Australia on trial

By Bruce Kercher

It is widely believed that the Myall Creek murder trials in 1838 resulted in the first executions of Europeans for the murder of Aborigines. Recent work in the archives and in colonial newspapers has uncovered earlier cases. As far as we know at present, the hideous distinction of being the first white man to be hanged for killing an Aborigine belongs to a man named John Kirby. In 1820, he was hanged for the murder of Burragong, alias King Jack, a 'native chief' of Newcastle. Kirby and an accomplice named John Thompson were escaped prisoners, who were captured by Aborigines. Kirby killed Burragong as he was being escorted back to town.

Europeans were convicted of killing Aborigines as early as 1799. In that year, Edward Powell a constable, and four others took part in a punitive raid, in a tit for tat response to Aboriginal attacks. They were found guilty but not hanged. Aborigines were sometimes convicted and executed for killing or attacking whites too: the first, apparently, was a man named Mow-watty, in 1816. Well before the Myall Creek trials in 1838, it was very firmly established that the colony's Supreme Court had power to try inter-racial killing, and even inter se killing among Aborigines.

There was a vast gap between stating the law and ensuring that it was enforced. In 1827, Lieutenant Nathaniel Lowe of the 40th regiment was placed on trial for the murder of an Aboriginal man named Jacky Jacky. Lowe's counsel, WC Wentworth and Robert Wardell, made a formal argument that the law had no jurisdiction on the frontier, that the only relevant principle was an eye for an eye. The Supreme Court rejected this, but that was not the end of the case. Lowe was then put on trial before a jury of seven of his brother military and naval officers. Despite the strength of the case against him, he was acquitted after only five minutes' deliberation. As the *Australian* newspaper reported it on 23 May 1827, 'Loud and general applause accompanied this announcement of the verdict. The numerous friends of Lieutenant Lowe crowded round to congratulate him on the happy termination of the trial. A second burst of applause was given as he triumphantly left the court.'

Hundreds of other cases show a similar ambiguity about the application of law in the Australian bush. The colony's basic law should have been the law of England, but what was suitable to Jane Austen and her family, did not always work in Australia. It was a more egalitarian place, one in which land was available for the taking (from Aborigines) and in which the outcasts of English and Irish society were able to make lives which would have been impossible had they not been transported.

This was evident in the first civil trial in Australia. Henry and Susannah Cable (or Kable) were two convicts whose luggage had gone missing on the voyage of the first fleet. In July 1788, they successfully sued a ship's master, Duncan Sinclair. English law would not have allowed them to hold property, let alone sue to recover compensation for its loss. Both had been sentenced to death and subsequently transported. The civil death called attainder should have lasted until the expiry of their sentences, but the Sydney court overlooked that. As a result, the colony was less a jail than a place of exile. Prisoners were able to earn an income and live relatively independent lives. Henry Kable went on to a vigorous career as a merchant (followed by a crash).

From its first civil case, then, the rule of law was in force in New South Wales, but it was not always strictly English law. The formal law required that English law should have been in force, but its ambiguities and the flexibility in the application of the reception rule, resulted in something different. Colonial people sometimes refused to obey the received laws of England. The judges in Lieutenant Lowe's case stated the law, but the jury apparently had a different view of the legal position of Aborigines. Sometimes this resistance to law had the effect of changing the formal law, squatting being the best example. The governors set formal limits to settlement, beyond which settlers were not meant to work. Mass refusal to obey these limits was not put down by legal power, but was managed through administrative means. The government issued licences to occupy squatting runs, followed eventually by the pastoral leases which still cover vast areas of Australian land. Thus the initiative for new law was not always taken in court rooms or legislative chambers. These conflicts were eventually mediated in the courts however, where we heard the stories of a new society, with sometimes tenuous connections to 'home'.

The uncovered colonial cases are being placed at Macquarie University's Colonial Case Law website, and will form part of Austlii's new Australian Legal History Library. The colonial newspapers are increasingly being placed online by the National Library of Australia.