

# 'no moral doubt...': Aboriginal evidence and the Kangaroo Creek poisoning, 1847–1849

Jane Lydon

## Part I: Historical context and discussion

### Introduction

Frontier violence between white invaders and Aborigines has become an established research theme, a development related to a contemporary consciousness of our brutal past. The significance of massacres of Aboriginal people is more than historical. Often suppressed, the truth and meaning of such incidents cannot always be demonstrated in conventional historiographic terms. For some, this does not matter: a 'myth' may satisfy the need to understand the past as well as 'facts'.<sup>1</sup> It has been argued, however, that in documenting such cases we establish an informed basis for contemporary reconciliation.<sup>2</sup> As Ann Curthoys has pointed out, for both Aboriginal and non-Aboriginal people, the on-going process of reconciliation is grounded in history—for Aboriginal people, *'in the fact of dispossession and the continuing importance of belonging to one's own country... For non-Aboriginal Australians, the ability to come to terms with Aboriginal claims with full political seriousness depends on a recognition of the historical basis of our very presence in the continent at all.'*<sup>3</sup> In this context, primary material relating to the poisoning of twenty-three Aborigines in 1848 at Kangaroo Creek in the Clarence River District assumes fresh interest. The incident configures opposing Aboriginal and European interests, but can also be seen in terms of the European struggle between nineteenth century official and humanitarian concerns for Aboriginal welfare on the one hand, and the interests of white settlers, on the other.

The following discussion briefly reviews this dialectic and the key events which shaped it, such as the 'Myall Creek massacre' of 1838, which was particularly significant in its effect on official policy and public attitudes. Specifically, the admissibility of Aboriginal evidence in European courts of law became an important debate. A brief account is given of the Kangaroo Creek incident and its role in this wider context. Finally, the depositions of the European witnesses to the Kangaroo Creek events, and documents tabled with the 1849 draft of a *Bill to provide for the Evidence of Aborigines in courts of justice*, are presented.

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<sup>1</sup> Roberts 1995.

<sup>2</sup> Reynolds 1982, p. 201; McGrath 1995, p. xxiv.

<sup>3</sup> 1983, p. 97; and see Read 1990.

### Official policy and the NSW frontier 1838–1844

From his arrival in New South Wales as governor in February 1838, Sir George Gipps was confronted by the problem of catering both to the home office and its increasing interest in the legal status of native peoples, and to the demands of the powerful squatters' lobby. One effect of the Select Committee Report on Aborigines of 1837 was the greater concern of the Colonial Office to uphold Aboriginal rights.<sup>4</sup> British policy, secured by a small number of British and colonial philanthropists, stressed that Aborigines were British subjects.<sup>5</sup> There was little understanding of the practical problems of the colonial 'frontier', which were rapidly worsening at just that time. In January 1838 Glenelg informed Gipps that Protectors of Aborigines were to be appointed, and in March Gipps decided to issue a government notice, based on Glenelg's despatch of July 1837, appealing to colonists to show sympathy and kindness towards the Aborigines of NSW.<sup>6</sup>

But in the meantime Gipps had to deal with a climax of frontier violence which polarised colonial opinion and aroused strong anti-protectionist feeling. Notably, the debate which surrounded the Myall Creek massacre of June 1838 articulated the range of contemporary attitudes, significantly affecting local politics and race relations for many years.<sup>7</sup> This incident, where twenty-eight Aborigines were killed at Henry Dangar's Myall Creek Station in the Liverpool Plains, seemed to have reached its conclusion with the acquittal of the eleven men accused. But the efforts of John Hubert Plunkett, Attorney-General, in the face of tremendous public opposition, saw seven of them tried again, and this time hanged. Of the remaining four, one was discharged, due to it being found that there was insufficient evidence against him, while the remaining three depended on the evidence of 'Davey', a 'civilised' Aboriginal man employed on Myall Creek Station. 'Davey's' evidence was considered inadmissible, on the legal principle that he did not understand religion and the concept of 'a future state of reward and punishment', and so could not take an oath. These three were therefore also dismissed.<sup>8</sup>

While the Myall Creek case was in some ways unique, both because of the willingness of Europeans to give evidence for the prosecution, and because of Plunkett's persistence, it was also shaped by the prevailing pattern of race relations. Specifically, the inadmissibility of Aboriginal evidence here as elsewhere formed a barrier to legal proceedings, and prompted Plunkett's vigorous campaign to remove it. As evident in the ensuing public debates, Myall Creek served to catalyse a range of interests, crystallising emotions concerning Aboriginal rights in general.<sup>9</sup>

In the minds of the squatters, the debate on Aboriginal rights was closely associated with the issues of land tenure and control, leading to a long struggle between

<sup>4</sup> In fact two reports: 1836 'Report from the Select Committee on Aborigines (British Settlements)' PP, 1836, VII, No 538, and the 1837 'Report from the Select Committee on Aborigines (British Settlements)...' PP, 1837, Vol. VII, No 425. Discussed in Reece 1974, p. 129ff.

<sup>5</sup> H.R.A. XIX, p.48. Glenelg to Bourke 26 July 1837; see also Reece 1974, p. 140.

<sup>6</sup> January 1838: H.R.A. XIX, p252.

<sup>7</sup> Harrison 1978.

<sup>8</sup> Harrison 1978, pp. 20–21; Milliss 1992.

<sup>9</sup> Harrison 1978.

them and Gipps.<sup>10</sup> They believed in the inferiority of Aborigines, and objected strongly to the official principle that Aborigines were subjects of Her Majesty, and as such had rights, as well as to the related, although unofficial argument that this implied a right to the land and therefore to compensation for its loss—both of which seemed ludicrous to those in the bush. Other moves towards Aboriginal welfare, such as the establishment of a Protectorate for Aborigines, and the philanthropic Aborigines Protection Society were also the targets of hostility. The grievance at the heart of the opposition to government policy was the perception that it favoured blacks at the expense of white settlers. Public outrage over Myall Creek persisted, as the nature of the event was forgotten, and it came to be remembered by some as white self-defence, '*seized upon by those who supported the settlers' interests as a highly convenient political weapon*'.<sup>11</sup> Against this view, the pro-Aboriginal feeling of humanitarians was heightened by the nature of the crime, as particularly bloody and unprovoked, and by the formation of the 'Black Association', a body of seemingly responsible men who had banded together to defend the accused. The Aboriginal reaction to the Myall Creek case was expressed in heightened resistance along the 'frontier', as white support was exploited to their advantage.<sup>12</sup>

Governor Gipps was heavily criticised for the state of frontier conflict by the Sydney newspapers, and *his* response to the Myall Creek case, while inexplicit and so less visible to us at this distance than unofficial parties', showed a desire to keep frontier conflict out of the public eye. Nunn's clash of January on the Gwydir River earlier in 1838 was allowed to languish until it was too late to effectively prosecute, and Harrison argues that this was because, as Gipps wrote to Glenelg, it was '*deemed inexpedient to hold an investigation while the Public Mind remained in a very excited state in respect to the Blacks*'.<sup>13</sup> He also delayed the long-planned proclamation based on Glenelg's 1837 despatch, advocating sympathy towards the Aborigines.<sup>14</sup> Despite these concessions to public opinion, Gipps did persevere in his attempts to implement official policy, for example introducing a Border Police Act in March 1839.<sup>15</sup>

Further, following a suggestion from Normanby, in 1839 (partly on the prompting of the Aboriginal Protection Society), he prepared legislation securing the admissibility of Aboriginal evidence in courts of law.<sup>16</sup> This act was passed by the NSW parliament, accepting Aborigines as competent witnesses in criminal cases, '*notwithstanding that they have not at present any distinct idea of Religion or any fixed belief in a future state of Rewards and Punishments*'.<sup>17</sup> But back in England it was decided that this was '*contrary to the principles of British jurisprudence*' after all, and was disallowed.<sup>18</sup> In 1843 the home authorities thought again and adopted an Imperial Act (6 Vic. Ch.XXII) allowing for Aboriginal evidence. However, when in 1844 a bill to this effect was put to the N.S.W. Legislative Council, it was thrown out.<sup>19</sup> This rejection maintained the situation where

<sup>10</sup> Reece 1974, pp. 166-174.

<sup>11</sup> Harrison 1978, p. 32.

<sup>12</sup> Harrison 1978.

<sup>13</sup> H.R.A. XX, p. 246, quoted in Harrison 1978, pp. 39-40.

<sup>14</sup> See Foster 1988; H.R.A.XIX, pp. 678, 698.

<sup>15</sup> Crown Lands Unauthorised Occupation Act 1839. 2 Vic. No 27 : McCorquodale 1987.

<sup>16</sup> 31 August, 1839 HRA XX, pp. 302-3.

<sup>17</sup> 3 Vic. No.16, NSW. H.R.A.XX, p. 368: Gipps to Normanby, 14 October 1839.

<sup>18</sup> H.R.A.XX, p. 756: Russell to Gipps, 11 August 1840, enclosure no. 1.

<sup>19</sup> NSW V. and P. (L.C.), May and June 1844.

settlers did what they wanted, with no recourse for Aborigines to the courts. Violent black-white relations continued on the margins of white settlement.

### Kangaroo Creek, 1847–48

At this point I turn from the general development of policy and opinion in NSW to the poisoning at Kangaroo Creek, briefly outlining the sequence of events. Rowley argued that the settlement of the Clarence River region by Europeans from around 1840, and the consequent conflict with the indigenous population typified the process of NSW frontier expansion.<sup>20</sup> Initially peaceful relations soon became hostile, frequently as a result of mutual misunderstanding, and in the early 1840s Aborigines from the country between Dorrigo and Kangaroo Creek carried out a number of small attacks on Clarence River stations. Attacks on the whites and their stock at Kangaroo Creek occurred throughout the 1840s.<sup>21</sup>

In 1843 Crown Commissioner of Lands Fry estimated the Aboriginal population of the Richmond and Clarence Rivers at over 2,000, the rich environment favouring hunter-fisher bands prior to white settlement. He observed seven 'tribes', each numbering between fifty and 150. In north-eastern NSW in the mid-nineteenth century, a diverse material repertoire included a wide range of tool forms, made from wood, plant and animal fibre, stone, shell, glass and bone.<sup>22</sup> Tindale identified the Kumbainggari tribe (Gumbaynggir) people as occupying the headwaters of the Nymboida and extending north to Grafton, east to the coast and south to the present vicinity of Coffs Harbour, Urunga and Bellingen.<sup>23</sup>

The Kangaroo Creek run claimed by Thomas Coutts in the Clarence River District was 53,760 acres in area—a large property, with an estimated grazing capacity of 560 cattle and 7,500 sheep. It was '*bounded on the north by Mr Forster's run; on the west by Mr Blaxland's run; on the south by Barren Mountains; on the east by the sea coast range of the Barren Mountains; and on the north-east by Mr Small's Station*'.<sup>24</sup> Coutts re-located to Tooloom Station in 1850, on the northern arm of the Clarence, and the Kangaroo Creek run was bought by William Layton.<sup>25</sup> The incident which occurred on or about the 28th November 1847 can be re-constructed as follows, according to the evidence of Coutts' dray-driver Patrick Byrnes, shepherds Thomas Walker and John Tomkinson, and hut-keeper John Flynn. These depositions comprise a detailed, eye-witness account of events on the Kangaroo Creek run, despite various biases. (The different informants are referred to in brackets by surname.)

<sup>20</sup> Rowley 1970, pp. 108–124.

<sup>21</sup> Rich 1990, p. 122; Officer and Navin 1994, pp. 15–20.

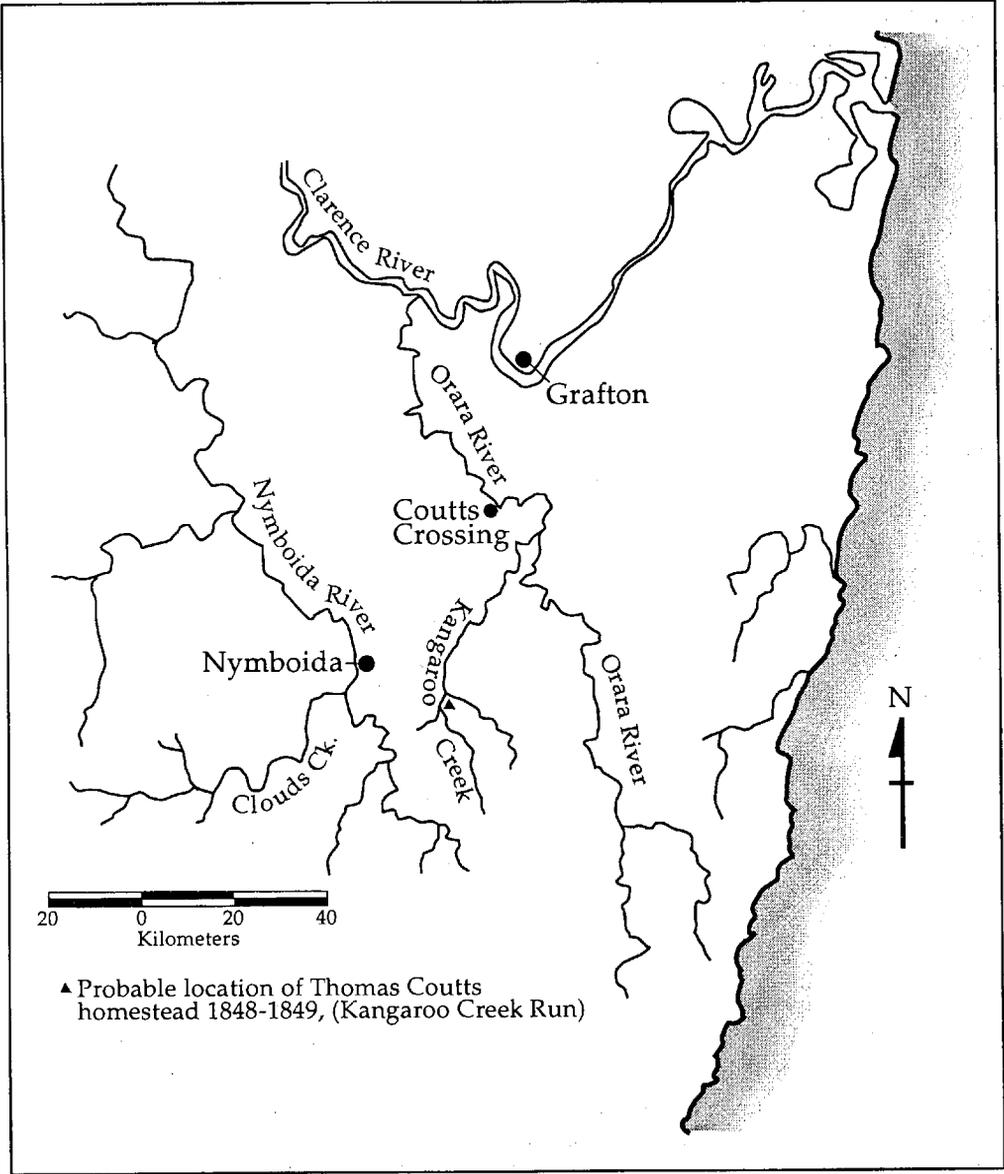
<sup>22</sup> McBryde 1974, p. 10.

<sup>23</sup> Tindale 1940 cited in Officer and Navin 1994

<sup>24</sup> *Gazette* 3 June 1848, p. 706.

<sup>25</sup> CRHS 1972, p. 51, 138. CP71.1633; CRHS 1972, p. 139, cited in Officer and Navin 1994, p. 19.

Figure 1 Location of Coutts's Kangaroo Creek run in 1848-1849. The modern township of Nymboida is on the site of Blaxland's 1840s station ('Pandemonium'). Forster held the run to the north, on the Orara, called 'Purgatory'.



At the end of November, 1847, an Aborigine named Jemmy was sent by hut-keeper Thomas Walker to get some tobacco from the Head Station, about thirteen miles away. He returned saying that Coutts had instructed him to gather all the Aborigines of the area to work at the head station (Walker). Tomkinson, another hut-keeper stationed about ten miles from the head station, reported that at the end of November about twenty Aborigines were assembled, ready to go and work for Mr Coutts, *'who would give them rum, and they would be back in two days'* (Tomkinson). Tomkinson's account suggests that the relationship between Coutts and the Aborigines had been poor: *'They moreover said they considered Mr Coutts unfriendly towards them—but I told them that he was not; and then they said they would go and make friends with him'*. Under cross-examination, he elaborated: *'I should say Mr Coutts was very unfriendly towards the Blacks before the time above-mentioned... They were not allowed to be about the Head Station before that—I have often heard Mr Coutts complain of the Blacks having killed his cattle, and say that they deserved shooting—Moses Jones told me Mr Coutts had lost a pistol by going out after the Blacks... Before this period none of them would go near the Head Station'* (Tomkinson). Flynn referred more obliquely to such problems, stating that *'Mr Coutts complained to me some time last winter that the Blacks were very troublesome to his cattle—he said that he would give them tobacco and tomahawks and make friends with them—I told him it would be the best plan as they were always very quiet with me with the sheep'*(Flynn). By contrast, Walker's evidence, which is otherwise quite damning regarding Coutts' character, suggests a more positive history. He said: *'some time ago the Blacks took 300 sheep from me but I rescued them again—It was the Bellingen Blacks who took the sheep—they had always been troublesome about the Station.—The other Blacks were very quiet—Mr Coutts had always behaved well to the Blacks'*(Walker).

The group of Aborigines who went to Coutts' Head Station included identified individuals Georgy Georgy, referred to by the other Aborigines as the King or Chief, Billy Billy, Jemmy Jemmy, Garry Garry and Jerry Jerry (Tomkinson, Walker and Flynn). Tomkinson stated that *'These Blacks were in the habit of constantly coming to my hut and I know them well...'* (Tomkinson)

What happened at the Head Station? Patrick Byrnes, dray-driver, told how on the 29th November (stated by other witnesses to be the 28th) he had seen twenty-three Aborigines weeding Coutts' paddock: *'They left off work at about twelve o'clock—I cannot say the precise time, as I had no watch—After the Blacks had finished weeding I saw Mr Coutts give a Black called Georgy Georgy about ten pounds of flour out of the store...I went near the store to see what was going on, as I had heard it murmured on the Farm that "the Blacks were going to have a dose"—By a dose I mean that the Blacks were to be poisoned—John Ryan told me of it—When Mr Coutts brought out the flour he had a piece of brown paper in his hand. I do not know what he did with the paper—he might have put it in his pocket for anything I know...Mr Coutts called for some soap and water and washed his hands...I saw the paper distinctly It looked as if it had contained a powder or something of the kind—My reason for supposing it, is that it looked as if it had been folded up...'*(Byrnes). The Gumbaynggir left, and were not seen again.

The news of the murders seems to have spread rapidly amongst the local community—black and white. Walker recounted how, two days later, around November 30th, he had heard from a man called 'the Barber' (an otherwise unknown figure who was not called as a witness), that *'a great number of Blacks had died from eating the flour that had been given them—About two hours afterwards I met two Blacks and two gins*

*who told me that twenty three Blacks had "tumbled down" from eating the flour—They appeared much distressed—They were crying very much.—I understood from them that the flour had made the Blacks vomit before they died—The Blacks call Mr Coutts ?Micato—They said it was the flour that Micato had given them, that made the Blacks tumble down...'* (Walker) Tomkinson's evidence also reveals the way the news had spread: *'Two or three days after the Blacks left for the Head Station two or three children came to my hut and told me that the Black fellows were dead—The following day three gins came and reported the same story, saying that about twenty of them were dead from having eaten of the flour given to them by Mr Coutts.—The next day one of the Blacks named Billy Billy—the one above-mentioned as having passed in company with about twenty others for the Head Station came to my hut and told me that about twenty Blacks were dead from having eaten of the flour given to them by Mr Coutts, He said that he was very ill—he looked very ill—He said he had eaten some of the poisoned flour but had got the better of it—He complained of his throat and stomach—he pointed to some flour, and said the Blacks had been working for Mr Coutts and that he paid them with flour and tobacco'* (Tomkinson).

Byrnes went to visit the site of the deaths about three days later, as did Walker, to whom the Aborigines had described the place, but no action was taken regarding the incident for about a month, when on the 5th January 1848 the district's Commissioner of Crown Lands, Oliver Fry, was visiting a nearby property, and a Mr Walker, (not Coutts' hut-keeper) informed him of the rumours. Fry paid little attention, until, enquiring of an Aborigine named Sandy attached to his department whether he had heard the story, he was informed that Sandy *'had heard it long ago—and that a number of Blacks had died in consequence of eating flour they had received from Mr Coutts'* Asking why he had not been told of it before, Sandy replied that *'he had forgotten it'* (Fry). Clearly, in this case the Aborigines themselves saw no point in appealing to white systems of justice.

Fry told Sandy to find some of the Aborigines of the tribe affected, to show Fry where the bodies were. Sandy had not re-appeared five days later, and on Tuesday 11th January, Fry visited the 'Lock-up' at Grafton to make enquiries of some of Coutts' employees who had come in, regarding the reported murders. The circumstances surrounding the witnesses' decision to give evidence are unclear: they may as easily have been prompted by self-interest as by ethical concerns. Byrnes, for example, was already in gaol, and when he heard Fry questioning the others, *'called out that he also knew about this murder'*(Fry). Later, overseer Bernard Malone, for the defence, claimed that he had been working with Byrnes throughout the day in question, and that it was therefore impossible for Byrnes to have witnessed the Aboriginal group (Malone). In his own very brief defence, Coutts declared simply that he knew nothing of the matter, and that *'Byrnes would swear anything'* (Coutts). Under cross-examination, Coutts similarly attempted to undermine Walker's credibility, suggesting that he had left the property over a dispute regarding rations. Walker had explained, *'I gave information as soon as I could get away from Mr Coutts—He refused to let me leave and kept putting me off from day to day—At last I told him that I would stay no longer, and accordingly started for the settlement for the purpose of giving information, but Mr Coutts rode there before me, and had me arrested for absconding.'* Under cross-examination he elaborated further: *'The evening before I left I told Mr Coutts I would not stay any longer while such poisonous murders were going on, and that no luck would attend it.—I told him his rations were bad—This was the next morning—But I told Mr Coutts I was not leaving on account of the rations, but for what I had told him the night*

before.' (Walker) At this distance it is impossible to determine the interplay of interest and strategem between the participants, but the evidence against Coutts was strong enough to convince the officials involved of his guilt.<sup>26</sup>

Fry and his party, comprising the Chief Constable of Grafton, one of the Crown Lands troopers, Sandy, and Thomas Walker, set out for the site on the 12th January. They camped that night two or three miles from Coutts' Station, and the following morning at about seven o'clock arrived at the scene. Fry's disturbingly graphic account relates how the party inspected the site in the rain, noting scattered human remains and collecting pieces of damper, presumed to contain arsenic, for analysis. The bodies themselves were too decomposed to analyse. The party then went to Coutts' Station, where Fry charged Coutts with the poisoning, to which Coutts declared that he '*knew nothing at all about it*'. Fry left, leaving the Chief Constable behind with Coutts pending the case being heard the following Saturday (Fry).

On the 17th January 1848, Thomas Coutts was committed for trial by Forster and Mylnes, local Justices of the Peace, on a charge of wilful murder, and was sent to Sydney for trial before the Supreme Court.<sup>27</sup> Local feeling was apparently strongly against Coutts, land-owner Charles Tindal writing in a letter to his father of the '*atrocious murder of Blacks*', and that '*everybody hopes he will be hung*'.<sup>28</sup> On the 23rd February Coutts was brought before Sir Alfred Stephen, Chief Justice. He was given bail, sureties of 250 pounds each being given by Robert Campbell, Merchant of George Street and William Gaunson, Greengrocer, of George Street, Sydney. He himself put up 500 pounds, making a total of 1,000 pounds.<sup>29</sup>

On the 10 May the Attorney General decided not to proceed with the case due to lack of evidence and Coutts was discharged.<sup>30</sup> The administration of the case demonstrates that the concern manifested by local Europeans such as Walker and Tomkinson was echoed by official responses to the event. Crown Commissioner Oliver Fry, for example, in the letter forwarding the depositions he had gathered to Sydney, designated the incident as '*one of the most hideous enormities that has ever taken place, in any age or Country. The atrocity to which I allude, is the murder by poisoning of not fewer (it is believed), than twenty-three Aboriginal natives...*'<sup>31</sup> Attorney General Plunkett's decision regarding the case was that '*there is not sufficient legal evidence to sustain the prosecution although I am sorry to say that the suspicion is very strong that the prisoner is not guiltless of the dreadful deed charged against him.*' And concluded that '*This is one of the many cases from which the defect of the present law, in excluding altogether the evidence of the Aboriginal natives, is apparent.*'<sup>32</sup> Other incidents in the area around this time took a similar course,

<sup>26</sup> Fry 18 Jan 1848, Col Sec. Corres. Rec. 48/1331; Att.Gen. to Col. Sec., 10 May 1848, 48/7126.

<sup>27</sup> Supreme Court N.S.W., Trials, 1848.

<sup>28</sup> 28 Jan 1848.

<sup>29</sup> (Supreme Court) (SMH 31.1.1848. [It is not known what Coutts' connection was either with the well-known Sydney merchant Campbell or with Gaunson, nor why they were prepared to provide bail for him, but the situation is reminiscent of the 'Black Association' formed by wealthy supporters of the accused in the Myall Creek case.]

<sup>30</sup> Col. Sec. 48/7126; Nicholls' letter, Supreme Court papers; and see Crown Sol. Judgement Books, June sessions.

<sup>31</sup> Col. Sec.48/1331.

<sup>32</sup> 10 May 1848, Col. Sec.48/7126.

such as that of the 31 January, 1848, when another Aborigine, also named Georgy, was shot on the property of Forster, one of Coutts' neighbours, and in which another neighbour, Blaxland, was implicated.<sup>33</sup> The Attorney General made the same decision.<sup>34</sup>

Some months later, in April 1848, Fry reported the murder by Aborigines of one of Coutts' hut-keepers, a James Lafont, and again, it was decided that there was insufficient evidence to proceed: that is, the law was applied regardless of the colour of the victim.<sup>35</sup> On this occasion the Attorney General stated his position at greater length: '*I certainly concur in the opinion of Commissioner Fry "that this lamentable recurrence must be regarded as the inevitable consequence of Mr Coutts' own conduct" for although I did not put Mr Coutts on his trial for the charge of poisoning a tribe of Native Blacks in December last, and for which he was committed it was not from any moral doubt I entertained of the strong suspicion of his guilt of the dreadful crime, but solely because, there was not sufficient legal evidence to substantiate it in a Court of Justice as the present state of the law excludes the evidence of the Black Natives themselves. Indeed the case of Mr Coutts renders still more apparent the great deficiency of the present law in that respect, and I trust that a new legislature will now see the expediency and necessity of passing a law to remedy it, similar in principle to the Bill which was proposed... to the present legislative council, but rejected by a large majority of that body.*'<sup>36</sup> In August the Governor requested that a bill allowing for Aboriginal evidence be drafted.

### The 1849 Bill

The debate surrounding this Bill shows that the stakes, and the players, remained much the same, ten years later, as in the Myall Creek case; the events at Kangaroo Creek in 1847-8 can be seen within the framework of the European struggle over legal reform. In April 1849, the Attorney General sent the draft of a bill, *to provide for the admission of the Evidence of Aborigines in courts of justice*, to the Colonial Secretary. Attached to the draft were two enclosures: copies of correspondence regarding the Coutts poisoning and the murder of hut-keeper Lafont at Kangaroo Creek, and a report by the Commandant of the Native Police, regarding similar conflict on the Darling River in February 1849.<sup>37</sup> These are transcribed below). The 1849 bill was similar to that presented in 1844.<sup>38</sup> The debate surrounding its introduction is interesting because while several 'outrages' are alluded to, only two are discussed in detail, and together: Myall Creek, still hotly debated ten years later, and the more recent Kangaroo Creek poisoning. Both were seen to exemplify the issues to hand, and were used as part of the various arguments put for and against the bill.

Plunkett, who introduced the Bill, refers to the Kangaroo Creek poisoning as 'a case where justice was entirely evaded because native testimony could not be admitted, to show that it was the use of the flour which had caused death. All the natives agreed to the same story, so that there could be no moral doubt, taking their tale in connection with that of the European witnesses, that the flour was given deliberately to destroy the

<sup>33</sup> Col. Sec. Corres. Rec. 48/2290.

<sup>34</sup> Att. Gen. to Col. Sec. 15 April 1848, 1 May 1848; Col. Sec. Corres. Rec. 15 June 1848, p. 48/7126.

<sup>35</sup> Col. Sec. Corres. Rec. 13 April 1848, pp. 48/5682.

<sup>36</sup> Att. Gen. to Col. Sec. 15 June 1848, pp. 131-3.

<sup>37</sup> Col. Sec. Att. Gen. 1849 Pt.1, pp. 49/3403, 49/2602, 48/7126 and 48/5682.

<sup>38</sup> 49/3403.

blacks. It was the legal evidence only that was wanting, and for want of this the parties whose guilt was well known, escaped the hand of justice. Many case too, occurred in which white people were murdered by the aborigines, and the latter escaped from justice because the testimony of their fellows could not be taken against them.<sup>39</sup>

Lowe responded, opposing the Bill, as he had in 1844 *'The wisest policy they could adopt, was to leave the blacks and the settlers to fight it out between themselves.'* He argued that the outrages upon the blacks had sprung directly from the protectionist policies of the government: *'The white people knew that if they repelled the aggression of the blacks they would be dealt with by the law. They could not carry on open war. They dared not treat them as open enemies, so this system of poisoning was resorted to.'* He predicted that the effect of this Bill would be to worsen the condition of the blacks because whites would act on the principle of *'dead men tell no tales'* and would put them out of the way. Nicholls claimed that the Coutts case was *'trumped-up'*, Coutts having made himself obnoxious to the magistrates on account of *'certain matters relative to the females of his family'*. Wentworth claimed that the origin of the Bill, at *'Exeter Hall'* (that is, with the evangelical movement), was enough to condemn it—battles must be fought without the aid of the government, which should not artificially perpetuate the Aboriginal race.

The strength of Plunkett's commitment to reform, demonstrated throughout his career, became apparent during the parliamentary debate when the Myall Creek case was alluded to as *'judicial murder'*.<sup>40</sup> He made a long and fervent speech, recapitulating the course of events during the Myall Creek trials, and stating that *'He (the Attorney General), loud as the outcry might be against him, would be ashamed of himself as a man, and as a public officer, if he had taken a different course on this occasion.'*<sup>41</sup> He went on to deal with the Kangaroo Creek poisoning, and the suggestion that Coutts was innocent, stating that *'the witnesses in that case concurred in a statement that was most probable. And if the committal that had been complained of was so unjust, why not prosecute for conspiracy on the part of those witnesses. But he must say that the exclusion of the evidence of the aborigines in this instance was unjust to the party accused. They were seen eating the damper and died from it, and the survivors alone could furnish the evidence how they came by it, and the circumstances under which it was given.'*

The council divided and a vote of nine for the Bill and ten against was recorded. The polarised positions evident in the debate, and the Bill's narrow defeat, reflected the complexity of white attitudes of the time. The strict rules regarding evidence, modelled on British jurisprudence, were gradually relaxed during the nineteenth century<sup>42</sup>, but it was not until 1860 that Attorney General Hargraves accepted the evidence of an Aborigine on the grounds that *'if an aboriginal witness be competent in other respects to give evidence, his being an aboriginal is no ground to reject his testimony if given on oath'*. Other cases followed, and in 1876 an *'Evidence Further Amendment Act'* became law,

<sup>39</sup> S.M.H.29 June 1849.

<sup>40</sup> Moloney 1973 and especially pages 134–161 for a discussion of Plunkett's work with respect to Aboriginal affairs; ADB 1788–1850, p. 336.

<sup>41</sup> It is important to note, however, that Plunkett's view of Aborigines was based on the same view of them as *'benighted creatures'* albeit with a soul to be saved. That is, he did not regard them as equals. See Read 1990, p. 293. Moloney 1973, pp. 158–161 discusses his racist attitude towards colonial immigration.

<sup>42</sup> Neil Andrews, *personal communication*.

although judges continued on occasions to rule Aboriginal evidence inadmissible on the grounds of their inability to take an oath.<sup>43</sup>

## Conclusion

Like other massacres, the Kangaroo Creek incident represented a crisis in race relations, a catalyst for the articulation of conflict. For contemporaries it was seen to be important largely as an example of frontier violence, shaped by official policy and events such as Myall Creek. As Lowe pointed out, the use of poison was a covert, more easily concealed form of assault.<sup>44</sup> Because it was therefore harder to uncover, presenting particular difficulties to prosecution and conviction, it threw problems with the law as it stood into sharp relief, and the Kangaroo Creek incident became a tool in the hands of legal reformers. Simultaneously, for the opposing squatters' faction it represented the dangers of Aboriginal legal rights, and the failure of white law to protect its own.

This nineteenth century denial of the Aboriginal voice also presents certain problems for the modern historian. The silence of the Gumbaynggir persists. But the Kangaroo Creek poisoning remains as an enduring memory for many members of the local community.<sup>45</sup> It reminds us that notions of truth and evidence are culturally informed. As Plunkett said, speaking in the 1849 parliamentary debate, *'there could be no moral doubt'* of the Aboriginal version of events at Kangaroo Creek, despite its rejection by white law. Similarly, as academic historians, we must be careful not to allow our own emphasis on rigorously constructed historical arguments to exclude versions of the past which have a different epistemological basis.<sup>46</sup> Nevertheless, as some historians have recently argued, by understanding the complexity of conflict in the past, and the way that men and women saw and made choices which violate our neat expectations, we are enabled to see more clearly the potentialities of our own time.<sup>47</sup> Disclosing what happened to the Gumbaynggir in 1848, and something of the contemporary European possibilities for choice, prompts reflection upon the options we have ourselves.

## Acknowledgements

This paper developed from research undertaken for archaeological consultants Navin Officer, as part of the *Grafton/Coffs Harbour Regional Water Supply Project*. I thank Kerry Navin and Kelvin Officer for this opportunity, and am grateful for Kelvin's valuable advice during the course of the project. I also thank Isabel McBryde, Peter Read, Ann Curthoys and Ross Gibson for their encouragement and comments on drafts of the paper. Peter Tonkin very capably assisted with research. Thanks to Isabel McBryde for preparation of Figures 1 and 2.

*Jane Lydon is a PhD student at the Centre for Cross-Cultural Research at the Australian National University, investigating cultural exchange in specific historical context, through a study of*

<sup>43</sup> Curthoys 1973, pp. 170-2; Rowley 1970, p. 128.

<sup>44</sup> And see Reece 1974, pp. 48-9.

<sup>45</sup> Officer and Navin 1994.

<sup>46</sup> cf Rose 1989, Roberts 1995.

<sup>47</sup> Read 1992; Reynolds 1990; Denning 1995.

*nineteenth century Aboriginal-European relations at Coranderrk Aboriginal Station, Victoria. She is currently contracted as historical archaeologist on Norfolk Island.*

## References

The salient facts of this tragedy emerged from material held by the State Archives Office of NSW, and especially from the Colonial Secretary's Correspondence. Research using this material often involves following subject index references down the years to an accumulating snowball of documents, due to the nineteenth-century administrative system of filing earlier relevant material with the most recent correspondence. This was the case with the Kangaroo Creek depositions transcribed below, which were lodged with a request to analyse the poisoned damper.

### Primary

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### State Archives Office of New South Wales

#### Colonial Secretary. Correspondence Received.

##### Index and Registers 1848.

*The following list, compiled from index and register, comprises (abbreviated) year and letter number (which is the key to its storage location in the archives), index subject entry and in brackets, a summary of contents as per register.*

48/2771 Coutts Thos (1 Mar, Applying for lease of Crown Lands, to Chief Commissioner: 3/5 Neg.)

48/1331 Commr Crown Lands, Fry: TC murder of blacks (transmitting copies of proceedings relative to the murder of several Aborigines by Mr Thomas Coutts) (= with 5858)

48/5858 (from Crim.Crown Solicitor, 1 May 1848. 'Requesting authority to incur expense of analization of a piece of damper [case of TC]') (approved 5 May)

*nb this is where copies of depositions were lodged, loc:4/2800.2*

48/2290 (Fry, 31 Jan, Reporting murder of an Aboriginal native at Mr Foster's Station. To Attorney General 10 ?. Answered 28 Feb = 48/5225

48/5225 Att.Gen. 15 April, recommendation for further investigation. See 48/5780)

48/5780 (Att.Gen. 1 May 1848 Deposition connected with death of Aborigine named 'Georgy' at Mr Foster's Station) (M.7703)

48/2291 Fry, 17 Jan, Annual report on state of Aborigines. Despatch No.107/1848. See 48/3298.

48/5682 (Fry, 13 April, Murder of Jas.Lafont hutkeeper of Thos.Coutts. To Att.Gen. 8/9: May, 48/7126)

49/7126 (Att.Gen. 15 June, Not sufficient evidence in the case of murder of Thos. Lafont: Ditto Coutts. See 49/3403) nb Att.Gen. opinion re Coutts not recorded in register, unlike opinion re Lafont

49/3403 (Att.Gen. Bill re admission of evidence of Aborigines. Thrown out 27 June)

**Colonial Secretary. Commissioners of Crown Lands (1) and (2) 1848.**

(2) 4/2812 Commissioner Fry, estimate for 1849—salary of two mounted police 54 pounds 15 shillings.

Commissioner Fry, reporting that Mr Coutts is the licensed occupant of the Kangaroo Creek Station.

(48/1332: 29 Jan 1848) Stands committed for the murder of the Aborigine named Georgy-Georgy.

Commissioner Fry, report on the state of the Aborigines in the Clarence River district for 1847.

Commissioner of Crown Lands, New England District. Description of Runs, ca. 1851. (4/6913)

**Attorney General to Colonial Secretary**

15 April 1848, page 100.

1 May 1848, pp 108–9.

13 June 1848, pp 129–130.

15 June 1848, pp 131–3.

**Supreme Court**

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**State Library of NSW: Newspapers**

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29 June 1849 reporting parliamentary debate surrounding bill to make Aboriginal evidence admissable.

*Australian* 2 Feb 1848

*The Atlas* 19 Feb 1848

*Maitland Mercury* 2 Feb 1848

**Mitchell Library**

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1837 'Report from the Select Committee on Aborigines (British Settlements)...' PP, 1837, Vol.VII, No 425.

*Crown Lands Unauthorised Occupation Act* 1839. 2 Vic. No 27.

*An Act to allow the Aboriginal natives of New South Wales to be received as competent Witnesses in criminal cases, 1839 [3 Vic. No.16 (NSW)]*

*An Act to authorise the legislatures of certain of her Majesty's colonies to pass laws for the admission in certain cases of unsworn testimony in civil and criminal proceedings 1843 (6 and 7 Vic. Ch.XXII.Imperial Act)*

*Aboriginal Natives' Evidence Bill. NSW V. and P. (L.C.), May and June 1844*

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## Part II: Transcripts of nineteenth-century documents relating to the Kangaroo Creek poisoning.

(A question mark ("?") before a word indicates that its form in the original document was unclear to me.)

*Commissioner of Crown Lands Office—Clarence River Jan 18th 1848. From Commissioner Oliver Fry, to Col. Sec.*

The copies of proceedings which I do myself the honour to transmit, will reveal to you the particulars (in so far as they can be ascertained), of one of the most hideous enormities that has ever taken place, in any age or Country. The atrocity to which I allude, is the murder by poisoning of not fewer (it is believed), than twenty-three Aboriginal natives, which, as there is every reason to conclude, was committed on or about the 28th of November last by Mr Thomas Coutts, of Kangaroo Creek, in this district.

The statements contained in the Depositions are so full both as regards the nature and extent of the offence, and the measures I considered advisable, consequent on acquiring a knowledge of it, that nothing remains for me to add, further than that every effort was made to procure such evidence as was possible under the circumstances, and that the cause of such (cut off)

*Regina v. Thos Coutts (copy)*

48/1331

*For the murder of an Aboriginal Native commonly known as Georgy.*

*Oliver Fry Esquire duly sworn states—I am Her Majesty's Commissioner of Crown Lands for the Clarence River District.*

On wednesday the 5th Jany Inst. I was at Mr Mylnes, where I was informed by Mr Walker that he had heard the day previously from Mr Forster of a rumour being current amongst the Blacks in his, Mr Forster's vicinity of a number of the blacks having died in consequence of eating flour which they had received from Mr Coutts. - I was not disposed to attach much credit to the report—I however determined upon enquiring into it—and on reaching home I asked a Black Boy named Sandy who is attached to my Department—if he had heard the story—He told me—he had heard it long ago—and that a number of Blacks had died in consequence of eating flour they had received from Mr Coutts—I asked him why he had not told me of it before when he told me that he had forgotten it.—I told him to go away on the following morning and find some of the Blacks belonging to Mr Coutts' Tribe who knew where the bodies of those who had died were lying and bring them to me that I might go with them and see where the bodies were.—Sandy had not returned on Monday the 10th January upon which day I was at the settlement for the purpose of holding an inquiry upon a man who had been drowned—On Tuesday the 11th Inst. I went to the Lockup at Grafton to see some men that had come in from Mr Coutts' Station, and in order to enquire into the supposed murder.—

At the Lockup I saw a man named Thomas Walker, also a man named Patrick Byrnes alias William Byrnes and a man named John Flynn, all of whom had come in from Mr Coutts Station.—Walker and Flynn informed me, that they had come in to charge Mr Coutts with having poisoned some Blacks—while they were speaking—Byrnes who was in one of the cells—called out that he also knew something about this murder.— I heard their several statements and on the day following viz on the 12th I had them taken down in writing and sworn to—Their depositions appeared to me to be sufficient to authorise the issuing of a warrant for the apprehension of Mr Coutts—I issued a warrant accordingly, and the same day I started for the place where I had heard that the bodies of the persons who had been poisoned were lying—I was accompanied by the Chief Constable of Grafton.—one of the



Crown Land Troopers—Sandy the Black Boy, and the man Thos Walker, from whom I had received the information, and who had seen the bodies and knew where they were.—On the night of the 12th we camped in the bush about two or three miles from Mr Coutts Station. On the morning of the 13th at about seven o'clock I reached a Black's Camp, a place which had been described to me as the spot where the bodies were to be found.—The Camp is situated in a straight line about a mile in rear of Mr Coutts' hut.—It may be more by the usual track—Upon reaching the camp the man Walker pointed out to me a sheet of bark, under which he said one of the bodies was lying.—I ordered the party to dismount and turn the bark over—Underneath it was lying the perfect skeleton of a human being—The camp was close alongside a creek—on looking about the camp I saw on the Bank of the Creek the skeleton of another which seemed as if it had been pulled out of the water.—There was also within a few yards of the camp a grave recently made—I had it opened and in it I found the remains of the body of a Black—part of the flesh was remaining—before further looking round I found also the skull of another human being, and the man Walker pointed out to me where others had been lying—I could see by the grass which was discoloured where they had been lying but had been removed, whether by dogs, or not I cannot say.—Before leaving for this camp Walker had told me, that there were several bodies in the water; I searched for them but could not find any part of them, but there had recently been a considerable fall of rain which I fancy may have flooded the creek and carried away the remains of the bodies—in the camp and quite close to where the bodies were lying I found a quantity of bread (damper)—Pieces of this damper were found in several parts of the camp—in four or several places.—They were triangular pieces and looked as if they had been cut from a circular damper—The pieces adhered to the ground—It required some force to detach them from it—The upper surface was worn away by the weather—They had evidently been lying there some time—I removed them—I have them now in my possession locked and sealed up—I should think there is about ten pounds weight of it—There are several circumstances which lead me to believe that this damper is strongly impregnated with arsenic—It smells strongly of garlic, which is one of the characteristics of arsenic, and upon taking it from the ground it caused the hands to smart considerably—The hands were moist at the time—It produced the same effect on the hands of the Chief Constable and the Trooper—at least they told me so.—It appears to me to be very much heavier than damper usually is—but this may possibly be from the moisture as it was raining at the time—My object in going to the Camp was not only to see the bodies but to endeavour to get some of the stomachs of the dead Blacks if I could.—I however found that they were so much decomposed that it was impossible to obtain anything of the kind—Nothing remained but the bones—some of the skin of the back and also some skin and dried flesh attached to it was found in the grave I had caused to be opened—The Blacks had however died at no very long period back, as the smell from the bones was very strong.—As the flesh of the bodies was all destroyed I saw it was no use looking for the stomachs and therefore went to Mr Coutts'—I saw myself, the remains of four bodies, and I saw where four others had been lying—Two had apparently been dragged in the Creek—I have had much experience with regard to the Blacks. It is my opinion that such Blacks as had wives would be buried by them—and such as had none would be left on the spot, supposing any large number to have died at once.—Upon arriving at Mr Coutts' Station I saw some children near the door, I asked them for Mr Coutts who shortly afterwards came out to me—I called him on one side and told him that he was charged with having poisoned some Blacks, and that it was necessary for him to come in to have the affair investigated.—I did not search the house, nor order the Chief Constable to do so—I left the Chief Constable behind with Mr Coutts and told him that the case would be heard on Saturday—When I told Mr Coutts of the charge laid against him he said that he knew nothing at all about it (signed) Oliver Fry.

*Patrick Byrnes, alias William Byrnes* being duly sworn stated—I am a bullock driver in the employment of Mr Thomas Coutts of Kangaroo Creek—About the 29th of November last I was at Mr Coutts Head Station—A number of Blacks were employed weeding Mr Coutts paddock—There were about twenty-three of them—They left off work at about twelve

o'clock—I cannot say the precise time, as I had no watch—After the Blacks had finished weeding I saw Mr Coutts give a Black called Georgy Georgy about ten pounds of flour out of the store—I was standing about eleven yards off at the time. I cannot say if it was flour that he gave him; but I suppose it to have been flour, as it was given from the flour store and was in a bag—I went near the store to see what was going on, as I had heard it murmured on the Farm that "the Blacks were going to have a dose"—By a dose I mean that the Blacks were to be poisoned—John Ryan told me of it—When Mr Coutts brought out the flour he had a piece of brown paper in his hand. I do not know what he did with the paper—he might have put it in his pocket for anything I know. After Mr Coutts gave the flour to a Black named Georgy Georgy—he ordered all the Blacks away, as he said some cattle were coming up which would be frightened.—The flour was apparently for the whole of the Blacks, as I did not see Mr Coutts give any more to any of the rest of the Blacks.—The Blacks went away, and Mr Coutts called for some soap and water and washed his hands.—There were some Cattle coming up to the Yrad at the time.—I saw the paper distinctly It looked as if it had contained a powder or something of the kind—My reason for supposing it, is that it looked as if it had been folded up—About three days afterwards I went to the Back Creek which is about a mile and a half from the Head Station, and I saw seven Blacks lying dead there—Amongst them was the Black named Georgy-Georgy above mentioned also Garry Garry, and Jerry Jerry. These three I know to have been working in the wheat paddocks on the day that Mr Coutts gave them the flour. The bodies were near a water hole and a Black's Camp was close by—I knew Georgy Georgy well—I have known him for about two years—He was called King by the Blacks—By King I mean Chief or something of the kind—To the best of my opinion Georgy Georgy had been dead about two days—The bodies were perfect but smelt strong.-

*Cross examined by Prisoner-*

To the best of my opinion it was about the 29th of November that you gave the flour to the Blacks.—I did not give information before through fear—I was afraid if I gave information that you would shoot me on the road—I have been at work with a man named Barney—I was cutting timber with him for about a day and a half—I will not swear to a day when I was working with him, (signed) P.A.Wm.Burns.

*Thomas Walker* being duly sworn states—I am a shepherd in the service of Mr Thomas Coutts of Kangaroo Creek—In the month of November I was stationed at an Out Station about thirteen miles from Mr Coutts Head Station—About the end of that month as near as I can recollect I sent a Black called Jemmy Jemmy with a note to Mr Coutts for half a pound of tobacco—Upon his return to my hut Jemmy Jemmy told me that he was desired by Mr Coutts to collect all the Blacks to work at the Head Station.—That evening Jemmy Jemmy and Garry Garry left my hut for the purpose of going to the Head Station.—Two days afterwards I heard from a man called "the Barber" that a great number of Blacks had died from eating the flour that had been given them—About two hours afterwards I met two Blacks and two gins who told me that twenty three Blacks had "tumbled down" from eating the flour—They appeared much distressed—They were crying very much.—I understood from them that the flour had made the Blacks vomit before they died—The Blacks call Mr Coutts Micato—They said it was the flour that Micato had given them, that made the Blacks tumble down—These Blacks described to me the place where the bodies of the dead Blacks were to be found lying, and some days afterwards I went to the place—It is situated about a mile and a half or two miles from the Head Station—Upon arriving there I found six dead bodies—Three were in the water—one was uncovered—One was under a sheet of bark, and one was under some boughs—The place where I found the bodies is usually called the Back Creek—To the best of my belief one of the bodies lying there was Jemmy Jemmy—I conceive it was him from his unusual size—The same evening a man named Flynn my hut-keeper—showed me another body about eighty yards distant from the six bodies above-mentioned. I told Flynn that there were six more bodies close to, and asked him to come and see them—but on approaching them, the stench was so great, that he held his nose and went away—On Thursday the 13th of the present month I accompanied Mr Fry to the place in question—I

showed him where the bodies had been lying—some of them had been removed—I saw a grave opened in which were some bones—Some five or six pieces of damper were lying near where the bodies had been—Mr Fry and the Chief Constable collected it, and put it into a handkerchief or something of the kind—I gave information as soon as I could get away from Mr Coutts—He refused to let me leave and kept putting me off from day to day—At last I told him that I would stay no longer, and accordingly started for the settlement for the purpose of giving information, but Mr Coutts rode there before me, and had me arrested for absconding.—I have heard Mr Coutts complain of the Blacks killing his cattle—Last Winter—or about three or four months ago—Mr Coutts desired me to send the Blacks in, and he would give them tobacco and tomahawks—some time ago the Blacks took 300 sheep from me but I rescued them again—It was the Bellingen Blacks who took the sheep—they had always been troublesome about the Station.—The other Blacks were very quiet—Mr Coutts had always behaved well to the Blacks -

*Cross examined by the Prisoner-*

The evening before I left I told Mr Coutts I would not stay any longer while such poisonous murders were going on, and that no luck would attend it.—I told him his rations were bad—This was the next morning—But I told Mr Coutts I was not leaving on account of the rations, but for what I had told him the night before. (signed) Thomas Walker.

*John Flynn* being duly sworn stated—In November last I was a hut-keeper in the service of Mr Coutts—about the shearing time, or just before it, I was one day in Company with a shepherd named Thomas Walker—When near the Back Creek and about a mile and a half from Mr Coutts Head Station I showed Walker a dead Black.—He said that there were some more close to the Creek and wanted me to go and see them but the smell of the one I showed him so disgusted me that I would go no further.—Mr Coutts complained to me some time last winter that the Blacks were very troublesome to his cattle—he said that he would give them tobacco and tomahawks and make friends with them—I told him it would be the best plan as they were always very quiet with me with the sheep—(signed) John Flynn

*John Tomkinson* being duly sworn states—I am a shepherd in the service of Mr Thomas Coutts of Kangaroo Creek—About the latter end of November last about twenty Blacks were assembled at the Station where I was placed—It is situated about ten miles as near as I can guess from the Head Station.—The Blacks told me that they were going in to work for Mr Coutts who would give them rum, and that they would be back in two days.—They moreover said they considered Mr Coutts unfriendly towards them—but I told them that he was not; and then they said they would go and make friends with him—Of the Blacks that went to the Head Station—Georgy Georgy—the King or Chief was one—Billy Billy was another and Jemmy Jemmy was also of the number besides many others which I can enumerate if necessary.—These Blacks were in the habit of constantly coming to my hut and I know them well—I have never seen any of them since the day that they left for the Head Station—except one.—Two or three days after the Blacks left for the Head Station two or three children came to my hut and told me that the Black fellows were dead—The following day three gins came and reported the same story, saying that about twenty of them were dead from having eaten of the flour given to them by Mr Coutts.—The next day one of the Blacks named Billy Billy—the one above-mentioned as having passed in company with about twenty others for the Head Station came to my hut and told me that about twenty Blacks were dead from having eaten of the flour given to them by Mr Coutts, He said that he was very ill—he looked very ill—He said he had eaten some of the poisoned flour but had got the better of it—He complained of his throat and stomach—he pointed to some flour, and said the Blacks had been working for Mr Coutts and that he paid them with flour and tobacco. -

*Cross examined by the Prisoner-*

I should say Mr Coutts was very unfriendly towards the Blacks before the time above-mentioned—that is to say—when they were going to make friends.—They were not allowed to be about the Head Station before that—I have often heard Mr Coutts complain of the Blacks having killed his cattle, and say that they deserved shooting—Moses Jones told me Mr Coutts had lost a pistol by going out after the Blacks—Mr Bloodsworth gave me some tobacco to give to the Blacks in order to induce them to go in to the Head Station.—This was about five or six weeks before the Blacks were said to have been poisoned.—Before this period none of them would go near the Head Station—signed John Tomkinson.

*For the Defence-*

*Bernard Malone* being duly sworn states—I am Overseer to Mr Coutts of Kangaroo Creek—About the middle of November William Byrnes was at work with me—this was the last time that the Blacks were at the Head Station except two that came with the shearers—On that day he went with me to dinner—You gave us a glass of rum each—When we came home to dinner, there were no Blacks there.—I only know that the Blacks had been on the Station that day by hearsay—I did not see them—Byrnes could not have seen the Blacks without my having seen them—I was working with Byrnes after dinner til nearly dark -

*Crossexamined by the Bench-*

I have heard some of the men say that some of the Blacks had been poisoned— I saw the skulls of two human beings at about two miles from the Head Station, on a place called the Back Creek—I never found the Blacks troublesome except in killing cattle, and the shepherds reporting them for trying to get their sheep away from them (signed) Bernard Malone.

*Moses Jones* being duly sworn states—I am an Overseer—Last month of November I was in the service of Mr Thomas Coutts of Kangaroo Creek—In September last—Walker a shepherd sent in a note to say the Blacks had taken 300 of his sheep from him but that he had got the best part of them back again.—In January or Feby 1847, in the course of conversation with him he complained very much of the Blacks and the depredations that they committed.—He said that if some stuff (meaning poison) was sent out to him, he could very soon put them out of the way—that he himself would undertake to put them out of the way and asked me to speak to Mr Coutts about it.—This I refused to do but promised him (merely to pacify him) that when I went to Sydney I would get it for him.—Walker was taking Holloway pills and using his ointment at the time—He said that if Mr Coutts would furnish him with it, he could easily conceal it in the boxes.—Upon my return from Sydney in August he (Walker) asked me if I had brought him the poison—I told him that I had not.

(signed) Moses Jones

*Peter Frazer* duly sworn states—I am a labourer—I was last in the employment of Mr Coutts—

*Memorandum*

This witness having been drinking was taken out of court.

*Thomas Walker* being re-sworn states—I never at any time had any conversation with Moses Jones respecting poisoning the Blacks—I never commissioned him to buy or procure any poison for me—I asked him to buy Holloways pills but he did not keep his word and get them for me.—A man named the Barber told me, that Malone had recommended Mr Coutts to poison the Blacks, and he said also that it would be a good plan, only that the innocent would suffer as well as the guilty (signed) Thos Walker

*John Tomkinson* re-examined- When I first went out to Mr Coutts Station—That is to say about nine months ago—I was riding out on the dray with Malone—a conversation took place about the Blacks—I cannot positively swear whether Malone said that he had struck up a

plan to poison all the Blacks or that Mr Coutts had done so.—He said however that it would have been an excellent plan only for one thing, and that was, that the innocent Blacks would suffer as well as the guilty ones. (signed) John Tomkinson

*Defence-*

Mr Coutts in his defence states that he knows nothing whatever about the matter—That he believes that Byrnes would swear anything. (signed) Thomas Coutts

The court commits Mr Coutts to take his trial at the next General Gaol Delivery in Sydney—  
signed William Forster JP, John Mylnes JP

Grafton Police Office

Jany 17th 1848

True copy  
(signature)

49/3403

10th April 1849

*The Honble the Attorney General to the Honble the Colonial Secretary, transmitting the draft of a Bill, to provide for the admission of the Evidence of Aborigines in Courts of Justice with two enclosures*

Attorney General's Office,

7th April 1849

Sir,

1. In attention to the comments of His Excellency the Governor, conveyed to me in your letter of the 9th August last, No. 48/635. I have the honour to transmit a Draft Bill, in the same terms as one presented to the Legislative Council in the Year 1844, to provide for the admission of the Evidence of Aborigines in Courts of Justice.

2. With respect to the suggestions made by Mr Walker, and enclosed to me in your letter of the 22nd March last, No. 49/208. I think the proper time for this consideration will be in committee; but I do not consider it advisable to insert them in the draft Bill, when laid before the Council.

I have the honour to be,

Sir,

Your obedient Servant,

J.H.Plunkett

2 49/2602 16th March 1849

*Commissariat Native Police Submitting observations respecting ill-treatment of the Aboriginal Natives ?*

Darling river

15 Feby 1849

Sir,

In another letter of this date I have the honour to inform you that I had reached this place. I have to report that during my journey I have been in constant communication with the aboriginal natives and have hitherto found them very friendly.

The settlers however complain of their stealing sheep and ? on the Darling on the stations of Messrs Fletcher and Walker. This seems to have been carried on to a serious extent as they have lost several hundred sheep.

On the other hand the natives complain bitterly of the illtreatment they receive from the shepherds and their servants who in return for the presents of immense quantities of fish and lobsters which they receive from the blacks, abuse them, threaten to shoot them and drive them from their huts. The owners of the stock are the sufferers from this conduct which it is the interest of their servants to persevere in for the purpose of keeping up the price of labour in this part of the Colony.

I wish to call your attention to the fact that at present the Natives are liable to all the penalties of the British Law, but derive no benefit or protection whatever from it, and this arises from thier (sic) evidence not being admissable.

I know that there is in this colony a strong prejudice against submitting their evidence, but I consider that the only danger to be ?raised is not that a Native would bear false witness, but that he might be inclined not to tell the whole truth.

I have no doubt that the opposition to a bill for the admission of the evidence of the blacks would be abandoned if it were not ?retrospective.

But it is in the lower courts of justice that such a bill would be of use to Natives for no man would assault and ill use a black if he knew he was liable to be fined for the offence upon the evidence of the Natives who might be present. It would be still better if there were a law for the prosecution of the Natives by which the Chief Constables could in their respective districts lodge informations against parties illusing (sic) the blacks.

I have also to observe that I think it would be more serviceable to the colonists and more merciful to the Natives if the crime of sheep or cattle stealing were not visited with the punishment inflicted by British law; but punished by imprisonment in the nearest lockup for three months with or without corporal punishment.

This would have a beneficial effect upon the tribe; but transportation or any other punishment at a distance is only revenging the offence upon the individual but has no effect upon his tribe who do not know what has become of him and forget him. It is so difficult and expensive to prosecute Natives before a Circuit Court that the settlers in their own defence have been obliged to take the law into their own hands and the consequence has been to the Natives that in many cases the crime of sheep stealing has been punished with death.

I have the honour to remain sir

Your most obedient servant

Frederick Walker J.P.

Commandant

Native Police

48/7126 17th June 1848

*Attorney General*

*Attorney General's Office*

*Reporting that there is not sufficient evidence to institute prosecution in the case of the murder of Jas. Lafont.*

Sir,

I beg leave to acknowledge the receipt of your letter of the 8th ultimo transmitting for my report, the accompanying letter from the Commissioner of Crown Lands at the Clarence River, reporting that on the 9th April last, a man named James Lafont, a hutkeeper in the employment of Mr Thomas Coutts of Kangaroo Point in the above district, was murdered by the Aborigines.

In reply I have the honour to report for the information of His Excellency the Governor, that I have received the proceedings of a magisterial enquiry relative to the death of Lafont, the late hutkeeper of Mr Thomas Coutts, by which it clearly appears that the unfortunate

deceased must have been murdered by the Native Blacks, but there is no Evidence to bring the offence home to any particular individual.

I entirely concur in the opinion of Mr Commissioner Fry "that this lamentable occurrence must be regarded as the inevitable consequence of Mr Coutts' own conduct" for although I did not put Mr Coutts on his trial for the charge of poisoning a Tribe of Native Blacks in December last, and for which he was committed, it was *not* from any moral doubt I entertained of the strong suspicion of his guilt of the dreadful crime, but solely because, there was not sufficient *legal* evidence to substantiate it in a Court of Justice as the present state of the law excludes the Evidence of the Black Natives themselves,—Indeed the case of Mr Coutts renders still more apparent, the great deficiency of the present law in that respect, and I trust that a New Legislature will now see the expediency and necessity of passing a law to remedy it and similar in principle to the Bill which was proposed by the government to the present Legislative Council, but rejected by a large majority of that body.

I would also beg to refer to my letter of the 1st May last, reporting, for the Governor's information, on the charge against Messrs Blaxland and Forster, relative to the death of a Native Black named "Geary"—as another instance of the deficiency in the law of Evidence. As long as such acts are committed by the White people on the Aborigines, and while the perpetrators of these go unpunished, it cannot be wondered at, that revenge should occupy the breasts of those Savages—I entirely concur in the sentiments expressed in Mr Fry's letter.

I have the honour to be,

Sir,

Your obedient Servant,

J.H.Plunkett

Attorney General

*copy*

Attorney General's Office

10th May 1848

Sir,

Having reference to the Depositions in the case against the Individual named in the the margin, charged with poisoning certain of the Aboriginal Blacks on the Clarence River; I beg leave to inform you that there is not sufficient evidence to sustain the prosecution, although I am sorry to say the suspicion is very strong that the prisoner is not guiltless of the dreadful deed charged against him.

This is one of the many cases from which the defect of the present law, in excluding altogether the Evidence of the Aboriginal Natives, is apparent.

I have the honour to be,

Sir,

Your Obedient Servant,

(sigd) J.H.Plunkett

Attorney General

48/5682 28th April 1848

Commissr Fry

Clarence River

Crown Lands Officer 13th April

Reporting Murder of Jas. Lafont, a hutkeeper in the employ of Mr.T.Coutts

Sir,

I do myself the honour to acquaint you that on Sunday the 9th inst. a man named James Lafont, a hutkeeper in the employment of Mr Thomas Coutts of Kangaroo Creek in this District, was murdered by the Aborigines at a sheep station, distant about three miles from the residence of his employer.

From the evidence ? elicited on the investigation as to the cause of death it would appear, the outrage took place under the following circumstances.

Upon the day above named a shepherd who lived with the ? was attacked by the Blacks while out with his flock and being driven from his sheep ran to the station for protection. On reaching the hut he found the hut-keeper Lafont outside the door, quite dead. There were no Blacks about the ? place, nor was there anything, save the peculiarity of the wounds, to indicate by whom or what the murder had been committed.

The flock of sheep (amounting to about nine hundred) was missing for some days, and supposed to have been driven off. But as (with the exception of about eighty\_) it has returned to the station, it is now generally believed that it was not disturbed by the Blacks and the loss is imputed to the ravages of native dogs.

Upon the foregoing being reported to the Magistrates all the available part of the Police was ordered in pursuit of the depredators but returned in a few days without having effected anything.

In conclusion I beg to add, that it is impossible to regard the circumstance I have reported as other than the inevitable consequence of Mr Coutts's own misconduct. To those familiar with the manners and habits of the Natives; the murder of Lafont, must seem, but the sequel to the poisoning of December last. There is no people who entertain a stronger sense of retributive justice than the Aborigines of New Holland. With them "Blood for Blood" is a necessary (and where circumstances render it possible) an inviolable maxim, according with their superstitions, and essential to their existence. It was easy to have foreseen the occurrence of a calamity such as the murder of Lafont, but the means of arresting it were not so readily perceived; as none presented itself as efficacious save the impracticable one of removing Mr Coutts from the District.

I have the honour to be sir your most obed servt

Oliver Fry