Constable Corry swore at the committal that between half past 8 and 9 o'clock he was in Flinders Lane and was informed that two men had run down Flinders Street and so he went in that direction and saw the prisoner with Charles Graydon and Mr Robins. The former accused the prisoner of robbing him and 'the Plaintiff [Prosecutor] demanded my assistance'. There was a bundle in Graydon's possession. The prisoner pretended to be drunk and endeavoured to get away. The prisoner said a woman in the house had given him the bundle. At the committal he was charged with 'stealing from a dwelling house' but James Croke avoided any difficulties arising from what was said to Constable Corry by indicting the prisoner for larceny. Charles Rix alias Spautan, who was 'Free by Servitude', pleaded guilty to larceny before Justice Willis on 15 May 1843 and was sentenced to imprisonment for six months with hard labour.[25]

Charles Barnes and Philip Holland had a station at Seven Creeks near the Goulburn. One of their shepherds was John Grey and, on the evening of Monday, 1 April 1844, he returned to the hut with his sheep and saw a stranger there with the hut keeper, Patrick Greene. The stranger was James Hanlon and he stayed overnight. The next morning Grey left with his sheep and noticed Hanlon and the hut keeper standing outside the door of the hut. On his return that evening, Grey discovered that some of his property – clothing and an unloaded pistol – were missing. The missing items had been in a bag hanging in the hut. John O'Neill, another shepherd in the employ of Holland and Barnes, also discovered that some of his clothing was missing.

News of the thefts was spread around the district and, on Saturday, 6 April 1844, Henry Kent Hughes, a settler on the Goulburn near Avenal, saw Hanlon going up a creek and 'on getting up to him he presented a pistol and said he would shoot anyone who apprehended him'. Kent Hughes told his men to keep him in sight and he went home for firearms. He got a gun and a pistol, which he gave to one of his men, and they went in pursuit. They found Hanlon, as Kent Hughes later swore:

> … going up a rocky mountain and called on him to surrender – he said he would never be taken alive and if we approached further he would fire on us and he levelled the pistol at me – I was then about 14 paces from him. I fired and struck him in the legs – he dropped the pistol and gave himself up. The pistol looked as if it had snapped fire – it was cocked at the time it was presented. I examined it and it was loaded with ball and the powder appeared to have fallen out.

John Grey later identified that pistol as the unloaded one stolen from the hut. Hanlon also had the stolen clothing with him.

Hanlon, who was 'Free by Servitude', was handed over to police and, after

being committed for trial, was convicted, later in April 1844, before Justice Jeffcott, of larceny of the clothing, pistol and powder and sentenced to be transported for seven years and was sent to Norfolk Island. During Kent Hughes' evidence at the trial, Justice Jeffcott was critical of him, saying that Kent Hughes, not being a Magistrate, had no authority to apprehend or fire at Hanlon. This criticism was technically correct, but Hughes said that if settlers didn't act, then bushranging would never be suppressed. When the jury convicted Hanlon, the foreman, Captain G Cole, a prominent businessman in Melbourne, said that the jury wished to thank Hughes. Hughes then pointed out the good work of Ellis, a ticket-of-leave man, who had told him where Hanlon was; Jeffcott said he would inform the Government of what Ellis had done. Although the expression 'hue and cry' was not used in this case, the evidence is an example of community reaction to bushranging.[26]

Timothy Considine resided in Lonsdale Street and at about 10 p.m. of 11 February 1846 was in his yard watering his horse when he heard voices about 10 yards distant. At first he thought it was a man asking a woman for money but went closer and saw it 'was one of the lascars'. The man wanted the lascar to go into the bush with him and they went towards Supreme Court (then on the corner of Latrobe and Russell Streets). When the lascar 'was not inclined to go he was struck a heavy blow and knocked senseless to the ground'. Considine called for the assistance of men in his house and, calling out 'stop the robber', they chased the man who, by then, was in Swanston Street making for the Star Hotel on the corner of Little Bourke Street and Swanston Street. Considine and his men were joined in the chase by William O'Connell, who was in Lonsdale Street nearly opposite the Caledonian Hotel, when he heard the cry of 'Stop robber'. They saw the man drop something before they captured him. Sergeant Charles Swindell was in Little Bourke Street and saw people running so he went to them. Considine then had George Scott in custody and gave him in charge for knocking down a man and robbing him. The men involved in the chase then got a lantern and went to the place where the lascar had been knocked down and found some money and a pocket knife which they gave to the police. The lascar, Meea Jaun, a 'native of Calcutta', identified this property as his. George Scott, who was 'Free by Servitude', was convicted of robbery with violence before Justice a'Beckett on 10 March 1846 and was sentenced to be transported for fifteen years.[27]

Warrant produced in court

A reading of depositions taken during this period indicates that the arrest warrant was often produced in court, although rarely tendered as an exhibit. The expression commonly used when referring to the apprehension of the prisoner was; 'by virtue of the warrant now produced'.

> I have received a dispatch from the Colonial Secretary dated the 5th, informing me by His Excellency the Governor's command that in the case of the Aboriginal natives named Robert Tinney Jemmy Smallboy and Jack Napoleon Tunninerparaway, convicted at a criminal sessions of the Supreme Court holden at Melbourne, of murder, and sentenced to suffer death, the sentence of the law is to be carried into effect at Melbourne in the usual manner on Thursday the 20th: and requesting that I would give you the necessary directions.
>
> It is my duty to direct you to make the necessary arrangements in order that the commands of His Excellency may be carried into effect on the day indicated.

Robinson visited the two convicted Aborigines in the gaol, as did various Protestant clergymen. The public execution took place near the intersection of La Trobe and Bowen Streets,[11]

Figara Alkepurata (aka Roger)

John Cox had a station at Mount Rouse and employed Patrick Codd as an overseer. On Tuesday, 19 May 1840, about 10 a.m., Codd, Patrick Rooney and James Brock were standing near a fire in front of Brock's tent while Brock was playing his bugle. About twelve to eighteen Aborigines suddenly appeared out of the bush and Brock indicated to them 'to advance'. He continued to play his bugle and the Aborigines were given damper. Rooney then suggested that they be used to bring in some tea tree, which he had been cutting in the scrub about 300 yards from the hut. They agreed and the work started and some timber was carried from the scrub. Then Brock heard Rooney say, 'O God I'm murdered' and then he saw Codd knocked down. Brock, who was near Codd, was also struck and 'having no means of defence ran'. He called to Codd to run as the 'natives threw spears and waddies'. Brock got a firearm and when he returned he saw that Codd was 'in the last agonies of death' and Rooney was lying nearby 'in a dangerous condition'. Codd died almost immediately. Although armed, Brock did not fire at the Aborigines but 'went back to the hut firing the gun to attract' some wood splitters. When some splitters arrived, they went back to the scene and found Codd dead and Rooney 'who could not see … his face and head one mass of blood'.

Brock reported the matter to the local authorities, including a mounted policeman, Peter Ewing, whom he used as courier for a letter, dated 20 May 1840, addressed to La Trobe. In this letter, Brock outlined the circumstances of the murder and stated that he 'could swear to identity of every one of the natives who attacked us having repeatedly conversed with them and made them presents'.

The men who had joined Brock after the event, or who had later been present

at an inspection of Codd's body, jointly signed a statement, dated 'May about 28th Wednesday 1840', in which they described the injuries to Codd:

> one wound with a bang into the left ear penetrating the brain – one wound immediately under left eye – one wound on left cheek – one wound above left eye brow – one wound on chin – one wound across bridge of nose severing the lower part and cutting upper lip – a wound along each side of nose – one wound into right eye – one wound with a jagged spear, entering the back of the neck and penetrating thro right breast – one wound on left knee – the whole of the back of the scull beaten in – the bones protruding.

On 4 June 1840, a Dr Martin certified that Patrick Rooney had several dangerous wounds about the head, his jaw was badly fractured in two places, his right arm also broken above the wrist and several contusions 'but on whole he is doing better than could be expected from the nature of the injuries'.

Codd's death was reported to Charles William Seivwright, the Assistant Protector of Aborigines in that area and he reported to Robinson that there had been other incidents in which Codd was involved whilst he was employed by the Wedge brothers in the same area.

Brock and Rooney identified the tall leader of these Aborigines as the man they knew as 'Roger' but very little happened to apprehend him until, on 15 March 1842, Patrick Codd's brother, Clement, wrote to La Trobe that he had information that Roger was now at the Protector's station and requesting that steps be taken to bring him to justice. He also informed La Trobe that Brock was at Mount Harper and would render any assistance he could. La Trobe noted that the letter be sent to the Crown Commissioner of Lands to look into the matter and if there was 'reliable evidence of identity and share in the murder' to secure him.[12]

Foster Fyans JP, Crown Commissioner of Lands at Port Fairy, had happened to visit Mount Rouse shortly after the murder and had learnt from Brock what had happened. In early April 1842, Fyans was informed, on oath by Rooney, that Roger was on the Protector's Reserve at Mount Rouse (which was formerly Cox's station, on which the murder had taken place). He issued a warrant for Roger's arrest and proceeded to the reserve where he met Assistant Protector Seivwright. He informed Seivwright of his intention to arrest Roger, and Seivwright maintained that Roger was innocent but eventually agreed to send Roger to a particular place, off the reserve, where Fyans could apprehend him. This was done and, after a chase, Roger was arrested on 21 April 1842.[13]

On the following day, Fyans held a committal proceeding on the charge of murder. Brock gave evidence of what had happened on 19 May 1840 and of

Roger's involvement: 'I saw Codd fall, this native Roger now before me was one of the natives who struck Mr Codd to the ground … I know Roger, I knew him before the murder of Mr Codd.' He also gave evidence of seeing Roger at the reserve and of telling Seivwright 'who said Roger was a great scoundrel and that he boasted of killing three white men. I told him I was determined to have the native apprehended and Seivwright said he would be glad to be rid of him'. Brock was then sworn to interpret to Roger that he was charged with murder and the depositions note that:

> Roger says that Mr Codd was killed by six natives but that he was not one of them from which time three of these natives died and the other three are at Mount Rouse:
>
> 1st Carowin
>
> 2nd Goolgolowne
>
> 3rd Carakarry.[14]

On 1 May 1842, Fyans wrote to La Trobe that he had arranged for Roger and some other Aboriginal prisoners to be sent to Melbourne by ship, via Launceston, VDL. They apparently arrived in Melbourne in late May. On 6 June 1842, Robinson forwarded to La Trobe a letter, dated 21 April 1842, from Seivwright complaining about Fyans' arrest of Roger and asserting that at the time of Codd's killing, Roger was too ill and that Brock had said Roger was not in the party.[15]

Robinson visited Roger and other Aboriginal prisoners in the gaol on 28 and 31 May 1842 and, on 1 June, got approval from La Trobe to engage David Ogilvy to act as solicitor for Roger. There are not many entries in Robinson's journal for June 1842 but the entry for Monday, 20 June 1842 records that 'Judge told me to speak to the superintendent about the blacks in gaol. Barry to move for writ of Haebous Corpus to bring them up on Wednesday and have them discharged'. Robinson also saw Croke, who said the blacks would be tried on 15 July 'for better or worse' and Croke 'Said good case against Roger'. I have not found any trace of any Habeas Corpus application in relation to Roger and it is difficult to envisage any basis for such an application at that time. An entry in the journal for 27 June indicates that, on that day, Robinson saw Ogilvy and later had a meeting with Croke, Gurner and Pinnock (the Deputy Registrar of the Supreme Court in Melbourne) at which he was informed he was responsible for paying Barry's and Ogilvy's fees. Robinson continues: 'I told him I knew nothing of the motion for a Habeas to bring up the blacks'

Roger was brought before the Supreme Court on Saturday, 16 July 1842 with Robinson, Rev. Benjamin Hurst and John Seivwright (C W's brother) sworn as interpreters. There are suggestions in the surviving records that attempts were

made, at least by correspondence, to secure C W Seivwright's attendance at the trial but he did not attend. The situation was complicated by the fact that, about this time, C W Seivwright was suspended from duty for reasons unconnected with Roger's case. The *Port Phillip Herald* reported that, at the outset of proceedings on 16 July, Redmond Barry indicated that there was material indicating that two white men could give Roger an alibi. Willis commented that Aborigines always blamed others and that he had seen this man in the gaol and he said he did not do the murder but others did. Justice Willis directed John Seivwright to ascertain if Roger understood sufficient to enter a plea and after some questioning, in which the charge must have been outlined, Seivwright informed the court that the accused had some knowledge of the proceedings and that he asserted that he was at Borock, some distance from Mount Rouse, on the day Codd was killed. Willis said, 'I think he has stated sufficient for a plea, therefore enter a plea of not guilty for him'.

The next issue was whether Roger had a sufficient understanding of the proceedings to allow of his being tried. The jury were sworn to try that issue. The jury foreman was Sylvester John Browne and others of the jurors were then well known in Melbourne. John Seivwright, Hurst and Robinson then gave evidence about Roger's ability to understand the proceedings. All had some reservations but Willis left the issue to the jury directing them that 'the issue you will have to try is this: Whether the prisoner at the Bar is competent to understand his right to challenge the jury, if he has sufficient capacity to understand the nature of these proceedings and whether with proper advice and caution he is able to make his defence'. The jury retired and, after twenty minutes, returned to court. The foreman announced that 'the jury found a verdict that the prisoner was of sufficient mental capacity to understand the nature of the proceedings'. Willis' notes then record that 'one said he did not agree. The verdict was not recorded so I sent them back to reconsider it – the jury returned and again put in the same verdict unamminously'. The second retirement was for some thirty minutes.[16]

The actual trial commenced on Monday, 19 July 1842. Redmond Barry apparently took some objection to the form of the Information (which has not survived) but no detail of the objection was recorded. A different jury was empanelled; six of them had been on the jury which had tried the issue of fitness; Browne was not on the trial jury. Willis has recorded that 'Revd B Hurst sworn to interpret' but a newspaper reported that 'Hurst, Seivewright, Smyth and Lacy were severally sworn as interpreters' and Robinson records, in his journal, that Redmond Barry objected to Lacy. Willis had brief notes of Brock's evidence-in-chief:

> Codd was my overseer – is dead – on 19th May 1840 he was murdered by the natives – I saw him struck with a leanginil [weapon] – within

> 5 minutes after he died – he received a great many blows at the time. I know the prisoner he was present – he was one of the party, the Chief of the Tribe – I saw him strike him – I swear positively as to his identity and I saw him strike the deceased.

Willis then notes 'interpreted' and continues with notes of the cross-examination by Barry. These notes indicate that Barry concentrated on the issue of identification. Brock swore to previous knowledge of Roger, who was taller than the other Aborigines. He was then cross-examined about subsequently seeing Roger at Mount Rouse and agreed he had not immediately recognised him but did on the second occasion he saw him:

> … the first time I saw him there he was clothed and face painted white – 2nd time he was naked – I recognised him immediately – I do positively swear before the court and jury that the prisoner is one of the men who struck Codd which with other blows occasioned his death.

He agreed that Roger had an elder brother but swore to their distinguishing features and that he did not think the brother was present during the attack.

In his journal notes about the trial, Robinson records that 'Croke said in open court that the protectors protected murderers and when Brock said at first he did not know the man because his face was whitened, Croke replied did Mr Seivewright have it whitened to disguise him.' In the course of the cross-examination, Barry said that Roger had received wounds to his arms which laid him up and, at this point, Roger 'bared his arms and showed marks of spear wounds which appeared to have been recently inflicted'. Willis said, 'I am glad Mr Barry the prisoner is so intelligent'. Patrick Rooney was the only other witness called by the prosecution and he, too, was positive as to Roger's identity and that he 'saw the prisoner at Mount Rouse and pointed him out as one of men who killed Codd – he denied it'. Rooney was cross-examined about the effect of the attack on his health and recollection.

In his final address, Redmond Barry argued that there was no evidence 'that the prisoner inflicted the mortal wound'. Willis directed the jury 'at considerable length commenting on the evidence as he proceeded' and the jury returned a verdict of 'guilty' after a ten-minute retirement. After the jury verdict was delivered, the *allocutus* was put, through Seivewright, to Roger. The *allocutus* was the formal question as to whether he had anything to say about why sentence of death should not be passed according to law. Roger then claimed that it was his brother who was at Mount Rouse and that he was washing Captain Webster's sheep at the time with white men – Carey, Jack, Sandy, Muggie and Charley. Captain James Webster had the Mt Shadwell Station on the Hopkins River near Mortlake in 1840.

Barry moved in arrest of judgment on the basis that 'it did not appear sufficiently clear from the evidence that the prisoner was guilty of the murder as principal in the 1st degree, for which offence he was arraigned & tried' and it was 'not proved he gave the mortal wound'. It is difficult, in the absence of the Information, to understand what the point was that Barry was attempting to make. On the evidence, it would appear the Roger was a principal in the first degree, rather than an accessory. In his sentencing remarks Willis said:

> you evidently understood the nature of the charge brought against you, and you denied it, saying it was not you but some wild black fellow that committed the murder; you have been found of sufficient capacity, by an intelligent jury, to understand the nature of the proceedings against you, and your right to object to any of the gentlemen of the jury; you have had the best professional assistance that the District affords; you have had a fair and impartial trial, and have been found guilty; you are not an 'ignorant savage' nor, perhaps, more unacquainted with the forms of the courts of justice than many of the immigrants arriving on these shores. '*I was never in a court of justice before*' is the constant defence of white people tried in this court You would not, had you killed a man of your own description, long have escaped with life, neither will the laws by which you have been tried for killing a white man suffer you for any length of time to remain alive.

Willis wrote to La Trobe immediately after the trial; he expressed the view that Roger did understand the proceedings, that he was 'ably defended by Mr Barry' and was found guilty on 'the clearest evidence'. Willis could not see any mitigating circumstances and suggested that the sentence be carried out 'at Mount Rouse rather than Melbourne'. La Trobe forwarded the notes of the trial and Willis' comments to the Executive Council but expressed his own view that mercy should be extended. The Council decided that the death sentence should be carried out in Melbourne after the Chief Justice had informed them that Willis' notes indicated the evidence was sufficient and sentence had been passed according to law. Although there does not appear to have been any formal court proceedings in Sydney, it would seem that the Chief Justice had considered Barry's points in arrest of judgment when advising the Council. Robinson continued to visit Roger in gaol after the trial and records that on 26 August Roger asserted that some named Aborigines had killed Codd. The execution was fixed for Monday, 5 September 1842 and Robinson records that he went to the gaol early that morning and saw Roger, who 'Cried that he killed Codd'. A newspaper report of the hanging states that, on the scaffold, Roger claimed that Codd was 'too free with the black lubras and had ill used many of them'.[17]

Jeremiah Connell

Jeremiah Connell was 28 years of age and came to the Port Phillip District as a bounty migrant from County Cork in 1842. By 1846, he was employed by the Yuille family on a station in the Bonninyong (now Buninyong) district near Ballarat. Robert Cameron was also employed by the Yuilles and, on Monday, 16 November 1846 during the afternoon, he and Connell went to John Veitch's inn at Bonninyong and were drinking together. There, Connell became 'riotious and quarrelsome but was not intoxicated'. Veitch noticed that Connell and another man were arguing 'about religion and King William' and Connell seemed to have 'had the impression that the other man was an orangeman and said he "would never be satisfied till he had the blood of an orangeman on his soul"'.

Later, between 7 and 8 o'clock in the evening, while Cameron was in the kitchen, Connell called him out to go back to Yuille's station but, when they got outside, Connell started to scuffle and hit Cameron on the head and 'he became insensible'. As Connell and Cameron were scuffling, Edward Martin passed and said to Connell that 'if he was a papist he made a very cowardly one to strike a man while on the ground'. Martin then went into the kitchen where his wife was, as were several other men, including John Ewing, William Ferguson Proctor and William Bannister. Martin was reading when Ewing saw Connell come into the room with 'his hands behind his back and he moved forward and with the poker he had concealed struck Edward Martin two blows on the head and Martin fell insensible'. Connell also struck Proctor. The uninjured men in the room secured Connell.

Richard Power, 'a medical man', attended Martin who was suffering 'violent pain of head from two wounds and he became insensible and died' between 8 and 9 o'clock on the following morning. Power had 'no doubt death was caused by the wounds'.

That same day, Veitch, Power, Ewing, Cameron and Bannister gave evidence before Thomas Learmonth JP. Probably these proceedings, at which Connell was obviously present, were to provide the necessary information for the issue of an arrest warrant. The formal committal took place in Geelong on 23 November 1846 before Edward Brown Addis JP. Most of the same witnesses gave evidence, as did Trooper William Hines, who had arrested Connell and who produced the iron bar which Veitch had given him.

Connell was tried on 15 December 1846 before Justice a'Beckett. He was unrepresented and, after the prosecution case was closed, 'the prisoner said an intoxicated man in court said he was present at the Affray and could help the prisoner.' A'Beckett allowed the prisoner to talk to him and the prisoner then called Edward Norton, who swore he was present when 'prisoner was attacked

by other men'. There is no mention of any Edward Norton in any of the depositions. Connell claimed he had no memory of the incident and relied on 'intoxication and excitement' as a defence. He was convicted of murder and sentenced to death. He was executed on 27 January 1847 and 'the body was handed over to Mr Therry the Catholic clergyman for internment'.[21]

Bobby (Booby), Ptolmie (Ptolemy) and Bullet Eye

The Beveridge family had a property, known as Piangil, on the Murray River some 26 miles below Swan Hill. It was divided into different stations and the lower sheep station, some 15 miles away and known as 'Panyan', was managed by Andrew Beveridge.

About half past 7 or 8 o'clock on Sunday morning, 23 August 1846, Andrew Beveridge, John Kelly and John Ryan, 'laborers', were having breakfast in the tent when they heard a '"Cooey" from a Black fellow'. Beveridge said, 'name, come baby?' and the 'Black fellow' who made his appearance answered 'Watty'. Beveridge said, 'a great scamp that Black fellow'. Beveridge then left the tent and accused that black of being present when some sheep were stolen. There were other blacks there and Beveridge told them to 'be off'. Ryan saw four blacks, including Ptolmie and Bobby, with spears 'shipped ready to fling at Beveridge'. Ryan returned to the tent and said to Kelly that the blacks were going to kill Beveridge. Some more words passed about the stolen sheep and Ptolmie struck Beveridge with a reed spear on the breast. Beveridge said, 'O my God I am to be murdered', and was running towards the tent when Bobby threw a jagged spear which hit Beveridge. The reed spear thrown by Ptolmie entered somewhere in the front part of Beveridge's body and 'in half a minute Bobby threw his spear'. Ryan made off 'as fast as I could to give the alarm'.

After being warned by Ryan, Kelly 'looked and saw three or four blacks with spears raised against Beveridge. Booby had his spear raised ready to fling at Beveridge who was about one yard away. Ptolmie was close to Beveridge also with a spear raised and there were two other Blacks around Beveridge'. Kelly went into the tent to get a gun but it was unloaded so he left it. Beveridge then came into the tent with a spear stuck 'in his body just above the hip on the right side about 18 inches of the spear outside and six inches in body'. It was a jagged spear. Beveridge told him to 'load the pieces'. Kelly went out the back of the tent and was 'grabbed by 7 or 8 Blacks and brought to the front where Ptolmie had axe in hand'. Ptolmie rushed at him but 'Bobby's brother saved him'; again Ptolmie rushed at him but 'a Black named Charley saved him'. Kelly got on a horse and went to Coghill's station nearby.

Eventually, both Kelly and Ryan arrived at the head station about noon and told George Beveridge that his brother 'was killed by the Blacks'. George Bev-

that Willis had fixed 15 May for the trial. Croke continued, 'If you can strengthen the case by any additional evidence I shall feel obliged to you to procure it. Your presence at the trial is indispensable. It will be necessary for me to see you before the 15 May' and suggested Parker 'come 4 or 5 days before the day fixed for the trial'. There is nothing now in the file to indicate that Parker ever obtained any additional evidence.

The trial was held before Justice Willis on 18 May 1841 and the five prisoners – Jenkins, Remington, Martin, Collins and Morrison – were charged with shooting with intent to maim or alternatively shooting with intent to cause grievous bodily harm. The only witness noted in Willis' Case Book was Joseph Maddox who swore, according to Willis' notes, that he:

> was *attacked on Sunday following by natives throwing spears at me – I saw spears thrown from 40-50 yards – I fired after the spears were thrown* as I was in great danger – there were about 150 natives. I saw a gun in Jenkin's hand – I was there at commencement of attack – Collins Martin Jenkins and Remmington were present when the attack was made on me – they had guns. [Italics indicate underlining by Willis]

It would appear from the newspaper reports that during some defence evidence, Croke 'relinquished the proceedings' and Willis gave the jury a 'no case direction' to the effect that the 'prisoners were perfectly justified in shooting in self-defence'. All were acquitted. Willis criticised Parker for taking sworn depositions from those charged. In doing so, he was repeating a criticism he had directed to Charles Seivwright, another Assistant Protector, who had done the same thing in another case heard earlier in the sittings. He also expressed regret that the prisoners had spent so long in custody.[3]

Sandford George Bolden

On Thursday, 28 October 1841, some Aborigines of the Conawaare (?) tribe came to Charles Seivwright's Protectorate Encampment in the Western District with a boy named 'Bang-il-Bang'(?Bong-il-bong) and said that, on the previous day, the boy and a native named Tatkier with his wife named Terang-gerang-coe were on their way to join Seivwright when four white men – 'two gentlemen and two poor men' – came upon them and beat them severely with their whips and one of the gentlemen, 'the smallest one', shot Tatkier through the body, and that the female had been shot by the poor man 'Bill' and that she died. Bang-il-Bang said he watched this from the branches of a tree. Later, he saw both dead bodies.

Seivwright went to the station run by the Bolden brothers on the Hopkins River and eventually saw Sandford George Bolden (commonly known as 'George') and asked him about this incident. At first, Bolden denied any knowledge of any

incident, but then asked, 'Are the bodies found?' and Sievwright said, 'I believe so'. Bolden then said, 'I do not hesitate to tell you that it was I who shot the native but I assure you that it was done in self-defence'. Seivwright considered him 'to be agitated' and told him he had better say nothing more at present. He also told him, 'I thought the best thing he could do was to meet the case upon the merits, to make such statement as would bear investigation and in the morning I would return and receive it from him'. Bolden agreed to do this. Later that day, Seivwright met Lemuel Bolden.

On the next day, George Bolden gave Seivwright a handwritten document, saying, 'it was the statement he wished to make of what had taken place'. The document is in these terms:

> Leighton Station
> River Hopkins Thursday, Oct 28th 1841
>
> Yesterday (Wednesday Oct 27th) when going down the run with my Brother and two stockmen Wm Kiernan and Peter Carney we met three natives a man, a woman, and a boy. I followed the man and tried to drive him off the run. He ran for a short distance but when crossing an open flats he turned and kept running round and round my horse and at last made a spring intending to strike me with his club, this compelled me to shoot him – he then ran and jumped into a water hole. I there left Wm Kiernan and Peter Carney to take him should he attempt to come out of the water whilst I returned to the hut for another pistol as I feared there were more natives about killing the cattle as these when first seen were at a considerable distance apart, evidently sweeping the run for cattle; on my return saw Peter Carney holding the two horses and the native fighting Wm Kiernan, the native seeing me gallop up jumped into the waterhole, I again shot at him and he immediately sunk. We now returned to my brother who had been left where we first saw the natives and found the woman's basket containing a large quantity of suet and beef fat, also an axe which the boy threw down when running away.
>
> The natives having been very troublesome to us was the cause of our driving these off the run having about the 10th inst killed two grown cattle and some calves besides wounding many others; on the 19th inst our stockman came upon a number of them ? a cow and on the 23rd they killed another cow, besides several calves which they have killed various times, parts of which we have found in different places on the run.
>
> (signed) S Geo Bolden

Seivwright then took the deposition of Peter Carney, who swore to the attempts to drive the natives off the run and how one struck at Geo Bolden with a long square stick and that, after Bolden had avoided the first blow, 'on the second stroke Mr Bolden fired and shot the native through the stomach'. The native then ran to the waterhole. Later, the native went to another waterhole and came out to attack the other stockman and struck him. Bolden came back and again shot the native. William Kiernan swore to the same effect that Bolden first fired when the native was attacking him. Later the native attacked him (Kiernan) with a weapon, striking him on the temple and the elbow. It was then that Mr Bolden again shot the native. Lemuel Bolden swore to being with the party in the first instance but he stayed where the female had been. She attempted to attack him and draw him into bush where he suspected there were other natives. He couldn't say he heard a shot fired. It would seem that, on some later day, when Captain Webster JP was present, the deposition of Carney was read over to him but there is some doubt whether Carney was resworn. Bolden was committed for trial on a charge of the murder of the male Aborigine and, although Seivwright had reservations, was released on bail.

The trial commenced before Justice Willis on 2 December 1841 and Redmond Barry defended Bolden, who was charged that at Port Fairy on 23 October 1841 he had shot at, with a firearm, with intent to kill, an Aborigine named Totkeire (Tatkier). Much of the writing about this case is either overtly or impliedly critical of Willis' conduct of the case or does not understand that there were difficult issues of law about the way the Information charged the offence and the admissibility of evidence. Willis is criticised for asserting that settlers had rights to remove Aborigines whether they were aggressive or not; he is also criticised for publicly stating that Bolden's brother was a neighbour of his. Both of these matters need to be considered in the light of the context in which they arose in the course of this trial. The trial itself was not brought on more swiftly than usual for cases of this nature where all the witnesses were white, adult and available.

Willis' Case Book records the charge as 'Tachier Aborig shoot with intent to kill'. Carney described how the Aborigine 'drew a weapon … a sort of club with edges like a sword … would cut a horse's head off' and that the Aborigine 'was standing close to head of the prisoner's horse and made a stroke at the prisoner with his weapon … prisoner quite passive … he slewed himself on the saddle and escaped the blow' and 'did not attack the native until second blow aimed at him'. This native ran off to a waterhole and Bolden went off to get more firearms. As he was returning, the Aborigine attacked Kiernan and Bolden again fired and the 'native fell or jumped into waterhole just as the shot was fired'. Willis then has a note in his book: 'per cur (question by the judge) – what has become of the native – dead or alive – if dead where body if alive why not produced.

'Mr Croke – the charge is for intent to kill and murder.'

Redmond Barry then cross-examined Carney; he ascertained that it was the other stockman who insisted that Bolden get more firearms and Barry then moved to questions about it being obvious that the woman had possession of some stolen fat. He then commenced a line of questioning about 'previous depredations' and, according to Willis' notes, 'evidence objected to by Crown Prosecutor'. With the greatest of respect to Croke, most criminal lawyers, then and now, would see the relevance of knowledge of 'previous depredations' to the prisoner's state of mind when self-defence of person or property was in issue.

Immediately after the note of Croke's objection in Willis' Case Book, the following is written;

> I said that the owner, lessee, the person paying for a licence for a run has the right to use every *lawful means* for recovering from any person White or Black any of his property attempted to be illegally carried away and further there being no reservation in the grant lease or licence from Government *in favour of the Aborigines* the possessor had also a right by all *lawful* means to turn off any person whether white or black who should trespass on his run. It was not like Bon jon's Case – this was a case of aggression between Blacks and whites in which the court had already jurisdiction. [Italics indicate underlining by Willis]

The underlining is by Willis and, as Willis points out in official correspondence about this case, the reference to Bon Jon's Case was to distinguish the present case from one in which all parties were Aborigines and, according to Willis' view of the law, outside the jurisdiction of the court. Willis was probably using the word 'trespass' in the then accepted context of 'doing some damage, however inconsiderable' to the land.

William Kiernan's evidence was to the effect that he saw 'the native trying to strike him [Bolden] with a club before the first shot was fired; that he asked Bolden to get more firearms and that he was being attacked when the second shot was fired'. He saw no indication that the Aborigine was injured. In cross-examination, Willis noted that Kiernan swore he 'saw same man killing a beast on 19th of this month – saw him several times before – can't say anything in pistol that might have caused death – might have been pistol discharged without ball or shot to frighten natives – it frequently happens – at time of 2nd shot native was in act of attacking me'.

Charles Seivwright was then called as a prosecution witness. At an early stage of his evidence-in-chief, Seivwright swore:

> 'I knew Tatchier I was perfectly acquainted with his person – I have

> no doubt he is one of the numerous tribes over which I have superintendence. *That is the name by which he is generally known. I have not seen him* tho' I have made enquiry for him from his own tribe in particular & from several other tribes. I saw him about a fortnight before the dates to which I have referred. It is impossible he can be about the bush. I have twice searched for him from sunrise to sunset.
>
> *He may still be alive.'* [Italics indicate underlining by Willis]

Croke attempted to prove the statement made by Bolden to Seivwright, but Barry objected to its admission – 'the prisoner's confession being made as was insisted by his counsel under the false impression that the Bodies were found, it was urged that it was inadmissible'. Barry elicited from Seivwright that the 'Prisoner's statement was freely and voluntarily made' but that the prisoner afterwards said, 'Had he known that the bodies had not been found he would not have made the statement he had'. It was in this context that Willis first mentioned Bolden's brother being his neighbour. He was making it clear that, as a Judge, he did not decide a point because he knew somebody, but, rather it was his duty to apply the law strictly, as 'the public had to know the case was properly investigated'. Willis said the court could reserve the point but he thought that, under such circumstances, the confession should not be received, 'a confession should be as free as the air', it had to be 'free, voluntary and without any misrepresentation to the party making the confession'.

During cross-examination by Barry, Seivwright swore: '*The inducement to state that the native's name was Tachier was the statement of the Aboriginal boy about 10 yrs old'. … 'I can't say that I fully understand the language of these Natives*. I made subsequent search for the bodies of these Natives – *they have not been found' … 'every facility has been afforded by the pris & and his friends for* the fullest investigation.' [Italics indicate underlining by Willis]

Seivwright was the final prosecution witness and Willis then noted, 'Mr Barry addressed the jury in an able speech'. The newspaper reports indicate that Barry argued that Bolden was acting in self-defence and that he also made the point that the prosecution case had failed because it had not been lawfully proved that Tachier was the actual name of the alleged victim. In this regard, Barry referred to the decision of the House of Lords, on 16 February 1841, in the Earl of Cardigan's Case. Cardigan had been tried by his peers for wounding a Captain Tuckett in a duel at Wimbledon Common, on 12 September, 1840. In that case:

> The Attorney-General in a lengthy address explained the law and the facts of the case; and the evidence of various persons who had witnessed the transaction of the duel was then produced; but at the close of the case it was objected by Sir William Follett, on behalf of the

> Earl of Cardigan, that there was no evidence to show that the person against whom the shot was discharged was Mr Harvey Garnett Phipps Tuckett. The card of 'Mr Harvey Tuckett' had been put in; but this might have been quite another person from the individual pointed to by the indictment.
>
> The Attorney-General was heard on the other side; but, after a short deliberation, the Lord High Steward announced that the evidence which fixed the identity of the individual was insufficient, The Peers thereupon declared the noble defendant not guilty.

Croke argued that there was sufficient evidence of identity and apparently did so in terms indicating he had previously framed Informations in that manner and would do so again. The law then required that persons named in Informations or indictments should be described with 'convenient certainty'; it was permissible to describe a victim as 'unknown'. It would appear, from the newspaper reports, that Willis again referred to knowing Bolden's brother in the context of his official duty of 'knowing nobody' when deciding points of law such as that raised by Barry about the defect in the Information.

> I told the Crown Prosecutor that there was no evidence that I could receive to show that an Aboriginal named Tachier had been shot at & and I alluded to the recent case of the Earl of Cardigan in the House of Lords. The learned Crown Prosecutor insisted that the evidence of identity of Tachier (which at the utmost was merely the report obtained by Mr Seivwright from the savage boy about 10 yrs old who but partially understood English) was sufficient. I told the jury that the Information could not on that ground be sustained, that, in fact, there was no proof of the main allegation viz that an Aboriginal named Tachier was shot at, and that they must acquit the prisoner but even had it been otherwise the circumstances of the case were such as would probably have induced them to do so.
>
> The jury followed this direction and acquitted Bolden.

The newspapers were critical of Seivwright's behaviour in this case and Bolden's brother, the Rev. John Satterwaite Bolden, who was Willis' neighbour in Heidelberg, did personally complain to the Governor, Sir George Gipps, about Seivwright's conduct as a Magistrate. This was on 17 December 1841 and not before the trial, as some writers have suggested. Willis sent a copy of his notes of this trial to the authorities; Gipps and La Trobe were both concerned about Willis' comments that squatters, holding Crown licences of land, could treat Aborigines as trespassers. Perhaps Willis was taking a 'plain-English' view of the Land

Regulations published on 24 August 1841 which provided, in the 8th Regulation, 'parties holding Lands under License … will be entitled to the exclusive right of occupancy of the same …'. That James Croke was not happy with the result of this case may be gathered from an entry in George Augustus Robinson's journal for Saturday, 26 February 1842 which records: 'Mr Croke said to me today, p.m., don't talk to me of that case Bolden, that man ought to have been transported'.[4]

John Jenkins

The law about naming the victim, as laid down in the *Earl of Cardigan's case*, was followed by the prosecution when John Jenkins was tried in 1849. On 14 September 1848, John Jenkins, overseer for James Maxwell Clow, a squatter at Pine Plains near Lake Albacutya, wrote to the Bench of Magistrates at Horsham reporting the death of an Aborigine. He wrote that 'on the night of 15th August last the sheep were very restless and upon going to ascertain the cause I saw an object in the yard like a dog within a little distance of the sheep. I immediately fired a pistol and found I had shot an Aboriginal Native. Any further information you may be desirous of obtaining I am fully prepared to give'.

As a result of this letter, Jenkins must have been charged with some offence and a committal proceeding was held at the Horsham police office before James M Darlot and Robert Hamilton on 21 September. William Rodgers swore he was in the employ of J M Clow at Pine Plains as a hut keeper and that on 9 [sic] August someone called out and he went to the door; he did not hear a shot or see a body and did not assist to bury a body. Other employees were there – John Price, Patrick Henry and William Pilcher. Apparently Patrick Henry had been subpoenaed but did not attend and a warrant was issued for his apprehension. The proceedings were adjourned to 16 November and, when no witnesses attended, were again adjourned to 14 December, and then 'no witnesses being in attendance Jenkins was bailed to the Supreme Court'. There is a note that he was bailed in the sum of £50 with two sureties, each of £25.

Darlot wrote to the Crown Prosecutor, James Croke, that Clow had abandoned his station and the witness could not be found, so Jenkins had been committed to the next sittings of the Supreme Court 'to answer any charge brought'. There was a postscript that the Magistrates had not been able to discover the name of the Aboriginal native shot by John Jenkins. There was no indication that any Protector of Aborigines was involved in this case and, indeed, the Protectorate was abolished in 1849. The trial was before Justice a'Beckett on 17 February 1849; Redmond Barry was junior counsel to James Croke for the prosecution and William Stawell defended Jenkins, who was described as being of the 'Wimmiera'. The first count of the Information was for shooting a 'person unknown'. Jenkins' letter was read as evidence – it was clearly a voluntary admission against interest – and a'Beckett

William Jones

William Jones was a shepherd employed by the Whyte Bros who had Konong-wootong Station which was north of Coleraine. As was usual, he lived in a hut on the property with other shepherds, and the hut keeper, John Hurley, did the cooking. In late September 1850, Jones and Hurley had an argument 'outside the hut, about the meat not being properly cooked and Hurley said "you are always growling about something"'. Hurley offered to fight Jones who said, 'he would not fight about trifling things' and turned back as if to go into the hut. Hurley continued to stand outside and, as he later swore:

> ... in about a minute the prisoner rushed at me behind my back and stabbed me with a knife in the back. I turned and saw the knife and called 'murder' and I ran but fell and the prisoner threw himself on top of me and stabbed me twice in the chest. I asked him if he was going to kill me he swore, 'by the holy Jesus' that he would roll it in me and raised his arm to stab me but I kicked it and he dropped the knife.

Hurley escaped and got over a fence. Hallin Strange, another shepherd, saw some parts of this incident and found the knife where Jones said he had put it; Strange said of the knife that 'it was for killing sheep'. No medical evidence was led at the committal and James Croke has a note about 'whether a doctor saw the wounds'. There is no indication that any doctor was subpoenaed for the trial which took place at Geelong on 20 February 1851. Jones, who was 'Free by Servitude', was convicted of stabbing with intent to do grievous bodily harm and Justice a'Beckett sentenced him to be imprisoned at Melbourne for eight months with hard labour.[25]

Wounding by Spear

Warrigle Jemmy

John Forrester was a shepherd employed by James Cooper near Reedy Lake in the Kerang area and was out with his sheep one day in July 1846 when he was 'startled by a spear which passed through the tail of his coat'. He turned and saw a number of Aborigines, one of whom threw a spear 'which passed through his clothing and into his skin' causing some bleeding. Forrester 'had a gun but did not fire it as he thought the blacks would kill him'. These Aborigines then departed with some 40 sheep from the flock. Forrester made his way back to the station with the remaining sheep and told his fellow workers that it was Warrigle Jemmy (of the 'Marrabool tribe') who had thrown the second spear. David Strang saw the wound and described it as 'a spear wound'. He also knew Warrigle Jemmy, of whom he said that 'he is not considered a peaceable black fellow'.

The wounding and sheep stealing were reported to a local Justice of the Peace

who passed on the information to William Johnson, a sergeant in the border police, who went to Cooper's station and 'ascertained the truth of the information'. He then went to the Curlewis station on Reedy Lake and, some 4 miles from the station, he saw Warrigle Jemmy 'who had sheep shears and who resisted him'. Johnson took him in charge and went back to the Aborigine's camp where he found Warrigle Jemmy 'had an unloaded carbine and two pistols'.

The committal proceedings commenced on 15 September 1846 in Melbourne before the Mayor, Dr James Frederick Palmer. George Augustus Robinson, the Chief Protector, has a journal entry for 18 September: 'Saw mayor on black prisoner (Warrigal) native policeman interpreted at first examination'. The committal was concluded on 12 October and James Croke received the depositions on the following day. Warrigle Jemmy was tried before Justice a'Beckett on 17 October 1846 and the Information charged wounding with intent to murder and the usual alternatives. There was no suggestion of any sheep stealing charges in any of the surviving material. Edward Stone Parker, Assistant Protector, was sworn as interpreter and Redmond Barry appeared for the prisoner. There is no record that any issue arose about either the ability of Warrigle Jemmy to understand the interpreter or to understand the nature of the proceedings.

In his final address to the jury, Barry raised the issue of identification and, in his charge to the jury, a'Beckett commented that 'Forrester did not appear to be so confused as not to be able to identify'. The jury convicted Warrigle Jemmy of wounding with intent to maim, disfigure or disable or to do some grievous bodily harm and he was sentenced to be transported for life.

The way in which Robinson has noted this verdict and sentence in his journal indicates that he was not present at the trial but, in December 1846, both Parker and Robinson sought to have Warrigle Jemmy's sentence of transportation commuted to a fixed term of imprisonment. Their submission was sent to a'Beckett for his comments. Parker alleged that there was a 'paucity of evidence to support the conviction' but a'Beckett rejected that view. Parker alleged that the witness, Forrester, was of bad character, but a'Beckett pointed out he 'was not cross-examined to that effect'; Parker alleged that 'the wound was slight' but a'Beckett responded that intent was the issue and that 'the jury so found and did not recommend mercy'. A'Beckett also pointed out that if the sentence did not reflect the seriousness of the crime, then the settlers 'would act themselves rather than allow the law to take its course as they had in this case'. He also said the sentence had to be 'exemplary' and that it 'had to reflect the circumstances of the particular case'.

On 10 February 1847, Lonsdale, then Acting Superintendent, wrote to Robinson that the Governor agreed with a'Beckett and that Parker's observations

were not supported by the facts of the case. The Governor was concerned that, if he interfered with the sentence, it would be 'an inducement to the White People to take summary revenge upon the blacks in every case in which they may be the aggressors, instead of, as in the present case, securing their punishment by due course of Law'. Warrigle Jemmy was sent to VDL in May 1847 but, at some point in time and in circumstances where the public were unlikely to learn of the fact, the sentence must have been commuted as, across two end columns in the relevant CRB entry, there is a note in different handwriting and ink to the original entry that 'commuted to twelve years imprisonment from date of conviction C J La Trobe'. The handwriting is not La Trobe's.[26]

Notes

1 Bl Bk 4, p. 205; Hawkins vol. 1, ch 15; 7 Wm 4 & 1 Vic ch. 85 sec. 2, 3, 4.

2 VPRS 30P Box 2 – 1-21-6; Willis' Case Book No. 15, p. 9; *Port Phillip Herald* 19 May 1843

3 VPRS 30P Box 185 NCR 8; VPRS 21 Unit 1 – 1841 collection; VPRS 19 Unit 13; Willis' Case Book No. 11, p. 159; *Port Phillip Gazette* 19 May 1841; *Port Phillip Herald* 19 May 1841; Billis; *see* John Faine in Murder

4 Depositions – VPRS 30P – Box 185 NCR 11; trial – Willis' Case Book No. 12, p. 88; VPRS 19 Unit 22 file 41/1835; *Port Phillip Herald* 30 November 1841; *Port Phillip Gazette* 1, 4 December 1841; *Port Phillip Patriot* 6 December 1841; Shaw: *Gipps-La Trobe Correspondence* p. 111; defect in Information – (general) Hawkins vol. 2, pp. 319 ff.; the Earl of Cardigan Trial – I am not sure how Barry and Willis then had access to any report of this case; later textbooks cite this case as being reported in *Dom Proc* 1841 (*Domo Procerum* – House of Lords) but the transcript is now available in *The Complete Newgate Calendar* (The Navarre Society, London, 1926) vol. 5, pp. 313-18; trespass to land – Bl Bk 3 p. 209; Shaw: *The Port Phillip District* p. 137; Clark: *Select documents* vol. 1, p. 238; Behan, p. 116 ff.; Garryowen p. 350 (both Behan and Garryowen are inaccurate); Ackerly pp. 217 ff.

5 VPRS 30P Box 191 – NCR 318; *Port Phillip Gazette* 19 February 1849; *The Argus* 20 February 1849; Billis

6 Official Records – VPRS 30P Box 1 – 1-11-1; VPRS 16 Unit 3 pp. 18, 63; VPRS 19: Box 30: file No. 42/954; VPRS19: Box 31: file No. 42/1163; VPRS 19: Box 35: file No. 42/1786; VPRS Series 19 Units 29, 33, 62; HRV vol. 7, pp. 20-1; Willis' Case Book No. 13, p. 61; *see* also Garryowen pp. 351-6; Behan, pp. 204-13; Boxall p. 99 ff.; Shaw: *Gipps-La Trobe Correspondence* pp. 128, 129, 133; Macfarlane pp. 21-36; Lindsay Mann, passim

7 VPRS 30P Box 187 NCR 106; *Port Phillip Patriot* 19 February 1844; *Port Phillip Gazette* 21 February 1844; VPRS Series 19 Unit 56; *see* Gunn in Preparation for Trial

8 VPRS 30P Box 3 – 1-3(a)-4; VPRS 19 Units 58, 59

9 Sullivan case – VPRS 30P Box 191 – NCR 283; Perjury case – VPRS 30P Box 191 – NCR 293; Galvin case – VPRS 30P Box 191 – NCR 313; *Port Phillip Gazette* 17 February 1849; *The Argus* 20 February 1849; Millar case – VPRS Series 30P Box 191 – NCR 316

box in her mother's arms. Although Croke called such other evidence as he had, Vanhall was acquitted by direction.[7]

Robert Lemon (or Layman) Mostyn

Sometime prior to April 1850, Nicholas and Elizabeth Kearney, a married couple, lived in the colony of South Australia on a property at Mount Gambier, owned by a man named McKinnon. Nicholas was a shepherd. Another worker on that property was Robert Lemon (or Layman) Mostyn. By April 1850, the Kearneys had moved to Woodford Station, run by the Scott Bros, on the Glenelg River near Dartmoor in the Port Phillip District. It so happened that Mostyn was also working on that station. The Kearneys lived with their two young children, aged five and two years, in a hut about 20 yards from the main road to Portland – the Mt Gambier Road. Their hut was about a mile and half from the home station. On Friday, 26 April 1850, about 6 a.m., Nicholas Kearney had gone away from the hut with sheep, leaving Elizabeth there with the children. Elizabeth was then 'far advanced in pregnancy'. Between 9 and 10 o'clock, Mostyn turned up at the hut and asked for some breakfast which, with then usual up-country courtesy, Elizabeth gave him. Shortly afterwards, Mostyn raped her and departed. There was nothing she could do until her husband returned with the sheep and then she was taken to the head station where she was cared for whilst Nicholas went in search of Mostyn.

Elizabeth's description of the rape, Nicholas' narrative of the capture of Mostyn and a discussion of the subsequent legal proceedings give valuable insights into life in the Port Phillip District. Elizabeth Kearney made a deposition before Horace Flower JP at Woodford on Saturday, 4 May 1850. As Moyston was not present, such a deposition was commonly known as an 'information' or an 'affidavit'. She swore:

> she was wife of Nicholas who was a shepherd at T Scott's – living in hut near Mt Gambier Road – on Friday, 26 April Robert Layman Mostyn came to hut about 9 or 10 o'clock in morning – husband had been gone with sheep about an hour. Mostyn asked for some breakfast, which I gave him – he remained standing all the time looking out hut to see if anyone were about. I was busy around the hut sweeping up. Mostyn came up to me and asked me for a cheeker. I said he ought be ashamed of himself and told him to be off or I would scald him. He caught me by the waist – I resisted him as well as I could – he wouldn't let me go but forced me backwards on to the bed which was in same room. My children were in hut at time. In the struggle he tore my dress. I screamed as loud and as long as I could but he continued to force me onto the bed – I was very much exhausted. I caught

> hold of the wash tub and then the bed post. Mostyn tried to bite my hand and at time kicked my youngest child in the face. I do not know whether this was an accident or not – the child and the other child cried vehemently. Mostyn then forced me on to the bed and pulled my clothes up. I was so ill and frightened I was unable to prevent him. He then undid his own trowsers – he was some time doing this and I was coming round when he renewed his efforts to have connection with me. He forced me across the bed I could make no resistance what ever – he held me around the middle and squeezed me very much and got on bed himself and forcing open my legs succeeded in having connection with me. He was not long in effecting the purpose and left me voluntarily – may have been ten minutes from time he got me onto bed until he left me. He stood by the fire place and I ran out to the cask – he followed and asked whether I should say anything about it – I said I would when my husband came home at night and that it would be a bad days work for him – he then went out of the hut saying, 'I'll have another light of the pipe and a drink of tea on the strength of it' – I did not go into the hut again while he remained there – he came out and said, 'you may go and shita (?)' – he then came towards me as if he was going to catch hold of me again – I ran and got an axe lying near the hut and said I would chop his head off if he came near me again – he did not speak but turned away and walked off towards a swamp at the back of the hut. I then fastened the hut door and went off in the hope of meeting my husband. I met him coming home with the sheep. I told him immediately all that Mostyn had done. He hurried home with the sheep and yarded them and then came to Scott's home station to look for Scott who was not home – he then returned and bought me and my children to the home station where I have been ever since. When Scott came home he lent my husband a horse to go in pursuit of Mostyn. I had seen Mostyn once or twice before 26 April but had never been on familiar terms with him at all. He had never done anything to offend me before the day he violated me at the outstation hut and I bore him no ill will. I am far advanced in pregnancy and cannot say but that I may be confined in a day or two's time.

She signed this deposition by mark, which indicated she was illiterate. A study of depositions indicates that, by 1850, the female ability to sign a document was much more common than in 1840.

When she swore that Mostyn asked for 'a cheeker' she meant 'a kiss' – this becomes clear from a deposition of her husband. It is not then a common expres-

sion so far my research has revealed; it is not to be found in the standard dictionaries of slang. Her threat to 'scald' him, in self-defence, was not uncommon, among women, at this time.

After Mostyn was arrested, a formal committal proceeding was held on 1 June 1850 before James Blair, the Stipendiary Magistrate for the Portland district. As was usual where a deposition had been made in the absence of an accused, Elizabeth Kearney reswore the deposition she had made before Flower. She gave some further evidence:

> She knew the prisoner before at Mckinnon's at Mount Gambier – was in same hut there with me and my husband for 8 or 9 days – had not seen him again until morning of the occurrence. While he was undoing his trowsers he continued to hold me down with his arm around my waist and kneeling across my legs. I swear positively he completed the offence – after he left me I hurried out of hut and sat on cask – took one child by hand – been ill since from injury he did in pressing me around waist – I cannot turn in bed without assistance from my husband and have been obliged to consult a doctor. Hut is a mile and half from home station and about 20 yards from the main road to Portland. Prisoner asked me several times if many pafsed that way and I have no doubt from his standing while eating his breakfast and subsequently looking out at the hut door that he went there with the intention of committing the offence

The spelling 'trowsers' for 'trousers' and writing 'pafsed' for 'passed' were standard at that time. Mostyn declined to ask her any questions when given the opportunity after her evidence.

After taking his wife to the head station where she was cared for, Nicholas Kearney went in search of Mostyn. He came upon him at a place he describes as 'Nolan's' but he escaped out of the back of the hut leaving his hat behind. Kearney continued to follow after him and, as he swore in his deposition before Blair:

> … saw him and kept in sight until he could get within reach of Mt Gambier police – had been told by settler named Bourke not to touch him as I could be in trouble if I did. Went to Mount Gambier police who told me they could do nothing for me – went to Wood the Magistrate who said he could do nothing as the offence had been committed within the Port Phillip Territory and told me I would not be justified in apprehending the prisoner myself. However, Mr Flower a Magistrate of this Territory (Port Phillip) came there that evening and I laid an information before him and he issued a warrant for the prisoners

> apprehension and Mr Wood endorsed it and took it to police. I accompanied the policeman and found the prisoner that evening about 14 miles from the police station at an outstation of the South Australian Sheep company. He (Mostyn) read the warrant himself and said he was out of that district – policeman then showed him Wood's endorsement on the back of warrant giving it force there – policeman then arrested him.

The surviving documents relating to this case indicate that, when Nicholas Kearney met up with Mr Flower JP in Mount Gambier, they must both have returned to the Port Phillip District. Nicholas Kearney's deposition swore on the 29 April 1850 clearly states that in is made in the 'district of Port Phillip'. He swore:

> that Robert Layman Mostyn had come to his hut on Friday, 26th April – he lived there with wife and two children aged five and two years – had breakfast and asked wife for kiss (he then describes the rape in very similar terms to those of his wife's first deposition) – she is far advanced in the family way and quite unable to leave home to lay this information. Have been in pursuit of him and came upon him at Nolan's but he escaped out of the back of the hut leaving his hat behind – since then have seen him about 3 miles from Mount Gambier – believe him to be in the neighbourhood of the mount now – have previously been on good terms with him
>
> I therefore pray that justice may be done and a warrant granted for the said Robert Layman Mostyn.

This deposition was also resworn before Blair in presence of prisoner on 1 June 1850.

The arrest warrant alleging that Mostyn 'did violently assault Elizabeth Kearney' is issued in 'New South Wales' and is addressed to 'John Fitzgerald Chief Constable at Portland and all others whom it may concern'. On the verso, John Wood JP has endorsed 'This Warrant to be in force in the province of South Australia'. Also on the verso is another endorsement by one, Greenwood, that he executed it on 29 April and an unsigned endorsement that Mostyn was received at the Lock-up Portland on 10 May 1850.

At the committal before Blair on the 1 June 1850, Elizabeth and Nicholas Kearney were the only prosecution witnesses. When Mostyn was given the usual caution after the conclusion of the prosecution evidence, the depositions record the following response;

> Prisoner who states he is 23 years of age declined to ask any questions or making any statement in his defence.

He was committed to Melbourne for trial for rape; the committal warrant has survived. James Croke must have read these depositions as he made a note on the verso of the witness recognizance that the husband should be subpoenaed to prove she 'immediately complained of the offence June 12th/50 JC'. Various standard 'Crown Solicitor Office' notes on the file indicate that this trial was fixed for hearing at the Geelong circuit in October 1850.

After the committal, Mostyn was again kept in the Portland lock-up whilst arrangements were made for his removal to Melbourne in accord with Blair's warrant. During the 1840s, there were constant difficulties in moving prisoners from the Portland area to Melbourne. Escorts had to be arranged for travel on infrequent shipping. The lock-up at Portland consisted of various cells and a yard. When the usual muster was held between 6 and 7 o'clock in the evening of 9 June 1850, Mostyn was missing. A gaoler named Arkell was then in charge and asserted that Mostyn must have hidden in a 'solitary cell', which could not be locked. Tests showed that cell could be locked. A search for Mostyn was unsuccessful and, so far as the surviving documents reveal, he was never found. Frederick George Arkell, an exile from Pentonville, was tried before Justice a'Beckett at Geelong on 21 October 1850 for negligenlty permitting an escape. He was found guilty and fined twenty shillings.[8]

John Fearns

John Fearns and John Douglas worked together in the Merri Creek area and, on Sunday, 19 January 1851, they had some ale together in George Vinge's inn on the Sydney road at Somerton. Douglas later swore that, after they left, they sat down near Vinge's house and Jane Williams and her two brothers came along and remained for about five minutes. Then Fearns requested Douglas to go 'as he wanted to ask Jane who was courting her sister'. Douglas went with the two boys to their house, about 200 yards away, and about twenty to thirty minutes later Jane came to house alone. She appeared 'to have her clothes ruffled a good deal'

Later on that Sunday, Margaret Williams of the Merri Creek appeared before Daniel MacKenzie J P at Sommerton and swore:

> that about 4 o'clock in the afternoon of this day Sunday, 19th January 1851 my daughter Jane Williams aged nine years came home from the road leading to the Sydney road being apparently injured and almost unable to walk – I examined her private parts and found her bleeding very much – I asked her how she was hurt and she answered that John Fearns, a labouring man in the neighbourhood, had met her on the road and said he wanted to speak to her when he threw her down and hurt her – as I verily believe Fearns committed a rape upon my daughter I pray a warrant.

of her age but she swore that she lived on the beach and knew the prisoner who lived 'in my papa's house'. The prisoner took her into the stable after the time of the regatta and the note then continues 'pulled up my petticoat, *put his in mine – his cockadoodle* – he lay on my person – he was long on me abt (about) half an hour. After that he took me out of the stable. Told mama what had happened told her directly'. The regatta, to which she referred, took place in the Williamstown area of Hobson's Bay on 12 January 1841. [The underlining (here italicised) is typical of Willis' form of note-taking.]

Willis then records the cross-examination – 'put his in mine (points ¾ of an inch). Papa and Mama told me what questions wd (would) be put and wh (which) answers I was to make – I was told to tell the truth – I remember going before a Magistrate – I told him they went to hell – he told me to say so – I knew not'. Then Willis has noted 'did not appear on subseqt (subsequent) examinat(ion) to be sufficiently impressed with the nature and intent of an oath as to make her evidence admissible'. He has then written 'Acquitted'. The *Port Phillip Gazette* of 14 April 1841 reported that 'The details of this case are of too disgusting a nature for publication'. The report indicated that the child could not be sworn because 'not sufficiently aware of nature of oath'. It also reported that Willis, in dismissing the accused from the dock said that from the evidence he was morally certain of the guilt of accused and that had the girl been older and able to give evidence he would have been convicted and sentenced to death.[31]

John Doyle

In August 1842 John Doyle was charged, before Major St John, the stipendiary Magistrate, with assault with intent to commit rape on the person of Elizabeth Hayden, a child of from ten to twelve years of age. James Hayden, her father swore that the girl was ten years old last November and is not twelve years of age. The evidence given by Elizabeth Hayden at the committal was quite brief; she swore that she was at the top of great Bourke street when the man asked her and three other children to have a ride in the dray to Newtown where 'my mother lived'. In the dray she was given brandy, which she was told was port wine 'I soon afterwards fell asleep and do not remember anything that occurred thereafter'.

It so happened that, on Tuesday, 2 August 1842, Andrew Thompson was taking a short cut near the Merri Creek and saw the man and the girl at the foot of a tree. He got within a yard. The man was on top of the girl and when he spoke the man pulled down the girl's clothes and pulled up his own. Thompson lifted up the girl but she could not stand. The man was quite sober. Thompson said he would take care of the girl and try and find her parents. When he 'cooeyd' near some houses the man [Doyle] came up, threatened to take his life and struck a blow on his head. Thompson was joined by some other men and they followed

the dray into town. In cross-examination at the committal he said he saw the man's leather straps lying at the foot of the tree. He saw the private parts of the girl exposed. He heard the prisoner say 'would I swear his life away when he had a wife and family at home'. In town, Thompson gave the prisoner in charge to Constable Cornelius Sullivan whose evidence was that the girl then 'was speechless drunk and lying in the dray'. Dr David Wilkie examined the child in the Watch House. She was under the influence of liquor and there was no appearance of injury except on her face. No marks of her person being abused and no marks to justify the opinion that penetration had been made in any degree. 'There might have been a tenderness in that part of the child for she screamed when I touched there'. Wilkie could not say positively there was any swelling.

Doyle was tried before Justice Willis on 15 August 1842. He noted in his Case Book that Elizabeth Hayden was sworn – 'understands the nature of an oath i.e. to common intent'. She gave more detail of her abduction:

> saw prisoner before – sure he is man – saw him at the first public house going down from Bourke Street to Newtown – asked me whether I would ride – I said, 'no thank you sir' then I said I was going to Flinders Lane and I could not stop – he said he would be back before it was dark and asked me where mother lived – I said up towards Newtown – he said he was going that way and knew mother and it was all right – never saw him in life before – gave me something to drink – said it was nothing but port wine – put me on his dray – this was up beyond the jail – gave me his purse – when he saw anyone coming he made me lay down and covered me with his coat and stopped my mouth – fell asleep – saw our house – went beyond it – after cart got beyond Newtown I recollect nothing.

In Doyle's cross-examination of the girl he attempted to elicit that she did not understand the nature of the oath and 'sneeringly asked her if she could say her prayers'. Willis then directed the child to repeat the Lord's Prayer. 'The little girl reverently knelt down on the chair on which she had been placed and repeated the prayer in a very distinct and proper manner'. Willis remarked that she had evidently profited by the instructions she had received. In charging the jury, Willis commented that he had never heard more creditable evidence than that given by child.

Thompson and Sullivan are briefly noted as witnesses but Willis had no note of either James Hayden or Dr Wilkie giving evidence. Doyle was convicted and sentenced to be imprisoned for two years and to be kept at hard labour and at expiration to find a security for his good behaviour for two years, himself in sum of £100 with two bondsmen each in sum of £50 and imprisoned until such

security be found. His status is given as 'T L', which I take to mean, he had been transported and later given a ticket-of-leave. Some later correspondence refers to Doyle as being arriving 'per *Morley* 1829'. In his sentencing remarks, Willis said he regretted he could not impose transportation for life.

In July 1843, Ellen Doyle petitioned La Trobe for a pardon of the remainder of Doyle's sentence on grounds of hardship to her children and his good conduct in gaol. David Wilkie MD stated that Ellen was of sober and industrious character; Wintle, the gaoler, said, 'prisoner conducted self in proper manner and made self useful in gaol'. Dr Cussen stated that Ellen was in a state of distress with three little children under six years of age and that the prisoner conducts himself with propriety. D Mackay 'RCC' (Roman Catholic Chaplain) stated that he considered Doyle 'sincerely sorry for having sinned against the law and desirous to lead a good life for the future'. On 17 July 1843, Pinnock, the registrar of the Supreme Court, wrote to La Trobe setting out the sentence and that there were no extenuating circumstances elicited in the trial which would justify any remission and that La Trobe would have to consider the 'alleged distressed state of his family'. Whilst there is nothing in this letter to indicate that Pinnock was communicating the view of Justice Jeffcott, then the Resident Judge, it is most likely that he was so communicating as my research indicates that functionaries, such as Pinnock, rarely expressed a view on such matters. On 28 November 1843, in an unsigned letter, Fr. Geoghegan forwarded to La Trobe another petition by Ellen Doyle. Geoghegan supported the petition as did Cussen. La Trobe referred the petition to Pinnock to get Jeffcott's view. Pinnock replied on 4 December 1843 that he had spoken with Jeffcott who took the view there was nothing in the evidence on the trial to justify any remission of sentence.

On 26 July 1844, Wintle, the gaoler, wrote to La Trobe that Doyle's sentence would expire on 16 August and commended his behaviour in gaol where he had been wardsman and barber. He pointed out that Doyle had been the first to assist the gaoler and turnkeys in preventing the escape, earlier in the year, of O'Niel, Bray, Lloyd and Abbott who were regarded as dangerous prisoners. On 26 July 1844, Geoghegan wrote to La Trobe recommending a renewal of Doyle's ticket-of-leave because of good behaviour and distress to wife and children. La Trobe referred the letter to Pinnock who replied on 3 August 1844 that Jeffcott had no objection to the requirement that Doyle find sureties being remitted if Doyle entered into his own recognizance. La Trobe referred the case to the Governor and on 20 August 1844 the Colonial Secretary replied that the Governor regretted that it 'was not consistent with his duty to comply with' Geoghegan's request (for renewal of Doyle's ticket-of-leave) and La Trobe should dispose of prisoner at his discretion. I have not found any document, which brings this saga to an end,

and the pocketbook was found and identified. At Wayland's trial, Wagoner swore to the arrest and search of the prisoner – 'I searched him and found a 2 pound and 2 ones no 6110 – the prosecutor gave me the number of the note before I took the prisoner – he told me it was 6110'. Wayland was tried before Justice Willis on 12 April 1841 for the larceny of a pocketbook containing notes and orders, the property of Donald Maloney. He was defended by Archibald Cunninghame but was found guilty and, on 14 April, was sentenced to be transported for seven years. Wayland's status is given in the Criminal Record Book as 'Free'. In Willis' Case Book, at the end of his note for this trial, Willis has written and crossed out 'Two years impris hard labour' and written in '7 years transportation'. Perhaps, between 12 and 14 April, Willis discovered that 'Free' was not the fact. Perhaps, 'William Wayland' was an alias. In the 1830-40s it was not uncommon for the word we know as 'cheque' to be written as 'check'.[37]

John Murphy was a transported convict employed at the lighthouse at Shortlands Bluff in September 1845 and was left in a hut there when Thomas Harrison went off in the pilot's boat to get some items from the *Cascade*, which was leaving Port Phillip. When Harrison returned to his hut, Murphy was gone and Harrison's property chest had been broken open; the lock appeared to have been broken open with an axe and wooden wedge. Harrison's silver watch and gold chain worth £12-£13 and two sovereigns and two half crowns and three shillings were missing. The word 'Friendship' had been written, apparently with a nail, inside the lid of the chest. Murphy was arrested some days later in Williamstown and, when searched, it was found he had a sovereign in one boot and a half crown in the other. Harrison identified the sovereign by marks on it. As was customary throughout the 1830-40s, no detail is given of the marks which allowed of identification of property. Neither the watch nor the chain were recovered. Murphy was tried and convicted of this larceny before Therry on 16 October 1845 and sentenced to be transported for seven years. He was sent to VDL.[38]

Charles Duncan was a baker residing in Flinders Lane and at about 6 a.m. on 31 August 1847 when he was in Elizabeth Street he met William Faber, whom he knew and who was also a baker. Faber who was wearing an old striped shirt told Duncan 'he was very destitute and had no place to sleep'. Duncan took 'compassion on him' and said he would give him employment and took him to his house and set him to work. Duncan then went out on rounds and during the day, Margaret Duncan wife of Charles gave Faber some food and, in his presence, put 11/9 in a small jug on the mantle in the parlour. Later in the afternoon, Margaret missed the money from the jug and discovered that Faber had gone. She went looking for him and saw him wearing a clean white shirt and a handkerchief. She gave him in charge to Constable William Lawlor and he was searched at the

watchhouse; he had two shilling pieces, four six-penny pieces and three three-penny pieces. Faber told Lawlor that he had purchased a shirt and handkerchief on same day and paid seven shillings for them but would not tell Lawlor where he purchased them. The seven shillings paid for the shirt together with the money found on him amounted to 11/9. Faber, who was 'Free by Servitude', was tried and convicted of this larceny before Justice a'Beckett on 11 October 1847 and sentenced to be imprisoned for six months with hard labour.[39]

On Monday, 13 March 1848, Edward Kelly, a labourer who could not read or write, was in the Friend in Hand public house in Little Collins Street and gave a £5 note to Daniel Meaney, the landlord for safekeeping. Because Kelly 'was a little tipsy at time', Meaney wrote the number of the banknote on a piece of paper. Later he returned the note to Kelly when he was leaving the premises. Cornelius Henry Sullivan (who had been a constable) was also in Meaney's and after Kelly left he saw Charles Philpott pick up a piece of paper near the counter and 'I thought he was going to use it to light his pipe – then he noticed it was a note and put it in his pocket – I tried to get him to give it up and kept him in hotel until a constable came'. Kelly returned shortly afterwards and said he had lost the £5 note.

Constable William Cartwright arrived at Meaney's about 9 o'clock and was told that Kelly had lost a £5 note and that the prisoner was suspected; he searched him but found nothing and let him go. About 2 o'clock the following morning, Cartwright was in Queen Street and 'fell in with the prisoner – asked him where he lived and he pointed in direction of the Yarra – noticed him put his hand in left hand vest pocket – seized it and held it there until I got him to watch house and there took the £5 note out of his hand and marked it.' At the committal, Meaney's piece of paper on which the banknote number was written and the banknote were both tendered as exhibits; the numbers were identical. Philpott, whose status was 'Free', was tried before Justice a'Beckett on 18 April 1848 and convicted of larceny; he was later sentenced to be imprisoned for nine months – to serve the first and last month in solitary confinement.[40]

John Donnelly was an innkeeper in Corio Street, Geelong, and employed Charlotte Porter as a 'hired servant'. Donnelly had a cash box, which he kept in his bedroom upstairs in the inn. In January 1849, on a Thursday, Friday and Saturday, he 'missed money so on Sunday I marked money' but later found he was 'one half crown and three shillings short'. He challenged the servants and, when he threatened to call a constable, Charlotte Porter produced the money from her bosom and threw it on the bed and said, 'my little dog' gave it to her. Elizabeth Donnelly was present when Porter threw down the money; she also 'knew it by the marks'. The material does not describe the marks. Porter was tried for