERALD, 17/08/1837

Supreme Court of New South Wales

Burton J., 16 August 1837

PETER FITZPATRICK was indicted for manslaughter. The information stated that on the 14th May, the prisoner was driving a horse and cart along the Cowpasture Road, when by hallooing, shouting, and making a noise he caused the said horse to gallop and run away, by which means the cart was upset, and one **THOMAS SEYMOUR** was cast on the ground, and received divers mortal wounds of which he died.

A constable named **MACINTOSH** stated that, on Whit-Sunday he was riding along the road, when he passed the prisoner's cart, a boy named Seymour was riding on the front of the cart;, Fitzpatrick was very drunk in the bottom of the cart, and the father of the boy was walking very near the horse's head; a few minutes afterwards, the horse galloped past him at a furious rate, the prisoner was hallooing and making a

noise, and the boy was crying out for help; he went after the cart, and saw it upset; and when he got up to the spot the boy was lying with his arms under the fore part of the cart, and expired immediately. The boy's father stated that he was walking near the head of the horse, and had occasion to leave it for a moment, when the horse ran away without any reason that he could assign; the prisoner was so drunk that he was obliged to be lifted into the cart. His Honor told the jury that they must acquit the prisoner, as it was necessary to support the information, that it should be proved he was the cause of the horse-running away. Not Guilty. - Discharged.
This case was also recorded in Burton, Notes of Criminal Cases, vol. 32, State Records of New South Wales, 2/2432, p. 70.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 18/08/1837
Burton J., 16 August 1837
PETER FITZPATRICK was indicted for manslaughter under the following circumstances. On the 14th May last, the prisoner was proceeding in his cart along the Cowpasture Road, he lying drunk in the bottom of the cart, and **THOMAS SEYMOUR**, a lad between eight and nine years of age sitting in the front of it. The father of Seymour was walking by the mare's head, but having occasion to stop for a few minutes, the cart went on. After it had gone on a short distance, the animal suddenly started off at full gallop, from what cause it was not known; the cart was capsized, and the boy killed upon the spot. Mr. **JOHN M'INTOSH**, Chief Constable of the Stonequarry district, had passed the cart shortly before the occurrence took place, and observed that the prisoner was helplessly drunk. Having occasion to dismount at a house a little further on, he was standing there when the cart passed at full speed, and the prisoner was shouting in the usual manner of a drunken man. Mr M'Intosh immediately galloped after the cart, but did not arrive until after it was upset, and the boy merely groaned once, and then died. The learned Judge stopped the case. The shouting of the prisoner while the mare was at full gallop, he might have intended as a call for assistance - the cause of the mare's starting off ought to have been shewn to sustain such an indictment. The prisoner was then discharged.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 18/08/1837
Supreme Court of New South Wales
Burton J., 15 August 1837
TUESDAY. - Before Mr. Justice Burton, and a Jury of Military Officers.
MICHAEL CAGNEY was indicted for the wilful murder of **EDWARD HUGHES**, at Maitland, on the 23d May last, by striking him on the right side of the head with a stick, from the effects of which the deceased languished until the following day, and then died.

Mr Therry conducted the case on the part of the prosecution; and Mr Windeyer appeared on behalf the prisoner.

The circumstances of the case were these:-- The prisoner, a young man between 20 and 21 years of age, who came free to the colony, lived in the service of a butcher named **WHOLAGHAN** at Maitland, who, having occasion to slaughter a beast about 2 o'clock in the morning of the day laid in the indictment, was assisted in that office by the deceased, on Broadway, and another person, not produced before the Court.

The beast was slaughtered in a paddock about 200 yards from Wholaghan's shop, and during the time the parties were engaged in slaughtering it, the prisoner came to them, and began to expostulate with Wholaghan for remaining from home for so long a time, upon which the deceased observed, what a cub, or brat of a boy, the prisoner was to be master over Wholaghan. On hearing this observation, the prisoner immediately took up one of the feet which had been cut off the slaughtered animal, and threw it at the deceased, knocking him senseless, and then ran off. The deceased, however, recovered sufficiently in two or three minutes to be able to finish the slaughtering and dressing the animal, and after it was completed, the body was quartered and put into a cart to be taken to the shop. An hour and a half had now elapsed since the deceased had been knocked down with the beast's foot, and in the interval his brother, and aged man, had been sent for; but as the deceased had recovered, no further notice was taken of the matter. Wholaghan, **BROADWAY**, and the deceased conveyed the meat in the cart to the shop, and when they came there, the prisoner was standing under the verandah with a piece of paling in his hand about 3½ feet in length, 4 inches in width, upwards of 1 inch in thickness, and weighing about 10lbs. Wholaghan endeavoured to dissuade the prisoner from renewing the quarrel, and attempted to take the bludgeon from him, but could not. After having reasoned with him, however, for about five minutes, he considered the prisoner's anger had subsided, and he then commenced unloading the cart. At this time the deceased was standing just inside the doorway, with his face inclined towards the left, as if looking up the street. The deceased's brother was in the verandah just opposite to him, and facing the prisoner, who stood at the end of the verandah with the bludgeon in his hand. Wholaghan was in the act of putting a quarter of the beef on his back, in which he was assisted by Broadway, the two Hughes' also waiting to assist in hanging it up in the shop, when the sound of a violent blow caused Wholaghan to throw down the quarter of beef, and ascertain the cause of the noise. He then perceived the deceased lying stretched on the floor, with his head inside the shop and his feet upon the lintel, upon which he immediately cried out, ``Oh! My God, the man's murdered.'' He then went for a surgeon. James Hughes saw the prisoner come towards the door just as the blow was struck, but thought he was merely going into the shop. Broadway, and **FURZE**, a constable, saw the prisoner immediately after the blow was struck, throw down the bludgeon and run away. He was apprehended on the following day. Mr **COCHRANER** attended the deceased immediately, and found him in a state of insensibility, in which he remained for 26 hours, and then died. There were two wounds on the right cheek, one of trifling importance, and the other producing a traverse fracture of the lower jaw. The violence of the injury had caused concussion of the brain in the first instance, and compression of it afterwards, and from these combined effects, the deceased died. The symptoms were so well marked, that Mr Cochrane deemed it quite unnecessary to open the deceased's head after his death. The witness thought that a slight blow with such a weapon as the one produced (and which had been identified by the constable) would have caused the injury of which the deceased died. The prisoner said nothing in his defence.

The learned Judge having explained the distinction between murder and manslaughter, proceeded to comment upon the evidence. His Honor told the Jury, that if they could see any thing upon the evidence to reduce the crime to the minor offence, to do so. The Jury, after a few minutes consideration, found the prisoner ``Guilty'' of murder, and the learned Judge putting on the awful insignia, viz. - the black cap, immediately passed sentence of death upon the prisoner - admonishing him to lose no time in preparing for the awful change he would soon have to undergo - for

although a recent alteration in the law afforded a longer period for the repentance of convicted murderers, yet he, the learned Judge could see no reason in the present case why the law should not take its course.

See also Sydney Herald, 17 August 1837. This case was also recorded in Burton, Notes of Criminal Cases, vol. 32, State Records of New South Wales, 2/2432, p. 20.

On the conviction for murder of Lewis Williams, the Australian, 15 August 1837 noted that the prisoner was remanded for sentence and that ``This was the first conviction for murder, since the passing of the Local Ordinance respecting the time of carrying into effect the punishment of that crime." The new legislation did not remove the practice of dissection of the prisoner's body after execution: see R. v. Williams, Sydney Herald, 25 August 1837; Sydney Gazette, 22 August 1837.

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

SYDNEY GAZETTE, 19/08/1837
Supreme Court of New South Wales
Burton J., 14 August 1837
THE ABORIGINES.

A discussion of some interest took place in the Supreme Court on Monday last on the subject of the trial of an aboriginal native, named Wombarty, belonging to the Port Macquarie tribe, who was arraigned before Judge Burton on a charge of murder, of an exceedingly atrocious character, committed at Port Macquarie. Mr. Windeyer, who had been ordered by the Court to act as counsel for the prisoner, moved that the case should be adjourned until an interpreter could be found sufficiently acquainted with the dialect of the Port Macquarie tribe, to explain to the Black the offence for which he was indicted. Neither the Reverend Mr. Threlkeld nor the interpreter, McGill, were sufficiently acquainted with that dialect to carry on a conversation with the accused, without the aid of a third party, and even with his assistance, the charge did not seem to be sufficiently understood by the prisoner. Under these circumstances he thought that the case should be adjourned. His Honor Judge Burton proceeded to put some questions to McGill the aboriginal, who has always attended at the Supreme Court with Mr. Threlkeld, when trials of his countrymen were about to come on. From his answers, it appeared that although he had been for many years under Mr. T.'s instruction, he is not yet aware of the nature of an oath. His Honor refused to allow the case to proceed until the Crown could furnish a proper interpreter, one to whom the Court could with propriety administer an oath. The Attorney General informed the Court that he murders of which the prisoner stood accused, had been committed under circumstances of peculiar atrocity, the men having been butchered while asleep in their huts. It was almost a matter of impossibility for the Crown to find an interpreter such as was required, but as his Honor refused to try the case, all he could do would be to write to the Magistrates at Port Macquarie to procure an interpreter from the interior, who should be instructed in the nature of an oath. The prisoner was then remanded until next Sessions.

[*] L.L. Threlkeld referred to this case in his Annual Report of the Mission to the Aborigines, Lake Macquarie for 1837: see Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, pp 312-334. At pp 319-322, he says that Wombarty's was the only Supreme Court trial he attended as interpreter in 1837. Threlkeld said that Wombarty was charged with the murders of four Europeans. The Court appointed counsel for him, and Threlkeld visited him in gaol to ascertain his defences. His assistant, McGill, helped interpret from one language to the next. Wombarty said that the murders were committed by another tribe, in revenge for two Aborigines being confined in a lockup charged with spearing cattle. Threlkeld was frustrated that he had managed to elicit this information, but the same means of dual interpretation were rejected by the Supreme Court, as McGill could not be

sworn as interpreter. Through this, said Threlkeld, the just principle that Aborigines were both subject to and protected by British law, became merely a legal fiction. Thus ``the strictness of the administration of the law becomes the height of injustice to all'' (p. 322). Threlkeld went on to say that this injustice was central to the gradual loss of Aboriginal land. Their land, he said, fills our Exchequer's coffers with gold. When Aborigines could not be tried, private revenge took its place. Some stations were places for refuge for Aborigines, and others were dreaded for their barbarity and violence.

This remarkable document is all the more poignant due to the Myall Creek massacre, which took place in the next year, 1838. In that case, a supposed refuge proved to be no protection.

For further correspondence on the inter-racial clashes in northern New South Wales during 1837, see Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, pp 306-311. The clashes detailed there ultimately led to the Myall Creek massacre, as to which, see R. v. Kilmeister (No. 1), 1838; and R. v. Kilmeister (No. 2), 1838.

An important document in the State Records of New South Wales called ``Aboriginal Natives, tried before the Supreme Court of Sydney N.S.Wales from 1832 to 1838 (in Supreme Court Statistics, 4/2129.3) lists all Aborigines tried there from 1834 to 1837. For 1837, it lists Murphy (larceny), Wombarty and Black Betsy (misdemeanor). There were nine people listed for trial in 1836.

There was a similar result to that concerning Wombarty in another case earlier in 1837: the Sydney Herald, 23 February, 1837 reported: ``Carbawn Paddy, a native black, had been some time in gaol, on suspicion of burglary, but as there were many blacks of the same name charged with being concerned in the Brisbane Water outrages, and as there was some doubt as to his identity, he must consent to his discharge. Discharged."

The Australian, 24 February 1837 reported this as follows: ``An aboriginal black, named Corbon Paddy, had been for some time in gaol on suspicion of burglary, but as there were a number of blacks of the same name in the tribes concerned in the Brisbane Water outrages, and as there were doubts of the identity of the man, he (the Attorney-General) would consent to his discharge." This was heard before Dowling A.C.J., and Burton and Kinchela JJ, on 21 February 1837.

The Brisbane Water cases were heard in 1835: see R. v. Lego'me, 1835; R. v. Long Dick, Jack Jones, Abraham, and Gibber Paddy, 1835; R. v. Mickey and Muscle, 1835; R. v. Monkey and others, 1835.

For details of the lives of these Aborigines in custody, see Threlkeld's Annual Report of the Mission to the Aborigines, Lake Macquarie, for 1836, dated 31 December 1836 (in Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, p. 290).

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

CJA, 3/219, 25/10/1837

On the 16th instant, at her residence, Macquarie-place, Mrs. **DUKE** of a son, still born.

SYDNEY HERALD, 06/11/1837

Supreme Court of New South Wales

Dowling A.C.J., 3 November 1837

JOHN PHOENIX was indicted for the wilful murder of **DANIEL HOGAN**, by beating him on the head with a wooden shovel, at Campbelltown, on the 4th of September.

The prisoner and the deceased were both free men in the employ of Mr. Campbell of Harrington Park. It appeared that on the day laid in the indictment which was on Sunday, Mr. Campbell and Hogan had been to some public house in the neighbourhood of the farm, and returned in the evening with a bottle of rum. Two of Mr. Campbell's convict servants then went up to the house to ask for some tobacco, and drank some of the rum with Hogan. Hogan then asked Mr. Campbell for an order for half a gallon of rum, which was given to him, and he went and procured it; a bottle

and a half of this rum was drunk in Mr. Campbell's house, when, as he wanted to go to bed, he desired them to go to their huts, and they went away taking the other bottle and half of rum with them. When they got to Hogan's hut, he said that none of the rum should be drunk until Phoenix came, and Phoenix who was asleep in an adjoining hut was called, and they all (Hogan, Phoenix, and the two convicts) commenced drinking. The two convicts soon got stupid drunk and went to sleep. About two o'clock in the morning, a brick-maker, named Brown, and a woman with whom he cohabited, who lived in an adjoining hut, were awoke by what they considered to be the noise of a person chopping wood, and the woman got up and called out to know what was the matter, when the prisoner came out the hut with a wooden shovel in his hand, and said he had got two bears to tame; she called Brown, and they went down to the hut where Hogan was lying on the ground, and Brown had only entered the hut a moment when Phoenix rushed past him, and stuck Hogan a violent blow on the head, upon which Brown knocked him down. On examination it was found that Hogan's head was dreadfully wounded, and that he was dead. The two convicts were so beastly drunk that they were unable to give any account of what had taken place; one of them said that he was lying asleep with his head on the table, when the prisoner awoke him and smiled, and said you -- I'll strike you, and hit him on the head with the shovel; but he could not recollect any thing else. Dr. Kenny described the dreadful condition of the deceased's head from repeated blows. The prisoner in his defence said, that he was asleep in his hut, when he was called up and made senseless drunk; he denied all knowledge of the murder.

His Honor said that the Jury could have no doubt that the death of Hogan was caused by the prisoner, and it is a maxim of law, that if a person is proved to have caused the death of another, the burthen of proving that he did not do it under circumstances that would amount to murder, lies upon him. The Jury would judge from all the circumstances, whether the case amounted to murder or man-slaughter. In law, drunkenness being a voluntary act, is no excuse for any crime that may be committed while under its influence. Guilty of man-slaughter. The Jury passed a very strong censure on Mr. Campbell for supplying his men with so much rum, and hoped that the Judge would not let his conduct go unnoticed. His Honor said that the remark was very creditable to the Jury, and ordered the two convicts that were in attendance on the Court, to be sent to barracks until the Governor's pleasure is known.
See also Australian, 7 November 1837; Sydney Gazette, 7 November 1837; Dowling, Proceedings of the Supreme Court, Vol. 144, State Records of New South Wales, 2/3329, p. 51.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 06/11/1837
Dowling A.C.J., 1 November 1837
EDWARD DOYLE, late of Sydney and **New Zealand**, labourer, and a subject of our Lord the late King, and of our Lady the Queen, was indicted for stealing twenty yards of calico, ten shirts, twenty pounds of gunpowder, and sundry other articles, from the dwelling-house of John Wright, at New Zealand, within the jurisdiction of the Honorable Supreme Court, on the 18th June, the said John Wright being therein put in bodily fear.
The facts in this case are very simple: - The prosecutor, Mr. John Wright, **is a British subject residing at the Bay of Island, New Zealand**. On the evening of the day laid in the indictment, about nine o'clock, hearing the dogs bark, he, accompanied by his

step-daughter, Miss Featherstone, went out to see what was the matter; when they got outside they saw a boat lying at a point a short distance off, and saw three men coming from that direction; when they drew near the house Mr. Wright asked them what they wanted, when one of them replied they wanted some tobacco, to which Mr. Wright replied that he was not in the habit of selling tobacco on a Sunday evening. At this moment one of the ruffians, who was distinctly and solemnly sworn to be the prisoner at the bar, both by Miss Featherstone and Mr. Wright, jumped over a stile and laid hold of Mr. Wright, at the same moment presenting a pistol to his breast, the other two men, known as Fell and the shoemaker, rushing past and entering the house. Mr. Wright struggled with Doyle, and kept hold of the barrel of the pistol, and in the struggle they both went down observing that Doyle was endeavouring to point the pistol towards him as they laid on the ground, Mr. Wright managed to knock Doyle's hand from the trigger, and fired the pistol into the sand. During this time Miss Featherstone remained with Mr. Wright, begging Doyle not to murder him, when the shoemaker desired Doyle to knock his brains out, and because Miss Featherstone refused to leave Mr. Wright, the savage laid hold of her by the hair of her head and dragged her away, knocking her against the fence with considerable violence, and at the same time striking Mr. Wright a violent blow on his head with a piece of wood, injuring him very much; hearing the screams of Miss Featherstone, Mrs. Wright came out of the house, and was met by the shoemaker, who made a blow at her with the piece of wood he had in his hand, and missing her he struck her mouth with his fist and knocked out four of her teeth, loosening several others. In the mean time Mr. Wright and Doyle had struggled into the verandah of the house, when the shoemaker went up to them and gave Doyle a second loaned pistol, desiring him to shoot Mr. Wright at once, and using an oath because he had not done so before; Mr. Wright laid hold of this pistol as he had done the first one, when the shoemaker wrenched the pistol from both of them, and, retreating a couple of yards, deliberately pulled the trigger as Mr. Wright rose from the ground, but providentially the pistol only burnt priming, and while he was endeavouring to re-prime it the family got into the house, and Miss Featherstone stood holding the door in her hand, when Doyle told her if she did not open the door he would knock her brains out, at the same time making all of them go into the bed-room, when they deliberately went into the store, and plundered it of property worth £120, which they took to the boat; during the outrage one of the ruffians demanded six hundred dollars, which he said Mr. Wright; had received from the master of a vessel, and on the family declaring they had no money in the house they threatened to place a barrel of gun-powder against the door and blow the house down. When they went away Fell remained sentry at the door until the whole of the property was in the boat, and desired none of them to look which way he went, or it would be the worse for them. The next morning an alarm was given, and the Rev. Mr. Williams, one of the missionaries, went to a native paah [sic], about three miles off, where the natives pointed out the prisoner and three other men as having committed the robbery, and produced a quantity of tobacco, which exactly resembled Mr. Wright's tobacco, which they said they had taken from them; it was several days before Doyle was taken into custody by a Mr. Maher, and shackled to the ground, but by means of a gimlet he liberated himself, and was at large until given up by the natives and placed on board H.M.S. Rattlesnake. The prisoner cross-examined the witnesses as to his identity, but could not shake them in the least; for as Miss Featherstone, in answer to a question from Doyle, said with great naivete, ``You know it was a very beautiful bright clear night, and when I stood in the door and you stood in the verandah there were three lights on the table behind my back, so that I had a

good opportunity of seeing your face, and what occurred that night made such an impression on me that I shall never forget you." Mr. Jilks deposed that when the prisoner came to the Police-office he told him he had done his original sentence in this Colony before he went to New Zealand. In his defence the prisoner denied all knowledge of the robbery, and stated that on the Saturday before the robbery was committed, he laid out £7 or £8 at a store, which accounted for his having the tobacco in his possession; he also stated that he was a native of New Bedford, in America, and had been left at one of the South Sea Islands, and been brought to Sydney by the man of war brig Zebra, where he shipped on board the Psyche whaler, which he left up; he said that the New South Wales Act very properly gives the Court jurisdiction over all offences committed in any of the Islands in the South Pacific Ocean by British subjects, and therefore they must be satisfied that the prisoner is a British subject. His Honor made some remarks respecting the nature of the evidence of Mr. Wright and Miss Featherstone, and the jury, after an absence of a few minutes, returned a verdict of Guilty. Remanded.

See also Australian, 3 November 1837; Sydney Gazette, 4 November 1837; Dowling, Proceedings of the Supreme Court, Vol. 143, State Records of New South Wales, 2/3328, p 156.

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

CJA, 3/221, 08/11/1837

SUPREME COURT.

Thursday, Nov. 2. Before the Acting Chief Justice Dowling and a Common Jury.

THOMAS HARTLEY was indicted for the wilful murder of **JOHN BRENNAN**, at Mr. Manning's station, near Cunningham's Creek, beyond Yass, on the 23rd of April, 1836, by beating him over the head, &c. with a stick. – Not Guilty.

Friday, Nov. 3. Before Mr Justice Burton and a Military Jury.

JOHN PHOENIX was indicted for the wilful murder of **DANIEL HOGAN**, at Harrington Park, near Campbell Town, on the 4th day of September, by beating him on the head with a wooden shovel. – Guilty of Manslaughter. Remanded for sentence.

JOHN GROVENOR alias **GROVER** was indicted for the wilful murder of **WILLIAM WALWORTH,** at a place near Ireland's, on the Parramatta Road, by stabbing him in the belly, causing a wound whereof he died at Sydney. The Jury found him guilty of manslaughter, and in consequence of his good conduct while Chief Constable at Norfolk Island, he was sentenced to six months' imprisonment. A witness in the case, named **JOHN ASHWOOD,** was also sentenced to the same punishment for gross prevarication.

MICHAEL TOBIN was indicted for the wilful murder of **JAMES FLETCHER**, by throwing him into the River Hawkesbury, on the 1st June, and **JAMES MARSHALL, RICHARD MADDOX** and **JOHN DUNKLEY** were indicted for being present, aiding and assisting. Tobin and Marshall Guilty of manslaughter, to be transported for life, Maddox and Dunkley, Not Guilty. Court adjourned.

SYDNEY HERALD, 20/11/1837

Dowling A.C.J., Burton and Willis JJ, 18 November 1837

Saturday Before the Acting Chief Justice, Mr. Justice Burton, and Mr. Justice Willis.

The Attorney General prayed the judgment of the Court on **EDWARD DOYLE**, convicted of stealing in a dwelling-house, **at New Zealand**, and putting in fear therein.

The Acting Chief Justice said that the circumstances of this case were marked with great outrage; the crime contemplated by the prisoner was not merely robbery, but if necessary to carry it into effect, loss of life was to occur. When the crime was contemplated he probably imagined that from the remoteness of the place at which it was committed he would be exempted from the penal visitation of the law; but the Court trusted that the example which would be made in this case would remove from the mind of lawless ruffians a delusion that by distance they were secured from the visitation of justice. Those in authority in this Colony would have failed in their duty had they spared any trouble or expense in bringing this case home to the prisoner; the Court had reason to know that the expenses on the case had been immense, but they could not look upon the expense in a case where it was so necessary. After recapitulating the facts of the case, His Honor said that it was marked with every circumstance of aggravation, and the prisoner need not delude himself with the hope that he would escape. Sentence of Death was then passed in the usual form.

See also Australian, 21 November 1837; Sydney Gazette, 21 November 1837.

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

SYDNEY HERALD, 20/11/1837

Dowling A.C.J., Burton and Willis JJ, 18 November 1837

JOHN PHOENIX, convicted before the Acting Chief Justice of manslaughter. His Honor in passing sentence on the prisoner described the case another illustration of that awful vice which reduces the Colony to the depth of depravity.

To be transported for life.

See also Australian, 21 November 1837; Sydney Gazette, 21 November 1837.

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

CJA, 3/223, 22/11/1837.

DEATH. On the 26th ultimo, at Turee, County of Bligh, **JOHN JONES**, Esq. From the affects of two severe wounds inflicted with a pair of sheep shears by one of his servants.

SYDNEY GAZETTE, 23/11/1837

Dowling C.J., 18 November 1837

Wombarty, a native black, was placed at the bar. The Attorney-General said that this was a very distressing case, and one in which he did not know how to act; the prisoner, as Mr. Justice Burton would remember, was placed at the bar in August last on a charge of murder; he is a native of the district of New England, at the back of Port Macquarie, a district so remote, and where the dialect is so different from that ordinarily spoken by the natives, that no European could be found who understood it. MacGill, the black who was known to the court, could partly understand him, but unfortunately MacGill himself was not a competent witness. He had no means of making the prisoner understand the charge, which was a most brutal murder - murdering four Europeans in their beds, and MacGill said that the prisoner confessed he had done it. He had written to the Police Magistrate at Port Macquarie, who had used every endeavour to procure an interpreter but could not get one; and Mr.

McDonald, who was conversant with the dialect of most of the natives, could not make himself understood by him. Under these circumstances he (the Attorney General) was obliged to leave the prisoner in the hands of the court.
The Acting Chief Justice said that they must discharge the prisoner if the Attorney General had no case against him; it was a case for which the law did not provide. Wombarty was then discharged.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 3/227, 20/12/1837
A Coroner's Inquest was held on Monday last at the "Bunch of Grapes" public-house, corner of Phillip-street, on the body of Captain **GLUVIAS**, of the brig *Bee*, who died at the General Hospital on Saturday night. It appeared that the deceased was placed in the watch-house on a charge of embezzling whalebone, the property of Messrs. Wright and Long. He was taken to the Police Office on Saturday, and remanded till Monday. There was nothing in the deceased's manner to indicate illness, until four o'clock, when he was seized with a fit. The constable in attendance had him conveyed to the Hospital, where he expired about midnight. The jury returned a verdict – "Died of apoplexy."

SYD1838

CJA, 4/229, 03/01/1838.
On Friday night, the *Pocklington* whaler came in from the whaling ground, and the second mate, Mr. **JOHN DAVIS**, being very ill came on shore for medical assistance; making his way up Windmill-street, he fell upon his hands and face in a fit, in which state he was found by a constable, who, concluding that he was intoxicated was on the point of taking him to the watch-house, but finding that there was something peculiar in the manner of Davis, he procured a light, and finding that he was in a fit, conveyed him to the house of Mr. **MACMILLAN**, in the same street, where in the course of an hour he expired.

CJA, 4/230, 06/01/1838.
Yesterday a soldier of the 80th regiment, a **PETER MOTHERSAD**, was received into Sydney gaol by warrant, from the Vale of Clwyd, charged with the wilful murder of a man named **JAMES LEARY.**

CJA, 4/231, 10/01/1838.
CORONER'S INQUESTS. --- On Sunday an Inquest was held at a public-house in Sussex-street, upon the body of an old man named **JOHN KENNY** or **KENNEDY**, a labouring man of intemperate habits, who was found lying dead in a yard in the same street on the same day. The Jury returned a verdict of "Died by the visitation of God."

On the same day an Inquest was held at the house of Mr. **MAELZER**, on the body of **EMILY FRANCES MAELZER**, the child of Mr. M. who, while playing in the yard of her parents' house, fell in a well, and before assistance could be procured, was drowned. The Jury returned a verdict of "Accidental Death.

CJA, 4/232, 13/01/1838.
Mr. **BRENAN**, the Sydney Coroner, has so far recovered his late indisposition, that he will resume his duties next week.
CORONER'S INQUEST. - On Thursday an Inquest was held at the *Eliza of London*, Elizabeth-street, upon the person of **WILLIAM GOODWIN**, a clerk in the employ of Mrs. **WYER**, Castlereagh-street, who, while driving a cart on the Surry Hills, was knocked down by one of the shafts, and a wheel passing over his leg and left foot lacerated them severely. Upon being carried into Sydney, medical assistance was immediately procured, but without effect, as he lingered till Wednesday, when he expired in great agony. The Jury returned a verdict of accidental death, and levied a deodand of one shilling on the wheel which caused the injury.

An inquest was also held at the Butcher's Arms, Clarence-street, upon the body of a young man named **WILLIAM CLARKE**, who fell dead in the street in a fit of apoplexy. The Parramatta Coroner, Mr. **HAYWOOD**, having explained the facts as detailed in evidence, the Jury returned a verdict of "Died by the visitation of God."

CJA, 4/233, 17/01/1838.
MRS. INGLIS. - … There is a case now pending before the Police respecting the concealment of a birth by an assigned servant named Merchant …
SHOCKING ACCIDENT. - On Monday a loaded dray was proceeding along the Parramatta Road, upon the top of which was seated a man named **JOHN JACKMAN**, perfectly sober, who accidentally slipped from his elevated position

towards the forepart of the dray, the wheel of which passed over his head, crushing it and causing instant death.
SUPPOSED MURDER. - Mr. **JOHN WHITE**, who resided about thirty miles from Burra (Mr. **W. BROUGHTON**'S estate), and who was in very good circumstances, was missed from his habitation about six months ago; and shortly afterwards his wife, an emigrant, eloped with a person named **HICKEY,** overseer to a Mr. **HASLINGDEN**; three other men also absconded at or about the same time. Intelligence was immediately sent to Mr. **JAMES WHITE**, the brother, who set out in search of him. He proceeded with a mind ill at ease (owing to the past bad conduct of his brother's wife) to make enquiries, but without success. However, a few days ago, in passing through a forest, he observed a large patch of grass burnt, and at a short distance, saw before him something bulky; on reaching the spot, he saw part of the body of a man, the rest having been consumed by fire. He alighted to examine the remains, and his feelings may be imagined, but not described, when he recognized, by a part of the dress, and a watch, which deceased had in his pocket, that what he saw before him was all that remained of his brother. Great suspicion is attached to certain parties, and four of the Mounted Police were yesterday despatched to make a search after, and apprehend all persons of whom they might have suspicions. It is to be hoped the guilty parties, whosoever they may be, will not long escape detection. P.S. – The brother of the murdered man is about offering a reward for the apprehension of those concerned in the murder. [We hear Government will also offer a reward.] – *Australian*.

CJA, e004/233, 20/01/1838.
CHARGE OF MURDER. - **EDWARD PALMER** for the murder in New Zealand of **JOHN DRENHAHAN**, on 14th June 1837.
CORONER'S INQUEST. - On Tuesday an Inquest was held at the Toll-bar on the body of **JOHN JACKMAN**, who came to his death the previous day by falling from a loaded dray, one of the wheels of which passing over his body caused instantaneous death. The Jury returned a verdict of accidental death, and levied a deodand of one shilling upon the wheel.

CJA, 4/237, 31/01/1838.
CORONER'S INQUEST. - On Saturday an inquest was held at the King's Head, Harrington-street, upon the body of Mr. **FRANCIS BEILBY**, who met his death the previous day by drowning. It appeared that Mr. B., together with some of his men, were in a boat hauling in a seine: they had made several casts without success, when one of the thowl-pins broke, and caused the pressure of the seine to half-fill the boat with water, which, gathering at the head of the boat, it filled and went down, but rose to the surface bottom upwards. One of the men clung to it, the others made to the shore, accompanied by Mr. B., who being a bad swimmer, sank to rise no more. The men reached the shore in safety, and then put off in a whale boat; seeing the body at the bottom, they fished it up. Every effort was made to restore animation, but without effect. The jury returned a verdict of "Accidentally Drowned."
CORONER'S INQUEST. - On Monday an inquest was held at the "Rum Puncheon," King's Wharf, on the body of a female prisoner of the Crown, named **MARY HAYES**, who died the previous Friday, but for want of proper exertion the Inquest was delayed until this period. The woman was assigned to a person on the North Shore, and in the first instance it was asserted that she had died from blows inflicted upon her person, but there is every reason to suppose such statement was

false, and that her death was occasioned by excessive use of ardent spirits; be that as it may, the Inquest had been delayed so long, that the body was decomposed to a degree that bruises would not have shown. The Jury returned a verdict of "Died by the visitation of God."

Colonial Secretary's Office,
Sydney, 18th January, 1838
FIFTY POUNDS REWARD,
OR
A CONDITIONAL PARDON.

WHEREAS, it hath been represented unto His Excellency the Acting Governor, that **PATRICK FLYNN**, late of the Badger Brush, in the County of Roxburgh, was barbarously murdered in the district of Bathurst, by some person or persons unknown, and whereas, three men have been apprehended on suspicion of being concerned in the above mentioned murder, ….

CJA, 4/239, 07/02/1838
Upon the arrival of the *Tamar* steam-boat on Saturday night, intelligence was received of the murder of Mr. **HOSKING**, the butcher of West Maitland. It appears that on Thursday last he had some misunderstanding with one of his assigned servants, who in the heat of passion, and being under the effects of liquor, seized a large knife used in the business, with which he stabbed his master in the left side, and drew the weapon round through the intestines to the right side. Hosking lived but a short time after the wound was inflicted upon him. The murderer is in custody.

AUSTRALIAN, 09/02/1838
Supreme Court of New South Wales
Burton J., 6 February 1838
PETER MOTHERSHEAD, a private in H.M. 88th Regt., was indicted for the wilful murder of **JAMES LEARY**, between Hassans Walls and Bowen's Hollow, on the 28th November last, by stabbing him with a bayonet on both the sides, and in the right shoulder, from the effects of which he lingered until the 1st December, and then died. A second count described the cause of death to have been by blows or kicks on the belly, breast, and sides. It appeared that the prisoner, who formed one of the military guard stationed over an ironed gang at Bowen's Hollow, was, on the day laid in the indictment, escorting with a comrade named Harrison, a gang of three convicts, who were drawing a hand-cart from Hassans Walls to Bowen's Hollow. The convicts were a man named **HOWARD**, another named **IVISON**, and the deceased. On the road they met a man driving a team of bullocks, to whom Leary requested the soldiers to give him permission to speak, and they granted the request. Leary contrived to obtain a bottle of spirits from this man, which he and Ivison, who were pushing the cart behind, while Howard was in the bibs, drank between them. The consequence was, that they both soon became drunk, and the deceased particularly abusive, and obstreperous. He was not able to do his work at the hand-cart, rather hanging on by it, than pushing it forward. At length he layed down in the road, and upon the prisoner desiring him to go on, he replied that he would ``see the soldier d--d first." The prisoner charged at him with his bayonet, and said he would make him go on. The deceased then went to the side of the road, as if with the view of escaping - a most hopeless achievement however, be being very drunk, and in heavy irons. The prisoner followed the deceased, and it was at this spot, that the unfortunate man met

with the injuries which occasioned his death, although the witnesses Howard and Harrison, (Ivison being too drunk to witness anything) deposed that they did not see the wounds inflicted. The deceased however, fell, saying ``I am stabbed,'' after which he was put into the cart, and conveyed to the stockade hospital at Cox's River, into which establishment he was admitted as a patient. Surgeon **JOHN REID**, of H.M. 80th Regiment, who had charge of that hospital, deposed that when he first saw the deceased, the latter was in a very low state, which he the Surgeon, first attributed to loss of blood from his wounds, of which on the following morning he took a minute inspection. He also questioned the deceased as to how the transaction occurred, he being at the time in so exhausted a state, that he must have known his end was approaching. The deceased told the Surgeon that it was Mothershead who had stabbed him - that both the soldiers had got drunk on the road, and that in that state, they had attacked him. The deceased lingered in an exhausted and almost insensible state, being scarcely able to make respiration, until the afternoon of the 1st December, when he died. After his death, Dr. Reid made a careful examination of the body, when he found one punctured wound on the left side, about an inch and a quarter in length, but which appeared to be merely superficial, having glanced alongside the rib. There was another wound on the right side, about two inches and a half in length, and penetrated in a slanting direction downwards, but it did not reach far enough to divide the membrane which covers the pleura. The third wound was in the back, under the right shoulder, and penetrated in a similar direction to the last, about two inches and a half to the blade bone. All these wounds, which were three cornered, appeared to have been inflicted by a bayonet, and the two last, from the nature of them, would seem to have been given while the deceased was lying on the ground. They were none of them however sufficient to have caused death - but upon dissecting back the integuments of the right side, there was discovered, without any external indication, a dreadfully morbid appearance of the muscles, commencing from over the fifth rib, and extending about four inches upwards, which might have been produced from a violent blow with the butt end of a musket, or by a severe kick, or by a fall from a considerable height on some projecting object. On opening the cavity of the chest, the right lung was found completely gorged with a dark thin fluid in quantity about two quarts rendering it quite incapable of performing its functions. The fluid appeared to be extravasated or effused blood from some of the vessels on that side which had been ruptured from the violent injury last described. This was the cause of the deceased's death and it appeared to have been a matter of surprise to the Surgeon, that the deceased should have so long survived so extensive an injury. The defence set up was that the deceased was endeavouring to escape; that he had wrested the musket out of the prisoner's hand, and that the prisoner was therefore obliged to act in the manner he had done. There was considerable discrepancy between the evidence of Howard and that of Harrison, the latter swearing that the deceased had his hand on the stock of the musket, at a few inches from the butt end, as it was being carried on the prisoner's shoulder; while Howard swore that the deceased's hand was on the muzzle of the piece, but whether for the purpose of warding off the meditated thrust at him, or to disarm the solider, he could not say. His Honor Mr. Justice Burton, in a luminous address to the jury, explained to them the law of the case. He observed that Mothershead might be considered in the light of a gaoler, responsible for the safe custody of his prisoner; and he therefore had arms placed in his hands, which however he must only use according to the necessity of the case. The question for the consideration of the jury was therefore, had he gone beyond that necessity in the present instance? and if so, was the act which occasioned the deceased's death,

committed under such circumstances as would make the offence murder, or reduce it to the milder one of manslaughter? The jury after a short consideration returned a verdict of Guilty of Manslaughter, upon which the learned Judge addressed the prisoner in a most impressive manner as to the magnitude of his offence. His Honor stated that he quite coincided in the propriety of the verdict returned. He was also of opinion that the deceased did not attempt either to disarm the prisoner, or to abscond - but, that his only offence was, abusive and insubordinate conduct arising from intoxication, into which state the prisoner at the bar himself had contributed to place the deceased, by a laxity of discipline. The learned judge then passed sentence of fourteen years transportation upon the prisoner.
See also Sydney Herald,8 February 1838; Sydney Gazette, 8 February 1838. This case was also recorded in Burton, Notes of Criminal Cases, vol. 34, State Records of New South Wales, 2/2434, p. 32.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/240, 10/02/1838
The man **MOORE,** the murderer of **HOSKING** the butcher, of Maitland, arrived in Sydney, by the steamer, on Wednesday night, and was lodged Gaol.
On Wednesday, a private belonging to H.M. 51st regiment, while on duty at Goat Island, dropped down senseless, and was carried to the guard-bed; he was subsequently conveyed to the hospital, but medical aid was of no avail, the vital spark had fled. An inquest was held upon the body, and a verdict of "Died by the visitation of God," returned.

CJA, 4/241, 14/02/1838.
On Friday night a man named **WATERS**, living on the Surry Hills, deliberately placed the muzzle of a loaded pistol under his chin and pulled the trigger; the contents lodged in the head. Medical attendance was procured, but the nature of the wound precludes all hope of recovery. The bad conduct of his wife is said to have caused the unhappy man to commit this rash act.
SUPREME COURT – CRIMINAL SIDE.
Feb.6.
Before Judge Burton and a Military Jury.
PETER MOTHERSHED, was indicted for the murder of **JAMES LEAR**, by stabbing him with a bayonet, at Hassan's Walls, on the 28th November. Guilty of Manslaughter. To be transported for 14 years.

CJA, 4/241, 14/02/1838.
SUPREME COURT.
Friday.
Before Mr. Justice Dowling and a Civil Jury.
JAMES MOORE was indicted for the murder of **CORNELIUS CONNOLLY**, by beating him on the head with a stick, and **THOMAS FREDERICK GOULD,** and **THOMAS SCULLY** were jointly indicted for being present aiding, abetting, and assisting the said James Moore to commit the murder aforesaid, near lake George, on the 18th October last. It appeared from the evidence, that drunkenness had led to the fatal catastrophe. Moore, guilty of manslaughter – The remainder of the prisoners were acquitted and discharged.

CJA, 4/242, 17/02/1838

The case of Mr. **PALMER**, charged with manslaughter at New Zealand, will not come on till next sessions.

On Thursday night, a young man named **EVANS**, a newly arrived emigrant, residing at the "Rum Puncheon" cut his throat so dreadfully from ear to ear, that he immediately expired.

ACCIDENT. - On Monday last, as the *Neptune* was leaving the Heads of Port Jackson, the Pilot boat attached to a tow rope astern capsized, and one of the three men who were in her at the time was drowned, although every exertion was made and assistance rendered by the passengers, officers, and crew of the *Neptune*. The accident was caused by the tow rope fouling the keel and a strain coming upon it, the result was what we have described. The Pilot boat belonged to Mr. **WELAND.**

SYDNEY HERALD, 19/02/1838

Supreme Court of New South Wales

Willis J., 19 February 1838

Monday, Feb. 19 - Before Mr. Justice Willis and a Civil Jury.

THOMAS KAYS was indicted for cutting and maiming **THOMAS ASKER** with a knife, at Port Macquarie, on the 19th October, with intent to kill and murder him.

The prisoner and prosecutor both belonged to the Port Macquarie ironed gang, and on the day laid in the information, the prisoner, without any provocation, struck the prosecutor twice with a knife, once in the neck and once in the side, saying. "take that, you --; I'll settle you." The prosecutor had on a former occasion quarrelled with the prisoner and challenged him to fight, in consequence of the prisoner having insulted him because he had been a military officer, but they had had no words that day. The prisoner merely observed in his defence, that from the manner in which he was treated in the gang, he would as leave be hanged as not. Guilty - Remanded.

****

JAMES FREEMAN was indicted for the wilful murder of **ROGER KENNY**, at Port Macquarie, on the 16th September, by throwing him into the river Hastings, where he was drowned.

In the month of June, an old man named Roger Kenny, who resided at the Settlement Farm, Port Macquarie, was found drowned in the river. There was a very small contusion under the left ear, but nothing to excite suspicion. About three months afterwards, the prisoner, who was at the farm at the time, went to a constable named **BAILEY**, and gave himself up, saying that he made away with Kenny. He said he had been cutting wood with him in the bush, and they had a quarrel, when he struck Kenny under the ear and knocked him into the river, where he was drowned. About four hours afterwards he saw the body still floating, and the cap worn by the deceased floated to the bank where it then was. Bailey went with him to the place and found the cap in a hole in the bank, and the next day Freeman made the same statement before Mr. **GRAY**, the Police Magistrate, and committed to take his trial. The dispenser of the Port Macquarie hospital stated that he saw the body after it was found, and that in his opinion the contusion under the ear was caused by a blow from the fist or a stick, but the immediate cause of death was drowning. The cap given by Freeman to Bailey was positively sworn to as having belonged to Kenny. The prisoner, in his defence, entered into a long statement of alleged mistreatment, and said that he made the statement for the purpose of getting away from the settlement. His Honor put it to the jury to say, whether they believed the prisoner had made the

statement from the reason he had stated, or whether it was a true statement. The jury retired for about half an hour and returned a verdict of Not Guilty.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/243, 21/02/1838.
CORONER's INQUEST. - On Friday, an inquest was held at Mr. Murdock's public-house, Pitt-street, upon the body of a female named **MARY ROBERTSON**, who died the previous day from the excessive use of ardent spirits. The jury returned a verdict of died by the visitation of God.
MOORE, for the murder of Mr. Hosking, the butcher at Maitland, will be executed at that place on Saturday next.
JAMES FREEMAN was indicted for the wilful murder of **ROGER KENNY**, by throwing him into the River Hastings, at Port Macquarie on the 16th September. It appeared in evidence that the body of an old man was found floating in the river, and upon examination a contused wound was found under the right ear. About three months afterwards prisoner informed his overseer, that he had murdered Kenny, having struck him under the ear and thrown him into the river. He subsequently made the same statement to the Police Magistrate and was committed for the same. Prisoner in defence alleged that the treatment he received caused him to make the statement with a view of getting away from the settlement. His Honor put the case to the jury upon this statement, and after an absence of two hours returned a verdict of Not Guilty.
[WEDNESDAY] – Before Judge Burton and a Military Jury.
EDWARD TUFT was indicted for the wilful murder of **JOHN JONES**, by stabbing him in the groin with a pair of sheep shears, at Wollongong, on the 1st September.
This case like nearly the whole of the up country cases of a similar kind, arose from the use of spirits on the farm, which it is to be deplored is in too many cases permitted. The prisoner was found guilty and remanded.
[THURSDAY] - Before Judge Burton and a Military Jury.
WILLIAM MOORE was indicted for the wilful murder of **JOHN HOSKING** at Maitland, on the 1st February. The particulars of this horrid transaction are already so fully before the public that repetition is unnecessary. The prisoner was found guilty, and sentence of death was passed upon him. He appeared but little moved at the awful situation in which he stood.

SYDNEY GAZETTE, 22/02/1838
Supreme Court of New South Wales
Burton J., 14 February 1838
(Before Mr. Justice Burton and a Military Jury.)
EDWARD TUFYS was indicted for the wilful murder of **JOHN JONES**, by stabbing him in the groin with a pair of sheep-shears, at Turee, on the 21st October.
JAMES BURGESS, overseer to the late Mr. Jones at Turee, in the county of Bligh. - Mr. Jones died on the 27th October about 3 o'clock; I recollect the Saturday night before his death; we had been sheep-washing, Mr. Jones attended it; Mr. Jones, Tufts, and me came home together; Tufts was a ticket-of-leave man employed by Mr. Jones, to whom, I believe, he had been assigned; Mr. Jones told me to give the men a glass of grop each as they had worked hard and washed upwards of eight hundred wethers; I gave them a dram glass full of rum each; some shepherds came in about eight o'clock; Jones gave every shepherd who reared a lamb for every ewe £5 as a

premium; Thurston, one of the shepherds, received £5, and craved very hard for some spirits; Mrs Jones said she could not give it as she had not enough for the sheep-shearing; Mr. Jones said she had better give a little, and I believe Thurston got some spirits, but I do not know how much; I afterwards saw Thurston with some spirits in a pint pot; William Lilly, another shepherd, was called in and received £3 10s.; he went out and I afterwards went into the kitchen; I then went up to Tuft's hut; Lilly and me had a quarrel; Mr. Jones heard the noise and came up and told me it was no place for me, and I went to my own room in a place joining the house; I had been asleep a little while when I heard Tufts calling Mr. Jones a robber and other names; Tufts was not tipsy; I got up, put on my clothes, and went to my door, and heard him call him all the thieves, robbers, and vagabonds he could set his tongue to, and said he had robbed him of four hundred sheep; John Wilson, the blacksmith, came by, and I said if Mr. Jones will put up with this he will put up with anything, the blacksmith went to Tufts' door and Tufts asked him if he was going to take a pill for Jones; the blacksmith went round to the left and I went to my master and said if you put up with this you will put up with anything, and Mr. Jones said that he did not mean to put up with it and would settle with him another day; Mr. Jones came out and sung out to Tufts, I will settle with you another day; Tufts came from his hut and appeared to walk to the left, and then walked past me towards Jones who was on my right; I then heard Jones say, Tufts you have murdered me, oh Ann Jones I am a murdered man; I cannot say how near he went to Mr. Jones, I did not see him nearer than two rods because there was a kind of parting; I saw Tufts within about half a rod when he went round a corner; when Jones said he was murdered I could not see him; Tufts made a run towards the blacksmiths' shop followed by Jones, who went a step or two and then turned to his own door; I then saw Jones throw the shears down saying those are the shears that murdered me; when Tufts passed me I did not see any thing in his hand; these are the shears, when I saw them there was blood near the point and the point was bent as it is now; Tufts went towards his own hut and said, I have settled the old sweep at last, he repeated it several times; this was about two minutes after he came from Mr. Jones; when I first saw Tufts after Mr. Jones called out, he was running from the house; Mr. Jones was wounded in the side of his groin and his thigh; a doctor was sent for; Mr. Howell came; this was on Saturday, the 21st October, and Mr. Jones died on the following Friday; a few minutes after my master was in the room I apprehended Tufts, he made no resistance; when he was lying on the floor in the kitchen, he said he was very sorry that the old man must die but he knew the shears touched the bone; these are the trousers the deceaed [sic] had on; I saw these holes they correspond with the place where the wounds were; (the trousers were completely saturated with blood) the deceased never walked nor got out of his bed afterwards.

Cross-examined - I was drinking no where that night; I only took one glass of spirits; I was not drinking, I did not swear I was; it was in the prisoner's hut I took the glass of rum; I was not drunk before I went to bed; I do not know how many bottles of rum were drunk; I only saw some in a pint pot; I never heard the prisoner make any threats towards Mr. Jones; the prisoner was expecting that the deceased would give him some sheep after shearing, and he was depending upon his signing a petition for his emancipation in Oct he had mentioned it that day; the deceased was a passionate man at times; the prisoner's shirt was not torn that night that I knew of, but I lent him a clean shirt to go to Court in; Tufts kept a woman, who asked me to lend him a shirt; I have drawn rum from Mrs. Jones in part of my wages; it was the custom to supply the free servants with rum, the convict servants could not get it; the free servants could only get a small supply; I never knew the free servants sell it to the convicts; I

do not recollect that the prisoner paid a pound for a bottle of rum for him and me to take to Tonga; the woman that lived with the prisoner was a free woman; there was a woman living with Shepherd at a station about six miles off.

By the Court - These women were not married then, one of them is married since; they were both fond of drink, the prisoner's woman particularly, she was always craving for rum; a man named **DAVID GILL** used to bring rum on to the farm sometimes, I do not know whether he had a license; there was a place about three or four miles off where rum could be got; whilst the men were shearing and washing they had had three bottles between eleven of them; the prisoner had some of it; it was served out by me at four different times; they were in the water about five hours, and had one glass going in, two while they were in, and one coming out; I did not go into the water but had the same rum as they had; I do not know whether the prisoner's woman was off the farm that day; I saw no strange men there that night.

JOHN WILSON - I was blacksmith at Turee; I was assigned to Mr. Jones; I was at the sheep-washing; after coming home I went to the men's hut, and when coming up again at night about nine o'clock I heard a voice; the sheepwashing was over about three o'clock, I had a little to drink after I got home, I dare say about three glasses, which were given to me by a free man named Thornton; I heard the prisoner having some words with my master; I went to the prisoner's hut and he told me to go away to my hut; Mr. Jones came up and asked me what I was doing; I said I knew I had no business there and went towards the overseer's hut; about an hour after this I heard some high words, the prisoner was against his own hut; I heard the prisoner saying something about some sheep; I was about six yards from them; I was not tipsy; they were talking angrily, the prisoner called my master names; I do not recollect what names; on my oath I do not know what names; the master was walking in front of his own house, I did not hear him say anything; the prisoner went into the hut and came out again immediately; I do not know whether he had any thing on his head; he went as if going towards the back of the building, and then turned short and came to the house, he passed me within two or three yards, and almost directly I heard Mr. Jones cry out that he was murdered, and I saw the prisoner run away; I ran towards my master, who said, catch him, and I went a few yards after the prisoner and then turned back to my master who had got into his bedroom and was down on his hands and knees.

Cross-examined - I had three glasses of rum that night; I was not drunk, and did not swear that I was; I did not see any body drunk; I drank the rum in the kitchen; the deceased was a violent, passionate man sometimes; the deceased had not drank anything that night that I know of; rum was sold on the farm; when it was there any of the men could get it; I don't suppose they could get all they liked; I have bought rum, a pint was the most I could get at one time; I have no doubt that I have got more than one pint in one day; I do not recollect who paid for it; I got it from Miss Christie, and I suppose I must have paid her for it; I swear I paid for none at that last sheep shearing; I do not know that Mrs. Jones sent for ten gallons for sale unbeknown to Mr. Jones; I have fetched rum to the blacksmith's shop for men not belonging to the establishment, but it is a long time ago; I did not see the prisoner's shirt torn that night.

ALEXANDER BUSBY, Esq., J. P. - I took this deposition from the late Mr. Jones on the 23d of October; the prisoner was present, charged with stabbing his master; it was taken at Turee, the residence of Mr. Jones; it was taken down by me as Mr. Jones gave it, read over to him, and signed by him in my presence; the prisoner asked Mr.

Jones if he thought he entertained any malice towards him, and Mr. Jones replied that from the expressions used by the prisoner he thought he had.

Cross-examined - I think that Burgess admitted before me he had been drinking, Wilson did the same, by my impression is that they said they were sober enough to know what had occurred; Mr. Jones was reputed to be a violent man; it was reported that rum was sold in the establishment; the deceased's application for assigned servants was refused at the September session, the assessors did not consider him a proper person to have servants; I did not tell the prisoner I considered him the victim of the illegal sale of spirits.

By the Court. - I am a sheep-holder; as a matter of opinion I should say it is not necessary to issue spirits to men at the sheep shearing, but it is generally done; as regards the health of the men, my opinion is that it is not necessary; it may be considered necessary as it is the custom; I believe there are not wanting instances of sheep being washed without; Mr. **CHARLES BLAXLAND**, it is reported, has done so; I have done so myself when I happened to be without spirits, -- the ration of tea and sugar was increased as a substitute; I believe, to a certain extent, it is the custom to supply servants with spirit; there is a great thirst among free labourers at that season of the year for spirits, and if they are not liberally supplied they will not work, and persons who are dependent on them are obliged to comply with them; about three years ago I hired free men, and the uproar on the farm in consequence was great; their demands were unreasonable, but there was no refusing them, and the whole establishment was in confusion; I have managed to do without them since; I think the practice of supplying servants with spirits for pay does prevail at that season of the year -- I mean as remuneration for extra labour, not for money, but I have heard for money; I should say a free man would not be satisfied with a pint of spirits per day; I found it necessary to leave off supplying spirits.

By the Attorney-General - My opinions are founded on extensive experience among large establishments; I have about forty convict servants, if they were taken from me, I should be obliged to hire free men and comply with their demands; in cases of this kind I prefer convict to free labour; I have heard that free men refuse to hire where spirits are not allowed.

Burgess recalled, and examined by the prisoner - I heard that some time before this Mr. Jones drank a glass of sugar-of-lead water instead of rum; that day Mr. Jones said he was much better than he had been for years, in consequence of leaving off drinking; Mr. Jones mentioned making the mistake at the water hole.

By the jury - Mr. Jones was a very kind master.

Mr. **MARK HOWELL** - I am a surgeon, and took my degree at Lincoln's Inn, in 1833; this is the only document I have with me; (a certificate of having attended Bartholemew's Hospital) I have not been drinking to-day; I will not swear to it; I drank a little water when I washed my teeth; I saw Mr. Jones on the morning of the 22nd of October about one o'clock; he was wounded in the groin and thigh; the wound in the groin was about give inches in length; there was about a yard of intestines protruding; Mr. Jones said, doctor, I am no more; the artery was wounded; I tied the artery up; the wound was the most dangerous one I ever saw; I dressed it and put him to bed; he was in great pain when I first came, but he obtained relief by the dressing; I remained there until Wednesday when he died; I was in the house all the time; after death I examined the body; the intestines were very much wounded; there was a wound in the groin an inch and a half in extent, and in the thigh about an inch; the body was perfectly healthy in all respect except mortification in the intestines

produced by external causes; the wound in the thigh and groin were the first cause; the wounds that I saw might be produced by these sheep shears.

Cross-examined - I heard Mr. Jones drank some sugar of lead water; that had nothing to do with producing the mortification.

The witness having given his evidence in a very flippant, disrespectful, vulgar, incoherent manner, the Judge called

Mr. Busby, who said the witness appears to me to be intoxicated; he is generally remarkably respectful; I never saw him in this way before.

The Attorney General said, that under these circumstances he would recall

Mr. Busby - I saw all the symptoms of a very severe wound in Mr. Jones's groin; the dressing was removed at Mr. Jones's request, and he then pointed the wounds out to me; he said he was suffering greatly, and I should think he must be; there was a great enlargement and discoloration of the parts; Mr. Jones spoke of his death as being to take place immediately; I expected it; I believe this to be prisoner's hand-writing; it was given to me either by Mr. or Mrs. Jones. (Letter read from the prisoner to the deceased before his death, requesting him to be as lenient as possible.)

His Honor ordered Mr. Howell to be confined in Sydney Gaol six months, for giving evidence in a state of intoxication.

This was the case for the crown. The prisoner's defence was - That he had taken so much rum that he could not recollect what had happened; he bore no malice to the deceased, and in fact his death was a great injury to him.

His Honor said that in all cases of murder it is necessary to prove, firstly, that the death of the person said to have been murdered has taken place; secondly, that he died by the means laid in the information; thirdly, that he died by the hands of the prisoner, and fourthly, that the prisoner did it of malice. In consequence of the manner in which Mr. Howell had behaved, the Jury must throw his evidence out of their consideration, and must say whether, from the facts sworn to by the other witnesses, they believed his death was caused by the means stated in the information. It had been proved that he was in good health before he was stabbed, and he took to his bed immediately after and did not get up again, and died in a few days. If the Jury belived [sic] that the act was committed under the circumstances stated in evidence, he was bound to tell them that in law it was a case of murder. The prisoner had stated that he had no malice towards the deceased, but if a case of homicide was proved the law presumed malice, unless circumstances arose in the course of the case to show that it was a less crime, and in looking through this case he did not see any such circumstances; on the contrary, the deadly instrument with which the deed was committed, and the part of the body in which the wound was inflicted, were facts from which the law presumed malice. As for the prisoner's being drunk, if persons voluntarily get intoxicated they must answer for what they do when they get sober.

The Jury retired about a quarter of an hour, and returned a verdict of Guilty. Remanded.

This case was also recorded in Burton, Notes of Criminal Cases, vol. 34, State Records of New South Wales, 2/2434, p. 136, Burton noting that the defendant was a ticket of leave holder at the time of the trial.

In 1838, the British government announced its intention to end of the system of assigning convicts to work for private masters. See Glenelg to Gipps, 30 June 1838, Historical Records of Australia, Series 1, Vol. 19, 461-462. In the meantime, Governor Gipps was placing it under tighter restrictions, including the abolition of assignments of males in towns and as domestic servants: Gipps to Glenelg, 8 October 1838, Historical Records of Australia, Series 1, Vol. 19, 603-604, and see 616, 679 and 773 on the British government's approval of these restrictions.

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

CJA, 4/244, 24/02/1838.
WILLIAM MOORE, for the wilful murder of Mr. **[JOHN] HOSKING**, the butcher, at Maitland, will be executed at that place this morning. **TUFTS,** the Ticket-of-leave holder, for the murder of his master Mr. **JOHN JONES**, of Turee, will suffer the utmost penalty of the law at the usual place of execution Sydney Gaol, on Tuesday next.

CJA, 4/245, 28/02/1838.
EXECUTION. - Yesterday morning, the utmost penalty of the law was carried into effect upon the person of **EDWARD TUFTS**, who was convicted during the last Criminal Sittings of the murder of his master, Mr. **JOHN JONES** of Turee. The unhappy man acknowledged the justice of his sentence, and everything being prepared, the drop fell, and he was launched into eternity. - A propensity for rum drinking brought this man to an untimely end, and thus have two fellow creatures lost their lives through this abominable vice.
CORONER'S INQUESTS. - On Saturday an inquest was held at Box Hill, the property of the late **SAMUEL TERRY**, Esq., near Windsor, upon the body of a man named **FRANCIS QUIN**, a servant upon the estate, who met his death by being thrown from a cart which he was driving, thereby breaking his neck. The Jury, under the direction of the Coroner, Mr. **DUNCOMBE**, returned a verdict of "Accidental Death."

On Monday an inquest was held at the "Bird in Hand," Clarence-street, upon the body of **FRANCES WILSON**, a child, aged two years and four months, who came to her death by drinking gin under the following circumstances: It appeared that on Thursday night a glass containing gin was incautiously left on the table. The child arose before her parents, and seeing the glass with its ardent contents, drank it; she became speechless, and up to the time of her death, which occurred about midnight, she never spoke. Verdict – Accidental Death.

On Sunday Mr. **MYLES SHEEHY**, the Attorney and Solicitor, was found upon the west shore of Darling Harbour in the last mortal agony, occasioned by his having passed a handkerchief round his neck and attempted to strangle himself. Mr. S. was discovered just in time – one minute later would have been fatal. He was conveyed to the nearest house, where every remedy was used, and with effect.
DREADFUL ACCIDENT. - On Monday, at ten o'clock, the daughter of Mr. **MAY**, baker of Kent-street, while putting on the kettle, approached incautiously too near, and her clothes ignited, burning her so severely, before assistance could be afforded, that her life is despaired of.
CORONER'S INQUEST. - On Sunday an Inquest was convened at the "Golden Anchor" public-house, Bridge-street, upon the body of **CHARLES FRAMPTON**, late steward of the ship *Persian*. It appeared in evidence that the deceased had been ill for a few days, and had taken medicine on Saturday; while in a state of delirium he attempted to throw himself out of the back window, but although he demolished the window-sash in the attempt he could not succeed. He was removed to the kitchen; during the evening he found means to elude the vigilance of the persons in the house, and going up stairs into the attic threw himself out of the front window into the street, whereby he died shortly afterwards from apoplexy. Dr. **HOSKING** was called in, but all human aid was of no avail. The Jury returned a verdict of temporary insanity.

SUPREME COURT – CRIMINAL SIDE
SENTENCES.
JAMES MOORE, convicted of manslaughter – To be transported for life.

CJA, 4/246, 03/03/1838.
CORONER'S INQUEST. - On Tuesday an inquest was held at the Dundee Arms, Harrington-street, upon the body of a notorious drunkard, named **SARAH BALDWIN**, who died suddenly the previous day. By the certificate of the doctor it appeared that she had died from apoplexy, brought on from excessive drinking, and a verdict to that effect was returned.

On Tuesday a young child, named **KINEARLY**, playing in front of his parents' house on the Surry Hills, accidentally fell into a pit from which brick earth had been dug, but was then full of water, and before assistance could be rendered the vital spark had fled.

On Tuesday night a woman residing in Castlereagh-street, named **ROSE BRYAN**, was discovered dead in her bed.

CJA, 4/247, 07/03/1838
On Sunday the remains of Mr. **G. HOWELL**, the late miller at Parramatta, who met his death on Thursday by a beam falling upon him, while the mill was under repair, were conveyed to the silent tomb with Masonic honors. A large number of the brethren of the Sydney lodges were present. The band of the 28th, were we understand refused permission by Colonel French, to attend upon the occasion. The mourners who followed Mr. Howell's remains were unusually numerous, and betokened the respect in which deceased was held.

CJA, 4/248, 10/03/1838
The angel of death has been flapping his heavy wings with unusual activity over Sydney during the last fortnight. Sudden deaths have become quite of daily occurrence, and are looked upon as a matter of course, and Mr. **RYAN BRENAN** has been run off his legs with holding inquests. On Tuesday, a woman named **HITCHCOCK**, returned to her house in Kent-street, in a state of intoxication, she sat down before her door leaning her chin on the chine of a water-cask; in the morning she was discovered a lifeless corse. On the same night a man named **DESMOND** was found dead in his bed, in Clarence-street. On Wednesday night a carter to Mr. **WAINWRIGHT**, in Market-street, was found dead in his bed. On the same day a woman residing in Castlereagh-street, named **ELIZABETH TAYLOR**, while sitting in an arm chair in the tap-room of the Barley Mow public house, died from an apoplectic fit.

CJA, 4/250, 17/03/1838
On the afternoon of Tuesday, a woman with a child in her arms, plunged into the mill dam of Messrs. Barker and Hallen's steam mill, with a view of ending, as she fallaciously supposed, all her sorrows and troubles at once. Fortunately, she was observed, taken out, and sent to the watch house, thus prevented from completing her rash action. She is married to a blacksmith named **MOORE**, but from the bruised state of her face and her apparel, we should imagine that the poor woman had found the truth of the observation – "The course of true love never did run smooth."

CJA, 4/252, 24/03/1838

CORONER'S INQUEST. - On Sunday an inquest was held at the Daniel O'Connell, George-street, upon view of the body of **RICHARD HUGHES**, an aged man, who had been for some time an inmate of the Benevolent Asylum. Deceased dropped dead suddenly the previous day, from the effects of a paralytic stroke. The Jury returned a verdict of "Died by the visitation of God."

CJA, 4/254, 31/03/1838
CORONER'S INQUEST. - Yesterday an Inquest was held at the King's Head, Harrington-street, upon the body of **THOMAS HELY**, a man much given to drinking, who died the previous day at the North Shore. The Jury returned a verdict of "Died by the Visitation of God."

CJA, 4/255, 04/04/1838
CORONER'S INQUEST. - On Saturday an Inquest was convened at the public house of Mr. Wilkins, Brickfield Hill, known by the sign of "Somerset House," upon view of the body of a woman named **MARGARET RICE,** who was found in an adjacent unfinished house that morning dead from strangulation. It appeared in evidence that she was the wife of a stonemason, and he had been employed for some months at Maitland; finding however that his wife was deranged in her intellects he brought her to Sydney, with a view of obtaining admission for her into the Lunatic Asylum, but he could not succeed. The husband was obliged to return to Maitland, to finish his work, leaving his wife at a Mrs. **O'BRIEN'S,** and allowing her sixteen shillings a week for her support. He returned finally from Maitland about a fortnight since. On Friday both herself and husband slept at a shipmate's, and upon getting up she attempted to cut her throat with a knife, but was prevented inflicting any severer injury upon her person than a severe cut. \In the evening she was from home, and was not seen again until found on Saturday morning. She had put one end to her existence by passing a silk handkerchief twice round her throat and tying it once in front. The witnesses described the husband as most humane and kind. The Jury returned a verdict that the deceased had put a period to her existence while labouring under temporary insanity.

CJA, 4/256, 07/04/1838
On Thursday night about 9 o'clock, a man named **THOMAS FOSTER**, ascended a ladder at the rear of Mr. **SHARPE'S** premises the butcher in Hunter-street; when he had reached the top his foot slipped, and he was precipitated to the earth, his head first touched the ground laying it open to a considerable depth. He was conveyed to the hospital and almost immediately expired.

Yesterday morning, the body of a man was found lying dead upon the Parramatta Road. An Inquest was to have been held upon the same yesterday afternoon.

CJA, 4/256, 07/04/1838
JUSTIFIABLE HOMICIDE. - On the 27th ult. an inquest was held before **D. DUNCOMBE**, Esq., Coroner for the district of Windsor, on the body of **JOHN QUINCEY [QUINSEY]**, assigned to Mr. **THOMAS JOHNSTONE**, of that place, who was short by his master's son, a young lad about 18 years of age. It appeared from the evidence that the family were alarmed in the night, and thinking that bushrangers were about the place, the young man went out with a loaded gun, and seeing a man who he took to be a stranger he called to him, but he made no reply. Young Johnstone told him, if he would not answer he would fire, adding that he was

armed with a loaded gun; still not answer was returned. Johnstone being convinced that it was a man who intended to rob the premises, then levelled and fired; the contents lodged in the body of the deceased who fell, exclaiming, "Oh, my God, I'm shot in the heart," and expired. The deceased had an excellent character and had been in the service of Johnstone for five years. The Jury returned a verdict of "Justifiable Homicide." [but see 4/258, 14/04/1838 for further proceedings.]

CORONER'S INQUEST. - On Tuesday an inquest was held at LeBurn's public-house, Parramatta-street, on a child aged six years, named **MARY ANN DEANE**. It appeared in evidence that the father of the deceased has a rope walk upon the Ultimo estate; on Saturday morning she came to him, when he desired her to go home to have breakfast; she went: he followed shortly afterwards but found that the child had not arrived; time rolled on, but still she did not make an appearance; her parents became alarmed, and several persons went in search, but the child could not be found; the bellman was employed, and Saturday and Sunday was crying the lost child; on Monday morning two boys playing on the Estate, found the dead body of the child in a water hole which was formed by digging clay. Dr. **HOCKING** certified, that there were no marks of violence upon the body. The Jury returned a verdict of "Accidental Death."

CJA, 4/257, 11/04/1838

ACCIDENT. - On Monday, a female child, aged about three years, fell into a pool of water upon the South Head Road, and was drowned. An inquest was held upon the body at Mr. **ARMSTRONG'S,** the King's Arms, and a verdict of Accidental Death returned. Really it is a most uncheering and ungrateful task to be continually pointing out errors which in their result have a tendency so lamentable as the loss of human life. It is a well known fact that the greater portion of Surry Hills is a mere pit fall, containing large quantities of water, but without the slightest protection in the shape of fence or railing. What can the constabulary be about to allow these traps for the unwary to remain uninformed against? The press has discharged the duty it owes the public, by repeatedly pointing out the necessity of these dangerous places being properly secured, but apparently without effect, and when child after child has been drowned through this negligence, they at last open their eyes and appear astonished.

CJA, 4/258, 14/04/1838.

On Monday an inquest was held at Cunningham's public house, King-street, upon view of the body of a man name unknown. It appeared that on the previous Thursday, he was found lying in a state of intoxication, on the Parramatta Road; he was conveyed to the round house. The following morning he was found to be in a dying state, and sent to the hospital, where he lingered until Saturday, when he expired. His name could not be discovered as he did not recover his senses. The jury returned a verdict of "Apoplexy."

On Wednesday night, **PHILLIP CLARKE**, a private in H.M. 28th Regiment, and servant to Captain **PARKER** of that Regiment, went to bed about 12 o'clock in his usual health; about two the following morning, he was awoke by violent internal cramps; he got up, walked about, and again returned to bed. About six o'clock his wife arose and thought her husband was asleep. She sent for a medical gentleman, but before he arrived, Clarke had expired. He was a man who bore an excellent character in his regiment.

On Thursday night, an old woman well known to the Police, was found dead in York-street.

A few days since, a child not quite two years old, named **WALTER JAMES**, was drowned in a large hollow in front of Mr. Hallen's house, caused by the quarrying of stone for the erection of his cottage. The inquest was held at Mr. Hallen's, and a verdict returned of Accidental Death. We know, that in more than one instance, the Foremen of Coroners' Inquests have presented to the Coroner, the unsafe state of many portions of the "Surry Hills," and he promised to represent the same in the proper quarter, but at present no notice appears to have been taken of the subject.

WINDSOR POLICE, 9th April, 1838. [Connect with 4/256: Justifiable Homicide.]

THOMAS JOHNSTONE, junior, of Portland Head, was brought up before **S. NORTH**, Esq., Police Magistrate, for discharging a loaded gun at his father's assigned servant, named **JOHN QUINEY [QUINSEY]**, by which he died in a few minutes afterwards, and on the following day an inquest was held on the body, when seven of the jury came to the decision that it was Justifiable Homicide, but the remaining five would not agree to that verdict. The coroner took the verdict of the majority, and sent the proceedings to the Attorney General, in the usual manner, who returned them to the Police Magistrate to make further enquiries into the matter. Several witnesses were examined, and amongst them the prisoner's father and mother, but nothing further was elicited. The prisoner urged in his defence that on the night, the unfortunate man met with his death, his father called him, prisoner, up about 12 o'clock, and told him to go out, as there was some stranger about the premises; he took his gun, which was loaded with duck shot, and went out, when he saw a man, to whom he called two different times, but receiving no answer, he thought it was a bushranger, it having been reported that there was a very desperate black fellow at large in the neighbourhood; he then fired, and to his surprise found that it was poor Quinlan. He never had any words with the deceased, but was on the best of terms with him. After a long and strict examination, which lasted upwards of five hours, the prisoner was committed to take his trial for "Wilful Murder." The prisoner appeared to be about 17 years of age, and is a native of the colony. He was much affected during the examination, and wept bitterly on being removed from the bar.

CJA, 4/259, 18/04/1838.

DREADFUL ACCIDENT. - On Monday a pigeon shooting match was got up to come off on the Surry Hills, which, however, terminated in a manner very different from what the outset would have warranted the parties engaged in supposing. Mr. **BEARON**, who was one of the parties, was stooping with the butt of a double-barrelled gun between his legs, fixing caps on the nipples, when some one touched Mr. B. from behind, and both barrels went off. A young man named **[WILLIAM] REYNOLDS**, son of Mr. Reynolds, the black smith, who was standing near the spot, received the greater portion of the charge in the calf of one of his legs, and so severely was the limb lacerated, that in the course of the evening it was found necessary to amputate. A young man named **JONES** was also wounded, but not very severely.

CJA, 4/260, 21/04/1838.

CORONER'S INQUEST. - On Thursday, an inquest was held at the "Burns' Head" tavern, kept by Mr. **HERRIOT**, in George-street, by **R. BRENAN**, Esq., Coroner for the district of Sydney, upon view of the body of Mr. **WILLIAM REYNOLDS**, who died that morning at four o'clock, in consequence of loss of blood, and other causes, arising from a severe wound in his leg at a pigeon shooting-match on Easter Monday, when amputation was found necessary. Mr. **MICHAEL GANNON** stated, that he was at the pigeon match on Easter Monday – that Mr. **BEARON'S** gun, which was

loaded and cocked, it being his turn to fire, went off accidentally, in consequence of his turning round; the charge entered the leg of the deceased. The Jury returned a verdict of "Accidental Death."

At the same time and place, an inquest was held upon the body of **ANDREW MURRAY**, who was found dead in his bed that morning. It appeared that the deceased stopped at Herriot's, waiting the sailing of the *Sarah*, in which vessel he intended leaving for Port Phillip. Verdict "Died by the Visitation of God."

On Wednesday night, two Aboriginal Natives were received into the Jail from Port Macquarie, under committal by warrant, for the murder of two servants of Mr. **FINCH**, the Surveyor of New England. After the murder, they robbed the hut where the men were.

CJA, 4/261, 25/04/1838

CORONER'S INQUEST. - On Friday, an inquest was held at the "Three Tuns," kept by Mr. Driver, Elizabeth-street, upon the body of **AMELIA HOGAN**, who died that day from having taken an overdose of medicine. It appeared in evidence, that the deceased was a servant in the employ of Mr. **a'BECKETT**, the barrister, of Elizabeth-street, and having been taken ill, applied to Dr. **BLICK** for medical advice, and he had given her a medicine called *"Strychnine,"* a preparation of the most active principles of *Nux Vomica*. The bottle containing the medicine was labelled, and the directions upon it ordered twenty drops to be taken three times a day, the dose to be increased according to circumstances. The bottle she placed in the hands of a girl about eleven or twelve years of age, and told her to give the prescribed quantity, instead of which she ignorantly gave her at least 300 drops; finding herself very ill she informed Mr. a'Beckett of the occurrence, who sent immediately for Dr. **BENNETT,** who upon hearing the circumstances, Dr. Blick was also sent for, but all medical aid was of no avail, the unfortunate woman shortly afterwards expired. Upon examining the bottle which had contained the medicine, it was found, that out of 19 drachms which it had originally contained, only 5½ remained. It was clear that there was no blame to attach to any one in this melancholy affair. The Jury returned a verdict of *"Accidentally Poisoned."*

An Aborigine named **CAPTAIN**, has been received into Sydney Gaol, from Wellington, to take his trial for the murder of a shepherd at Wellington. He was captured, after a hard chase, by one of that valuable body of men, the Mounted Police, about 90 miles beyond the Settlement.

On Monday a man named **MANNING**, in Campbell Town jail, awaiting his trial for cattle stealing, cut his throat to evade the law. At the time our informant left Campbell Town, Manning's life was despaired of.

On Sunday, an inquest was held at the Thistle, Bathurst-street, upon the body of a woman, who was found dead in her bed that morning. The deceased was enceinte – and the jury returned a verdict of – Died by the visitation of God.

On Monday, an inquest was held at the Benevolent Asylum, upon the body of an aged man, who had been brought in to the establishment the previous day in the last stage of human existence, and shortly afterwards expired. The jury returned a verdict of – Died by the Visitation of God.

SYDNEY GAZETTE, 03/05/1838
Supreme Court of New South Wales
Burton J., 1 May 1838

JANE GUTHRIE was indicted for the murder of her infant male child by suffocating it in a privy, at Illawarra , on the 11th day of Feb. last.
The prisoner arrived in the colony as a free servant to an officer of the 80th Regt. The fact of the child being the child of the prisoner was not denied, and Dr. **OSBORNE** was of opinion that the child was born alive. His Honor told the Jury that if they believed the child was born dead, or was suffocated accidentally, they would acquit her of the capital charge, and find her guilty of concealing the birth. The Jury returned a verdict of Not Guilty of murder but Guilty of concealing the birth. To be imprisoned in the Factory as a House of Correction for Two Years.
See also Australian, 4 May 1838; Sydney Herald, 3 May, 1838. This case is also in Burton, Notes of Criminal Cases, vol. 34, State Records of New South Wales, 2/2434, p. 59, recording the charge as ``child murder''.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 03/05/1838
Supreme Court of New South Wales
Burton J., 1 May 1838
JOHN LESTIL was indicted for the wilful murder of **MICHAEL READY**, by striking him on the head and neck with his fist, at Morpeth, on February 8th.

The prisoner and the deceased Ready were both privates in the 28th regiment. On the day laid in the indictment the prisoner had been to Maitland and returned to the barracks in the afternoon, in an extreme state of intoxication, and was put to bed by some of his comrades. Shortly afterwards the prisoner and a soldier, both of whom were drunk, commenced fighting, and ordered to the guard room by the serjeant on duty; handcuffs were put upon the prisoner, but he managed to pull his right hand out, leaving the handcuff on his left, and escaping from the soldiers retired to the barrack room, where he was followed by several of his comrades, who persuaded him to go to the guard room, but he refused. Ready was awoke by the noise, and in a half drunken fit staggered towards the prisoner, and persuaded him to go, but he said he would not, and would knock the first man's head off that attempted to take him; Ready went a step closer towards him when the prisoner struck him on the side of the head with his fist; Ready reeled back a step or two towards a bed, and then fell forward on his face, and died instantly. The next day an inquest was held, and Mr. Lewis, a surgeon residing in the neighbourhood, opened the head; he found the vessels about the head in a very turgid state, and on minute examination found that a small vessel, near the base of the head, had been ruptured, and that there was a small quantity of coagulated blood: there were no marks of external violence to account for this rupture, but there was a small scratch on the face, which looked as if it had been done by a fall upon the ground. Mr. Lewis was of opinion that in the excited state of the deceased's brain the injury might have been caused by a sudden shock, such as a fall, and it was possible that it might have been caused by passion; he did not think that the rupture of such a small vessel would have caused instant death. The prisoner in his defence called several witnesses, one of whom swore that when Ready returned to the barracks he complained either of a fall or a blow on the face; and as assigned servant to Mr. E. Sparke swore that on the day of the accident he was going towards the stockade with his master's cart when he gave two drunken soldiers a ride, and that in getting out of the cart one of them fell down; as he did not know Ready, and did not see the body, he could not say whether it was him. His Honor said that he considered the evidence of Mr. Lewis made it very doubtful whether the blow given by the prisoner was the

cause of death; and if they considered that any other cause produced the ruptured vessel, of course the prisoner must be acquitted. If they believed that the prisoner did cause the death he thought that enough had been proved to show that the crime did not amount to murder: there was proof that the prisoner had been assaulted and apprehended, and that while in hot blood from that provocation he hit the deceased with his fist. If it had been intended by the Crown to show that the arrest was justifiable in consequence of the prisoner having committed a breach of discipline, then it was necessary that the articles of war should be produced, and that it should be shown that the prisoner was serving under them. If the jurors were sitting on a court-martial they would then have to take notice of the articles of war, but sitting in a court of common law they could take no notice of them as they had not been proved in evidence before them, but must act according to the common law, which, as there was no offence proved, looked upon the assault committed as a sufficient provocation to reduce the offence from murder to manslaughter. The jury, after a few minutes' absence, returned a verdict of Not Guilty.
See also Australian, 4 May 1838; Sydney Gazette, 3 May 1838.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 03/05/1838
Supreme Court of New South Wales
Burton J., 1 May 1838
MURDER.
BRYAN FLANNIGAN was indicted for the wilful murder of **JOHN NAGLE**, by striking him on the head and body with an axe, near Mudgee, on the 5th February.

The Attorney-General, in opening, said, that he understood that the defence would be, that the prisoner was insane, and he hoped, for the honor of human nature, that it might be proved that he was so.

JOHN SHEERING. - I am assigned to Mr. Kinnerly and reside in Bringelly; I have been at the station near Mudgee; John Nagle was overseer there; he was a married man; **RILEY** was a free stock-keeper; I slept in a hut with a shepherd named **MARTIN**; the prisoner lived in a hut with Nagle and his wife, and Riley; they had moved there the evening before; Flannigan came to me at break of day in the morning; he asked me if I was asleep, and told me to get up; he told Martin he wanted a pair of trowsers; Martin asked his wife where they were, and she told him, and he handed Flannigan a pair of trowsers out of the door; when I was dressed Flannigan came to me and said, ``I have put an end to them three;'' I asked him what he meant, and he said he had murdered them three over the way; I said I could not believe him; Nagle's hut was across the Mudgee River; Martin came out and he told him the same; Martin's wife came and she said she could not believe it, when the prisoner held up a pair of trowsers covered with blood, and said, will you believe it now; he had just taken the trowsers off, and put a clean pair on; I went over to Nagle's hut, accompanied by Martin, and his wife, and the prisoner; the prisoner as we went along said the black boy had run away, but he would not have hurt him; there was a bark shed near the hut, where Riley used to sleep, and there we saw Riley dead; he was lying on his face on the ground; there was a wound in the back of his head; we went into the hut, and saw Nagle and his wife lying dead on the floor; Martin told me that I had better go to Mr. Lackey's and report it; the prisoner said he would go with me; I ran as fast as I could, leaving him at the station; the prisoner gave no other account of the murder than I have told; I saw the bodies of Nagle and his wife in the afternoon;

the woman had some cuts on the back of the head; the man had one cut in the back of the head; his left wrist was nearly cut off, and there was a large cut in the knee; it looked to me as if the wounds had been made with an axe; there was an axe there the morning before, but I never saw it afterwards; I was there when Lieutenant Beckham held an enquiry; the sculls were fractured, cut open; Flannigan had been on bad terms with Nagle and his wife, and Riley lately; Flannigan had a garden and some fowls and ducks, and Nagle used to say he would have them, and then they had words; I was afraid of Flannigan in the morning; I had no arms, nor had he, but as he murdered them, I thought he might murder me.

When asked if he would cross-examine the witness, the prisoner said it was no use.

By the Court - The body of Riley was quite warm, and the blood was oozing out; they had had no quarrel the night before, that I am aware of; Flannigan was dairyman; he was right in his mind he never was otherwise; the prisoner appeared to rejoice in what he had done; he said he had put three bad members out of the way, and he was very happy; there was nothing to distinguish his manner from any other morning; it was Flannigan's hut Nagle had moved to, and Flannigan told me he did not like it; Flannigan was to go as hut-keeper to a sheep-station; he said he did not like going, and would rather stop until his master came; I had often heard Riley and the prisoner have words, because Riley told tales of him to Nagle; Riley did not like Flannigan's getting up so early in a morning to milk.

Lieutenant **WHITTING** - I was in the Mounted Police; in February last, having heard of a murder, I went to Mr. Kinnerly's station, accompanied by Lieutenant Beckham and two troopers; I should think the station is about ninety miles from Bathurst; I got there on February the 6th, towards evening, and saw the bodies of John and Mary Nagle, and John Riley, all dead; they appeared to have been killed recently; the body of Mary Nagle was not cold; I saw Martin and his wife, and Sheering there; the body of the stockman was in an outhouse, with the scull quite cut open; the bodies of Nagle and his wife were in the hut, and had a great number of wounds, apparently inflicted with an axe; they were both undressed; there was not much blood in the bed; they appeared to have been dragged from the bed; the floor was covered with blood; I saw a shirt, which was said to belong to the prisoner, very much covered with blood; I and Lieutenant Beckham held an enquiry; we examined Martin and his wife, and Sheering, and a black boy; the black boy was not sworn; the prisoner had left the station when we arrived; we sent after him, I think, without a warrant, and he was brought to Mudgee the next morning, and committed to take his trial; the depositions were all read over to him; he made no defence; he made no admission in my hearing; he declined saying anything; the prisoner was very sullen, and apparently fatigued from walking; I asked him how he came to murder the unfortunate woman, and he said -- ``For what I have done I am the sufferer;'' I have no reason to suppose there was any insanity about him.

Corporal **SHEEDY** - I belong to the Mounted Police; I recollect going to Kinnerly's station and saw the bodies; I was sent off immediately to apprehend the prisoner; I came up with him at the Murrumbi Creek, about seven miles from Kinnerly's; he told me he was going to see a friend of his, and that when he had seen him, he should die happy; the prisoner was on his knee near a hut striking a light; thinking he might have some firearms, I said, hold up your hands, you murdering thief; he said, if he had taken their lives, he was not going to take mine; I said, I would take pretty good care of that; I secured him and took him to Mudgee; I asked him what he had murdered the people with, and he said with an axe which he had thrown into the river; I had blackfellows searching for the axe for two days, but there was a large quantity of

timber in the river and they could not find it; the prisoner told me he had supper with them that night, and could not sleep; in the morning he got up and murdered the stockman, and had to pull him out of bed to get the axe out of his head; that the little black boy who was with him in bed was frightened and ran away, he said he then went into the hut, and as he could not see which way Nagle and his wife laid their heads, he chopped about until he killed them; there were some cuts in the bed ticks as if some blows had missed the bodies; he said he could get no rest on account of Nagle, and I asked him why he had killed the man and not the woman; and he said he might as well be hung for a sheep as a lamb; he said he was guilty of it, and willing to die; he was sufficiently in his senses to lead me astray; I did not know the road, he said, he did, and he led me astray.

Mr. **ALFRED KINNERLEY** - I have a station near Mudgee; John Nagle was my overseer; I had a free stockman named Riley; the prisoner was assigned to me for about six years; I received information about the murder three days after it occurred; my homestead was about two hundred miles from the station; I was aware of the ill-feeling between Nagle and the prisoner; as I was going up the country I met the prisoner coming down under an escort; he asked me if I had received a letter from him, I said no; he said he had left a letter for me which would explain all; he asked me if I had ordered him to be sent hut-keeping; I said I did not, but had ordered Nagle to discharge Martin and his wife as I considered they had been the cause of the quarrel; immediately upon my arrival at the station, I received this letter; (the letter could not be sufficiently traced to the prisoner, to make it evidence,) I have no reason to suppose Flannigan is out of his mind; when I met him on the road he was very cool and collected; Riley had been a great mischief-maker at the station, and there had been a great deal of ill will between him and Flannigan.

Cross-examined - The prisoner has been an industrious, hard working servant for me for the last six years; he is a man that I always put great confidence in.

Mr. **F. HAWTHORN** - I am a surgeon; I saw the bodies of Nagle and wife, and Riley; Nagle's body had five or six wounds on it; the top of the head was almost cut off; the left hand was severed at the wrist joint almost entirely; there was a deep wound about five inches in length on the shoulder; and a wound on the right side of the thigh near the knee; the wound on the head was sufficient to cause death; a large portion of the brain had fallen out; they must have been inflicted with a heavy sharp instrument; **Nagle's wife and Riley had apparently been killed by the same means**; the woman was pregnant, and there was a slight degree of warmth at the abdomen; I should think she had advanced to the seventh month of her pregnancy; Riley had one very extensive wound in the head, so large that I could put my hand in it; the skull was laid completely open; all the bodies were undressed as if they had been in bed.

This was the case for the crown.

The prisoner in his defence denied all knowledge of the crime; protested his innocence, and said that he had neither act, part, or knowledge in the affair.

His Honor said, that in consequence of the humane suggestion of the Attorney General, he had narrowly watched the evidence, but could see nothing that shewed that the prisoner was insane. His Honor went through the whole of his notes and the jury without retiring from the box, returned a verdict of guilty. Sentence of death was passed on the prisoner.

See also Sydney Herald, 3 May 1838. This case was also recorded in Burton, Notes of Criminal Cases, vol. 34, State Records of New South Wales, 2/2434, p. 82, Burton noting that the defendant was ``bond", i.e. a convict, at the time of the trial.

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

AUSTRALIAN, 04/05/1838
WEDNESDAY. -- Before Mr Justice Burton and a Military Jury.
LONG JACK, an aboriginal native, was indicted for the wilful murder of **MARY**, his wife, at Maitland, on the 25th of February last, by beating her on the head with a waddy.

His Honor asked the prisoner several questions, by which it appeared that the black was well conversant with the English language, so as to render the assistance of an interpreter unnecessary. Mr a'Becket, at the suggestion of his Honor, undertook the defence.

When called on to plead in answer to a question by his Honor, whether he did kill his wife, the prisoner said yes. His Honor directed a plea of Not Guilty to be recorded.

It appeared in evidence, that the prisoner, with several other blacks belonging to his tribe, had become very drunk, by drinking a quantity of ``bull,'' given to them by a publican; and whilst in a state of the greatest excitement, he struck the deceased several blows on the head with a heavy waddy, which caused her death. After deceased had fallen, he appeared quite unconcerned about it, and would not believe for some time that she was dead; when, however, he was satisfied of her death, he expressed his sorrow. The only defence he offered when called on, was that he was drunk.

In putting the case to the Jury, his Honor expatiated at some length on the lamentable neglect in the civilization of the aborigines; since the foundation of the Colony, no means appeared to have been taken to improve their moral or religious state. By the law of England they were, whilst within the boundary of the Colony, amenable to British law, of which they were totally ignorant, being governed among themselves, by laws enacted by and peculiar to themselves. But however lamentable such inhuman neglect was, they were still amenable to the law; and the only question was whether there were any circumstances in the case which might palliate the crime, and justify a verdict of manslaughter. On this point, difficulties also arose, as no evidence appeared as to the origin of the quarrel.

Mr a'Becket endeavoured to draw a distinction between a white and a black man in cases of drunkenness, the latter not being (he contended) acquainted with the nature of the liquor he was drinking, and being thus taken by surprise.

His Honor could make no distinction between white or black men; that was a consideration for those who exercised the prerogative of mercy. The Jury must deal with the case according the evidence before them.

The Jury retired about five minutes, and found the prisoner Guilty - His Honor directed sentence of death to be recorded against him; observing, that he should avail himself of this opportunity of laying before the Government, many cases of the connection between the whites and blacks, which had come to his knowledge, in his judicial capacity.

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

AUSTRALIAN, 04/05/1838
Supreme Court of New South Wales
Willis J., 1 May 1838

TUESDAY. - Before Mr Justice Willis, and a Civil Jury.

THOMAS CORDELL was indicted for an assault with intent to murder **JOHN MacGUIRE**, at Bathurst, on the 29th October, 1837.

John Macguire. - I am a government man to **GEORGE KABLE**, of Bathurst; I was stationed at Burragang, on the Mudgee River, in October last, I was a stock-keeper; the prisoner at the bar was hut-keeper for me; there was no other person at the hut; one night (Sunday) in October, I asked the prisoner for some supper; he refused me and I went to bed; on the following morning, when I awoke, I found myself covered with blood; when I opened my eyes, I saw the prisoner standing over me with a tomahawk, which was all over blood, as well as the prisoner's hand; when I was going to rise, he said, ``you b--r you are not dead yet,'' and he struck at me with the tomahawk; I put up my hand to save the blow, and he broke my finger as I now shew; it was with the edge of the tomahawk he struck; my hand was not strong enough to ward off the blow, which also struck me on the head; my head had been cut before; I asked him for a drink of water; he refused me; I said he had served me very badly, and he answered that he ought to have served me so long before; I had eight or nine cuts on my head and body; several days after, he asked me to make it up; he offered me £5 if I would lay it on the bushrangers; I asked him to get me some assistance; he refused me, and never afforded me the smallest help for nine days, during which time I could not stir out of my bed, and had no person to give me anything; I was without sustenance during that time; at the end of nine days I went to Mr Cox's station, where I got every attention; when the prisoner was at home, he used to sit at his meals and never offered me anything; no person came to the hut during that time; the prisoner remained five days after he struck me, he then bolted away; I had to crawl on my hands and knees to Mr Cox's station; I could not walk.

The prisoner, when desired to cross-examined the witness, asked a few questions as to whether he did not supply witness with provision - which the latter denied. The prisoner appeared an ignorant clownish man, and did not deny the striking.

SAMUEL CURTIS, Esq. - I am a Surgeon; in the beginning of November I saw the last witness; he came to me for advice; he was greatly exhausted; he had eight or nine very large scalp wounds both on the front and back part of the head; the wounds laid bare the skull, and must have been inflicted with great violence; he had also the fore finger of the left hand fractured; it was a compound fracture, and must have been given with a blunt instrument; the wounds on the head were filled with maggots; I heard the last witness's evidence; the statement tallies exactly with what he told me; he stated to me that he had been several days without food, and I should think it possible that a man might linger nine days without food; he was greatly exhausted when he came to me; I do not know how the witness came to my house; he was scarcely able to walk; the fracture of the finger might have been done with the back of a tomahawk; the skin was not cut, but the bone protruded through the skin; I did not myself observe any indication of imbecility in the prisoner; I did hear a report of it.

Mr **KECK**, gaoler, was ordered to be sworn by his Honor, as there was some doubt as to the prisoner being of sane mind. Mr Keck stated that the prisoner had been in his custody about three months, during which time he had frequent opportunities of observing his manner, which to Mr Keck, appeared to be that of decided lunatic.

RICHARD MILLAGE, stockman to Mr George Kable, Bathurst, knew the prisoner a short time, but never observed anything particularly strange in his manner; the prisoner went to witness's hut to ask for corn meal to make a poultice for Macguires head, which he stated to have been cut by bushrangers; Macguire was very

weak, covered with blood, and had many cuts on his head; witness lent Macguire a horse to go to the surgeon's, at Wellington, but had to help him on the horse.

JOHN RAE, a mounted policeman, stated that he apprehended the prisoner, who appeared to be imbecile, sometimes laughing, sometimes crying, and at other singing; he always denied having cut the man.

This was the case. The prisoner stated in his defence, that the prosecutor, a few days before the deed, had run after him with two tomahawks and threatened his life; he had been thirteen years with one master out of fourteen, and had never been in trouble.

Mr **ALFRED KENNELLY** was called by his Honor at the suggestion of the prisoner. Mr K. knew nothing personally, but had heard that he was not of sane mind.

Another witness was called to endeavour to ascertain the state of the prisoner's mind at the time of the assault, but he could not speak satisfactorily on that point.

Before summing up, His Honor delivered himself to the Jury as follows:--
Gentlemen of the Jury - I take this, the first opportunity afforded me in the session, before I allude to the case of the individual before us, to say a few words with reference to our relative situations, and the high and honourable trust which is imposed upon you as Jurymen. In this Colony, as in England, a great part of the public business of the country, is transacted by the country itself; and upon the prudent and faithful management of it depends, in a very considerable degree, its interior prosperity, and the satisfaction of the great body of the people. There is erected in this Colony, as in England, a high and venerable tribunal, to which owners of permanent property, down almost to the lowest classes, are indiscriminately called upon to take part; not in the mere ceremonies and forms of the meeting, but in its most efficient, and important functions. The wisdom of man has not devised a happier institution than that of Juries, or one founded in a juster knowledge of human life, or of human capacity. In jurisprudence, as in every other science, the points ultimately rest upon common sense. But to reduce a question to these points, and to prepare them accurately, requires not only an understanding different from what which is necessary to decide upon them when proposed, but oftentimes also, a technical and peculiar erudition. Agreeably to this distinction, which runs, perhaps, through all sciences; what is preliminary and preparatory, is left to the legal profession; -- what is final, to the plain understanding of plain men. But since it is necessary that the judgment of such men, as you, Gentlemen of the Jury, should be informed, and since it is of the utmost importance that advice, which (I venture to say), falls with so much weight, should be drawn from a proper source; a Judge, who has spent the greatest portion of his life in the study and administration of the laws of his country, is directed to preside; and is bound to declare his opinion without reference to any thing whatever, save the evidence he receives. The effect must correspond with the wisdom of the design. Juries, Gentlemen, may err, and frequently do err; but the system of error is not, in our English Juries, incorporated with the system of their constitution. Corruption, terror, influence, are excluded by it; and prejudice in a great degree, though not entirely. The danger which consists in Juries viewing one class of men, or one class of rights, in a more or less favourable light than another, is the only one to be feared, and to be guarded against. It is a disposition which, if in the course of the session, it should by any possibility arise in your minds, will, I am sure, Gentlemen of the Jury, be repressed by your probity, your consciences, the sense of your duty, the remembrance of your oaths. The institution of Juries, I need hardly tell you, is not more salutary than it is grateful and honorable to those popular feelings of which all good governments are tender. Hear the language of the law: In the most momentous

interests, -- in the peril indeed of human life - the accused (as the prisoner at the bar has done this day), appeals to God and his Country; -- which Country you are. What pomp of titles! What display of honours! can equal the real dignity which these few words confer upon you, Gentlemen of the Jury, to whom they are applied? They show, by terms most solemn and significant, how highly the law deems of the functions and characters of a Jury; they show also with what care of the safety of the subject it is, that the same law has provided for every one a recourse to the fair and impartial arbitration of his neighbours. This, Gentlemen, is substantial justice; this is equality of protection; real freedom; freedom from injustice. May it never be invaded - never abused. May it be perpetual - and it will be perpetual if the affection of the Colony continues to be preserved to it by the integrity of those, who like you, Gentlemen of the Jury, are this day charged with its high ad honourable office. I now proceed to the case before us. Before I enter upon the evidence, however, let me, with reference to a point that has arisen, state what the law is in this particular: -- ``To justify the acquittal of a prisoner, charged with such a crime as is now before us, on the ground of insanity, the Jury must be satisfied that he was incapable of judging between right and wrong; and at the time of committing the act, he did not consider that it was an offence against the law of God and Nature." The evidence you have already heard: It is your province, Gentlemen, to decide whether that evidence, which I shall proceed to recapitulate, sustains the accusation. I shall call your attention, as I proceed, to those points which appear to me most worthy of your consideration; and then, without further observation, leave it, as it is my duty to leave it, in your hands. His Honor proceeded to recapitulate the evidence, and continued - ``on this evidence, Gentlemen of the Jury, it is for you to decide. It would be a most unhappy case for the Judge himself, if the prisoner's fate depended upon his directions; unhappy also for the prisoner; for if the Judge's opinion must rule the verdict, the Trial by Jury would be useless."

The Jury retired for a few minutes, and returned a verdict of Guilty. Mr. **LAMB** the foreman of the Jury recommended that enquiry should be made of his former master, as to the state of his mind generally; as also of any medical gentleman experienced in the matter. The Jury recommended this on account of the testimony which had been given by Mr Keck as to his insanity.

His Honor stated that he would take care that every inquiry should be made for the benefit of the prisoner, before sentence was passed. The prisoner was remanded.

See also Sydney Herald, 3 May 1838; Sydney Gazette, 5 May 1838; and see Speech to Jury, 1835. - On the insanity defence, see also R. v. Wagoner, Sydney Herald, 14 May 1838; Sydney Gazette, 15 May 1838. The prisoner was acquitted of murder on the ground of insanity, two medical practitioners having given evidence that he was of unsound mind. He was remanded until Her Majesty's pleasure was known, under an Act cited in the Gazette as 39 and 40 Geo. 3.

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

SYDNEY GAZETTE, 05/05/1838

(Before Mr. Justice Burton and a Military Jury.)

LONG JACK, and aboriginal native, was indicted for murdering his wife **MARY**, by inflicting divers wounds on the head with a black fellow's waddy, of which she died at Maitland on the 25th February.

The facts of this case were very simple. The prisoner and some other blacks were very drunk at Maitland; the deceased was seen running from the blacks' camp pursued by her husband, who overtook and gave her several blows on the head with a waddy.
In summing up, his Honor said that it was lamentable, that although it is now upwards of fifty years since the Colony was first inhabited by the British, so little has been done for the amelioration of the black natives; but notwithstanding the almost savage state of the prisoner he must be dealt with as a European, as it is a well known principle of British law, that wherever the British standard floats the inhabitants are within the pale of British law, and whatever savage customs may have been in existence must cease. His Honor said that there were great difficulties in this case, because it was almost impossible to get at the motives which led to the quarrel, which might perhaps shew that the crime was committed under such circumstances as would reduce it from murder to manslaughter, but the jury were bound to return a verdict according to the evidence, and unless from the evidence the jury could gather any circumstances that would lead them to think it was such a case as would not have amounted to murder if committed by a European they must find the prisoner guilty.
The Jury retired about five minutes and returned a verdict of Guilty.

His Honor ordered sentence of Death to be recorded against the prisoner, and said he should take this opportunity of reporting to the Home Government several cases that had come before him in which the blacks were concerned, in order to shew the nature of the communication between the blacks and whites of this Colony.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 05/05/1838
Supreme Court of New South Wales
Burton J., 2 May 1838
BRIDGET DOGHERTY was indicted for attempting to administer a certain quantity of oil of vitriol to one **ELIZABETH CLEGG,** with intent to kill and murder her, at Liverpool, on the 14th December.
The Attorney-General briefly opened the case, and called -
Mr. **G. GRAHAM**. - I reside in Liverpool; the prisoner has done the washing for the family for the last three years; Elizabeth Clegg is an orphan fatherless and motherless, and has been in my house the last five years; when I and Mrs. Graham leave home together we leave the house in charge of Elizabeth Clegg; some time in December last, a little girl of mine complained of a headache and lay on the bed; when she lay down she found a phial; I took out the cork and a little of the mixture it contained fell on the sofa cover, and upon asking Mr. **PRITCHARD**, the druggist, he told me that it was oil of vitriol; knowing that Elizabeth Clegg was the only person who had access to the room, I asked her about it, but she denied all knowledge of it; a short time before I left some spirits out which were not accounted for, but the matter had passed; when I questioned the girl closely she told me that she got it from Biddy Dogherty; after seeing Mr. Pritchard I sent a constable for the prisoner.

Cross-examined. - Clegg said she got the vitriol for bugs; I never put vitriol into my liquors; I never discovered that any had been put into it; I made a complaint of some run having been made away with.

Elizabeth Clegg. - I am fourteen years of age; I have been living with Mr. Graham a long time, ever since my father died; in December last, Bridget Dogherty gave me some oil of vitriol; she gave it to me to kill myself, because Mr. Graham was going to bring me before the Court because I did not give the money right that Mr. Graham

was away one day; he said he would bring me to Court in November, he did not do it; Bridget Dogherty knew nothing about the money; I gave all the money to Mrs. Graham; I gave her fifteen shillings; half a gallon of rum and two gallons of wine were left out, which I sold all but a pint of run and half a gallon of wine; I gave the money to Mrs. Graham the next morning when she asked me for it; I told Biddy Dogherty that I was going to Court and did not want to go; she gave me the vitriol and told me she would show me how to make it the next time she came down; I don't know who paid for it; Bridget brought some clothes home while Mrs. Graham was out, she got no rum nor wine; the money I received I kept in a drawer in a room next the tap-room; the prisoner was not in that room; I was in charge of the house; I did not tell Biddy that I wanted to kill myself; she told me if it was found I was to say it was to kill bugs; I never spoke to Bridget Dogherty about killing myself.

Cross-examined. - The prisoner spoke about the vitriol first; I did not know what the vitriol was; Mr. Graham beat me, because I would not tell him where it came from; I did not like it because I did not know how; she said nothing about mixing it with the spirits and the wine; I did not tell the prisoner to get the vitriol for me in her own name; I did not know it was vitriol.

Mr. **WILLIAM PRITCHARD**. - I am a druggist residing at Liverpool; the prisoner came to me for some oil of vitriol on the 14th of December last; she called for three-penny worth; I gave her an ounce; that is quite enough to kill any one; she told me she wanted it for Mrs. Allan with whom she then lived; about two hours afterwards, Mr. Graham shewed me what I believed to be the same bottle of vitriol; it was charged to Mrs. Allan's account.

Cross-examined. - I have known the prisoner for some years; she bears a good character as far as I recollect; she came to me one or two days before, and asked for vitriol, and went back to enquire what kind of vitriol she wanted; she said she wanted oil of vitriol.

Mr. Graham. - The prisoner had been at the house the day the vitriol was found, but not in the room where it was found; I have no reason to suppose the prisoner would do me any malicious injury.

Elizabeth Clegg. - The prisoner did not tell me what to do with the vitriol; I never asked her for it.

The prisoner's defence was that she was sent for the vitriol by the little girl, and was told to get it in somebody's name, because if it was for Mr. Graham, the druggist would not sell it.

Mr. **a'BECKETT** submitted that the evidence of Mr. Pritchard as the prisoner got it in a false name was some corroboration of the girl's statement.

His Honor said that he thought even if the girl's statement was true, it did not amount to an attempt to administer; it appeared to him to be a parallel case with a person giving another a dagger, telling him that he would shew him how to use it. If the dagger were used, the party giving it could be charged with being an accessary before the fact, but the man giving the dagger did not amount to an attempt at murder.

After a short conversation, His Honor said he would leave the case to the Jury.

The prisoner in the most correct manner protested that she was sent for the vitriol by the girl Clegy [sic]; and did not know what was wanted with it.

In putting the case to the Jury, the Judge said that he was of opinion, that the mere giving another a deleterious drug, did not amount to an attempt to administer. Mr. Justice Willis happening to come into Court at the time, was consulted on the point by His Honor, and who also was of the same opinion; the Jury was therefore directed to acquit the prisoner. Not Guilty.

See also Australian, 4 May 1838; Sydney Herald, 7 May 1838. This case was also recorded in Burton, Notes of Criminal Cases, vol. 34, State Records of New South Wales, 2/2434, p. 115.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/264, 05/05/1838.
DROWNING. - On Tuesday afternoon, an old man named **GROOM**, who gets his living by vending oysters, shot himself across Darling Harbour in his dingy, which he made fast, as he thought, by the painter to the rocks, and commenced knocking off his piscatory meal, Upon turning round, what was his surprise and mortification, to find his dingy drifting away from its moorings; without a moment's thought or hesitation, he plunged into the briny element, but his strength was not equal to the task he had undertaken, and after a few convulsive struggles, he sunk, and the waters became calm and placid above his head.
CORONER'S INQUEST. - On Monday an Inquest was held at the "Bunch of Grapes," King-street, upon the body of a man named **THOMAS SHEFFIELD**, who expired in the hospital the previous day. It appeared that deceased was attached to the gang at Goat Island, but having been taken ill he was sent to the hospital. Upon the dispenser on Sunday approaching his bed to administer medicine he found a lifeless corpse. The Jury returned a verdict of "Died by the visitation of God."
The Criminal Sittings of the Supreme Court commenced yesterday. The Calendar is heavier that we believe any upon record, both as to numbers and crime. **JOHN DIGNUM [alias HENRY JENNINGS]** and **FREDERICK HALLUM**, confederates of **COMERFORD**, will be tried for murder, also Comerford for the murder of **THOMPKINS** at Port Phillip.
SUPREME COURT.
Tuesday, May 1.
Before Judge Burton and a Military Jury,
JANE GUTHRIE was indicted for the murder of her infant child at Illawarra, on the 11th February. There was no proof of the capital charge, but the Jury found her guilty of concealing the birth of the child, and she was sentenced to be imprisoned in the third class of the Factory for two years.
JOHN LESTALL, a soldier of the 28th Regiment, was indicted for the wilful murder of **MICHAEL READY**, a soldier belonging to the same Regiment, at Morpeth, on the 8th February. As it appeared more than probable that deceased had come to his death from the effects of intoxication the Jury returned a verdict of not guilty. Discharged.
BRYANT FLANIGAN was indicted for the wilful murder of **JOHN NAGLE**, AT Bunbejong, Mudgee, on the 5th February. It appeared that in consequence of some misunderstanding with Nagle, who was his overseer, he entered the hut at the dead hour of the night, and murdered not only Nagle, but a stock-keeper named **RILEY** and his (Riley's) wife with an axe. He was found guilty on the clearest testimony, and sentence of death was passed upon him, to be carried into effect at such time and place as his Excellency may think proper to appoint.
Wednesday, May 2.
Before Judge Burton and a Military Jury.
LONG JACK, an aborigine, was indicted for the wilful murder of Mary his wife, by beating her on the head with a waddie, at Maitland, on the 25th February. It appeared

that drunkenness had caused the commission of the offence. Guilty. Death recorded. The case will be sent home with a recommendation for a pardon.

SYDNEY HERALD, 07/05/1838
Supreme Court of New South Wales
Burton J., 2 May 1838
Wednesday. - Before Mr. Justice Burton and a Military Jury.
LONG JACK, an aboriginal native, was indicted for the wilful murder of his wife **MARY**, at Maitland, on the 25th February, by beating her with a waddy.

A long conversation took place between the Judge, the Rev. Mr. Threlkeld, M'Gill the black native, the prisoner, and the Attorney General, the result of which was, that His Honor considered the case had better go on without the intervention of an interpreter, as he thought the prisoner had a sufficient knowledge of English to understand the case. At the request of His Honor, Mr. a'Becket undertook the prisoner's defence.

When the indictment was read over and explained to the prisoner, and he was called on to plead guilty or not guilty, he said yes, meaning that he did kill the woman, but His Honor directed a plea of not guilty to be entered.

The facts are very simple. The prisoner and several other blacks were very drunk and quarrelling; a person who was standing by, saw the woman Mary running from the black camp towards a house for shelter, followed by her husband; the door of the house was shut in her face, and the prisoner overtook her and laid hold of her by the wrist, and after a few moments parlance struck her several blows with a waddy on the head, which killed her. The prisoner was taken into custody, and the next morning when told he had killed his wife, at first said it was "gammon," but when convinced she was dead, cried very much, and said he was drunk and could not help it. When called on for his defence, the prisoner merely said, "I was drunk." The Rev. Mr. Threlkeld said, that the prisoner told him that he got some bull from a public-house near the bridge for something he had done, which made him drunk, and that when drunk he had killed his wife, and was very sorry for it.

In putting the case to the Jury, His Honor said, it was impossible to avoid making those reflections which naturally arose to the mind upon hearing the case. Fifty year have passed since this country was colonised, and a jubilee had been lately held to celebrate that day. Happy would it have been if the celebration of that day had been accompanied by some measure for the amelioration of the unhappy class to which the prisoner belongs. There can be no doubt that they are as much amenable to the British law as Europeans. Parliament has been pleased to appoint certain limits to this Colony - in those limits the British standard is raised - and there are British law must be enforced; wherever the British standard floats, all persons, in the emphatic language of the law, are in the peace of God and the King, and whatever barbarous customs may be in existence must cease. It would have been well if when this Colony was first planted some regulations respecting the intercourse of the whites with the natives had been enforced, and it is monstrous at the expiration of fifty years to find that no means have been taken either to instruct them in the precepts of our holy religion or to civilise them in any manner. If the offspring of these wretched people had been taken into the bosom of the white people and properly instructed, we should not now find a young man like the prisoner, who is not more than half fifty years old, in the state we now find the prisoner. Sitting as a Christian and a British Judge, I could almost say, that it would have been better if at the first planting of the Colony the native had been driven beyond the boundaries (although I, of course, deny any

right to do so), where they could not have come into collision with the Europeans, and would not have been exposed to the temptations they now are, but would have been regulated by their own laws, which they are bound to obey; or else that they should have been so far subjugated that their children could have been instructed. To them, in their present state, our laws are as a closed book; but, as I before observed, whether an outrage is committed upon a black by a white, or by a white upon a black, or by a black on one of his own tribe, wherever the British flag flies all persons are within the law, and the prisoner, savage as he is, must be tried the same as a European. In conducting a case of this kind great difficulties exist from our not being able to get at the circumstance which led to the commission of the crime; we are in the dark as to whether there were not circumstances of mitigation that might make the case manslaughter instead of murder (His Honor here made several remarks upon the distinction between murder and manslaughter). The law presumes that where death ensues from repeated blows given with an instrument like a waddy, that it is murder, unless circumstances are shown by which it is made a lesser crime; here unfortunately we are shut out from ascertaining how the quarrel originated, and it is for you to say whether from the evidence you can gather such circumstances as will lead you to return a verdict of manslaughter.

Mr. a'Becket asked His Honor whether the prisoner could be looked upon the same as a drunken white man, as he could hardly be supposed to know the effect of liquor.

His Honor said he could make no distinction; that was a consideration for those who exercised the prerogative of mercy, which was in safe hands, but the Jury must deal with the case by the evidence as if the prisoner was a white man.

The Jury retired about five minutes and returned a verdict of Guilty.

His Honor directed sentence of death to be recorded upon the prisoner, and observed, that he should take this opportunity of mentioning to the Queen's government several cases that had occurred before him in which the blacks were concerned, to shew the nature of the communication between the whites and blacks of this Colony.

See also R. v. Murrell, 1836; R. v. Ballard, 1829.

This hearing was also recorded in Burton, Notes of Criminal Cases, vol. 34, State Records of New South Wales, 2/2434, p. 103. Rev. Threlkeld proposed to act as interpreter, with the assistance of MacGill, another Aborigine, without whom he could not communicate with the defendant. Threlkeld said MacGill had been with him for 10 years, had been instructed by him, and helped him in translating the scriptures. Burton noted, however, that MacGill had not been baptised; Threlkeld would have done so, had MacGill understood religion. Burton then declined receiving him as a sworn interpreter. He then found that the prisoner was sufficiently conversant in English for the trial to go ahead. The prisoner understood why he was in court, and the questions put to him.

Threlkeld's account of what he learned from Long Jack is in Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161, 347-349.

On a police hunt for other Aborigines in the Goulburn district who were accused of murder of Faithful's men, see Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161, 337-343. At 344-346, there is a list of 14 Europeans killed by Aborigines between 1832 and 1838. Threlkeld also reported the murder of Aboriginal women by other Aborigines, at 370-373. See also 502-504 for his report of clashes between Europeans and Aborigines. At 511-514 there is an anonymous memorandum on ``Outrages upon the Aborigines''.

Governor Gipps was exasperated by the number of clashes between whites and Aborigines: see Gipps to Glenelg, 21 July 1838, Historical Records of Australia, Series 1, Vol.19, 508f.

SYDNEY HERALD, 07/05/1838
Supreme Court of New South Wales
Willis J., 5 May 1838
Before Mr. Justice Willis and a Civil Jury.
THOMAS JOHNSTONE was indicted for manslaughter, in having shot one **JOHN QUINSEY**, at Lower Portland Head, on the 27th March.

The prisoner is the son of a settler residing at the Lower Portland Head, on the banks of the Hawkesbury. The farm is in a lonely situation, and the only persons on it were the prisoner, his father and mother, and the deceased. In the middle of the night old Johnstone heard the dogs bark, and getting up, desired his son to go out and see who was about. The son went out with his gun in his hand, and seeing a man a few yards off, called to him; the man made no answer, but kept advancing towards, him, upon which the prisoner fired, and the man spoke, saying "my dear Tommy," upon which the prisoner recognised him, and was much affected. The deceased lived in a hut a few rods from the house, and what he was doing near the house is unexplained. It was proved that there was a report in the neighbourhood that there was a black man at large committing depredations. His Honor told the jury that if the prisoner shot Quinsey under an impression that he was about to attack him they must acquit him. Not Guilty. See also Sydney Gazette, 8 May 1838.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 17/05/1838
R. v. Palmer
Supreme Court of New South Wales
Burton J., 16 May 1838
Wednesday. - Before Mr. Justice Burton and a Civil Jury.
EDWIN PALMER, late of New Zealand and Sydney, a subject of our Lord the late King, and our Lady the Queen, was indicted for killing **CHARLES DENNAHAN**, at **Preservation Bay, New Zealand**, within the jurisdiction of this Honorable Court, by beating him with a rope, on the 14th day of June, so that he languished until the 4th day of July, when he died.

The prisoner in this case was formerly superintendent of a whaling establishment at New Zealand, belonging to himself and Mr. James. In the month of January last, he arrived in Sydney with some of the men belonging to the station; when he had been here about three weeks, some of the men accused him of killing a boy named Charles Dennahan. Four of them gave evidence at the Police Office, and the tenor of their statements was, that in June, 1837, Dennahan and a New Zealand boy were left in charge of a boat, to keep her outside the surf, which they did not do, and the boat was injured, and for this, the prisoner beat Dennahan so severely that he died about a month afterwards. On this evidence Palmer was committed to take his trial, but admitted to ball.

Last session, Palmer was arraigned for manslaughter, and, on his application, the trial was postponed to this session, in order to enable him to procure the attendance of witnesses who were at New Zealand.

In opening the case, the Attorney-General stated that he should be able to prove that two of the most material witnesses had been kept out of the way by Palmer, in which case he should give in evidence, the depositions they had sworn to before the Magistrates.

The first witness called was a carpenter named **DAVISON**, who swore that about the middle of June, he was laying a bed one evening about seven or eight o'clock, when he heard Dennahan crying out "don't beat me Mr. Palmer, and I'll work for a year to pay for the boat;" he heard a great noise as if the boy was jumping over the tables and stools, and heard the sound of a rope, sometimes as if it struck the boy and sometimes as if it hit the wall; Howard and Lyons were in the hut with Palmer; the next morning he saw the boy walking to the boat almost double, and when he (witness) went for his eleven o'clock grog, Palmer showed him a two and a half inch rope strop, which he said he had beaten that scoundrel with, and with which he would beat him every day until he either killed him or cured him; when the boy returned that night, he was taken ill, and continued so for nearly a month, when he died; before he died he smelt dreadfully offensive; Davison also stated that two or three days after Palmer returned from New Zealand, he called on him at his lodgings in Sussex-street, and after a few remarks, to him that while he had been at New Zealand, Mr. Jones had got two of the witnesses (Howard and Lyons) away, and that he would pay his (Davison's) expenses if he would go too; this offer he made several times, and finding that it had no effect, he told him that he did not care a d--n for him, and had got witnesses that would fix him. He also stated, that in a conversation which he had with Palmer, shortly before the boy's death, he mentioned to him that if the boy died, he (Palmer) would be blamed, to which Palmer replied that there was no danger of the boy dying, and that the flogging he had given him could not have hurt him; besides which, he did not care a d--n, for there was no law in New Zealand. In cross-examination, Davison positively denied that he ever said either to Mr. Jones or any body else, that for a little money he would keep out of the way.

THOMAS ASHWELL, cooper of the establishment, was in the hut with Davison, and heard the noise on the night alluded to, but could not recollect a word that was said, but the next morning Palmer told him that he had given the boy a rope's ending for losing the boat. Four or five days after this the boy who was always sickly, was taken ill and confined to his bed; he complained of a gnawing at his stomach and his breath smelt horribly offensive; so much so that the men could not stop in the hut; worms used to come from his nose and mouth six inches long and the size of a quill; he (witness) gave him eggs to eat, and Mr. Palmer used to give him wine and a fowl, soup, and medicine. In about six weeks he died, and he was quite confident that he never heard him complain of the beating; the man that washed him after he was dead told him that there were no marks of violence.

Mr. **JOHN JONES**, formerly the prisoner's partner, denied that he had any hand in getting Howard out of the way. When Howard came up from New Zealand there was a balance of £137s. due to him, which he would not take because Mr. Jones would not pay him for sixty days grog at nine pence per day, which he alleged was due to him. On the 26th March he called, in company with a lodging-house keeper, named O'Grady, for his money, and as the witness had only £3 7s. in cash in the house, he gave him a note for £10 payable three days after the sailing of the whaling ship Pilot, by which he understood that Howard was going to sail. He was aware that Howard was a witness against Palmer, but it never occurred to him that he was acting improperly. The witness assigned as a reason for giving the note, that in consequence of having purchased the whaler Caroline, he had been drawing heavily on his banker, and did not know whether he had any cash in the bank. Mr. Jones also stated that at the commencement of the sessions Davison told him that if Mr. Palmer would give him a little money he would keep out of the way.

A lodging-house keeper, named **O'GRADY**, corroborated Mr. Jones's evidence, and stated that Davison when having dinner at his house one day, stated that if Palmer would give him a little money he would keep out of the way.

The Attorney-General said, that on this evidence he was unable to give the depositions of Howard and Percy in evidence, and must close his case.

Mr. a'Becket submitted there was not sufficient evidence of the cause of death to send the case to the Jury, but His Honor refused to withdraw it from the Jury.

The prisoner's defence was that the charge was made in malice.

His Honor in summing up, commented on the suspicious circumstances under which Howard left the colony, whose evidence was as necessary to clear the prisoner's character, as it was for public justice.

The Jury retired for about half an hour, and returned a verdict of Not Guilty.

Mr. a'Becket, who, with Mr. Foster, were retained for the prisoner, applied to his Honor to commit Davison for perjury, as he had been contradicted both by Jones and O'Grady, but his Honor said he had formed his own opinion, and declined to commit him.

This case was also recorded in Burton, Notes of Criminal Cases, vol. 36, State Records of New South Wales, 2/2436, p. 39. See also Australian, 22 May 1838; Sydney Gazette, 22 May 1838. Both of these newspapers reported that Mr Forster for the defendant objected to the evidence of Davison being admitted, on the ground that he was convict attaint. The Australian gave the best account of this:

> When a witness (Davidson) was called, Mr Forster, with whom were Mr A'Becket, and Mr G.R. Nichols, for the defence, took an objection to his eligibility as a witness, he having been convicted of felony in the Colony, and transported to a penal settlement. The learned Judge, in over-ruling the objection, observed that this question had already been argued, and it had been solemnly decided upon by the court that he was an admissible witness, whose testimony of course would go for what it was worth, but still he was a competent witness. His Honor observed that by the rules of court, he had been placed in a singular situation for a length of time by that decision, which the court was bound to abide by. When the point was argued, two of the learned Judges (Mr Stephen and the present Chief Justice) were opposed in opinion to Mr Forbes, with whose opinion then expressed, he (Mr Burton) perfectly agreed. There was this anomaly therefore in the Supreme Court for some time. Two of the judges opposed in opinion to an established precedent, and to the third Judge. The precedent, however, was established, and he (Mr Burton) was bound to acknowledge it. It would be competent for the defence to get the fact of his conviction from the witness, if that in any way affected his testimony.

The reference was to R. v. Farrell, 1831; and see R. v. McCabe, 1833; R. v. Gardener, 1829.

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

SYDNEY GAZETTE, 19/05/1838
Supreme Court of New South Wales
Willis J., 11 May 1838

DANIEL MALONEY, was indicted for the wilful murder of **TIMOTHY MAHONEY alias THOMAS MAHON,** by stricking him on the head with a pick-axe, at Hassan's Walls, on the 20th April.

JOHN DAVIS - I am a prisoner of the Crown; I was at the Hassan's Walls ironed gang, where I remained nine months; the prisoner was there about two months; there was a person named John Mahoney there; there were sixteen of us at work getting stone for the road; the prisoner was about four yards from me, and came within a yard and a half of me; I saw Mahoney picking up a stone, and as he was rising, the prisoner Maloney drove a pick into his head; they had had no quarrel of any kind; I called to **SCARROTT** who was very close to me to take him to the sentry; he was seized by me and another man the pick taken out of his hand; the man fell the instant he was

stuck with the pick; he made two blows at him, both on the head; the man was lying on the ground when the prisoner struck him the second blow; we took him to the sentry; the prisoner said he was tired of his life from the usage he got, and was sorry he did not kill half a dozen; the prisoner was punished for neglect of work two or three days before; he received fifty lashes on the breech; the prisoner was not fit to work, his feet were all cut with the irons.

The prisoner declined asking questions.

By a Juror. - The prisoner was not drunk; he could get no liquor; he might be drunk from hunger; we do not get out rations properly, if we did we should have enough.

By the Attorney General. - Our proper ration is seven pounds of flour, three and a half pounds of maize, and seven pounds of meat a week; when the ration comes to us there is not four ounces of meat; there are a good many messengers and watchmen walking about, and the cook gives it to them; it goes through about twenty hands before we get it; the meat is given out daily by the serjeant, who hands it to the cook and delegate; the delegate is a prisoner who attends to see the meat properly served out; we take it in turns; there are two wardsmen to carry up the rations; there are fifteen or sixteen men out of irons who draw rations along with us; they get theirs cut off before ours is put into the boiler; the cook gives them the best of the meat, and when it is cut off there is little but bones left; we don't get our full complement of flour and maize; it is concealed by the cook and delegate; I was delegate once myself, I took none; I could tell by the difference in the rations that other delegates must have concealed it; I never saw anybody take it; Captain Cains ought to look after our rations. (His Honor apologised to the jury for taking up their time in a matter not relevant to the issue, but the witness having made the charge publicly, these questions had been asked that it might be enquired into.)

RICHARD SCARROTT. - I have been in the ironed gang at Hassan's Walls about two months, I knew Mahoney, I do not know his christian name; I saw the prisoner leaning over Mahoney after he was killed; I caught hold of the prisoner and pulled him away; I saw the pick in his hand a few minutes before but did not see it then; I brought the prisoner away and some of the men at the gang cried out murder; the prisoner never spoke, but on the road said it was not one he wanted but half a dozen; the wounded man was taken to the hospital.

WILLIAM YOUNG. - I belong to the ironed gang at Hassan's Walls; I saw the prisoner strike Mahoney with this pick; Mahoney was carrying stone; they had a few words a day or two before that; they had no words then; I was three or four yards from them; he struck him a second time when he was down, he was seized by Davis and Scarrott.

JOHN YEADEN, private in the 80th Regt. - I recollect the day Mahoney was killed; I believe his name was John Mahoney; I was sentry over the gang and went to the rear; whilst I was there I heard the prisoners saying that Maloney had killed a man; I came up and saw the prisoner in charge of Davis and some others; I ordered the other sentry to take charge of the prisoner and take the gang home and I would stop with the deceased; as soon as the other sentry marched the gang away and the prisoner with him, I went to the deceased and lifted him up and he said ``Yeaden what's the matter;" I told him Maloney had struck him on the head with a pick, and he said ``Oh God why did he do that, I never spoke a word to him, I thought it was a tree had fallen on me;" the overseer came with some men and we tied up his wounds and took him to the stockade and afterwards to the hospital; I afterwards saw him dead.

The Court was now kept waiting upwards of an hour for Dr. Reid, who could not be found.

Captain **NATHANIEL KAINS**. - I recollect Mahoney being killed; his name in the warrant was Thomas Mahoney alias Timothy Maher; I saw him after he was wounded; he had a hole in his head as if made by a pick; the head was opened by Dr. Reid; there was a hole about the size of half a crown, and several pieces of skull which must have been broken off by a blunt instrument; the prisoner told me he was tired of his life, and seemed to try to appear out of his mind.

Cross-examined. - I asked the prisoner why he had done it; he said he was tired of his life; I told him he should be tried, or suffer by the laws of the country.

The prisoner said nothing of consequence in his defence, but called two men from the stockade who knew nothing of the circumstance, but said that the prisoner had undergone a deal of hardship in the ironed gang.

Before proceeding to charge the jury, when the Court had been kept waiting for Mr. Reid about two hours and a half, His Honor said Mr. R. had been guilty of such gross contempt that he was determined to punish him severely, and he therefore ordered that Assistant Surgeon **JOHN REID**, of H.M. 80th Regt. be fined £20, and be imprisoned in Sydney gaol for two months.

His Honor told the jury that if they believed the facts sworn to, there could be no doubt the offence amounted to murder. The jury, without retiring, returned a verdict of guilty. His Honor immediately passed sentence of death upon the prisoner.

See also Sydney Herald, 14 May 1838.

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

CJA, 4/266, 12/05/1838

CORONER'S INQUEST. - On Tuesday, an inquest was held upon a man named **THOMAS SPRING**, who died in the hospital the previous morning. It appeared that about seven weeks since, deceased had a row with a man called **"BIG-NOSED JACK,"**, for no other name could be elicited from the witnesses, during which, he received a blow on the back of his head from a stone, from the effects of which he gradually declined in health, until he was removed to the hospital, where he expired. The inquest adjourned until Wednesday, when a warrant was issued for the apprehension of "Big-nosed Jack." There the matter rests at present.

On the same day, an inquest was held at the Cockatoo, Pitt-street, upon the body of **ELIZA GLINN**, an assigned servant to Mrs. **CLEWITT**, who died suddenly that day. The jury returned a verdict of – Died by the Visitation of God.

Same day an inquest was held at the Albion Inn, Market Wharf, upon the body of an aged man, who expired in a boat while being brought from Lane Cove to the Hospital. Verdict – Died by the Visitation of God.

On Wednesday, an inquest was holden at the Bunch of Grapes, King-street, on the body of **JAMES ALLEN**, a prisoner of the crown, attached to Goat Island, who died while being brought from thence to the Hospital. Died by the Visitation of God.

MURDER. - On Monday, a man employed in the gang at Parramatta, murdered another who was at work alongside him, by thrusting a needle, which is used in blasting, into his head.

LAMENTABLE OCCURRENCE. - On Wednesday, as Mr. **JOHN HUMPHREYS**, of the "Billy Blue," Grose's Wharf, was driving in his gig down Bathurst-street, the horse took fright and darted off at a furious rate; in turning into his gate, Humphreys foolishly threw away the reins and jumped out, in doing which he pitched head foremost on some scantling which lay on the road, and was killed upon the spot, his head being literally split open.

Yesterday afternoon the mortal remains of Mr. **JOHN HUMPHREYS**, of the "Billy Blue" public-house, and a timber merchant, who met his death by jumping from his gig at his own gate on Thursday, were conveyed to their last resting place --- the tomb. The body was preceded, carried and followed by members of the body of the Independent Lodge of Odd Fellows, to which Order the deceased belonged; numerous private friends also followed, amounting in the aggregate to about one hundred. The procession moved from the residence of the deceased about the hour of four o'clock, headed by the Town Band, consisting of fourteen instruments, playing the dead march of Louis 16; and the Officers of the Lodge with banners displayed. A numerous body of persons were in attendance to witness the imposing spectacle.

ACCIDENT. - On Wednesday morning, a young boy, named **CARTWRIGHT**, was dreadfully scalded by pulling a tea kettle of scalding water over himself during the absence of his parents. His recovery is questionable.

SYDNEY HERALD, 14/05/1838
Supreme Court of New South Wales
Dowling C.J., 10 May 1838

JAMES COOK was indicted for the wilful murder of an aboriginal native, to the Attorney-General unknown, by shooting him at Mr. Hall's station, near Lake Bathurst, on the 7th February.

The death of the black in this case appeared to quite accidental. The deceased and the prisoner were on excellent terms, and the prisoner in joke levelled a loaded gun at the black fellow, which went off and killed the unfortunate man. Mr. Hall, the prisoner's master, said they were all on excellent terms with the blacks, who were quite satisfied it was accidental. Not guilty.

See also Australian, 19 May 1838; Sydney Gazette, 19 May 1838; Dowling, Proceedings of the Supreme Court, Vol. 150, State Records of New South Wales, 2/3335, pp 34-44. According to the latter, the Attorney General argued that there was no distinction between black and white in the eyes of the law. The primary witness, **JOHN CORBETT**, said that two Aborigines came to a hut where he fed them. Cook was in another room when he shot the victim, and claimed that he had not known that the gun was loaded. There was no trouble with the natives at the time. Corbett testified that Cook had not attempted to run away, and had always treated the Aborigines with kindness.

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

SYDNEY GAZETTE, 19/05/1838
Willis J., 12 May 1838

Mr. Assistant Surgeon **REID**, appeared on the floor of the Court and tendered an affidavit of facts in explanation of his not appearing in Court the previous day. The affidavit stated that Mr. R. arrived from the Interior in the morning, and immediately hastened to the Court, where the Crown Solicitor gave him a short leave of absence for the purpose of taking some refreshment, upon which he went to his lodgings where he was seized with a sickness and kind of stupor, occasioned by the fatigue of the journey, under the influence of which he fell asleep and did not wake until past six o'clock. Mr. Reid, who appears to be upwards of sixty years of age, in answer to questions from His Honor, denied most positively that he had tasted either wine or spirits that morning. His Honor said he was bound to believe the facts stated by Mr. Reid, and as it appeared that his remaining from Court was not the effects of any

impropriety on his part, but was caused by an accident to which all persons are liable, he should direct the penalty he had ordered to be inflicted the previous day to be remitted, but had not Mr. Reid purged himself of the contempt it would have been enforced. His Honor said he wished it to be distinctly understood, that the rank of a party guilty of contempt in disobeying the process of the Court will make no difference, except in the excess of punishment, for the higher in rank the party may be, who is guilty of contempt, the heavier shall be his punishment. Mr. Reid then withdrew.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/268, 19/05/1838.
CORONER'S INQUEST. - On Thursday an Inquest was held at Mr. Cunningham's, "Bunch of Grapes," King-street, on the body of a waterman named **JOHN HALL**, who died in the Hospital that morning. It appeared that a few days ago, while on the Queen's Wharf, he was seized with a swimming in the head, fell and fractured his skull, which caused his death. The Jury returned a verdict of "Died by the visitation of God."

Another Inquest was held on Thursday, at the "Evening Gun," Cumberland-street, on the body of **DAVID DONOVAN**. Deceased was the owner of some drays, and had a few days previously hurt himself while busied about them; he subsequently took cold, and was afflicted with Titanus, which caused his death. Dr. **RUSSELL** having given a return to this effect, the Jury returned a verdict of "Died from lock jaw."

Mr. **PALMER** having been acquitted, at the Supreme Court, for the murder of the boy at New Zealand, the Crown Solicitor has declined proceeding with the case which was before the Police for getting the witnesses out of the way; the result will be a prosecution against **DAVIDSON** for perjury.

CJA, 4/469, 23/05/1838.
CORONER'S I NQUEST. - On Friday an Inquest was held at the "Evening Gun," Cumberland-street, upon the body of an infant aged four months, named **JAMES TURNER**, who died in consequence of turning round in bed, by which his face became entangled in the sheet and suffocation ensued; which having been certified by Dr. **RUSSELL**, the Jury returned a verdict to that effect.

CJA, 4/270, 26/05/1838.
CORONER'S INQUEST. - On Wednesday an Inquest was held at the "Shamrock" public-house, King and Clarence-streets, upon the body of a man named **JAMES HAMLAN**, who had been for some time ill, but had died suddenly that day. The Jury returned a verdict of "Died by the visitation of God."

CJA, 4/271, 30/05/1838
SUFFOCATION. - On Sunday morning the mate and a seaman named **MACDONALD** were all the hands left on board the ship *Strathisla*, which was undergoing the operation of smoking. Macdonald was drunk, and wishing to obtain more grog he took off the companion hatch, in attempting to get down which it is supposed he smoke overpowered him and he fell into the hold. Upon the mate seeing the hatch open and missing Macdonald, he suspected what had happened, and lowered himself by a fall at the risk of his life into the hold, where he found Macdonald in

violent convulsions; he made the fall fast to him, and getting him on deck hoisted him up a lifeless corpse.

On Saturday evening, a drayman, named **WILLIAM PINKER**, was riding upon the shafts of his dray in a state of intoxication in Market-street, when a child, named **CAINS**, playing in the road, was knocked down by the wheel, which passed over its head, and seriously wounded it. The child is since out of danger. The carter was taken to the Police Office, and fined five shillings for being intoxicated.

SUPREME COURT.

(Before the Chief Justice.)

Monday. – **GEORGE COMMERFORD** was indicted for the wilful murder of **MATTHEW THOMPKINS**, at Deep Creek, near Port Phillip, on the 30th December. The prisoner pleaded Guilty, and sentence of death was passed on him, ordering him for execution this morning, his body to be buried within the walls of the prison.

CJA, 4/272, 02/06/1838.

EXECUTION. - On Wednesday morning, the utmost penalty of the law was carried into effect upon the person of **COMMERFORD**, who pleaded Guilty on Monday lat to an information filed against him, for the wilful murder of constable **TOMPKINS**, at Deep Creek, near Port Phillip, on the 30th of December last, at which time he was in custody of Tompkins, another constable, and a sergeant of the 80th regiment, having been sent from Sydney for the purpose of pointing out the remains of seven or eight murdered men, whom he had alleged, himself and a companion named **DIGNUM**, had murdered. The surviving constable had been dispatched to procure something they had left at their last encampment, and deceased was employed making a fire, the sergeant had incautiously placed his musket on the ground, when Commerford seizing his opportunity seized upon the piece; Tompkins was a resolute and well conducted man, and notwithstanding the threat of the murderer that he would shoot him, attempted to close, when the contents of the piece, a heavy charge of slugs, passed through his body. The sergeant hearing the report of it, came from the bush, when Commerford having possessed himself of the musket which had belonged to Tompkins, presented it and threatened to shoot him, the sergeant finding all resistance useless could not prevent Commerford taking the bush. He subsequently gave himself up to Mr. **EBDEN'S** overseer. Being a Catholic, he was attended in his last moments by the Rev. Mr. **M'ENROE**. He made no public confession, and every preparation having been made the drop fell and the soul of the murderer ascended to its maker. His body was buried within the precincts of the gaol.

CJA, 4/273, 06/06/1838.

On Wednesday a child of Mr. **DENT'S** the house and ship painter, Windmill-street, approached too near the fire, when its clothes immediately ignited; the mother in her anxiety to extinguish the flames was enveloped in the burning element, and the father, who was fortunately present, in his exertions to put out the flames, so dreadfully burnt his hands, that he was mad for some hours owing to the intensity of his anguish.

CORONER'S INQUEST. - On Saturday an Inquest was held at Mrs. Barne's public-house, in Gloucester-street, on the body of a seaman named **JAMES MASON**, who came to his death by poison. It appeared in evidence that on Friday he procured some arsenic, about a quarter of a pound, which he obtained upon the plea of poisoning rats. This destructive mineral he mixed with beer and drank it. Medical aid was promptly on the spot, but it was useless - he expired in great agony. The Jury returned a verdict

that the deceased had destroyed himself while labouring under temporary derangement.

CJA, 4/274, 09/06/1838.
BRYAN FLANNIGAN, for the murder at Bathurst, … ordered for Execution … on Friday the next 15th instant.
There were … received from the country yesterday, … two Aborigine Blacks for Murder committed in the neighbourhood of Wellington Valley.
POLICE INCIDENTS. [see 4/264]
MARY [GROOM] - Oh, yes your honour, but poor Bob is dead now – drowned the other day – sad affair. [see 4/264, 05/05/1838]
CJA, 4/276, 16/06/1838.
EXECUTION. - Yesterday morning the four unhappy men, **FLANIGAN and MALONEY,** for murder; … and **ROBBINS** for a robbery and attempt of rape at the North Shore, underwent the extreme sentence of the law, at the common place of execution; their conduct up to the moment of their exit from this life was marked with a sense of feeling approaching to a future and better hope which we have seldom seen displayed on such melancholy occasions. They were attended by the Rev. Mr. **M'ENROE**, to whose religious instructions they appeared to pay the greatest and most devout attention. We cannot pass this awful catastrophe without lamenting, that the public executioners are not more expert in their unenviable situation. It is a glaring fact that the writhings of two of these men, occasioned by some neglect was, we will not say disgusting, but shocking in the extreme.

CJA, 4/278, 23/06/1838.
CORONER'S INQUEST. - An inquest was held on Thursday morning, at the "Bunch of Grapes," King-street, on the body of **WILLIAM DART**, a free man, who died in the Colonial Hospital on the previous day of natural causes. Verdict accordingly.

Another inquest was held on the same day at the same place, on view of the body of Mr. **CHARLES NYE**, late a clerk in the Colonial Secretary's Office, who died in the Hospital on the previous evening. It appeared that the deceased had of late been much addicted to the excessive use of ardent spirits, and on Saturday last he was removed to the Hospital in a state of great exhaustion, labouring under internal disease. The jury returned a verdict of "Died by the immoderate use of ardent spirits."

A DREADFUL SCENE AT CABRAMATTA: assigned servant to Mr. Bull, fractured skull, left lying in the bush, discovered in the morning ???

CJA, 4/280, 30/06/1838
CORONER'S INQUEST. - An Inquest was held on Thursday morning, at the house of Mrs. **MORLEY**, Dove and Olive Branch, Church Hill, on the body of **HARRIET CURSTON**. The sudden death of this unfortunate woman created considerable excitement in the neighbourhood, from its awful suddenness, and her husband, an impotent old man, was charged with her murder. Throughout the evidence given it appeared that she was very much addicted to drinking, and was last seen alive on Tuesday evening, by a man named **ANDREWS**, who lived on the premises. Andrews subsequently heard her making use of violent expressions, to which it appeared she was addicted when in a state of intoxication. No violence being proved, the jury, after a patient investigation, and by the direction of the Coroner, returned a verdict of "Died by habitual intemperance."

CJA, 4/281, 04/07/1838

INQUESTS. - An inquest was held on the body of Mr. **CHARLES BURNEY**, late clerk in the office of Messrs. Chambers and Thurlow, who died of apoplexy, accelerated by poison. Verdict accordingly.

Another inquest was held on the body of **WILLIAM CLUTTON**, who was killed by falling out of his cart, the off wheel passing over his head. Verdict, Accident Death.

The body of a female Immigrant by the *Westminster*, wife of **NELSON MORRIS**, who died on board that vessel since her arrival, was landed at the jetty on Monday, and conveyed to the Protestant burial ground for interment.

CJA, 4/283, 11/07/1838

CORONER'S INQUEST. - An inquest was held on Monday morning at the house of Mr. **MILLER**, "Blue Posts," Clarence-street, on the body of **ELLEN SMITH**, who came to her death about half-past two on Sunday morning, produced by a fall from a step-ladder, in consequence of which a haemorrhage ensued. Verdict – Died by Suffocation.

The funeral of the late Mr. **HENRY RUSSELL**, of Pennant Hills, took place on Sunday last. The procession moved from the residence of Mr. **JOHN TUNKS,** Parramatta, to the church, and was followed by a numerous circle of relatives and highly respectable friends. The death of this unfortunate man was premature and unexpected. On Thursday afternoon the 5th instant, he was returning home from Parramatta to his family, with his cart and a young horse, the horse being restive came in contact with a stump and upset the cart, and from the injury he received, the unfortunate man died. Mr. Russell was unusually respected, and the neighbours of Pennant Hills have lost a sincere friend and brother.

MURDER AT PORT MACQUARIE. - Just as the *William the Fourth* was leaving Port Macquarie, information was received at the Police Office, of the murder of a prisoner in the Iron Gang, named **ANTONIO**, by another prisoner in the same gang. We have not received any particulars, but we understand that the deceased was killed by a shovel being thrust into his head.

Yesterday a party of five male and one female was received into the gaol for trial from the interior, amongst them, two for wilful murder.

There were also received from Newcastle and the different Benches on the Hunter, last night, seven male prisoners for trial, one of which is a soldier of the 28th regiment, for rape.

CJA, 4/285, 18/07/1838

Up to the hour of going to press there has no inquest been held on the body of the child **[McCANN]** found at one of the wharfes under peculiar circumstances.

CJA, 4/286, 21/07/1838.

CASE OF EXTRAORDINARY DISTRESS. - An inquest was held on the body of the child found at one of the wharfs on Wednesday, (as reported in our last); from the evidence given, it appeared that the father of the child's name is **McCANN**, one of the unfortunate "commuted pensioners"; that his wife had been put to bed of a seven months child, which died shortly after birth, and the unfortunate man not having the means to pay the churchyard fees, was driven to the miserable, the unnatural alternative, of interring the body where it was found. Such was the appalling distress in the miserable residence of this poor man, that Mr. **BRENNAN**, to his credit, gave

£1 towards the family's relief. The surgeon also contributed; and, we believe, several, if not all of the jury.
ACCIDENTAL DROWNING. - A woman named **ELIZABETH PEARSON** was found drowned on Thursday morning last, about ten minutes after she had fallen into the water near Mr. **WILSHIRE'S** slaughter-house, Darling Harbour. Although a doctor was immediately on the spot, and every remedy applied to restore suspended life, every effort of the medical gentleman failed. The old woman had placed a tub at the water's edge, and it was supposed that she overbalanced herself while attempting to lift it up, and could not recover her equilibrium.

CJA, 4/287, 25/07/1838
INQUEST. - An inquest was held on the body of **ELIZA [ELIZABETH] PEARSON**, at the "Light House," public house, in Sussex-street, who was found drowned near Mr. **WILSHIRE'S** slaughter-house, Darling Harbour, on Friday last.

CJA, 4/289, 01/08/1838
INQUESTS. - On Thursday evening an inquest was held upon the body of a child named **[MARY A] WALTON**, at Mrs **COLE'S** Public House, Prince-street, which was found in its father's house on the previous morning burnt so severely as to cause almost instant death. It appeared the mother had left her child upon a chair close to the fire while she stepped out for a few minutes, and on her return, found her offspring in the deplorable state alluded to. The jury returned a verdict of accidental death by burning.

An inquest was held at the "Bunch of Grapes,", King-street, on Saturday last, on the body of a young child named **ANN WELCH [may be JANE WALSH?],** lately attached to the Roman Catholic School, who had been received into the General Hospital on Friday last, where her mother was permitted to remain as nurse. It appears the child had been indisposed through the effects of cold for several days previous to going into the Hospital, and it was supposed that previous to this the child had not received proper attention. The Jury returned a verdict – *Died by the visitation of God.*

At the same time and place, an Inquest was held upon a man of colour **[OSMAN?]**, formerly a seaman on board the barque *Elizabeth*, from India, named **HOMAR**, who had been received into the General Hospital on the Friday, while labouring under the effects of cold, of which he died on the Saturday morning. Verdict – *Died by the visitation of God.*

The three following inquests were held on Monday morning, at the sign of the "Bunch of Grapes," viz. -

On the body of a man of colour, another of the crew of the barque *Elizabeth*, named **SABUDAN**, who had been received into the Hospital in consequence of a violent cold caught a few days ago, of which he died on Saturday night. Verdict – *Died by the visitation of God.*

The second Inquest was on the body of a female of colour, **ASSEN** [**HASSAN],** the boatswain's mate's wife, of the above mentioned barque, who was likewise received into the Hospital, and died about the same time. Verdict – *Died by the visitation of God.*

The third Inquest was on the body of a man named **JOHN SIMPSON**, who formerly lived in Castlereagh-street. It appeared that deceased had been received into the General Hospital on Friday last, while labouring under the influence of a most

violent cold. Shortly after his arrival it turned to *Tetanus*, of which he died on the Sunday night. Verdict – *Died by the visitation of God*.

SYDNEY GAZETTE, 04/08/1838
Supreme Court of New South Wales
Burton J., 1 August 1838
(Before Mr. Justice Burton and a Military Jury.)
ANN MACINTOSH was indicted for the manslaughter of her infant child, on the 29th April last, at Castlereagh. The prisoner was an assigned servant[*] to a settler at that place and was in the family way. The day after her confinement she procured a bottle of rum which she drank and while in a state of intoxication the child was smothered by her. His Honor in putting the case to the jury, remarked, that although the prisoner had been morally guilty, no wilful act had been proved against her. Not Guilty.
See also Sydney Herald, 6 August 1838; Australian, 3 August 1838. This case was also recorded in Burton, Notes of Criminal Cases, vol. 36, State Records of New South Wales, 2/2436, p. 70, Burton noting that she was a convict assigned to work for her husband.
[*]Convict assigned to a private master or mistress.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/290, 04/08/1838
INQUEST. - On Tuesday afternoon an inquest was held at the "Bunch of Grapes," King-street, on the body of **JOHN FERGUSON**, who died in the General Hospital. It appeared that deceased had returned to Sydney from Norfolk Island with between £200 and £300, at which place he had acted as Superintendent of Works. Since his return to Sydney, about three months ago, he had become very intemperate. The Jury returned a verdict – "Died from the effects occasioned by the excessive use of ardent spirits."

Another inquest was held at the "Blacksmith's Arms, Windmill-street, on the body of **GUMAN**, a Lascar seaman on board the *Lady Hayes.* The verdict returned – Died by the Visitation of God.

SYDNEY GAZETTE, 07/08/1838
Supreme Court of New South Wales
Dowling C.J., 4 August 1838
(Before the Chief Justice, and a Military Jury.)
JOHN JONES, late of Liverpool, labourer, stood indicted for the wilful murder of **THOMAS DAY**, at the South Creek road, by beating him over the head with a piece of wood, on the 3rd of June, and causing divers wounds and bruises whereof he lingered until the 16th June, and then died. The Attorney-General, in stating the case to the Jury, observed that the quarrel which led to the murder of the deceased man (Day) originated through that bane of society - rum. The prisoner, deceased, and several other convicts had assembled at the house of a notorious sly-grog seller named **STEPHEN EDWARDS**, and after leaving, the circumstances which led to the present enquiry occurred. The Chief Justice here interrupted the Attorney-General, by telling him that the indictment was defective, and handed it over to him for perusal. The Attorney-General read it over, and acknowledged it to be so, and begged to have it quashed. His Honor then discharged the Jury under that indictment, which was

forthwith amended. The error consisted in the finding of the Attorney-General (in the capacity of the Grand Jury), that the prisoner Jones did kill and murder, omitting the name of the deceased person. Mr. Foster, who appeared on behalf of the prisoner, submitted the information could not be quashed after the jury had been sworn in, and the trial commenced. The Attorney-General contended that it did not matter whether the trial had commenced or not, but it was competent that the information should be quashed if it was of such a nature that the jury could not found a verdict on it. The information charged the prisoner that he did kill and murder, but did not state whom. His Honor observed it was evident no jury could found a verdict on that information; but he would reserve the point, if Mr. Foster thought it important. The indictment having been amended, and the jury again sworn in, the prisoner was arraigned, and the case proceeded. The first witness called was:

BERNARD REYNOLDS, who deposed that, on the 3rd day of June last, he was an assigned servant to the Male Orphan School, at Liverpool as also the prisoner and the deceased. On that day twelve or thirteen assigned servants assembled at the house of a man named Stevie, a free man, living at the side of the road, near Mr. Bull's. They had some grog there, for which witness paid the man's wife with money he collected from the rest of the party. Witness had got grog there twice before. Day, the deceased, was a bullock-driver to the Orphan School, and the prisoner was baker. On that evening a row took place, after leaving Stevie's, on the road near Mr. Bull's. The party had been at the grog-house before that, in the afternoon; they returned home shortly after sun-down, and returned again in the evening - the deceased, the prisoner, and several others were there – **MICHAEL GLYNN, JAMES DAWSON,** and **JOHN BROWN**, all servants of the establishment. The party remained drinking until about eleven o'clock, when they left. They had five bottles of rum between them. On the way home, when near Mr. Bull's the prisoner, deceased, witness, and Glynn were walking together - the prisoner and the deceased man (Day) were first; some words arose between them respecting a man named Potter, another assigned servant of the establishment; the deceased said Potter was a -- dog, and he would pay him off for jacketing him to his master; the prisoner replied Potter was as good a man as any there, and he was not there to answer for himself: the deceased then said to Glynn ``you are as big a dog as he is,'' and struck the prisoner with his fist in the eye; the two then closed, and had some falls together. Witness was standing behind, and did not at first interfere, but when he saw the deceased had the prisoner on the ground, he went up to pull him off; the deceased then put his head under witness's legs, and threw him down, and while he was on the ground he kicked him in the groin. Witness laid on the man, and could not move; he was not drunk, but was sensible, they had all been drinking, the deceased seemed most drunk. While witness continued lying on the man the rest went away, except the deceased, who stood by talking to him. While he was there two of Mr. Bull's assigned servants came up, and asked what was the matter? Witness told them he had been kicked by the deceased; the deceased was standing there, and said if he had done so he was sorry for it. After witness had been lying on the ground bout ten minutes or a quarter of an hour, the prisoner Dawson and Glynn returned, and the latter asked them (witness and the deceased) to return, but witness said he was not able. At this moment while he (Reynolds) was lying on the broad of his back he hoard a scuffle, and some one remarked that Day was killed; witness was on the ground, and could not see what occurred, and he could not get up on account of the kick. After a short time he scrambled on his side, and saw the deceased lying on his side, and the prisoner standing close by; he said nothing; some of the others said it was not the hurt, but the effects of the drink that effected the

deceased; one of them (Campion) said, the prisoner had struck the deceased; witness did not notice what reply was made; **CAMPION** also said something about a stick; witness did not see any near; Glynn observed it was a treacherous blow, but witness was not certain whether he alluded to that blow, or the one that had been struck by the deceased previously. The deceased could not speak at the time, but after a time he partly recovered, and got up and walked away; witness and the prisoner assisted him as far as they could. The deceased wished to be laid down, ad recognized the prisoner, and made a rush at him. The deceased was left on the road.

JOHN BOWLEY, assigned to Mr. Bull, deposed, that on the evening in question he had been drinking at the house of Stephen Edwards; the prisoner, the deceased, and several others were there. No quarrel occurred in the house, which they left between ten and eleven. A quarrel occurred after witness had parted from the rest. When witness afterwards came up, Reynolds was on the ground, and the deceased (Day) standing near; the prisoner and Glynn came up, Glynn asked him to go home; Reynolds said he was not able. At that moment the prisoner struck Day with a stick; it was a sapling (the stick was produced and identified; the sapling so called was either a young gum tree, or a limb of a large one; it was about six feet long, and at the thick extremity about nine or ten inches in circumference). Witness did not see the stick in the prisoner's hand until the deceased was on the ground; witness' mate called out to him to catch the man who killed him; the prisoner ran away with the stick which he dropped a few paces off; he (Bowley) ran after him, and brought him back, and picked up the stick, which he afterwards threw over a fence. Campion was talking to Day at the time he was struck. The prisoner said nothing when he was brought back. The deceased continued lying on the ground about half an hour; he was taken up by Reynolds and the prisoner, and they assisted him to walk, which he was not well able to do.

MATTHEW CAMPION, assigned to Mr. Bull stated, that he had been at Edwards house that evening, but was not present when the quarrel commenced, witness saw the blow struck; when witness went down to the road the deceased was standing there, and showed witness some witness some marks on his shoulders where he had been bitten; Jones was not there then; he came up in about a quarter of an hour with Glynn; Glynn asked Reynolds to come home; no words or quarrel occurred between Jones and Day at the time, but the prisoner took a stick from behind him, and struck the deceased on the side of his head, and knocked him down; Jones said nothing before he struck the blow; the deceased could not see Jones coming up (witness identified the stick); witness called out to Bowley to hold the murderer; had had three glasses of rum.

JOHN BULL proved the finding the deceased in the road about eight o'clock the next morning; his attention was attracted to him by the barking of his dogs; his head exhibited several wounds, and appeared in a bad state; he was cold and shivering, and was insensible.

Dr. **HILL**, of the Liverpool Hospital, deposed, that the deceased was received into the Hospital on the 4th of June, and lingered until the 16th, when he died. There was a contused wound on the right side of the head, and a more severe contusion on the left. On opening the head after death, witness discovered a large quantity of extravasated blood on the brain caused by exterior violence, in his opinion caused by the blow of a blunt instrument, similar to the stick produced; the deceased remained in a state of insensibility while in the Hospital.

The prisoner said nothing in defence, but called Michael Glynn, who deposed that the prisoner did not walk above twenty yards after he had been struck by the deceased

before he returned, when the deceased again attempted to strike Jones, but the latter avoided the blow, and he fell on the ground, and that Jones did not strike Day, who he said was a very violent man in liquor.

JAMES DAWSON was called; he had seen no blow struck, but he saw the prisoner standing near with the stick in his hand after Day was on the ground; he did not think the prisoner could have been away more than a minute or so before he returned.

Mr. **SADLER**, of the Male Orphan School, and Mr. Weston, the Governor of Carters' Barracks, were called to give the prisoner a character. They described him as a man not violent when under the influence of drink, but argumentative.

His Honor in charging the jury directed them to consider chiefly whether the prisoner had had sufficient time after he had been struck by the deceased to deliberate before he returned and struck the blow (if they were satisfied that he had done so), or whether he was still under excited feelings. The jury found him guilty of ``Manslaughter." - Remanded. See also Australian, 7 August 1838; Sydney Herald, 6 August 1838; Dowling, Proceedings of the Supreme Court, Vol. 152, State Records of New South Wales, 2/3337, p. 121.

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

CJA, 4/291, 08/08/1838.

MURDER. - The man **JAMES MACMULLEN**, for the murder of his mistress **ELIZA MACMULLEN**, was tried yesterday and found guilty. We have never heard of, in the whole course of our lives, such a barbarous murder.

ACCIDENT. - On Wednesday last, Mr. **JOHN THORN**, (late Chief Constable of Parramatta,) was stopped on the Razor Back Road, by two armed men, who took from him a considerable quantity of property, but returned to him two watches belonging to his children. On the following morning when passing through Sutton Forest, about five miles beyond Berrima, his gig ran against a heap of stones which overturned it, and he was killed almost immediately. Mr. Thorn was a native of the colony, and has left a widow with a numerous family to deplore his loss. He had however, by his industry amassed a large fortune, which will be the means of providing for them through life. It is expected his remains will be interred this day.

SUPREME COURT – CRIMINAL SIDE

Wednesday, Aug. 1, 1838.

Before Mr. Justice Burton, and a Military Jury.

ANN M'INTOSH was indicted for the manslaughter of her infant child at Castlereagh, on the 29th April last. It appeared in evidence that the child had been much neglected, in consequence of the mother's great fondness for drink. There were no marks of violence. - Not guilty.

Before the Chief Justice and a Military Jury.

JOHN JONES, was indicted for the wilful murder of one **THOMAS DAY**, having on the 3rd June last, struck the said Day several blows with a stick on the head, of the wounds from which he lingered till the 16th, and died – guilty of manslaughter. One of the witnesses named **GLYNN**, having sworn that Jones never had a stick in his hand, and did not, on the occasion above stated, strike the deceased, the Attorney General deemed it his duty to apply to his Honor to commit him for perjury – committed.

CJA, 4/292, 11/08/1838

SUPREME COURT – CRIMINAL SIDE

Before his Honor the Chief Justice and a Civil Jury.
Tuesday, Aug. 7.
MICHAEL LEAHY stood indicted for the wilful murder of one **JAMES RYAN**, at Mudgee, in the Wellington District, on the 2d day of May last. Deceased was an assigned servant to the prisoner, and had six others. It appeared that the prisoner's wife had presented him with a son-and-heir, and being a kindly master on most occasions, thought he could do no less that give his servants a sort of holiday, and a little wine, &c., to make merry with. During the day, the deceased had become somewhat unruly, and refusing to obey the wish of his master (the prisoner), that he should go into his hut, assaulted him in such a violent manner, as to render it absolutely necessary for the prisoner to shoot him in his own defence. After the summing up, the jury, without retiring, returned a verdict of Not Guilty. – Acquitted.

CJA, 4/293, 15/08/1838
SUICIDE. - On Saturday morning last, a man named **[JOSEPH] HANMORE**, a bricklayer, at Ultimo, cut his throat, and almost instantly expired. The ill-fated man went from his house after breakfast in apparent health and spirits, and nothing can be conjectured as the cause for the rash act.

An old inhabitant named **SANDY CAMPBELL**, residing in the neighbourhood of Cumberland-street, was found drowned in a well on Sunday morning last. It is thought he fell in accidentally.

CJA, 4/294, 18/08/1838.
INQUESTS. - On Saturday morning last, an inquest was held at the sign of the "White Horse," George-street, on the body of **THOMAS HOLDSWORTH**, a promising youth, between ten and twelve years of age, and son to Mr. Holdsworth, grocer, &c. who came to his death by the falling of a wall the evening previous, on that plot of ground adjoining to the house of Messrs. L. and F. Wilson, Ironmongers. The Jury returned a verdict of "Accidental death."

On Sunday last an inquest was held at the sign of the "Horse and Jockey," George-street, on one **JOSEPH HANMORE**, who cut his throat with a knife on the morning previous. It appeared that deceased had been labouring under a depression of spirits for some time past, occasioned it was conjectured by the falling off of his business, in which, as a brick maker, he had formerly been well to do in the world. Deceased had also latterly addicted himself to the excessive use of ardent spirits, or other equally injurious liquids, and in all probability had put a period to his earthly career while labouring under their influence. The Jury returned a verdict of "Died while labouring under a temporary fit of insanity."

On Monday an inquest was held at the sign of the "Royal Oak," Miller's Point, on the body of one of the Lascar seamen belonging to the *Arethusa*. Verdict – "Died by the visitation of God."
SUPREME COURT – CRIMINAL SIDE.
Thursday, August 10. (Before Mr. Justice Burton and a Military Jury)
WILLIAM WORTHINGTON stood indicted for the wilful murder of **JOHN SWANN**, residing at Port Macquarie, on the 13th June last. The evidence in this case was strictly circumstantial; and as his Honor thought it possible the Jury might have misconceived the bearings, he wished to impress the fact upon their minds. It was remarkable that the prisoner had a "club foot", and the foot-mark resembled it so much that it would leave a strong impression of guilt. The case being left in the hands

of the Jury a verdict of guilty was returned, and sentence of death passed on the unhappy prisoner.
CHARLES ANDERSON stood indicted for assaulting with intent to kill one **JOSEPH ANTONIO**, at Port Macquarie, on the 9th day of July. It appeared that the prisoner had made the murderous attempt on the prosecutor because he conceived he had been instrumental in sending several individuals to a Penal Settlement, and on returning from the bloody scene addressed the rest of the gang to which he belonged, to the effect that he wished all of them would take example by him and murder all such b---y dogs when they happened to come within their reach. The Jury returned a verdict of Guilty. Sentenced to be transported for life to Norfolk Island.

AUSTRALIAN, 21/08/1838
Dowling C.J., 18 August 1838
JOHN JONES, indicted for murder, and found guilty of manslaughter, was placed at the bar. His Honor in passing sentence, remarked that the jury had, fortunately for him, taking a very merciful view of the prisoner's case, which was worked with a malignity of heart, and a desire for blood, which would have warranted them in finding him guilty of murder. There had been proved, a deliberation in the manner of his committing the act, which shewed that his mind had been bent on shedding blood, but as the jury had returned a verdict of manslaughter, his life would be spared, but only on condition of his spending the remainder of his life in irons at Norfolk Island. Sentenced to be transported for life to Norfolk Island. See also Sydney Gazette, 21 August 1838.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/295, 22/08/1838.
ACCIDENTAL DEATH. - Mr. **STEWART [GEORGE H STEWARD],** son-in-law to Mr. **GARLING**, was thrown out of his gig and killed, while returning to Windsor from a ball given by Mr. **COX** at Hobart Ville, on Friday last. His lifeless corps was found next morning on the spot where it was supposed he was precipitated. An inquest was convened, and a verdict of accidental death was returned.

SUPREME COURT – CRIMINAL SIDE.
(The Chief Justice on the Bench.)
Saturday, August 18.
JOHN JONES, convicted of manslaughter – life to Norfolk Island. The prisoner was indicted for murder; and the Judge said, that from the evidence, the jury would have been warranted in finding him guilty thereof, but they had taken the merciful view of the case, and therefore his life must be spared.
The following were discharged by proclamation:- and the following four aborigines – Pretty Boy, Brambly, Captain, and Jackey. These latter were discharged in consequence of the Attorney General not being able to procure an interpreter. [Comment in previous column re expence.]

CJA, 4/296, 25/08/1838
PARRAMATTA. - CORONER'S INQUEST. - An Inquest was assembled at Mr. Nash's "Woolpack Inn," on the body of **JOHN SPRING,** who had been but a short time in the Colony previous to his perpetration of the deed that brought him to an untimely grave. The circumstances detailed before the jury were as follows:-

Constable **MEAD** deposed, that on the 10th June last he received information that the deceased, who was assigned to Mr. **THOMSON**, of Penrith, had absconded, leaving a dray he had charge of, loaded with property, on the Penrith Road, and that he had taken the direction for Sydney. Himself and another constable went to the "Horse and Jocky," public house, on the Sydney road, and soon learnt that a person answering the prisoner's description had come there the overnight and had not got up. He went to the bed-room of the deceased, and found him in the act of dressing, and knowing him to be the man they wanted, mentioned their business, when he asked permission to put on the fest of his clothes, which was assented to, when deceased went to the head of the bed and drew a pistol from under the pillow, and threatened to blow their brains out if they dared to meddle with him. Seeing their danger they both attempted to close with him, when he pulled the trigger, and the pistol being a percussion one missed fire, but which on examination was found to be heavily loaded with powder and shot. He was then secured by having hand cuffs put on him, and brought towards Parramatta as far as Mr. Pike's, of the "Kangaroo Inn," when the deceased said it was the last house he could get his breakfast, and begged to be allowed this favour, which was permitted. Breakfast was immediately got for him, and as he had his handcuffs on, Mrs. Pike cut up his meat. Having made a hearty meal[?] he gave half-a-crown in payment, and whilst Mrs. Pike was going to the bar for change, she observed the deceased drawing something across his throat, and a torrent of blood issued from the wound. Witness and the other constables were standing close to him when he did the act, but did not observe him obtain the razor from his waistcoat pocket, where he had concealed it. The deceased was taken to hospital by nine o'clock in the morning, and his wounds dressed, and remained a patient up to the 10th of July, when he said he was well enough to be sent to jail, in the hopes that he might be forwarded to Sydney for trial during the late Sessions. On the morning of the 11th, the Surgeon visited him at the jail, and found him very unwell, and in a desponding state of mind. The jail affording no accommodation for invalids – he was removed back to the hospital on that day, and remained there until the 10th of the present month, when he was discharged as convalescent; but from want of necessary comfort in jail, he was brought back again to the hospital, and he expired on the 17th instant. A verdict was returned of "Died by the visitation of God;" and the Coroner, at the request of the Jury, represented to the Doctor that it appeared dis-satisfactory that the deceased should have been discharged in the first instance at his own request, when it was quite evident he was not in a fit state to leave the hospital; to which the Doctor replied, that he would never discharge another patient at his own request. – *Monitor.*

CJA, 4/297, 29/08/1838.
ORDERS FOR EXECUTION. - The death warrants have been read upon … **WILLIAM WORTHINGTON**, for a murder at Port Macquarie … will be executed on Tuesday morning next the 4th September. The latter individual [**WORTHINGTON],** we are sorry to learn, treats the affair with the greatest indifference, by singing vulgar songs, and other conduct, so as to cause those who attend upon him to look on him with pity and disgust.

CJA, 4/299, 05/09/1838.
SHOCKING ACCIDENT. - On Saturday last as some little boys were amusing themselves at Miller's Point, firing trains of gunpowder, a huge quantity unexpectedly exploded in the face of a son of Mr. **BROWN** in that neighbourhood and seriously injured him.

On Monday last a woman of the name of **SHEPHERD**, residing in Kent-street, attempted to destroy herself, by taking a quantity of arsenic. Medical assistance was immediately called in, and such prompt measures adopted, that hopes are entertained for her recovery. We understand that jealousy was the cause of this rash act.
EXECUTION. - Yesterday morning, the last dread sentence of the law was put in force upon … **WILLIAM WORTHINGTON**, for a murder at Port Macquarie … walked from the Press room to the foot of the gallows with a firm step … accompanied by … the Rec. Mr. **M'ENROE.**

CJA, 4/302, 15/09/1838.
An inquest was held on Sunday last, at the house of a Mr. **AVIT**, at Bankstown, on the body of Mrs. **BRIDGET AVIT**, his wife, who had been found in a water hole on the preceding morning. From the evidence adduced, it appeared that the deceased had been confined to bed since the month of May last, at which time she had been delivered of a still-born child, and it was rendered extremely probable from the evidence given at the inquest, that on Friday night or early on Saturday morning she had, in a fit of phrenzy, put an end to her existence, being led to this desperate act by the excrutiating sufferings to which, since her delivery, she had been subjected. In the absence, however, of all direct testimony to this effect, a verdict of – "Found drowned," was returned, to which the Jury, before separating, requested the Coroner to accompany with a strong presentiment expressing their detestation and condemnation of the conduct of two *soi disant* medical men who had attended the deceased when in labour, and from whose ignorance of their pretended profession, this unfortunate female had for a period of 16 weeks been lying in a most lamentable state; and, as was proved by Dr. **HILL** and others, it was made so manifest to the Jury that the deceased had been virtually the victim of one of the *soi disant* medical men before alluded to, that had she not hastened her end by desperately committing self-destruction, there is little doubt but that this gentleman would have had eventually to take his trial for manslaughter. - *Parramatta Correspondent.*

CJA, 4/304, 22/09/1838
SUICIDE. - On Monday last, a man named **BYRNE**, while labouring from the effects of intoxicating liquors, plunged into the Harbour, off the Soldier's Point, and was not rescued from the watery element until life was quite extinct. It is stated that the unfortunate man has been thought somewhat disordered in his head for some time.

CJA, 4/305, 26/09/1838
CORONER'S INQUEST. - An inquest was held at the sign of the "Erin Go Bragh," public-house, George-street, Windsor, before the Coroner, **DAVID DUNCOMBE**, Esq., and a most respectable and intelligent jury, on view of the body of **JOHN MAY,** a native of the Colony.
The first witness called was Mrs. **FORRESTER**, wife of the landlord, **HENRY FORRESTER,** who, being duly sworn, stated, that the deceased came to lodge at her house about 5 weeks ago, and appeared to be then in good health; but shortly after became much indisposed; that a few days after his first attack, a little girl named **EMMA ARMFIELD** came to the house with a bottle, and a paper containing some pills, and said they were for John May (the deceased) – that she brought them from **TAYLOR**, the clerk and dispenser at the Colonial Hospital. **ESTHER HIBBERT**, a native of the colony, was also sworn, and gave her testimony after the following manner:- that she had formerly cohabited with the deceased; and on hearing of his

illness she came to see him, and remained with him up to the time of his demise; that during the period of waiting upon the deceased, she has frequently questioned him as to what he had been taking, and that the deceased told her that he had taken a pill which had been sent to him from the hospital; that two pills had been sent to him and that he had taken but one of them, having lost the other; he further told the deponent that his mouth was sore, and had been so from the time of his taking the pill, or shortly after.

EMMA ARMFIELD, about 7 or 8 years of age, was called, and without being previously apprised of the purpose for which she was required, stated, that a short time ago she was sent by Taylor, the clerk and dispenser of the Colonial Hospital, with whom she was at that time living, with a quart bottle and some paper, but she did not know the contents of the paper. She saw him mix some stuff, which he put into the bottle, and saw him put a small quantum of alum in it which, he said he had got at the hospital; and on some questions being put to her, exclaimed "O! he always gets the medicines there." This child was not sworn; neither was her statement taken down in writing, as she was considered, by both Court and Jury of too tender an age, and consequently incapable of understanding the nature of an oath. **JOHN TAYLOR** being called and duly sworn, stated that he was a prisoner of the crown for life; that he was acting clerk and dispenser at the Colonial Hospital, Windsor; that he never sent the deceased any medicine; that he had not spoken to the deceased for the last nine months; that he knew the little girl Emma Armfield, but denied having sent her with medicine to the deceased, or to any other person. The witness was here cautioned by the Coroner as to the manner of giving evidence (when the Jury observed, that they did not believe a single word he had spoken). On being further questioned, Taylor stated that he had never administered any medicine to May since he had been in the hospital, and that he was an apothecary. Here he was cautioned by the Coroner before he signed his deposition, but was inflexible, and was allowed to depart.

Another witness was then examined, who fully corroborated the testimony of the child as to the fact of her having brought medicine from Taylor to the deceased.

Dr. **GRAHAM** on being sworn, gave his opinion that the deceased came to his death by the improper use of mercury.

The Jury returned a verdict – that the deceased John May came to his death by the improper use of mercury, but by whom administered was to them unknown.

CJA, 4/310, 13/10/1838.

ACCIDENT BY DROWNING. - On Monday afternoon, about half-past 4, a fatal accident occurred to some persons in a sailing boat, off Soldier's Point, occasioned by a boat upsetting above a mile from shore. The parties in it at the time were Mr. **JAMES REYNOLDS,** Mr. **GROVE**, of the Theatre, a seaman commonly known by the name of **IRISH JACK**, and a hired servant belonging to Mr. Reynolds, named **ROBERT USKETT**, who was proceeding to the farm of Mr. Reynolds in the capacity of gardener. The accident was occasioned by a heavy puff of wind, which drove the boat gunnel under, when she immediately filled and went down. A boat from the opposite point immediately put off to the sufferers, and succeeded in rescuing Mr. Reynolds, Mr. Grove, and Irish Jack, from a watery grave: although from the assistance rendered to Mr. Reynolds by Mr. Grove and the seaman, there is little doubt but they would both have reached the shore in safety had necessity required it. Another boat came from shore and found the body of Uskett, but medical aid was of no avail, as he expired immediately on reaching the shore. Mr. Reynolds remained in a state of stupor for a considerable time, and when taken into the boat

was thought by those who picked him up to be quite dead; he was found on his back in the water compulsively grasping an oar. An inquest was held on the drowned man, on Tuesday morning, at 7 o'clock. Mr. Grove was examined, and the Jury without hesitation brought in a verdict of *accidentally drowned.* We perceive a paragraph in the *Gazette* of Tuesday (and the writer of it deserves a severe trouncing for the gross and unfounded falsehood it contains) stating that the *other two men were so intoxicated that they could give no account of themselves on the boat.* We are requested by Mr. Reynolds to state, that all in the boat were perfectly sober (except the unfortunate man who met his death); and further, had it not been for the assistance rendered by the seaman and Mr. Grove to Mr. R., he certainly must have perished. When the boat came alongside Mr. Grove, he would not be taken into the boat until Mr. Reynolds was in safety. The oar which Reynolds clung to, and which kept him above the water, was given to him by Irish Jack. Such conduct does not look as if influenced by intoxication.

CJA, 4/311, 16/10/1838

CORONER'S INQUESTS. - An adjourned inquest was held upon **ELIZA WARD** on Friday last, when the jury returned a verdict of accidental death from the effects of a burn some time ago. It appeared in evidence that the child had been very much neglected by its mother. Another inquest was held on the same day upon the body of an old man, named **JAMES COX**, at the sign of the "Bunch of Grapes." Verdict – Died from exposure to cold and intemperate habits. After which, at the same place an inquest was held upon the body of a servant to Mr. **G. JONES**, a **WILLIAM MURPHY.** Verdict – Died by the visitation of God.

ANOTHER FATAL BOAT ACCIDENT. - On Sunday last, a man supposed to be the carpenter of the *Runnymede*, was drowned by the upsetting of a sailing boat, under the following circumstances. It appeared that two other seaman were in his company previous to this disastrous affair, but had landed somewhere, and the carpenter made sail by himself, making fast the tackle which in boisterous weather should have been held by hand, and in consequence in a sudden squall, the boat was observed to upset by some parties on the North Shore. Almost immediately afterwards, the poor fellow was observed straddling to boat as it floated keel uppermost shouting for assistance, which was immediately rendered by a lady residing on the North Shore, who acquainted two young gentlemen of the circumstance, and they put off to his assistance, but before they could reach the unfortunate man, in consequence of the boisterous state of the weather, being nearly upset once or twice in the attempt, he was observed to leave the wreck, whether from exhaustion or his over anxiety to reach the assistance rendered him, could not be ascertained by these praiseworthy young men, but alas, he was seen to sink and rise several times, and when just within a few boat's length from him, his legs appeared above water for a moment, and he sunk to rise no more. After pulling about the upset boat for some time, in the hope of yet securing his body, they were obliged to relinquish their fruitless efforts, but fastened on to the wreck, and towed her ashore.

CJA, 4/313, 23/10/1838

A REWARD OF TWENTY POUNDS OR A CONDITIONAL PARDON has been offered by the Government, for the apprehension and lodgement in gaol of **THOMAS MAHER** and **DANIEL DOOLEY**, who were concerned in the death of **WILLIAM FOWLER**, at the Burrowa Store, at Yass, by inflicting mortal injuries. Warrants have been issued for their apprehension.

CJA, 4/316, 03/11/1838.

CORONER'S INQUESTS.

On Thursday week, an inquest was held at the *Bull-faced Stag*, Brickfield Hill, upon the body of **THOMAS FOX.** It appeared that deceased was in the employ of **L. DUGUID**, Esq., and had come from that Gentleman's residence at Cook's River, for the purpose of procuring medicine at the Hospital. Becoming worse on his return, he was compelled to stop at a house kept by a Mr. **GRAY,** where he expired on the following day. - Verdict – "Died by the visitation of God."

On Saturday last, an inquest was held at the *Rum Puncheon*, Queen's Wharf, on the **HEAD OF A MAN** found on Friday last on the North Shore. The head being so much decomposed it was impossible to identify it; it was supposed to be the head of some person who had been drowned lately. From the appearance of the windpipe it was conclusive on the part of the jurors, that the head had not been severed from the body by any sharp instrument. - Verdict – "That the head belonged to some body lately drowned, which it was impossible to identify."

On Sunday last, at the *Farmer's Arms*, Castlereagh-street, on the body of Mrs. **FRANCIS HICKEY**, who died in a fit on the day previous. Verdict – "Died by a fit of epilepsy."

On Monday, at the *Bunch of Grapes*, King-street, on the body of **JOHN CONNOR.** It appeared that deceased had been thrown from his master's horse on the day previous, Mr. **WEEDON**, of the "Cherry Gardens." Verdict – "Accidental death."

On the same day [Monday], at the *Saracen's Head*, Harrington-street, on the body of a man named **CURTIS**, a shoe maker, who had died from debility, increased by the excess of ardent spirits. Verdict returned to that effect.

On Thursday, at the *Blue Lion*, Kent-street, on the body of **MARY ANDERSON**, who died on the day previous from the effects of a fall which broke her neck. She was in a state of intoxication at the time. Verdict – "Accidental death while in a state of intoxication."

On the day [Monday], at the *Angel and Crown*, Harrington-street, on the body of a child named **MARS**, found dead the previous day in bed. It appeared that the child had been ill for some time. Verdict – "Died by the visitation of God."

MR. ASPINALL. - This Gentleman, we are sorry to record, died on board the *Maitland* steamer, on Thursday morning about 10 o'clock, in which he had arrived, in a precarious state from Newcastle on the night previous. His corpse was removed to his residence in the afternoon of that day. We understand he will be consigned to the silent tomb on Tuesday next.

SYDNEY HERALD, 05/11/1838

Supreme Court of New South Wales

Dowling C.J., 3 November 1838

Saturday, November 3rd – Before the Chief Justice and a Civil Jury.

WILLIAM BROWN was indicted for striking **WILLIAM BAILEY PARKER** with a shovel, at Sydney, on the 11th August, with intent to kill and murder him. A second count charged the prisoner with intent to do him some grievous bodily harm.

The prisoner was a convict belonging to one of the street gangs employed in Sydney. According to the government regulations these men are allowed to leave off work at two o'clock on Saturdays, but on the day laid in the indictment, the gang to which the prisoner belonged was ordered to remain at work an hour longer in order to remove some rubbish from one of the streets. Mr. Parker, the sub-inspector of streets, rode up

at the time, and the men returned to their work very reluctantly, and Brown was very abusive. Mr. Parker sent a man for handcuffs for the purpose of sending Brown to the watch-house, when Brown raised his shovel with both hands and made a blow at Mr. Parker's head; Mr. Parker held up his arm, and as his horse shied at the moment, the blow took effect upon Mr. Parker's arm, and unhorsed him. The prisoner then ran away, but was apprehended by two of the overseers, when he used the most disgusting and violent language, and said, that if every he got his liberty he would have Parker's life. The prisoner's defence was, that Mr. Parker struck him first, but this was denied by all the witnesses. His Honor said that this was the first case that had come before the Court under the Acts of Parliament passed in the first year of the reign of her present Majesty. In the 2nd section of the Victoria 1, it is enacted that if any person by administering poison or striking a blow with any unlawful instrument, shall cause any bodily injury dangerous to life, with intent to murder, the shall, on conviction, suffer death as a felon. The fourth section of the same act, under which the second count of the information was framed, says, that if any person shall strike another with an unlawful instrument, with intent to do any grievous bodily harm, he shall be transported for any term not less than fifteen years. With respect to the first count, he thought that as Mr. Parker had not received any injury dangerous to life, the jury might discharge it from their consideration. As regards the second count, it was for the jury to say, whether, under the circumstances, they considered it was the intention of the prisoner to do Mr. Parker any grievous bodily harm; if they did, as there was not the slightest provocation, they would, of course, find the prisoner guilty. Guilty. In praying judgment, the Attorney-General informed the Court that Brown was transported from England for an assault with intent to murder. His Honor told the prisoner that; luckily for him, the jury had acquitted him on the first count, or he should have been bound to pass sentence of death upon him, which, after what had been stated by the Attorney-General, would most assuredly have been carried into execution. To be transported to a penal settlement for life.

See also Australian, 6 November 1838; Dowling, Proceedings of the Supreme Court, Vol. 155, State Records of New South Wales, 2/3340, p. 19.

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

AUSTRALIAN, 06/11/1838

Supreme Court of New South Wales

Burton J., 3 November 1838

SATURDAY. - Before Mr Justice Burton and a Military Jury.

JOSEPH GAWENLOCK was indicted for stealing from the dwelling house various articles the property of **WILLIAM FLANAGAN**, at Bathurst, on the 18th May last.

William Flanagan - I live at One Tree Fall, at Bathurst , about two miles and a half from the settlement; I am a ticket of leave man and a tenant of Mr Perrier.

His Honor said he was bound to take judicial notice of the prosecutor being a prisoner of the crown, and the indictment laying the property in his name, in the face of an act of the imperial Parliament, which expressly said that such persons could not hold property - the prisoner must be acquitted.

The jury found a verdict accordingly.

The prisoner was again indicted for an attempt to kill and murder **JOHN WILLIAMS**, at Bathurst, on the 19th of May last. The indictment contained several counts varying the offence.

John Williams - I am a constable in the Bathurst police; I was at Mrs William Kable's public house on the 19th of May last, and the prisoner came in; I was standing at the bar, and a young man named Jones told me the prisoner had a pistol about him; he went out in the yard and I followed to capture him, when he drew a pistol from the pocket of his coat, pointed and flashed it at me; it was about seven o'clock at night, and I could not see distinctly; the muzzle of the pistol passed my left cheek, and the priming burned my hair; I was about a minute struggling before he attempted to free it; I had told him I wanted him to go along with me; I had my staff with me and he must have seen it; he only stopped a minute or two in the bar of the house, and had nothing to drink; I had never seen him before; I secured him, took the pistol from him and unloaded it; the pistol was loaded with gunpowder and two balls; the prisoner is a runaway from the stockade at Hassan's Walls; the pistol produced is the one I allude to; the prisoner had seven or eight and twenty loose balls, some powder and some ball cartridges in his pocket.

RICHARD JONES - I am a labourer and live at Bathurst; I was at Kable's public house on the 19th of May last, in company with constable Williams; the prisoner came in and spoke to me; he asked if I knew him, and said he was a blacksmith at the Lumber Yard at Bathurst; I saw he had a pistol, and I told constable Williams that the prisoner was not a constable, and that he had a pistol about him which was suspicious; the prisoner went out, Williams followed him, and two or three minutes after I saw the flash of a pistol; I asked Williams if he had secured him and he said yes; the pistol was in his breast under a shooting jacket.

THOMAS JONES - I am chief constable at Bathurst; I know the prisoner; he is Joseph Gawenlock by the *Henry Tanner,* a prisoner of the crown, and a bushranger; he was reported in the Government Gazette as a runaway, he absconded twice, first from the iron gang, and afterwards from an escort; I know the prisoner personally; he was a blacksmith in the Lumber Yard at Bathurst; he was sentenced to an iron gang at the Quarter Sessions at Bathurst for stealing in a dwelling house; I was present on his trial and heard him convicted and sentenced.

This was the case; the prisoner offered no defence, and His Honor briefly put the case to the Jury, who retired and were absent about half an hour, when they returned, and the foreman stated that they found him guilty on the first count, for intent to murder.

Mr **CARTER** observed that there were several other indictments against the prisoner, but His Honor said that he had turned the matter over in his mind, and by the new act, lately come into operation, he found that none of the offences for which the prisoner might be indicted were capital offences, although they were at the time they were committed, and he should take upon himself to pursue the lenient intent of the legislature, and treat the prisoner's offence as if committed since the act came into operation in the colony. He then ordered the sentence of death to be recorded against the prisoner, with a recommendation that he should be transported to Norfolk Island for life, and never returned to the colony.

See also Sydney Herald, 5 November 1838; Sydney Gazette, 6 November 1838. The Sydney Herald recorded the following: ``Mr. Carter informed his Honor that there were several other informations against the prisoner, but His Honor said that as none of the offences were capital, under the new Act of Parliament which have lately come into force, although they were at the time they were committed, he should take upon himself to carry the lenient intentions of the Legislature into effect, and treat the prisoner as if the offences were committed after the Act came into operation. His Honor then ordered sentence of death to be recorded against the prisoner, with a

recommendation that he should be transported to a penal settlement, and never allowed to return to the Colony."
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 09/11/1838
Supreme Court of New South Wales
Willis J., 7 November 1838
THOMAS DICKSON SAUNDERS was indicted for the wilful murder of **JEMMY BALL** by shooting him, at Darlington on the 1st September.

WILLIAM MATTHEW publican at Darlington. I recollect seeing the prisoner in company with two native blacks on the 6th of September; they were all perfectly sober; the blacks were carrying a bag of flour, and two bottles; Saunders had a musket in his hand, they sat down near McDougall's paddock, about two hundred yards from my house, I saw Saunders loading the gun in front of my house but I do not know with what; he appeared to be loading it. I went out and told him to be cautious with it; I did not see him point the gun at the blacks; not intentionally; I saw the gun pointed in the directions of the blacks; I did not see the blacks afterwards dead or alive; Saunders had a gill of rum at my house which he divided with the blacks; I cannot say whether the bottles were full or empty.

Cross-examined by Mr. Foster. They appeared friendly; I merely told him to be cautious with the gun the same as any one else; I saw him drawing the ramrod from the gun, but I cannot say what he put in it.

Chief Constable **COOK**. In consequence of information I had received I caused the prisoner to be apprehended: I was told a black had been shot, I went to the spot where he was lying; he was commonly called Jemmy Ball; he was lying at the back of Kingsbury's shop, about three hundred yards from Matthew's; he was lying on another black fellow's knees; he had been shot in the belly with small shot; Dr. Glennie went and looked at him and gave me some medicine for him, which he took about seven o'clock and he died about an hour afterwards; the next day I sent two constables after the prisoner, who was sawing about four miles in the bush; when he was brought in he told me that the black fellow was shot in a scuffle about the musket, but whether the black was taking the musket from him, or he from the blackfellow I could not understand; it was about a bottle of rum; Saunders had been in for his rations and the blacks were helping him out; Saunders could make a walk of it but he was in a state of intoxication when he was brought in; a man named Richardson who worked with the prisoner was apprehended on this charge but afterwards discharged; when the prisoner was brought before the Court he acknowledged that Richardson was not near him.
Cross-examined: As far as I could learn from Saunders the gun went off accidentally in a scuffle.

GEORGE FAWCETT constable and scourger at Patrick's Plains; I apprehended Saunders near Hickson's Creek; he asked me what he was apprehended for and I told him for a bad job; he said was it anything about a blackfellow and I said it was; coming down the road the prisoner took me to a stump marked with shot, and said that he and the black had been firing at it; he said he would not have shot the blackfellow if he had not struck him; he showed me a mark on his right knee where he said the blackfellow had struck him; I found a musket and some powder and shot; this is the shot; I saw the black fellow Jemmy Ball lying dead; the blacks had him covered up; the prisoner was sober when I apprehended him; I fetched him to the Chief Constable.

Cross-examined. I took him to the Chief Constable in company with constable Foster; they went to Matthew's about getting a cart, and Foster and the prisoner called for a glass of either brandy or porter; I had a glass of half-and-half by myself; the glass the prisoner drank out of was the usual size about four to the half-pint; the prisoner was perfectly sober when we delivered him to the Chief Constable: the prisoner drinks a good deal and one glass would have no effect upon him; Foster did not hear what the prisoner told me; I had to run half a mile to apprehend the prisoner and it was coming back that we had the conversation; the prisoner's wife was on the look out; I have not been living with the prisoner's wife since he has been in custody; he told me that he would shoot any blackfellow that struck him.

Re-examined. I cannot say how much the prisoner had drunk that morning; after I put Richardson on the handcuffs the prisoner said Richardson had nothing to do with it; this was after the prisoner had been at the Chief Constable's and he did appear a little the worse for liquor.

Mr. **GLENNIE** surgeon. About September 6th. I saw a blackfellow named Jemmy Ball wounded in the abdomen with small shot; there were from ten to twelve holes; it was a mortal wound and caused death.

This was the case for the crown. The prisoner said nothing in his defence but recalled Mr. Matthews who said I do not think I would believe Fawcett on his oath.

Cross-examined. I never knew Fawcett to take a false oath; I speak from his general character.

Mr. **DRIVER** and a young man named **WALLER**, who had known the prisoner for several years, gave him a character as an industrious, peaceable man.

His Honor commenced summing up by observing, that the native blacks of this Colony are as much under the protection of the laws as any other persons, and all aggressions committed by them on other persons, or by other persons on them, are punishable the same as if committed by or against the Jurors themselves, and it is not because they are native blacks they can be shot at or treated differently from other people.[1] In this case the first question for the jury was whether they believed the evidence of Fawcett, for if they did, they would have to ask themselves, whether they believed that the prisoner, irritated by being struck at, shot the black, and if so they must take into their consideration all the circumstances of the provocation, to see whether the case was reduced to manslaughter. If the blow given by the blackfellow was such as to excite the immediate wrath of the prisoner, and he thereupon without consideration shot the black it was only manslaughter, for the true distinction between murder and manslaughter is, was the act committed when the prisoner was labouring under such a state of irritation as not to be master of his own understanding. If they believed that the prisoner coolly and deliberately shot the black after his passion had cooled, it was their duty to find him guilty of murder. If, as according to the evidence of Cook, the prisoner had at one time stated, the gun accidentally went off in the course of a scuffle, and was not wilfully discharged, the prisoner was of course entitled to his discharge. The Jury retired about five minutes and returned a verdict of Not Guilty.

His Honor enquired whether the Jury had distinctly understood him that they could acquit the prisoner of murder and find him guilty of manslaughter. He did not wish to bias the Jury, but he wished to know whether he had made himself clearly understood.

The foreman said that the Jury were of opinion that the gun went off accidentally.

The Sydney Gazette, 8 November 1838 recorded this as follows: ``His Honor in summing up said, that the native blacks were to be protected as much as any other subject of Her Majesty, and they were not to be shot at and killed with impunity because they were blacks. On the evidence of Faucit, it appeared according to Saunders' confession that the

blacks had first struck him, then it was for the Jury to decide whether the provocation was sufficient to justify them in returning a verdict of manslaughter. If they believed Mathews' evidence, that the gun went off accidentally in a struggle, of course the prisoner would be acquitted as a death caused by accident cannot amount to manslaughter.
``His Honor pointed out the passages relating to the prisoner's being intoxicated, and also those reciting conversations in the evidences of Cook and Faucit, and also to the passage where it is said that the prisoner declared he would shoot any black fellow who struck him."
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY GAZETTE, 10/11/1838
Supreme Court of New South Wales
Willis J., 7 November 1838
JOHN CROWLEY was indicted for the wilful murder of **JOHANNA CROWLEY**, on the 4th of October. The indictment set forth on the first count that the prisoner inflicted with a stick various blows and bruises on the head of deceased, of which she died on the 6th of the same month. The second count set forth that the prisoner on the 4th of October threw her on the ground, and gave her various kicks on and about the head, back, and sides, of which blows she died on the 6th of the same month.

JOHN KEIF. – I am brother of deceased: I live at Penrith, on the Sunday night preceding her death prisoner and the deceased, his wife, were neither of them sober; I saw prisoner pull her out of bed twice, and beat her; I saw them again on Tuesday morning; he again pulled her out of bed, and beat her; on Wednesday Power, myself, and Mrs. Power, were going up to Crowley's; they heard we were coming, and when we left she came away with us for protection; she would not remain with her husband; prisoner came to Power's on Thursday morning, October 4; Mrs. Power gave me 2s. 6d. and told me to get a bottle of rum; prisoner gave another shilling to get more; it was about ten o'clock; witness went for the rum; when I returned Power had just come home, having been out on business; while I was away I heard a row; a screaming; when I came to Power's place I saw Johanna Crowley lying outside the door, which was shut, and the prisoner kicking her; before I reached the door prisoner entered, and the door was shut; deceased could not speak; her face was black; I scarcely knew her; I had left the rum in the house before; deceased was sober when I left the house; I did not speak to her, she was in bed; I had not been absent a quarter of an hour; her face was disfigured; her eyes blacked, and as big as my fist; one eye was entirely closed; when I saw what a state she was in I kicked the door open, and saw Crowley sitting across a stool; I asked him why he had treated the woman in such a way; he rushed at me, and after a short struggle, he perceived a knife near the door; I then ran away; he threw it after me; he was sober; I was sober also; he called me a coward; I then went to the Chief Constable and informed him that deceased was murdered; he said it was no affair of his, that the Bench sat every day, and I might go and tell them; I saw her afterwards, but she was in such a state that she could not speak to me; she was taken to prisoner's house in a cart; she lived till Saturday morning; I was afraid to go to Crowley's house after he had threatened my life; I saw prisoner afterwards at his own house; I also saw my sister after her death; I went to Power's two or three hours after the beating; I saw a short stick with blood on it; I did not observe any blood about my sister's face; the inquest was held on Saturday; she was buried on Sunday; the prisoner was apprehended after the inquest.

Cross-examined by Mr. Windeyer – I was paid by prisoner for making up tobacco for him, four or five months. I have seen my sister drunk. I was frequently drunk. I never head Crowley complain that I was encouraging his wife. I never made my

sister drunk without prisoner's permission. I never told any one that prisoner complained of my making my sister drunk. I know **KERWIN**; but I never told him I struck prisoner once. I do not know that his arm was broken; he never went to the doctor. I was present when my brother was killed; I was not drunk then. The man was executed for the murder. I was sober on the night that I slept at Kerwin's; it was the 4th of October. It was not for the benefit of getting drunk that I went to Power's on Wednesday night. There had been several rows between prisoner and his wife; I never saw him strike her when sober, except this time. I never took her home from any place, when she had got drunk. She was sober when I fetched her from Cashin's; I have had a bottle of rum there; I took it there to drink with **CASHIN** and his wife. Prisoner sent me for her; I do not know his reason. She was sober; she had slept there that night. During 10 days that Prisoner was in Sydney, she never tasted liquor; we never got drunk together while he was away. I left prisoner's house with my sister on Wednesday evening. I slept at prisoner's house on Sunday, Monday, and Tuesday – I swear I did. The half-a-crown which Power's wife gave me was not enough for a bottle; prisoner gave me a shilling to make it up. I had not gone for rum before the prisoner came. I do not think Power brought any rum home; he told me he had brought some wine. On the Wednesday we had all been drinking; on the Thursday Power went out on business, and brought home some wine, and prisoner sent for rum. Power's house is on the other side of Penrith. I went to Mr. Wilson's, Emu Ford, for the rum; I was back before Power. I helped the things out of the cart; I saw nothing but meat and sugar. I did not hear that he had gone to fetch the doctor (rum). Power is here. Mrs. Crowley and the prisoner sent me for some flour; when I came back prisoner's daughter came into the garden to pull some chalots. The daughter could see the beatings. The constable did say it was no business of his. I was sober at the time. I went to prisoner's house for the flour. I did not see any liquor in prisoners house at that time. I watched the cart in which deceased was taken home. I did not see her fall out of the cart; she could not fall out without my seeing her.

JOHN POWER. I am a settler on Wilson's land; so is Crowley. I recollect Mrs. Crowley coming on Wednesday evening, in the first week in October. I was at Crowley's on Wednesday; I was coming away in the evening. I had been drunk on Sunday, Monday, Tuesday, and Wednesday. I think I was sober when before the Coroner. I partly recollect what I swore. I do not know whether I swore that there was a row. They had a few words on Monday evening; there were a few blows too, I believe. Crowley brought her in and asked her to stand up; I believe she could not.

Mr Therry said he would not examine this witness any more until the Crown Solicitor came, as this man's evidence must be taken down.

One of the Jury though the man was not sober now.

Mr. Justice Willis was of the same opinion.

I was sober on Thursday morning, the day after she came to my house; deceased's daughter accompanied her; I went to Penrith for some meat, and returned between one and two o'clock; when I came back Crowley was there, and Mrs. Crowley was on my bed, but removed as I wanted to lie down; I do not know whether she was sober or not; she had a black eye; I was tired, and sober enough to hold on by the mare's head coming from Penrith; shortly after I had laid down the door was kicked open and Keif walked in; when I got up Mrs. Crowley was lying outside the door, apparently drunk; she had a black eye and her face was a little scratched; I went and lay down again; Crowley said ``our Saviour lay three days, but she is lying the fourth;'' he then struck her, and said get up you -- and go home to cook the victuals for the men; he also said take her out of my sight; after he had done beating her he told my wife to come out

and see her now; I did not hear him say ``I'll murder you;'' I heard her say ``you murdering dog, I'll die content if you hang for it;'' I did hear him say he would murder her.

Mr. Justice Willis, and in fact the whole Court, loudly expressed their disgust at the manner in which this gave his evidence, and His Honor expressed his sorrow that a man's life should be exposed on such evidence.

Witness continued – On Friday morning I saw Mrs. Crowley very bad; I told Crowley to come and see his wife; I told him I thought his wife would die, that she was very much injured about the head; he went with me, but said he had not beat her about the head, but a[b]out a part of the person which she could not expose; I did not hear Keif speak to Crowley after Thursday; when Keif broke in the door he said ``well, you've killed her at last;'' Crowley did not answer; the moment the door was opened they began to fight, I did not hear any answer; I do not recollect swearing that Crowley said he would murder Keif also.

Mr. Windeyer submitted that Mr. Therry's examination was not according to rule.

Mr. Justice Willis said that the present proceeding was to see whether witness would corroborate his former statements on oath, or whether it would be necessary to institute further proceedings against him. His Honor said he thought he might use the power vested in him by summarily dealing with him.

Mr. Windeyer said he wished to get one fact from the witness before His Honor sent him to the place to which he deserved to go.

Mr. Justice Willis then committed witness to gaol for six months, for contempt of Court and prevaricating in his evidence.

MARGARET DACEY - knew the deceased; I was in the house with Crowley when she died; I slept with her at Power's on the Wednesday night; he sent his daughter for her on Thursday; she said she would not come; he then came himself and asked for her, and was told she was in bed; he then went and dragged her out of bed, and put her outside the door; she then got up and went to the back of the house; he went to her and told her to go home, and commenced beating her; I head the blows; was sitting with her daughter at a little distance from her; I heard her scream at first, but not afterwards; I did not hear anything about dying; the day after she was taken home in Powers' cart; she asked for a Priest once, that was all she said till four o'clock on Saturday morning when she died; Crowley took great care of her; she had nothing to say against her husband.

Cross-examined - Crowley did not beat his wife after she got home; he nursed her very kindly. Crowley here said it was no use to ask her any more questions as she would say nothing more. Witness - ``it is not my business to watch my neighbours;'' I was in Crowley's house 3 weeks; the witness again said she would not answer any thing to Mr. Windeyer, that she was talking to the Judge and Jury, and not to him .

The Crown Solicitor had himself given her in charge two hours ago, a publican having turned her out of his house (``the Dog and Duck,'') for being drunk.

This witness was committed to gaol on bread and water for one month.

The Landlord of the ``Dog and Duck'' stated that Power had paid for the drink at his house.

Mrs. Power examined. - No one has advanced any money to pay our expenses; what has been paid we have paid ourselves; I saw Johanna Crowley for the last time on the Friday when we took her home in the cart; the first thing in the morning I went to Crowley, told him to come and see his wife; he came; I wished him to send for the doctor; nothing occurred between them; he spoke a few words to her; I was at Crowley's on the Wednesday before; I think they had a few words; I do not know that

I did see any blows on Wednesday; on Thursday he struck her; same day deceased's brother brought some run; I paid half-a-crown, and Crowley paid a shilling; we drank it between us; he wanted to get her home; she could not stand up; he laid hold of her by the arm; he struck her with a bit of a stick or a faggot; I do not know whether from the blow she fell; I cannot say how often he struck her; he might have struck her ten times; I do not know; I saw the stick at the inquest with blood on it, but I did not take notice of it in the house; I heard her scream a little; she was able to scream as well as I am; I have a son seven years of age; I do not recollect whether I told my son to take care of the stick; Crowley was aggravated at her not going home; there was something abut murdering; I did not hear Crowley say it; he said, I think, that she should be murdered some time or other; I was never in her house after she went home till after her death, but I believe she was able to speak.

Cross examined. - This witness had been sent out of Court while another person was being examined; there was testimony that she had been three times in Court, and turned out as often.

Mr. Windeyer said, it was left to the discretion of the Judge whether the testimony of the witness should be received at all.

Witness. - I was always able to do my business, getting the money to get drunk among other things; I was not drunk for a whole week; I was not drunk the whole time we were at Crowley's; they might have been drunk; there was drink, and I partook of it; she must have been drunk, or she would not have left her good home to come to my bad one; I saw her brother bring half a gallon of rum to her, and her husband did blame her; I was not drunk at the time; off and on I was; there is a tea chest in my room; I rather think that it was on a washing tub she fell; when Keif came she was laying outside the door; I took her outside; I believe her daughter helped me; my husband wanted to lie down, and I had no other bed; she did not know whether she was getting off or on; Mrs. Crowley's daughter is about twelve years of age; I dare say she was sober; prisoner was very much displeased; she fell several times side the house, and likewise outside; I do not know whether it was a stick or a tobacco stalk that Crowley struck her with.

Re-examined. - I did not say anything about tea-chest or washing tub before; I saw him strike her several times; he said that if she were not taken out of his sight, he would smash her head.

JOHN FRENCH, about 10 years of age. - I am a son of Mrs. Power. I recollect Mrs. Crowley, I saw her at our house; I saw Crowley kick her. The brother came up and asked Crowley if he had killed her. Crowley then struck Kief ran away, and Crowley threw an axe after him. I saw him kick her in the house first; I saw him beat her with a short stick, about the thickness of my arm. I saw two or three other sticks. I saw strike her on the head. He gave her one kick on the cheek; I did not see any blood on her face. There was blood on the stick; it came from her head. My father and mother told me to take care of the sticks. Mother afterwards desired me to burn them.

Dr. **CLARKE**. - I examined the body of the late Johanna Crowley very particularly. I found external marks of injury about the breech; also some slight marks about the face - one a black eye, which had apparently been in existence some time; the other eye appeared to have been struck more recently, not very violently. I found a slight cut on the outside of the scalp; there was very little blood about the hair. I should think the wound was inflicted by a blunt instrument. On turning back the scalp from the cranium, I found a discolouration of the internal membrane of the scalp. I opened the head; I examined the brain and found it surcharged with blood, presenting the

appearance of a person dying from the effect of poison, or excessive use of ardent liquor. There was no injury of the brain, nor was the skull fractured. I do not think that any blow given while in a state of intoxication accelerates the evil influence of the spirits.

Cross-examined. - I should say that those wounds and bruises would not cause death alone, but still would accelerate the progress of death. The appearance of the brain presented that of a person dying from habitual drunkenness.

His Honor then stated the substance of the evidence of the boy, which appeared the most important; there was very little in Keif's evidence which criminated the prisoner; he had a very convenient memory and could remember or forget as he pleased. The question for the Jury was whether the prisoner intended to kill his wife, or whether she died from habitual drunkenness.

The jury retired, and in a few minutes returned a verdict of – ``Not guilty."

See also Sydney Herald, 9 November 1838.

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

AUSTRALIAN, 10/11/1838

Supreme Court of New South Wales

Burton J., 8 November 1838

THURSDAY. – Before His Honor Mr Justice Burton and a Civil Jury.

THOMAS HOLDEN stood indicted for the wilful murder of **MARY, his wife**, at Cockfighter's Creek, Patrick's Plains, on the 13th of October last.

JOHN EVANS, a shoemaker, residing at Cockfighter's Creek, deposed, that he knew the prisoner, who lived about a mile distant from his house. About four o'clock on the 13th of October, witness met the prisoner who was limping, and at first witness thought he was drunk, but on further scrutiny he found he was not. Witness observed a cut on his eye, and asked how he came by it, to which the prisoner made no answer, but asked witness to go back with him. Witness had a pair of shoes with him, which he was going to deliver to a man named Grounds, and he told the prisoner that he could not go back with him, but that he would overtake him if he did not walk fast. Prisoner then said to witness ``Mary my wife is dead and cold;" witness asked him how she had come by her death, to which he answered, that three men had been at the house the day before, and had some wine to drink, and that when they left he house, his wife had slipped out after them, and he could not find her. Witness asked him if he did not know the men, or any of them, and prisoner said he did not, witness remarked, that if he did not find out who the men were, the police would make him answerable for it. Witness then went on to Grounds; house, and returned accompanied by a man named **CARPENTER**, to whom witness related the circumstance. Carpenter then called the witness, and said ``come back with me and I will shew you where Tom killed his wife." They went to Holden's house, and Carpenter pointed out to the witness blood on the slabs, and in a gutter round the chimney, (which had been made to carry the water off) and beside this was the leg of a stool, about the length of his arm and about two inches round. Carpenter and witness then went into the house, and the prisoner's wife was laid out dead, with a sheet over the body, which was dressed in a clean chemise and cap; they also observed a track, as if something had been drawn along the ground from the gutter where they had observed the blood, to the door of the hut; the face of the corpse was very black, and there were several marks evidently made by blows. The deceased was about twenty-nine years old. Witness formerly lived with the prisoner, but left him

the night he was married, because the deceased bore a very bad character. On the morning following, witness returned to prisoner's hut and looked for the leg of the stool, which had been removed. Witness did not believe that any liquor was sold by the prisoner, but there was a wholesale store in the neighbourhood, from which it was procured. The deceased had the character of being a drunken prostitute, and when drinking would stop two or three days away from home, for which, a short time before her death, she was sentenced by the Bench to the cells.

THOMAS CARPENTER, a general storekeeper, who lived a quarter of a mile from the prisoner's house, in consequence of information he received from the last witness Evans, went over to the hut, and saw the leg of a stool covered with blood and hair; also blood over the door and other parts of the house. Witness also observed a gown, much torn, a pair of trousers, and some other articles, all covered with blood in the hut; and he also spoke distinctly of a track from the chimney to the door, which appeared to be that of the feet of a person dragged along the ground.

ELIJAH GULLRIDGE, a native of the colony, stopped at Carpenter's house, about a quarter of a mile from the prisoner's, on the 12th of October, and on the morning of the 13th, between six and seven o'clock, he was going past the prisoner's house to water his horse, and saw a man come out of the hut, flourishing a stick over his head; when witness advanced a little further, he saw a woman lying by the chimney of the house, apparently asleep; thinking nothing about the matter, and that the woman might be drunk, witness went on to water his horse, and on his return past the house, the woman was gone from the chimney, and the hut was shut up and quiet. Witness was too far from the hut to recognise the person of the man, who was dressed in a shirt and fustian trousers, similar to those produced in court. He mentioned the circumstance to Carpenter when he got home, but thought no more about it.

THOMAS CLEVERNEY, a shepherd, called at the prisoner's hut, on the morning of the 13th of October, and asked to boil his pot, and get his breakfast. The prisoner gave him permission, and he was going out to gather some sticks to put on the fire, when, in passing the bed-room door, witness saw a woman lying on the floor, but supposing her to be drunk, he did not take any more notice of it. When he returned with the sticks, the prisoner shut the bed-room door, and witness went on to boil his pot; prisoner sat down in the ut, and at times cried, and said his heart was broken; but neither witness nor prisoner said anything about the deceased; the house appeared gloomy, and out of order and there were marks of naked feet on the floor, which induced the witness to suppose that a party had been drinking and dancing in the house; prisoner wanted witness to stop, but he would not, and wet on with his flock after he had his breakfast. On his return with his flock, about thee o'clock, witness saw several persons about the house, and was told that the prisoner's wife was dead.

PETER LITTLE, who lived about a mile and a half from the prisoner, deposed that the prisoner went to his house, and asked to stop there, as his wife was dead. Witness told him he had better get some woman to go up and lay her out, when prisoner replied that he had washed her and laid her out himself. Prisoner told witness that three men went to his house the night before; that his wife opened the door, and one of the men knocked him down; that his wife went away, remained away all night, and come home abut two hours before day-light on the following morning; she laid down on the floor, and he laid down upon some chips outside; when he went to her shortly after, and turned her over, liquor flowed out of her mouth, as though it had been poured from the bung-hole of a cask, and he then found that she was dead. Prisoner was dressed in a striped shirt and a pair of Parramatta trousers; witness observed some spots of blood on the shirt; witness then reported the circumstance to a

neighbour, who sent to the prisoner's house, where he found the deceased laid out with clean things on her; she had a cut on her chin and other blows on the face. In describing the transaction to witness, the prisoner said that his wife came home with her clothes much torn, and that some person had badly used her; witness saw the prisoner and his wife well, and sitting on the same seat on friendly terms, at two o'clock on the day before; when witness went to the prisoner's house, he produced an old gown, and said, ``look here, what a pretty state she came home in;'' witness observed some blood on the ground by the chimney, and some blood on the slabs, and the prisoner said he did not know how it came there.

Captain **FORBES**, police magistrate at Patrick's Plains, deposed that he went to the prisoner's house on the morning following that laid in the information. He took down a statement in writing, which was read, and was to the following effect:-- Three men had gone to the house on Friday night, just as he was going to bed; his wife got up to go to the door, and he followed to prevent her; when one of the men knocked him down, and his wife went out. She returned home drunk at seven o'clock in the morning, went into the bed-room, and laid down on the floor; prisoner was at breakfast, and after he had his breakfast, he went out to work, and did not return until one o'clock; during his absence, his wife must have got up, as she had a jacket and shirt of his under her head; he went to lift her up, when about a quart of wine came out of her mouth, and he found she was dead; he said that when she came home, her hair was hanging about her person, she had blood upon her, and her clothes were torn all to pieces; he accounted for the blood on his shirt, as having got it from her when he lifted her up; and for the blood on the slabs, by his having killed a sheep the day before. When at the Police office, a wedding ring was found on his person, which was broken, and much bent from blows, and the prisoner stated he had picked it up outside the door of the hut.

Dr. **GLENNIE** was called to examine the body of Mary Holden on Sunday, the 14th October last, and found four wounds on the head about an inch and a half long, apparently given by some blunt instrument, and several bruises on her face, arms and body, as if she had attempted to save herself; opened the head and found none of the vessels broken, but they were extremely turgid; he also opened the stomach which was nearly empty, and as there was no sign of spirits on the stomach, he arrived at the conclusion that her death was occasioned by the blows; after receiving such blows, she could not only have not walked from the chimney to the door of the house, but she would not even have physical strength to raise herself from the ground; she must have been rendered immediately senseless by the blows. The blows must have been very heavily inflicted, as the scalp was divided on the four principal wounds on the head.

This was the case; the prisoner declined saying any thing in his defence, stating, that the written statement read by Captain Forbes, was the truth of the matter.

The witness Little was recalled by His Honor, and stated that when the prisoner came to him, he had a wound in his eye, and that he walked home.

His Honor summed up at great length, recapitulating the evidence, and the Jury retired for a quarter of an hour and found the prisoner Guilty.

The Crown-Solicitor prayed the judgment of the Court on the prisoner, and His Honor addressing the prisoner, remarked upon the story which the prisoner had invented to cloak the offence, when it was possible that the true reason for the violence he had used to his wife, would have in some measure excused the crime. As the power was in his hands to reserve judgment, he would not now pass the last sentence of the law, but lay the case before his brother Judges to see if there was any room for the extension of mercy.

The prisoner was remanded. This case was also recorded in Burton, Notes of Criminal Cases, vol. 38, State Records of New South Wales, 2/2438, p. 95.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/318, 10/11/1838
SUPREME COURT – CRIMINAL SIDE.
Saturday, November 3. Before the Chief Justice and a Civil Jury.
JOHN FINN stood indicted for the wilful murder of **JOHN WAREHAM**, by striking him on the head with an axe at Mount Vittoria, on the 23rd July last. - Guilty. – Remanded for sentence.
Monday, November 5. Before the Chief Justice and a Civil Jury.
PETER FLYNN stood indicted for the wilful murder of **RICHARD MORLEY**, at Mount Vittoria, on the 20th June last. – *Guilty of Manslaughter*. Remanded for sentence.
Wednesday, November 7. Before Mr. Justice Willis and a Civil Jury.
THOMAS DEIGON SAUNDERS, stood indicted for the wilful murder of **JEMMY BULL**, an aborigine, by shooting him on the 6th September last. Not Guilty. The jury believed the gun went off accidentally.
JOHN CROWLEY stood indicted for the wilful murder of his wife **JOHANNA CROWLEY**, on the 4th of October last, by striking her with a stick on the head several blows. – Acquitted, in consequence of a great doubt existing among the Jurors whether the deceased expired through the effects of the blows or from the excessive use of ardent spirits, the having been drunk at the time the blows were given.
During the trial of **JOHN CROWLEY** in the Supreme Court on Wednesday last, a man named **POWERS [JOHN POWER]**, a witness, in whose house the deceased Johanna Crowley, was beaten, was committed to six months imprisonment for gross prevarication and drunkenness, while giving evidence. An old woman, named **DARCEY [MARGARET DACEY],** also a witness in this case, was ordered to be confined in a cell, and fed upon bread and water for one month, for drunkenness in the witness box.
CORONER'S INQUESTS. - At the "Black Horse," Clarence-street, on Thursday afternoon, on the body of a **MAN OF COLOUR**, lately a servant to Mr. **MACQUOID**, the High Sheriff, who put a period to his existence on Monday, by cutting his throat, while sitting at a table at the house of Mr. **O'DEANE**, THE Singalese interpreter, in the presence of the family. Dr. **HOSKING** was called in and sowed up the wound, but the unfortunate man expired in about an hour afterwards. It appeared in evidence, that he had several times lately called upon his late master for a character, but was unsuccessful in procuring one, in consequence of his not having left that gentleman's employ with clean hands. The Jury returned a verdict of "*Felo de se.*"

CJA, 4/319, 13/11/1838.
We hear that a man named **ALCOCK**, belonging to Mr. **BUCKLEY**, of Limestone, has been barbarously murdered in the Maneroo country. Sly grog sellers, horse and cattle stealers, abound in numbers in that portion of the country, in spite of the vigilance of the constabulary and the mounted Police. At present in the whole of Maneroo country there is neither a constable or mounted policeman stationed. - *Australian*.
SUPREME COURT – CRIMINAL SIDE.

Friday, November 9. Before Mr. Justice Burton and a Military Jury.
WILLIAM PRICE stood indicted for the wilful murder of **JOHN DUNN**, of Parramatta, on the 28th August last. *Guilty* – Sentence of death was passed upon the prisoner without the least hope of mercy.
Saturday, November 16. Before the CHIEF JUSTICE and a Civil Jury.
WILLIAM M'LEAN stood indicted for the wilful murder of **WILLIAM M'MAHON**, at Monaroo, on the 21st October last. *Guilty of Manslaughter.*

CJA, 4/320, 17/11/1838
CORONER'S INQUEST. - At the "Whalers' Arms," Windmill-street, on the body of **ALEXANDER WALLACE (**Thursday week,) who was found dead in the water, floating close to the bows of the *Mandarin*, at Aspinall & Brown's Wharf. The last time he was seen by any one who knew him was last Wednesday. The deceased was a cooper, late in the employ of Dr. **IMLEY**, of Two Fold Bay, and arrived here in the *Merope*. Verdict – Found drowned.

CJA, 4/321, 20/11/1838.
THE INFLUENZA.
We have also been informed, that, on a man calling at a house of Monday, for the payment of a bill, he was alarmed at beholding four dead children stretched on two tables, and the parents sick in bed.

SYDNEY GAZETTE, 20/11/1838
Supreme Court of New South Wales
Dowling C.J., 15 November 1838
(Before His Honor the Chief Justice and a Civil Jury.)
Charles Kilmaister, William Hawkins, John Blake, John Johnston, Charles Toulouse, Charles Lamb, Edward Foley, James Oates, James Parry, George Pallister, and John Russell, were indicted for the wilful murder of one Daddy, an Aboriginal black native, on the 9th of June, 1838. There were 9 counts in the indictment, charging the prisoners in different forms with committing the murder, and aiding and abetting each other in the murder of Daddy, or of an Aboriginal black to the Attorney General unknown.

For the prosecution - The Attorney General and Mr. R. Therry.

For the defence - Messrs. Foster, a'Beckett, and Windeyer.

List of the Jury - Thomas Holmes, Foreman; David Hill, George Humphries, John Harris, Joseph Hanson, Matthias Hooper, Charles Hensley, Thos. Harper, Henry Hough, William Howard, Andrew Higgins, and John Hall.

The indictment was read to the Jury.

Mr. Attorney General enquired whether the opposite side would require the Police Magistrate to leave the Court? The Judge decided that he must.

The Attorney General then proceeded with his case. - The case, gentlemen, which you are called upon to try is one of no ordinary importance to this colony; I am sure the case will receive all the attention which it demands. When 11 men are placed at the bar for a capital crime, it is itself sufficient evidence of the importance of the case. Before going into the case, I must entreat you, gentlemen, to dismiss from your minds all impressions which may have been produced by what you may heard or read on the present subject. As the information is so long, gentlemen, I may as well state its foundation: -- It is stated in various ways in order to meet the evidence which we shall produce. When you hear the evidence you will know the reason why we were obliged

to have so many counts. The last count, gentlemen, charges the whole of the prisoners with casting the deceased Daddy into the fire and thereby causing his death. Gentlemen, murder is regarded as the greatest crime in all nations, but here is a case which shews that there are gradations even in murder. The information only shews at the utmost the death of two men, whereas, in fact, on the same day and in the same hour the lives of 28 individuals, men, women, and children, were sacrificed without any probable cause or provocation to palliate the atrocious crime in the sight of any laws human or divine. Gentlemen, the prisoners at the bar were all living beyond the boundaries of the colony. Kilmaister is a prisoner for life assigned to Mr. Dangar, Hawkins is a ticket-of-leave man, Johnston free by servitude, Toulouse assigned to Mr. Glennie, Lamb a ticket-of-leave man, Foley assigned to Mr. Flemming, Oates assigned to Mr. George Hall, Parry assigned to Mr. Eaton, Palliser and Russel free by servitude, and Blake assigned to Mr. Glennie. You see, by this description, that they were all assigned, for one cause or other, to their respective situations, and you will perceive by the evidence that they were confederate in the slaughter of the native blacks. On the 8th or 9th of June they met at Russel's, they were all armed and mounted, and proceeded to scour the country in pursuit of the blacks. They went from station to station until they arrived at Mr. Dangar's. The overseer was not at home but Kilmaister was there, also another assigned servant; they gallopped [sic] up. The blacks on seeing them escaped into the house; this was the object of their persecutors; they wanted to get the whole of them into the house and thus get them into their power. Two women and two ``picanninies'' alone remained outside; the two little ones escaped by crossing a brook. The prisoners on being asked what they wee about to do with their captives said, and I believe it was Russsel who was spokesman, that they were going to take them to the mountains to frighten them; however, they had not proceeded far when several shots were heard. The whole party then returned, and three of them took fire-sticks and again proceeded to the spot where the shots had been heard. Kilmaister produced a bloody sword which he had in his hand when he left before the shots were heard, but which was not then bloody. The prisoner (Kilmaister) charged the men that took the fire-sticks to take care that the blacks were close together in order that they might all be consumed. This expression could only apply to the bodies. When Mr. Hobbs, overseer at Mr. Dangar's, came home he went to the spot and discovered a great number of bodies which had been burned on logs. He counted 10 or 12 sculls of children and as many of women; he also saw the remains of a body which he is convinced was that of Daddy, a large powerful man. Mr. Foster, overseer to Dr. Newton, also witnessed the dreadful sight. When Mr. Hobbs returned he had great difficulty in discovering anything about the matter; Anderson, the hutkeeper, was afraid to say anything knowing that so many men of the different stations were leagued together for the destruction of the natives. When Mr. Hobbs announced his intention of making the matter public, Kilmaister went on his knees to his master and begged him to say nothing about it. He also stated that, when reprimanded for the share he had in the affair that he could not resist eleven men. I am sincerely glad to see prisoners defended by counsel; I am glad to see the present prisoners in that situation, but a rumour has gone abroad that this defence is made at the instance of an association illegally formed, for the purpose of defending all who may be charged with crimes resulting from any collision with the natives. I say that if such an association exist, that, if there be men who have joined together for the purpose of defending such men as these, the object of that society is to encourage bloodshed and crime of every description. Gentlemen, I have too high an opinion of you, and of the discrimination of the public at large, to think for a moment that any

bloody article appearing in any paper or papers will at all influence you in the verdict which you are to give this day. Gentlemen, it has been promulgated from the bench, by the judges of the land, that the black is as amenable for his evil acts as the white men, and therefore as much entitled to protection by the laws. These crimes were committed in cold blood, and arose from no dispute; it was malicious and not caused by momentary irritation and excitement. I have endeavoured to do part of my duty, and I will now conclude by calling the witnesses.

THOMAS FOSTER, Superintendent of Dr. Newton's establishment on the Big River - I have been at the Big River three years; I was there in June last; it is almost fifteen miles from Mr. Dangar's; it was, I think, on the Saturday before the 9th of June, I went to Mr. Dangar's; Mace, Mr. Dight's overseer, was with me; I stopped there that night; I saw Anderson the hut-keeper, and about thirty or forty blacks; there were men, women and children; I was accompanied by ten blacks, and Mr. Dight's overseer, when I went home; when I arrived I received information from John Merton, a boy on the station, in consequence of which I sent the ten blacks back to Mr. Dangar's; I never saw them again; I saw them about half a mile off going to Mr. Dangar's; it was about 4 in the afternoon, when I sent the blacks away; On Monday at about half an hour after sunrise, I saw a party of mounted men, some of them armed; there were about ten or twelve, all mounted, nearly all armed, I believe, with pistols; they came to the men's hut, in which were Dr. Newton's servants; two of them came near enough to speak to me; Oates and Kilmaister were the two; Oates is commonly known by the name of Hale's Jemmy; I asked him ``what's the matter?'' he made no answer, but asked for the blacks; I said, ``God knows where they are now.'' This was all I heard or said; they all galloped up together; they were all near enough to hear, but I can't say that they did; some of them got off their horses and went into the hut; I saw Johnstone afterwards pass the door of my own hut; all appeared to be going towards the stockyard; I can only recognise Kilmaister, Johnstone, Hawkins, and Oates; I know that Kilmaister and Oates were armed; Russell was with them; I do not know any other prisoner at the bar; I said to Kilmaister, ``are you after the blacks?'' he said, ``they rushed my cattle yesterday;'' he came in for his horse which had gone into the garden; I believe Kilmaister is an assigned servant to Mr. Dangar; I had been over to Mr. Dangar's the day before, but I did not hear anything about the cattle; I dare say they stopped about a quarter of an hour; I know Sexton, who lives on the farm; I did not see any black woman; when they left our place they went to Mr. Dangar's; I did not fall in with the party again; Dight's station was two miles off in another direction; I saw a party again about three miles off; I could not recognise them at that distance; two or three days afterwards I went to Mr. Dangar's and saw Mr. Hobbs; I accompanied him to a sheep station within two or three miles of the principle station; I parted with him at the sheep station, but proceeded to Mr. Dangar's, and remained there that night; in the morning Mr. Hobbs took me about half a mile from his house to see the remains of some blacks; Anderson's house is almost adjoining Mr. Dangar's; I believe he is a hut-keeper; I saw the body of a black man with the head on; the limbs had apparently been burned off; I saw another head without any body; and several other skulls so destroyed by fire as to render it impossible to say whether they were men or women; there appeared to have been a large fire recently; there were two mens heads that were not burned, and I am positive they were black men's heads; I did not examine whether there were any wounds on the body or not; I did not see any arms of a body; I did not see any smaller limbs; I tracked some horses from Mr. Dangar's to that place; I cannot say how many; but there must have been several; I did not see any other heads but those I have spoken off; I saw four or five heads

altogether; I did not go close enough to examine how the head was separated; I only stopped ten minutes at the furthest; I was overcome by the smell; the place where these remains were, was the side of a ridge about half a male from Mr Dangar's; the fire appeared to have occupied a large space; I went direct home from the spot; I told the circumstance to several persons; I did not communicate with the magistrate; Mr. Hobbs was with me when I saw the skulls, but he went home; Mr. Hobbs told me he had been there before; we went together and left together when I saw them; Mr. Hobbs was obliged to keep further away than I did on account of the smell; on the Sunday I was at Mr. Dangar's I saw Kilmaister; he did not not [sic] say anything about the battle; it was the next morning.

Cross-examined by Mr. a'Beckett - What Kilmaister said to me was in answer to a question put by me; Mr. Hobbs was very much affected; the tracks were in the road from Mr. Dangar's to my place; I do not think I tracked the horses all the way to the spot where the fire had been; it had been wet I should think it very easy to track any horses; I would only swear to two being armed with pistols; it is customary to carry pistols in the bush; they are always mounted, it is in consequence of the danger ensured by meeting the blacks; I have been very fortunate; my station is a central station, and I believe that is the reason that I have not been annoyed; my neighbours have not been so fortunate; I cannot say whether the blacks are generally armed, that was the first party I had seen; I have not seen any childrens skulls, I have told you all I saw; Hobbs did not state that there was any difference from the night before; I supposed Mr. Hobbs to be affected by the effluvia; Mr. Hobbs did not then say he wished the blacks had all been killed.

Re-examined - The tracks were on a road which we term public; it is very little used; It is not usual to meet several men mounted looking for blacks; the ten blacks who accompanied me were quiet; they were not armed; I certainly think if there had been any skulls I should have seen them; I have seen Daddy.

By Mr. a'Beckett - I have seen Daddy; he is called Daddy.

By the Chief Justice - He was an old man.

By Mr. a'Beckett - The blacks were unarmed with the exception of a tomahawk or two; there might be three; I did not see any sticks; Daddy was a short man.

Mr. Hobbs - I have been superintendent to Mr. Dangar for two years; I am his principal superintendent; I recollect the beginning of June last; I left my station on the 7th June for the Big River; It was Thursday; I had a station sixty or seventy miles lower down; I left Kilmaister and Anderson in charge; There were about forty or fifty blacks on the station when I left; there were men, women, and as many children; the remainder were men young and old; as far as I saw they were quiet; they had been ten or twelve days on the station when I left; I returned to the station on the 15th June; I am certain it was the 15th, but I cannot recollect the day of the week; Anderson was at home when I returned and a black servant (Davy) whom I had left at the station; I saw Kilmaister in a few minutes after; I received some information which made me question Anderson; when Kilmaister came home, I sent for him and asked him what had become of the blacks I had left at the station? he said he did not know; I told him that I knew they were murdered and all about it; he declared that he knew nothing about it; I told him that he had been to Dr. Newton's and Mr. Dight's stations with other men; he said he was looking for his cattle; from what Davy said to me, I asked him to go with me and he took me about half a mile from my house in a westerly direction; there had been a shower of rain and the tracks of horses and of naked feet were quite discernable [sic]; it was a regular track; there were childrens footsteps; the horse tracks were on either side and the track of the naked feet were in the middle;

they were in the same direction of the horse tracks; I arrived at a spot where there were a great number of dead bodies; but the stench was so great that I was not able to be accurate in counting them; I endeavoured to count them and made more of them sometimes than others, the most I made was 28; the skulls which had been burnt were easily discernible; the last number I counted was 20; I will undertake to swear that there were the remains of above 20; I saw some of the bodies; they were very much disfigured; I cannot say how many, I did know Daddy, he was an old man; he was the largest man ever I saw, either white or black; I saw a large body there, but the head was gone; from the size of the body I think it was his; I left Daddy on the station; I saw the childrens heads distinctly; there were 10 or 12 small heads, also some childrens bodies; I could not swear that it was Daddy's body; I am perfectly satisfied within my own mind that it was the body of Daddy; it was laying on its back; there was no head and the fire had destroyed nearly the whole of the flesh; I believe it to be the body of a man - the body of Daddy; I saw several heads; I endeavoured to recognize them but could not all; I saw both male and female heads; there were several which had altogether escaped from the fire; I should think they were cut off, I cannot say positively; Davy was with me that evening, the following morning Mr. Foster went with me; I tracked the horses up to the spot where the bodies were lying; at the corner of a paddock behind Anderson's hut I came upon this track, about 50 or 60 yards from my house; the fire occupied a space about half as large as this Court-house; there were the remains of a large log; I saw several blood-stains on the gravel all around; the extent of the ground prevented my counting the numbers correctly; the next day Mr. Foster went with me; I did not go close to the spot, I was unwell from the effects of the sight the day before; Mr. Foster was not there more than a minute and a half altogether; I had remained at least a quarter of an hour the day before; the only difference I perceived was that the native dogs had destroyed portions of the remains; there were a great many birds of prey, eagle hawks, &c.; I spoke to Kilmaister on the evening of the second day; I told him I thought it a very cruel thing to sanction the murder of these people as they were on such friendly terms, and also it was altogether through him that the blacks were permitted to be on the station at all; I said I considered it my duty to report it; he said he hoped I would not, not that he had anything to do with it, but the blacks having been with us for some time it would cause his removal; he appeared excessively uneasy and begged me not to report it; I wrote to Mr. Dangar; when I had written the letter, I went for the men to come down and hear it; they came; Kilmaister and Anderson came down; I read the letter; Kilmaister was very much agitated; he entreated me not to report the matter; he said the blacks had been spearing his cattle while I was away; he did not tell me that when I first told him of the murder; I requested him to shew me the cattle which he said had been speared; I was on the ``run'' four or five days, but I saw no signs that the cattle had been disturbed; I felt satisfied that he had told me an untruth in order to prevent my relating the circumstance; there were no cattle speared at this time; the blacks I left on the station were brought there by Kilmaister; they behaved well; they were not offensive in the least degree; I had several conversations with Kilmaister; I pointed out the indecency with which the remains had been treated; he offered to go and bury them, but I told him that if his protestations of innocence were true, it would do him an injury to interfere in any such way, when the matter was investigated; he always denied knowing anything of the crime and I always believed him innocent until the depositions were taken; he was daily dancing and, singing with the blacks after his return from the run; I asked Kilmaister how the blacks were taken away, and he told me that the men took them; he did not say that he was present, but I understood that

he was; I asked him what he was doing at Mr. Dight's station with the men; he said he was looking after his cattle, that he did not go with them, and that Davy would prove it; Kilmaister had a brace of pistols at his command, and he rarely went without them; I never went out without a brace; some few days after I was at Mr. Eaton's station I saw Perry; I thought he was the ut keeper; I said to him ``Jemmy, this is a bad job, and I am very sorry you are one of the number." He answered, ``it is, sir, but I hope there will be nothing more about it;" Mr. Day, the P. M., went to the stations either at the latter end of July or the beginning of August; I had forwarded my communication to Mr. Day; Mr, Dangar has not yet settled with me, but I believe that I shall leave his employ on account of this affair; I was at the station when Mr. Day came there; I pointed out the place where the fire had been; the bodies had disappeared; there were some remains; ribs and children's jaw bones; I helped to pick them up; the heads had all been removed; I did not know by whom, I never heard; I never went to the place between the day that Mr. Foster was with me and the time I went with Mr. Day.
Cross-examined by Mr. Foster. - I had been at Myall Creek 15 months; I had been there nearly all the time; Kilmaister always denied having had anything to do with it; Kilmaister has always been a good servant, and he was afraid if this case were investigated he should be returned into government service; the fire-arms were there for personal safety; I would not go out without fire-arms myself; I do think it dangerous for any one to go into the bush far from the settlements without fire-arms; I very much doubt whether is in New South Wales a better servant than Kilmaister; I should not have thought he would wantonly attack another; I returned on the 15th June; Davy, the black, took me to the place where the fire had been; I was there on the evening of the 15th, and on the morning of the 16th; it was near sundown in the evening, and about 8 or 9 in the morning; the general appearance of the remains was the same; some of the bodies appeared to have been dragged away by the native dogs; I did not go near it the second time, but he (Mr. Foster) had not so good an opportunity of examining the place as well as I had; I saw the large body; the legs and arms were gone; I could not swear that it was a male; it was a large frame; I could not swear that the black called is not now in existence.

By the Attorney-General. - I could not swear that Daddy is dead; I have not seen him since; I never saw a female so large as that frame; I never say any of those persons who were on the station since; I have made enquiries for them.

Mr. **DAY**, P. M., Mussel Brook. - I received information at the latter end of June, which induced me to report the circumstances to the Colonial Secretary; some time after I was directed to proceed with a party of police to that part of the Dungar's; on the evening I arrived Mr. Hobbs and one of the officers of the Mounted Police accompanied me to the spot, there appeared to have been a fire about 15 yards in circumference; there were a great quantity of fragments of bones; the place had the appearance of having been swept, and all large portions had been removed; I found a bone which I supposed to be the rib of a young child, the jaw bone of a human being, and a few teeth; I examined into the case and committed the prisoners; the prisoner Parry, I was informed, had expressed great regret for having been concerned in the affair; I accordingly had a communication with him, thinking perhaps that he had some communication to make; I found much difficulty in obtaining information on the subject.

GEORGE ANDERSON examined. - I am hut keeper, and assigned servant to Mr. Dangar; I was at Myall Creek five months; Mr. Hobbs is Superintendent; I recollect his going to the Big River in the beginning of June; I cannot say exactly how many native blacks were on the station; I know there were twenty and upwards; I could not

say there were not forty; on a Saturday about ten men came on horseback, armed with muskets, swords, and pistols; they were all armed; I was at home when they came; I was sitting in the hut with Kilmaister, the stockman; they came up galloping, with guns and pistols, pointed towards the hut; they were talking to Kilmaister; they all came up together; Russell, Toulouse, Foley, Black Johnston, Hawkins, Palliser, Lamb, and Oates, were there; Blake and Parry I cannot swear to; there were about ten on horseback; I will not say parry was not there, but I cannot say I saw him; I cannot say who came out first; they were spread out into a line about to surround the blacks; the blacks were all camped, ready for the night; it wanted about an hour and a half of sun down; there were women and children with them; the blacks on seeing them ran into the hut; the men then got off their horses the prisoner Russell took a rope from his horse's neck, and commenced undoing it; while he was preparing his rope, I asked what they were going to do with the blacks; he answered me that they were going to take them to the back of the range, and frighten them; Russel went into the hut, and the blacks were brought out tied; I heard the blacks crying out for assistance; the mothers and children were crying, and the little ones that could not walk; Russel brought out he end of the rope that they were tied with, and gave it to one of the men on horseback; they then started, taking the blacks with them; the man who took the rope from Russel went in front; they were tied; one black was handcuffed; their hands were all tied, with the palms to each other; the rope was a very long one; they took all the blacks away, except two boys that jumped into the creek as the men were coming up; they left one black jin with me in the hut; they said she was good looking; I do not know who said so; they left another black jin with Davy; a little child was at the back of the hut while they were tying the blacks; instead of allowing her to go with the party, I pulled her into the hut, and kept her there; the oldest of the lot was called Old Daddy; he was a very old, big, tall man; they were all tied; they all complained of being obliged to go; the biggest boys were tied, and those who could not walk were carried by the jins; the women who carried the children were tied; they went towards the West from the hut; Kilmaister got his horse while they were tying the blacks; he went with them, and took the pistol with him; he had been talking with them five or ten minutes; I did not pay any attention to what they were talking about; I was frightened; Oates was armed, he had a brace of pistols; they had a great many amongst them; I saw Foley standing at the door with a pistol in his hand; I did not notice his sword; I saw the swords in the distance; Kilmaister went with them; I did not keep them in sight more than a minute or two; about a quarter of an hour afterwards I head the reports of two pieces, one after the other, in the same direction as they had gone; the sound was quite plain; I did not notice more than two; I should have heard if more had been fired; I did not hear any other sounds; I forget what sort of a night; I saw the same men the night after; they came back to my hut whence they had taken the blacks; they all came except Kilmaister; one of the party gave me Kilmaister's saddle; I asked where he was; he came in about twenty minutes afterwards; they stopped there all night; I did not know any thing myself, but I heard something about the blacks; on the next morning they went out on the same road as they took the night before; Kilmaister slept with me, the other men were in the hut all the night, but I do not remember what they talked about; after breakfast Russel, Kilmaister, and Flemings, took out fire sticks, and when they were going, Fleming told Kilmaister to bring the leg rope; they all went off in the same direction as they went the night before, excepting Foley, who remained with me; Foley and I were in the hut, and during the time they were away I asked Foley if all the blacks had made their escape; he said none that he saw; they were all killed but one; a short time before

the party came home, Foley drew a sword belonging to one of the party; it was covered with blood; in about an hour they came home; I saw the smoke a short time after; they got up their horses, and Fleming told Kilmaister to go up by ad by and put the logs together, and to be sure that all was consumed; I do not recollect whether Kilmaister answered; Kilmaister did go in that direction almost immediately, and remained nearly the whole day; he said he was going for his horse; I never went to the spot, Davy went; Kilmaister was away nearly the whole day; his horse might have been easily caught; there was a great smoke; I was at the station when Mr. Dangar came; Kilmaister was at home; a piece of a sword was found in the hut; I picked it up, and gave it to Mr. Hobbs when the police left the station; it did not belong to the station; it was a piece of the handle; I gave it to Mr. Hobbs; he returned it to me, and I put it in the hut, where it remained till after the police went away; Kilmaister said to me, for God's sake mind what you say; do not say I went with them, it was not true, he did go with them, and at the same time; the women and children who were left with me I sent away with the ten blacks who had left our station with Mr. Foster; it was a moonlight night; I turned them all away the same night, because I did not want them to be killed by those men whom I knew to be out after the blacks.

Cross-examined by Mr. Windeyer. - I do not know exactly the hour the ten blacks came; I did send them away all together; I did think they might be killed; they did not leave the boys; they might not have killed the two jins; I do not remember asking for that jin; after they untied one for Davy, I asked for one for myself; I do not know their reason for not taking Davy; the only thing I know is, that Davy was more naturalised; I do not recollect their giving any reason for not taking Davy; I wish they had left them all; I did not wish any blacks to remain there; I wanted a jin that I had had before, not the one they left me; I will swear that I staid in the hut all night; Davy did not go with them; I never went to the place where the bodies were found; I did not see any bush fires on that day, or the day before; I heard the two shots quite plainly; I do not know whether I told all this to Mr. Hobbs; I told him that I could not help the blacks; I did tell Mr. Hobbs I did not know who they were; I never said that I was sorry I had not made a stronger case against Kilmaister; I do not recollect I ever said any thing of the sort to Burrows; I did not recognise more than one at the time of my first examination; I do not recollect how long after it was that the Magistrate called at the station; I remembered Russel and Fleming by name as well as his face; I did say to Mr. Hobbs that I did not know them; I had a second examination, because I wanted to tell more which I had recollected; I have been in the Colony about five years; I am here for life; I never said that my evidence would get me my liberty; I would take any thing I could get; I only ask for protection; I do not know what made my evidence more against them the second time I do not know; the Magistrate said he would commit me for perjury; he said I might be committed for not thinking; it was after this that I began to recollect every thing that was said and done; I have been punished twice, once for neglect of duty and being absent frem [sic] the station; I was not punished at that station; he took me to Court once; I was at New England; I do not think I deserved that punishment; I was eight days coming; I had a hundred lashes; I came here for robbing my master; I was ignorant, and misled by others; I am no thief; I told another to do it; I was apprentice; they said let Foley stop to take care of the arms; I thought it was meant to make me believe that there was danger; I have been frightened by the blacks; I saw a black fellow one night run away directly he saw me, and I was very much frightened; I knew Old Joey; he was at the station with the others; King Sandy, his wife, and little Charley, were also taken away; the jin I wanted was Heppita, she, Sandy, and Joey, were taken away, and another black fellow

called Tommy; I could name nearly the whole if they were before me; I did not know all their names; Sandy, his wife, Charley, and the others I have mentioned were tied and taken away.

Re-examined. - Davy never belonged to that tribe; he belonged to Peel River; he came down to that station with cattle; the blacks were there when he came; I meant that I did not know them before; I was examined at my own place the first night that Mr. Day came; Kilmaister was taken into custody and I was examined; I was in bed when I was called before Mr. Day; I was frightened and confused; I knew them all by sight immediately when they were in custody, and I said at once that there were two with men who did not come to the hut; they left muskets, pistols, and two swords; I counted fifteen pistols myself; there were two Sandys, one ws with Mr. Foster and the other was takeng [sic] away; it was King Sandy who went with Mr. Foster.

JOHN BATES, hut keeper, assigned to Mr. Dight's station at the Big River, about two miles from Dr. Newton's. - I was at Dr. Neweton's in June; I saw a party of men, apparently stockkeepers, at Dr. Newton's; they asked if there were any blacks there; I knew some of the men; I knew Hall's Jemmy (Oates); Lamb was at Dr. Newton's; Oates was not at Dr. Newton's, he was at our place on Saturday. Mr. Eaton's man Parry was there, Hawkin's was there, Black Johnston was there also; one of them asked if there were any blacks cutting bark there; they all rode up together; some were armed; I saw two or three pistols, some small muskets, and a sword; I cannot positively say whether any of those I have mentioned had arms; I called the hutkeeper, and after speaking to him they rode away; on Monday, about 9 o'clock in the morning, the same party came to Mr. Dight's; when I came home I found the party in the hut; they had dismounted; I had been about the place; the woman was not in the hut a few minutes before; when I came back I found the men and a woman there; there might be ten or twelve men altogether; I do not know whether they were all armed; Hall's Jeffimy and Kilmaister were at our place on Monday morning; one of them, I do not know which, said they would call for the black woman; they remained about an hour and a half; Mr. Eaton's man Parry told em they had settled the blacks; they were all at the hut when Parry said this; I cannot say whether they heard the observation; no one denied it; I am sure Parry said it; I did not say anything about Mr. Foster; I cannot tell why he talked to me about the blacks; it was the day after the murder, the Monday; I do not know Toulouse; I do not know any more than those I have pointed out; I was sent for to know if I could identify Russel, but I could not.

ANDREW BURROWS assigned to Mr. Dangar. - I was at the lower station with cattle when Mr Hobbs went to the Big River, I know there were a great many blacks, men, women, and children, about the house; I know that there was an old man called Daddy; he was a large man; I was away about ten days; I do not know exactly what day I arrived at the station; I spoke to Kilmasiter about what I had heard; I said that I had heard the blacks had been taken away, that it was a shame, and that Mr. Hobbs would be angry; he said that he knew nothing about it, and told me to mind my own business, that there were some men came and took them away, he did not know where; I was living with Kilmaister before; I was at Russel's before that; I saw some men there, I do not know their names; Hawkins was there, Russel, Foley, Palliseer were there also, and I think Johnston; I know there was a man of color, but I did not speak to him; I arrived at the lower station before Mr. Hobbs; I started before him; it was the third night we stopped at Russel's; they were talking about the blacks and other things; they asked me if the blacks were at our station, I said yes, that they had been there four or five weeks; they then said those could not have been the blacks who committed the depredations down the river; I saw some fire-arms and one man

was putting a leather strap to his sword; they said they were going to look after some blacks, one man was making a leathern pouch; it might be used for ammunition; I think they said they wished Jem Lamb was at home; I do not remember the number; I do not swear what number, and if I did swear it I cannot now remember; I met Fleming a short distance from Russel's hut; I cannot say how far; he had a musket or a fowling-piece; I called at Russel's on my way back; he was not at home; I only went into the milking-yard; I never knew Fleming before, but I was told it was him; Toulouse was at Russel's.

Cross-examined by Mr. a'Beckett. - It was not strange to meet a man armed; stockmen always go armed; I cannot say whether there was a larger man than old Daddy; I know Anderson; Kilmaister and he used to quarrel very often; I know one night when we were in bed he said he was sorry for one thing he had done; he was sorry he had not told the whole affair, and that it would have been worse for Kilmaister.

By the Attorney General - I do not know what he meant; I was afraid of Mr. Dangar's asking me questions; I can't say that it was in spite to Kilmaister; it was after Kilmaister had been taken away by the police that he saw this.

Warren Mace, a ticket-of-leave man living at Mr. Dight's - A party of horsemen came to our place; some of them were armed; I saw them when they arrived; they left a black jin at our station; there was one person desired her to be taken care of; there were ten or twelve; they stopped to breakfast; Kilmaister, Hawkins, Johnstone, Touloun, Toby, Blake, and Oates were amongst them; some of them were armed; there was nothing said about blacks; I have seen five or six men armed and on horseback before; I knew some of the men to be employed in the neighbourhood, and did not ask any questions.

Cross-examined by Mr. Foster - I saw King Sandy the day before - Sunday; I am not positive to the day of the week, but it was on the 10th; our place is about sixteen miles from Mr. Dangar's house.

CHARLES REID - I am servant to Mr. Dangar; I joined the station at the Big River; I took some cattle down to the lower station; it is about sixty miles; we stopped at Russell's I think on Thursday, three days after we left Mr. Dangar's; I saw Palliser, Hawkins, Foley, and Toulouse; Burrows was with me; I do not recollect anything particular; they asked if we had any blacks up our way; they said those could not be the blacks who had committed the depredations down the river; I saw a musket and a sword; I think they said they had been down the river; that the blacks had been rushing the cattle; I knew the men; I did not ask them what brought them all together; the pouch was just such a one as is used for ammunition; I stopped at the lower station; I met Fleming; he was alone.

Mr. Hobbs recalled - I sent Burrows and Reid to the lower station with cattle on Tuesday the 5th; Russell's is about forty miles from our upper station; it was the evening of the 15th; I first saw the remains then.

Cross-examined - I did not watch them the whole of the way; I saw them start.

Mr. **FOSS**, dentist - I seen a jaw-bone; there are two teeth in it; this is a part of a human jaw, and there are human teeth in it; they appear to have been burnt.

This was the case against the prisoners.

Mr. a'Beckett submitted that there was nothing in all the nine counts to go the jury. He said the whole charge is about Daddy, or a black native, name unknown, and the evidence is perfectly circumstantial. Mr. Hobbs is the only one who speaks to the identity of Daddy, and he could not swear whether the mass of putridity which he saw was a man or a woman; thus four counts fall to the ground. In the fifth count the case

is set forth differently; it is said that some person, name unknown, lost his life, by a shot from a pistol; there is no proof that this party lost his life in such a way. The sixth count charges Oates with the firing of the pistol, he having been seen with a weapon of the hut, but there is no evidence that Oates did fire it; and therefore, the simple circumstance of his carrying a pistol or pistols, was not enough for a case to go to the jury. The seventh count relates the same circumstances, except that a sword is the weapon, and Foley is the man charged. The same remarks which were made as to the pistol were applicable in this case. Mr. a'Beckett quoted a rule about criminal informations, which related an instance of two persons who were executed for the murder of two persons who were then alive, although missing.

Mr. Foster supported the objections on the same grounds, adding that those counts which set forth the black male to have been unknown could not stand, inasmuch as it was proved that he might have been known had he been one of the blacks who left Mr. Dangar's. The point which I submitted most strongly was, that no proof had been adduced that Daddy was not alive, or that a dead male black had been found.

His Honor said that the case must go to the Jury.

Mr. **DANGAR**, St. Patrick's Plains. - Kilmaister is my servant, he has been a good and obedient servant; Anderson is also my servant; I would not believe him on his oath; he has been very troublesome, and on the most trifling occasion he is addicted to lying.

Cross-examined. - Anderson has been in my service since 1833, and for the first two years he was under my immediate superintendence; he has been two years under Mr. Hobbs; I have had him punished more than once, at a very recent occasion, at the last sheep shearing, he left his station to the mercy of chance for two or three days; I visited the station on two occasions during his absence; I would not believe him on his oath; if I discovered Kilmaister away from his station I would have him punished; I heard he was taken up; I have only heard what has been deposed; Kilmaister was not in my power; Mr. Hobbs is not under my displeasure on account of this case; I swear it; he is about to leave my service; his term is up; I have been at the station since the fire was there; Mr. Hobbs was with them; I understood from the evidence against Kilmaister, that he had joined a party; I did not see a part of a sword; Anderson has been troublesome, and has often told me he was at one place at one time, when I have discovered he was at another; on the very occasion for which he was punished he told me a lie; he said he had been to look for lost sheep, when I knew that they were safe at the station; at another time he was sent to a station at some distance, and he came home with a story of having lost his beasts, and I discovered he had been loitering at a station on the road; I am a subscriber for the defence of these men; I have a servant amongst them; I believe an honest one and perfectly innocent; as to how much I decline answering.

Mr. Cobb. - I know Lamb; he has been in my employ two years; he has conducted himself with every propriety, I always thought him a quiet, peaceable man.

Mr. T. Simpson Hall. - Oates is under my superintendence; I have known him for three years; he is a steady, correct man.

Cross-examined. - I superintend a large stock; some of it is my own; I have the superintendence of two stations on the Hunter, and three beyond the boundaries; he was without an overseer on the occasion of the present trial.

GEORGE BOWMAN, farmer and grazier. - Johnston has been in my service five years and a half; for the last four years and a half I have found him a good man; I always sent him in charge of cattle and goods; I preferred him, and he has always behaved well; he is free about two years; I only knew him while in my service; it is

now two years since he left my employ; Mr. Cox offered him higher wages than I did, and he left me, or I should have employed him to this day.

Mr. **JOLLIFFE**, superintendent to Messrs. Bell - Palliseer and Russel have been under my charge two years; Russel has been a very active man, a good servant, and a quiet well-disposed man; Palliseer was the same; I always found them at home and quiet attentive servants.

Cross-examined. - I know nothing of this affair I was in Sydney at the time it happened.

This was the case for the defence.

His Honor in addressing the jury said, we have now been engaged many hours in one of the most important cases which has ever come under our notice since there has been a Supreme Court in New South Wales; the case has excited considerable interest, and you were warned at the outset to throw aside any impression which might have been made by hearing or reading descriptions on this affair. I hope you will not be offended when I recall to your minds, that each of you when entering that box invoked God to witness that he would be determined by the evidence, and return a verdict according to the substance of that evidence; if that were not so; if it were possible a jury could be biassed [sic] by out-door impressions and return a verdict not according to the evidence, our dearest rights were at stake and public justice was a farce. It was clear that a most grievous offence has been committed; that the lives of near 30 of our fellow creatures have been sacrificed, and in order to fulfil my duty, I must tell you that the life of a black is as precious and valuable in the eye of the law, as that of the highest noble in the land. The black is answerable for his crimes, and some short time since, before I had the honour of occupying my present seat on this Bench, a man, a native was executed for the murder of a white man. Having made these observations for the benefit of the public as well as the prisoners, I will call your attention to the evidence, and leave you to discharge your duty by considering whether the prisoners at the bar were the parties who committed the crime which has been proved. I agree, said His Honor with the learned counsel for the defence, that a man cannot be committed for manslaughter or murder before a body is found; therefore the point you have just to determine is, whether Daddy was the unfortunate man who lost his life as set forth in the indictment, or whether a man, whose name is unknown to the Attorney-General, came to his death by violent means from the prisoners hands. He added, that in some of the counts the prisoners were charged as accessaries only, but he observed that although they were charged as accomplices only, yet accomplices were by the law held to be principals, and if found guilty subject to the same punishment. He mentioned an anecdote on this subject, which occurred while he was in England practising at the bar - A young man named Lewiston, went out with some companions for the purpose of committing a burglary, at the time they determined upon the robbery they contemplated no violence. On arriving at the house in question, the noise they made attracted the attention of the owner, who arose, opened a window, and put out his head, and was immediately shot dead by one of the party. They were all apprehended, and although charged only as accessaries, were found guilty and hanged for the murder as principals.

His Honor summed up at great length, minutely recapitulating the whole of the evidence, and the jury returned a verdict of - Not Guilty, after having retired about a quarter of an hour.

The prisoners were all remanded for trial on the same charges, the Crown Officers being dissatisfied with the verdict. It is their intention to indict the prisoners for the

murder of an aboriginal woman, and to call the same evidence in support of the case. The trial is to take place on Monday next.[*]

See also Australian, 17 November 1838; Sydney Herald, 19 November 1838. The judge's trial notes are at Dowling, Proceedings of the Supreme Court, Vol. 156, State Records of New South Wales, 2/3341, pp 85-149.

This is the first of the two famous Myall Creek massacre cases (the other being R. v. Kilmeister (No. 2), 1838). Preliminary notes on these trials are in Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161, 742-761. They are preceded at 682-741 by an account of attacks by Aborigines at Port Macquarie. See also 306-311. (Some of these documents are now online: see numbers 27, 27a, 27b, 87.)

The depositions in this case are held by the State Records of New South Wales, 4/9090; COD 392. For one of the earliest of Gipps' reports to the British government on this case, see Gipps to Glenelg, 1 October 1838, Historical Records of Australia, Series 1, Vol. 19, 601.

For the release of two Aborigines due to insufficiency of proof, see R. v. Wombarty, 1837.

A year earlier, the British government was very concerned about the massacre of a party of Aborigines by a group headed by Major Mitchell: see Glenelg to Bourke, 26 July 1837, Historical Records of Australia, Series 1, Vol. 19, pp 47f, 390; and see Historical Records of Australia, Series 1, Vol. 18, p. 590, stating that ``a considerable number of these unhappy Savages were slaughtered'' (Bourke to Glenelg, 15 November 1836, and see 25 January 1837, p. 656). This led to a debate in the newspapers: see, for example, Australian, 30 December 1836; Sydney Herald, 12 November 1838. On the governor's initial instructions for the Mitchell expedition, see Australian, 7 February 1837.

Major Nunn's massacre of even more Aborigines (which is examined at length by R. Milliss, Waterloo Creek: the Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales, McPhee Gribble, Ringwood, 1992) was the subject of official correspondence as early as April 1838: Gipps to Glenelg, 25 April 1838, Historical Records of Australia, Series 1, Vol. 19, p. 396. Milliss also gives the best analysis of the Myall Creek murders.

Governor Gipps was exasperated by the number of clashes between whites and Aborigines: see Gipps to Glenelg, 21 July 1838, Historical Records of Australia, Series 1, Vol.19, 508f.

See also R. v. Douglass, 1838.

[*]Dowling recorded this dramatic decision by the crown as follows: ``At the prayer of Mr. Attorney General the prisoners were remanded for trial on another charge'': Dowling, Proceedings of the Supreme Court, Vol. 156, State Records of New South Wales, 2/3341, p. 149.

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

CJA, 4/322, 24/11/1838

CORONER'S INQUEST AND COMMITTAL FOR MURDER. - An inquest was held by **W.H.KERR**, Esq., acting Coroner in the absence of Mr. Brennan, who was from Sydney on leave, at the "Victoria Hotel," Pitt-street, on the body of a female child newly born, which was found in a cess pool. It appeared in evidence that a woman named **MARY [ANN?] APPLEBY**, a prisoner of the crown, assigned to her husband, and in the employ of Mr. **GIBSON**, of the above hotel, kept her bed on Friday last, merely stating to her mistress that she was indisposed, but Mrs. Gibson suspecting that all was not right, sent for a medical man, who confirmed her suspicions, that she had but a few hours ago been a mother. The woman confessed it, but asserted that the child was still born. Dr. **ROBERTSON** declared it as his opinion that the child had lived after being born. The jury returned a verdict of *Wilful Murder* against the woman, who on the Coroner's warrant will be committed to gaol to await her trial, as soon as she is able to be removed thence from the Hospital where she at present lies.

AUSTRALIAN, 27/11/1838
Supreme Court of New South Wales
Burton J., 26 November 1838
Source: Australian, 27 November 1838[1]
MONDAY. - Before His Honor Mr Justice Burton and Civil Jury.
Charles Kilmaister, James Oates, Edward Foley, John Russell, John Johnstone, William Hawkins and James Parry, were indicted for wilful murder, at Myall Creek, on the 10th of June last.

The information contained twenty counts; which charged the prisoners severally with being accessory to the murder of a male and female aboriginal child, by shooting them with a pistol loaded with powder and ball; of which they (the aboriginal children described,) then died. Other counts charged the death of an aboriginal male black, called Charley, by shooting with a pistol, cutting with a sword, and casting into a fire, whereof he died, on the day and year before named.

At the close of the reading of the information, which occupied an hour and a half reading, Mr a'Beckett who was retained for the prisoners rose and applied to be allowed time to plead to the information. The learned gentleman contended that the prisoners had not been furnished with a copy of the information, which was long and required some time, to be answered.

The Attorney General contended that the prisoners were not entitled to a copy of the information, but at the same time, he did not object to the application.

Mr a'Beckett admitted that the prisoners were not entitled to a copy of the information, but he thought that the Court would not refuse so reasonable a request, when it was considered that the prisoners were on a trial for their life.

Mr Justice Burton said that he thought the application was quite reasonable, and he thought that under the circumstances, the prisoners should be allowed time to plead to so lengthy an information, and he certainly was inclined to acceed [sic] to the application.

The Attorney General said that, so far from being inclined to oppose it, he should immediately consent to it, as it had been his intention to apply to the Court for a postponement of the trial in consequence of the publication of certain articles through the public press, which must, in the course of human feeling, bias the trial of this case; and he was of opinion that if the case was now brought on and tried, that it could not have a fair and impartial consideration by a Jury who must in a certain degree be biassed [sic] by what they had heard out of the Court. Besides which he would be prepared with affidavits to shew that the case could not be now tried without prejudice, and that public justice would be in jeopardy, by the case being proceeded with at this time.

Mr Justice Burton said, that if the Attorney General was now prepared with affidavits to support his application to the Court, he would be ready to hear the cause shewn against the present proceeding with the trial, but if the Attorney General was not prepared with those affidavits, the application was premature, and he (the Attorney-General), had better reserve his remarks until the application came, in course of practice, before the Court. He (Mr Justice Burton) regretted that the Attorney General had not adopted the mode which had been adopted by the Attorney General, on an application to the Chief Justice of England to suspend the publication of a case which had not been terminated. If the Attorney General had adopted such a course, he (Mr Burton), was certain that an order would have been given to that effect.

The Attorney General said, that had he been aware that such a course would have been pursued by the press, he certainly would have made the application, but he had

not been aware, nor could he have supposed that such a course would have been pursued by the press - until that morning, when a copy of the Sydney Herald had been put into his hand, and he thought that such a publication tended to pervert the ends of justice. He would willingly consent to the postponement of the case until the following morning, at which time he would be ready to submit his affidavits to the Court, and as the prisoners' counsel had only applied for a postponement of the trial until ten o'clock on the following morning, he could not have any objection to the application.

Mr Justice Burton said, that he thought the application on the part of the counsel for the prisoners, was very reasonable; the inforamtion [sic] was long and complicated, and he felt he was bound to grant it.

The Attorney General said, that after what had been said, he was bound to apply to the Court for an order to restrain the press from publishing any thing more relating to the case, as he believed that it would prejudice the jury.

Mr Justice Burton said, that the Attorney General could take what course he thought proper, but he would advise him not to be hasty in his application, nor in the course he intended to adopt. For in his (Mr Justice Burton's) opinion, he thought, and he said so with confidence, that the course of public justice would never be perverted when a case came before a Jury and a Judge of New South Wales. He thought there was too much honour in the Supreme Court of New South Wales, to ever bias a case that might come before the Court. He hoped, and not only hoped, but could assert, that the Judges, as well as the Juries, were never biassed [sic] by any thing that occurred out of doors, in the decision of a case; and he felt with pleasure that the administration of justice was safe in the Bench and Jury of New South Wales. However wicked persons might attempt, by their writings, to sway the course of justice, he would never admit that the moral stated of the Colony was so bad as had been represented, and that the course of justice could be perverted by any thing that was said out of the doors of the Court.

The Court then granted the application for the postponement of the trial until the following morning (this morning), when the trial will come on in full, and we shall make it a point of giving a full report of this trial.

See also Sydney Herald, 28 November 1838; Sydney Gazette, 29 November 1838; and for proceedings between the two trials, see Australian, 20 November 1838. For an indication of the passionate response to the outcome of this trial, see R. v. Douglass, 1838.

This case was also recorded in Burton, Notes of Criminal Cases, vol. 39, State Records of New South Wales, 2/2439, pp 28-107. It concludes with the following: ``Verdict - all Guilty on the first five Counts. Not guilty on the others."

The first trial is reported as R. v. Kilmeister (No. 1), 1838.

Justice Burton had a sincere, albeit paternalist, interest in Aboriginal welfare, as is shown in Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161, 378-493, 515-517, 772-780, 789-796. At 385f, there is a draft bill which appears to have been written by him, the preamble of which states: ``Whereas it is expedient and necessary to make provision for the amelioration and protection of the Aboriginal Natives of this Colony in such manner as shall be consistent with their just rights and privileges as Subjects of Her Majesty the Queen". At 797-802, there is an application by the Aborigines Protection Society for the admission of native evidence. (Some of these documents are now online, see numbers 27, 27a, 27b, 87.)

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

SYDNEY GAZETTE, 29/11/1838
Burton J., 27 November 1838

The seven men charged with the murder of the blacks at Liverpool Plains having been placed at the bar, the Clerk of Arraigns proceeded to call on them for their plea.
The prisoners pleaded a demurrer to the first five counts of the indictment charging them with killing a child name and sex unknown. To the 6th, 7th, 8th, 9th and 10th counts, they pleaded autrefois acquit; and not guilty to the remaining ten.

The pleadings set forth that the prisoners ought not to be tried on the first five counts as they were not sufficient in law, and therefore the prisoners were not bound to answer them, inasmuch as they were charged in that set of counts with the murder of an aboriginal native child without any further description; they therefore prayed judgment on these counts in their favour. A plea of autrefois acquit was laid to the five following counts setting forth that the prisoner had, on the 13th November, been tried in this Supreme Court on an information filed by the Attorney General that certain persons had wilfully and maliciously murdered a male aboriginal black at Mr. Dangar's station, Myall Creek, of which charge they and others then at the bar were all acquitted, and that the aboriginal male child with whose murder they now stand charged is the same felony and murder for which they were before tried on the aforesaid information laid by the Attorney General, and of which charges they were before acquitted.

The Attorney General explained that the first five counts were quite sufficient in law.

Mr. Justice Burton did not see the the [sic] necessity of the first five counts. The individual murdered must be either male or female. The last verdict was given in favour of these prisoners; he did not think it right to state any impression of the effect of that verdict; he thought the Attorney General should proceed with deliberation and duly consider the case before he commenced it. His Honor said the Attorney General could enter a nolli prosequi for those counts.

The Attorney General said it was necessary to vary the counts on account of the evidence; he should wish particularly to ascertain the averments as made in the prisoners' pleadings; whether it was stated that the male aboriginal black for whose murder they had been already tried, was the same aboriginal native black set forth in the present information.

Mr. Justice Burton believed that the averment set forth that the felonies and murders with which they (the prisoners) now stand charged are the same as those for which they were tried and acquitted on a previous information.

The Attorney General having obtained a copy of the pleadings, said he took issue with the averment, inasmuch as the felonies and murder for which they are now brought to this bar are not the same as they were before tried for; and, moreover, that the child here set forth is not the same as described in any previous information.

Mr. a'Beckett said the replication ought to be in writing on the part of the crown.

Mr. Attorney General believed it was his privilege, as Her Majesty's Attorney General, to answer either verbally or by writing as he pleased.

Mr. Justice Burton then stated what he believed to be the substance of Mr. Plunkett's replication, viv [sic]. - That as to the matters contained in the 1st, 2nd, 3rd, 4th, and 5th counts, the Attorney General saith that the said matters therein contained are different in law. As to the several pleas of the prisoners on the counts 6th 7th, 8th 9th, and 10th in the information, the Attorney General saith that the felonies and murders for which the said Attorney General has so laid the said information against the prisoners at the bar, are not one and the same as the felonies and murders for which the prisoners have been already tried and acquitted as set forth by the said prisoners in their averment. The Attorney General denies that the male aboriginal black for

whose murder they were before tried is the same aboriginal male black now set forth in this present information, and prays that the issue may be tried by the country.

A jury was then empannelled to try the issue taken with the prisoner's averment on the second five counts.

Mr a'Beckett said that in cases of this sort there should be certainty and precision, without doubt or ambiguity. The Court cannot allow any doubt here, and if there be any it will tend in favour of the prisoners. The charge of killing an aboriginal child is not descriptive enough. The prisoners might plead guilty to the murder of a male child, and on that concession be found guilty of the murder of a female. It is material a person should be aware of what he is accused, and law itself does not presume that an aboriginal black child means an aboriginal black female child. Mr. A Beckett submitted that this uncertainty was fatal to the first five counts.

Mr. Foster - The information does contain sufficient accuracy to enable prisoners to plead in answer. It is especially incumbent on prosecutor to set forth the charge clearly and distinctly. Here it says that the party killed was unknown, and having at the commencement been thus vague, he ought to have been more particular afterwards; the sex, surely, of the individual might have been set forth - it is not, and cannot now be proved.

Mr. Windeyer quoted a case in support of what had been said by his two friends. The learned gentleman challenged the Attorney-General to point out a single information in which either the name or sex of the child is not set forth. I suspect he said, that whoever has made out these informations has been misled by some of the works which are erroneous as far as our practice goes. In Hale we find the words ``eujusdem ignoti,'' but the Latin termination here shows the sex, which termination and its effects do not appear to have been noticed by the writers of the information in this case. Mr. Windeyer submitted it would be carrying uncertainties to an alarming extent, and hoped the Court would show parties that they must be much more exact.

The Attorney-General said that it was not necessary to prove the sex of the child; so long as it could be proved that a child had lost its life, it was enough. When all the distinctive organs are destroyed, how is it possible to distinguish and describe a sex. It is not necessary to describe the name or sex of the deceased; however, should the party be known to the jury, the prisoner might, if that be not provided for by another count, be acquitted. If a pleader undertake to prove the sex, he must do it; but until he does undertake it, he need not. In cattle killing or stealing the law provides terms; it is known also that children are protected by law, and the term is well and clearly defined.

Mr. Therry followed shortly in support of the first five counts against the plea of ``demurrer'' entered by the defendants. One of his learned friends on the other side had relied on ``conjusdem ignoti,'' but had chosen to forget the word ``homins,'' which was plainly understood.

Mr. a'Beckett was impervious to the arguments of Mr. Therry, and could not understand how the murder of a male child and also of a female child was really but one murder. Mr. a'Beckett had not heard, nor could he find a case in which the name or sex were not set forth on the face of the indictment. Mr. a'Beckett submitted that this uncertainty was fatal to the five counts.

His Honor thought the information was as certain as was required by law, as it was only required to set forth that a human being had been killed, without setting forth whether it be male or female. He was of opinion that there was such certainty in the those counts as to enable him to overrule the demurrer, and to judge that the prisoners should plead to those five counts.

Mr. Justice Burton. The proof is with the prisoners, therefore Mr. Foster you will have to begin.

Mr. a'Beckett. - The gentlemen of the Jury will have, under the direction of his Honor, to decide whether the felonies of which the prisoners were formerly charged are not the same as those with which they are now charged.

Mr. Gurner, Chief Clerk of the Records, produced the record of an information for murder against the prisoners at the bar and others. The prisoners were tried on the 15th of November, 1838, before His Honor the Chief Justice, and all found not guilty. It was admitted that the prisoners at the bar were part of the men who were tried on that information.

The Attorney-General said, this was no proof for this case, they say that these men were acquitted of a murder, not the murder of which they are now accused.

Mr. Justice Burton. - Surely Mr. Attorney-General does not wish them to prove his meaning. How is it possible that they can prove whether one person stated to be unknown is or is not the same as a person set forth a second time also unknown!

The Attorney-General paid all due respect to his Honor's opinion, but thought him self bound to advance his own opinion in discharge of his duty. The learned gentleman quoted authority; the proof of issue lies with defendant, and as yet there is no proof in this case.

Mr. Therry followed the Attorney-General very briefly. There were twenty-eight aboriginal natives, unknown to the Attorney-General, who appear to have been destroyed, and the acquittal for the murder of one does not do away with the crime as far as the others are concerned. The defendants, in order to support their plea, must prove that the crimes of which they are now accused are precisely the same as those of which they were before acquitted. If they could prove that there was only one person murdered, and that they had been acquitted of that murder, they would have established their grounds, but no identity of the persons set forth in the information have been proved, and that, therefore, unless they do prove identity, it was hoped his Honor would not allow this plea to stand. If it were allowed, it would be a passport for crime; if a man be acquitted of the murder of an aboriginal native, name unknown, he will always be able to start this plea, as we have no other way of naming them.

Mr. a'Beckett thought there was nothing to go to the Jury except the admission of his being, as to the identity of the prisoners. In the first information we were charged with the murder of a male aboriginal child. Is an aboriginal native boy not a black? It is quite absurd to talk about the identity of persons who are set forth as unknown, and how would it be possible to prove the identity of those persons set forth in the informations, and all that defendants had to do was to prove the identity of the prisoners.

Mr. Foster said there was scarcely anything to be said in addition to what Mr. a'Beckett had advanced; but he thought the Attorney General wanted them to prove what it was utterly impossible to prove. The informations are evidently the same - a male aboriginal child is a black, and a male aboriginal black may be a black child.

Mr. Windeyer replied to a case quoted by Mr. Therry, and repeated that the plea was fully established, and that he should not consequently detain the court any longer.

The Attorney General - The arguments on the case go thus far - a dozen murders might be committed and the same parties tried for them, and if acquitted for one, could not be tried again. They laugh, because in this case there are 28, or about that number; and because, although the prisoners at the bar were acquitted in one case, they are to be tried again in another; but I say, that if 28 or 58 murders have been committed, each of those murders is a separate crime, even though not one of the

names of the parties murdered be known. The word ``child'' is a description of itself recognised by law, and not to be compounded with man. We have different terms for differently aged aged [sic] cattle, and in our calendar there are crimes which differ in magnitude - as the case of the parties offended is more or less. Who would think of an adult, when he hears the term child? It is certainly usual to give a full description of a party in a warrant for apprehension, but not in an indictment.

Mr. Justice Burton - This case has occupied the court long time, and he had time enough to consider it thoroughly. This case did not resemble common cases, and as many other blacks were killed, some whose names might be known, and others not, Mr. Justice Burton thought that Mr. Foster ought to go a little further; and he would admit more evidence on the part of the defendants if Mr. Foster chose to adduce it. It was very likely that, at the end, the whole of the parties concerned would fid themselves in very nearly the same position, but he wished to proceed in due form as had been enforced in so long an argument as that of the Attorney General.

Mr. O Reilley - I am attorney for prisoners; I recollect the prisoners being tried ten or twelve days back; the witnesses were turned out of court; I remained; I heard the opening speech of the Attorney General; I understood the Attorney General to state that several persons had been killed on the same day, mean, women, and children, at the same place; I know that bones wee produced, I believe when mr. Day was in the box on the part of the crown; Mr. Foss, who was afterwards examined, thought it was the rib of a child; I would not take upon myself to say whether the Attorney General stated any number.

Cross-examined by the Attorney General - There was a count for the murder of Paddy; the evidence was not confined to that or to the case of another black; childrens' bones were produced; I understood Mr. Hobbs had said there were 28 bodies; evidence did come out about the murder of some women and children; the circumstances were applicable to the whole of the cases; I do recollect that the counsel for the defence did contend that it had not been proved that Daddy's body had been found; Mr. Hobbs swore positively that he did not know whether the body found was a male's or female's; Mr. Hobbs did mention a head with a beard; it appeared to me that the evidence related to the whole of the case; there was the rib of a child, a jaw bone, and some teeth which had been burned.

Re examined - I do not recollect the Chief Justice remarking anything about one of the prisoner's saying only one woman had escaped.

Mr. Kemp - I am in the habit of attending in order to report cases in this court; I was present on the trial of these men; the objection taken by counsel was - that the body found had not been proved to be the body of a man; there was also an observation made as to Foley's having said that they were all killed but one woman.

Cross-examined - The Attorney General drew his Honor's attention to what Hobbs swore about the beards; I do not see how the evidence could be separated; the subject of the beards was merely an incidental observation; Daddy, according to one witness, was a very large man.

The Judge, in summing up, directed the jury's attention to the points as to whether it was proved that Daddy was killed, or if not, if it had been proved that a black male had been killed; as if even the last had been proved, it was sufficient to support the informations.

The Attorney General observed, that the case for the Jury, was a collateral point as regarded the trial of these men, if the Jury decided that the counts were the same in this information as those set forth in the former information of course they would fall to the ground.

Mr. Justice Burton said this was a case of law and fact; there was an important point for their consideration; it had occupied considerable time in arguing this case; and as was stated in the argument of the Attorney General, if a prisoner or prisoners commits the murder of 28 persons, I am bound to tell you that each of those murders is a separate crime; had we not received in evidence in this case proof that the inquiry was directed in the last trial, to a large body, supposed that of Daddy, and that the rest of the matters came out in evidence; thus we see that the enquiries were not directed towards a male black alone; as, had it been so, we might then have understood that it was a male black child. It is therefore for you, gentlemen of the Jury, to decide whether they were tried on the same charge, as is now set forth against them in the five first counts of the present information. The point of law on which these pleas are drawn, is thus - no man can be put in jeopardy twice for the same offence. The question is, whether the prisoners are in that condition.

The Jury, after having been absent more than an hour, were sent for by His Honor, who told them that he thought, perhaps they did not exactly understand what they had to consider. The prisoners say that they have been tried for the crimes alledged [sic] against them in this information; it is for you to consider whether they have or not.

The Jury again retired, and after a few minutes returned for the crown.

The prisoners were then called upon for their plea. Mr. a'Beckett said they were now considering their plea, and that all the pleas which were open to them before they took the ``demurrer'' were still open to them.

His Honor said they were. - M r. Therry quoted at some length, when Mr a'Beckett rose and said, he would save his friend his trouble, as the prisoners would at once plead not guilty.

The Attorney General rose to apply for postponement of the trial to Thursday morning, on account of the absence of Mr. Hobbs, a principal witness.

Mr. a'Beckett said that His Honor would observe that this affidavit was exceedingly vague. The Attorney General was well aware of the time the trial was coming on, and ought to have had his witnesses ready. His Honor having been satisfied that there was a jury summoned for Thursday, did not know how he could resist the application, but Mr. Hobbs certainly ought not to have been absent.

See also Australian, 29 November 1838; Sydney Herald, 28 November 1838.

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

CJA, 4/324, 30/11/1838

LOCK JAW. - **DANIEL KELLY**, who last Sunday week was seriously ill-treated by two men, one of whom (**SIZE)** bit his thumb, died on Sunday last, of Lock Jaw, occasioned it is said by the bite. A Jury was convened to hear evidence on the death of the deceased, when a Verdict of manslaughter was returned against **SIZE**, who already stands indicted for a robbery upon deceased.

SUICIDE. - Captain **[DAVID W.] O'HARA**, of the 50th Regiment, put a period to his existence on Monday evening, by shooting himself through the head with a pistol. It is reported that the unfortunate man, has for some time past been in a desponding state. A Jury sat upon the body of the unfortunate Officer on Tuesday last, when a Verdict of Insanity was returned. His remains were interred with Military Honours on Wednesday afternoon, the procession moving from his late quarters at 3 o'clock P.M., the Band of the 50th playing the *"Dead March in Saul."* Most of the Officers of the Regiments in Sydney followed; among whom were Colonels **SNODGRASS** and **WOODHOUSE,** Captain **HUNTER,** Major **JACKSON**, Commodore **DU PETIT**

THOIRE, and several Officers of the French frigate *Venus*, besides many Officers of H.M.S. *Pelorus*.
SUPREME COURT.
Friday, November 30. Before their Honors the three Judges.
The Court being opened, the following prisoners were called up for sentence:
JOHN FINN, for wilful murder, death.
PETER FLINN, for manslaughter, to be transported for life to a Penal Settlement, and never to be allowed to return.
THOMAS HOLDEN, for murder of his wife, death recorded, with a recommendation that the sentence be commuted to transportation for Life to a Penal Settlement.
WILLIAM M'LEAN, for manslaughter, to be transported to a Penal Settlement for life, and never to return.

AUSTRALIAN, 01/12/1838
Burton J., 29 November 1838
THURSDAY. - Before Mr Justice Burton.
On the opening of the Court, when the Registrar called over the pannel, the following Jurors were severally fined for non-attendance, Messrs William and Robert Jenkins, Richard Kemp, William Kerr, James Kay, William Kearnes, Alfred Kennerly, Francis Kenny, Isaac Levy, Thomas Lockeyer.

The Attorney General observed, that out of the pannel of 48, only 28 remained to chose out of, and he begged that the Court would impose the highest fine on the absentees.

The Court did not think this a case which particularly called for the indiscriminate imposition of the highest penalty; and it did not think that imposing the highest penalty would bring the parties to the Court that day to remedy the inconvenience.
The Attorney General said, that although it would not remedy the evil then, it would prevent a similar evil occurring in the future. The fine generally imposed was so small, that persons in any kind of business, would sooner forfeit the penalty than attend. He had frequently urged the necessity of extreme fines on the Court; and on his last complaint, Mr Justice Willis had stated that in future he would enforce the highest penalty.

The Court then ordered that the several parties who had been fined in the mitigated penalty, on calling over the pannel, should be severally fined £10, and that I should be notified that this cause would, in future, be in general operation.

The Attorney General then suggested, that as the pannel was so low, the sheriff's officer could call on the parties who lived in town, and compel their attendance, as it was more than probably that a jury would not be returned after the prisoners had exercised their right of challenge.

The prisoners Charles Kilmaister, Edwards Foley, James Oates, John Johnstone, William Hawkins, John Russell and James Parry, were put to the bar.

The Jury were then called to be sworn, and the following jurymen were challenged as they came to the book: -- William Jones, blacksmith; William Knight, publican, Sydney; Henry Linden, publican, Sydney; and William Johnstone, publican, Sydney, by the Crown; and Samuel King, shopkeeper, Sydney; N. L. Kentich, Sydney; Henry Lane, shopkeeper, Sydney; Edward Lord merchant; Joseph Luke, boatbuilder, North Shore; John Knox, cabinet-maker, Sydney; Andrew Liddle, Sydney; Edward Lee, merchant; William Love, landholder, Concord; Solomon Levien, hotelkeeper, Sydney; John Lamb, merchant; Saul Lyons, shopkeeper, Sydney; Richard Lynch,

shopkeeper, Sydney; William Lee, shopkeeper, Sydney; James Kay, brewer; Parramatta; and William Longford, boatbuilder, Sydney, by the prisoners.
The pannel having been gone through, the four jurors challenged by the Crown were returned to the box, and the following jury were sworn to try the case:--
George Sewel, of Sydney, foreman; Francis King, soap boiler, Sydney; John Little, publican, Sydney; Richard Leeworthy, tailor, Sydney; Benjamin Lee, landholder, Parramatta; Edward Hyland, landholder, Richmond; Alexander Long, publican, Sydney; William Knight, publican, Sydney; and William Johnstone, blacksmith, Pitt Town.

On Mr. Henry Linden coming to the book, the Attorney General asked him whether he had not openly expressed an opinion on this case. His Honor would not allow the question; it was not fair, neither was it constitutional.

Mr William Humphries was called by the sheriff as a talesman, and the Attorney General having ascertained that he had been on the jury on the former trial of the prisoners, said ``you may walk off,'' which expression the Court immediately checked, as casting an unnecessary reflection on a juryman.

The Registrar then charged the jury with the prisoners, and read through the indictment which contained twenty counts, as before stated, charging the prisoners with the murder of a black aboriginal child; the counts varying the person of the child, as a male, and a female child to the Attorney-General unknown, and as a black aboriginal named Charley. The information charged the murder at having been committed by shooting with a pistol, cutting with a sword, and beating, casting into a fire, and keeping the child there until death ensued, to which the prisoners pleaded not guilty.

The Attorney-General opened the case. They had (he said) already been put on their trial for murder, but for a totally different offence to the present charge; that point had already been decided by a jury of the country. This case was a peculiar one and he was aware that considerable feeling and excitement had prevailed in the public mind on the subject; and on this head he might receive blame, for not having, at the close of the last trial, obtained an order from the court to prevent the publication of the trial before the matter was finally terminated, as well as the comments that appeared in some of the public prints. That order, however, not being given, the trial appeared fully in the public prints and was commented on generally by every portion of the press according to their different opinions of the case. He did, however, hope that the jury came into the box uninfluenced and unbiased by any feeling but that of a determination to strictly observe the oaths they had taken, and conscienciously [sic] perform that duty which the stern justice of the country, and the sacred obligation of their oaths demanded at their hands. It could not be concealed, as it had already been disclosed in evidence, that twenty-eight human beings had lost their lives in a manner which was sufficient to move the most hardened and obdurate heart; it was not his intention, nor was it his wish to bias them against the prisoners, now put on their trial, but it was his duty as well as his custom to bring before them the enormity of crime, and to paint it in its most debasing colors. The vengeance of the law only fell upon the guilty, and if the crime now imputed to the prisoners was not brought home to them by the clearest evidence, he did not expect a verdict at their hands, nor did the law expect it. (The learned Attorney proceeded to state the circumstances of the case.) There was one circumstance, which had come out since the former trial which would clearly implicate Kilmaister, and shew that he, at any rate, was actuated by malice, in the share he took in the matter; it was his having, when spoken to of the motives which could have induced him to commit such a deed, replied that if it was

known what the blacks had threatened to do to him, he would not be blamed. On the former trial eleven persons had been arraigned, and the jury would observe that seven only of the eleven, were now called to answer the present indictment and it would be competent for the prisoners to put those four persons into the box, to relieve them from the charges of which, having all been in company, they could not be ignorant; and, if they did not avail themselves of this, it would be presumptive proof of their guilt, as they might have called those who were present, to establish their innocence. He could not avoid declaring that the thanks of the country were due to Mr Day, the police magistrate, for the vigilance he had exercised in tracing this barberous [sic] murder; and they were doubly due to him, as he had every obstacle thrown in his way by those who ought to have assisted him, and was strenuously opposed in the performance of his duty. But notwithstanding the unworthy opposition he received, he had fearlessly performed that duty, and had, although not without great difficulty, collected proofs which he (the Attorney-General) thought, placed the matter beyond doubt. As he before observed, there was no doubt but that great prejudice existed in the public mind, on this matter, but he trusted that the jury would cast all from their minds, and return a verdict on the evidence which would be laid before them, to satisfy their consciences, and the justice of the country.

The following witnesses were then called.

Mr Thomas Foster, superintendent to Dr. Newton, was called, and gave evidence precisely similar to that contained in the report published in The Australian of the 17th instant.

Mr William Hobbs, also gave similar evidence with one or two exceptions; and continued: I knew a little boy named Charley whose father was called Sandy, and they both were with the party of blacks I left at Myall Creek, when I proceeded to the Big River; he was a very familiar and a forward boy for his age; I know his mother who was called Martha, and they were all at my station when I left. I saw the foot-marks of persons who appeared to have been engaged in rolling logs to the fire; they were not cut logs, but dry timber; I found a basket such as is used by the blacks, on the road between my station and the fire; it contained various articles such as are carried by the blacks; it contained a piece of opossum skin, some pipe clay, which they use for painting, some belts, and some small crystal stones which the blacks set great value on; I have been told they worship these stones, and consider they possess a charm to cure them when they are sick.

Cross examined by Mr Foster. - I know that depredations had been committed by the blacks some time before this, but further down the river; and I recollect Kilmaister saying that he thought it was a good gob that the blacks had come to the station, so that he could make friends with them; I did not say in my evidence, although I set it in the public prints, that Mr Foster stopped only a minute at the fire. By saying that the bodies and sculls were in the same state when I went with Mr Foster, as they were, the evening before when I examined them alone; I did not mean with reference to the number of bodies, but to their state generally; I was close enough to see them; there was no fire, either on my first, or my second visit with Mr Foster; unless a person went close up and stirred about the ashes, he could not see the bones and sculls so well as I did; Mr Foster went closer to the fire than I did on my second visit; I will not swear that he did not remain ten minutes at the fire; on my first visit, I examined them very minutely, and I judged from the sizes of the heads and sculls as to their being children or adults; I left from forty to fifty blacks at my station when I went to the Big River; I think there were more, but I may safely say from forty to fifty; I cannot swear that the forty or fifty I left are not living in any other part of the Colony,

but I am quite sure they are not; I had a conversation with Mr Cormick at Mr Eaton's station relative to the murder; Parry was there, but I did not like to speak directly to him; Mr Cormick was begging me not to report it; I spoke to Parry of the matter about twenty minutes after, when Mr Cormick had left; he said he was sorry for it; I do not exactly know what Myall means, but I believe it is the name of some wood; I do not not [sic] know that the term Myall Black means a savage ferocious black.

By the Court. - It was distinctly to be seen that the remains were those of blacks; the flesh in many parts remained on the bodies.

By the Attorney General. - I believe those blacks belonged tot hat particular district; Davy's brother who was named Billy, and came to my station after the murder; I do not think from the general habits of the blacks, that they would be allowed to go into another district.

By the Court. - The basket of things I found were not likely to be left by them, of their own accord; I also saw several other baskets that had been left by them at their camp; they all contained the articles generally used and carried by the blacks; I have always understood they worshipped the crystal stones, and I have seen a great many with them; I have got some of those left myself; I also found a Scotch cap, which an old man named Joey wore; it was a good cap, and had been given to him by a white man; when they were at my place, I used to give what food I could spare, and they went out every morning hunting, and returned at night with opossums, and other food enough to keep them; I found no food at the camp.

Mr E. Day, Police Magistrate, at Muscle-Brook, gave nearly the same testimony as on the former trial, and added: I took Anderson under my protection, in consequence of the important information he had given me, and his being in an unprotected state. In the course of the examination, or rather at the close of the examination, and just as Kilmaister was leaving the room, I said that I was more surprised at Kilmaister than at any of the others on account of his great intimacy with them, when he turned round and said, ``If you knew what they threatened to do to me, you would not be surprised." I did not make any further remark at the time; I did not state this on my former examination, but when the Chief Justice was summing up, I recollected the circumstances, and told the Attorney General of it at the time.

The Court keeper was called on to produce the bones found at the fire which had been in his custody since the last trial.

George Anderson, assigned to Mr Dangar, and hutkeeper at the Myall Creek Station, and John Bates, an assigned servant to Mr Dight, of Richmond, were examined, and the former underwent a tedious and very strict cross-examination, but did not waver from the evidence he gave on the former trial.

Dr Robertson, colonial surgeon, examined the bones produced, and pronounced them to be human bones; the rib bones, apparently that of a boy six or seven years old; the teeth were also human, but although there was a great difference in the formation of the bones of white and black people, he could not undertake to swear that they were the bones of black persons.

Robert Sexton sworn (this witness was not examined on the former trial), I am assigned to Dr Newton, and was at the station in June last, when a party of horsemen came to the station; my master was not at home; they were all mounted, and I knew Johnstone, Hawkins, Russell, Oates, Kilmaister, and a man named Lamb, who I do not see before the Court; they asked John Bates if the blacks were there, and he said no; they remained a few minutes, and rode off, saying, they were going to Mr Hall's station, which is eight miles distant; this happened on the Saturday, and on Sunday Mr Foster came home and brought some blacks with him, but after they had stopped half

an hour or an hour, they went away again; Mr Foster told them to go away, because the party were out looking for them; on the Monday morning following, the same party, with two others, came to the station; they gave me a black gin, and said I was to take care of her until some one called for her; the overseer (Mr Foster) would not let me keep her, and they took her away and went over to Mr Dight's station; Hawkins asked if the blacks were there, and when told no, he said it was a bad job they were not, and that they were driven away in order that they should not be caught; a few days after, when I went up to Mr Hobb's station, I told Kilmaister it was a bad job about the blacks, and he said yes, but he was all right.

Charles Reid, a ticket-of-leave man, gave evidence to the same purport as on the former trial, and added; I saw the place where the murder was alleged to have been committed, and saw bodies and heads lying about, but I walked away as quick as I could; Kilmaister appeared very angry when I spoke to him about it; the blacks are generally treacherous, but this tribe was particularly peaceable, and had been about Mr Wiseman's and Mr McIntyre's stations for some time.

By the Court. - This tribe was backwards and forwards from one station to another, and they had the name of being always in the district and very peaceable; a month or two before this happened, I saw them at Mr McIntyre's station.

The Attorney General proposed to call Mr Hobbs to speak as to Anderson's character, which had been impeached by the Counsel for the defence; but His Honor said it would be open for the Attorney General to do so at a future stage of the proceedings.

Mr Foster re-called by the Court. - It had rained about the time of the murder; I think it rained on the Saturday I reached Mr Dangar's station, but I don't think we had any rain on the Sunday.

Mr Hobbs re-called by the Court. - I believe that tribe of blacks to have been about Mr McIntyre's station seven or eight months; it must have been known that I was going to the Big River, ten or twelve days before I started, because I was collecting the cattle for that purpose, and I said that as soon as I could get one herd in, I should go.

This was the case for the prosecution.

Mr a'Becket contended that there was no evidence of the murder of Charley, to which the jury must confine themselves, nor was there any thing amounting to probability to put to the jury; for although he did not pretend to deny that circumstantial evidence was sufficient to establish case, as it was not always possible to get direct evidence; yet there must be some probability in the circumstances, which should be connected, and corroborated by the different facts. In this case the evidence was so loose and vague, as regarded the murder of Charley, (and that was the offence charged against the prisoners,) that it could not be put to the jury. The first point to be determined, was whether Charley had been killed, and what evidence was there that he was not now alive. It was distinctly laid down by Lord Hale, that no conviction should take place, unless the body was found, or on the testimony of an eye witness to the commission of the crime; and a very remarkable case was reported in the books, which proved the extreme caution necessary in determining a case of murder. A sailor was heard to say that he would kill his captain, and asked one of his brother seamen to assist him, which he refused to do; in the night, the sailor who had been asked to assist, heard a noise, and on going on deck, he saw the other sailor throw the captain overboard, but at the same time there was a billet of wood lying on the spot where the captain was, and the deck and the sailor's clothes were covered with blood. The man was convicted upon this evidence, and executed, although the body was not

found. But here there was a conclusive hypothesis; the jury were satisfied that the captain had been murdered before the body was thrown overboard, otherwise the authorities quoted would have entitled him to an acquittal; but that case was not like the case quoted on the trial, which was that of a child, which was thrown into the sea by its parents, and because it might have been drifted by the flow of the tide, and have been picked up, or otherwise saved, the parents were acquitted; and he (Mr a'B.) contended that the present was a much stronger case than that, where the alleged murdered person was a savage roving amongst his native hills and dales, and who might not be seen by any human being except his own tribe for years. He contended that proof of the corpus delicti was essential; it could not be disregarded; it was the very substance and essence of the offence, and without such proof (and none had been given in the present case) there could not be a case for the jury. If the jury had any doubt of the murder of Charley, except that of the man Anderson, who, although he saw him at the hut, did not see him go away with the party. He would quote another equally strong case, which showed the great caution which ought to be exercised before a conviction for murder took place, and in which the law was clearly laid down by Lord Hale, that no conviction should take place unless on view of the body, or the evidence of an eye witness of the fact. It was the case of a child, who was heard to say ``good uncle, don't kill me;'' the child was directly after missing, and the uncle was called on to produce the child by a certain day. In terror he procured a child of the same age, and greatly resembling the child missing; but the imposture being detected, he was put on his trial, convicted, and executed. Some time after, when the child became of age, it appeared to claim some lands, and it then appeared that on account of harsh treatment, the child had absconded. Upon all these authorities, he though the Court would pause before putting to the jury a case (which was much less supported than those he had quoted,) upon the principle that the mere abstract fact of the coincidence of an hypothesis could be arrived at. Now, in this case, he contended that not one only, but many reasonable hypotheses could be arrived at. He would put one case - This tribe might have gone, as was stated, in company with the whites; had been met and attacked by another body of blacks, and left in the way described; and were these men, merely because they happened to be in their company some time before, to be put on their trial for murder? However, many other and stronger cases might be put, but he contended that as this was a case dependent merely on vague circumstantial evidence, if any other case could be suggested, it must altogether fail.

Messrs Foster and Windeyer followed on the same side and exercised great ingenuity in argument.

His Honor said that he was of opinion that there was a case to go to the jury, but he should exercise great caution in putting it to them, and should pay due attention to the argument of counsel.

Mr Henry Dangar was then called for the defence. He gave Kilmaister an excellent character, and stated that he would not believe Anderson on his oath, on account of his being greatly addicted to telling lies, and on account of his general bad character.
Cross examined by the Attorney General - I never saw Anderson take an oath, and I would not believe him on account of his bad character; he was under my immediate superintendance [sic]; he was a shepherd and had religious instruction, at least, I had prayers every sabbath day at my house; he was a shepherd; he was at prayers every sabbath when I was there; I had occasion to take him to court; I made two charges against him - one for absence from his station, and another for not removing his hurdles; he got fifty lashes for each offence; they both occurred at the same time; he could not move his hurdle when he was absent; he was at court once before, but I

forget the circumstances; I don't mean to say that I would not believe a man on his oath because he neglected his business; he was two years at Patrick's Plains and I was about three miles from the bench of magistrates; Mr Hobbs said he was a cleanly man, but he could make no hand of him as a shepherd; I received a letter from Mr Hobbs a few weeks after the murder happened; by the time I had received Hobb's letter, I heard that Mr Day had received orders to proceed and enquire into it; I did not discredit Mr Hobb's statement that the blacks had been killed; sometimes letters are six or seven weeks getting down; I might have been three or four weeks after the murder I received Hobb's letter; I asked Mr Day to recommend me in the proper quarter, that I should get a substitute for Anderson; if he had remained in my employ, I should have had to send him to a distant station, and I was fearful to do so; I was at the station after Mr Day was there; I did not believe Anderson's story; Mr Hobbs told me that he had seen twenty-eight bodies there; I did not altogether credit that there were so many, because Mr Foster's story was different, and he did not see so many; I enquired particularly of Mr Hobbs if the bodies were in the same state and numbers, as they were when he had seen them; I don't recollect him stating numbers, but he said in all other respects; another complaint against Anderson was about a cart; I did not see that myself but depended on the evidence of an overseer, named Ross, and I did not make the complaint against him; I was suspended from a public office, and I heard no more about it.

The Attorney General. - Were you not dismissed from your situation?:

Mr Dangar. - I was suspended.

The Attorney General. - Were you not dismissed. I say sir? you know what I mean.

Mr Dangar. - I was suspended.

The Attorney General. - Answer me without equivocation, sir! Were you not dismissed, and not suspended, as you want us to believe?

Mr Dangar addressed the Court, to know whether he was bound to answer that question.

Mr Justice Burton replied that he was bound to answer the question.

Mr Dangar (in continuation). - I was a surveyor; I did not ask to be reinstated; perhaps the Secretary of State might have given orders that I was not to be reinstated; perhaps I received a public intimation; it is ten or twelve years ago, and I don't recollect the contents of a letter of so remote a date; I was suspended.

His Honor Mr Burton - Mr Dangar, if you were not dismissed, you can have no hesitation in stating so without equivocation.

Mr Dangar - A suspension was tantamount to a dismissal. The Governor ordered my suspension, and perhaps the Secretary of State might have ordered that I was not to be reinstated; I would dismiss one of my servants for shooting a black man; on my oath I would; Mr Hobbs is not to remain in my service; his time is expired.

Mr Justice Burton - When an answer is given to a question, it is to be fully given without reservation. Was that the only reason of his leaving your service.

Mr Dangar - No your Honor, and I was going to add, he has not given me satisfaction in the case of my property; that is the only cause; I never did express any dissatisfaction at Mr Hobb's conduct in this case; I expressed my dissatisfaction at his keeping me in town the other day; I never told him nor any one else that I was dissatisfied at his bringing this case forward; if this case had not happened, I would have discharged him; I had an intention, six months ago, of putting an end to his agreement, but I did not state so to him; he has been with me two years; I believe his term expired in October, and I gave him notice in October; I don't know to 500 head of cattle, how many I possess; I made up my mind six months ago to discharge him; I

communicated that determination to my own family, but not to him; when I was going up to my station the last time, I stated to Mr Day that I was well pleased with Mr Hobbs; that was in September, a month before I gave him notice that I would terminate his agreement; I did not tell Mr Day that Mr Hobbs was a man of truth; I said that Mr Hobbs was a respectable young man, and I was very glad Mr Day had found my station so regular; when Mr Hobbs agreed for a year, it was not imperative on me to give him notice; if he had asked me, I should have told him; I did not come in contact with him in the second year as I did the first when I renewed his agreement; I was about the Court this morning; some person told me he was arrested, but I did not know that he was to be arrested; I did not know that there was a scarcity of jurymen, and I swear I did not speak to any one, advising him to come here to get on the jury; I did not ask any one why he did not sit on the jury; I did not say to any one ``why did you not sit on the jury, and why did you refuse;" I swear I did not use these words before Mr Fisher, the Crown Solicitor, and Mr Justice Willis; I do not defray the expense of the defendants; I subscribed £5 in the month of July or August to defend my servant, who is a faithful one; it was simply because Kilmaister was my servant that I subscribed; I won't swear that I would not have subscribed if he had not been my servant; I subscribed before I heard the particulars of this matter; I gave Mr Hobbs notice two or three days after I got up to my station, or may be the next day; I spoke to Mr Ferris to-day; I said to him, ``you have made haste back from the Hunter;" I saw him going off by the steamboat, and I was surprised at seeing him back so soon.
By Mr Foster - I considered it my duty to see my servant defended; I was suspended for purchasing a piece of ground from a grantee, sooner than the government regulations admitted; it was a common practice at that time; my Surveyor General did the same; there was another reason assigned for my suspension, which was the misappropriation of land; that was not true, and was set right by the Surveyor General at the time. That is the great moral offence I committed; the reason why I would not believe Anderson on his oath, is his general habit of lying.

By the Court. - Mr William Dunn was the grantee of whom I spoke; the land was selected at Invermein - 800 acres; this was an additional grant for meritorious services; I bought the order for appropriation, before it was granted to him; I selected the land with his concurrence, he did not select it himself; I gave him five shillings an acre for it; the misappropriation charged against me was not that, but in measuring some land for my brother; Mr McIntyre did make a complaint against me; the man, Finney, who was tried for the murder of Mr McIntyre, was an assigned servant to my brother; it was at the Namoi River, in the same direction as the Big River.

Mr T. S. Hall was called and gave Oates a character.

Mr William Hobbs recalled. - I have been superintendant [sic] to Mr Dangar at the Big River; Anderson was under my immediate controul all the time I was there, except a few weeks when he was punished; I had no reason to doubt his oath; from his general character I should believe him on his oath; he was as good a servant as ever I met, and as good as Kilmaister in his station.
The case closed here.

Counsel on either side argued at some length on objection in law, which, as the points are to come on for the solemn decision of the three judges, when they will be fully argued, we have not given.

His Honor said that he would make a note of the objections, and reserve them for the decision of the full Court.

At eleven o'clock His Honor commenced summing up. Before he went into the particular facts that had come before the Court in evidence, he wished to impress on

the jury the situation that they and himself were placed in, and he thought that by imparting to them what was passing in his own mind, there might be found a consonance of feeling on the subject. There was no doubt but a great crime had been committed, and the prisoners were charged with having committed it. They had been told that opinions had been formed, and inferences drawn from what had appeared in print, but the jury were, in the solemn situation in which they were then placed, between God, their country, and the prisoners, separated from the community; and they, as well as himself, were bound to hold themselves responsible to God and their country, and not to public opinion. The very form of the indictment, which stated the crime to be against the peace of God and the Queen, shewed that they were equally under the protection of God and the law, and the tribunal before which should be supported by solemnity, and its operations conducted with a rigid regard to the laws of God, and the laws of the country. He knew how pleasant it was to have the good will of friends, and of the public, but in the consciencious [sic] discharge of the duty now imposed on them by the solemn oath they had taken to administer justice, they must discard all private feeling, and guard against the semblance of being biased by any consideration. There might have been persons who had endeavoured to influence the public mind on either side of the case; they were not however to be moved by the opinions of either party, but to do their duty to God and their country, as they were sworn to do so. Seven persons were charged with he murder of a human creature, and the circumstances of the case presented a fearful barbarity which perhaps had rarely been equalled; several persons had been tied together and shot, and cut and burned, in the most barbarous manner, and for one of these murders, the prisoners now called to answer. The information contained twenty counts, varying the offence which had been considered necessary by the crown officers, and a good deal of solid argument had been addressed to him, from which he was strongly inclined to think that it was one and the same offence. The offence here was confined to the murder of children and the impression upon his mind then was, that the prosecutor should be restricted to evidence of the murder of Charley, on the principal that a party should not be put on his trial for two offences at the same time; and he should take on himself t direct them that in the first instance they must apply their minds to the conclusion that Charley alone; if they arrived at the conclusion that Charley had been killed and that the prisoners were the parties implicated in the murder, they would find on the last five counts, and they would be relieved from the consideration of the other counts but if they did not find that fact, then they would apply their minds to the other counts which charged the murder of a black child unknown, and he would reserve the point taken by Counsel for the decision of the full Court, so that the prisoners might have the benefit of their solemn decision. Before he read through his notes in full, which he should feel it his duty to do, he would select such parts of the evidence which appeared to him to bear particularly on the case (His Honor then made lengthy extracts from the evidence, contrasting the various corroborative circumstances). With respect to the evidence of the man Anderson, it had been impeached strongly by Mr Dangar, who from some frivolous cause had stated that he would not beleive [sic] him on his oath; but if it were allowed that men charged with some trifling disobedience of orders or neglect, were to be incapacitated from giving evidence, he was fearful that many crimes, and murders amongst the number, would go unpunished. However, they had heard Mr Hobb's character of Anderson, and they had also heard Mr Dangar's reason for impeaching the credit of Anderson; they had heard circumstances relative to the misappropriation of land, and they had seen the manner in which Mr Dangar had conducted himself in the box, and it was for them to

judge whether Anderson's testimony had been impeached, or whether Mr Dangar's testimony had not rather been impeached by himself. At all events, Mr Dangar had shewed the bias of his mind; he had shewn that his opinion had already been formed, and that he came before the Court prejudiced. In this case, it was clear that a human creature had been slain, and he hoped he need not impress on their minds that it mattered not, in the sight of God or of the law, whether that creature had a white or a black skin; they were equally liable to the protection of the law, and he could not help noticing (and he had waded through the evidence to find it if possible), that in this case there had not been the shadow of provocation given by the unfortunate blacks. If the pecuniary interests of gentlemen required that their servants should go armed, it ought to be impressed upon them that nothing but extreme necessity would warrant their using those arms against their fellow-creatures; and if the community ever became so depraved, that lives of human creatures of so little value, that it was to be supposed that the blacks night be indiscriminately killed, wherever they were seen, then, he said, that it was no wonder that the Colony should be visited by the displeasure, and heavy visitations of God. If outrages had been committed by other blacks down the river, this tribe had been represented as peaceable; they were in constant contact with the whites, and were peaceably encamped for the night, when they were led away to slaughter.

His Honor read through the whole of his notes, and left the case with the Jury, upon his former exposition of the law.

The Jury retired at a quarter past one o'clock, and returned into Court at two o'clock, when the foreman delivered a verdict of Not Guilty severally as the names were called by the clerk.

A Juror stated to the Court that the foreman had made a mistake, and had not delivered the verdict of the Jury, which was Guilty on the first five counts - Not Guilty on the other fifteen counts.

This verdict was recorded, and the prisoners were remanded.

The Court adjourned at two o'clock, until twelve o'clock on Friday.

See also Sydney Gazette, 1 December 1838; Sydney Herald, 3 December 1838. The Sydney Gazette gave the longest account of the evidence and of the speeches of the Attorney General, but the Australian gave a much better summary of the judge's summing up. The Herald, which had acted disgracefully in attempting to influence the juries to acquit, gave only a very short account of the actual trial.

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

SYDNEY HERALD, 03/12/1838

Dowling C.J., Burton and Willis JJ, 30 November 1838

THOMAS HOLDEN, convicted before Mr. Justice Burton, of the murder of his wife; His Honor, after recapitulating the whole of the circumstances of this case, said that the prisoner's living at a distance of a mile and a half from any neighbour, had prevented him from having the benefit of any evidence which might have induced the Jury to find him guilty of manslaughter only instead of murder; had the prisoner not have told so many different stories about the transaction, and confessed himself to what the Judge felt convinced was the truth, that he (the prisoner) struck his wife in consequence of some quarrel, he had no doubt the verdict of the Jury would have been different. These opinions he had laid before his brother Judges, who concurred with him that he would be justified in saving the prisoner's life, and he should therefore order sentence of death to be recorded against him, and he would be transported to a penal settlement for life.

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

CJA, 4/325, 04/12/1838
SUICIDE. - A Mrs. **BURTOFT**, better known as **WIDOW BROWN**, lately residing at the corner of Park and Castlereagh-streets, put a period to her existence on Saturday afternoon last, by throwing herself into the Harbour, near Lady Macquarie's Chair in the Domain, during a temporary fit of mental derangement. It appears that the deceased attempted to cut her throat some time ago, in consequence of her not being sure of the fidelity of her spouse, a man, young enough to be her grandson. He was bound some time ago to keep the peace towards her at the Police Office, for threatening to throw her down a well.

SYDNEY GAZETTE, 06/12/1838
Dowling C.J., Burton and Willis JJ, 5 December 1838
Before the Judge - In Banco.
The prisoners convicted of the murder of the Blacks at Liverpool Plains were called upon to shew cause why sentence of death should not be passed upon them.
Judge Burton said that the point reserved for the consideration of the Court was, whether the prisoners could be tried for separate murders on the same indictment.
Mr. a'Beckett would confine himself to that point, but he submitted to His Honor that he might take any objections to the state of proceedings at present.
His Honor said that the learned gentleman might take any objections which appeared on the face of the record only.
The learned gentleman proceeded to take the same objections as on the former occasion, when the point was argued before a jury. His Honor observed he had not reserved that point for his brother judges, but he would communicate it to them now. His Honor having done so, said he had truly stated the point to his brother judges, and it was for them to state whether any objection could be made.
The Chief Justice gave it as his opinion that this could not be allowed, it would amount to an application for a new trial, and would very much shake the verdict of a jury who returned that verdict after a mature consideration of the whole of the evidence. Mr. a'Beckett quoted a case to shew the power of the Court to reprieve before judgment, and lay the case before the King. Mr. Justice Willis said, that if the Court were of opinion that it was at all necessary they would always hear counsel's arguments.
Mr. Justice Burton again stated that he had not reserved this point for the consideration of his brother judges, but he had already communicated it, and if necessary he would again advise with them; the second duty of man was, after trying to avoid error, to correct any previous error; but were the present application allowed it would shew too much laxity. The Court decided the case and the jury the fact, and that decision of a point put to the jury was unexceptionable.
Mr. a'Beckett was anxious to know what the point was confined to; it was not argued that there were two separate murders. His Honor stated that he should confine the evidence to Charley, and thus the prisoners now were convicted of one crime, while they had been defending themselves against another charge.
His Honor Judge Burton stated the manner in which he had put the case to the Jury. The prisoners were at liberty to call any evidence in their defence when the prosecutor's case was concluded, but they did not even propose any more than that which was heard.

Mr. a'Beckett said they had not given evidence because they thought the case confined to Charley alone, or they might have proved that the parties said to be unknown were in fact known, and the prosecutor was not put to his election.

Mr. Justice Burton said he had before stated his opinion that the objection as to ``election'' was not tenable.

Mr. a'Beckett urged that the prisoners were virtually put to their election, and confined their defence to the case of Charley.

Judge Burton said the only point for the consideration of the Court was whether the prisoners were properly convicted having been acquitted of one charge and found guilty on another in the same indictment.

Mr. Justice Willis read the law of the case, and observed that this was one transaction, and the law being thus laid down would save time.

Mr. a'Beckett said that in that case the prisoners might be tried 100 times for as many persons unknown, and not in any one case have the benefit of an ``autrefois acquit.''

Mr. Justice Willis said that if the prisoners had been tried for the murder of one black and acquitted, and afterwards tried for the whole number said to have been killed, they would of course be again acquitted, as no man can be tried twice for the same offence.

Mr. a'Beckett said he was now shut out from an objection which he should have made at the trial if he had thought the evidence was to be applied generally.

Mr. Justice Burton said that the counsel for the prisoners took each their turn to address the Jury on this point.

His Honor the Chief Justice said that the consideration of the Court must be confined to the point reserved.

Mr. a'Beckett gave up this point, but submitted that the indictment was not sufficient to go to the Jury.

His Honor the Chief Justice said the prisoners had already had the full benefit of that objection. It had been solemnly discussed and decided.

His Honor Judge Burton having ordered silence to be observed proceeded to pronounce sentence: -- Prisoners at the bar, you have been found guilty of the crime of murder by a jury of your countrymen. A point was reserved for consideration in your favor; by abandoning that point your counsel have confirmed the impressions which already existed in the minds of the Court. You have all been sent to this colony for some crime committed at home; you have all lost your liberty for some cause or other, though some of you have since regained that liberty by service; you are well acquainted with the law which says, that whoever is guilty of murder shall suffer death. This law is no conventional law, no common rule of life formed for human purposes; it is founded on the law of God, which was laid down of old - ``Whoso sheddeth man's blood, by man shall his blood be shed.'' - No human legislature could dare to depart from a law originating in the Deity, which has existed in its full force since the days of Adam. The atrocious circumstances attending the crime of which you have been found guilty, must have convinced you long ere this of the result which must soon follow the conviction. This is not a case of that description which has so indelibly stained the annals of this colony; there was here no drunken brawl, when the blood of the murderer and the exciting poison mingled together on the ground. There was here no provocation; no cause for anger. Men, women, children, even babes hanging at their mothers' breasts, not less than 30 altogether of these unfortunate defenceless blacks, who were quietly reposing by their evening fire, believing themselves safe in the friendship of one of you, were suddenly surrounded by a party

of horsemen, and when shewing their full reliance on the former professions of that man they rushing to his hut for protection, in blind hope for safety into the net which had been prepared for them. In the midst of their cries and groans, and sighs and tears, they are bound by a cord and led to slaughter. These remarks are not made to add to the pain which you must now experience, they are made for the benefit of standers by. I sincerely hope that the grace of God may reach and penetrate the hardened hearts that could surround a funeral pile lighted by themselves, and gloat on the tortures and sufferings of so many of their fellow beings. Great pains had been taken by you, or by some one deeply interested in the concealment of your crimes, to remove every vestage [sic] which might tend to clear up the mystery of their fate. But Heaven was cognizant of the crime, and sent its attesting witnesses. The day before the murder was committed a shower of rain falls, and the ground so softened received the tracks made by you on your road to the scene of slaughter. The birds of prey darkened the clouds over the spot, and who would not be attracted by such a sight; a man would seek whether it were an ox or an ass that thus enticed the ravenous hordes. From Dr. Newton's to Mr. Dangar's, and from Mr. Dangar's to the fatal spot were found your guilty tracks, thus affording the strongest corroboration to the evidence against you. This crime, again, has not been committed without the greatest consideration and premeditation; all the plans were carefully laid; days before you were seen, some 8 or 9 of you, at some distance from Mr. Dangar's preparing yourslves [sic] for the guilty consummation of your purpose. On the Saturday you went to Dr. Newton's; what was your errand? seeking out the unfortunate blacks; and on the Sabbath, that day which should be hallowed by all, you perform this incomparable act of cruelty as if to make the deed doubly atrocious. You know the English laws, and there must have been some moving cause, some hidden hope that your crime would be concealed by parties interested that urged you on. You have flattered yourselves vainly; and I hope that if there be any parties who were interested in its concealment, they will be discovered, for the law holds the life of the black as dear as that of the white. In doing my duty as a judge, I have my feelings as a man, and I do, in sincerely commisserating your unfortunate state, hope that no other motive than that set forth in the information has induced you to the crime. I do trust that it was the ``being seduced by the devil, and not having the fear of God before your eyes'' alone that urged you on, and that you have not been induced by the persuasions of others; for, if it be so, it will be brought to light, and they will receive their meed of punishment. At the distance you were placed, 15 miles from any police station, any interference or protection by law was rendered unavailable to you, and perhaps it was a great misfortune for you to be so placed. Whatever private feelings may exist, I must not allow them to interfere with the stern duty imposed upon me by law - and that is to award the sentence due to your crime, which is - that each and every of you be taken from this place to whence you came, and from there to a place of public execution to be hanged by the neck until you are dead, and may God have mercy on your souls.[*]

(Time will not admit of our giving more than the foregoing brief outline of Judge Burton's speech on passing sentence, during the delivery of which the judge was deeply affected - to tears. His Honor was listened to with the deepest attention by a crowded court; and we trust that the remarks which fell from the Bench will have the effect they were intended to produce on the audience - of showing them that the black man, like the white man, has a soul to be saved, and that any outrage on the former by the latter, will be as soon avenged, as would be an outrage on the white man by the black savage.)

The plans for retrying the other Myall Creek defendants came to nothing. The Sydney Herald, 7 December 1838, reported that ``John Blake, James Lamb, George Palliser, and Charles Toulouse having been placed at the bar, the Attorney General moved that their trials be postponed until next session. The affidavit of Mr. William Hobbs stated that a black boy, named Davy, told him that he stood behind a tree and saw the prisoners and others murder the blacks – that Davy is nineteen years of age, can speak English, and, in the opinion of Mr. Hobbs, might be sufficiently instructed so as to become a competent witness. The affidavit of the Crown Solicitor stated that it appeared by the depositions that Davy was a necessary and material witness for the prosecution. The learned Attorney-General alluded to several cases in which this course had been pursued. Postponement of trial ordered.'' See also Australian, 6 December 1838; Sydney Gazette, 6 December 1838. The Sydney Gazette noted that Davey would be instructed in the nature of an oath in the meantime. According to Roger Millis (Waterloo Creek: The Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales, McPhee Gribble, Ringwood, 606-608), the supposed failure of the attempts to instruct Davey were used as an excuse to drop the prosecutions against these four. The public hostility to the execution of the seven Myall Creek murderers had pressured the government to let the others free. See R. v. Lamb, Toulouse and Palliser, 1839.

[*]Governor Gipps reported this to Lord Glenelg on 19 and 20 December 1838: Historical Records of Australia, Series 1, Vol. 19, 700f, and 705f. In the latter, Gipps told him that he had omitted Robert Scott from the magistracy as a result of his advocacy of the murderers' cause. On 8 January 1839, Gipps told Glenelg that the gaoler, Mr Keck, had reported that all of the hanged men had confessed their guilt: p. 739. For the British government's views of the clashes between Europeans and the Aborigines, see Glenelg to Gipps, 21 December 1838, at p. 706.

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

AUSTRALIAN, 06/12/1838

Dowling C.J., Burton and Willis JJ, 5 December 1838

WEDNESDAY - The three Judges took their seats.

On the Judges taking their seats, Kilmaister and the other prisoners convicted of murder, were put to the bar.

The Attorney General prayed the judgment of the Court thereon.

Mr a'Beckett rose and stated that he believed he was called on to move in arrest of judgment; and as he was not in Court at the time the objections were reserved, begged that His Honor Mr Justice Burton would state what the real objections reserved for the decision of the Court were.

His Honor said that the objection taken was, that the prisoners having been acquitted on one set of counts, for the murder of Charley, they were improperly convicted on the other counts for the murder of a black unknown.

Mr a'Beckett said that he would confine himself to that point, but he conceived that he could take other objections to the record afterwards.

Mr Justice Burton said, that he could take objections to the record, but he must confine himself entirely to the points connected with the record. His Honor added that he had fully explained to his brother Judges, the nature of the objections taken on the trial, which he had reserved.

The Chief Justice said that he was of opinion that it was too late now to moot that point, as the question had, in point of fact, been put to a jury who had determined it by their verdict, which could not now be questioned.

Mr a'Beckett contended that if the verdict of a Jury was clearly contrary to the evidence, it was open for counsel to go into that point in motion for arrest of judgment.

His Honor Mr Justice Burton said that there was nothing in point, either of law or conscience, which would justify a reversal of the verdict, even if it was competent to

do so; he would, however, take opportunity of further advising with his brother Judges on the circumstances of the trial, on which he had been in some doubt, for he conceived it to be a most important duty for a Judge, after endeavouring not to err, to correct error when it was discovered. It would be attended with very injurious consequences, if the solemn verdict of a Jury was allowed to be impeached, after that verdict had been determined on the full development [sic] of the facts, and the statement of the law by the Judge.

Mr a'Beckett wished to know if he was expected to confine himself to the point as explained by His Honor Mr Justice Burton.

Mr Justice Burton said that the point to which Mr a'Beckett would confine himself was, the murder of two distinct individuals, at the same time, being charged in the same indictment, and the prisoners being acquitted on one, whether they could be convicted of the other.

Mr a'Beckett said that he had no doubt but that two or more felonies could be charged in the same indictment, and if he was confined to that point he would not take up the time of the Court.

After a lengthy argument, in which Mr a'Beckett tried to open the objection on the demurrer, in which he was stopped by the Court, as that point had already been argued and decided by the Court, proclamation was ordered to be made, and His Honor Mr Justice Burton having put on the black cap, addressed the prisoners:--

The prisoners had been found guilty on an information charging them with murder, a point had been reserved for the consideration of the full Court, and although the mind of the Judge did vary on that point, they had now had the benefit of its being argued by Counsel and decided by the Judges. The Law of the Land was that whosoever was guilty of murder should suffer death, and this was not a mere law of human convenience or human direction which was adopted, and could be rejected at pleasure, but the law of God, delivered by him when there were few human beings on the face of the earth, and was not addressed to a few but to all nations. The law given was imperative, and could not be altered. ``Whoso sheddeth man's blood, by man shall his blood be shed.'' He, (Mr Justice Burton) doubted whether it was possible for any human legislature to vary from this law given by God himself to the children of men, nor was it just that it should be altered. The circumstances of this murder were marked with singular atrocity, and he was persuaded that the prisoners, long ago, must have anticipated such a result to their trial. It was not a case of the murder of a single individual - it was not a case of death ensuing from violence committed in a drunken quarrel, many of which had been been [sic] tried this Sessions, when it appeared that blood had flowed, and intermixed with the damning liquor. This was not a case where any provocation had been given, which might have been pleaded in excuse for the deed - this was not a case where the property or lives of individuals had been attacked, and force had been resorted to, to repel the attack - the murder was not confined to one man, but extended to many, including men, women, children, and babies hanging at their mothers breasts, in number not less than thirty human souls, slaughtered in cool blood. This massacre was committed upon a poor defenceless tribe of blacks, dragged away from their fires at which they were seated, resting secure in the protection of one of the prisoners; unsuspecting harm, they were surrounded by a body of horsemen, twelve or thirteen in number, from whom they fled to the hut, which proved the mesh of destruction. In that hut, the prisoners, unmoved by the tears, groans, and sighs, bound them with cords, fathers, mothers, and children, indiscriminately, and carried them away to a short distance, when the scene of slaughter commenced, and stopped not, until all were extirminated, with the

exception of one woman. His Honor did not mention these circumstances to add to the agony of that moment, but to pourtray [sic] to those standing around the horrors which attended this merciless proceeding, in order, if possible, to avert similar consequences hereafter. He could not hope to reach, but he hoped that others would reach, that the grace of God would reach the hearts of men who could, without remorse, sacrifice fathers, mothers, and infants, in one swoop, without any cause for excitement. It appeared that extraordinary pains had been taken y the prisoners, or by some persons deeply interested in the concealment of their crime, to prevent the murder from coming to light; but it had pleased Almighty God to conduct a person to that heap of human remains, to be a witness of the scene, before the heap was taken away bit by bit, as it evidently had been, to remove every vestage [sic] of the murder. The crime was, however, committed in the sight of God, and the blood of the victims cried for vengeance: the carrion was so far exposed as to invite flocks of birds of prey, and the traveller would naturally leave his path, and go to see if his ox or his ass had fallen there; moreover, it pleased God to cause rain to fall, as it were to raise up evidence of this deed; the tracks of the horsemen who led the blacks, and those of the naked feet of the blacks, were visible from Mr Dangar's huts, from whence they were taken, to the spot where the bodies were found; and it was observed that no marks of naked feet were seen leading from the scene of slaughter, which corroborated the confession made by one of them to the witness, whose evidence was also thus supported, that not one of them escaped, except the woman who was saved: no, not one. The crime was conceived, and not suddenly executed whilst imaginative injuries acted on his mind. It was premiditated, and cooly planned, as appeared by their being seen some time before it was perpetrated, at a station further down the river preparing straps, and burnishing their swords; they had called the Saturday previous at Newton's station, avowedly seeking the blacks, and on the Sunday evening they came on them, thus closing a hallowed day by the perpetration of murder, thus doubly offending their God, by selecting His holy day for the commission of this unheard of barbarity. He (Mr Justice Burton) could not conceive that they could have so far forgotten all Christian feeling, if they had not flattered themselves that there were many who would exert themselves to conceal their crime, and that they would be protected by them - if they had not flattered themselves that none would be found to bring it to light. But for the sake of those who stood round, he wished to clearly explain what the law of the country was, and what the judges would do when called on to perform their duty. The law and the judges went hand in hand, and in no case in which the life of a human being was taken, whether black or white, would the judges scruple to carry the law into effect. In doing his duty as a judge, he could not avoid expressing his feelings as a man, and he did seriously hope that they were instigated solely by their own feelings in the commission of this crime - he sincerely hoped they had not been led on to the commission of it by the instigation of others; if that was the case, he hoped the parties would be brought to light, and called to answer for the part they had taken. He believed that all the prisoners had originally been transported and sent to a station, 150 miles away from any religious instruction - to where the ordinances of religion were never observed, if they were even thought of -- and where they could give way to their uncontrolled feelings. He greatly deplored this; but he could not suffer his feelings to interfere with his public duty, and that duty forced him now to pass the sentence of the law on them.

His Honor passed the sentence of Death on the prisoners, who were removed from the bar.

See also Sydney Herald, 7 December 1838; and see commentary in Australian, 6 December 1838. This was also recorded in Burton, Notes of Criminal Cases, vol. 39, State Records of New South Wales, 2/2439, p. 113, simply stating that the point of law was disallowed, and the sentences of death passed.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 07/12/1838
Supreme Court of New South Wales
Dowling C.J., Burton and Willis JJ, 5 December 1838
FRANK, an Aboriginal black, charged with the murder of one of his own tribe; Mooney Mooney charged with killing sheep at Port Phillip, and **NANNY MOON** charged with murder at the same place. In consequence of the absence of witnesses these cases were remanded to next term, and the Court particularly impressed upon the Crown Officers, the necessity of using every energy to provide interpreters in order that there may be no failure of justice from that cause. See also Australian, 6 December 1838.
[*]The trials did not take place. See Sydney Herald, 31 May 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 4/327, 11/12/1838
INQUEST. - On Thursday last, at the *Bunch of Grapes,* King-street, on the body of **DAVID BOURKE,** an old man who had formerly been scourger, on board the *Phoenix* hulk, who died in the General Hospital. The old man was a great friend to the retailers of rum, and by his intemperance there is no doubt but his death has been accelerated. After hearing the evidence, the Jury came to the conclusion that the deceased died from the effects of hard drinking, and returned a verdict accordingly.

An inquest was held on Monday last, before Mr. **HAYWARD**, in the district of Parramatta, on the body of a man named **KEEGAN**, a lime-burner, who it appears met his death from a violent blow he received on his head, in a quarrel with another lime-burner, with whom he was at work, and who has been committed to take his trial on a charge of manslaughter. These lime-burners and shell-gatherers have long been complained of as a complete nuisance; they commit, apparently with impunity, every kind of depredation on persons and property, near where they think proper to locate.

CJA, 4/328, 14/12/1838
To The Editor of the Commercial Journal.
SIR, - Several complaints are loud, busy, and urgent in this district, relative to the holding inquests on individuals who have come to a natural death, in consequence of the prevailing catarrh or influenza; where the parties have been ill for some time, together with the extensive surgical survey or anatomization of the bodies – this complaint embracing certain improper motives for doing so, on the part of the Coroner, conjointly with the usually attendant-Surgeon.

It is to be hoped, that, for the credit of the parties, the above rumours may be explained.

J.W.FULTON

Penrith, 13th Dec., 1838.

CJA, 4/330, 21/12/1838

EXECUTION. Yesterday morning, **WILLIAM PRICE**, for the murder of one **DUNN** of Parramatta, and **JOHN FINN**, for the murder of **JOHN WAREHAM** on the Bathurst Road, were led to the place of execution at about nine o'clock. The former was attended by the Rev. Messrs. **COOPER** and **MATTHEWS**, and the latter by the Rev. Mr. **MURPHY.** No sooner had they arrived in the gallows yard, when Price, who was an old man, upwards of 60 years of age, marched with the greatest coolness and indifference to his fate, and would at once have ascended the gallows, but for the detention by laying hold of his arm, by one of the clergymen who was attending him in his last awful moments. The warrant was then read to him, but he appeared quite heedless of its contents. To the great surprise of Finn, who was pinioned, and standing by the side of the other murderer, a reprieve was read to him, which announcement heard by culprits generally with much emotion seemed to have little if any effect on him. He was then removed from the death scene; but Price was conducted to the scaffold on which he still appeared to be asleep to the awful eternity he was about to be launched into; and while the clergymen were exhorting him to think of the future in a proper spirit, he complained that the knot of the rope was not properly fixed, and the hangman came and adjusted it to his satisfaction. When the cap was drawn over his face, he told the executioner to mind what he was about, or he should be smothered, (or words to that effect,) and endeavoured to lift up the cap from his eyes, and was in the very act of doing so when the drop fell. While the rope was being placed around his neck, he repeatedly asked the executioner what had become of Finn, and appeared very angry that he was not brought to the scaffold with him. He was only quieted by his being told that he was coming.

CJA, 4/331, 25/12/1838

INQUESTS. - An inquest was held a few days ago by Mr. **C. SIMS**, at the residence of the Chief Constable, on the body of **SARAH SIMPSON**, a free married woman, who it appeared died from the effects of enfluenza, having been eleven days previously ill, at the house of the said Chief Constable, and finally burst a blood vessel from the severity of the cough. Verdict, died by the visitation of God.

Another inquest was held on the body of **THOMAS PAMPHLET** alias **JAMES GROOM**, who died at the house of **THOMAS JAMES**, bucket-maker of Penrith, a very old man, having been six weeks previously ill, of which the Chief Constable had been acquainted by the said Thomas James, in requesting to be informed who was to bury the patient in the case of death. Verdict, died by the visitation of God.

We unhesitatingly pronounce both of the above inquests unnecessary and improper, as well might inquests be concurred on all who die by the prevailing catarrh. We say improper and unnecessary, inasmuch as it leaves a door open for intrusion into the privacy of my family when the hand of providence has stricken. The expiration of the body of your wife or daughter to the inspection of a body of Jurors, however respectable, merely because death ensues from a prevailing disease is preposterous!!! The law in defining the duties of a Coroner, confines the convention of his inqests to such cases where the party came *by an unnatural or violent death*, in which instances, notice is to be given to the Coroner by *the inhabitants of the place.* Quere – was such notice given or enquiry sought in the cases alluded to? *Certainly and distinctly not!!* Besides, the convention of such unnecessary inquests, a number of individuals are drawn from their occupations. The Treasury is charged with the expense of an *attendant Surgeon, £2, and Coroner's fees*; and in many cases the feelings of the diseased's (sic) relatives are liable to be injured and outraged. If the Coroner of Sydney had adopted such a line of procedure, during the devastation of the late

Epidemic, both *that officer and the Surgeon's attendance* would have gleaned a tolerable harvest I trow. It would have been a convenient mode of acquiring a little loose cash.

CJA, 4/332, 28/12/1838.

INQUEST. - On Saturday afternoon last, at the "Evening Gun" Cumberland –street, on the body of a child named **[JOHN T] TEMPLETON**, about five years of age, the son of a shoemaker. It appeared that the child had been in company with a number of aboriginals and had been induced to partake of some of their intoxicating beverage commonly called Bull. On the night of Friday last the child was heard to groan several times, and his father found him in a fit, of which he shortly afterwards expired. Verdict, died from the effects of a spirituous compound, commonly called Bull, being ignorant of its qualities.

INQUEST. - On Wednesday afternoon, at the "Rum Puncheon," Queen's Wharf, on the body of **THOMAS [or JOHN] SIMPSON,** an aged man, who has for some time acted as a baggage porter at the Queen's Wharf. It appeared in evidence that deceased had acted in the above capacity for a number of years, and was a notorious drunkard; that on Monday evening he was taken ill at the landing-place at Queen's Wharf, when Dr. **JEFFREYS** was sent for, but before he arrived the unhappy man was no more. Verdict, died by the visitation of God, accelerated by habits of drunkenness. We have to lament that a body should be exposed from Monday afternoon until Wednesday afternoon, exposed to the rays of the summer sun, - a nuisance, and a disgrace to individuals who ought to attend to their duty – which would remove such nuisances.

MANSLAUGHTER. - A man named **THOMAS HAYNES** was forwarded to the Sydney gaol yesterday, from Parramatta, on a coroner's warrant, which charged him with manslaughter.

SYD1839

CJA, 5/333, 02/01/1839
Editorial re hanging for Infanticide in England.

CJA, 5/335, 07/01/1839
Editorial re boy of 14, sentenced Assizes for murder; sentence of death.

CJA, 5/336, 12/01/1839
CORONER'S INQUESTS, WINDSOR. - An inquest was held at the *Windsor Hotel*, on the body of **G[EORGE] STEEL**, keeper of Her Majesty's gaol, who shot himself with a pistol, which he placed in his mouth, the ball of which entered his brain. The unfortunate man emigrated from Ireland to this Colony, and was formerly a Sub-Sheriff in Ireland; he held the situation as gaoler for five or six years at Windsor. It appeared in evidence that the deceased lived quite uncomfortable with his wife, and was so at the moment he shot himself. Verdict: that the said George Steel destroyed himself during a temporary aberration of mind, occasioned by his intemperance, and the embarrassed state of his pecuniary affairs.

Another inquest was held on the body of **GEORGE LAMB**, a native of the Colony, at Mr. G. Freeman's, sign of the *Swan*, who fell dead at his own door, by breaking a blood vessel. Verdict: Died by the visitation of God.

INQUEST. - On Wednesday, at the "Bunch of Grapes," King-street, on the body of a man named **STEVENSON**, holding a ticket-of-leave. It appeared that deceased died from apoplexy. Verdict to that effect.

INQUEST. - On Wednesday, at the *Wellington Arms*, Parramatta Road, on the body of **WILLIAM BISHOP**, who put a period to his earthly career, by cutting his throat on the previous night, with a cooper's drawing knife. After a careful examination, in which nothing was adduced which could lead to the cause of the rash act, the Jury returned a verdict of *felo de se*.

CJA, 5/338, 19/01/1839.
QUARTER SESSIONS
Tuesday, January 15.
MICHAEL SIZE, COMMITTED ON THE 24TH November, for a robbery, and on the 27th of the same month for manslaughter, was discharged for the robbery, bugt remanded for the trial of manslaughter.

HORRIBLE MURDER AND SUICIDE. - On Tuesday last, between eleven and twelve o'clock, Sergeant **GOODWIN**, of the Water Police, stationed at Garden Island, came to Sydney, with his wife, family, and boat's crew, leaving the station in charge of a constable, named **GEORGE BRENNON**, and his wife's brother, **EBENEZER MUNROE.** Goodwin and the rest of the party returned to the island about eight o'clock in the evening, and on arriving found the two men left in charge dead. The body of Brennon was lying outside by the side of the house, and that of Munroe was lying on the floor of the kitchen. No other person was on the Island at the time.

INQUEST ON THE BODIES. - On Wednesday, at one o'clock, an inquisition was held at the sign of the "Three Jolly Fishermen," opposite the dockyard; and the Jury, after being sworn, proceeded in two boats to the spot where the murdered men were, and after a *post mortem* examination on them, made by Dr. **a'BECKETT**, they again returned, when the following evidence was taken down:

EDWARD NELSON, on being sworn, stated, that he was one of the boat's crew, and went to Sydney, as above stated, with Sergeant Goodwin; on their return, he was the first to land, and proceeded with Goodwin's child, in his arms, to the house, and it being dark he stumbled against the body of Brennon; supposing him to be asleep, he endeavoured to arouse him; for that purpose he turned the body over, and found that he was dead. He immediately gave the alarm, and another of the boat's crew came up; they together went in search of Munroe, and finding the kitchen door fastened looked through the window close to the door, from which they managed to draw the bolt which held fast the door, and having procured a light found Munroe lying on the kitchen floor quite dead, and his flannel shirt singeing with fire; they rent it off and found a bullet wound in the left breast, just below the heart, and discovered that the minister of death had escaped through the back; a mark in the wall of the kitchen was discovered, supposed to have been caused by the striking of the fatal ball; the pistol was lying three feet from the body and the left hand was resting near the wound. When Mr. Goodwin came up, we examined the bodies minutely, and found that the left side of the head of Brennon was nearly gone, presenting a most awful spectacle; there was a hole under the right cheek bone, which appeared to have been caused by the entrance of a ball. Sergeant Goodwin fired an alarm, but no notice was taken of it. Mr. **MOORE**, chief officer of the revenue cutter, *Prince George*, WAS THEN SENT FOR. There was a carpenter's broken adze at the house a day or two ago, which was not to be found; when the body of Brennon was first found, it was lying on its side, the legs drawn up towards the body; there was not the least sign of life in the body at that time, neither was there in Munroe when he was found. The ammunition was found on the cill of the kitchen window, and the ramrod of the pistol was lying alongside the same. There were no spirits to my knowledge at the station; there was no one on the Island when we arrived; have known Munroe for fifteen months; he has lived with us four months; he was a quiet sober man, and kept himself away from the rest of the residents at the station; we supposed it was on account of his suffering from rheumatic pains, with which he was afflicted; do not believe Munroe and Brennon had lived on bad terms with each other. Brennon was a constable, and a very quiet man.

Sergeant **FAYETTE GOODWIN**, on being sworn, said, that he left the Island as related in the previous evidence, and returned as therein stated. Nelson first went up to the house, and afterwards returned to the boat, saying that when we came up we should see a pretty sight. This witness then corroborated the particulars of Nelson's evidence. Brennon was no addicted to drinking. Munroe had been for some time past in a desponding state; he once went to a rock which overhangs the water, it was supposed, to put a period to his existence; and my wife, on another occasion, caught him in the act of loading a pistol, no doubt for the same purpose; he often talked distractedly, and one night, when we were about to retire to rest, begged us not to lock him out; have spirits of my own in the house; do not miss any from my stock; the pistol found was in my private room, unloaded, when we left for Sydney; it is the property of the Government (deodand thereon being therefore of no use); the two deceased men never quarrelled to my knowledge; they often talked about religion together; the door leading from my private room, communicating with the kitchen, was bolted by me before we started for Sydney. When we went into the kitchen, after our return, it was found open; he supposed Munroe had procured the pistol to shoot himself, and on being interrupted in his intention by Brennon, shot him; then, finding that the wound from the ball, had not killed him outright, took the missing adze, and finished the work of death, by cutting his head in a shocking manner; and that he then re-loaded the pistol with which he shot himself.

Dr. **a'BECKETT**, on being sworn, said, that he had examined the bodies of the deceased men; the head of Brennon was greatly disfigured; there was a bullet hole under the right cheek bone; the bullet had gone to the brain; this would not have caused instant death; the fractured state of the scull not produced alone by the bullet; it might have been done by an adze of other weapon. Examined the contents of the stomach, found no traces of spirituous liquors therein. The left breast of Munroe was pierced with a bullet, which had passed just below the heart, and escaped through the back; examined the stomach, and found no traces of spirituous liquors therein.

GEORGE DERRICK, on being sworn, corroborated the evidence of Nelson, from the time when the alarm was first given.

This closed the investigation; and after the Coroner had summed up, the Jury returned their verdict – that Munroe had murdered Brennon while labouring under a fit of temporary insanity, and then committed *felo de se*.

It appears that Munroe, is or was a small settler on the Hawkesbury, and had come up to Sydney for the purpose of procuring medical advice, through the effects of his bodily pains; and having remained in the General Hospital a short time, went to deside with his brother-in-law, on Garden Island, where he so shockingly terminated his earthly career. On the Tuesday when the party left for Sydney, Brennon the constable was cautioned by Goodwin to keep him from the ammunition and firearms, as from what he had lately observed, he fancies that he intended to do himself an injury, when an opportunity offered. This was the reason why Goodwin supposed Munroe had killed Brennon on the constable attempting to hinder the former from destroying himself.

FUNERAL OF THE DECEASED. - On Thursday afternoon, the bodies were brought from the Island to Sydney. The bodies were placed in a hearse, preceded by a seaman, carrying a flag, and followed by a very respectably conducted company of mourners, in naval uniform. The man with the flag might be said to have forsaken the mourning procession, as when the hearse and mourners were at the Bank of Australia, he with his banner, had arrived at the main Barrack Gate. It shows how earnest this man must have been in the performance of his mournful duty, not to have noticed that he had got so far in advance of the hearse. The adze with which the head of Brennon was supposed to have been broken, has been found.

INQUEST. - At the Light-house, on Thursday afternoon, on the body of **ANN NELSON.** It appeared in evidence that deceased was found at noon on Wednesday last, dead, and lying in a pond at the rear of Messrs. Barker and Hallen's Mills. In consequence of rumours respecting the manner of the woman's death, a man was taken into custody, to await the result of the inquest, but he was discharged before the Court had closed, as there was not the least thing adduced to show that he was in any way concerned in the woman's death. The Jury returned a verdict of – Found drowned.

CJA, 5/340, 26/01/1839.

INQUEST. - At the "Bunch of Grapes," King-street, on Friday morning, on the body of **JOHN GANNON**, a prisoner of the Crown, attached to the Woolloomooloo Gang. It appeared in evidence that the man had been at work with the Gang on Tuesday 15th, during the excessively hot wind, and fell down exhausted; he was conducted to the hospital, where every attention was paid to him to restore him to his senses, but without avail; warm wine was applied to his body in various forms. Surgeon **ROBERTSON** stated that it was his belief that the deceased came to his death from exposure to a parching sun. The Jury returned a verdict accordingly. As soon as

Surgeon Robertson learnt, when the man was received into hospital, that he had been reduced to such a state, he sent directions for the men to leave off work during the excessive heat of the day.

CJA, 5/341, 30/01/1839.

INQUESTS. - On Thursday last at the Bunch of Grapes, King-street, on the body of a respectable young man named **PROSSER**, who was an Inspector in the Police up to the time of his death. It appeared in the examination of evidence, which lasted for several hours, that deceased had taken a waterman, named **PENDER**, into custody, at the instance of Mrs. **RAYNER**, wife of the landlord of the Star, corner of Hunter and Phillip-streets, at whose house the prisoner was, on Monday noon last, in a state of intoxication, and behaving in a very indecent manner. Pender, when in custody, on going to the station door, had to pass his own door, and declined going any further, and by dint of strength managed to get in, Prosser still following him. On entering the house, Prosser's eyes were directed to a New Zealand waddie, with which prisoner had previously been armed, and on his taking it up, Pender rushed at the deceased, and in the scuffle the prisoner fell on his bed, and the deceased was leaning against him; eventually Pender succeeded in obtaining the deadly weapon from Prosser, with which he struck deceased a violent blow on the head, on account of which he was, subsequently to the blooding of Dr. **WHITTLE**, at the station house, conveyed to the hospital, where Prosser died on Wednesday noon last, occasioned by an extravasation of blood on the brain, caused by the wound inflicted by the prisoner Pender. The Jury, after consulting in private about twenty minutes, returned a verdict of Wilful Murder, against Pender; and the prisoner was accordingly committed to take his trial. Prosser was an unassuming gentlemanly young man, and far too delicate, we might say, effeminate, for the situation he held. He was a favourite among his comrades, and his loss, no doubt, will be felt.

DISTRESSING BOAT ACCIDENT. - On Saturday last Mr. **CAVENDISH** and his sister [**KAVENDISH, William J and Mary]** proceeded in a boat, accompanied by Mr. **DAVAUCHELLE**, Mr. **LEONARD**, **WILLIAM WILLIAMS**, assigned to Mr. Cavendish, and two hired boatmen, to Middle Harbour, to inspect some land. After leaving the Government Jetty all went on well, until they had arrived off Chowder Bay, where when going about, a sudden puff of wind filled the mainsail, and upset the party in the water. The hired boatmen mad the best of their way to land, and arrived safe; but Mr. Cavendish made for his sister, and told her not to be afraid, as he would hold her up till assistance came. They both remained on the surface of the water, but when Mr. **GREEN'S** boat took them in, they appeared quite dead; the other three persons laid hold of the keel of the upset boat, and were taken into another boat. The boat with the unfortunate brother and sister came direct up to Sydney, and Mr. **NEILSON** was sent for, but his services were of no avail, as life in both bodies was extinct. Every means was used by him to restore Mr. Cavendish by inflation of the lungs, as there appeared a slight degree of warmth in his body. The bodies were removed from Anderson's Wharf, where they at first were laid, to their late residence in King-street, and on Sunday morning an inquest was held upon the bodies, when the Jury, after being satisfied with the evidence, returned a verdict of Accidental Death.

We understand that a subscription list is in hand, to collect a present for Mr. **GREEN,** as a tribute for his very meritorious conduct in giving all the assistance in his power to the late unfortunate Mr. Cavendish and his sister, at he time their boat upset on the Regatta Day, and eventually bringing their bodies to Sydney. This we consider nothing but right, as it must be remembered that, at the time of the accident,

Mr. Green's boat was contending for the prize between the first-class sailing boats, with the chance of winning, which he lost sight of, to render assistance to the unfortunate sufferers.

CJA, 5/342, 02/02/1839
SUPREME COURT – CRIMINAL SIDE
THOMAS HAYNES, indicted for manslaughter. *Not Guilty*. Discharged.

AUSTRALIAN, 05/02/1839
Supreme Court of New South Wales
Willis J., 1 February 1839
HENRY BARCLAY was indicted for slaying an aboriginal black named **JEMMY, or MOSES**, at Matavia, on the 4th August last.
The prisoner is a stock-keeper in the service of Mr **LOWE**, of the Big River. On the day laid in the indictment, a fellow-servant named **KELLY**, went into the bush to look after cattle, and was accompanied by the black man in question; they got the cattle, returned to the hut, and had supper; after supper the prisoner got up and said he would go and give the black fellow a good thrashing, stating that he had stolen some dogs from him. The prisoner went towards the black, and kicked him, when the black raised his nulla nulla, which the prisoner wrested out of his hand, and struck him over the eye; the blood flowed from the blow, and the prisoner then threw the nulla nulla away, and struck the deceased several times with his fist about the body; the black made away as well as he could, staggering along, and sometimes supporting himself by the fence. The prisoner then called the dogs, but witness kept them back by enticing them with a piece of meat, so that they should not follow the black. Deceased made towards the creek, and witness never saw him after. On his return to the hut, witness saw another black named Titty-bong, who took a fire-stick and followed the deceased. On the following morning Titty-bong returned to the hut, and in presence of the prisoner, said ``Jemmy is dead;" witness understood him to mean the deceased; the prisoner told him to go away for he was gammoning, but Titty-bong said that the body was buried a short distance from the hut, by the creek-side; witness saw the new grave that had been made as described by Titty-bong, but he never saw the body.
In his cross-examination witness admitted that Titty-bong could scarcely speak a word of English, but that it was interpreted by a black gin who was stopping at the place with Barclay. He also admitted that the deceased raised the nulla nulla to strike the prisoner before he snatched it from, and hit him on the head.
In consequence of the imperfection of the witnesses' evidence which was partly acquired by interpretation by a third party, the Crown prosecutor said he would not proceed with the case. It did not appear that the prisoner had any idea of killing the deceased, only of giving him a thrashing. The prisoner was accordingly discharged.
See also Sydney Herald, 4 February 1839, reporting the case as follows: ``Henry Bartley, assigned to Mr. Robert Lowe, was indicted for killing a black, named Jimmy or Moses, at Mathegi, on the 4th August, by striking him on the head with a blunt instrument. ``This case failed, there not being any evidence of the death of the black; but it was proved that the prisoner struck him once or twice for stealing a dog. Mr. Therry said, that it did not appear that the prisoner had any intention of killing the black. Not guilty."
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 5/343, 06/02/1839
EDITORIAL – THE SUPREME COURT
On Monday four cases were disposed of by Mr. Justice Willis; one was a black native who was not put on his trial; the other three cases required, a civil jury for the two first, and a military jury for the last; for the trial of which (a woman for the murder of her infant child), the jury will receive five guineas of public money.
GOVERNMENT GAZETTE, JANUARY 30. - A reward of £20 to a free man, and a conditional pardon to a prisoner, is offered for the apprehension of the Native Blacks that murdered **DENIS DEHANY**, an assigned servant to Mr. **JENKINS**, stationed on the Murrumbidgee, about one hundred and seventy miles from Yass - The same rewards are offered by the Government for the apprehension of **J. WHITTING**, alias **JOHN WHITTLE**, per *Exmouth*, and **JOHN TOMPSON**, alias **THOMAS THOMPSON**, per *Henry Porder*, who absconded from the Wangolla estate some time since, and are supposed to be the murderers of **MICHAEL PEEKE**, on the 13th ult.
SUPREME COURT - CRIMINAL SIDE
Saturday, February 2
Before his Honor Mr. Justice Willis.
FRANKEY, an Aboriginal Native, was arraigned (the Rev. Mr. **GUNTER** appearing as the interpreter) for the wilful murder of a man named **PADDY**. In consequence of Mr. Gunter not being able to make the black fellow understand, the trial of the case was postponed.
A Military Jury was then sworn in.
JANE APPLEBY was indicted for the wilful murder of her infant child, by casting it into a sewer, whereby it was smothered. Guilty of concealing the birth of the child, and sentenced to be imprisoned in the House of Correction for twelve months.

CJA, 5/345, 13/02/1839.
SUPREME COURT – CRIMINAL SIDE
Monday, February 11th.
Before his Honor the Chief Justice and a Military Jury.

SYDNEY GAZETTE, 14/02/1839
Supreme Court of New South Wales
Dowling C.J., 14 February 1839
On his Honor the Chief Justice taking his seat, **JAMES LAMB, CHARLES TOULOUSE, and GEORGE PALLISER**, three of the men charged with the murder of the aborigines at Liverpool Plains, were put to the bar.
The Attorney General said, that it would be in recollection of the Court that at the last Sessions the trial of these men, with another, was put off, in order that time might be allowed for instructing a material witness, named **DAVEY**, an aboriginal black, in the nature of an oath. Although two months had elapsed since that time, Davey still remained in the same uninstructed state, and he (the Attorney General) said, he thought he should not be doing his duty if he risked proceeding to trial without his evidence. As the rules of the Court would not admit of putting off the trial from Session to Session, ad infinitum, he could adopt no other course than leave the matter in the hands of the Court, in order that they might be discharged; but he hoped that, as one of them (Palliser) was a free man, he might be ordered to find bail proportionate to the offence, and the other two being prisoners, could be returned to the service of

the Government. Blake, the other prisoner, remanded with them, he considered there was not sufficient evidence to include him.

The Chief Justice enquired whether there was any chance of instructing Davey?

The Attorney General said he was afraid not, as no instance was known of aboriginal blacks having been sufficiently instructed.

Mr. **a'BECKETT** submitted that Palliser being a free man, after the explanation of the Attorney General, was entitled to his discharge.

The Chief Justice then addressing the prisoners observed, that fortuitous circumstances had relieved them from the peril of being tried for murder, which he hoped would have a salutary effect upon them for the remainder of their lives, if it should happen that they were not brought to justice for the crime in question. He said, but for the circumstance [de]tailed above, it was probable that more sacrifice would have been made for the blood-shed as detailed before the Court, and he earnestly warned them if they were not brought to justice to repent of their sins. They had on a former occasion been tried and had been pronounced not guilty, and as the verdict had been delivered under the sanction of an oath he would not call it in question. He added, that whether the still small voice of conscience echoed to the justice of that verdict he could not discover that only could be known to their God. In the partial justice that had already been made, he said, human justice might be satisfied, as the law was not revengeful; but if any barbarizing delusion had entered the hearts of those who presumed to make a distinction between God's creatures, he hoped that the delusion would be dispelled by the example shown. Public opinion, he was confident, would applaud the justice that had been done, and would not, he trusted, censure the mercy shown them.

Lamb and Toulouse were then discharged to Hyde Park Barracks, and Palliser set at large upon his entering into his personal recognizance of £500, to appear when called upon.

*This was to have been the third of the Myall Creek trials. All three of these defendants had been found not guilty at the first of those trials, R. v. Kilmeister (No. 1), 1838. Their other co-defendants were then found guilty at the second trial, R. v. Kilmeister (No. 2), 1838, and hanged. (For further documents on these cases, see Miscellaneous Correspondence documents numbers 27, 27a and 27b.)

The Sydney Herald, which had played such a disgraceful role in the Myall Creek trials, in effect urging the juries to acquit no matter how strong the evidence, did not report this case, the last in the saga.

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

SYDNEY GAZETTE, 14/02/1839

Supreme Court of New South Wales

Dowling C.J., 14 February 1839

On his Honor the Chief Justice taking his seat, **JAMES LAMB, CHARLES TOULOUSE, and GEORGE PALLISER**, three of the men charged with the murder of the aborigines at Liverpool Plains, were put to the bar.

The Attorney General said, that it would be in recollection of the Court that at the last Sessions the trial of these men, with another, was put off, in order that time might be allowed for instructing a material witness, named **DAVEY**, an aboriginal black, in the nature of an oath. Although two months had elapsed since that time, Davey still remained in the same uninstructed state, and he (the Attorney General) said, he thought he should not be doing his duty if he risked proceeding to trial without his

evidence. As the rules of the Court would not admit of putting off the trial from Session to Session, ad infinitum, he could adopt no other course than leave the matter in the hands of the Court, in order that they might be discharged; but he hoped that, as one of them (Palliser) was a free man, he might be ordered to find bail proportionate to the offence, and the other two being prisoners, could be returned to the service of the Government. Blake, the other prisoner, remanded with them, he considered there was not sufficient evidence to include him.

The Chief Justice enquired whether there was any chance of instructing Davey?

The Attorney General said he was afraid not, as no instance was known of aboriginal blacks having been sufficiently instructed.

Mr. **a'BECKETT** submitted that Palliser being a free man, after the explanation of the Attorney General, was entitled to his discharge.

The Chief Justice then addressing the prisoners observed, that fortuitous circumstances had relieved them from the peril of being tried for murder, which he hoped would have a salutary effect upon them for the remainder of their lives, if it should happen that they were not brought to justice for the crime in question. He said, but for the circumstance [de]tailed above, it was probable that more sacrifice would have been made for the blood-shed as detailed before the Court, and he earnestly warned them if they were not brought to justice to repent of their sins. They had on a former occasion been tried and had been pronounced not guilty, and as the verdict had been delivered under the sanction of an oath he would not call it in question. He added, that whether the still small voice of conscience echoed to the justice of that verdict he could not discover that only could be known to their God. In the partial justice that had already been made, he said, human justice might be satisfied, as the law was not revengeful; but if any barbarizing delusion had entered the hearts of those who presumed to make a distinction between God's creatures, he hoped that the delusion would be dispelled by the example shown. Public opinion, he was confident, would applaud the justice that had been done, and would not, he trusted, censure the mercy shown them.

Lamb and Toulouse were then discharged to Hyde Park Barracks, and Palliser set at large upon his entering into his personal recognizance of £500, to appear when called upon.

*This was to have been the third of the Myall Creek trials. All three of these defendants had been found not guilty at the first of those trials, R. v. Kilmeister (No. 1), 1838. Their other co-defendants were then found guilty at the second trial, R. v. Kilmeister (No. 2), 1838, and hanged. (For further documents on these cases, see Miscellaneous Correspondence documents numbers 27, 27a and 27b.)

The Sydney Herald, which had played such a disgraceful role in the Myall Creek trials, in effect urging the juries to acquit no matter how strong the evidence, did not report this case, the last in the saga.

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

CJA, 5/346, 16/02/1839

INQUEST. - On Monday, at the Saracen's Head, Cambridge-street, on the body of **EDMUND SCOTT**, who was knocked down by a cow, which was about to be shipped at the Queen's Wharf, when he was so seriously injured, as shortly to expire. Verdict, accidental death.

INQUEST. - On Monday, at the Bunch of Grapes, King-street, on the body of a free man named **JAMES WATSON**. It appeared in evidence that he was in a disturbance

a short time back up Durand's Alley, and after being absent a short time returned with other persons to the scene of the disturbance and on leaving the spot a brick was thrown by a person unknown, which struck him on the back of the head; he lingered in pain a day or two, and was on Friday conveyed to the Hospital, where he died on the Saturday following. Verdict, wilful murder against a person unknown.
INQUEST. - On Thursday, at the "George the Third," on the body of **LUCY FOX.** Verdict, Died by the visitation of God.
SUPREME COURT – CRIMINAL SIDE
Tuesday, February 12.
Before the Chief Justice and a Military Jury
JOHN PENDAR, was indicted for the wilful murder of Inspector **PROSSER**. After a long examination which lasted till 9 o'clock in the evening, a verdict of *Guilty* of manslaughter was returned. Remanded for sentence, in consequence of several objections being made by Mr. **WINDEYER**, who appeared for the prisoner.
Wednesday, February 13 – Before his Honor the Chief Justice and a Civil Jury.
MICHAEL SIZE was indicted for wilfully and maliciously assaulting one **DANIEL KELLY**, on the 18th November last, and biting the thumb of the said Daniel Kelly, which brought on lock-jaw, of which he, in a few days, died. The Chief Justice, on learning that the prisoner had no counsel, requested Mr. **BREWSTER** to watch his interests.

His Honor, in addressing the Jury, said, that whatever suspicion there might be of the guilt of the prisoner, yet there was not evidence adduced to warrant a conviction. *Not Guilty*. Discharged.

CJA, 5/347, 20/02/1839
[see also 5/346, p 4]
JAMES PENDAR alias **JACK THE WATERMAN**, for the manslaughter of Inspector **PROSSER**, was brought up for sentence yesterday, and ordered to be transported for the term of his natural life to Norfolk Island.

CJA, 5/348, 23/02/1839
SUPREME COURT – CRIMINAL SIDE
Tuesday, 19th. Before the Chief Justice and Mr. Justice Willis.
JOHN PENDER, indicted for murder, but found guilty of manslaughter, sentenced to be transported for life.
PARRAMATTA. - An inquest was held on Friday last upon the body of Mrs. **FISHBURNE**, an old and much respected colonist. It appeared in the evidence at the inquest that deceased had been in her husband's company on the day previous, who had visited several public-houses, and being intoxicated, was conveyed to the station house, to which place his wife followed, with a child in her arms, and remonstrated with the constables; in consequence thereof, the unfortunate deceased was seized by three of them, and lodged in the watchhouse, where, about two hours afterwards, she was found dead in a cell. The constables in justification of their brutal conduct towards Mrs. Fishburne, swore that she was also intoxicated, and only for her annoyance they would not have interfered. Other (*credible* witnesses) swore as to her sobriety. Verdict – Died by the Visitation of God. [This affair shows to the authorities the necessity of closer investigation into the facts of the case, and also the propriety of the police force being made up of more reputable characters, than those now infesting the streets of every town in this Colony. A Gentleman in the same town of Parramatta, was lately walking with his wife, in the evening at dusk, in the

main street [part illegible] Mild remonstrance was of very little avail to this fellow, and not until threats were used would he go his way.]

An inquest was lately held at Prospect upon a child named **SARAH WALL**, who appeared, in evidence, had gone with other children to have a bathe in a pond contiguous to her father's house, and having waded beyond her depth sunk, and was drowned. Verdict – Found drowned.

CJA, 5/350, 02/03/1839
STABBING. - **PATRICK CARROLL**, victim **WILLIAM CHARLES**, second entry, remanded.

An inquest was held on Wednesday, at the Stonemason's Arms, Parramatta-street, on the body of **ROBERT FERGUSON**, who died from injuries received by falling from the walls of St. Andrew's Cathedral, the previous day. Verdict – Accidental Death.

CJA, 5/351, 06/03/1839
PATRICK CARROLL again.

CJA, 5/352, 09/03/1839
SUICIDE. - On Wednesday morning, Sergeant **RITCHIE**, of the 50th regiment, put a period to his earthly career by shooting himself through the body with his musket, which was loaded with ball. It entered the body at the upper part of the abdomen, and passed to the right shoulder. The surgeon of the regiment was immediately sent for, and after lingering for about half an hour he expired. An inquest was held upon the body the same afternoon, at Webb's public house, corner pf barrack-lane and York-street, and in the evidence it were stated by Sergeant **DALEY** that deceased had for some time past appeared rather singular in his conduct and address; but that on Monday night from about twelve o'clock to three the following morning, he had acted in the most extraordinary manner in the guardroom, by throwing peachstones from one wall to the other, saying that he was very uneasy and had something important to communicate to him, but could not just then. A letter of a later date was also shewn in Court to the effect hat he wished his relatives and friends to be made acquainted with his untimely fate. The jury after consulting together for a few moments, came to the conclusion that deceased had put a period to his existence while labouring under a temporary fit of insanity, and a verdict to that effect was accordingly returned.

CJA, 5/354, 16/03/1839
STRANGE VERDICT. - An inquest was held upon a man about a week ago, who died of a cut throat, and the verdict returned, and we suppose recorded, was *"died by the visitation of God."* This beats every thing we ever heard of in the shape of verdicts – even that returned upon the black murder trial by the second jury.
ADVERTISEMENT.
Re **CAPPER PASS**, inquest on Tuesday last. Signed by a **WILLIAM JOHNSON** and refers to the Sydney Gazette of 14/03/1839.

CJA, 5/357, 27/03/1839
SKELETON FOUND. - A few days ago several men employed on a vacant plot of ground to clear away some rubbish came upon the skeleton of a human being. An old woman in the neighbourhood stated that she knew something about the disappearance of a man a long time since. An inquest was convened at the sign of the *Builder's*

Arms, York-street, yesterday morning, but the old woman then said she knew nothing about this circumstance, and the inquest was set aside.
INQUEST. - Yesterday morning at Mr. Dear's public-house, George-street, on the body of **JAMES DEAR [DEER],** the infant son of the landlord, aged five weeks. It appeared in evidence that on the morning on which the inquest was held Miss Dear, the step-sister to the deceased, went to call her mother, and on her going to the bed found the infant's arms extended in the air, and quite cold; and on endeavouring to place them down fancying they were cold in consequence of the exposure, found that they were stiff, and the infant dead. The mother was immediately awakened, and was quite unconscious of, and alarmed at, her child's death. On Sunday last the infant had been ailing, but had mended yesterday, and it was supposed, from the position of the child, its face being downwards and resting partly on the breast, and partly on the pillow, that it had been suffocated while suffering from the effects of convulsions. The jury returned a verdict of "Died by the visitation of God."

CJA, 5/359, 03/04/1839
INQUEST ON THE LATE DR. [**FRANCIS] MORAN;** two columns.

CJA, 5/360, 06/04/1839
SUDDEN DEATH. - Mr. **[JAMES] MACINTOSH**, who has been for some time past superintending the public-house business of Mrs. **TOMPSON** of the Coach and Horses, Cumberland-street, left the house yesterday noon, in perfect health, and after an absence of only a few minutes dropped down dead in the home of a friend.
CHILD BURNT. - A child, **[SUSANNAH BAILEY]** whose parents reside in Kent-street, was so severely burnt, on Thursday evening, that death ensued shortly afterwards. It appears the mother locked the child and her husband, who was drunk, in the house, while she went down to a steamer; and on her return, the wretched spectacle presented itself to her notice.
BOAT ACCIDENT. - A man named **WHITTAKER**, a sail-maker, being "half seas over," fancied to himself, no doubt, that it would be just as well if the seas were over him, made a plunge into the swell between the Heads and Bradley's Head, on Monday afternoon, for the purpose of securing a hat which had been blown into the water, from the head of a companion in the same boat – when he sunk to rise no more. Every effort has since been made to recover the body but without effect.
INQUEST. - On Monday and Tuesday last, at Wood's Hotel, Pitt-street, on the body of an infant, three months old, named **ELLEN HENRY [HENRYS].** It was in consequence of rumours of neglect on the part of the child's parents, particularly the mother, that caused this inquest to be convened, and it was fully shewn by the evidence, and the *post mortem* examination of the body of the deceased, that the infant had been most shamefully and inhumanly treated by its mother. A verdict of wilful murder of her infant child was returned in consequence; and the woman was committed to gaol on the Coroner's warrant to take her trial for the offence.
ANOTHER INQUEST. - On Wednesday, at the Green Dragon, Kent-street, on the body of **JOHN WILLIAMS**, who died on Tuesday morning, in consequence of an injury sustained on the day previous, on Moore's Wharf, by the passing of the wheel of a cart over his ribs which caused blood to flow out of his mouth, nose, ears, and eyes. It appeared that the deceased had placed himself on the spoke of one of the wheels, unperceived by the driver, who was relieving the horse by standing on the spoke of the opposite wheel; and it is supposed that when the horse was made to move on, the accident happened. Verdict - Accidental Death.

CJA, 5/361,
[see 5/360]
EDITORIAL NOTE: We are requested by Mr. Surgeon **RUSSELL** to contradict the reports in the different papers, respecting the Inquest held on the man **M'INTOSH**, on Saturday last, wherein it is stated that Mr. R. applied to the Coroner to sign a certificate of his having given medical evidence. Mr. Russell states that he has been too uncourteously treated by that officer to ask any favour at his hands. It was Mr. **KEMP**, the foreman, who was asked, and who replied that he was no official. Mr. R. afterwards got his certificate signed by several of the jury.

INQUESTS.

At the Hope and Anchor, Kent-street, on Friday last, on the body of a child named **SUSANNAH BAILEY**, an account of whose death by burning was reported in our last number. Verdict, accidental death.

On Saturday last, an inquest was held at the Barley Mow, Castlereagh-street, on the body of **JAMES MACINTOSH**. It appeared that deceased left the house of Mrs. **TOMPSON** on Wednesday evening and called at a friend's named **TUTE**, living in Castlereagh-street, "to collect himself," and stopped there all that night, and part of the following day (Thursday) on which night he slept there again. On the Friday morning he complained of being unable to eat, and only had a little tea and a glass of water. About eleven o'clock on the same morning the deceased was heard to breathe very hard by Mrs. Tute, and on a man going up into the room, where deceased was found lying on the floor, it was clearly to be seen that he had tumbled off the bed in a fit, and was that moment expiring. Mr. Surgeon **RUSSELL** was sent for, but life was extinct. Verdict, died by apoplexy, induced by drunkenness.

[Our remarks upon the above inquest (extraordinary) are deferred till our next publication, for the want of space. We however take this opportunity of stating that our opinions are somewhat at variance with our contemporaries on Mr. Surgeon **RUSSELL'S** conduct.]

CJA, 5/362, 13/04/1839
EDITORIAL.

On the late Inquest on Mr. **JAMES MACINTOSH**, the Coroner stated that he had been in the habit of calling in Mr. Surgeon **RUSSELL**, and would have done so again, had not the present occurrence taken place, in all cases where he could do so.

This we can take upon ourselves to deny, as we remember sitting upon an inquest on the body of a soldier about two years since, who, on his way from the Parramatta steamer dropped down in Market-street. Mr. Russell was sent for, and attempted to bleed the man, but was too late. Mr. **BRENAN** brought his own *protégé*, Mr. **STEWART**, to the Inquest, and the foreman of the jury asked for Mr. Russell's evidence, but was told it was perfectly unnecessary, as Mr. Stewart was sufficient. Again; an assigned servant took his master's half broken colt from the stable one Sunday, and rode it into Sydney; he was thrown from the saddle in York-street, and taken in a dying state into Mr. Russell's shop, who advised his immediate removal to the Hospital, as the spine was dislocated, and no hope of his being able to relieve the man. He was taken to the shop of Mr. **DOLE**, and left there by the persons who had carried him. Mr. R. then sent for the Police Inspector, and gave immediate notice of the accident; but the Coroner, instead of removing the body to the nearest public-house, according to law, had it taken to the hospital, and stated afterwards that Mr. R. ought to have bled the man. Is Mr. Brenan a qualified practitioner? If Mr. Russell

was honest enough not to attempt to bleed a dead man, we are of opinion that he ought not to have been reflected upon by the Coroner for such treatment. Did Mr. Brenan ever read the Medical Witnesses Bill? If he did he will find therein that where there is not a surgeon in attendance he is bound to call on the nearest medical resident, why is not that clause acted upon? We have been rather surprised to hear that Mr. Brenan, on the late Inquest (Extraordinary) in the course of Mr. **SAVAGE'S** evidence, asked the following invidious, and to say the least of it, very ungentlemanly question – "Did Mr. Russell's *post mortem* examination appear to have been made in a slovenly manner?" Mr. Savage's reply must have been mortifying to him; it was "no, quite the contrary, it was done particularly neat and must have been performed with much care and with good instruments," and we might add, by one with a steady hand, and well skilled in anatomy. We have been making enquiries amongst the profession, and find that it is a very common thing for Surgeons in London to make examinations of bodies unauthorised by Coroners, and even remove parts; as in common law, a dead body belongs to no one. The taking away a string or any thing not part of the body amounts to felony.

LETTER.

TO THE EDITOR OF THE COMMERCIAL JOURNAL.

SIR - In your Journal of Saturday last, there is an account of an inquest holden on a child burnt to death, stating "that it's mother had left the father at home, drunk, locked up in a room with the child, whilst she went to the steamer, and on her return, the sad catastrophe which caused the enquiry presented itself to her sight." Now, I assure you this is altogether erroneous, and you will oblige me, and vindicate the man, by inserting the truth, thus in tomorrow's number. In the first place, the man is in no way related to the child, unless our law, or Church, recognise such affinity as step-grandfather, for he married the child's mother's mother. However, on the evening in question, he and his wife (the child's grandmother), went into town to purchase on or two things, leaving the child asleep in bed, with a candle burning in the fire place (the mother had gone to Maitland the same evening). During their absence, the child it appears awoke, and in some way set itself on fire, for some neighbours hearing it scream violently, broke open the door, and discovered its clothes in one mass of flame. Several persons started in search of the man and his wife, and upon their arrival at home, the man came and procured the assistance of Mr. **HOSKING**, who, upon seeing the child, gave no hope of its recovery. He (Dr. Hosking) I am sure, as well as myself and many others will vouch for the sobriety of the man during the whole time, and his masters, Messrs. Hughes and Hosking, in whose employ he has been for two months, have never once known him to be in liquor. Your statement of Saturday, has, I am sorry to say, worked much to his prejudice, but I am sure your wish for justice will influence you to rectify the mistake.

&c. **G.E. ELLIOTT.**

[Our paragraph, in reference we suppose to the above child's death (not an account of the inquest), appeared in our Journal last Saturday. It contained no names, and so it could not be said or supposed, justly, to reflect upon any man. We were told the circumstances by one of our agents in Sydney late on the Friday night previous, but the name, which appears in the *inquest* in Wednesday's paper, was not known; besides the street was wrongly named.]

PENRITH

(From our Correspondent)

An inquest was held on 2nd instant, on the body of **JOHN STAPLETON**, a little boy, who had come prematurely to his death. The verdict found, was, that the child died in consequence of spirits that had been injudiciously administered by the child's father. A subsequent investigation took place before the Penrith Bench, but no improper feeling, appearing to have actuated the parent, but, on the contrary, through an error of common occurrence amongst low people. The case was dismissed.

CJA, 5/363, 17/04/1839
An inquest was held at the sign of the *Cross Keys*, corner of Kent and King-streets, on the body of **WILLIAM HARDING**, who was found dead in that house the previous day. The deceased had for some time past been afflicted with dropsy. Verdict – Visitation of God.

CJA, 5/366, 27/04/1839
An inquest was held at the Mess Room, Military Barracks, yesterday afternoon, on the body of **SEPTIMUS CAMPBELL**, Esq., late a Lieutenant in the Army. It appeared in evidence that the deceased expired on Thursday afternoon at the *Governor Macquarie*, where he had called in through indisposition, to rest himself and procure a restorative, and after partaking of a portion of a glass of spirits and water, he became worse, and was moved to bed. Medical assistance was procured, but, unfortunately, without effect, for the deceased expired shortly after he had been bled by Mr. Surgeon **GUIDON**, 50th Regt. It also appeared that deceased had been subject to fits since his boyhood. Verdict – Died from Apoplexy.
EDITORIAL.
Having heard a report that Mr. **CAMPBELL'S** death was the result of excessive and injudicious bleeding by Mr. **RUSSELL**, of Pitt-street, we waited upon him to learn his particulars of the case, when we were authorised by him to make the following statement:- About two or three o'clock, or later, on Thursday afternoon, he was requested to attend at the *Governor Macquarie*, Pitt-street, to consult with a medical gentleman, respecting the health of a Mr. Campbell, supposed to be dying; on arriving at the med-side of the patient, he found a military surgeon in the act of tying up the arm after bleeding him; he was unable to articulate, although sensible; the blood was shown to Mr. Russell, who did not see any reason to find fault; medicine was prescribed by Messrs. **GUIDON**, 50th Regt., and Russell; a few hours after a Mr. Surgeon **SALTER** called, who stated that the patient had been under his care for the last six weeks, and Mr. Russell's Assistant replied that he was sure Mr. R. would give up the case, which was done. Mr. Russell desires us to say that he saw no reason to censure Mr. Guidon's treatment, and that the quantity of blood was by no means excessive, although, from the flat and broad bottom of the hand bason used, it might appear to non-medical persons very great. We are told that the following medical gentlemen saw the patient:- Messrs. **SALTER, GILLESPIE, BLAND, GUIDON**, 50th regt., **RUSSELL,** and **BELL.**

CJA, 5/367, 01/05/1839
EDITORIAL. - We have been led again to remark upon this subject, in consequence of the facts elicited at the Inquest on a female named **MARGARET REID**, who was attended on her confinement by a person named **LESLIE**, a shopman to Mr. **DAVIES**, and through whose treatment, no doubt, she met an untimely end. Mr. Brennan, the Coroner, sifted the whole affair to the very bottom, as far as evidence could go, and in consequence two verdicts were put before the Jury to decide upon –

whether deceased died by the visitation of God – or by murder at the hands of Mr. **LESLIE**; the result of which Mr. Leslie did not wait to learn, he was therefore summoned to attend before the Coroner, who severely and justly reprimanded him for his conduct.

We certainly think that the Coroner has been too merciful in this case, for example sake; for when it is clearly proved that the delinquent is in reality no surgeon, how could he escape the penalty of the law in such case made and provided, without injustice to the injured, and to the public at large?

SYDNEY HERALD, 03/05/1839
Supreme Court of New South Wales
Dowling C.J., 1 May 1839

THOMAS KEARNES was indicted for the wilful murder of **BRYAN ROWE**, by stabbing him with a knife at Pennant Hills, on the 16th March.

The prisoner and the deceased were in partnership as settlers at the Pennant Hills, and their huts were only about ten rods apart. The fist witness that was called was a neighbour named **WILLIAM QUINLAN** who stated that he was called to the house of the deceased about half-past nine o'clock on the night of the 16th March, and found him lying on his bed with several stabs in his body; he went to the prisoner and told him of the dangerous state Rowe was in, when he said he was very sorry he was so bad, but he had caught him in bed with his mistress, and that caused the row; the woman afterwards acknowledged to him this was true, although she denied it at the inquest; he knew that the prisoner, had warned the deceased away from his house several times, and five or six days before the accident occurred, he saw the prisoner's wife lying drunk on the deceased's bed. Mr. Surgeon **RUTTER** proved that the deceased had received several wounds from a knife which caused his death. Captain **FORBES**, J.P., stated that in consequence of the information which he received from Mr. Rutter, he went to the deceased and found him dying, and without the least hope of life, and took, his statement, which was to the effect, that he went into the prisoner's hut and filled his pipe, when they had some words, and the prisoner struck him, upon which he knocked him down, and the prisoner went into the skilling and returned, and struck him with a knife several times; he believed the prisoner was jealous of him, but he had no occasion as he never caught him in the fact; the prisoner was drunk at the time.

The prisoner in his defence stated, that he had often quarrelled with the deceased, and on the evening in question was cutting tobacco, when the prisoner came in and refused to go out of the hut, prisoner came in and refused to go out of the hut, and struck him; they grappled and went down, and in the scuffle the deceased received the stabs.

The Chief Justice said, that if the Jury were satisfied that the death of the deceased was caused by the prisoner, the question for their consideration was whether it was done under such circumstances as amounted to murder, or any less offence. If the Jury considered that the prisoner while under irritated feelings from having received a blow from the deceased, and having at the same time a conviction that he had had criminal intercourse with his wife, inflicted the wound, the law in commiseration of the infirmity of human nature, had declared it to be manslaughter. The prisoner in his defence had stated that the blows were accidentally given in the scuffle, and it was for the Jury to say whether, as sensible men, they believed that to be the case. Guilty of Manslaughter -- Remanded. On 18 May 1839 he was sentenced to transportation to a

penal settlement for life: Sydney Gazette, 21 May 1839; Sydney Herald, 20 May 1839. See also Sydney Gazette, 2 May 1839; Australian, 4 May 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 04/05/1839
Supreme Court of New South Wales
Willis J., 2 May 1839
THURSDAY. -- Before His Honor Mr Justice Willis, and a Civil Jury.
JOHN McGEE was indicted for the wilful murder of his wife, **CATHERINE McGEE**, by beating her with a spade, inflicting wounds whereof she lingered, and died on the 18th March last, at Penrith.

The principal witness in this case was a labouring man named **THOMAS GILL**, a servant to Mr Green of Bingelly, but living in the prisoner's house at the time of the alleged murder. On St. Patrick's day, a man named Bolton and his wife were at the prisoner's house, and they were all drinking together, but they left the house in the afternoon, and the prisoner also left the house. The deceased, her family, and the witness Gill retired to their beds at the usual hour, and about twelve o'clock at night the prisoner returned home, and went to his bed, but not finding the deceased, who was sleeping with the children, he woke Gill and asked where she was? Gill told him with the children, and he went over, roused her up, and bade her get his supper. Deceased got up, and the prisoner followed, knocked her down with his fist, and desired Gill, who had got up and dressed himself, to get a light. When the light was procured, the deceased went over and sat down upon a sofa that was in the room, when the prisoner, making use of some very indecent language, seized a spade from one corner of the hut and struck her on the shoulder with it -- adding that ``he would then pay her out for all.'' Gill then interfered and prayed the prisoner to be merciful, when the latter aimed a blow at him with the spade, saying that he would knock his brains out if he interfered. At this time the children were crying much, and a little girl who was under the table, cried out, ``Daddy, daddy, don't kill mammy.'' The prisoner turned to his child and used the most revolting expressions, asking her ``if she was there to criminate him.'' By this time Gill had got outside the hut, and hid himself near a straw stack where he heard very heavy blows repeated several times, and during the blows the deceased cried out, ``Oh! Harry dear -- deary, Harry.'' Gill had taken the infant with him, and he went to a fire which had been made in an old tree, where the infant fell asleep in his arms, and hearing nothing more, he went over to the hut, where he saw the prisoner sitting at the table eating some beef, and drinking tea. Prisoner asked Gill where the infant was, and being told, the deceased called to Gill to give her a drink of water, of which she drank heartily. Shortly after, a man named Murphy went to the hut, and complained of the tooth ache, and at this time the deceased was lying on the floor with her head resting on a piece of wood which went across the fire-place, and Murphy asked the prisoner why he allowed his wife to lay there? Gill then asked Murphy to help him, and they lifted the deceased, who was incapable of helping herself, on the bed, and then the prisoner got a pair of pincers, and extracted Murphy's tooth of which he had complained, after which Murphy said he would go away, and the prisoner went to bed, where Gill heard him use further indecent expressions, shaking her, and shortly thereafter the prisoner cried out, ``Murphy, Kitty is dead.'' Some conversation then ensued, a light was procured, and the woman was found to be dead. The prisoner and Murphy then went to report the death, leaving Gill to take care of the children; Gill afterwards went to a constable

named Riley, and reported the murder, and Riley and a man named Kenyon went up to the hut; Gill looked about for the spade, but could not find it.

McGee had four children, and at the first commencement of the affray there was no one in the house but the prisoner, Gill, and the four children. The prisoner underwent a long and very strict cross-examination by Mr **WINDEYER**, who was retained for the prisoner, the intent of which was to shew that a criminal intercourse had existed between the witness and the deceased which was the primary, and indeed the sole cause of the assault committed by the prisoner on the deceased, as well as the attempted assault by the prisoner on witness, which was the result of his jealousy being excited by what he heard before entering the hut.

EDWARD SAMUELS district constable, deposed to having proceeded to the prisoner's hut, and finding a female's cap and other things, with blood on them, secreted behind some bags of wheat, also a spade with blood on it, which was hid in a heap of dung at the back of the hut; the prisoner denied all knowledge of the murder, and he and Gill were taken into custody. On the following day, he found a man's shirt, with blood on it, and a woman's apron saturated with blood, hid amongst some rags in the bedroom.

ELLEN McGEE, a girl, between seven and eight years of age, was called, and it appeared that she had never been to school, could not read, never said her prayers, and did not know what telling a lie was. On these grounds, her evidence was not taken.

Mr Surgeon **CLARK**, of Penrith, deposed that he attended the inquest held on the body of Ellen McGee, the deceased, and on examining the body, he found that the left arm had been broken, and there were many bruises about the body, a cut on the right side of the head, and another on the left side by the ear; on opening the scull, he found that the scull had been fractured by one of the blows on the head, and a large blood vessel had been ruptured, and had discharged itself on the brain, from the effect of which the deceased died. The blows were probably given by an instrument like a spade.

This was the case for the prosecution, and Mr Windeyer desired that Gill's evidence taken at the Coroner's inquest might be read by the Clerk of the Court, which was done, but no material discrepancy occurred between that and his evidence on the trial, which could warrant a doubt of the correctness of Gill's evidence.

The prisoner offered nothing in his defence, and declined calling witnesses. His Honor, preparatory to summing up, addressed the Jury as follows:--

On first meeting you, gentlemen of the civil jury, on whom, in a great measure, the discharge of the criminal business of the colony depends, it has hitherto been my practice, at the commencement of the session (previously to adverting to the case more immediately before us), to say a few words on that glory of the English law, the inestimable advantage of trial by jury -- a mode of trial infinitely superior to that prescribed by the civil law, which has regulated the course of those Courts in which I have chiefly practised and presided during a laborious professional life. I have thus alluded to trial by jury, and am now once more about to do so, because, I am persuaded, that if this great constitutional blessing were thoroughly understood, and duly appreciated by those whose names occupy the list of jurymen, instead of any individual disobeying or endeavouring to evade the call for his attendance, there is no one who would not (laying aside all other considerations) cheerfully come forward, and feel himself honored in being selected to participate in the discharge of this all important duty.

I agree with a great legal and constitutional author, familiar to most of us, ``that it is the most transcendent privilege which any subject can enjoy or wish for, that he

cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals -- a constitution which, under Providence, has secured the just liberties of the English nation for a long succession of ages." I doubt not, however, that, as in Sweden, where the trial by jury, that bulwark of northern liberty, long continued in full vigour, and afterwards fell into disuse, thereby extinguishing the liberty of the commons; so, if in this, or any other community, that mode of trial be neglected by those who duty it is to come forward to its support -- and in consequence, if such right be abolished -- the liberties of the people will be lost for ever. This, I say, with confidence: for I venture to affirm, that the impartial administration of just -- the only safeguard of life, of liberty, and of property, the great end of civil society mainly depends on ``trial by jury''. If the administration of justice were entirely entrusted to the magistracy, a select body of men chosen by government, their decisions, in spite of their own natural integrity, might frequently have an involuntary bias towards those of their own class; for it has been well observed, that it is not to be expected that the "few should always be attentive to the good of the many." On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our Courts. It is wisely, therefore, ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times, or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come, properly ascertained, before them. For here partiality can have little scope -- the law is well known, and is the same for all ranks and degrees, it follows a regular conclusion, from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved, which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a component number or sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. The most powerful individual will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial -- and that, when on[c]e the fact is ascertained, the law must of course redress it. This it is that preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the most powerful and wealthy citizens. Let me beg, then, and entreat, that, you, gentlemen, who are by law to serve on juries in this colony will all now remember that a degree of trouble is the price which we pay for our common liberty -- and that our common liberty, for which no price would be dear, will then only fall when trial by jury shall be superseded; when colonists of education and property shall cease, through their love of ease, to shew by their personal exertions a warm alacrity for the support of it.

In what I have said, gentlemen, I claim not the merit of originality -- I merely repeat that which has been said and written by the wisest and greatest in their generations. I will not, however, allow my veneration for trial by jury to blind me to the fact that, as juries are composed of men, they must be liable to human infirmity. Great political or religious questions may not always be viewed by them with perfect impartiality; and they may not always manifest those qualities which it would be desirable they should never fail to display. Thus, for instance, it has been justly said that much harm has

been done to the community by that overstrained scrupulousness or weak timidity of juries, which often demands such proof of a prisoner's guilt as the nature and secrecy of his crime scarce possibly will admit of, and which holds it part of a safe conscience not to condemn any man while the minutest possibility of his innocence exists. I do not mean that juries should indulge conjectures -- should magnify suspicions into proofs -- or even weigh probabilities to gold scales; but when the preponderance of evidence is so manifest as to be persuade every private understanding of the prisoner's guilt -- when it furnishes the degree of credibility on which men decide and act in all other doubts, and which experience has shewn they may decide and act upon with sufficient safety; to reject such proof from an insinuation of uncertainty that belongs to all human affairs, and from a general dread lest the charge of innocent blood should lay at their doors, is a conduct which, however natural to a mind studious of its own quiet, is authorised by no considerations of rectitude or utility. It counteracts the care, and damps the activity of Government -- it holds out public encouragement to villainy, by confessing the impossibility of bringing villains to justice.

Here, gentlemen, under ordinary circumstances, I should close any observations not immediately applicable to the question you have to try. But knowing, as I do, from having read the depositions in the several cases set down for this Sessions, that the calendar, though light in point of number, is yet more heavy in atrocity than I have hitherto known it (there being a very unusual number of accusations of murder, and other crimes of a most serious description). I must beg to be permitted to trespass a little longer on your patience. I can only attribute this sad state of things to the absence of that zealous, energetic, judicious, and persevering religious instructions, which alone, under providence, can controul the strong passions of the human race. ``So long as the fear of God,'' says Archdeacon, now Bishop Broughton, in his letter on transportation -- ``so long as that fear governed the general mind of the British nation, the dread of legal inflictions coming in as a secondary restraint in aid of that which was more prevalent and formidable, was quite sufficient to curb violence and dishonesty, and to enforce tolerable regard for life and property. But as soon as the barriers of the law are exposed, as (says the Right Reverend Author) is the case at present (that is, when the book I quote was written), to the whole rush and pressure of men's unruly appetites, those barriers will inevitably bend and give way; and the wave, if excluded at one point, will come pouring through with greater impetuosity at another.'' From this doctrine, I think no reasonable man will dissent. If the fear of God, more universally prevailed, few of those unhappy beings who now come before us would be moved by the instigation of the devil, to commit the numerous and dreadful crimes to which I have deemed it to be my duty to advert. Experience has evinced, and is evincing daily, that men of savage hearts, and savage deeds, may be generated from the off scourings of civilization, no less than amidst the barrenness of the desert. Nay, of the two extremes, the savages of civilization are perhaps the more dangerous; inasmuch as, with the same untamable dispositions, they combine greater knowledge, fiercer passions, ampler means, and above all, a larger field of mischief. The heart sickens at considering what evil can be done by a few hands, if the rich and brittle edifice of prosperity, which, by God's permission, has been reared in this Colony, were abandoned by him, even for a few short moments, merely to human laws and human vigilance, ``Except the Lord keep the City, the watchman waketh but in vain.'' For what, after all, can human laws avail against men who own no moral tie? The crafty elude -- the sanguine overlook -- the violent defy them; apart from the moral obligation; their own hold on man is through the medium of his bodily scars;

and against these, the heart easily learns to harden itself, and will even take a sort of pride in braving them.

Since even laws, if considered as merely human ordinances, are so manifestly inadequate to the protection of the community, what remains to supply the deficiency but religion? It is that, and that alone, which can awaken and keep alive a sense of duty in a country -- which can bind the moral law upon the hearts of men -- which can set before their reason an Almighty Ruler, the ever present witness of all their actions, the hater of iniquity, the punisher of the wicked. It is religion, and that alone, which can fix the laws deeply, as with living roots, in the imagination and conscience of a people.

If, then, this Colony is to be preserved from crimes of such atrocity as stain the present calendar, and the people are to be kept within the pale of duty, it can only be done, in my humble opinion, by one method: the method which alone has hitherto elsewhere prevailed, and by God's blessings will here also prevail -- it can only be done by the instrumentality of religion.

Gentlemen, I will now proceed to the issue you have to try, from which I have too long, I fear, withheld your attention.

His Honor then summed up, recapitulating the evidence, and the Jury retired. On their return they delivered a verdict of guilty. Sentence of death was then passed on the prisoner. See also Sydney Herald, 3 May 1839; Sydney Gazette, 4 May 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 5/368, 04/05/1839.
SUPREME COURT – CRIMINAL SIDE
Wednesday, May 1.

THOMAS KEARNS, stood indicted for the wilful murder of **BRYAN ROWE**, on the 16th of March, at Pennant Hills, by stabbing him in the belly with a knife, from the wound of which he died on the 18th following. The prisoner in his defence stated that deceased struck him while he was cutting up tobacco, and that in the scuffle following they fell, deceased uppermost, and then it must have been that he was stabbed. Guilty of manslaughter. Remanded.

Before Mr. Justice Willis and a Common Jury.

HENRY MAGEE, stood indicted for the wilful murder of **CATHERINE MAGEE**, by striking and wounding her in the head with a spade, on the 18th March last; Magee resided at Cowpastures, and is by trade a blacksmith; on the night in question he came home late, and made deceased get up to get his supper; a man named **GILL**, a lodger, was in the house at the time; and on deceased getting up, he saw prisoner violently strike his wife, and made a blow at him; he then ran out of the house, after he returned, the prisoner's wife was dead. Guilty. Death.

JOHN HALLORAN, bond, was put to the bar charged with murder, but was remanded for further evidence to gaol for seven days.

SYDNEY HERALD, 06/05/1839
Supreme Court of New South Wales
Willis J., 3 May 1839
Before Mr. Justice Willis and a Military Jury.

JOHN MAGGS, free by servitude, was indicted for killing **CHARLES MAZE**, by beating him with his hands, at the Cowpasture, on the 3rd of February.

The prisoner and the deceased were in a public-house on the Cowpasture Road, when the deceased, who was described to be a very quarrelsome man, took away the prisoner's hat, and when the prisoner asked him for it, he used a deal of bad language, and challenged Maggs to fight. Maggs declined several times, when the deceased struck him; the landlord then turned them out of the house, and they went to a neighbouring paddock to fight. They had several rounds, when the deceased gave in, and was taken ill, and died about three days afterwards. Mr. Colonial Surgeon **HILL** stated, that the deceased came to his death from inflammation of the lungs, caused by external injuries. The Judge told the Jury the only consideration for them was, whether the death of the deceased was caused by the prisoner; the other matters were for his consideration. The Jury found the prisoner guilty, but strongly recommended him to mercy. The prisoner had been in gaol upwards of two months. To be fined one shilling and discharged. See also Sydney Gazette, 7 May 1839; Australian, 7 May 1839.

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

SYDNEY HERALD, 06/05/1839
Supreme Court of New South Wales
Dowling C.J., 4 May 1839

JOHN BRYAN was indicted for the wilful murder of **WILLIAM KENNY**, by shooting him at Bryom's Plains, the 2nd September.

The prisoner and the deceased were both assigned to Mr. **PETER MACINTYRE**, the one as shepherd, and the other watchman at a distant station. On the day after that laid in the indictment, the former went to another station, and reported to a man named **CANDLER**, that Kenny had been absent from the hut all night. Candler accompanied the prisoner to look for the deceased, when the prisoner said, it was no use going, as he had quarrelled with the deceased the day before, about an ewe which had strayed from the station, and the deceased had threatened to blow his brains out if he did not go and find it: the deceased had taken the musket up, cocked it, and presented it at the prisoner and pulled the trigger, when the piece burnt priming; the deceased proceeded to reprime the piece, and the prisoner took another musket and let drive at the deceased who fell down dead; that he had set up with him the greater part of the night, and then put the body into a water hole to keep it from the native dogs. The body was found where he described it to be. The prisoner was spoken of as a quiet well behaved man, and the deceased was said to have been a very quarrelsome bad tempered man, having on one occasion levelled a piece at a fellow servant, who had set fire to some grass, and at another threatened to put his overseer on the fire. His Honor told the Jury, that if they believed the statement made by the prisoner, that the deceased had snapped a musket at him, and was repriming it for the purpose of firing at him when the prisoner shot him, it was not murder, but justifiable homicide, for the man's life was in peril and he had a right to defend himself. Not Guilty. Discharged.

See also Sydney Gazette, 7 May 1839; Australian, 7 May 1839. The Sydney Gazette, 7 May 1839 noted the following: ``The prisoner in defence merely observed that he fired the shot for self-preservation. The whole of the men on the station, it appeared had been allowed arms for their protection against the blacks, who, about that time, was very troublesome.

``His Honor, in summing up the evidence, laid much stress up the fact of the deceased being a man of such passionate temper, and of the fact of his having presented a piece

at a fellow servant on a former occasion; he told the Jury, that if they believed this, and that the prisoner had fired the piece in self-defence, the act would be justifiable homicide. The Jury retired for a few moments and returned a verdict of acquittal." The Gazette stated that these events took place at a property 450 miles from Sydney, at Byron's River.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 5/369, 08/05/1839
NAMOI RIVER MURDERS. - Five Aboriginal natives, of the names of **COOPER, BILLY, JEMMY, JACKY, and SUNDAY**, arrived by the steamer yesterday morning, in custody, and were conveyed to the Sydney gaol, on a charge of being concerned in the murder of two white men at the Namoi River, in the district of Liverpool Plains. They were committed by Mr. **MAYNE**, at Maitland, on the 3rd instant. It is to be hoped, and we have no doubt the public will join us in the wish, that after the great *sacrifice* of human life at a late session of the Supreme Court, when *seven white men* were sentenced to be hanged, and were finally executed, for the *alleged* (there was no positive proof of their guilt – the evidence being simply "circumstantial,") murder of certain n blacks, that these blood thirsty monsters (in heart and soul) now in custody will be made to feel that they cannot, with impunity, outrage the laws, even beyond the bounds of the settled portion of the territory.
SUPREME COURT – CRIMINAL SIDE
Friday, May 3.
(Before the Chief Justice and a Civil Jury)
MICHAEL CASEY stood indicted for the wilful murder of **PETER CORCORAN**, by shooting him with a gun on the 6th March, at Campbell's River. – Guilty of manslaughter – remanded for sentence.
(Before Mr. Justice Willis and a Military Jury)
JOHN MAGGS stood indicted for killing CHARLES MAZE, at the Cowpastures, on the 3rd of February, by violently striking him several blows with his fists. The prisoner and deceased, on the day laid in the indictment, it appears were drinking together in a public-house at the Cowpastures, where they quarrelled, and deceased hit prisoner a blow, after he had challenged him to fight. The landlord then turned them out, and they adjourned to a paddock, where they had several rounds, and the challenger (deceased) got the worst of it; the blows he received made him seriously ill, and in the course of a few days he died. - Guilty. – fined 1s. and discharged.
Saturday, May 4.
(Before the Chief Justice and a Civil Jury.)
JOHN BRYAN stood indicted for the wilful murder of **WILLIAM KEMING**, AT Byrom's Plains., on the 2nd September last. The deceased and prisoner were assigned to Mr. **MACINTIRE** of Byrom's Plains, and having quarrelled together, by the prisoner's statement, the deceased presented his gun at him and pulled the trigger, but the gun missed fire; on his preparing to re-prime the piece, the prisoner presented his gun at deceased, and shot him dead upon the spot. – The jury returned a verdict of Justifiable Homicide; the prisoner was thereupon discharged.

CJA, 5/370, 11/05.1839
SUPREME COURT – CRIMINAL SIDE
Monday, May 6
(Before Mr. Justice Willis and a Military Jury)

HARRIETT SHEPHERD stood indicted for a manslaughter on the person of **WILLIAM BERRYMAN**, on the 16th January last, by beating him most violently on the head with a paling. Guilty. To be transported for seven years.

CJA, 5/371, 15/05/1839
SUPREME COURT – CRIMINAL SIDE – Friday, May 10
(Before the Chief Justice and a Civil Jury)
WILLIAM and **MARGARET FITZPATRICK** (man and wife) stood indicted for the wilful murder of **ROBERT STINSON**, on the 17th March last. Guilty of manslaughter. Remanded for sentence.
Monday, May 13
(Before the Chief Justice and a Military Jury)
GEORGE BEVERIDGE and **WILLIAM OLDING** stood indicted for the wilful murder of **JAMES IRWIN**, at Arden Hall, near Invermein, on the 17th March. Verdict – Guilty of manslaughter. Sentenced to 12 months in an ironed gang.

SYDNEY HERALD, 15/05/1839
Supreme Court of New South Wales
Stephen J., 14 May 1839
ELLEN HENRY, the elder, was indicted for manslaughter. The information set forth that the prisoner being moved, and seduced by the instigation of the devil, and wickedly contriving and intending to starve, kill, and slay **ELLEN HENRY, the younger,** her infant daughter, at divers times between the first and the thirty-first day of March, did neglect, omit, and refuse to administer proper and necessary food, milk, meat and drink, for the maintenance, sustenance and support of the body of the said infant, whereby it died. The second count set forth that the said Ellen Henry the younger, being an infant under the age of three months, the prisoner well knew, that on account of her tender age she was unable to support herself, and that it was necessary she should have the milk of the prisoner her mother, and yet, the said prisoner, at divers times from the 1st to the 31st of March, became, and remained in a state of intoxication, and took such large quantities of rum, that her milk became injurious, unwholesome, unhealthy and poisonous, and yet, the said prisoner, gave the said infant the milk, and by means of its deleterious qualities, the constitution of the said child became emaciated, and the child became sick, distempered and diseased, and languished until the 31st March, when she died.

The prisoner who is the wife of a labouring man, was much addicted to habits of intemperance, but, would sometimes abstain from intoxicating liquors for a week together, and when sober she was a kind mother. She had an infant child about three months old, which died on the 31st March. Upon a post mortem examination of the body by Mr. **HOSKING**, he found the child healthy in every part; he took out the stomach, and found about a table-spoonful of crude, undigested matter, like curded [sic] milk, and the upper part of the stomach was considerably inflamed; there were no signs of food, but the matter before described, and the intestines were empty; the child was emaciated, and, in his opinion, died from exhaustion and want of proper nourishment; the mother taking ardent spirits, would very much injure the child, and even the smallest quantity would affect it, as it lessens the quantity of the milk, and makes it unwholesome. Several witnesses called, who proved that the child was often left lying in the bed crying, and one of them had given the child the breast while the mother was drunk.

The prisoner merely asserted her innocence, and called two witnesses to character, but they merely went to confirm the statements of the witnesses for the prosecution.

His Honor said, that if the Jury thought that the child died from the culpable omission as charged in the first count, or the commission as charged in the second, they must say so by their verdict. It was not necessary that the prisoner should imagine that the neglect of her child would cause its death, for then, the offence would amount to murder, but, if they considered that the prisoner must have known that the child required more care and nutriment, than she was giving it, it was sufficient. The principal evidence on which the Jury must rely, was the surgeon's, first count than the second. The case was certainly one of doubt, and it was for the Jury to decide.

The Jury retired a few minutes, and returned a verdict of guilty, but recommended the prisoner to mercy, on account of her previous character. -- Remanded.

See also Sydney Gazette, 16 May 1839; Australian, 16 May 1839; and see R. v. Ward, 1839; R. v. Appleby, Australian, 5 February 1839. In the latter, a woman was convicted of concealing the birth of a child. The child had been found dead in a sewer with its skull fractured. Jane Appleby was acquitted of murder, but convicted of concealing the birth and sentenced to imprisonment in the gaol for 12 months.

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

SYDNEY HERALD, 15/05/1839

Supreme Court of New South Wales

Dowling C.J., 13 May 1839

Monday -- Before the Chief Justice and a Military Jury.

WILLIAM CLAY, assigned to Mr. Dow, and **GEORGE BEVIDGE**, free by servitude, were indicted for the wilful murder of James Irwin, by beating him, at Arden Hall, on the 17th March.

On St. Patrick's day, which this year was on a Sunday, there was a great deal of wine drunk by the servants of Mr. **DOW**, who were joined by Bevidge, who resided near the farm. The men got disputing about religion, and about an hour before sun-down a man named **IRWIN**, who was an Irishman, walked up and down in the front of the hut, and said he did not care a damn for either Englishmen or Scotchmen; the prisoner Bevidge went out and wanted to fight him, but he declined; the prisoner Clay then left the hut, when Irwin ran away, followed by both prisoners; he got to his own hut and the prisoners returned; in a minute or two afterwards, Irwin left his hut for the purpose of picking up his hat which had fallen from his head as he was running; Clay went up to him, and they had a conversation which no one was near enough to hear; Bevidge said he would go and hear what they were talking about, but before he got to them Clay closed with Irwin, and was immediately thrown down, when Irwin ran away, followed by the prisoners. They went out of sight of the hut, and in a minute or two afterwards a person, who resided in another hut, was attracted by hearing some one cry out Oh! he went towards the spot and saw Bevidge kick the deceased in the side, and immediately afterwards Clay jumped upon him and kicked him, and they then returned to their huts. Mr. Goodwin, a surgeon, residing at Invermein, who examined the body two days afterwards, said that death proceeded from extravasation of blood on the brain, caused by external violence.

His Honor summed up for a verdict of manslaughter, on the ground of there being no proof of intent to cause death, or of malice on the part of the prisoners; while it

appeared that the deceased had challenged any Englishman or Scotchman to fight, and there had been hot blood in the course of the day from a quarrel about religion.
The Jury retired about-five minutes, and returned a verdict of guilty of manslaughter. To be worked in irons for twelve months. See also Sydney Gazette, 16 May 1839; Australian, 16 May 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 17/05/1839
Supreme Court of New South Wales
Dowling C.J., 15 May 1839
JAMES MAYNE and **EDWARD HALL** were indicted for being present, aiding, and assisting in the murder of **PATRICK FITZPATRICK**, who was shot by some person to the Attorney-General unknown, at Carrawang Creek, on the 24th September.

About seven o'clock of the evening of the day laid in the indictment, four men in the service of Mr. **J. ROBERTS**, at Limestone Plains, were having their tea in a hut about twenty rods from Mr. Roberts's house, when three armed bushrangers, two of whom were the prisoner [sic], rode up to the hut, and told the men not to be frightened, as they would not hurt them, but were looking for fire-arms and money. Mayne stood sentry over the hut as a guard over these men, while Hall and the other bushranger went to the house. Fortunately Mr. Roberts was from home at the time, but in the kitchen of the house there were Mr. Marks, the superintendent; Jennings, a groom; Fitzpatrick, a jockey; a lad about seventeen years of age; a shepherd; and a black boy; and the cook, **PETER MORAN**, was outside the kitchen. Moran saw the unknown man come up to the house and go in at the back door, upon which he told him that there was nobody there, and followed him in; he said he would blow Moran's brains out if he did not stand back; the persons in the kitchen heard the noise, and all rushed out, when the bushranger said ``You mean fighting, do you?'' and retreated a yard or two and fired his piece just as all the persons were endeavouring to get in at the kitchen doorway. The piece must have been very heavily charged, for Fitzpatrick received five or six slugs in his head, and a bullet struck his upper teeth, went through the roof of his mouth, and out at the top of his scull; Mr. Marks received a ball which broke his jaw; Jennings received a slug in his neck and two shots in his breast, and the black boy received two shots which deprived him of the use of one of his eyes. Hall, who appears to have then been at the front of the house, came round to the back, and asked who had fired, and seeing how matters stood, he told the other man that he thought he had fired without occasion. Hall then searched the house, but finding neither arms nor money, took nothing. They went to the stables and took two of Mr. Roberts's horses, which they changed for two of the horses they brought with them which they had previously stolen. During the time that the bushrangers were at the station, Mr. Roberts and a friend arrived there, but one of the men contrived to give them warning, and they got away. The noise they made alarmed the bushrangers, and th[e]y imagined it was the Mounted Police; they evidently intended to make a determined resistance, for one of them said ``Stand to your arms, and make sure of your marks.'' They then went away, and in a few minutes afterwards, Fitzpatrick died.
The prisoners in their defence asserted that they were innocent, and had nothing to do with firing the shot. They called no witnesses.

His Honor said that the prisoners, although charged in the information as accessories, were in the eye of the law equally guilty with the person who actually fired the shot. It is clearly laid down in Mr. Justice Foster's book, that if a number of person go out with the common intention of committing a felony, and a murder is committed they are all equally guilty. This doctrine was acted upon in England about fifteen years since in a case which His Honor was Counsel for the prisoners. A party of idle young men went to the house of an old gentleman at Lewisham, the uncle of one of the young men, for the purpose of committing a burglary, when the old gentleman alarmed at the noise opened a window and looked out, and was shot by his own nephew; several of the young men were afterwards apprehended, and although they were in different parts of the garden and premises, and had never contemplated murder, yet as it formed a part of the crime they went out to commit, they were found guilty and executed. The question, therefore, for the Jury in this case was, did the prisoners and the man who actually fired the shot go out for the purpose of committing a felony, for if they did, although they were not actually in sight when the deed was committed, in the eye of the law they were equally guilty.

The Jury after a few minutes absence, returned a verdict of Guilty.

The Chief Justice asked the Crown Prosecutor whether he knew the previous history of these men.

Mr. Fisher said that they had been out in the bush a considerable time, and were last session convicted of robberies and sentenced to be transported for life, and there were other charges against them. Hall made his escape from Goulburn Gaol once, and had several times attempted to escape from Sydney Gaol. The man who fired the sho[t], was shot a few days afterwards when committing a robbery.

Upon being called upon to say why sentence of death should not be passed, and execution awarded according to law, the prisoners again protested their innocence, and Hall said that he had gone all over the Colony, and had never killed anybody.

The Chief Justice said that, although in their own minds they might think themselves innocent, in law they were as guilty as if they had actually fired the shot which was fired in prosecution of their common design, the dipping his hands in the blood of a fellow-creature fell to the lot of another, but if they had been in his situation doubtless they would have done as he had done, and they were equally answerable. They had been for a long time about the country armed plundering the inhabitants, but the law had at length overtaken them, and they must expiate their offences; they must shut their eyes to all worldly hopes, for the great stake of life was forfeited, and in this distant land, thousands of miles from father, mother, kindred, or friend, they would be ushered into eternity, with all their sins upon their heads. He trusted that they would make the most of the short time that was allotted to them in this world by praying for the forgiveness of their sins, and availing them[s]elves of the services of the ministers of religion who would attend them in the Gaol. His Honor then passed sentence of death, to be carried into effect on such day as the Governor may appoint.

Mayne appeared tolerably resigned, but Hall worked himself into a violent passion, and said he had been all through the country and never shot anybody, but he was sorry he didn't shoot every --- tyrant that he had met; he had been baited like a --- bull dog; if he only had the Judge there, he would muzzle him. After he was removed from the bar, he continued his violence for some time. See also Sydney Gazette, 18 May 1839; and see 1 and 19 February 1839 (guilty of house breaking). See also Sydney Herald, 5 February 1839; Australian, 21 February, 16 May 1839.

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

CJA, 5/372, 18/05/1839
SUPREME COURT – CRIMINAL SIDE – Friday, May 14
(Before Mr. Justice Stephen and a Civil Jury)
ELLEN HENRY, stood indicted for manslaughter, under the following circumstances:- It appeared in evidence, that during the month of March last the prisoner had neglected to give proper or sufficient nutriment to her infant child, **ELLEN HENRY**, in consequence of which she languished and died. An inquest was held upon the deceased infant, and the Coroner committed the mother to take her trial, on the verdict being returned by the Jury. The prisoner declared her innocence of any intention to destroy the child. The Jury, after having retired for a short time, returned a verdict of guilty, but recommended the prisoner to the mercy of the court. Remanded.
TIMOTHY O'DONNELL and **MICHAEL WELSH**, stood indicted for the wilful murder of **ALEXANDER M'EDWARD**, on the 4th March last, at Mount Campbell. Guilty. Remanded for sentence.
Wednesday, May 15
(Before the Chief Justice and a Military Jury)
JAMES MAYNE and **EDWARD HALL**, stood indicted for aiding, abetting, and assisting some person or persons, unknown, in the murder of **PATRICK FITZPATRICK,** at Carranwang Creek. It appeared in evidence, that the prisoners had for some time been connected with a gang of bushrangers, who have scoured the district of Yass, terrifying the settlers; and on the evening laid in the indictment, the prisoners, with others, went into a hut occupied by four of Mr. **ROBERTS'** farm servants; shortly after they had entered, the prisoners left the hut, placing Mayne as sentry at the door; a gun was fired as a signal for something by those who left the hut, and in a few minutes they again returned, when they found two other of Mr. Roberts' servants in the hut; the whole were immediately ordered into the kitchen and fired upon by the party, Fitzpatrick being killed, and others severely wounded. The bushranger who shot Fitzpatrick has not yet been taken, but has since been heard of in an attempt to rob another station. The two prisoners are both lifers. The Judge, in summing up, stated to the Jury, that although the prisoners might not be the actual murderers, yet being of the murderous company, they were equally liable to the extreme penalty of the law. The Jury retired for a few minutes, and returned a verdict of guilty. Proclamation was directed to be made, and the Chief Justice having placed the black cap on his head, in an impressive manner passed the sentence of death upon the criminals. Hall, as soon as the sentence was passed upon him, addressed the Court in a most disgusting manner; and said, that although he had committed many depredations, yet he had never been guilty of murder. That he had been hunted through the country like a wolf, and was now sorry he had not done for (meaning shot) every b - - - y tyrant in the Colony and was about saying something more, when he was dragged from the dock.
(Before Mr. Justice Willis and a Common Jury)
GEORGE REYNOLDS stood indicted for killing **THOMAS CANNON**, on the 18th of March, at the Macdonald River. Not guilty. Discharged.
Thursday, May 19.
(Before the Chief Justice and a Military Jury)

CATHERINE WARD stood indicted for a misdemeanour in not supplying her child **ELIZA WARD** proper and sufficient nourishment. Not guilty. Discharged.
Police Incidents; Thursday, May 16.
CORNELIUS O'LEARY appeared on warrant, charged with being concerned in the forging of a will. It will be recollected that in the month of February last an inquest was held upon the body of **PATRICK CARHILL**, who, it was stated, died from a violent blow on the head from a sapling which he had been felling in the bush, in the district of Maitland.
TIMOTHY O'DONNELL and **MICHAEL WALSH** found guilty of wilful murder. The Chief Justice, previous to passing the awful sentence of the Court upon the prisoners observed that it was not because he did not consider the verdict of the jury a just one, but simply because he wished them to have more time to prepare themselves for the death that awaited them, and also to consult with his brother judges upon the evidence, which he felt satisfied was too clear for them to hope for mercy on this side the grave. The sentence of death was then passed upon them; and ordered to be executed on such a day as His Excellency shall appoint

SYDNEY GAZETTE, 21/05/1839
Dowling C.J., Willis and Stephen JJ, 18 May 1839
ELIZA HENRY, who was convicted of manslaughter in causing the death of her infant child, was next put to the bar. His Honor Mr. Justice Stephen, in passing sentence, said that it was clearly proved the child died from starvation, brought about by the cruel neglect of its own mother, but she was reduced to the level of a beast by her habits of intoxication. The Jury, he said, had certainly recommended her to mercy, not on account of any redeeming circumstances in the case, but of her previous good character; and the Judges (His Honor said) thought this recommendation might be attended to as it was the first case of the kind, and as it might be that the prisoner and others were not aware of the punishment they were subject to. The sentence he was about to pass, a very lenient one, was, that she should be confined in the Sydney Gaol for two years. See also Sydney Herald, 20 May 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 5/373, 22/05/1839
SUPREME COURT – CRIMINAL SIDE
Saturday, May 18.
THOMAS SUMMER, GEORGE COOK, DENNIS DACY, and **RYDER GORMAN**, found guilty of a robbery with violence, and violating the wife of the owner of the house, where the robbery was committed. On the prisoners being called upon to say why the sentence of the Court should not be passed upon them, they all declared their innocence, Dacy and Gorman particularly, the latter being much affected, even to the shedding of tears; the two said that the suddenness with which they were brought to trial, and not thinking the matter was so serious with which they were charged, they had not had time to procure the necessary witnesses to prove an alibi. Gorman said that he could bring witnesses to prove he was full ten miles from the spot at the time when and where the outrage was committed. The Chief Justice having passed the sentence of the law, that they be severally hanged by the neck, until they were dead, Gorman burst into tears, and said he was innocent.

MICHAEL CASEY, found guilty of manslaughter, had nothing to say why the sentence of the Court should not be passed upon him. The Chief Justice said that the

prisoner should consider himself fortunate, as the jury had taken a merciful view of his case, there was a doubt, and they had given him the benefit of that doubt; but according to the evidence, and the bearing of the law upon it, the jury would have been justified in finding him guilty of murder; but as he had been declared by a jury of his country only guilty of manslaughter, he was sentenced to be transported to Norfolk Island for the remainder of his natural life.

WILLIAM and **MARGARET FITZPATRICK**, found guilty of manslaughter, were sentenced to be transported for the remainder of their natural lives. The female prisoner put in a memorial, which was read to the Court; it purported to lay the cause of death of the man for whom they stood charged, by his own actions.

THOMAS KERR, found guilty of manslaughter, was sentenced to be transported to a penal settlement for life.

ELLEN HENRY, found guilty of the manslaughter of an infant child, was sentenced to be confined in Her Majesty's gaol of Sydney for two years. Mr. Justice Stephen previous to passing sentence upon the prisoner, stated that the jury in consideration of her family and afflicted husband, had recommended her to the mercy of the Court; they had not done so from any tender feeling towards her; for they viewed the inhuman offence of neglecting her infant offspring, with that abhorrence which it deserved. He himself had seldom or never heard of such barbarous neglect in a mother, as that for which she had been found guilty; and he trusted that this punishment that she was to receive, although lenient for her offence, would have the desired effect, of restoring her to her former sober manner of living; he fully believed she had been enticed from the paths of sobriety, by her husband, who, on becoming free, had celebrated the day by drunkenness, in which she joined and continued for days together, neglecting her children, and leaving them without the common necessaries of life.

CJA, 5/374, 25/05/1839
BIRTH.
At Newcastle, on the 1st instant, the wife of Mr. **THOMAS SIMPSON**, of a son, still born.

CJA, 5/376, 01/06/1839
ORDERS FOR EXECUTION. - The following prisoners condemned to die during the last session, have been ordered for execution. To take place on Friday next:- **HENRY MAGEE, JAMES MAINE, EDWARD HALL, TIMOTHY O'DONNELL, and MICHAEL WALSH.** To take place on the Tuesday morning: **THOMAS SUMNER, GEORGE COOK, RYDER GORMAN, and DENNIS DACEY.**
MEDICAL PRACTITIONERS BILL. – Evidence of **JAMES CHARLES RUSSELL,** Esq.

CJA, 5/377, 05/06/1839
EDITORIAL re Mr. Surgeon **RUSSELL.**
RESPITES. - We understand His Excellency the Governor has directed respites for the following individuals, to the 25th instant, who had been ordered for execution on Tuesday next:- **THOMAS SUMNER, GEORGE COOK, RYDER GORMAN** and **DENNIS DACEY.**

CJA, 5/378, 08/06/1839

ADVERTISEMENT – COLONIAL SECRETARY
Reward for **JOHN HOBSON** alias **OPOSSUM JACK** for killing Constable **FOX** at Cassilis on 25 May. Mentions an aborigine, Francis Knight, John Wilson.
RESPITES. - In our last, we stated that the respites for the four men ordered for execution on Tuesday next, were made out for the 25th instant, to prove an alibi; it should have been the 21st – on which day the execution will forthwith take place, unless the alibi be substantial.
EDITORIAL. Long editorial re Mr. Surgeon **RUSSELL.**
The Executive Council sat yesterday to decide upon the cases of the other four men who had been ordered for execution on Tuesday next, but had been respited to the 21st instant, in consequence of their having declared themselves competent to prove an *alibi*. This proceeding was occasioned by the men's statements with regard to the *alibi*, being so exceedingly conflicting, as to make the authorities conclude that their only motive was to lengthen their days prior to the execution. We have not heard the particulars of the meeting of the Council, but it is supposed that the criminals will be executed sooner than the day to which they have been respited, because of their false representations.
HALL'S ATTEMPT TO ESCAPE. - It would appear from the following that this notorious young man, who expiated his crime on the scaffold yesterday morning, had fed himself up to the last with a vain hope of escape. On Wednesday evening last, a noise was heard by the turnkey as if proceeding from the cell of Hall and others confined with him, like to a knocking at the cell door. He thereupon went in, and asked what they wanted; they replied, the light was out, and wished him to bring a fresh one. This request was immediately complied with, and no more was thought about the matter until the following morning, when the turnkey paid them a visit, and missed one of the iron handles from off a bucket, left in the cell for their use. On his asking the prisoners what had become of it, Hall said it had come off, and he threw it to a corner of the cell. This reply created suspicion, and on the turnkey's examining the handle, he readily saw that it had been used in some way or other, and found that a padlock connected with the ring-bolt in the floor of the cell, had been forced open, which released him from that fastening. But he was not yet free from the ring-bolt in the wall, the lock of which being much stronger, he was unable with his slight tool to force it open.

EXECUTIONS

The five men, **HALL, MAINE, MAGEE, O'DONNELL and WALSH**, were brought from their cells yesterday morning to the place of execution. Hall, was attended in his last moments by the Rev. Mr. **COWPER**, and the others by the Rev. Mr. **MURPHY.** Hall, walked with a firm step to the foot of the gallows where with his Reverend attendant he knelt down, and apparently joined with deep devotion in prayer. His expression of countenance was as if he was thinking seriously, from the time he entered the yard until the cap was drawn over his head. While on the gallows, he addressed himself, to the following effect:- "Take warning all who hear me" - ; and after a pause: "I have made my peace with God, and die hating no man," and until the drop fell he could be distinctly heard calling upon his God to have mercy upon him and receive his soul. Maine, his companion in crime, said that he was innocent of shedding any man's blood, which he wished all before him to understand; he then left his standing, and went to Hall, and after shaking him by the hand, bid him farewell and hoped they should meet in another world. Magee said he wished all who heard him, would mark his last declaration of his innocence in murdering his wife, but he added, he did not know who had done the deed. Welsh also said a few words; but

O'Donnell did not open his mouth, and had the same ghastly look as when sentence of death was passed upon him. After the drop fell the unhappy men did not long linger, for in five minutes after they were ushered into eternity. In the yard a number of aboriginal blacks in custody, and a little urchin, a runaway from Goat Island, were stationed by the gallows to witness the execution. The aboriginals seemed very terrified.

INQUESTS

On Thursday morning, at the Albion Inn, Market Wharf, on the body of **CATHERINE MERRETT**, who was found dead near the Market Wharf. It appeared in evidence, that deceased, had until lately been living with a man who was not her husband, and was very much addicted to drinking. Verdict, found drowned.

On Friday (yesterday) morning, at the Crown and Anchor, George-street, on the body of a man named **JEREMIAH MALONEY**, who was found dead at day-light on Thursday morning, on the west side of the tanks, with his face partly buried in the mud. Verdict – death caused by a concussion of the brain, occasioned by a fall from a wall or bank, in a state of intoxication. [We are compelled to complain of the negligence of the Coroner in suffering the body of the above man to be exposed in a public place for twenty-four hours after he had been made acquainted with the man's death. We shall recur to this negligence of the coroner, and his inability to hold with credit to himself and the government, and with satisfaction to public, the two offices of Third Police Magistrate and Coroner for so huge a place as Sydney.]

CJA, 5/379, 12/06/1839

SUICIDE, AND AN ATTEMPT AT SUICIDE. - On Sunday last, a woman residing in Clarence-street, went into her bed-room, and found the man, named **JONES**, with whom she had sometimes co-habited, suspended by his handkerchief to a beam. The loss of her darling so overcame her feelings, that she would have destroyed herself, but for the interference of her neighbours, by drawing her paramour's razor across her throat. A surgeon was called in to the man, but life was found to have entirely gone out of his body.

CJA, 5/381, 19/06/1839

ORDER FOR EXECUTION. - The following men who had been respited from the previous order for execution, will meet their doom on the scaffold on Friday morning:- **THOMAS SUMNERS, GEORGE COOK, RYDER GORMAN, and DENNIS DACEY.** The two following have been finally respited, and will accordingly be transported for the term of their natural lives; - **JAMES M'CULLUM and JOHN FINN.**

CJA, 5/382, 22/06/1839

RESPITES. - In our last we stated that **M'CULLUM and FINN** had been finally respited, when we should have said **SULLIVAN** and **O'LEARY**, for the forging of a will. **M'CULLUM and FINN** are still under sentence of death, awaiting the pleasure of the Queen, till put in execution.

EXECUTION. - The four unhappy men, **SUMNER, COOK, GORMAN** and **DACEY**, were led to the place of execution yesterday morning, two of them attended by the Rev. Mr. **COWPER**, and the others by the Rev. Mr. **MURPHY.** The culprits entered the yard with tremulous step, and their countenances shewed, that however much they were resigned to their fate, and the awful death that awaited them, they still were moved (till the fatal caps were drawn down over their heads), by that inward fear, which is at most times endeavoured to be smothered by men in their condition. The weather was very unsettled and added to the gloom of the scene; yet the yard and

every available spot of ground having a view of the gallows, was covered with spectators, long before the unhappy men entered the place of execution. The death warrants were read by the Sheriff, who was in attendance with his Deputy, to see the law put in force, which took place at about a quarter past nine o'clock – when the wretched men were ushered into eternity, and the presence of their Maker.

INQUEST. - An inquest was held at the St. Andrew's Tavern, Kent-street, on Wednesday last, on the body of **JOHN JOHNSON**, a carpenter, who lately emigrated to this Colony. It appeared in evidence, that he came home from his work that morning to his breakfast, and having finished it, commenced cutting up a pipe full of tobacco, which he had no sooner done than he fell backwards and almost immediately expired, before medical assistance could be procured. – Verdict, Died by the Visitation of God.

An inquest was held at the Butchers' Arms, on Tuesday, upon the infant son of **JOHN DUCE**. This inquest was held through a rumour having got afloat that the child had been much ill used, but the Jury after a careful investigation, and review of the evidence, returned a verdict of died by the Visitation of God.

CJA, 5/383, 26/06/1839

AWFUL DEATH. - Mr. **R. ROBERTS**, who was received into Sydney Gaol, under sentence to Newcastle Gaol for one month, on Friday last, but in consequence of the solicitations of his friends he was to be allowed to remain in Sydney, as the sentence passed was so unexpected, as completely to disturb the tranquillity of his mind, being a man of education, and they gradually became more intense until Sunday morning, when reason fled, and he was obliged to be restrained by force until about one o'clock on Monday morning, when he expired. An inquest was convened during the day, which was adjourned to yesterday, and occupied the Court until a late hour, when the Jury returned a verdict of – "Died of *delirium tremens*, occasioned by repeated acts of intemperance, and accelerated by the injudicious treatment of Mr. Surgeon Neilson."

WINDSOR

An inquest was held on Saturday, the 15th, at the King's Head public-house, before **D. DUNCOMBE**, Esq., coroner, and a respectable jury, on the body of a very aged man, named **JOHN M'DONOUGH**, who was found in Macquarie-street ina state of nudity by Inspector **CHAPMAN**, and taken to the watch-house for shelter; during the night he complained to the watch-house keeper, and consequently was taken to the hospital, where he lingered a few days, and expired. Verdict – Died by the visitation of God.

An inquest was also held on Tuesday, the 18th, at the same public-house, on the body of a man named **JOHN DAFT MELLSON**, holding a ticket-of-leave, who fell from a cart and injured the spine of his neck, occasioned by one of the wheels running against a stump as he was returning from Windsor Church, where he had that morning been married. He was immediately conveyed to the Hospital, where he lingered a short time, and expired. Verdict – "Acccidental Death."

CJA, 5/384, 29/06/1839

WINDSOR

AN AFFLICTING CASE. - An inquest was held on the 17th instant, at the Welcome Inn, Richmond, on the body of **WILLIAMS SELLS**, a very aged man, who was found lying dead in his house. Verdict – "Died by the visitation of God."

An inquest was also held on the 20th instant, at the house of **ROBERT EATHER**, of Richmond, on the body of **ROBERT WIRELL**, generally called "Bob the Armourer;" it appeared from the evidence, that he was a very hard drinking man; and

on the morning on the 20th instant was found lying on a bench, in a blacksmith's shop, quite dead. Verdict – "Died by the visitation of God."

CJA, 5/385, 03/07/1839
INQUEST. - An inquest was held yesterday at O'Mera's public-house, on the body of **JAMES BYRNES**, who died on the day previous in the Benevolent Asylum. It appeared that deceased had lately been in the employ of Mrs. **WYER**, Castlereagh-street, as a rope-maker, from which he had been removed to the Asylum. Verdict – died by the Visitation of God.
POLICE INCIDENTS.
MONDAY, July 1. - Mr. **LESLIE,** better known as Dr. Leslie, was put to the bar, having been taken into custody for protection. Captain **INNES**, who was on the Bench, asked the unfortunate man what he was, to which question he replied – a chemist and druggist; and his answers to other questions were, that he lived upon charity, that he had no house, but that he was then living in the Police Office; that he had friends in the Colony; but he wanted to know why he was brought to Court; that he was free, and the Bench had no business to impede his progress. Constable **SULLIVAN** stated that Mr. Leslie was observed in the bush at Petersham, by Mr. **BURT's,** playing all kinds of antics, and throwing stones at his hat, which he had set up as a mark; at the time he took him he appeared to be of unsound mind. (Here the unfortunate man laughed most unmeaningfully, and desired the constable to take him back to the place from whence he had been brought.) - Remanded. The whole deportment of Mr. Leslie appeared as if his senses were in a deranged state, which has been the case ever since the death of the woman whom he attended at her accouchement, when he was in the service of Mr. **DAVIES** of Brickfield Hill, and on account of which he was dismissed.

Dr. **LESLIE**, was put to the bar and ordered to be remanded to the Gaol, and find sureties for his good behaviour, himself to be bound in the sum of £20, and two sureties in the sum of £10 each. The unfortunate man appeared quite insane, and said that if he was sent to Gaol at all he prayed it might be as "a criminal."

CJA, 5/389, 17/07/1839

FELO DE SE

[preceded by a very long story] An inquest was held on his body at the "Blue Posts" on Saturday last; whereat Mr. **PENDREY** recognised the deceased as **JOHN SCOTT**, who had some sixteen years ago been in his service as a tailor; and Mr. **EMMERSON**, of Phillip-street, also recognised him as the "elderly gentleman" who had walked off from his residence about a month ago, without paying for his board and lodging. The Jury, after a patient investigation, returned a verdict of *Felo de se.*

CJA, 5/390, 20/07/1839
EDITORIAL – re **JOHN SCOTT** [see 5/389 above] and frauds.

An inquest was held yesterday at the Tradesman's Arms, Clarence-street, on the body of **PETER NEVILLE**, who, it appeared from the medical evidence, died of delirium tremens, produced by an excessive use of ardent spirits. Verdict returned to that effect.

An inquest was held on Friday the 12th instant, on the body of a woman, named **ANN COPSON**, who was found lying dead on her bed, she had been unwell for some time. Verdict – Died by the Visitation of God.

CJA, 5/391, 24/07/1839
FATAL BOATING ACCIDENT. - On Sunday last a boat containing Captain **MITCHELL**, of the *William Mitchell*, two apprentices of that vessel; Mr. **ASHER**, the head clerk of Messrs. Edwards and Hunter, Dr. **DUGGAN**, Master **FREDERICK EDWARDS**, and two others, while proceeding up the harbour under sail from the Heads, unfortunately upset, and Captain Mitchell, Mr. Asher, and the apprentice named **WHITEHEAD,** sunk to rise no more. It appears that the unfortunate Captain Mitchell, and his friends, had gone down to the harbour in the *Jean*, and after the vessel had cleared the Heads, the party returned, but the wind being from the southward they were obliged to beat their course, and when off Bradley's Head, a sudden squall upset the boat, which having a quantity of iron kentridge in her bottom, immediately sunk, and with her Captain Mitchell, Mr. Asher, and one of the apprentices named Whitehead. The others were providentially rescued; but the lad Edwards was almost exhausted when taken into the boat that picked them up; and the apprentice boy was miraculously saved through his having taken so much water as to prevent his sinking. As yet none of the bodies have been found.

CJA, 5/394, 03/08/1839
INQUESTS. - At the Royal Oak, Windmill-street, on Sunday last, on the body of Mr. **ASHER**, who was accidentally drowned on that day week, by the upsetting of a sailing boat belonging to the *William Mitchell*. The face was so disfigured that it would have been impossible to have identified the deceased by his features. The body was known to be that of Mr. Asher, by his ring, watch and clothes. Verdict – accidental death. At the bunch of Grapes, same day, on the body of **THOMAS POUND**, a prisoner of the crown, who was killed by a quantity of earth, where he was excavating, falling on him. Verdict – accidentally killed.
BIRTH.
At her residence, Pitt-street South, on Wednesday last, Mrs. **ROBERT ORMISTON** of a daughter, still born.

CJA, 5/395, 07/08/1839
On Saturday, an Inquest was held at the Albion, George-street, on view of the body of **WILLIAM THOMPSON**, who died in the asylum of Friday. Verdict – Visitation of God.
SUPREME COURT – CRIMINAL SIDE
August 1, 1839
Before the Chief Justice and a Military Jury
OWEN STAPLETON stood indicted for killing his child, by administering an excess of ardent spirits and water, on April 1st. Not Guilty.
Saturday, August 3.
PATRICK QUILKER stood indicted for the wilful murder of **WILLIAM M'LAREN** at Gloucester, on the 11th December last. The prisoner and deceased were fellow assigned servants to the Australian Agricultural Company, and were employed at a remote sheep station. Deceased had made a complaint of prisoner's conduct (who was then a watchman), which caused him to be suspended, and deceased appointed in his stead; on the day laid in the indictment deceased was found in the garden with his head quite flattened by a weighty stone and his throat cut, and appeared by his position to have been trans-planting at the time some tobacco plants. The soles of prisoner's shoes exactly corresponded with the marks near the body on the ground; and the tomahawk which he took out with him on the morning of the

murder was found hidden in some grass a few days after covered with blood. The prisoner in his defence thought it probable the deed might have been perpetrated by blacks or bushrangers, and asserted his innocence of the crime imputed to him. The jury after a short consultation returned a verdict of guilty, and his Honor in an impressive manner passed the last dread sentence of the law upon him, that he should die, there being no hope for him on this side the grave.
Monday, August 5.
Before Mr. Justice Stephen and a Military Jury
THOMAS LOWE, late a constable in the Sydney Police, stood indicted for the wilful murder of his father-in-law, Mr. **BURNETT**, in May last, by the blow of a stone, violently thrown at him in a public house. Guilty – sentenced to death.
Tuesday, August 6.
Before Mr. Justice Stephen and a Military Jury
THOMAS FINNY stood indicted for the wilful murder of his wife, **BESSY FINNY**, on the 26th April last. Guilty – sentenced to die.

AUSTRALIAN, 08/08/1839
Supreme Court of New South Wales
Stephen J., 5 August 1839
MONDAY. -- Before Mr Justice Stephen and a Military Jury.
THOMAS LOWE was indicted for the wilful murder of **JOHN BURNETT**, at Sydney, on the 29th of April.

The prisoner was a constable in the Police, and the deceased was his father in law. On the day laid in the indictment, the deceased, in company with a surgeon, named **MADDOX**, and a person named **DAVIDSON**, were drinking together in Mrs Walker's public-house, the St. Andrew's Tavern, in Kent-street, when the prisoner entered the room and threw a large stone which struck the deceased at the back of the right ear, Deceased fell, and on examination it was found, that blood flowed freely from the right ear, and Surgeon Maddox dressed the wound, considering it of little consequence at the time. The deceased lived for ten days after the blow was given and was well enough to attend at the Police-office and give evidence against the prisoner on a charge of assault with intent to murder. He became gradually worse and died on the tenth day after the blow was given.

At the death of deceased an inquest was held on the body and a post mortem examination was made. The surgeon who made the examination was Dr. **SALTER**, a duly qualified surgeon under the colonial Act, who deposed, that he found a complicated fracture of the occipital bone, and a large quantity of extravasated blood on the base of the brain, which he was of opinion was the cause of death. Witness said, that without being acquainted with the fact of hermorrage [sic] from the ear, he should have been doubtful as to the fracture presented on the post mortem examination being the cause of death without some posterior cause; but, being told, that considerable hermorrhage [sic] had taken place, he considered that that might have relieved the brain at the time, and that the extravasation might have come gradually on, until the pressure on the brain eventually caused death. With all the circumstances before him, he was of opinion, that the fracture would have caused death without reference to the intemperate habits of the deceased, and certainly would have caused death in a healthy sober person. The only doubt which had existed on his mind was removed by the statement of the hermorrhage having taken place outwardly.

Mr Therry, as Crown Prosecutor, urged the reading of the evidence given by the deceased at the Police-office on the charge of assault with intent to kill, but after some argument on the point of its admissibility, Mr Therry withdrew his application and closed his case.

The prisoner in his defence simply averred his innocence, and stated, that the charge against him was mad[e] from bad feelings, as the parties wanted to get him of the premises; he said that he never had any unfriendly feeling towards the deceased, but this part of his statement was contradicted by witnesses, who stated, that he had had frequent quarrels with the deceased; he called two witnesses who could only give a negative character for a short acquaintance with him.

His Honor summed up, and the jury retired for a quarter of an hour, when they returned into Court and asked His Honor whether it was competent for the jury to return a verdict of manslaughter.

His Honor said not, and the foreman then pronounced a verdict of guilty.

The Crown prosecutor then prayed the judgement of the Court, and His Honor addressed the prisoner upon the facts as elicited on the trial, and stated that he had carefully looked through the deposition given by the deceased at the Police-office (which had not been laid before the jury,) in the hope of finding some circumstance in extenuation, but he had not been able to find one; on the contrary, he had found on the face of it that there had been frequent quarrels between them, and that the prisoner had more than once threatened his father-in-law's life. After a very feeling address to the prisoner, His Honor passed the sentence of death on the prisoner, to be carried into execution at His Excellency the Governor's pleasure. See also Sydney Herald, 7 August 1839; Sydney Gazette, 8 August 1839.

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

SYDNEY HERALD, 09/08/1839
Supreme Court of New South Wales
Stephen J., 6 August 1839
Before Mr. Justice Stephen and a Military Jury.

THOMAS FINNIE was indicted for the wilful murder of **ELIZABETH FINNIE**, his wife, at Wollombi, or Cockfighter's Creek, in the district of Hunter's River, on the 23rd of April last.

The prisoner was a small settler at the Wollombi, and having conceived that his wife was in comply with a bullock driver, or some person who was staying at a neighbour's hut occupied by one **SAMUEL ETHER**, went there and enquired for his wife, who had just escaped out of the back door, having by some means heard that her husband was coming; he went out afterwards and found her about six or seven rods from Ether's hut, beat her with fists for about ten minutes, then returned home, fetched a musket, and beat her about the head and body until he broke the musket; then dragged her by the hair of her head to the threshold of Ether's house, and dashed her head against it; threw her down again, and lifted up a tub of water standing in the verandah and threw the tub and all over her face, then dragged her by the hair again to an iron-bark tree about seven rods, where his conduct was disgustingly indecent and brutal. After this he beat her dreadfully, and on taking her home threw her down and jumped upon her; ultimately, with assistance, he took her home, where she died.

These facts were sworn to by Ether's wife and her servant **LOUGHLIN**, and although there were some slight discrepancies, their evidence was corroborative on all the material points. Guilty.

His Honor, in passing sentence, told the prisoner that it was totally impossible that any mercy could be extended towards him.
The prisoner was defended by Messrs. **FOSTER** and **WINDEYER**. See also Sydney Gazette, 8 August 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 5/396, 10/08/1839
INQUEST. - An Inquest was held on board H.M.S. *Alligator*, YESTERDAY, ON VIEW OF THE BODY OF **JAMES WAY**, a marine, who expired suddenly on the previous day. Verdict died by the visitation of God.

CJA, 5/398, 17/08/1839
SUPREME COURT
Friday, August 9
Before Mr. Justice Stephen and a Military Jury
JOHN COOK stood indicted for the manslaughter of **SARAH GASHAL**, on the 1st July last, at Emu Plains, by throwing her into a river, while passing over in the ferry boat. Not Guilty. Discharged.
Saturday, August 10.
Before Mr. Justice Stephen and a Common Jury
JAMES HARMER and **JOHN WELSH** stood indicted for the murder of **WILLIAM KELLY,** at Harpers Hill, on the 28th December. Not guilty. Discharged.
Wednesday, August 14
Before the Chief Justice and a Common Jury
Mr. **CHARLES JAMES RUSSELL** of Pitt-street, Surgeon and Druggist, appeared to answer an information charging him with dissecting and mutilating the head of one **JAMES M'INTOSH.** The charge was varied in several counts. Mr. Russell stated that in consequence of his not having been able to procure a copy of the indictment, which had been applied for several times through his Solicitors, he was not prepared to plead, the Attorney General stated that it was not his business or duty to comply with such requests; and is he were compelled to do so he should require several clerks to transcribe them.
The Chief Justice replied that a prisoner had an indisputable *legal* right to apply, nay demand, a copy of the information charging him with any offence. The duty to supply the same did not lie with the Attorney General – but with *the Officer of the Court*. (Who is he?) The applicant was also entitled to four days to plead.
Mr. Russell was then allowed to withdraw, to procure the necessary document.
Thursday, August 15.
Before the Chief Justice and a Common Jury
KING JACKEY, BILLY, COOPER, SANDY, and **JEMMY**, Aboriginal natives, stood indicted with having on or about the 20th March last murdered and robbed two white men on the Big River, servants to Mr. **M'DONALD**, a gentleman lately settled in that district. Guilty of house robbery. Remanded for sentence.

SYDNEY HERALD, 19/08/1839
Dowling C.J., 17 August 1839
RICHARD YOUNG, THOMAS SPENCER, JOHN ROSE alias HENRY ELLIS, and WILLIAM ALLEN, convicted of shooting at, with intent to murder, were placed at the bar. The Attorney General in praying judgement stated that those men

had been in the bush a long time and committed many depredations, but he did not think that any of them were capital offences. There were several charges of robbery in a dwelling house and putting in fear but no case of extreme violence. The Chief Justice said that there were no circumstances of mitigation in the prisoners' cases; fortunately for them the Imperial Parliament had taken off the capital punishment for this crime or else it would have been his duty to pass sentence of death upon them and strongly recommend the Executive to carry the sentence into effect. Had it not been for the meritorious conduct of the young gentleman who gave evidence against them and the spirited young men who assisted him, the prisoners might still have been at large committing their depredations. In the place to which they were going they would have plenty of time to repent and he hoped they would do so, and perhaps after a series of years of good conduct they might be allowed to return back to a civilised part of the world. The sentence of the Court was that the prisoners be transported to a penal settlement for the term of their natural lives. See also Sydney Gazette, 22 August 1839; Australian, 20 August 1839. The Australian, 20 August 1839 reported that the sentence was to Norfolk Island for life.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

SYDNEY HERALD, 19/08/1839
Supreme Court of New South Wales
Dowling C.J., 16 August 1839
FRIDAY -- Before the Chief Justice and a Military Jury.
RICHARD YOUNG was indicted for shooting at **JOSEPH FLEMING**, with intent to murder him at the Big River, on the 26th May, and **WILLIAM ALLEN, JOHN ROSE alias HENRY ELLIS, THOMAS SPENCER and MARY ANN**, were indicted for being present aiding, assisting and abetting. A second Count charged, that Richard Young being a convict illegally at large fired at Fleming to prevent his apprehension, and then charged the other prisoners as accessaries.

This case was very simple. Mr. Fleming, a stockholder in the Liverpool Plains district having heard that a party of bushrangers, who had been committing many outrages, were in a hut on the banks of the Big River, made up a party consisting of himself, Mr. **FREER**, Mr. **BROWN** and three free men named **CLARK, PEARSON,** and **ISTEAD**. The bushrangers were in a hut belonging to a Mr. Marshall, on the banks of the Big River and immediately opposite to it was a hut belonging to Mr. Scott, to which Mr Fleming and his party went. On their way to the hut the party fell in with three servants belonging to a Mr. Smith one of whom Mr. Fleming sent to the nearest police station, and another to Mr. Fitzgerald's station for further assistance. When they arrived at the hut Allen was walking up and down outside. Young came out of the hut with a gun in his hand and asked Mr. Fleming if they wanted them; Mr. Fleming replied that they came for the purpose of taking them. Young said that they would never be taken, every man of them would be shot before they would be taken, to which Mr. Fleming replied that they were determined to take them dead or alive. Young called them cowardly dogs for standing behind the hut, when Mr. Freer said that if they would come half way across to meet them they would see whether they were cowards. Young and Allen then went into the hut and Allen shortly afterwards came out with a great coat on, and a belt with a gun on each side of him, a sword and a gun in his hand. Allen kept parading up and down in front of the hut and Young kept going in and out of the hut sometimes with one gun and sometimes with two. The prisoner Rose and the black woman were out looking for

horses, and after the party had been watching the hut several hours, they came up with some horses. Allen, Young and Spencer then came out of the hut with a bridle and gun in their hands and made towards the horses which the man and woman were driving. Mr. Fleming then called upon the prisoners to stand but they still pushed on, upon which the party fired and the shot was immediately returned by Allen, Spencer and Young, but no person was hurt on either side. The horses took fright at the firing and the three men returned to the hut and Allen and Spencer went in, but Young levelled his piece across the back of a horse that was standing near the hut; he levelled at Fleming who was standing alongside Mr. Freer at the door of the hut and the ball passed close over their heads; Mr. Fleming and Freer fired at the same instant but missed and Young went into the hut. Rose and the black woman who were both on horseback galloped to the back of the hut and remained about four hundred yards off until a slab was cut away at the back of the hut, and Rose and the woman got into the hut that way. A man was then sent round to see that the people did not get away, but before he could get round Allen got on the black woman's horse and rode away. Two men were then sent to intercept him but they missed him and returned without him as he got into a brush and they were afraid he might conceal himself behind a tree and fire at them before they saw him. Two men were then sent to a flat in the neighbourhood across which Allen must pass to get away and there he was apprehended. By this time some of Mr. Fitzgerald's men had come up and asked the prisoners if they would surrender, when Young came out of the hut and said that he supposed that the police had been sent for and when they arrived they would surrender but they would not be taken by settlers. About four o'clock the policeman arrived and the prisoners then surrendered. In the hut there was plenty of blankets and clothing and the following supply of arms, three double barrelled guns, two rifles, two fowling pieces, three brace horse pistols, one double barrelled rifle pistol, one sword, nine cannisters of gun powder, two shot belts, bullets, slugs, &c. There were also eight horses, seven saddles, half a dozen horse shoes, hammers, pincers, shoeing knife, a tomehawk, leather, needles, &c. All the fire arms were loaded except one small pistol.

Young and Spencer made no defence. Allen said that Mr. Fleming was mistaken in his identity and that he was only going up to the hut when he was apprehended.

The Chief Justice told the Jury that in the eye of the law all the persons who are present and engaged in an unlawful act are equally guilty of any felony that may be committed in the pursuance of their common design although they may not be aware that it will be committed. He invited the particular attention of the Jury to the case of the female prisoner, and if they had any doubts as to her participation in the offence to give her the benefit of it. The Jury, acquitted the female prisoner and found the others guilty.

The Attorney General said that there were several other charges against the prisoners in the course of investigation and he wished that they should be remanded.

Remanded. See also Australian, 17 August 1839; Sydney Gazette, 22 August 1839.

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

SYDNEY HERALD, 19/08/1839

Supreme Court of New South Wales

Dowling C.J., 14 August 1839[1]

Wednesday, August 15 [sic] -- Before the Chief Justice and a Civil Jury.

JAMES CHARLES RUSSELL, Druggist, of Pitt-street, Sydney, was indicted for a misdemeanor.

The information set forth that at Sydney, on the 5th April, on **JAMES MACINTOSH** died a sudden death, and that according to the laws, customs, and usages of the Colony, it became necessary that an inquisition before a Coroner and Jury should be held, and that the said Coroner and Jury ought upon view of the said body, to enquire and determine whether the death was caused by violent means or from natural causes; and that the defendant Russell knowing the premises, but having no regard for the laws, and wishing to prevent the cause of the death from being ascertained, unlawfully, wickedly and contemptuously did remove and take away the brains of the said James Macintosh, with intent to frustrate the ends of justice, in contempt of the laws, &c. A second count charged the defendant with having no regard for the religion and laws of the Colony, and with having dissected the body in a manner contrary to religion and decency. A third count charged the defendant with having immediately upon the death of the said James Macintosh, and while the body was yet warm, dissected it, to the grievous affliction of his relatives and his friends, in contempt, &c. A fourth count charged him with knowing that John Ryan Brenan was one of Her Majesty's Coroners, and with neglecting to give him notice of the death of Macintosh. A fifth count recited the Coroner's Inquests' Act, and the Medical Witness Act, and asserted that the defendant had not proved to the satisfaction of the Medical Board, that he was a duly qualified medical practitioner, and yet, in order to prevent a duly qualified witness from giving evidence as to the cause of the death of Macintosh, the defendant opened his head and took away the brains.

Upon being called upon to plead, Mr. Russell said that his Solicitor had been promised a copy of the information which had not been forwarded to him. He prayed that he might have a copy. His Honor said that Mr. Russell was entitled to a copy of the information, which he ordered should be furnished, and also to four days to plead.

[*] The Sydney Herald got the date wrong, as the newspapers often did. In this week Wednesday fell on the 14th of August.This is one of the few cases of this period to be reported. See (1839) 1 Legge 110, solely on the judgment delivered on 16 September 1839. That judgment is reproduced below.

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

AUSTRALIAN, 20/08/1839

Willis J., 19 August 1839

MONDAY. -- Before Mr Justice Willis.

On the opening of the Court the Attorney-General moved, that **JAMES CHARLES RUSSELL**, Druggist, of Pitt-street, be called on to plead for an indictment for a misdemeanor.

Mr Justice Willis said, that he understood there was a demurrer to the information, and a special plea, which would occupy some time in arguing, and he therefore suggested, whether it would not be better to have the case conducted before the full Court, when they would have the benefit of the joint experience of the three Judges.

Mr Windeyer said, that he was of opinion it would be, and, independent of that advantage, he should have time to study the case (which he had not yet had time to do) and be enabled to condense his argument which otherwise, would occupy from three to four hours, if not from five to six.

His Honor said, that it was very desirable the argument should be condensed, and he thought a postponement would be better for all parties.

The Attorney-General said, that he was not at all frightened at the probable length of Mr Windeyer's argument, and he should press on the case now. With respect to the advantage of having it tried before the full Court, he must say, that he should be perfectly satisfied with the decision of His Honor, and even if Mr Windeyer extended his argument to twelve hours he would bear it patiently. The time allotted to the defendant to plead had expired, and under all the circumstances he ought to have been ready and in attendance that morning. On Saturday the defendant had proposed to plead guilty provided he (the Attorney-General) would consent not to call him up for judgement, but this he had at once refused, as he did not chuse [sic] to compromise the matter but let it come fairly before the public.

Mr Windeyer wished to say a few words on what had fallen from the Attorney-General, at which he was much surprised. It was impossible that the defendant could have made such a proposition to the Attorney-General, without prejudice (after the communication which had been made to him) and he was astonished that the Attorney-General should have made such a disclosure which was communicated strictly in confidence.

The Attorney-General explained that there was no confidence in the matter. Mr Johnston (Mr Nichol's clerk) had applied to him, on Saturday, to consent not to call the defendant up for judgment if he would plead guilty, but it was without any reference to prejudice which was a term he did not understand.

Mr Windeyer said that Mr Johnstone had stated the substance of the communication as related by the Attorney-General, but said that it was in confidence.

The Attorney-General said that he would pledge himself for the truth of what he had stated relative to Mr Johnstone's communication, which had been neither more nor less.

Mr Windeyer said that the Court had granted the defendant four days to plead, which was Thursday, Friday, Saturday, and Monday, so that he had all that day to plead, and could not be called on bef[o]re the end of the day.

Mr Justice Willis said, that if what Mr Windeyer stated was true, and he was bound to believe that it was, he could not call on the defendant to plead, as required by the Attorney-General.

The Registrar of the Court said, that Monday had been specially appointed by His Honor the Chief Justice for the defendant to plead.

Mr Windeyer said, that he did not come into Court for the purpose of pleading, but the plea was drawn and ready to file. However, if the Court would take the trouble to look over the information, it would find that it was such a novel one -- so total unprecedented, that it must have taken the Attorney-General considerable ingenuity, as well as time, to draw it; and it was rather unfair to call on the defendant to answer an information in three days, which must have taken the Attorney General a week to consider and concoct. If the Attorney General would say that he had put the information together in three days, he (Mr Windeyer) would plead to it at once.

His Honor said, that he thought it would be much better to have the experience of his learned colleagues, who had had far greater experience than he had, in hearing the argument on this case. His Honor the Chief Justice had practised at the Old Bailey, and His Honor Mr Justice Stephen had been the Attorney-General of the sister colony for many years, and consequently was better versed in the framing of informations than he was. However, if he was required, he would hear argument, and deliver his decision to the best of his power.

The Attorney-General said, that he could not consent to a postponement of the pleading, which would cause wasteful expenditure of the public time. His time was

not his own, and he was accountable for the expenditure of it. On Tuesday he would have to attend the Legislative Council, and as he was now ready to go on with the case, he required that it should be proceeded with. It was the defendant's own fault that he had not communicated with counsel in time, and he could not now take advantages of his own neglect. As Mr Windeyer talked of a demurrer, it would be open to him to move in arrest of judgment, after the case had gone to a jury, which would have the same effect as a demurrer to the information in the present stage of the proceedings.

Mr Windeyer stated that Mr Johnstone was then in Court, and had instructed him that the communication made by him to the Attorney-General, was that he thought justice would be satisfied if Mr Russell pleaded guilty, and the Attorney General undertook not to call him up for judgment, by the heavy expence [sic] to which he had been put, and this had been communicated in confidence, and without any idea of its going before the Court.

The Attorney-General said, that he would pledge himself that what he had stated to the Court was the fact, and that M[r] Johnstone had made no other communication to him either about expense or confidence, but had simply put the question to him and he had refused to compromise in any way. He took this opportunity of giving notice that he would never communicate with any clerk, but solely with the attorney himself or officer of the Court.

Mr Windeyer said, that Mr Nichols was out of town, and his clerk as a matter of necessity, communicated with the Attorney-General.

His Honor said, that the conversation had been irregular, and he felt it had been his fault for allowing it.

The Attorney-General said, that he now moved, that James Charles Russell, be called upon to plead.

Mr Windeyer said, that if it was decided that the four days allowed had expired, he begged that His Honor would read over the information which was unprecedented, and h would then probably allow them another day to plead.

His Honor said, that he was always anxious that every person should be allowed full time and opportunity to prepare his defence, and have ample justice done him, and it was upon this ground that he had suggested that the case should be postponed until the first day of next Term. It was also a matter of great inconvenience to the jury to be kept waiting for nothing.

Mr Windeyer said, that with respect to the jury it would be for him to say what jury would try the case, and he might at once say that no jury then present, would try it.

His Honor said that as the Chief Justice had specially appointed this day for the case, it would be presumptious [sic] and indecent in him to postpone it. However, as the party was not sufficiently prepared he could have no objection to postpone it for an hour, in order to give the defendant an opportunity of coming into Court so as to meet justice.

The Court was adjourned to one o'clock.

Upon the re-opening of the court, the information was read over, and was to the following effect:-- that at Sydney, on the 5th April, one **JAMES MACINTOSH** died a sudden death, and that according to the laws customs, and usages of the Colony, it became necessary that an inquisition before a Coroner and Jury should be held; and that the said Coroner and Jury ought upon view of the said body, to enquire and determine whether the death was caused by violent means or from natural causes; and that the defendant Russell knowing the premises, but having no regard for the laws, and wishing to prevent the cause of the death from being ascertained, unlawfully,

wickedly and contemptuously did remove and take away the brains of the said James Macintosh, with intent to frustrate the ends of justice, in contempt of the laws, &c. A second count charged the defendant with having no regard for the religion and laws of the Colony, and with having dissected the body in a manner contrary to religion and decency. A third count charged he defendant w[i]th having immediately upon the death of the said James Macintosh, and while the body was yet warm, dissected it, in the grievous affliction of his relatives and his friends, in contempt, &c. A fourth count charged him with knowing that John Ryan Brenan was one of Her Majesty's Coroners, and with neglecting to give him notice of the death of Macintosh. A fifth count recited the Coroner's Inquests' Act, and the Medical Board, that he was a duly qualified medical practitioner, and yet, in order to prevent a duly qualified witness from giving evidence as to the cause of the death of Macintosh, the defendant opened his head and took away the brains.

To this information, Mr Windeyer put in a plea in abatement, setting forth, that the defendant was a surgeon, and that the addition in the information was wrongly stated, praying thereupon the judgment of the court that the information might be quashed.

The Attorney General thereon put in a demurrer to the plea, and also prayed the judgment of the court on the insufficiency of the plea.

Mr Windeyer rejoined on the demurrer, and after argument on either side, the information was ordered to be amended by the addition of the title surgeon.

The Attorney-General wished to know what was the next step to be taken, when Mr Windeyer demurred to the information as not being sustainable in law.

His Honor said that, having stood upon the demurrer, if that was not sustained, final judgment would issue without the interference of a jury, who might consequently be discharged.

The civil jury was a[c]cordingly discharged.

His Honor said, that it was only occupying the time of the Court uselessly to proceed with the argum[e]nt at that stage, a[s], whatever it might be, he should certainly refer it to the opinion of his bro[t]her Judges, and should not pronounce upon it himself without their advice.

The Attorney-General said, that the alteration in the circumstances had removed his objection to the postponement of the case, and if His Honor would fix any day which did not interfere with his duties in the Legislative Council, he would consent to the postponement of it until that time, when he would be prepared to answer Mr. Windeyer's argument.

The further hearing of the case was postponed until Saturday next.

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

CJA, 5/399, 20/08/1839

THE “WILLIAM MITCHELL.” - The following is the inscription on a neat tombstone, erected in the Scots’ Burial ground, to the memory of the unfortunate individuals therein, by the late chief officer of the *William Mitchell:-*

Sacred to the memory
of Ebenezer Mitchell, Esq., owner and
Commander of the ship *William Mitchell,*
and native of Alloa, in Scotland,
who was unfortunately drowned by the upsetting
of his boat,
on the 21st July, 1839,

aged 23 years.
Also, of Alexander Asher, aged 47 years,
Native of Fifeshire,
and of Richard Whitehead, aged 18 years,
native of Stirling,
who met their death on the same melancholy
occasion, and are buried in the same grave.

Erected to their memory,
by Francis Harvey, late Chief Officer
of the *William Mitchell.*
August, 1839.

CJA, 5/400, 24/08/1839

The five Aboriginal blacks, **KING JACKEY, JEMMY, BILLY, SANDY,** and **COOPER**, were brought up for sentence before His Honor the Chief Justice, on Monday last, who having prefaced the sentence by an "impressive address," stated that the Court adjudged that they be transported beyond the seas for the term of ten years!!! – *Absurd.*

EXECUTION. - The miserable and hardened murderer, **FINNEY,** ended his days on the scaffold on Tuesday morning, at six o'clock. This man was convicted, at the Criminal Sessions which have just expired, of a murder as diabolical as any ever committed, and upon his wife. The criminal expressed no sorrow after his sentence calculated to create a belief that he died a penitent, or hoping for mercy at the hands of his offended maker; but he walked with a firm step, and seemed to view the limited scene around him with perfect composure and indifference. **LOWE**, the constable, who was expected to have been executed at the same time, was reprieved on this Friday preceding. This man, from the apparently sincere preparation he was making to meet in a proper tone of mind his untimely death, had little or no hopes of mercy on this side the grave.

SUPREME COURT
Saturday, August 16.
Before the Chief Justice

The case of Mr. **JAMES CHARLES RUSSELL** for a misdemeanour was put off till Monday, it being found that the four days allowed him to plead would not expire till that day.

Monday, August 18.
Before the Chief Justice

On the opening of the Court the Attorney-General moved that **JAMES CHARLES RUSSELL,** Druggist, Pitt-street, be called to plead to an indictment for a misdemeanour.

After a great deal of argument between the Attorney General and Mr. **WINDEYER** (the defendant's counsel), which amounted to a wish for further time to plead, as although the case had been specially set down for that day, by his Honor, the four days had not yet expired. The Court however judged it right to adjourn the court to one o'clock, the defendant not being sufficiently prepared, and in order to give him an opportunity of coming into court with a feeling that justice was being done him.

At the stated hour the Court reassembled, and the indictment read; but as several objections were taken by the counsel for the defence, it was finally agreed to postpone the trial till Saturday (this day).

WILLIAM ALLEN, committed for murder, as another man was jointly charged with prisoner for the same offence, and not yet in custody, he could not be put on trial.

Eight other prisoners for murder and highway robbery; carried over to the next Sessions in consequence of the principal witness, the wife of the murdered man, being far advanced in pregnancy and unable to attend.

The Court then adjourned to Saturday (this day), specially to try the case of Mr. **JAMES CHARLES RUSSELL.**

SYDNEY GAZETTE, 27/08/1839
Dowling C.J., Willis and Stephen JJ, 24 August 1839
(Before Their Honors the three Judges)

JAMES CHARLES RUSSELL, of Pitt-street, surgeon, was indicted for the illegal dissection of a human body. The information contained five counts. It set forth that on the 5th of April, in Sydney, one **JAMES MACKINTOSH** died a sudden death and that according to the laws, usages and customs of the colony, it became necessary that an inquisition should be holden before one of Her Majesty's Coroners and a jury, and that such Coroner and Jury ought, upon view of the body, to have enquired whether death was caused by violence or otherwise; and that the defendant, knowing the premises, but having no regard for the laws, &c. The second count charged the defendant with, having no regard for the religion and the laws of the colony, dissected the body of the said James Macintosh, contrary to religion and decency. The third count charged the defendant with, having immediately on the death of the said James Macintosh, and while the body was yet warm, dissected it to the grievous affliction of his relatives and friends, in contempt of religion, and the laws, usages and customs of the colony. The fourth count charged the defendant with knowing that John Ryan Brenan was one of Her Majesty's Coroners, and neglecting to give him notice of the death of the said James Macintosh. The fifth count, after reciting the Corners Inquest and Medical Witness Acts, charged the defendant that, he not being a duly qualified medical witness and in order to prevent a duly qualified medical witness from giving evidence as to the cause of the death of the said James Macintosh, opened the head, and removed the brain.

To this information the defendant had pleaded a demurrer.

Mr. Windeyer on behalf of the defendant raised several objections to the information, in the discussion of which he occupied the court five hours and forty minutes. His first objection was with regard to that part of the information wherein it was alleged that John Ryan Brenan was one of Her Majesty's Coroners. Mr. W contended that Mr. Brenan was not legally appointed, as the office of Coroner was by right of election by the people in county courts, and it was a right of the people which the Crown could not assume. The appointment of a Coroner in this colony, he stated, was a matter of accident. When Mr. Gore was Provost Marshall he was ordered by the Governor to hold an inquest, which he did, and he continued to perform that duty until he was ordered home to England, to give evidence in the case of Admiral Bligh, when the duty devolved upon Mr. Lewin. He contended that as the election of Coroner was in the people, the grant of that office would be void, and that the office consequently was, as if it had never been made at all, and on that account the information must fall, as the Coroner could have had no jurisdiction. In the course of his remarks, Mr. Windeyer referred to several ancient statutes in support of his argument -- that the

election lay in the people, and that although that privilege had, at certain times, been wrested from them, it had been again conceded, and he held it to be a privilege which the colonists still inherited, and had brought with them from England, in the same way as with all their common law rights.

Mr. Justice Stephen enquired if Mr Windeyer was prepared to show in whom the office of Coroner was vested, before it was in the people, as the decision of the kingdom into counties only took place in the time of Alfred.

Mr Windeyer replied that he had no doubt it was vested in the people from the [???] and in support of his opinion he quoted authority [???] Lord Coke's Institutes, wherein it is said that the right was vested in the people in [???].

Mr Justice Willis remarked that [???] consideration appeared to have been lost of, the conquest of of [sic] England by William, who introduced his own laws, retaining what he liked from those of Edward the Confessor.

Mr. Windeyer went on to say that that privilege had not been conceded was certain; it was inherent in the people, even Kings were formerly elected by the people in the open field, and therefore it could not be said that these privileges were conceded to them. The office was paid by the people, and it was a privilege of the people that any office which should act as a tax or tallage on them, should be elected by them.

Mr. Justice Willis again referring to the conquest observed that William made all the people hold of him in capita, and the question was whether he might not by his might, not his right, have acquired such an interest in the people as to make them fall in with his views in withholding these privileges.

Mr Windeyer answered that William never pretended to come in by right of conquest but by right of succession, and all his acts afterwards were declared to be derived from the common law before in existence [sic], and the Norman Kings were made to say, over and over again, that they would hold the laws of Edward the Confessor, and the election of these offices was one of them, binding; in the present instance, although the custom was not in use, it was not abolished, it was clear the office was in abeyance, but it did not on that account follow that the right of election was gone; it was a right of which they could not be deprived except by Act of Parliament. The Queen, for instance, could not appoint a legislative Council without an Act of Parliament, she could not nominate a member for Sydney or Parramatta, but only issue a writ of election -- a remnant of the power which had once been obtained by the Kings from the people. Mr. W. then went on to speak of other parts of the information; the defendant, he said, appeared on the face of it as a surgeon; it was a question whether as such, he had not a right to do what he had done. It could be no criminal offence even assuming that he had no permission to dissect the head, it might be that he was guilty of an act of impropriety, that he was guilty of a breach of taste, but was the defendant to be indicted criminally for a breach of taste, in doing that which was the only legal mode of discovering the cause of death? He would shew that it was a matter of necessity, and what was a necessity was no crime. He wished to remark, that there was no precedent for such an information, all previous cases touched upon the violation of the sepulchre, of digging up dead bodies for sale, or for selling them with a view to prevent their burial, matters which were contrary to decency, but in this case there was no indecency, nothing was done but what was necessary to be done by every surgeon in order to acquire a perfect knowledge of the anatomy of the human frame; without this kind of knowledge how were many operations, especially that of trepanning, to be performed. The defendant found the man dead and it was necessary that he should ascertain the cause of death as soon as may be. There was no contempt, for it was not assumed in the various counts that he

did so, knowing it was to be a matter of adjudication, but even if were so, he did so to qualify himself to give evidence on that enquiry as any other man would have done. He, Mr. Windeyer, recollected a Judge on the Bench (Mr. Justice Burton) censured a man who was not a professional man, that he did not a[s]certain the cause of another's death. A witness in his evidence of a murder, said he had seen the wound, and had poked his stick into it, his Honor asked him why he did not examine the wound more closely, when the man replied, he was no surgeon. His Honor remarked, that notwithstanding that he ought to have made himself acquainted with the cause of death. If such a course were imperative in a non-professional person, it could be no offence in a surgeon, although the matter were to be followed by a judicial investigation. In the information it was said to be unnecessary, wanton, and indecent; that expression was brought about by the ingenuous way in which the information had been originally framed, when the defendant was termed a druggist, a mis-statement which the Court had ordered to be amended, and that he should be called a surgeon. He (Mr. W.) could not help it if it were said that it was unnecessary for a surgeon to make himself acquainted with his business; that which had been done by Mr. Russell had been done over and over again in the knowledge of the Court without any indictment having been preferred against the parties. The defendant would have been sorry that the case should go to a common jury after all the prejudices the Attorney General in the information had appealed to. It was well known what were the feelings of individuals on the subject of dissection, of the man nor in which it was viewed by their ancestors when criminals alone were ordered for dissection, but to this very vulgar prejudice the Attorney General relied on in his appeal to religion. He could well conceive its effect on a common jury, if any one man had stood out against this appeal to religion, he would have been held as a fool or a bigot, with no respect for religion or decency. He admitted that the operation might have been termed indecent if it had been performed publicly, but it could not be so termed when done in private. With as much reason an indictment might be preferred for various acts connected with the Arts, more especially with sculpture. In the same way an information might be preferred against an artist for preparing a model from a living naked figure; if it were done before a stranger there could be no doubt it would be indecent, but in the Studio it would not be so, the very character of the party would clear away the imputation of a crime. In the Stat 1 Vict. No. 3, an Act for regulating medical witnesses on Coroner's Inquests he observed it said that if it appeared the deceased person was not shortly before his death attended by some medical gentleman it should be lawful for the Coroner to appoint some legally qualified practitioner to give evidence, and provided a remuneration, but it went on to say that if any post mortem examination of the body should be made without the Coroner's permission that nothing should be paid. The defendant could not be charged with withholding evidence; he prepared himself to give evidence, and he did give his evidence. The penalty for his conduct was pointed out by the act just quoted, namely, that he should receive no fee for his examination. The imputations against the defendant, he contended, were stretched; anything that inclined towards him had been concealed; he was charged with taking away the brain -- how was it possible he could make a post mortem examination without removing the brain? It was like Shylock's pleading, all very well in a play, but it would not do in a court. He submitted therefore, that what the defendant was charged with, was but a post mortem examination, unauthorised be it, wanton be it, but still it was only a post mortem examination, and for which a penalty was provided by the Legislature, by saying that he should receive no fee. If Mr. Warburton's Act, he observed, did not extend to this colony, and it had been said that it did not, he would

ask what means would surgeons have of obtaining professional knowledge; no doubt, that of post mortem examination alone. He concluded by urging the court not to confuse in this matter, any want of decency or of taste, with anything criminal; the defendant had a right to do what he did, and he did no more.

The Attorney General briefly answered the objections of Mr. Windeyer by observing that the defendant had admitted the allegations in the information by his demurrer, and he contended that the office of Coroner was vested in the Chief Justice.

Mr. Windeyer replied to the speech of the Attorney General.

The court ordered the defendant to enter into his person recognizance of £100, to appear on the first day of next term (the 15th September) for judgment. The court was then adjourned until Saturday next.

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

CJA, 5/401, 28/08/1839
SUPREME COURT
Saturday, August 24

The Court was specially summoned this day, to hear the case of Mr. Surgeon **RUSSELL**; and the three Judges having taken their seats on the Bench, Mr. **WINDEYER**, counsel for the defendant, proceeded to argue upon the demurrer, which lasted until past six o'clock P.M., and, after the close, their Honors, having consulted together for a short period, ordered Mr. Russell to be bound in £100 to appear on the first day of term, to learn the decision of the Court. – [We shall say something on this case in an early number, and upon the very learned and incomparable arguments of the counsel for the defence.]

CJA, 5/402, 31/08/1839

SUICIDE. - Yesterday morning a man was seen to rush over the railings of the paddocks opposite Carter's barracks, and deliberately, but with great desperation, cut his throat, so effectually that he expired almost instantaneously. We have since ascertained that the unfortunate wretch was a coach–painter named **KELLAR.** The effects of intemperance are supposed to have caused his unhappy determination.

CJA, 5/403, 04/09/1839

EXECUTION. - The murdered, **PATRICK QUELKIN**, tried at the last Criminal Sessions, has been ordered for execution on Friday next.

CJA, 5/404, 07/09/1839

EXECUTION. - **QUELKIN**, the murdered, underwent the last dread sentence of the law on the scaffold, yesterday evening. He appeared to approach the awful paraphernalia of death with resignation and becoming humility, but spoke not a word that was audible to the spectators from the time he left the press-room.

SYDNEY HERALD, 18/09/1839
Dowling C.J., Willis and Stephen JJ, 16 September 1839

The Queen v. Russell. -- The Attorney-General prayed the judgment of the Court upon **CHARLES JAMES RUSSELL**. Mr. Russell being in attendance, the Chief Justice said -- This was an information filed by the Attorney-General against the defendant for a misdemeanour. There were five counts. The first stated, that on the 5th April, 1839, one **JAMES McINTOSH** [died a sudden death at Sydney and] that

his body laid dead, and that according to the laws of the Colony in such cases, an inquisition is had and taken on the view of the body by and before one of the Coroners of the Queen and a Jury in that behalf, and that such inquisition ought to be had and taken on view of the said body, in order that it might be inquired into and found whether the sudden death was caused by violent means or from natural causes or otherwise, and that the same might be found by verdict and return of the said Coroner and Jury. That the defendant, a Surgeon, well knowing the premises, did unlawfully, &c. cut open the head of the body of the deceased, and removed and took away from and out of the said head, the brains thereof, in order and for the purpose that the cause of the sudden death of deceased might not be found and ascertained as aforesaid, and thereby to frustrate the ends of public justice, in contempt of the laws, &c. The second count stated that deceased had suddenly died, and that defendant being an evil-disposed person, and not having regard for the religion, laws, &c., whilst the body laid dead, contrary to decency, good morals, and religion, and in contempt of the laws, &c., did without any reason or necessity, wantonly, indecently, unlawfully and contemptuously cut open and dissect part of the body of the deceased so lying dead, to the great scandal, &c. of religion, in contempt, &c. The third count stated that whilst the said body laid dead, the defendant, without any authority, and almost immediately after life departed, and whilst the body of the deceased so lying dead was still warm, did cut open, dissect, and mutilate the body of the deceased so lying dead, to the grievous affliction of the relatives and friends of the deceased, in contempt of the laws, &c. The fourth count stated, that at the time the body of deceased lay dead as aforesaid, one John Ryan Brenan, Esq., was the Coroner for the Queen, acting as such Coroner, for the district of Sydney, in the Colony aforesaid, and that defendant being an inhabitant of the district of Sydney, and having notice of the premises, and not regarding his duty in that behalf, did not at any time send or give notice to or for the said J. R. Brenan, or to or for any Coroner of the Queen for the said district of Sydney, or any Coroner of the Colony, to view the body of the deceased, but unlawfully &c. omitted and neglected so to do, and unlawfully &c. did cut open and dissect the head of the body of the deceased, and removed the brains from and out of the head of the said body, and cut open and dismembered the said body, without and before any view being had of the said body by the said J. R. Brenan, or any Coroner of the Queen for the said district, and before any inquisition being had and taken on the view of the body of the deceased, as by law required in that behalf, to the great hindrance of justice, in contempt of the Queen and her laws, &c. The fifth count stated, that the defendant not being a legally qualified medical practitioner, in pursuance of the local ordinance passed on the 12th October, 1838, entitled ``An Act to define the qualifications of Medical Witnesses at Coroners' Inquests,'' &c., and well knowing the premises, and contriving and intending to prevent a legally qualified medical practitioner from giving full and sufficient evidence at and upon the holding of an inquest on view of the body of the deceased so lying dead as aforesaid, of the cause or probable cause of the sudden death of the deceased, did on &c., unlawfully &c., dissect and mutilate the body of the deceased, and did unlawfully &c. cut open the head of the body of the deceased, and take and carry away the brains from and out of the head of the same body, with an unlawful and wicked intention to pervert the due course of justice, in contempt, &c. To this information there was a general demurrer, and the question is, whether there is sufficient on the face of the record to warrant the Court in giving judgment against the defendant as for a misdemeanour. In the course taken by the defendant he admits the facts stated, in the information, and contends that admitting the facts so alleged

against him to be true, they do not constitute any offence punishable by law. It is clear that if any one count in the information be good, the Court may proceed to pronounce judgment and award sentence, without the intervention of a Jury upon the merits. By demurring the defendant has concluded himself upon the facts, instead of going before a Jury and offering any matter of defence excusatory of his conduct or demonstrative of his innocence of the matter charged. Had he been found guilty by a jury the objections taken on demurrer were equally open to him in arrest of judgment. Having therefore closed the door of inquiry by the country, and declined taking chance of an acquittal, we are now to determine the case as it appears upon the record. The facts admitted by the demurrer to the different counts, respectively, are these:-- First, that McIntosh had died a sudden death, and that by the law of the Colony it was requisite that an inquest should be holden on the body, before a Coroner and Jury, in order to ascertain the cause of the death, and that the defendant knowing the premises, cut open the head of the body and removed the brains therefrom, in order and for the purpose that the cause of the sudden death might not be ascertained, and thereby to frustrate the ends of public justice. Secondly, that without any reason or necessity he cut open and dissected part of the body of the deceased. Thirdly, that without any authority, and almost immediately after life had departed, and whilst the body was still warm, he did cut open, dissect, and mutilate the body of the deceased. Thirdly that knowing J. R. Brenan, Esq. to the be the Coroner for Sydney, and acting as such, and defendant being an inhabitant thereof, contrary to his duty as such, did not give notice to the said Coroner of the death of the deceased, that an inquest might be held on the body, but on the contrary thereof, and before any view had been had of the body by the said Coroner, he did cut open and dissect the head of the body of the deceased, and removed the brains from and out of the head of the body, and cut open and dismembered the body, to the great hindrance of justice. Fifthly, that being an unqualified medical practitioner, according to the law of the Colony, and intending to prevent a legally qualified medical practitioner, according to the law of the Colony, and intending to prevent a legally qualified medical practitioner from giving full and sufficient evidence at an inquest upon the body of the deceased as to the cause of the death, he dissected and mutilated the body, and cut open the head thereof, and took and carried away the brains from and out of the head, with intent to pervert the due course of justice. Upon these facts, admitted by the demurrer, it was contended, first, that those counts which mentioned a Coroner either generally or by name, were bad, because there was no legally appointed Coroner for Sydney or any other part of the Colony, and that consequently the whole matter charged by these counts to be criminal had no basis to support them; and secondly, admitting this objection to be tenable, there was nothing imputed to the defendant in the other counts which amounted to a crime, however offensive it might be to good taste or propriety. I am of opinion, that in the way in which this case is presented to the Court, we are not at liberty to consider the question, as to the mode of appointing Coroners in New South Wales. The demurrer does not raise that question, if any doubt could be entertained upon it. The defendant is estopped [sic] by the record on this point, for he must be taken to have admitted that by the law of the Colony an inquest must have been had upon the body in question, and that at the time the body laid dead, J. R. Brenan, Esq. was the Queen's Coroner, acting as such for the district of Sydney. In the absence of all proof to the contrary, we are, for the purposes of this case, bound to presume that the Coroner was lawfully appointed by Her Majesty, and that it is not now open to the defendant, after demurrer, to dispute the validity of his appointment. Could such a question have been raised, the mode of appointment must have been matter of proof

before a Jury, and if the question were disputable, the point might be determined on special verdict. The defendant has, however, concluded himself from disputing this part of the case, by admitting on the record, that there is such an officer in existence in the Colony, and that by the law of the Colony an inquest on a dead body must be holden by and before such an officer. We can look to the record only, and see whether there is a sufficient constat of facts aptly charged to warrant us in giving judgment upon it. Here we have the fact admitted, that at the time this body laid dead, there was a Coroner of the Queen for Sydney acting as such in the district where the sudden death occurred. I do not therefore think it necessary to enter into any consideration of the very ingenious argument addressed to us on this part of the case, it being no part of the duty of this court to decide points not necessarily involved in a case submitted for judgment. It being admitted that there is in fact a coroner for the district where this sudden death happened, having cognizance by law of sudden deaths, within his jurisdiction, the only question now is, whether the conduct imputed to the defendant, in all or any of the counts, is criminal, in the eye of the law. I agree, that giving hard names to an Act, innocent in itself, will not make it criminal. The terms wicked, contemptuous, pernicious, wanton, indecent, scandalous, disgraceful and irreligious, (expletives, pregnant of great pungency), would not, I admit, give any deeper colour to the transaction charged as criminal, unless it were really criminal in the eye of the law. But is the act imputed to the defendant innocent as it appears on this record? By the Statute de officio coronatoris, IV Edw. 1, st. 2, which was passed in affirmance of the common law, the Coroner, upon information, shall go to the place where any beslain or suddenly dead or wounded, and forthwith summon a jury to enquire into the circumstances attending and the cause of the death, and the jury must view the body. Although the Statute alluded to does not say expressly, that the Coroner shall take his inquest on view of the dead body, yet it is clearly laid down by all the books, that an inquest of death can be taken by a Coroner super visum corporis only, and if there be no view, the inquisition is void. This is an essential part of the duty of the Coroner, to the intent of making due enquiry as to the cause of the death for the purposes of public justice. In truth the body itself is part of the evidence before the jury, and if they see it before, and not after, they are sworn, a material part of the evidence is given when the jury are not upon oath. It is essential then, for the ends of justice, that the inquest should have the dead as well as the living witnesses untampered with before them, in order to enable them to arrive at a just conclusion. This being the law, has the defendant been guilty of any criminal infraction of it? It is charged in the various counts, that the defendant cut open the head of the body and removed the brains, in order and for the purpose that the cause of the sudden death might not be ascertained, and thereby to frustrate the ends of justice, -- that without any reason or necessity he did so; -- that without any authority and almost immediately after life had departed, and whilst the body was still warm, he did so, -- that knowing of the sudden death, and that J. R. Brenan, Esq. was the Coroner, he contrary to his duty, before any inquest was held, cut open the head, to the great hindrance of justice, -- and that being an unqualified person by the law of the Colony, and to prevent due enquiry into the cause of the death, he cut open the head with intent to prevent the due course of justice. Regarding these allegations as now indisputable, I have no hesitation in holding this to be a criminal misdemeanor. The act imputed, tended to defeat the very object of the Coroner's inquest. How could the jury, upon view of the mutilated body, determine the cause of the death? It is an offence at law to tamper with a living witness, prior to an ordinary trial, and surely it is no less so, to practice upon the most important witness upon so solemn an enquiry

as an inquest super visum corporis. The view of the body is often the most important and material proof before the jury. The body, in such cases, often speaks more eloquently and convincingly for itself than the most consistent oral testimony. The silence of death is more impressive than the vocal testimony of living witnesses. The gravamen of the defendant's offence is, that without reason, or necessity, and without authority, and being an unqualified person, he did this act, in order to prevent due inquiry into the cause of the death, and for the purpose of hindering public justice. This I hold to be a high misdemeanor. It was competent for the defendant to have proved before a jury, if he could, that he was the medical attendant of the deceased before his death, and that he had the authority of his relatives to open the head, either for their satisfaction or for purposes of medical science, or that there was some cogent reason or necessity for opening the head, extracting the brains, and carrying them away. By demurring to the information he has shut himself out from these grounds of defence, and taking the facts in the marked manner in which they are alleged, I cannot hesitate to pronounce this a criminal act at common law. Whether it was con[t]rary to religion, we are not called upon to decide, but there can be no doubt that the wanton, unnecessary, and unauthorised, mutilation of a dead body, whether for idle curiosity or otherwise, is an offence. Doubtless the interests of science ought to be promoted by all legitimate means. The welfare and the happiness of the living are involved in an anatomical knowledge of the human frame. However shocking it may be to popular prejudices, dissection is necessary and often indispensable, for the advancement of the sciences of surgery and medicine, by which the alleviation of human misery and the prolongation of human life are deeply concerned; and I should be sorry to give encouragement, in this enlightened age, to any popular feeling upon such a subject. It is the manner and circumstances of this transaction, which constitute its offensive character. Here the act of mutilation stands on the record to have been wanton, unnecessary, and unauthorized. Such an act is criminal, as being contra bonos mores. It was on this principle that it was determined to be an indictable offence to take up a dead body even for the purpose of dissection, (Rex v. Lynn, 2 T. R. 733, 1 Leach, 497), the Court holding ``that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal Court, as being highly indecent, and contra bonos mores; at the bare idea of which nature revolted, and that the purpose of taking up the body for dissection did not make it less an indictable offence." If it be criminal to take up a dead body after burial, for the apparently innocent purpose of dissection, I cannot think it less criminal to dissect it before burial, without any reason, necessity, or authority assigned, with this additional ingredient, that it is done for the purpose and with the intent to hinder public justice. In this information it is alleged, that the defendant took and carried away the brains from and out of the head of the deceased. If this had the effect of defeating the enquiry as to the cause of the death, it would be no more effective for that purpose, than if he had taken away the body altogether, which it will not be disputed would be a criminal act, if unauthorized by competent authority. On the whole of this case, I am of opinion that the information is good in law, and that we are bound to award judgment and sentence upon the defendant.

Both the other Judges delivered judgments to the same effect, but in consequence of the great length of Judge Willis's arguments, we are compelled to omit it in the present number. Mr. Windeyer then briefly addressed the Court in mitigation, and the Attorney-General in aggravation, after which Mr. Russell was sentenced to pay a fine of £50 to the Queen. See also Sydney Gazette, 17 September 1839.

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

CJA, 5/407, 18/09/1839
The five aboriginal natives lately sentenced at the Supreme Court to transportation for ten years, have received a commutation to five years' hard labour at Cockatoo Island. The idea of confining these men, who we may truly say are amphibious, to an island only a few hundred yards from the mainland, seems to us preposterous in the extreme. We may be mistaken, but we anticipate that their five years' imprisonment will be still further commuted by their swimming ashore, without leave being first had or obtained.

CJA, 5/408, 21/09/1839
EDITORIAL re 'The Election of Coroner'.
[The Queen v Russell]
SUPREME COURT
CRIMINAL SIDE – Monday, September 16
Before the three Judges
The Attorney-General said that Mr. Surgeon **RUSSELL** was in court, judgement having been set down for this day, for the misdemeanour case; which is already known to the public, to require our giving particulars.

The Chief Justice then opened the case for judgement, and gave it as his opinion that the Court could not consider whether the Coroner was a legally appointed officer; that Mr. **BRENAN** was acting in that capacity at the time when, and before, the information was laid, was sufficiently clear to the Court; the defendant admitted the facts of the various counts, and he was decidedly of opinion that the act of defendant was a high misdemeanour.

Mr. Justice Willis was of the same opinion; and made lengthy quotations from law and history from the time of the conquest to the present time, in support of the manner of appointment of Coroners – and being in the gift, or the exclusive right, of the Crown here.

Mr. Justice Stephen also addressed, but briefly, the Court, after the same fashion.

Mr. Justice Willis then, after a short consultation with his brother Judges, delivered the sentence of the Court, which was, that the defendant pay a fine of £50 to the Queen, which was immediately handed over to the Sheriff.

CORONER'S INQUESTS. - On Monday last, at the "Sportsman's Arms," Parramatta-street, on the body of a labourer named **THOMAS [WILLIAM] CROW**, in the service of Mr. **SMIDMORE [?],** Liverpool-road. It appeared that the deceased was addicted to drunkenness, and on the 5th instant, being in that state, he left the premises, and was seen no more until discovered in a water-hole a few yards from the house, quite dead. Verdict – Found drowned.

At the same time and place, upon the scull of a human being, which was found when digging by a gardener in the employ of Mr. **T. HUGHES**. Verdict – Scull found, but how the individual came by his death there is no evidence before the Court.

On the same day, at the "Erin-go-bragh," York-street, on the body of **ALEXANDER ADAMS**, a seaman, who expired at the watchhouse on the previous morning. Verdict – Apoplexy.

On the same day, at the "Bard's Legacy," George-street, on the body of **JAMES HICKEY**, formerly a constable in the police, who feel overboard from a boat while in

a state of intoxication, on Thursday, the 5th instant, and was found by a waterman on Sunday last. Verdict – Drowned while in a state of intoxication.

On the same day, at the "Hope Tavern," York-street, upon the body of a person named **THOMAS JOHNSON**, lately arrived in the Colony. Dr. **RUSSELL** was examined as a legally qualified witness, and deposed that he was called to attend deceased on Monday, and when he saw him, deceased was labouring under *delirium tremens* and general bodily debility, being covered with sores all over his body, which arose from the want of proper and sufficient attention and aggravated by previous habits of intemperance. Verdict – that deceased came to his death from nervous exhaustion, arsing from *delirium tremens.* [We have something to say on the inquest of this individual, the subject of it, which we are compelled to carry over to our next publication.]

CJA, 5/415, 16/10/1839
QUARTER SESSIONS
Tuesday, October 8.
ELIZA JAQUES, stood indicted for an assault, with intent to kill and maim a little boy on the 4th July last. The child in question, is the son of a sailor, who is at sea. The father left the boy with the prisoner to take care of him; and on the day above named, beat the child until he became stupefied and bled at the nose profusely. Guilty of a common assault, and sentenced to be confined in the first class factory for twelve months, each fourth week in each month to be in solitary confinement.

CJA, 5/416, 19/10/1839
COMMUTING SENTENCES. - On Thursday last, a man was tried at the Quarter Sessions for a most dangerous assault upon a female, and it is generally supposed, that had not Mr. **G.R. NICHOLLS** interfered, she would have been murdered by the ruffian. The prisoner was found guilty of the offence, but the Jury recommended him to the mercy of the Court; and in consequence, a lenient sentence was passed upon him, namely – to three years in an ironed gang. Almost immediately after the prisoner was removed from the bar he in a most undaunted manner declared, within the hearing of several officers of the Court, that at the expiration of his sentence he would be "even" with his prosecutor; meaning, no doubt, that he would, to use a colonial phrase, settle the prosecutor, or, in other words, commit murder; whereupon the chairman was informed of the threats, and the prisoner forthwith recalled to the bar, when the evidence of Mr. **KECK** was taken to confirm the villain's threats, while yet the Jury was in the box, and the prisoner's sentence was commuted to fifteen years to a penal settlement, he being free only by servitude.
QUARTER SESSIONS
Saturday, October 12
WILLIAM HARDING stood indicted for an assault. Guilty – fifteen years to a Penal Settlement.

CJA, 5/417, 23/10/1839
EDITORIAL ON CORONERSHIP - in favour of medical coroners.
BOAT ACCIDENT. - On Sunday afternoon a boat, containing several gentlemen, while under canvas, was upset by the Brickfielder when about midway between Garden Island and Pinchgut. The boat and the boatman immediately sunk, and the latter to rise no more; the other parties fortunately being good swimmers, managed to keep afloat until assistance reached them from the *Alligator,* which vessel, as soon as

the accident occurred, despatched a boat with praiseworthy promptitude, and rescued the sufferers from a watery grave. One of the unfortunates was so exceedingly exhausted, that it was supposed he would not recover, and, indeed, up to the following morning he had not thoroughly recovered his senses. All attempts to recover the body of the boatman, have been at present unsuccessful. It is a matter of surprise that more accidents of this nature do not take place, when it is considered the danger our aquatic *gentlemen* run in carrying on a heavy press of sail during a strong breeze.

CJA, 5/418, 26/10/1839
INQUEST. - At the *Green Dragon* on Tuesday last, on view of the body of **WILLIAM M'ALISTER**, a cabinet-maker, who expired on Monday evening, after a short illness occasioned partly by intemperance. Dr. **RUSSELL**, who was in attendance, stated, that deceased died from natural causes, and a verdict to that effect was recorded. It appears that deceased was formerly a very industrious and sober man, but latterly he had taken to strong drink, which, from comparative comfort, reduced himself and family to little short of starvation and misery, and no doubt accelerated his death. The cause for the deceased's sudden transition from the sober and industrious man to the drunkard and spendthrift, it would be worth while to fathom.
LETTER: from Inspector **JOHN PRICE** of the Sydney Police, re the article "'Boat Accident' in the Sydney Gazette, saying that he was not drowned.

CJA, 5/419, 30/10/1839
EDITORIAL, re retirement of First Police Magistrate.
PARRAMATTA.
A report has reached us that an inquest was held on Sunday, the 27th inst., some distance from Parramatta, on a skull which has been found, and which is supposed to be that of **JAMES [JOSEPH] BROADBENT**, who some years ago kept the "Golden Lion," in Sydney, and was supposed to be murdered some four months since. A pair of spectacles and a Guernsey shirt were found near the skull. The verdict of the jury is not yet known.
MURDER. - On Saturday last the body of a mechanic was discovered lying close to the low water mark off Darlinghurst Point, with his throat deeply cut and the back of his head fractured. The deceased was in a state of nudity, with the exception of his socks, and was lying, when found, a little on his left side, his left arm under the ribs, and his right straight on the side. The clothes supposed to belong to the deceased were found close to the shore, above high water mark. They were a good blue jacket, coloured shirt, fustian trousers, a hat with a handkerchief in it, and a pair of shoes, all of which were more or less bespattered with blood; the back part of the jacket and shirt were literally stiffened with clotted blood. The deceased was brought in a shell coffin to Sydney, and placed outside the St. James watch house to be identified; and on Monday afternoon (NOT BEFORE) was the inquest held upon him, when the jury came to the conclusion that the unfortunate man had been murdered by some person or persons unknown. Yesterday, while yet the body was exposed for identification, a woman named **TURNER** came up to view it, and in an agitated manner said she thought it was her husband, but it was nearly twelve months since she saw him last, when he left her. Enquiries were afterwards made concerning this woman, as to where she lived and other particulars; when it was found that she had been residing in Phillip-street only about four days, in a room by herself, the door of which had always been kept locked since she took possession, whether she was in or out. These things

tending to create suspicion, the woman was taken into custody, and is now at the watch house, outside which her supposed husband was lying but a few minutes before. [Since writing the above we have been informed that the woman in question has confessed to having been present at the murder of the deceased, her husband.

SUPREME COURT – CRIMINAL SIDE

(Before his Honor the Chief Justice)

WILLIAM MORRIS stood indicted for the wilful murder of **THOMAS RENTON**, alias **WOUGH**, on the 22nd January last, by shooting him with a gun loaded with ball, at the Bargin River, in a hut, in cold blood, and without the least provocation. The Jury found the prisoner guilty after retiring for a few minutes, and his Honor passed the sentence of death upon him, in an impressive manner.

(Before Mr. Justice Willis)

LLEWELLYN POWELL, stood indicted for the wilful murder of **ABRAHAM MEARS**, on the 6th August, at Wellington Valley, and **JAMES LYNCH** and **CHARLES CLIPH** for aiding and assisting the said Powell. A second count laid the principal charge to Lynch. The prisoners were bushrangers. Guilty; death.

SUPREME COURT

Monday, November 4.

(Before the Chief Justice)

JOHN GORMAN, stood indicted for the wilful murder of **ANN DALEY alias DALLEY**, on the 21st July last, at East Maitland, by beating him on the head with a stick; and **JOHN M'BRIDE,** with aiding and assisting the said John Gorman. M'Bride was discharged, it appearing in evidence, that he had endeavoured to prevent Gorman from beating Ann Daley. Both the prisoners, it appeared, were under the influence of ardent spirits at the time of the diabolical act. His Honor in an impressive manner, passed sentence of death upon Gorman, and recommended him to prepare himself for the awful eternity into which in a few short days he would be ushered.

Tuesday, November 5

(Before the Chief Justice)

PETER SCALLYEN stood indicted for the wilful murder of one **ANDREW SHANLEY**, at Sutton Forest, by shooting him with a gun on the 8th May, and wounding him so that he lingered and died on the following day, the 9th, and **JOSEPH SAUNDERS, RICHARD JONES alias KNIGHT, SAMUEL ELLIS, JAMES HICKEY, WILLIAM BARNE, and GEORGE CASEY**, with aiding and assisting Peter Scallyen. It appeared in evidence that deceased had charge of a dray laden with merchandise, the property of Mr. **MOSES**, of Sydney, and was proceeding to the stores at Maneroo. On the 8th of May last, in the evening, the bullocks were taken from the dray, and the deceased, his wife, and child, and the bullock driver (Saunders, one of the prisoners) prepared to rest for the night; when seven men came up, and deceased stood before them with a pistol, which one of the prisoners ordered him to drop, and ordered him, with his wife and the bullock driver, to go away in the bush, but almost immediately afterwards shot deceased in the side, which caused him to die in the afternoon of the following day. The men had all their faces blackened, except two. The deceased was visited by a magistrate before he died, and his statement of the whole transaction was taken down. It was elicited during the trial that the bullock driver had previously concerted with the other prisoners the whole affair, and the judge, in summing up, laid much stress on the fact that, although no doubt could exist as to the evil dispositions of the other prisoners, yet in all probability they would not have been concerned in *this* outrage but for the temptation

afforded them by the bullock driver. The jury found them all guilty, and the judge immediately passed sentence of death upon them all.

SYDNEY HERALD, 04/11/1839
Supreme Court of New South Wales
Dowling C.J., 1 November 1839
FRIDAY -- Before the Chief Justice.

JOHN WILLIAM TRIGG was indicted for the wilful murder of **THOMAS FLYNN**, by shooting him on board the *Sesostris*, at sea, on the 12th of August.

The prisoner was chief officer of the ship *Sesostris*, and the deceased was a seaman belonging to the same vessel. Flynn, from the evidence, appeared to have been a quiet inoffensive man when sober, but when drunk was a most desperate vagabond, and being a very powerful man was the terror of the whole ship. The crew was in a very mutinous, disorderly state, and there was a great deal of drunkenness; indeed, to such a pitch did they carry their audacity, that they stole a whole cask of beer from the quarter-deck where it was lashed, and drank it in the forecastle. About three weeks before the occurrence referred to took place, Flynn was handcuffed by the officers of the ship, when the irons were forcibly taken off by the crew, and thrown overboard, and one of the seamen threatened to chop off the chief officer's hands for endeavouring to interfere. The deceased had on more than one occasion threatened the life both of the captain and mate. On the night in question Flynn went aft and upon being asked what he wanted, said, the doctor; the doctor was called but did not come immediately; and the chief officer put his hand on Flynn's shoulder and directed him to go forward: he did not go, and Trigg again requested him to do so, when Flynn struck him and closed with him; it was a very dark night, raining and blowing fresh, and Trigg and Flynn slipped towards the bulwarks; Flynn then repeated the blow, and Mr. **NICHOL**, a passenger who had just come on deck, walked over towards them with the intention of assisting Mr. Trigg, but just as he put his arm round Flynn Mr. Trigg fired a bullet through his head. The captain and some of the passengers who were in the cabin immediately came out, and Flynn was taken down below and died a few hours afterwards.

Mr. **HUSTLER** addressed the jury at considerable length for the defence, contending that it was evident that Mr. Trigg did not in the darkness of the night and the confusion of the moment see Mr. Nichol come to his assistance, but that having retreated across the deck until he could get no further he was afraid Flynn would murder him, and was justified in firing at him; in consequence of the state of the crew the officers had been directed by the captain to carry pistols.

A great number of witnesses were called for the defence, who proved that Flynn was one of the most powerful men that ever was seen, and a perfect demon; that on the night in question he had, with the most horrible language, threatened to have Mr. Trigg's life; that he had intended to break into the main hold that night but was prevented by the hatches having been battened down. The account of the affray given by these witnesses varied very much, some stating that there were twenty blows, other that there were only three or four, but three witnesses for the defence swore positively that before the shot was fired, they heard a gurgling kind of noise as if Mr. Trigg was being strangled. All the witnesses concurred in calling the prisoner a humane kind man.

The Attorney-General replied upon the whole case.

The Chief Justice commenced his summing up by paying some compliments to Mr. Hustler for the earnestness and zeal he had displayed in conducting his client's case.

By law, he said, if one person is proved to have killed another the burthen of shewing that he did it under such circumstances as not to amount to murder is cast upon the prisoner. If the prisoner is able to rebut the idea of malice by proving that the death wound was inflicted when his blood was heated in consequence of his having been assaulted, the crime is reduced to manslaughter; no words, however provoking they may be, will reduce murder to manslaughter. Be it that the unfortunate deceased was one of the most worthless vagabonds in existence, still the law holds his life as sacred as that of the highest person in the community: his blood must not be shed, He thought that under the circumstances he was justified in withdrawing their consideration from the case of murder, and leaving it to them to say was the prisoner guilty of manslaughter; and then the true point for their consideration was, had the prisoner, at the moment he fired the shot, fair grounds for thinking that his life was in danger? had he no means of escape? could he not call for and procure assistance? Nothing but the utmost necessity could justify shedding of blood; and if the jury did not think that necessity existed, they must find him guilty of manslaughter. The jury retired about a quarter of an hour, and returned a verdict of Guilty of manslaughter, with a strong recommendation to mercy. Remanded. See also Australian, 2 November 1839; Sydney Gazette¸7 November 1839. For an editorial on the case, see Sydney Herald, 8 November 1839, noting that the mercantile laws of England ``are disgraceful and infamous in the extreme." They were insufficient in the protection of ships' masters.

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

SYDNEY HERALD, 04/11/1839
Supreme Court of New South Wales
Willis J., 2 November 1839

LLEWELLYN POWELL was indicted for the wilful murder of **ABRAHAM MEARES**, by shooting him at Cullengoingoing, in the district of Wellington Valley, on the 6th August, and **JAMES LYNCH** and **CHARLES CLIPP** were charged with being present, aiding, assisting, and abetting. A second count charged Lynch as principal, and the others as accessaries.

The prisoners were all runaway convicts, and on the day laid in the indictment they rode up to Mr. Hall's station on the Big River, and seeing a woman belonging to the station outside, they asked her if there were any men inside; she said, no; to which they replied, that if there was, they had better come out, or they would blow them and the house down too; they got down, and fired at the hut, when Abraham Meares, the dairyman of the station, who was inside, fired out at them; the prisoners told the woman to go in and tell the man to come out, and nobody would hurt him; Meares came out, holding up his hands to show that he had no arms. Powell told him to go down on his knees and say his prayers, which he did; and in a minute or two Powell said Meares had attempted to take his life, and he would have his, and took a pistol out of his pocket, and shot him in the face; Meares dropped down, and immediately jumped up and begged for mercy; Powell called out for some one to bring a piece loaded with a ball to put him out of his misery at the same time firing at him with a musket. Lynch then came up and levelled his musket and fired at Meares, who died instantaneously. They then went into the hut and took some tobacco and sugar, which, with Mr. Hall's horse they took away with them. A party was made up who went in pursuit of, and apprehended them a few days afterwards.

At the request of the Judge Mr. **a'BECKETT** undertook the defence of the prisoners.

The jury retired about three minutes and returned a verdict of guilty. -- Death.

See also Australian, 5 November 1839; Sydney Gazette, 7 November 1839.

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

SYDNEY HERALD, 04/11/1839
Supreme Court of New South Wales
Dowling C.J., 2 November 1839
Saturday -- Before the Chief Justice.

WILLIAM MORRIS was indicted for the wilful murder of **THOMAS RENTON, alias WAUGH**, at the Bargon River, on the 22nd of January, by shooting him.

The prisoner was a freeman in the employment of a gentleman named Matson, at Port Phillip, as hut-keeper, at a sheep station, the shepherds at which were named Renton and Sumner and all the parties had been known to each other in Van Diemen's Land. On the evening of the 22nd of January, the shepherds returned home about the usual hour, and found their supper, some mutton, standing before the fire; Renton said that it was not fit for a dog to eat, and **SUMNER** told Morris to put it in the pan and warm it, which he did. Morris asked them whether they would have their suppers inside or out; they said inside, and sat down, when the prisoner passed across the hut, took up a musket, and without saying a word shot Renton through the neck, and taking a powder flask from Renton's pocket reloaded his gun and made his escape, and was not taken for four months, when he was apprehended by a gentleman named Sullivan. Renton lingered about twenty-four hours, and expired. No cause whatever could be assigned for the act, the parties having been friendly. The Chief Justice examined the witnesses as to the prisoner's sanity, and they all agreed in thinking him of sound mind. Mr. **KECK**[*] said that when Morris first arrived in Sydney he made some clumsy attempts at insanity, but upon his threatening him and telling him he would not be imposed upon, he left off his attempts, and he believed him to be sane, but he was always very much depressed. Guilty.

After the jury had returned their verdict Mr. Matson stated that he had taken some pains to enquire as to the motives of the prisoner, and he believed that he had committed an unnatural offence, and was afraid that Renton would inform against him, and that was the reason he had committed the murder.

His Honor immediately passed sentence of death upon the prisoner.

See also Australian, 5 November 1839; Sydney Gazette, 7 November 1839. [*] The gaoler. The Sydney Gazette, 7 November 1839 reported this as follows: ``Mr. Keck the governor of the gaol, was then called and sworn. His Honor asked him if he had observed anything strange in the conduct of the prisoner since he had been in his custody in the gaol. Mr. Keck replied that when Morris was first received he made several clumsy attempts at insanity; but he told him he would not impose him as he would be punished; after which time he appeared perfectly sane. He, witness, continued closely to watch him, and he observed nothing which led him to suppose him of unsound mind."

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

AUSTRALIAN, 05/11/1839
Supreme Court of New South Wales

Willis J., 1 November 1839

MICHAEL HOGARTY was indicted for stabbing with a knife, with intent to murder **HENRY BIRD**, at Hassan's Walls on the 23rd July. The prisoner and prosecutor were convicts in the stockade. The prisoner was convicted on the testimony of the prosecutor, of stealing, and he got up during the night and stabbed the prosecutor in his bed.

Previous to charging the Jury, His Honor addressed them as follows:--

``Gentlemen of the Jury -- the distinguishing mark in the administration of English justice, is the institution of trial by Jury; and whatever this institution may have been in its origin, one quality, at least, for which it is now held in estimation, is, that it imposes on the Judge the necessity, when required, of summing up the case -- of showing himself acquainted with all its details, and of assigning his reasons for any opinion on the merits of it, which he may think proper to express: though at the same time, it leaves the Jury wholly unfettered by what may fall from the Bench, in coming to the decision they may finally pronounce. It is, in truth, the privilege of the Jury, regarding above all things the oath which they have sworn, taking the whole case into consideration, conscientiously and independently to return an unbiased and impartial verdict. This it is which is the characteristic excellence of trial by Jury. Such being our relative positions, I am persuaded that you, Gentlemen, must feel, as I do, that dispensing the criminal justice of this colony is always an anxious, and frequently an arduous duty, not only with reference to the nature, but on account of the number of the accusations; a number which I fear on the present occasion will be found even greater than usual. But the magnitude of the labour can only stimulate to additional exertion, notwithstanding the pain and difficulty which it may produce. A recent decision of the Supreme Court has proclaimed the ``Prisoners' Counsel Bill'' to be in force in this colony; a measure of the British Parliament evidently intended to promote the interests of humanity and justice. In some cases, therefore, we may hope for the assistance of hearing Counsel for the prisoner, as well as for the prosecution. Under any circumstances, to condemn a fellow creature to punishment, cannot fail to be repugnant to the unalloyed feelings of charity and compassion; yet those who are intrusted [sic] with the administration of criminal justice to the public, as well as justice, tempered with mercy to those whose fate they are to determine. I have the authority of Lord Hale, one of the greatest Judges and best men that ever lived, for saying ``that Juries are not to overlook the evidence -- that they are not to forget the truth, and give way to false mercy; but without looking to the right hand or to the left, they are to weigh the evidence on both sides, and then according to the best of their understanding, to do justice to the public, as well as to the prisoner.'' Your duties, Gentlemen, during the period of service which the law requires of you, are now encreased [sic] by the abolition of military Juries, and although you will now be more fully employed than formerly, yet there will be no greater tax upon your time. The difference is this -- instead of being merely in attendance, you will be [in] employment. Before proceeding with the case in issue, I have only to add my fervent prayer, that He, without whose aid all our doings [are ?] worth, may so fill our hearts with that spirit of justice and mercy, and incline our minds to those sure and safe conclusions in all matters that may come before us, that when hereafter it may happen, as oft it must, that you shall meditate and reflect on the important duties which as Jurymen you may have been called upon to discharge, your reflections may be such as will prove to you a source of comfort in life -- of consolation in death -- of happiness here, and of hope hereafter.''

His Honor then adverted to the case before the Court, and left it in the hands on the Jury, who returned a verdict of guilty. Judgment of death was ordered to be recorded.
See also Sydney Gazette, 7 November 1839; Sydney Herald, 4 November 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

AUSTRALIAN, 07/11/1839
Dowling C.J., 4 November 1839
At the opening of the Court, the Attorney General prayed judgment upon **JOHN WILLIAM TRIGG**, convicted of manslaughter.

The prisoner having been placed at the bar, the Chief Justice addressing him, said, the Jury having negatived the defence set up on your trial, namely, that you were justified in taking the life of the deceased, in order to preserve your own, and having found you guilty of manslaughter, the Court is called upon now to award such sentence as the interests of justice demand. In the administration of the law, Courts of justice know no distinction of persons, and however lamentable it may be to see a person in you station of life in so ignominious a position, the judges must discharge their duties with impartiality. It is not to be denied that those who have the charge of ships, employed in the merchant service, have a difficult and anxious duty to perform, when encountering the perils of a long and tedious voyage. Not merely the safety of the property confided to their charge, but the lives of all on board are in their hands. In proportion, however, to the responsibility thus undertaken, does it behove the interests of all concerned, that the trust reposed should be committed to persons possessed of impertubable [sic] temper, cautious discretion, and sound judgment. Great allowances are doubtless to be made, when such persons are brought in contact with so much diversity of temper, habits, and dispositions, as are found amongst their crew, but especially amongst their passengers, who, unaccustomed to the restraints of a floating prison, are ill reconciled to the privations necessarily incident to a sea voyage. Perfect discipline and entire harmony are scarcely to be expected, and perhaps it would be unreasonable to scan with much severity on shore, many of the irregularities and outbreaks of temper which too often have vent in the course of a tempestuous voyage of sixteen thousand miles. Happily, these are in general allayed before the voyage terminates. Seldom indeed have they produced so grievous a result as this case presents. The records of this Court exhibit few instances of inquiries of this nature arising from like causes, and it is to be hoped that they will not become more frequent. This case is certainly not marked by any cold-blooded spirit of tyranny, for if it had, it is probable that a different verdict would have been found. It is the case, however, of an officer of a ship on duty, previously armed, in contemplation of possible mischief, resenting in his own sober senses to the death, the assault of a drunken unarmed seaman, under circumstances which did not call for the use of a deadly weapon, and with the means at hand of avoiding such extremities. The verdict of the Jury has established this proposition. It may be taken, that the deceased was, when in liquor, a violent man of indomitable temper. This was his character throughout the voyage, although when sober, he was represented to be a quiet and able seaman; and yet with perfect knowledge of his habits, he appears to have been allowed to have his own sway without any attempt, except in one instance, to put him under restraint. No sensible reason for this forbearance was offered at the trial, and it appeared that the captain suffered one of his passengers to arm you the night before this transaction, with the deadly weapon in question, for the purpose of resisting any aggression on the part of the unfortunate man now no more. The

testimony of the second mate went to shew, that he also was prepared to resort, by orders of his Captain, to the same extremity under the like circumstances. It is to be hoped that the spirit thus manifested is not common amongst gentlemen who are plac[e]d in authority over their fellow creatur[e]s. Indeed, I persuade myself that it is not common. Should it be, it is proper to intimate to men armed with brief authority, that it is not every act of misconduct in a violent drunken man, which will justify him in depriving him of life. As a warning to those who may entertain so unbecoming an opinion of their vocation, they should be informed that it is possible they may put themselves in such a position as to call for the last extremity of the law in cases of capital felony. While proper authority, for the purposes of salutary control, is placed in the hands of persons in this situation, it does not imply an utter abandonment of sound discretion and recklessness of human life. Fitness to comm[a]nd imparts the possession of self-control, knowledge of human nature, and freedom from headlong passion. The worst feature in the present case, was, the unusual course taken to arm yourself previously, without any adequate cause proved in evidence. There had been no disturbance in the ship, from which any just cause of danger need have been apprehended, and what had been suspected, might have been removed by the cautionary vigour of the captain, aided by his officers, and the well affected part of the crew, who, with the numerous male passengers on board, could easily have put down any mutinous spirit in individuals. Notwithstanding the various and contradictory accounts of the different witnesses to this transaction, it is clear that this unfortunate man might have been reduced to obedient control, or at least personal restraint, before he proceeded to the violence which induced his death. Means were at hand to put him in confinement, and compel him to obey the lawful commands of his superior. Unhappily, with full knowledge of his temper, he, a rough seaman, was allowed to give himself up to that recklessness with which intoxication characterises the drunkard, and in the conflict, you, being previously armed, terminated his existence. Looking upon this as a sudden abandonment of self control, under great provocation -- that, being unfortunately possessed of a deadly weapon, you were in an unguarded moment betrayed into the use of it -- the Court is disposed to take the most mitigating view of your conduct. The high character you have received from all the witnesses avails you greatly in this stage of the proceedings, when the Court is called upon to exercise a discretion, at all times embarrassing, in awarding punishment. To a man possessing such a character, your present degrading position must form no inconsiderable portion of suffering, which is, I trust, not a little aggravated by that sense of remorse which a generous mind will assuredly feel in reflecting that by his hand he has ushered a fellow creature into eternity, with all his sins upon his head. The Court is unwilling by its sentence to blast all your future prospects in life, but it is their bounden duty, for the sake of example, to award such a judgment as shall have a salutary effect in awakening those in authority to a just sense of their responsibility, and that they are not freely to practise [sic] upon the lives of their fellow creatures. I have had the advantage of a conference with his Honor Mr Justice Willis on all the circumstances of your case. We have taken into consideration the high character you have hitherto borne, and we have not been unmindful of the opinion expressed by the jury on the conduct of the captain under whose orders you served; and we think upon the whole that the interests of public justice do not demand a greater punishment than a fine, in the hope that the result of this case will have a salutary effect upon your future conduct. The sentence of this Court is, that you do pay to Her Majesty a fine of £50, and that you be imprisoned until that fine is paid. See also Sydney Gazette, 7 November 1839.

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

SYDNEY HERALD, 08/11/1839
Supreme Court of New South Wales
Dowling C.J., 7 November 1839
Thursday. -- Before the Chief Justice.
JAMES DAVIS was indicted for the wilful murder of **JAMES MAHER**, by shooting him, at Black Creek, on the 19th July, and **ALEXANDER TELFORD** and **ARCHIBALD TAYLOR** were indicted for being present aiding and assisting.

Three drays belonging to Messrs. Scott, of Glendon, were proceeding from Morpeth to Patrick's Plains, loaded with shells. There was one man with each dray, and an old man named James Maher, who had been engaged by Messrs. Scott to proceed to their establishment as a free servant. About nine o'clock on the night of the day laid in the indictment, the drays were camped near Black Creek, about fourteen miles from Maitland: three men approached the dray, and Maher got up and walked towards them and asked who was there, when one of them immediately fired at him, and he fell, saying ``I am done for,'' and in three or four hours expired. The other men were forced to lay upon their faces and the ruffians robbed the dray of a small quantity of tea and sugar, and three or four pounds in money, belonging to the man in charge of the dray. **HUGH HUGHES**, one of the men with the dray, swore positively to the prisoner Davis, and thought that the other men resembled the other prisoners. The other witnesses could not identify the prisoners, but thought they resembled the men. About three weeks afterwards the three prisoners were apprehended by District Constable **WILSON** and two young men named **BRIDGE**; they were secreted in the mountains, and were tracked by the blacks: when discovered ten or twelve shots were fired, by one of which Taylor was wounded, before they surrendered. They were armed, and were surrounded by property they had stolen from Mr. Wiseman's. They were all runaway convicts. The Jury found all the prisoners guilty. Death. See also Australian, 9 November 1839.
Decisions of the Superior Courts of New South Wales, 1788-1899; Published by the Division of Law Macquarie University

CJA, 5/421, 09/11/1839
THE INQUEST ON THE MURDERED MAN. - In our last we stated, that the inquest upon the man found on Saturday with his throat cut, was not held until Monday *afternoon*; it would appear from this, that we wished to show the Coroner’s indifference to attend to the duties of his office, with that despatch so essential to the manner in which the deceased may have come to his death; and such *was* our motive when we added to the line the words “NOT BEFORE?” but it appears from information subsequently obtained, that we were in error in stating the time the inquest was held; that it was in the morning and not in the afternoon. It was on Monday afternoon, when we were going into the Supreme Court, that we saw the body outside the St. James’ Watchhouse, and supposing that an inquest had *not* been held upon the body, we asked the constable in charge, who replied in the negative, and further stated that he believed the Coroner’s constable had gone off in search of the Coroner; this we presume will be sufficient to show that our incorrect statement, w as unintentionally made. Nevertheless, we must say, that the inquest should have been held on Sunday, or as soon as possible after the body was discovered.

The woman **TURNER**, supposed to be his wife, and implicated in the murder of the man found with his throat cut at Darlinghurst Point, is now confined in the watch-house, George-street, till enquiries can be made concerning the death of the unfortunate man.

SUPREME COURT

Thursday, November 7.

(Before the Chief Justice)

JAMES DAVIS, ALEXANDER TELFORD, and **ARCHIBALD TAYLOR**, stood indicted for the wilful murder of **JAMES MARR**, at Black Creek, on the night of the 19th of July; Davis with shooting him in the left breast with a carbine, and Telford and Taylor with being present, aiding, abetting, and assisting.

HUGH HUGHES sworn:- I was present on the night when Marr was shot; three men came up to the dray, armed, where we had camped for the night, at Black Creek,, and Marr said, Who comes there? when one of the men fired at Marr, and shot him in the left breast. I spoke, and this same man said if I did not hold my tongue he would blow out my ---------- brains. I think Davis is the man who shot Marr; he stood over me at the time the other two went to the dray, from which they took various little articles; my face was on the ground, so I cannot swear which of the three took it. Marr was sixty years of age; he only lived a few hours after he was wounded; he died at the Bush Inn, kept by Mr. **COHEN**, about a quarter of a mile from the spot where the murder was committed; we had no fire arms. I and **WIGGINS** were lying under the dray when the robbers came up; they asked how many of us were in the camp, and ordered Wiggins and myself from under the dray. I could not swear to either Telford or Taylor, they resemble them in size, but I cannot swear to them.

Wiggins and **BOURKE**, two of the camp party, were sworn, and corroborated all the evidence of the previous witness in most of the particulars, but they could not swear to the features of the prisoners at the bar; they were of opinion that the prisoners were the men, they resembled them in size, but witnesses would not swear to them.

CHARLES WILSON, district constable at the Wollombi, sworn:- very long account, mentions a **THOMAS WISEMAN.**

The Jury retired for about half an hour and returned a verdict of guilty. – Death.

CJA, 5/422, 13/11/1839

The woman **TURNER**, who stated that the murdered man lately found at Darlinghurst Point was her husband, now denies her assertion, which caused her to be taken into custody on suspicion of being implicated in the foul deed. The police are making enquiries still to ferret out the murderer.

SUPREME COURT

Saturday, November 9

(Before Mr. Justice Willis)

HENRY ALLEN stood indicted for the wilful murder of **PATRICK M'CARTY**, at O'Connell Plains, on the 3rd July last, by stabbing him with a knife in the abdomen. Guilty of manslaughter: to be transported for seven years.

PARRAMATTA

(From our own Correspondent)

On Thursday last **JAMES M'MANNIS**, who has been a confined lunatic now nearly ten years, during the pleasure of the Home Government, put an end to his existence about eight o'clock at night, by hanging himself with a cord from the bar of his

window where he was confined, at Tarban Creek. He has been remarkably lucid for these few years past, and it is supposed that domestic matters preyed on his mind.
DIED.
On Tuesday, the 5th instant, at the Bridgend Factory, Botany-road, in consequence of an accident while getting into a vehicle, when about to proceed to town, **MARY JOHNSTON**, wife of Mr. **ABRAHAM JOHNSTON**, of that place, and daughter of Mr. **JOHN BROWN**, of Sydney, to the great regret of her family and friends. [See later, CJA 5/423, 16/11/1839; letter to the editor concerning the inquest.]
INQUEST. - Friday afternoon, at the Sailor's Home, George-street, on the body of **PETER**, and American man of colour, who was found dead that morning on bended knees, as if just previous to his death he had been looking out of window. On the day previous to his death, the deceased was, or appeared to be, in perfect health. The jury returned a verdict of Died by the visitation of God. [? Surname = Swedenburgh?]
CORONER'S INQUEST. - An inquest was held at Windsor, on Saturday last, before D. Duncombe, Esq., coroner, on view of the body of **ELLEN DEVLIN**, who died suddenly on the 7th instant.

JANE M'KILLAR stated, on Wednesday evening I was sent for by the deceased to come to her; I did soon afterwards; she fell in a fit; I called to her husband for assistance; she appeared quite deranged when she got up, and went into the ……; soon afterwards she went to bed; she called me in the morning and appeared quite merry; in the evening she became ill, and her husband carried her to bed; some time after she fell off the bed; I went to my own room and saw her no more till Friday morning, when I heard her making a noise as if she was choking. Dr. **ROWEN** was sent for, and he pronounced that she would die. - The bruises she had got she stated were caused by her fall against the side of the wall; about half an hour after Dr. Rowen arrived she died. On the night previous to her death she seemed in good health.

JANE ASHTON corroborated the statements of the previous witness.

Dr. **ROWEN** stated, - I have attended the deceased for 12 months occasionally; I have often been called to see her, and have found her in a state of nervous excitement. On Tuesday I was called in, and found her in a fit of apoplexy, which I attribute to drunkenness; her mouth and forehead were bruised; I think it was caused by her falling out of bed; on Wednesday I saw her again, by order of Mr. **DEVLIN;** I then found her in a dying state, and remained until she died. I have seen the most affectionate regard exhibited by the husband to the deceased.

Mr. **H. WHITE**, surgeon, certified that she died from apoplexy, arising from the pressure of effused blood on the brain – and the jury found their verdict accordingly.
LETTER TO EDITOR, from **R. GILLESPIE,** concerning the inquest of Mrs. **JOHNSTONE**, and containing more details of her death. [**to be copied]**

AUSTRALIAN, 19/11/1839
Supreme Court of New South Wales
Willis J., 13 November 1839
THOMAS GRIEVES, master of the ship *Royal Admiral*, lately arrived from Liverpool, was indicted for the wilful murder of **THOMAS ARMSTRONG** on the high seas, by shooting him with a pistol, on the 24th June last, of which he died on the 27th of the same month.

It appeared that the *Royal Admiral* had on board about two hundred emigrants, and that on the evening of the 24th June, between the hours of ten and eleven o'clock, several of the sailors were down in the steerage (against the express orders of the

Captain and Surgeon), and were fighting with some of the male, and abusing many of the female passengers. Mr **BOTTOMLEY**, the second mate, whose watch it was on deck, hearing the disturbance, went down and endeavoured to prevail upon the sailors to go to their own berths. They would not, and one of them struck him a severe blow. He found it utterly impossible to quell the disturbance himself; and as two of the sailors had previously shewn a mutinous spirit, he went to the Captain's cabin and called him, saying, ``Make haste, Captain Grieves, there will be murder committed in the steerage, and bring your pistols with you." One of the passengers, hearing the noise as he was retiring to rest, also went down to the steerage, and implored the men to go to their quarters, but they would not, and one of them drew his knife and made a stab at him. He immediately went and called the Captain, saying ``For God's sake make haste, or murder will be committed." The same passenger went to the main hatchway, and seeing that matters below were getting worse instead of better, he again went and called the Captain. He (the Captain) then came out in his trousers and shirt, with a brace of pistols in his hands, and advanced to the main hatchway, where he had no sooner arrived than he was knocked down by a sailor named **KERR**, and his elbow catching upon a cask which lay against the bulwarks, one of the pistols went off and shot the boy. Immediately upon the Captain getting up from the deck, Kerr seized the other pistol by the barrel and endeavoured to wrench it from the Captain; but the latter, in order to prevent Kerr from obtaining possession of the pistol, and u[s]ing it against him, discharged it over the gunwale. The father of the boy, and White, Polson, and Campbell (three of the crew), swore that the ball from the second pistol shot the boy. **C.B. BREWER**, Esq., Barrister-at-Law, who was [a passenger on board the *Royal Admiral*], swore positively that the second pistol was fired by the Captain over the side of the ship, to prevent Kerr from gaining possession of it. Several respectable gentlemen, passengers on board the vessel, spoke to the mutinous spirit that had, for some time previous, been manifested by the crew, and considered the Captain perfectly justified in arming himself. They spoke of him as a most humane man, and that he had felt much at having been the cause of the boy's death.

The Jury retired to consider their verdict, and, after being absent a couple of hours, returned to say that they could not agree. His Honor the Judge allowed them further time, but still they could not come to an unanimous verdict, in consequence of which they were shut up until they could return one; the Judge, at the same time, telling them that they could not be allowed either fire or candle, meat or drink.

At six o'clock the following morning, the Judge having opened the Court, the Jury were called in, when they informed his Honor that one of their body would not agree to the verdict of the other eleven. A Juror was withdrawn by consent, and the Captain discharged. The prisoner was most ably defended by Messrs **a'BECKETT** and **BREWER**. See also Sydney Herald, 18 November 1839.

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

CJA, 5/424, 20/11/1839

GROSS NEGLECT OF DUTY. - Many persons have remarked to us, that it is exceedingly strange that the Coroner did not cause an inquest to be held on the unfortunate Mrs. **JOHNSTON** of the Botany Road, who met her death by an accident – or through the accident combined with gross neglect or incompetency of the medical man called in to her aid. There is nothing strange in the Coroner neglecting his duty; but we must certainly say, that in neglecting to institute an enquiry into the

facts whereby the deceased came to her death, the Coroner has not done his duty either to the deceased or to the public. Mr. B. [**BRENAN]** was very particular with the inquest on the body of **MACINTOSH**, some time ago; but in the above case he has done nothing – he has allowed an accidental death to pass unnoticed, when it was his duty to have made every enquiry.

MELANCHOLY ACCIDENT. - FIVE LIVES LOST. - On Sunday afternoon, about five o'clock, the Haidee, sailing boat, having on board Messrs. **W. JOHNSON, CHARLES ROGERS, JOHN ROGERS, SAMUEL THORNTON,** Mr. **WILLIAMS,** saddler, of Bridge-street, and Mr. **FLIGG**, whilst turning to windward between Shark Island and Shark Beach, carried away its jib sheets, when the boat broached to, and a heavy sea struck her, and hove her on her beam ends; another sea rolled in over the quarter, and she immediately went down. Messrs. Thornton, Williams, and Johnson, sunk with the boat, and were seen no more. Mr. Charles Rogers was swimming towards the beach, followed closely by his brother John, and when within a few yards of the shore, Charles complained of weakness – his brother encouraged him on, stating that a few storkes (sic) more, and they would be safe; Charles however, could not rally – but raised his voice to call his brother, and immediately sank. John reached the shore in safety, but in a very exhausted state, being hove on the rocks by the force of the breakers; after lying on the beach some time, he recovered sufficiently to enable him to crawl to the residence of Mr. **RICHARD HILL**, at Vaucluse. After being sufficiently recovered to relate the dreadful disaster, Mr. Hill, accompanied by his men, immediately put off in search of the remaining unfortunate individuals, but which terminated in his being unsuccessful. [Yesterday evening the body of Mr. Johnson, without the head, one of the above unfortunate men, was brought to the Queen's Wharf and placed in a shell. It would appear that the head was torn off by something supposed to be a shark, while it was being drawn up with the grappling irons into the boat.]

ADVERTISEMENT. - Copy of affidavits in refutation of a letter which appeared in the Commercial Journal of Saturday, November 16th; Signed, **R. GILLESPIE.** Two columns.

CJA, 5/425, 23/11/1839

ORDERS FOR EXECUTIONS. - On Monday last the Sheriff proceeded to the Gaol, and read the death warrants of the following individuals in their presence:- **WILLIAM MORRIS, JOHN GORMAN, PETER SCALLION, JOSEPH SAUNDERS**, and **GEORGE CASEY**; to be executed on Tuesday next the 26th instant; and **LLEWELLYN POWELL, JAMES LYNCH, CHARLES CHIPP, ALEXANDER TITFORD, JAMES DAVIS,** and **ARCHIBALD TAYLOR**, to be executed on Friday the 29th instant. All these prisoners, besides four others, were convicted at the last Criminal Sessions, of that awfully prevalent crime – murder; another man for burglary and rape, is also under sentence of death; but the day has not yet been fixed for their execution, by His Excellency the Governor.

INQUESTS. - On Friday week, at the Paterson River Hotel, Market-wharf, on the body of **JOHN NETTLE**, who died on board the *Industry*, on her passage from Wollongong, having been put on board in a sickly state. Verdict, died from disease induced from hard drinking.

On Saturday last, at the Albion Wine Vaults Brickfield Hill, on the body of **JOHN HOOD**, a drayman, who had been killed by a blow on the head from a hogshead of beer, while loading a dray. Verdict, died from a compression of the brain.

CJA, 5/426, 27/11/1839
EXECUTIONS. - Yesterday morning at the usual hour, the following unhappy men were aroused to me their doom: - **WILLIAM MORRIS, JOHN GORMAN, PETER SCALLION, JOSEPH SAUNDERS**, and **GEORGE CASEY**, all found guilty of highway robbery and murder at the last Criminal Sessions. A little after nine the melancholy and heart rending procession moved from the press-room to the foot of the awful drop, accompanied by their respective clergyman, who, before the criminals had ascended the platform joined with them in prayer; that being ended, the whole were arranged under the fatal beam, and the executions performed their last sad office, by affixing the ropes around their necks; this done, the bolt was drawn, and all their souls were ushered into the presence of their Maker.

CJA, 5/428, 04/12/1839
MORE ON CORONERS. - Refers again, with more detail, to the failure to hold an inquest on Mrs. **JOHNSTON**, Botany road.
EXECUTIONS. - The remaining six men, namely, **LLEWELLYN POWEL, JAMES LYNCH, CHARLES CHIPP, ALEXANDER TELFORD, JAMES DAVIES**, and **ARCHIBALD TAYLOR**, were executed on Friday morning. They said nothing, but with a steady step, and apparently in a thoughtful state of mind, walked from the prison to the scaffold yard, where the necessary formalities having been gone through, they were launched into eternity.

CJA, 5/429, 07/12/1839
EDITORIAL - re the Coronership.
BATHURST. - *(MURDER).* - Yesterday evening week, the wife of a publican named **GEORGE LUCK**, residing within twenty miles of Bathurst on the Wellington road, was shot through the head, while she was standing in one of the rooms of the inn, where she was found shortly after the fatal occurrence, lying dead upon the floor, and the fatal ball which has passed through her scull, and striking the wall bounded back by her side, was found close to her. An inquest was held upon the body on the following day, and a verdict of wilful murder was returned, against some person or persons unknown. Three men, however, are in Bathurst Gaol, on suspicion of having been concerned in the dastardly and murderous transaction, two assigned to Mr. **PERRIER**, and the other holding a ticket-of-leave, and in the service of Mr. **NICHOLSON.** The house was robbed at the same time, and an old man much ill-used, who was pinioned while they ransacked the premises. It is supposed that the unfortunate female was murdered because the wretches fancied that she would be able to identify them, as the robbers of her husband's premises.
WINDSOR
An inquest was held on Tuesday the 3rd instant, at the Cricketer's Arms, Fitzgerald-street, on the body of **JAMES [JOHN] YATES**, an emigrant, lately arrived in the colony, who was drowned in the Hawkesbury River, while bathing, on Sunday morning last. Verdict accidental death.

CJA, 5/433, 21/12/1839
QUERY. - Why did not Mr. Coroner **BRENAN** hold an inquest upon the body of a female some time ago, who, it was currently reported, might have been saved from death, had proper medical assistance been rendered her at the time when a certain surgeon arrived at the side of her death-bed? And why was the Surgeon's conduct not scrutinised? The public demand an answer; and although the matter has for a short

time been allowed to slumber, we have not done with the seeming neglect. Let Mr. B. explain; and thus the public, and ourselves, being one of its guardians, may be satisfied.