

ABORIGINES, COLONISTS AND THE LAW, 1838¹

A MOMENTOUS YEAR BEGINS

1838 was a pivotal year in the history of relationships between Aborigines, Colonists and the law in colonial Australia. At that time, it must be remembered, the colony of “New South Wales” included territory that became New Zealand (in 1841), Victoria (in 1851) and Queensland (in 1859). Tasmania had become a separate colony only in 1825 and South Australia only in 1836. Further border adjustments affecting New South Wales, South Australia, Queensland and the Northern Territory were made in 1861-1863.² The only part of mainland Australia that was never part of New South Wales was Western Australia, but it was on instructions issued by the Governor of New South Wales that (in 1827) a formal declaration was made in Western Australia claiming the whole of the Australian continent on behalf of Britain.³ Modern Australians need to remind ourselves not to allow common origins to be obscured by later developments. When Captain Cook made his most solemn claim to possession of Eastern Australia (on 22 August 1770) he did so at Possession Island, off Cape York, now part of Queensland.⁴

¹ A scholarly, legal treatment of this subject by a serving judge of the District Court of NSW is G.D. Woods’ *A History of the Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Sydney, 2002), pages 86-96. A useful, but over-full chronology is published in the introductory pages of Roger Milliss, *Waterloo Creek: The Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales* (Sydney, 1992). Despatches written by Governor Gipps, reporting to the Colonial Secretary (“the Minister for Colonies” in the British Parliament), tell the whole tale with a fresh, human voice: 19 HRA (1) pages 396-400, 508-511, 700-706 and 739 and 20 HRA (1) 243-259. The Colonial Secretary’s side of that correspondence appears in the same publication: 19 HRA (1) 706-707 and 20 HRA (1) 242-243 and 439-444. Another (almost) contemporary account of the Myall Creek prosecutions is Roger Therry, *Reminiscences of Thirty Years’ Residence in New South Wales and Victoria* (1863; reprinted, Sydney, 1974), chapter 16. Therry was junior counsel for the Prosecution. Full reports of the court proceedings appear on the web-site of the Division of Law, Macquarie University (www.law.mq.edu.au/scnsw) in the law reports colloquially known as *The Kercher Reports* after Professor Bruce Kercher, who has supervised their preparation: *R v Kilmeister (No 1)* (1838), *R v Kilmeister (No 2)* (1838) and *R v Lamb, Toulouse and Palliser* (1839). The *Australian Dictionary of Biography* (available on line at www.adb.online.anu.edu) provides solid research material on many characters of interest. A search of the “pages from Australia” section of the Google website (www.google.com.au) may produce useful research information in response to the search criteria, “Waterloo Creek Massacre” and “Myall Creek Massacre”.

² David Taylor, *The States of a Nation: The Politics and Surveys of the Australian State Borders* (Sydney, 2006).

³ Alex C. Castles, *An Australian Legal History* (Sydney, 1982), page 27.

⁴ Castles, *An Australian Legal History*, page 22; *The Journals of Captain Cook* (Penguin Edition by Philip Edwards, 1999), pages 170-171.

For the momentous events of 1838, the die was cast in the interval between the departure of Governor Sir Richard Bourke⁵ from the Colony of “New South Wales” on 5 December 1837 and the arrival of his replacement, Governor Sir George Gipps,⁶ in Sydney on 23 February 1838. In that period Lieutenant Colonel Kenneth Snodgrass⁷ served as Acting Governor.

Before and after the changeover there were persistent, lethal clashes between Aborigines and Colonists as Colonists increasingly entered Aboriginal lands. Law and order was not easily maintained on the frontier, beyond the limits of a controlled area defined by what was known as “the boundaries of location”. There were deaths on both sides of the contest between “Black” and “White”.

Critically, however, on 18 December 1837 Snodgrass responded to a report of Aboriginal “outrages” in the northern region of what is now the State of New South Wales by dispatching an expedition of Mounted Police to the area. The Police were under the command of their commandant, Major J W Nunn. His initial orders from the Acting Governor were to repress Aboriginal “aggressions...so far as he [had] power” to do so. In the course of the expedition those orders were supplemented by another order to “pursue and capture” Aborigines responsible for the recent killing of two Colonists.

MARTIAL LAW: RELEVANCE AND SCOPE

In directing Nunn as he did, Snodgrass did not publish a “Declaration of Martial Law” purporting to suspend the Common Law. Nor did he refer to any such Declaration subsisting. Whether there was legal power in a Governor to publish such a Declaration and, if he did, what legal effect it might have had might have been considered by a thoughtful observer to have been large, uncertain questions in themselves.

In the early days of the Colony the standard-form of a Governor’s Commission (that is, his instrument of appointment by the British Crown) purported to confer upon the Governor power “to execute Martial Law in time of Invasion or at other times when by Law it may be executed”, coupled with an associated power “to do and execute all

⁵ 1 ADB 128-133; Hazel King *Richard Bourke* (Melbourne, 1971); Max Waugh, *Forgotten Hero: Richard Bourke, Irish-born Governor of New South Wales 1831-1837* (Melbourne, 2005).

⁶ 1 ADB 446-453

and every other thing and things which to our Captain-General and Governor-in-Chief doth or ought of right to belong”.⁸ Apart from giving formal recognition to the concept of “Martial Law” by *executive government*, this terminology begged the question: When and in what circumstances did *the Law* permit the operation of Martial Law (whatever “Martial Law” might entail) in a “settled colony” (which NSW was perceived be) not the subject of an “Invasion”.⁹ At it highest, the delegated power of a governor could rise no higher than its source, the Crown, and (without legislation) the Monarch had no clear power to set aside ordinary processes of the law and government in the name of “Martial Law”.

Government officials and the people whose lives they affected often assumed that the ordinary law of the land could be displaced by a display of brute force justified by the label “martial law”, but the law was unsettled on that question until at least the mid-1860’s, when there was a crisis in colonial Jamaica, and an attempt during the US Civil War (1861-1865) to codify the laws of war, that called for the concept to be more closely examined.¹⁰

As it happens, we have objective evidence that, had anybody in the Colony of New South Wales been able to seek legal advice on the meaning and limits of “martial law” from the Colonial Office in January 1838, they might well have obtained the benefit of a legal opinion obtained by the Colonial Secretary, that very month, from the English Law Officers (the Attorney-General, Sir John Campbell and the Solicitor-General, Sir R M Rolfe) on unrest in Canada. The substance of their Joint Opinion (dated 16 January 1838) was in the following terms:

“...[In] our opinion the Governor of Lower Canada has the power of proclaiming, in any district in which large bodies of the inhabitants are in open rebellion, that the

⁷ 2 ADB 454-455

⁸ This formula appeared in Governor Phillip’s Commission (at 1 HRA (1) 5) and in those of his successors until Governor Bourke (at 16 HRA (1) 841). It did not appear in the Commission of Governor Gipps (19 HRA (1) 285-301 and 308 note 73).

⁹ This formulation of the question assumes that the country’s original inhabitants were not to be characterized as invading their own lands and the colonists were not themselves to be characterized as being in a perpetual state of “invasion” of Aboriginal lands.

¹⁰ J F Stephen, *A History of the Criminal Law in England* (London, 1883), Volume I, pages 207-216 (especially page 215); A V Dicey, *Introduction to the Study of the Law of the Constitution* (London, 1st ed 1885, 10th ed 1959), chapter 8; F W Maitland, *The Constitutional History of England: A Course of Lectures Delivered* (Cambridge, 1908), pages 324-329, 489-492; W S Holdsworth, *A History of English Law*, Volume 10 (1938), pages 709-713; A W B Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, 2001), chapter 2, especially pages 58-59; R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford, 2005), chapter 4.

Executive Government will proceed to enforce martial law. We must, however, add that in our opinion such proclamation confers no power on the Governor which he would not have possessed without it. The object of it can only be to give notice to the inhabitants of the course the Government is obliged to adopt for the purpose of restoring tranquility. In any district in which, by reason of armed bodies of the inhabitants being engaged in insurrection, the ordinary course of law cannot be maintained, we are of opinion that the Governor may, even without any proclamation, proceed to put down the rebellion by force of arms, as in the case of foreign invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance; and this, as we conceive, is all that is meant by the language of the statutes referred to in the report of the Attorney and Solicitor General of Lower Canada when they allude to the 'undoubted prerogative of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors'.

The right of resorting to such an extremity is a right arising from and limited by the necessity of the case – quod necessitas cogit, defendit.¹¹ For this reason we are of opinion that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown¹² to adopt any other course of proceeding. Such power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the Irish rebellions of 1798 and 1803, and also of the Irish Coercion Act of 1833.¹³

From the foregoing observations, your Lordship [the Colonial Secretary] will perceive that the question, how far martial law, when in force, supersedes the ordinary tribunals, can never in our view of the case, arise. Martial law is stated by Lord Hale¹⁴ to be in truth no law, but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded.

It is hardly necessary for us to add that, in our view of the case, martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compels its adoption.”¹⁵

There is no reason to suppose that this legal opinion was inapplicable to the circumstances prevailing in the Colony of New South Wales. The constitutional development of Australia in the nineteenth century often reflected the situation in colonial Canada. At any rate, the rights and obligations of the players in the drama

¹¹ This is a latin expression meaning “*what necessity forces, necessity defends*”.

¹² The reference here to “the Crown” is a reference to “the Government”.

¹³ This is a reference to legislation passed by the British Parliament.

¹⁴ Sir Matthew Hale, a respected English judge and author, lived between 1609-1676. Influential books written by him were published after his death, including *A History of the Common Law* (1713) and *A History Pleas of the Crown* (1736); A W B Simpson (Editor), *Biographical Dictionary of the Common Law* (London, 1984), pages 220-222.

¹⁵ The Joint Opinion is extracted in D L Keir and F H Lawson, *Cases in Constitutional Law* (5th edition, Oxford, 1967) at pages 238-239.

unfolding in Australia in 1838 were unaffected by any Declaration of Martial Law. And, even had there been such a Declaration, it was at least strongly arguable that, absent legislation authorizing more, the Police had no lawful authority to use more than reasonable force proportionate to any risk to the safety of persons or property. Nobody had a licence to kill.

THE WATERLOO CREEK MASSACRE: A CYCLE OF VIOLENCE IN MOTION

Nunn's troopers clashed with Aborigines on or about 26 January 1838 (then celebrated in the Colony as "Anniversary Day") at Waterloo Creek. An unknown number of Aborigines, possibly as many as 200-300, were killed. Whatever the number of deaths, there appeared, at least, to be a suspicion that the troopers had used disproportionate force and force directed towards individuals who posed no risk to anybody or anything. There was a suspicion that the troopers might have acted as an ill-disciplined military force rather than as a regular police force.

On 5 March Nunn submitted a report on his expedition to the newly arrived Governor Gipps. Within the following month the Colony's Executive Council (the Colonial government constituted by the Governor and his advisers) accepted a recommendation of their Attorney General, Mr J H Plunkett¹⁶, that there be an official inquiry into the expedition, including the Aboriginal deaths.¹⁷

The colonial government and the Colonial Office in England were both conscious of a need to extend the rule of law to Aborigines as well as other "British subjects" in the Colony¹⁸. On 6 April the Executive Council decided to issue regulations in the form of a government notice announcing that there would be an inquiry (that is, a coronial inquiry) into the death of any Aboriginal at the hands of a Colonist in the same way as that held when the death of a Colonist occurred through violence or suddenly.¹⁹

LAW AND ORDER AT RISK

¹⁶ 2 ADB 337-340; J N Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (Canberra, 1973).

¹⁷ 19 HRA (1) 396-397.

¹⁸ Ambiguities in the legal status of Aborigines in colonial society are explored in Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Sydney, 1995), Chapter 1.

¹⁹ 19 HRA (1) 397-398.

However, the decision to publish this notice was overtaken by events. When reports of Colonist deaths at the hands of Aborigines were received from both the northern and southern regions of the Colony (as far apart as the north of present-day NSW and Port Phillip, present-day Melbourne, Victoria), the Executive Council decided to defer publication of the notice until after public excitement had been quieted.²⁰ There were already too many reprisals and counter-reprisals to risk stirring up more. Orderly government required calm counsel, not populist clamour.

In this heated atmosphere, with repeated clashes between Aborigines and Colonists throughout the Colony, two measures of the then widespread unrest bear upon the topic of “Authority, Democracy and the Rule of Law”. They are to some extent interrelated. First, Gipps’ official inquiry into the Nunn expedition was delayed. He claimed to be unable to withdraw men of the Mounted Police from active service to have them give evidence as witnesses at the inquiry; there were too many calls for “protection” to divert their attention away from performance of police duties, and he could not afford to alienate the police volunteers upon whom effective policing then depended.²¹ Second, Colonists in remoter parts of the Colony were driven, or tempted, to take the law into their own hands. In short, there was a breakdown in law and order affecting the capacity of government to govern.

THE MYALL CREEK MASSACRE: EXCESS BEYOND EXCUSE

The need of the law to assert its authority became clear to the Executive Council when confronted (on 4 July) with the deaths (on 9-10 June) of 28 Aborigines (including unarmed women and children) at the hands of Colonists at Myall Creek, in the same region (near Gwydir River) as Waterloo Creek. Unlike those of Nunn’s expedition, these killings could claim no colour of authority. Moreover, many of the perpetrators of the deed at Myall Creek had convict backgrounds, and appeared to be acting in the interests of assertive Squatter interests.

GOVERNMENT RESPONDS TO THE CRISIS

The wheels of government turned a little. On 7 July the Executive Council authorized an investigation of the Myall Creek massacre. By a dispatch dated 21 July 1838 the Governor wrote to the Colonial Secretary lamenting this new “outrage...committed

²⁰ 19 HRA (1) 398-400, 508-511.

²¹ 19 HRA (1) 508-509.

not by the Blacks, but on them”.²² On 14 August the Legislative Council appointed a Committee of Inquiry into “the present state of Aborigines” under the Anglican Bishop, W G Broughton. On or about 31 August eleven of twelve suspected Myall Creek murderers were apprehended. Before they arrived in Sydney on 16 September a reward was posted for their fugitive ringleader, John Fleming, a free man. He escaped prosecution.

Opposition to government determination to bring the men to justice was not limited to that of the popular press. In the week following the arrival of the Myall Creek suspects in Sydney a landowning magistrate, Robert Scott²³, led a deputation of northern Squatters to Governor Gipps to propose a plan for creation of a specialist police force to keep “peace” on the frontier; he visited the accused in jail to assure them of Squatters’ support; and he testified to the Broughton Committee of Inquiry. Scott’s intervention was considered improper. It lends weight to a theory that the Myall Creek accused had acted in the interests of Squatters. On 8 December, in the midst of controversy consequent upon trial of the accused, his commission as a magistrate (as Justices of the Peace then were) was not renewed. He was disowned by government.²⁴

THE FIRST TRIAL OF MYALL CREEK ACCUSED: VERDICTS OF NOT GUILTY

On 15 November the eleven Myall Creek accused held in custody were tried by the Supreme Court of NSW for the murder of one named and one unnamed Aborigine. Chief Justice Dowling presided over a civil jury.²⁵ The concept of such a jury was a comparatively new phenomenon for the Colony. Campaigns for civilian, as distinct from military juries had been a feature of colonial politics throughout the life of the fledgling Court.²⁶ Attorney General Plunkett and Roger Therry²⁷ appeared as

²² 19 HRA (1) 510-511.

²³ 2 ADB 428-429

²⁴ 19 HRA (1) 704-706.

²⁵ A full report of the trial is published in the *Kercher Reports* as *R v Kilmeister (No 1)* (1838). The letter “R” is an abbreviation for the latin words *Regina* or *Rex*, meaning “The Queen” or “The King” (depending on the gender of the reigning British monarch) as representative of the government, sometimes described in this context as “The State”.

²⁶ David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, 1991); Ian Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (Sydney, 2003).

barristers for the Prosecution. Barristers William Foster, William a'Beckett (appointed to the Supreme Court of NSW in 1846 and, in 1852 as the first Chief Justice of Victoria)²⁸ and Richard Windeyer²⁹ appeared as counsel for the Defence. The prosecution case, as outlined to the jury by Plunkett, laid bare the enormity of what had been done at Myall Creek. As his biographer records³⁰:

“The actual crime, as outlined by Plunkett, was naked in its simplicity. About fifty Aborigines – men, women and children, belonging to the reputedly inoffensive Myall tribe – had been living on and about [the cattle station of Henry Dangar on the banks of Myall Creek] for some weeks, neither provoking nor being provoked. On the afternoon of 9 June 1838, a Saturday, they were surrounded, to the number of about thirty, roped, led away and shot. For reasons requiring no elaboration two young women were spared, one child was saved by a stockmen and two other boys escaped to a nearby creek bed. An attempt was made on the following day to burn the remains. The event was witnessed by a lame Aboriginal who had remain hidden behind a tree, but his evidence was not used given the then state of the law that did not allow evidence to be taken from those having no religious beliefs [recognized by English law. A social commentator of the times, Alexander Harris] a decade later described it as ‘a formal execution’ for the outrages committed by the blacks. No evidence was submitted that the Aborigines in question had ever been party to any outrages.

The accused made no defence except that [the remains of the named victim] could not be identified with certainty: they rested on evidence given as to their characters and they did not plead any extenuating circumstances....

Dowling summed up [to the jury] and made it clear that the whole argument rested upon identity – namely that the jury had to be satisfied that one of the bodies in question was [the named victim], or that of any of the bodies were those who had been ‘taken away by the prisoners’.”

The jury retired for 15 minutes and then returned a verdict of not guilty.

Plunkett did not rest content with that outcome. He applied to the Court to have the prisoners remanded (that is, held in custody during an adjournment of court proceedings) on other charges.

THE SECOND TRIAL OF MYALL CREEK ACCUSED: GUILTY VERDICTS

²⁷ 2 ADB 512-514. Therry subsequently published his account of the case in his *Reminiscences* (1863), Chapter 16.

²⁸ 3 ADB 10-11; J M Bennett, *Sir William a'Beckett: First Chief Justice of Victoria 1852-1857* (Sydney, 2001).

²⁹ 2 ADB 615-617

³⁰ J N Molony, *An Architect of Freedom*, page 141.

On 26 November seven of the acquitted were re-arraigned on charges of murdering other Aborigines at Myall Creek.³¹ This time the presiding judge was Mr Justice Burton³². Counsel on both sides of the record, Prosecution and Defence, remained the same. There was, again, a civil jury.

Although the trial began on 26 November, it was adjourned to the next day on the application of Defence counsel. On that day legal objections were taken by the Defence to validity of the charges against the accused. The prisoners contended that, having been acquitted at the first trial, they could not twice be put in jeopardy on substantially the same charges. They also contended that there insufficient certainty in the identity of one of the child victims they were alleged to have murdered. The judge and jury rejected these submissions.³³ The trial proceeded on 29 November. Although the prisoners were acquitted of some charges against them, they were on this occasion found guilty of murder.

SEVEN CONVICTED MURDERERS HANG: NO MERCY ALLOWED

On 5 December they were sentenced to death, and the remaining four of the eleven men originally apprehended -were remanded to face fresh charges. On 7 December the Executive Council confirmed the death sentences of the convicted seven. On 14 December it rejected petitions seeking clemency for them. On 18 December they were hanged in Sydney Gaol.

COMMUNICATIONS BETWEEN AND THE COLONIAL OFFICE: SETTING THE RECORD STRAIGHT

In his report to the Colonial Secretary, by a Despatch dated 19 December, Governor Gipps laid out the story of the Myall Creek Massacre, its investigation, consequent trials, the execution of the convicted murders, and his belief that the condemned men were justly convicted.³⁴ However settled his belief in the guilt of the men he had allowed to hang, his conscience was lighter for having been told subsequently that

³¹ A full report of the trial is published in the *Kercher Reports as R v Kilmeister (No 2)* (1838).

³² 1 ADB 184-186

³³ On a plea of *autrefois acquit* ("double jeopardy") the jury, not the judge, was entrusted with determination of the question whether pending charges against the accused were substantially the same as charges for which they had been previously acquitted (and could not be re-tried): G D Woods, *A History of the Criminal Law in NSW: The Colonial Period 1788-1900* (Sydney, 2002), pages 91-92. The trial judge was entrusted with determination of the question whether, in law, a charge lacked certainty: *op cit*, page 91.

they had each confessed their guilt to their Gaoler.³⁵ In a Despatch dated 20 December he also explained to the Secretary his reasons for omitting the name of Robert Scott from the list of magistrates.³⁶

He could not have known that, at about the same time, far away in England, the Colonial Secretary was signing a Despatch to him, written in response to his Despatch of 21 July. In his Despatch dated 21 December the Secretary demonstrated the breadth of his own sympathies:³⁷

“I am deeply concerned, on account of the character of the settlers, to find that the aggressions have not all been on the side of the Aborigines. I hope [with reference to the Myall Creek Massacre] that a strict investigation will have taken place in pursuance of your directions, and that due punishment will have been inflicted on the parties, against whom acts of so revolting and disgraceful a nature may have been substantiated.

I do not clearly perceive the force of the reasons which have led to a continued postponement of the proposed notice [announcing the conduct of coronial inquiries for Aborigines and Colonists alike]. Without at this distance prescribing to you the precise course which should be adopted, I cannot help expressing my opinion that such a notice is highly expedient in order that, while the Government affords all due protection to the person and property of the peaceable and industrious settlers, it may be clearly known by all parties that it will not shrink from enforcing the Law against all those who, not for the purpose of self-defence but wantonly, commit acts of violence or aggression against the aboriginal inhabitants.”

By another Despatch to the Governor (dated 17 July 1839) a succeeding Colonial Secretary endorsed the Governor’s actions:³⁸

“The whole of these proceedings point out strongly the necessity of pursuing in the most firm and decided manner such measures as may be best calculated to check that system, which has unfortunately arisen, of atrocities committed both by the Settlers and the Aborigines against each other. The measures, which you have adopted with a view to that end, have met the unqualified approbation of Her Majesty’s Government; and I trust that the fate of those men, who have recently suffered the extreme penalty of the Law for the Murder of Natives, will serve to check that feeling of recklessness in sacrificing the lives of the Natives, which has shewn itself to a lamentable extent on this occasion.

Under the Circumstances which you have reported, you would have failed in your duty, had you permitted the name of Mr Scott to remain in the Commission of the Peace [that is, the List of Magistrates, commissioned as Justices of the Peace]. The station which he held in Society, made it the more necessary to mark the disapprobation of the Government of his conduct...”

³⁴ 19 HRA (1) 700-704.

³⁵ 19 HRA (1) 739.

³⁶ 19 HRA (1) 704-706.

³⁷ 19 HRA (1) 706-707.

³⁸ 20 HRA (1) 242-243.

MOMENTOUS EVENTS WIND DOWN: "ENOUGH IS ENOUGH?"

Having vindicated the authority of the law, the colonial government allowed the whole, sorry affair to wind down. On 14 February 1839 the remaining four Myall Creek accused were discharged after the Prosecution withdrew its charges against them for a want of admissible evidence, dropping charges against one man and indefinitely deferring the possibility of other charges against the other three.³⁹ Although the Nunn inquiry was reactivated in the early months of that new year, its outcome fell short of any further judicial proceedings. With Attorney General Plunkett reluctant to prosecute any of Nunn's expeditionary force in the face of delays, the unavailability of reliable evidence and popular opposition, the Executive Council decided in July to take no further action.⁴⁰ It accepted that the Aboriginal deaths at Waterloo Creek were the consequence of the Police, led by a military officer, acting honestly even if mistakenly or unwisely, under orders and in execution of their duty, to repel an aggressive attack by Aborigines.

There the matter rested. A new Colonial Secretary endorsed the government's response to the crisis.⁴¹ The wheels of government had turned.

REFLECTIONS ON LAW AND JUSTICE

Even at its best, any real-life system for the administration of justice cannot guarantee that complete justice is always done. Junior counsel for the Prosecution in the Myall Creek Massacre trials, Roger Therry, appears to have been acutely conscious of this. In his autobiographical *Reminiscences*, published in 1863 after a long career as a barrister and a judge, he wrote of his account of the court proceedings:

"I have sketched, in minute detail, the account of this massacre in justice to the Government of the day. It may be said justice was not fully satisfied; if so, it was because it did not overtake some delinquents of a higher class than those who

³⁹ The Prosecution declared that they felt unable to press the charges without critical evidence from an Aborigine who, despite instructions, was thought to lack an understanding of the nature of an oath; without proof of that understanding his evidence was inadmissible under the then state of the law. Roger Milliss speculates that this was but a convenient excuse by the Governor and the Attorney-General to drop a politically sensitive case: *Waterloo Creek* (Sydney, 1992) pages 605-509. The *Kercher Reports* include a report of the proceedings as *R v Lamb, Toulouse and Palliser* (1839). Dowling CJ was the presiding judge.

⁴⁰ 20 HRA (1) 243-249.

⁴¹ 20 HRA (1) 439-444.

suffered, to whom the clearing of the land of the blacks after this fashion, the prisoners believed, would be very acceptable."⁴²

Therry's perception that the men tried for murder were lackeys of more powerful men who had been able to escape detection, or prosecution, is consistent with Governor Gipps' Despatches to the Colonial Secretary. At one point he wrote:

*"After condemnation, none of the seven [sentenced to hang] attempted to deny their crime, though they all stated that they thought it extremely hard that white men should be put to death for killing Blacks. Until after their first trial, they never I believe thought that their lives were even in jeopardy."*⁴³

Chief Justice Dowling addressed these topics when, on 14 February 1839, he discharged those of the Myall Creek accused against whom the Prosecution felt unable to proceed because of the unavailability of admissible evidence. His Honour's measured words to those accused were reported in the newspapers of the day. This is an edited version of one of the newspaper reports:

"The Chief Justice addressed the prisoners. The fortuitous circumstance which had relieved them from being tried [by the Court], for the wilful murder of the blacks for which their associates had already suffered the extreme penalty of the law was fortunate for them in an earthly sense, as he hoped that it would have a lasting and salutary effect on their lives. But for the circumstance [that evidence of a critical witness was inadmissible] it was more than probable that more sacrifices of life must have been made to public justices [by capital punishment of them upon delivery of guilty verdicts] and he earnestly entreated the prisoners, if they were not brought to justice at some future time to repent, and endeavour to atone for what there was too probable belief that they had been guilty of. It was true that a Jury of the country had, upon one occasion, declared by their verdict that they were not guilty of the crime imputed to them, and that verdict was returned upon the sacred oath to Almighty God, of the Jury, that they would administer impartial justice. He (His Honour) had too much veneration for that tribunal [that is, the Jury] to doubt for one moment the impartiality of that verdict, which had been condemned by some. If there had been cause for fault, it had been atoned for [in the verdict of the second Jury which had made findings of guilt], and it had been a very fortunate issue for the prisoners [who had not been prosecuted before the second Jury], and ought to [be] a lasting lesson to them. But if they were not brought to justice, there was still that

⁴² Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (1863 reprinted, Sydney, 1974), page 284.

⁴³ 19 HRA(1) 704.

small voice which would without fail admonish them, and, if their conscience did accuse them, he hoped they would repeat and atone to God for any part they might have taken in the bloody affray with which they had been charged. In the partial justice which had already been done, perhaps, a sufficient sacrifice had been made in atonement for the crying crime, and if there had existed a barbarous delusion in the minds of some hard hearted-men, he hoped that it was now dispelled by the efforts that had been made to satisfy justice. Public justice had been outraged, and to a certain extent appeased, and he was persuaded that if it was found not practicable to proceed further in the matter [by a subsequent prosecution of the prisoners], that the public opinion would relieve all parties from any imputation of not having done all that was possible to be done to perfect the demands of justice, and would consider that the sacrifice already made [by the hanging of seven men] was sufficient atonement. The Attorney-General had informed him that he was not able to proceed, and he was bound to presume that the indictment [that is, the charges which the Attorney-General had sought to withdraw] could not be sustained... ”⁴⁴

Sadly, the rewards and punishments of this life do not always have a close connection, or necessary relationship, with meritorious behaviour. The ringleader of the Massacre, John Fleming, lived out his life to the full, without ever having to face prosecution, and he died “a pillar of respectability” in 1894 at the age of seventy-eight.⁴⁵ But then, in the critical eye of historians, what **is** “respectability”? And can we ever know what lies in the heart, and conscience of another?

GCL
16 March 2007

(Words - 5,836)

⁴⁴ This extract is adapted from the report of the *Australian* newspaper of 16 February 1869. A briefer version of the Chief Justice’s remarks was published in the *Sydney Gazette* on 14 February 1839. Both versions are reproduced in the *Kercher Reports* as part of the report of *R v Lamb, Toulouse and Palliser* (1839).

⁴⁵ Roger Milliss, *Waterloo Creek* (Sydney, 1992), page 721.