
Redeeming Fitzpatrick: Ned Kelly and the Fitzpatrick Incident

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***Abstract.** In April 1878 Constable Fitzpatrick was wounded by Ned Kelly while attempting to arrest his brother Dan for horse stealing. The incident triggered the “Kelly outbreak” that elevated Ned to the status of Australia’s most notorious historical figure. Ever since the event Fitzpatrick has been almost universally labelled a liar and perjurer, and the various records of his testimony in two trials and a Royal Commission have been assailed as fanciful and unlikely concoctions. This article reconstructs and vindicates Fitzpatrick’s version of events after some 140 years of denigration. Ned and his family and associates’ various statements and denials about the event emerge as a series of ever-shifting self-serving fabrications that, together with other evidence, raise doubts about much other prevalent Kelly mythology.*

***Keywords:** Ned Kelly, Kelly Gang, Alexander Fitzpatrick, Fitzpatrick Incident, Fitzpatrick Affair, Constable Fitzpatrick, bushrangers, Australian bushrangers.*

The attempted arrest of Dan Kelly at his mother’s house on suspicion of horse stealing by Constable Alexander Fitzpatrick on 15 April 1878, Fitzpatrick’s wounding in the course of the event, and the arrest and subsequent gaoling of Mrs Kelly and others on a charge of aiding and abetting the attempted murder of Fitzpatrick, was the trigger for what became known as the Kelly outbreak.¹ It was immediately after this incident that Ned and Dan Kelly, together with Joe Byrne (and to be joined mid-year by Steve Hart), disappeared into the bush until the Stringybark Creek shootings on 26 October, almost six and a half months later.²

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¹ The trigger: McIntyre deposition, Beechworth, 7 October 1880, “Ned Kelly said to me [at Stringybark Creek], ‘Why I broke out was that b_____ Fitzpatrick was the cause of all this’“, *Age*, 9 August 1880, 3; cf. Edward [Ned] Kelly, *Jerilderie Letter* (SLV MS 13661, February 1879), 19-20; Standish, *RC Q181; RC2 1881*, ix; Francis Hare, *The Last of the Bushrangers* (London: Hurst and Blackett, 1892), 97; Ian Jones, *The Fatal Friendship*, rev. ed. (South Melbourne: Lothian, 2003), 58.

² Hart was released after 12 months imprisonment for unlawfully using horses. “Prisoners Discharged, Week Ending 17 June” *Police Gazette* 1878. He joined the Kellys soon afterwards, Steele, *RC Q9133*.

The ensuing Kelly saga has been described as “a quintessential Australian story”.³ The government website *Australia.gov.au* notes that “more books, songs and websites have been written about Ned Kelly and the Kelly Gang than any other group of Australian historical figures”.⁴ Yet in their day the Kellys were merely notorious Greta stock thieves and larrikins, of no other significance until the Fitzpatrick incident, during which ex-convict Ned also first declared that “he would never again be taken alive”.⁵ Much discussion of the Kellys has been underpinned by theories of colonial socio-political relations focussed on “land wars, squatter tyranny and police harassment”.⁶ Some commentators even see Ned as a republican rebel hero and a “messiah of Australian democracy”.⁷ Such approaches confuse history with fantasy. This first full critical reconstruction of Fitzpatrick’s narrative after 140 years of denigration demonstrates how far prevalent Kelly mythology is from historical truth.

Discussion of the Kelly outbreak has for the most part condemned Fitzpatrick’s attempt to arrest Dan as an unauthorised, drunken and oafish escapade, followed by deliberate lying and exaggeration to his superiors as to what happened at the Kellys (where he was unquestionably assaulted), and perjury about the event in the resulting court case in which Mrs Ellen Kelly, William (Bill) Skillion and William (“Bricky”) Williamson were sent to prison for substantial terms.⁸ Fitzpatrick himself is typically introduced as one “whose first year in the force had been a chapter of unreliability, bad company, narrow scrapes, and a fondness for liquor”.⁹

Yet there are reasons to doubt this damning portrait, not least of which is a petition signed by over a hundred prominent residents of Lancefield seeking Fitzpatrick’s reinstatement to the force after his summary dismissal in April 1880.¹⁰ In the light of recent work defending much of the police activity in the pursuit of the Kelly gang, it is

³ Peter FitzSimons, *Ned Kelly: The Story of Australia’s Most Notorious Legend* (Sydney: Heinemann, 2013), xi.

⁴ <http://www.australia.gov.au/about-australia/australian-story/ned-kelly>, accessed 15/7/2015.

⁵ The “notorious “Greta Mob,” as it was termed”, *Argus*, 30 October 1878, 6; *Argus*, 22 April 1878, 3.

⁶ Ian Jones, *Ned Kelly: A Short Life*, new ed. (South Melbourne: Lothian, 2003), x; the quote, Doug Morrissey, *Ned Kelly: a Lawless Life* (Ballarat: Connor Court, 2015), xi.

⁷ Jones, *Short Life*, 191-2, 200-1, the quote, Max Brown, *Australian Son*, rev. ed. (Sydney: Angus & Robertson, 1981), x.

⁸ Exemplified in George W. Hall, *The Kelly Gang, or The Outlaws of the Wombat Ranges* (Mansfield: G.W. Hall, 1879), 25-7, and Jerome J. Kenneally, *The Inner History of the Kelly Gang* [1929] 4th ed., (Melbourne: Roy Stevens, 1945), 48, 50. Mrs Kelly was sentenced to 3 years imprisonment, the others to 6 years each, all with hard labour, *O&M*, 15 October 1878, 3.

⁹ Jones, *Short Life*, 97. The pattern is established through a number of sources, including, RC2 1881, x (“a very indifferent character”; “adverse opinions of Fitzpatrick”; “a liar and a larrikin”); cf. Frank Clune, *The Kelly Hunters: the authentic, impartial history of the life and times of Edward Kelly, the ironclad outlaw* (Sydney: Angus & Robertson, 1954), 129, “a liar, a perjurer and a drunkard”; Graham Jones, *Ned Kelly: The Larrikin Years* (Wangaratta: Charquin Hill, 1990), 69, a career “as short as it was unsatisfactory”; Kenneally, *Inner History*, 62; John Meredith and Bill Scott, *Ned Kelly after a Century of Acrimony* (Sydney: Landsdowne, 1980), 18; FitzSimons, *Kelly*, 130.

¹⁰ Lancefield petition, VPRS 4969 Unit 1 Item 30.

timely to review the background and sequence of events of the Fitzpatrick incident.¹¹ It will be argued that a demonstrably wrong condemnation of Fitzpatrick and his actions continues to be recycled by partisan historians as a key justification for Ned Kelly's self-declared war on the police force of his day.¹² The extent to which Kelly could claim any justification from this incident for his subsequent actions will also be considered.

Alexander Wilson Fitzpatrick was born in 1856 and was working as a boundary rider when he was recommended by Crown Prosecutor Charles A. Smyth to Chief Commissioner Frederick Standish as a prospective police recruit.¹³ He joined the force on 20 April 1877, received three months mounted police training at Richmond Depot, and was then stationed at Benalla from 1 August.¹⁴ Const. Thomas McIntyre, the sole survivor of the later Stringybark Creek shootings, knew him from this period. He was never stationed with Fitzpatrick but knew him casually, and described him as "a decent young fellow".¹⁵ Despite some difficulties in his personal life, he seems to have conducted his duties responsibly.¹⁶ No negative remarks or disciplinary comments were recorded against him during the 12 months to April 1878, and he was still regarded positively and as efficient in June 1878 on his transfer to Beechworth.¹⁷ Not until 1879 did his Record of Service slide towards the tarnished reputation for which he has been remembered and reviled.

On Thursday 11 April 1878, Inspector Brooke Smith in Beechworth, who would know Fitzpatrick's duty roster for the week, telegraphed Sgt. Whelan, Officer In Charge (OIC) Benalla, that upon his return from duty elsewhere, Fitzpatrick was to take charge

¹¹ Kate Spinks, "A Forgotten History of the Kelly Gang: Stories from Victoria Police", in *Conference Papers*, Museums Australia National Conference, 2010; Ian MacFarlane, *Unmasking the Kelly Gang* (South Melbourne: Oxford University Press, 2012); Elizabeth Marsden, "The Police Perspective", in Craig Cormick ed., *Ned Kelly Under the Microscope* (Collingwood: CSIRO Publishing, 2014); Morrissey, *Lawless life*.

¹² Edward [Ned] Kelly, *Euroa Letter*, (VPRS 4966 Unit 1 Item 3, 14 December 1878), 16-7, "I will seek revenge ... while god gives me the strength to pull a trigger"; Gloster deposed at the Beechworth Assizes that at Faithfull's Creek (9 December 1878) Ned Kelly had said "The police are my natural enemies" and that if his mother was not released soon "he would possibly overturn the train", VPRS 4961 Unit 1 Item 6; Reardon testified that Ned said at Glenrowan, "I expect a train from Benalla with a lot of police and black fellows, and I am going to kill all the —", RC Q7607; Kelly quoted in *Argus*, 29 June 1880, 5, that he had "intended to rake it with shot"; cf. Curnow, RC Q17597, lines 30-3.

¹³ Justin Corfield, *The Ned Kelly Encyclopedia* (South Melbourne: Lothian, 2003), 163 - Fitzpatrick was born at Mount Egerton, Victoria; Standish, RC Q182; for Smyth's career, *Argus*, 17 June 1908, 7.

¹⁴ Alexander Fitzpatrick 2867, *Record of Conduct and Service*, in VPM 10018; Police Muster Rolls, VPRS 55 Unit 7 (1877, Ovens).

¹⁵ McIntyre prosecution brief (cross-examination), 7 August 1880, VPRS 4966 Unit 1 Item 6.

¹⁶ His fiancée was pregnant and he was already paying maintenance elsewhere; see Corfield, *Encyclopedia*, 163.

¹⁷ Fitzpatrick, *Record of Service*. Nothing against Fitzpatrick's character was brought to Standish's attention before his posting to Benalla (RC Q182-3); it then had nothing to do with his duty but his postponed marriage to a pregnant woman (Jones, *Short Life*, 96). Whelan (OIC Benalla) said nothing adverse to the 1881 Royal Commission about his behaviour or character during his more than 9 months at Benalla.

of Greta police station during OIC Strahan's temporary absence.¹⁸ That same day Fitzpatrick would have left on a 25 mile journey by horse to Cashel, sent for two days duty at a race meeting which must have been on the Friday and Saturday.¹⁹ He doubtless slept at Cashel police station again on Saturday after his day's work, left for Benalla on Sunday morning, and unsurprisingly did not return "in the forenoon".²⁰ Ian Jones and others who have accused him of laxity, and returning shamefaced a day late to Benalla, have ended the races on the Friday and failed to allow a good half day for travelling each way to Cashel.²¹ Whelan would not have expected him back before Sunday afternoon, and accordingly despatched Const. Healy to Greta to stay overnight and patrol back on Monday 15th. Healy returned at 1pm Monday, and Whelan duly despatched Fitzpatrick at 2pm.²² This was to be Fitzpatrick's first acting OIC position, and clearly he was thought capable of fulfilling it.²³

On what must from the following have been that Monday morning, Fitzpatrick read in the current *Police Gazette* that Dan Kelly and his cousin John ("Jack") Lloyd were wanted on warrants sworn at Chiltern for horse stealing.²⁴ Fitzpatrick had seen Dan riding a mare "two or three days previous to that", i.e. on the Friday or Saturday, while at Cashel.²⁵ Years later he recalled of that Monday that he had been on duty at Cashel two days earlier, and had met Dan "with a young fellow named Lloyd" while returning, i.e. on the Sunday.²⁶ Most have assumed these refer to the same encounter with Dan, but the contexts are different. The first is about him recognising Dan's mare at the Kelly's later that Monday afternoon; the second is about him having met Dan with a Lloyd on the way back to Benalla. He said to Whelan that if he found Dan at home on his way to Greta, he would arrest him and take him along to the Greta lock-up.²⁷ Whelan knew that Fitzpatrick had seen the *Gazette* notice, and either said or confirmed that there was a warrant out for

¹⁸ "As soon as M.C. Fitzpatrick returns send him to Greta. S.C. Strahan will have left", telegram, Brooke Smith to Whelan, 11 April 1878 and endorsements, cited by Jones (*Short Life*, 97, 382), who noted that Whelan erroneously said 12 April in RC Q5944.

¹⁹ Whelan, RC Q5944; Fitzpatrick in Brian W. Cookson, "*The Kelly Gang from within: Articles written by Brian W. Cookson for the Sydney 'Sun', 27 August to 24 September 1911*", compiled and edited by Brian McDonald (Bondi, N.S.W.: Australian History Promotions, 2005), 93 (23 September).

²⁰ Whelan, RC Q5944. Dookie police station had recently been renamed Cashel (*Police Gazette* 1878, 80).

²¹ Jones, *Short Life*, 97; FitzSimons, *Kelly*, 130. (Kenneally, *Inner History*, 48 wrongly had Fitzpatrick return "on Monday forenoon"; he returned Sunday 14th, Whelan RC Q5944.)

²² Whelan, RC Q5944.

²³ Fitzpatrick, RC Q12836.

²⁴ *Police Gazette* 10 April 1878, 110; seen by Fitzpatrick, cross-examination, *Argus*, 22 May 1878, 10; cf. Fitzpatrick, RC Q12812. Warrants issued 5 April; for Dan's, VPRS 4966 Unit 1 Item 4.

²⁵ Fitzpatrick, RC Q12822.

²⁶ Fitzpatrick in Cookson, "*Kelly Gang*", 93 (23 September).

²⁷ Fitzpatrick, RC Q12841; Greta lock-up, RC Q12848.

Dan.²⁸ Fitzpatrick subsequently headed for Greta, and would attempt to arrest Dan on the way.

Regardless that Whelan knew Fitzpatrick's intention, many have insisted that Fitzpatrick's call at the Kellys was unauthorised or dubious. This view rests on any combination of four claims to be examined below: that Fitzpatrick did not have a warrant to arrest Dan in his possession and so was acting without requisite authority; that Fitzpatrick and the other police of the district had been directed by Superintendent Charles Nicolson that the Kelly house was a dangerous place, and was not to be visited by a policeman unless accompanied by at least one other officer; that Fitzpatrick was not ordered to make the arrest but was acting more on an alcohol-fuelled whim; and that he was at least as much interested in seeing the daughter Kate Kelly than in any official business concerning her brother Dan.

Fitzpatrick was legally empowered to arrest Dan on the basis of a notice of a warrant for stock theft published in the *Police Gazette*.²⁹ Mrs Kelly's alleged challenge to Fitzpatrick, echoed by many since, that he could not arrest Dan because he could not produce a written warrant, is unfounded.³⁰ It was usual for, and, under the *Police Offences Statute* the legislated duty of, police to arrest persons wanted for larceny (and other matters), whether or not they had a written warrant in their possession at that moment.³¹ The arrested person would then be remanded to the place specified when the warrant was issued. Even without any warrant, a policeman had a duty to arrest a person where he had a reasonable suspicion of that person having committed a crime.³² In this case Fitzpatrick knew from the *Gazette* that there was a warrant, and Mrs Kelly and others did, in some way to be examined, prevent the lawful attempt of Fitzpatrick to arrest Dan from being carried out.

It has been claimed that Fitzpatrick disregarded an order by Supt. Nicolson that no policeman should go unaccompanied to the Kellys.³³ Nicolson told the 1881 Royal Commission that in April 1877 he had visited the Kelly house on his way to Benalla. He

²⁸ Whelan, *RC Q5949*; Fitzpatrick, Benalla deposition, 17 May 1878, VPRS 4966 Unit 1 Item 4; cf. Fitzpatrick, *RC Q12816*.

²⁹ See *Police Offences Statute 1865*, Secs.19, 61.

³⁰ Kelly, *Euroa Letter*, 6, "Mrs. Kelly said he [Dan] need not go unless he liked without a warrant. She told the trooper he had no business on her premises without some authority besides his own word"; Mrs Kelly in Cookson, "*Kelly Gang*", 7 (28 August), "he had no warrant or anything"; cf. Hall, *Outlaws*, 23, 25; "*Kelly's Defence by a Lady*" [1880], VPRS 4967 Unit 1 Item 52; Clune, *Kelly Hunters*, 133. Fitzpatrick testified that "Mrs Kelly never asked me to see the warrant", *O&M*, 10 October 1878, 5.

³¹ Whelan, *RC Q5951*; Fitzpatrick, *RC Q12813-4*; *Police Offences Statute 1865*, Sec.56. Questioning of the acceptability of this standard practice did not in any event apply to police in uniform whose authority was evident; Judge Cope was quoted in May 1876 on this question (see Jones, *Larrikin Years*, 73).

³² Whelan, *RC Q5951*.

³³ John McQuilton, *The Kelly Outbreak 1878-1880* (Carlton: Melbourne University Press, 1987), 85, "disobeying the specific order given by Sergeant Whelan and the general order issued by Nicolson, he detoured to the Kellys, alone"; William Joy and Tom Prior, *The Bushrangers* (Sydney: Shakespeare Head Press, 1963), 80-1, "Fitzpatrick had been ordered to ride straight to Greta and not to visit the Kelly home alone under any circumstances"; cf. Clune, *Kelly Hunters*, 129.

took Const. Hayes from Greta with him part of the way and “instructed him”, just as he said he had Const. Thom (OIC Greta), “and warned him never to go near that house, and to tell the other police that came there [i.e. to Greta] never to go near that house alone [as they were absolutely dangerous all through]; ... simply because I knew if there were two constables together, bad characters were always afraid to proceed to extremities with them, because [one] constable is a witness and support to the other”.³⁴ Yet there is no evidence that Nicolson ever made his instruction or warning known outside of these verbal warnings to the two police then at Greta in early 1877. Had any formal instruction or order existed, Nicolson would have cited or produced it to the Commission during his response to Q1035-6.

Certainly Fitzpatrick was not aware of “any regulation in that district ... that no single constable should go to arrest characters such as Dan Kelly”,³⁵ and he had worked there for over 8 months. If Fitzpatrick had breached a direct instruction by Nicolson this would necessarily have led to disciplinary action or at least some internal correspondence, but there is not a single notation against him. Whelan agreed with Fitzpatrick’s intention to arrest, despite some misgivings about his personal safety, and said nothing to oppose it. He advised Fitzpatrick only to be careful, as the Kellys were thought dangerous and likely to resist.³⁶ For his own part, Fitzpatrick knew the Kellys.³⁷ He was confident that Dan would not resist arrest, (which initially proved correct), and that he was quite capable of taking him away if he did resist.³⁸ He also believed that Ned would not be home as the police were then searching for him on a warrant related to an ongoing horse-stealing investigation.³⁹ The arrest attempt was clearly known and sanctioned, and no order or regulation was breached in the process.

It has been argued that because Whelan did not directly order Fitzpatrick to arrest Dan, the attempt was an independently conceived action taken on a whim.⁴⁰ A common variation on this theme is that Fitzpatrick’s decision to make the arrest in the first place

³⁴ Nicolson, *RC* Q1035-6, cf. Q1020. Nicolson had visited the original (“old”) hut on the Kelly selection.

³⁵ Fitzpatrick, *RC* Q12815.

³⁶ Fitzpatrick, *RC* Q12817-8, Q12837-41, Q12847, Q12850; Whelan, *RC* Q5950; cf. Fitzpatrick in Cookson, “*Kelly Gang*”, 93 (23 September). *RC* 2, x, found no breach of duty, though his visit was “unfortunate in its consequences”.

³⁷ He arrested Ned for drunkenness on 16 September 1877, followed by a brawl en route to court the next day (see Jones, *Friendship*, 56), and in October 1877 Ned persuaded Dan and two Lloyd brothers to surrender to Fitzpatrick after an assault at Winton (*RC* Q12873; *Police Gazette* 10 October 1877, 271; *O&M*, 13 October 1877, 4).

³⁸ Dan consented as expected, including telling his mother to ‘shut up’ when she objected (Fitzpatrick, Benalla deposition, VPRS 4966 Unit 1 Item 4; cf. *RC* Q12822). Ned also said Dan consented to be arrested (*Age*, 9 August 1880, 3).

³⁹ Fitzpatrick, *RC* Q12819-20. Warrant for Ned, *Police Gazette* 20 March 1878, 78; Baumgarten case summarised, McQuilton, *Kelly Outbreak*, 84-5.

⁴⁰ Fitzpatrick, Benalla cross-examination: “Had no instructions to go to Kellys. Was acting perhaps as an amateur constable on the occasion”, *Argus*, 22 May 1878, 10.

occurred as a whim under the influence of alcohol consumed mid-route at Winton.⁴¹ According to Jones, this whim was a response to the prospect of police retrenchments by the Berry Ministry. Of that time ex-Supt. Sadleir wrote (against Standish), that “the shadow of Black Wednesday was still over the service, no officer felt secure in his position under the Berry regime. Indeed, Mr Berry made no secret of his view that the police service could be carried on altogether without officers whose names were never mentioned in the courts as having arrested anyone”.⁴² For Jones, “any constable remotely unsure of his position ... would undoubtedly try to convince his superiors of his zeal and his value to the force”.⁴³ But Berry’s views (even if implemented) would not have panicked Fitzpatrick, given his established arrest record.

Jones claimed that the “unreliable” Fitzpatrick had returned a day late from Cashel, and his intended arrest of Dan on a newly published warrant was mostly a spur of the moment bid to win his way back into favour with Whelan and prove his usefulness in the job.⁴⁴ Against Jones, the evidence rather suggests that Fitzpatrick did not return late, and his *Record of Service* to that time was satisfactory. Other than his contentious Cashel dates, Jones had nothing behind his hostile claim that Fitzpatrick was “again in trouble with Sergeant Whelan”, allegedly “exasperated” by his “late” return to Benalla, “full of implausible excuses”.⁴⁵ Jones perversely ignored the dates on the negative comments in Fitzpatrick’s service record, and two other files of material related to his discipline and dismissal, all of which apply only from March 1879 onwards, and repeatedly read them back into his first year of service.⁴⁶ In fact Whelan and others saw Fitzpatrick then as capable and responsible, and Whelan expected his officers to use initiative. While he did not directly order Fitzpatrick to arrest Dan he clearly endorsed it, and later strongly defended the attempt.⁴⁷ Fitzpatrick’s call to arrest Dan was both planned and sanctioned, and it was certainly not a whim as some have suggested.

An often linked claim is that Fitzpatrick was “well under the influence of liquor” when he arrived at the Kellys.⁴⁸ The accusation was started and maintained by the Kellys, popularised by Hall and Kenneally, and has been broadly accepted and recycled ever since.⁴⁹ Against it, Whelan knew Fitzpatrick’s intended movements that day, and that he

⁴¹ Corfield, *Encyclopedia*, 163, he decided “on his way to take up the [Greta] post”; “Sir Solomon”, “Did Fitzpatrick Cause the Kelly Outbreak?”, *Singleton Argus*, 17 May 1924, 3; Clune, *Kelly Hunters*, 128-9; FitzSimons, *Kelly*, 131.

⁴² John Sadleir, *Recollections of a Victorian Police Officer* (Melbourne: Robertson, 1913), 183.

⁴³ Ian Jones, “A new view of Ned Kelly”, in Colin Cave ed., *Ned Kelly: Man and Myth* (North Ryde: Cassell, 1968), 161; cf. Jones, *Short Life*, 97.

⁴⁴ Jones, *Friendship*, 57; so too FitzSimons, *Kelly*, 131.

⁴⁵ Jones, *Short Life*, 96-7.

⁴⁶ VPRS 4969 Unit 1 Item 30; VPRS 3991 Unit 1257 Item 81/5048.

⁴⁷ Fitzpatrick, *Record of Service*, “An efficient constable” (22/6/78); McIntyre testified that he “never saw anything wrong with Fitzpatrick”, *Age*, 9 August 1880, 3; Whelan, *RC Q5951*.

⁴⁸ Kenneally, *Inner History*, 50.

⁴⁹ Mrs Kelly, “He was drunk,” in Cookson, “*Kelly Gang*”, 8 (28 August); and Jim Kelly in Cookson, 16-17 (30 August), although Jim was in gaol at the time. Bowman for the defence of Mrs Kelly and others at

was en route to Greta police station where Mrs Strahan and her family resided, to remain there until Strahan returned.⁵⁰ It was always a highly unlikely tale that he stopped off for “a couple of hours” drinking at Lindsay’s ‘shanty’ on the way.⁵¹ It is based solely on a wish to believe that Fitzpatrick was a drunkard who took an otherwise inexplicably long time to get to the Kellys after leaving Benalla, and it is demonstrably wrong.⁵²

Fitzpatrick was despatched by Whelan at 2pm, and arrived at the Kelly’s between 4 and 5pm.⁵³ As the maximum possible window is three hours, FitzSimon’s allegation of “a couple of hours” break at Winton is on any account unsustainable; and one can also establish a more precise timeframe for the journey. To be despatched is to be given an order; it is not a time of departure.⁵⁴ Upon despatch, Fitzpatrick would have gone to bridle and saddle his horse, ready it for riding, collect his revolver and any equipment or pack that he would take for an overnight stay, and then depart, as he testified unchallenged, about 2:30pm.⁵⁵ The minimum time a mounted constable in a hurry needs to saddle up, collect basic equipment and depart is about 15 minutes, but there was no urgency here.⁵⁶ Thirty minutes for Fitzpatrick to prepare and depart is by no means unreasonable.

The other end of the equation is his arrival at the Kellys. After his first call there, he spoke to Williamson some quarter of a mile up the range behind the house, then started

Beechworth Assizes argued that Fitzpatrick knew nothing of what had happened as he was drunk (*O&M*, 10 October 1878, 5). While in the Beechworth gaol, Ned claimed that Fitzpatrick “got drinking at some place in the neighbourhood while he was watching for Dan to come home”, *Age*, 9 August 1880, 3; Hall, *Outlaws*, 25, the Kelly party aver he was “pretty well on” at arrival and drank more alcohol there; Kenneally, *Inner History*, 48, “several drinks [at Winton]. He drank spirits”; Clune, *Kelly Hunters*, 129, “a drink or two – perhaps several”; Brian Carroll, *Ned Kelly: Bushranger*, (Dee Why West: Lansdowne, 1976), 55, “at Lindsay’s Hotel ... and possibly other hotels”; Keith McMenemy, *Ned Kelly: The Authentic Illustrated History* (South Yarra: Hardie Grant, 2001), 67, “stopped at Lindsay’s unlicensed shanty ... for a few drinks”; Alex McDermott, ed. and introduction to *Ned Kelly: The Jerilderie Letter* (London: Faber & Faber, 2001), xiv, “while drunk, attempted to arrest Dan”; Jones, *Short Life*, 96, “aglow with brandy”; FitzSimons, *Kelly*, 131, “several brandy and waters ... not drunk per se, but certainly merry”.

⁵⁰ Whelan *RC* Q5945.

⁵¹ FitzSimons, *Kelly*, 131; so too Jones, *Short Life*, 99. The “unlicensed shanty” slur is from Kelly, *Euroa Letter*, 16. Lindsay was the licensed owner of the Commercial Hotel, *RC* Q12844; Gary Dean and Dagmar Balcarek, *Ned and the Others*, rev. ed. (Glenrowan: Glen Rowen Cobb & Co, 2014), 181.

⁵² E.g. Corfield, *Encyclopedia*, 163, “It took Fitzpatrick between two and three hours to reach the Kelly homestead. This tends to corroborate the Kelly’s account that he was partially intoxicated”; cf. FitzSimons, *Kelly*, 130-1.

⁵³ Whelan, *RC* Q5944; Fitzpatrick, Benalla deposition, VPRS 4966 Unit 1 Item 4.

⁵⁴ Consistent operational meaning of “despatch” throughout Victoria Police documents and records confirmed by Victoria Police historian Dr Robert Haldane, email 14/9/2014.

⁵⁵ Fitzpatrick, Benalla deposition (cross-examination), VPRS 4966 Unit 1 Item 4. The Benalla Occurrences Book (see Robert Haldane, *The People’s Force: A History of the Victoria Police*, 2nd ed. [Carlton South: Melbourne University Press, 1995], 111) should give certainty if found.

⁵⁶ At Melbourne’s Mounted Police Depot Open House (27 July 2014) in reply to my questions about speedy departures on horse, an officer said she could be ready in 15 minutes if urgent – saddle up, get her gear, clipboard, etc., and depart; but would normally take an hour to warm the horse up and head off on duty.

for Greta. Williamson started for home ‘shortly afterwards ... about sundown’, which at Eleven Mile Creek on 15 April 1878 was 5:51pm.⁵⁷ Allowing two minutes for “shortly”, ten for conversing on Williamson’s statement, and perhaps six or seven to end his first conversation with Mrs Kelly, get his horse, ride up, and locate Williamson, he would have headed uphill from the Kellys around 5:30pm. He had been speaking with Mrs Kelly “about an hour or more” before that, which places his first arrival at the Kellys around 4:30pm, two hours after he left Benalla.⁵⁸ Jones was led astray by believing Skillion’s statement to Strahan that the last he saw of Fitzpatrick was passing his place about 5pm en route to the nearby Kellys, fabricated to distance himself from the later fracas.⁵⁹ Fitzpatrick’s statement of arriving “between 4 and 5pm” is literal, consistent with other parts of the story, and has some indirect corroboration on timing via Williamson.⁶⁰ The question is whether two hours’ travel time was reasonable, or whether he may have spent a significant part of it in a hotel or otherwise dawdling en route.

Fitzpatrick’s intended fifteen mile journey from Benalla police station to Greta took him along the old Sydney Road to Winton, then directly past the Kelly selection at Eleven Mile Creek on the Greta-Winton Road.⁶¹ It is almost seven miles from Benalla to Winton, another four miles from Winton to the Kellys, and a further four miles from there to Greta.⁶² His journey as far as the Kellys took him eleven of those fifteen miles. In that era, police horses were “not officially permitted to go out of a walking pace except upon an emergency”.⁶³ There was no urgency, so a comfortable, well-paced walk is likely. This is typically around five and a half miles per hour, affirmed by contemporary mounted police and a horse breeder.⁶⁴ At that rate it would take about two hours to cover the eleven miles on horseback.

⁵⁷ Fitzpatrick, Benalla deposition, VPRS 4966 Unit 1 Item 4; Williamson, remission letter, 6 August 1881, VPRS 4969 Unit 1 Item 52; Geoscience Australia, Sunrise&Sunset results.

⁵⁸ Fitzpatrick, Benalla deposition, *Federal Standard*, 25 May 1878, 3.

⁵⁹ Jones, *Short Life*, 104; Strahan’s report, VPRS 4966 Unit 1 Item 4. Hearty and Ryan equally swore Skillion was 4 miles away horse dealing with them in Winton from 5.30pm (*O&M*, 10 October 1878, 5); but Williamson saw Fitzpatrick speak to Skillion near Kelly’s on his own way back home (around 6pm), VPRS 4969 Unit 1 Item 52.

⁶⁰ Williamson, *ibid.*.

⁶¹ The Kelly selection fronted the Greta-Winton Road. It is block 57A on the Winton district plan in McMenemy, *Illustrated History*, 72.

⁶² Benalla to the Kellys “is reckoned 11 miles”, Fitzpatrick deposition, VPRS 4966 Unit 1 Item 4; about 4 miles from the Kellys to Greta, Nicolson, *RC Q1028*. Distances checked on Google maps: Benalla Police Station to Winton, almost 7 miles (10.6 km) on the old Sydney Road; Winton to Greta via the Greta-Winton Road, 8 miles; 15 miles in total.

⁶³ Ex-Mtd. Const. Thomas McIntyre mentioned this incidentally in his memoir (McIntyre, “*A True Narrative of the Kelly Gang*” [unpublished typescript, VPM 2991, ca. 1922], 99).

⁶⁴ At Melbourne’s Southbank Mounted Police Depot Open House (27/7/14) I spoke to an officer with over 30 years mounted service. He regularly used to ride on duty from the Depot to Windy Hill football ground at Essendon (11 km = 6.87 miles) at a “good, comfortable pace”, which took 1¼ hours. This equates to just under 5.5mph. He said this was good exercise for the horse and not taxing; an enjoyable ride for horse and rider. The parallel is 1¼ hours from Benalla Police Station to Winton (10.6 km = 6.62 miles, at 5.3mph), plus another 4 miles at the same rate from Winton to the Kellys (45 mins) = 2hrs.

At its outset, the intended fifteen mile trip to Greta could be reasonably anticipated by both Fitzpatrick and his sergeant to take about three hours: two hours to the Kellys, plus a further hour for a stop to arrest Dan and escort him to Greta. On Fitzpatrick's statement he stopped at Lindsay's hotel in Winton for information, had some lemonade and brandy (i.e. one drink), and stopped nowhere else on the way.⁶⁵ When he arrived at the Kellys' some forty-five minutes after leaving Winton, he would likely have had a blood alcohol content around 0.01 at most.⁶⁶ Had he turned up "half drunk" it is doubtful that Mrs Kelly would have invited him in for a pleasant chat over afternoon tea and fresh scones while Kate sat darning socks, as Molony held, or for the later fracas to culminate in a friendly dinner get-together, as Kenneally was led to believe.⁶⁷

In summary, Fitzpatrick was despatched by Whelan at 2pm for an overnight stay at Greta. He went to fetch his gear, ready his horse, and left Benalla around 2:30pm, arriving at the Kellys around 4:30pm after a comfortably paced 2 hour ride with a short stop at Winton. Clearly he did not spend "a couple of hours" drinking en route, and neither did he arrive drunk or "merry" at the Kellys. There is no reason to believe that Fitzpatrick had more than his stated lemonade and brandy at Winton on his way to make an arrest and then stay at Greta with Strahan's wife and family. Nothing lies behind the accusation of drunkenness that day but the Kellys' desperate slur against him.

A fourth claim is that Fitzpatrick, then aged 22, had taken a fancy to Kate Kelly, then three months short of 15, and had visited the Kellys at least as intent on paying court to Kate as in arresting Dan, who was not at home when Fitzpatrick made his first of two calls at the house that afternoon.⁶⁸ Jones went so far as to describe Fitzpatrick as a "possible boyfriend" and "former suitor" of Kate.⁶⁹ But the belief has no other foundations than Mrs Kelly's allegation that Fitzpatrick tried to kiss Kate during his visit,

Another officer said she would not trot her horse (8+ mph) for more than half an hour in the interests of the horse; it could do it, but it would tax the horse unnecessarily. I went on a public tour and did not give any context before my enquiries other than that I was interested in history and horse travel in the nineteenth century. On 12/10/14 a western district horse breeder told me that an average walking pace would be somewhere around 5.5mph depending on the horse.

⁶⁵ Fitzpatrick to Bowman, Beechworth Assizes, *O&M*, 10 October 1878, 5; Benalla deposition (cross-examination), VPRS 4966 Unit 1 Item 4.

⁶⁶ Moderation Management, <http://www.moderation.org/bac/bac-men.shtml>, accessed 5/9/14. Fitzpatrick weighed 170 lbs at 10 August 1878 (*Record of Service*).

⁶⁷ John Molony, *I am Ned Kelly* (Ringwood: Penguin, 1982), 98, went far beyond his source (Samuel Jamieson, "Drunken Trooper Started Kelly Gang", *Dubbo Liberal*, 11 November 1933, 2) in his fanciful depiction of Mrs Kelly's hospitality; Kenneally, *Inner History*, 51, followed even more creatively by Clune, *Kelly Hunters*, 134.

⁶⁸ Fitzpatrick born 18 February 1856; Kate (Catherine) born 12 July 1863 (the dates, Corfield, *Encyclopedia*). Hall, *Outlaws*, 26 (sceptically), no intention of arresting Dan, but went 'simply to make a call'; Molony, *Ned Kelly*, 97, Kate was central to his mind's "basic workings"; Jones, *Short Life*, 92 "infatuation"; 96, "always eager to see Kate".

⁶⁹ Jones, "New view", 161; *Friendship*, 56; *Short Life*, photo caption following p. 78; cf. Morrissey, *Lawless life*, 43, "girlfriend"; 46ff.

and in Ashmead's fantasy of a moonlight romance.⁷⁰ Fitzpatrick saw himself at that time as friendly with the Kellys.⁷¹ If he did try to kiss Kate there is no need to read more into it than a friendly gesture that affronted her police-hating mother.⁷² Ashmead's moralising typescript is unreliable throughout.⁷³ Indeed, his purple prose on the claimed romance, which Jones quoted extensively as something Ashmead "witnessed or was told", is so implausible that Jones himself acknowledged that their alleged lover's conversation was simply imagined.⁷⁴ Fitzpatrick later said of his arrival at the Kellys, "They all showed me bitter dislike from the time that I rode up. Their whole attitude to the police force was one of intense hostility".⁷⁵ The idea that Fitzpatrick was ever a suitor of 14 year old Kate is idle fancy, particularly given that Fitzpatrick was then engaged, if problematically.⁷⁶

There are two principal versions of the fracas that followed the attempted arrest of Dan, and both have been creatively embroidered.⁷⁷ The first is that given by Fitzpatrick on his return to Benalla after the incident and subsequently. In this version Fitzpatrick was shot in the wrist by Ned, struck on the helmet with a fire shovel by Mrs Kelly, and fainted before being bandaged and released later that night. The second account is that predominantly given by the Kellys and is notable for the absence of Ned. In this version, Fitzpatrick drew his gun during the attempted arrest. Dan wrestled him and seized it, and Fitzpatrick sustained his wrist injury on a door latch. A frequent enhancement is that Mrs Kelly and Dan were defending Kate from an assault by Fitzpatrick. Given these very different accounts it is necessary to establish whether or not Ned was there.

WAS NED PRESENT?

Ned and his circle made a number of conflicting statements as to his presence during the fracas. At the Beechworth Assizes, Ned's cousin Joseph Ryan swore he had bought a

⁷⁰ Mrs Kelly in Cookson, "*Kelly Gang*", 7 (28 August); Joseph W. Ashmead, "*The Thorns and The Briars: A True Story of the Kelly Gang*" (unpublished typescript, SLV MSPA PA, Box 55, [1922]), ch. 8.

⁷¹ Fitzpatrick, *RC* Q12871; Kelly, *Jerilderie Letter*, 34, "he said we were good friends and even swore it".

⁷² "He tried to kiss my daughter", Mrs Kelly in Cookson, "*Kelly Gang*", 8 (28 August); her first husband was an ex-convict; 3 sons had already served prison terms (*RC* Appendix 10); she had escaped convictions on past charges of keeping unlicensed premises and furious riding, and her daughter Annie had died two days after giving birth to an illegitimate child apparently fathered by a policeman (MacFarlane, *Unmasking*, 41-2).

⁷³ Most obviously, Ashmead, "*Thorns*", places McIntyre inside the police tent at the start of the Stringybark Creek attack, and has the tent still at the site the next day when it had been well reported burned (ch.10); he has £8000 not £2000 taken from Euroa (ch.11); and he makes Joe Byrne and Aaron Sherritt cousins (ch.15).

⁷⁴ Jones, *Short Life*, 91-2. Ashmead's preface acknowledges that his story is "clothed in fiction".

⁷⁵ Fitzpatrick in Cookson, "*Kelly Gang*", 94 (23 September).

⁷⁶ Jones, *Short Life*, 97; Fitzpatrick married (under pressure from Standish) in July 1878, and raised three children (Corfield, *Encyclopedia*, 165-6).

⁷⁷ See e.g. Hall, *Outlaws*, 23-7; Charles White, *History of Australian Bushranging. Vol. 2: 1863-1880, Ben Hall to the Kelly Gang* (Sydney: Angus and Robertson, 1903), 263-4.

horse from Ned for £17 cash on the 15th. He produced a receipt which he said was written that same evening, thereby placing Ned in the area.⁷⁸ On 26 October at Stringybark Creek, Ned admitted he had shot Fitzpatrick to McIntyre, saying “I almost swore after letting him go that I would never let another one go”.⁷⁹ He then turned to denial, except directly after capture.

Ned told some of his Euroa captives that “he could prove he was 15 miles away at the time Fitzpatrick was shot in the wrist”.⁸⁰ From this point the distance claimed grew rapidly. Still at Euroa, Ned told captive James Gloucester that “he was 200 miles away at the time of the alleged shooting at Greta”.⁸¹ In the Euroa letter (December 1878), Ned said Fitzpatrick was inside with Dan and their mother when a fracas developed over the lack of a written warrant. Ned directly denied being in Victoria at that time.⁸² A page later he claimed he was 400 miles away at the time of “this transaction”, which appears to refer to the remand of his mother and others pending trial. In the Jerilderie letter (February 1879), the Euroa letter’s simple denial has been replaced by a wordier claim that he had left the colony as a “rambling gambler” over the relevant period.⁸³ Ned also said, identically to the Euroa letter, that he “heard nothing of this transaction until very close on the trial I being then over 400 miles from Greta”.⁸⁴

Still at Jerilderie, Ned told Const. Devine he was “200 miles away at the time that Fitzpatrick was shot”.⁸⁵ Ned then told his captives at the Jerilderie Royal Mail Hotel that he “was 400 miles away from home” when he heard of the incident, that he was “entirely innocent” of shooting Fitzpatrick, and that he was married.⁸⁶ He again claimed in a statement published while in the Beechworth gaol awaiting trial, “I was not within hundreds of miles of that place at the time, and I never at any date shot at Fitzpatrick”.⁸⁷

After Ned’s capture at Glenrowan (and receiving the Last Rites) Sgt. Steele said Ned “was asked if it was true about his shooting Fitzpatrick. He said ‘Yes it is true; I shot him.’”⁸⁸ Snr. Const. Kelly similarly testified that in the Benalla lock-up about 3am the morning after Ned’s capture, in Const. Ryan’s presence, he asked if Fitzpatrick’s

⁷⁸ Ryan deposition, *O&M*, 10 October 1878, 5.

⁷⁹ McIntyre deposition, 7 August 1880, VPRS 4966 Unit 1 Item 1.

⁸⁰ *Argus*, 12 December 1878, 5.

⁸¹ *Argus*, 29 October 1880, 6.

⁸² Kelly, *Euroa Letter*, 5-6.

⁸³ Kelly, *Jerilderie Letter*, 20.

⁸⁴ Kelly, *Jerilderie Letter*, 26. Jones (*Friendship*, 59) argued that this sentence is “ambiguous but consistent with him being present, though leaving before the arrests were made”. Such a reading is unsupported given Ned’s separate unambiguous denials of his presence in the colony in both letters.

⁸⁵ *Argus*, 30 October 1880, 8.

⁸⁶ *Herald*, 14 February 1879, 3. No corroborative support for his marrying has ever surfaced.

⁸⁷ *Age*, 9 August 1880, 3. In a shorter prior version, Gaunson relayed Ned’s claim “that he was not near the place when the affray took place”, *Age*, 7 August 1880, 6.

⁸⁸ Gibney, *RC Q12346*; Steele deposition, *Argus*, 30 October 1880, 8.

statement was correct, and Ned said “Yes, it was I that fired at him”.⁸⁹ Ned lived to be tried for murdering Lonigan at Stringybark Creek, and in his Governor letter of 3 November 1880 he again claimed unconvincingly, “From February to October [1878] I can prove I never was ... in the locality” when Fitzpatrick was shot.⁹⁰ In sum, there are at least three occasions on which Ned freely admitted his presence and action.⁹¹ Once to Const. McIntyre, once as relayed to Sgt. Steele, and once to Constables Kelly and Ryan.

The night after the incident Mrs Kelly denied to Strahan that Fitzpatrick had been at her house the previous night, or Ned “for the last four months”, but then admitted her assault on Fitzpatrick to Steele during her arrest.⁹² Many years later she admitted that Ned had been present, but claimed Fitzpatrick’s own revolver had gone off accidentally such that he shot himself in the wrist; an unlikely claim given the damage a .442 Webley bullet would do close up.⁹³ Mrs Kelly’s eventual admission is not surprising. Ned is present in Kenneally’s version of the fracas, and in the fourth edition of his 1929 *Inner History* Kenneally revealed his informant as Tom Lloyd, often called the “fifth member” of the Kelly gang.⁹⁴

Kate Kelly is recorded on the same statement to Strahan as her mother, identically holding that neither Fitzpatrick nor Ned were there the previous night. If ever there was a time to complain about Fitzpatrick’s conduct causing an affray, or to display outrage and distress at an assault, that was it; but the story had not yet been invented. Offered the opportunity by the prosecution to take the stand at her mother’s trial in October (“to bear out the defence that Ned was not there”), it was not taken.⁹⁵ But in February 1879 Kate began telling anyone who would listen that Fitzpatrick was violently assaulting her when Ned came to the door, rushed for his revolver and shot Fitzpatrick in the wrist.⁹⁶ In Kate’s version her (now gaoled) mother does not appear at all. It is the only version that has her in the house alone when Fitzpatrick arrived, yet it is set just before the shooting when, in other Kelly versions including her mother’s, Fitzpatrick entered the house with Dan, and was with him and Mrs Kelly when the fracas erupted minutes later. Ned joined in briefly in February, telling some Jerilderie captives that Kate “had a revolver put to her head,

⁸⁹ John Kelly deposition, VPRS 4966 Unit 1 Item 6. These were separate disclosures a day apart.

⁹⁰ Kelly, dictated to Buck, 3 November 1880, VPRS 4966 Unit 2, Item 10.

⁹¹ There is also a hearsay report “by a person worthy of belief that [Kelly] voluntarily stated in this person’s hearing soon after the alleged shooting of Fitzpatrick that every word stated by him was correct except that Skillian and Williamson did not pursue Fitzpatrick but that they mounted their horses to do so”, Memo, 3 November 1880, VPRS 4969 Unit 1 Item 29.

⁹² Strahan, report, 27 September 1878, VPRS 4966 Unit 1 Item 4; Steele, *RC* Q9214-5.

⁹³ Mrs Kelly in Cookson, “*Kelly Gang*”, 8, 10 (28 August), “the boys” being Ned and Dan. From 1873 the mounted police were progressively issued .442 Webley revolvers (Bill Denheld, “The Bullets of Kelly’s Creek”, www.denheldid.com/twohuts/bullets.html, accessed 26/8/14; cf. Steele, *RC* Q9085; “Webley RIC presentation revolver”, <http://collectish.com/Items/653>, accessed 5/10/2014); damage, Jones, *Short Life*, 105.

⁹⁴ Kenneally, *Inner History*, 50 (presence); 9-10 (informant). Fifth member, Jones, *Short Life*, ix.

⁹⁵ Whelan, undated note, VPRS 4965 Unit 4 Item 316.

⁹⁶ *Herald*, 7 February 1879, 3; *Burra Record*, 21 February 1879, 3.

demanding her to submit her virtue or be shot by Fitzpatrick”.⁹⁷ But Ned strongly denied any such assault elsewhere; and in February’s *Jerilderie* letter the fracas was again blamed on the lack of a written warrant.⁹⁸

For influential Kelly historian and scriptwriter Ian Jones, the Kelly outbreak was the direct end-result of Ned’s impulsive pistol-wielding rush into the house to defend Kate from an assault by Fitzpatrick, who had attempted to pull her onto his knee or otherwise molest her.⁹⁹ The tale of Fitzpatrick’s alleged outrageous conduct gained wide acceptance in north eastern Victoria.¹⁰⁰ It was printed in several newspapers of the day and in Hall’s February 1879 *Mansfield* pamphlet, featured as a key scene in Tait’s 1906 film *The Story of the Kelly Gang*, and was promulgated widely by Kenneally’s *Inner History*.¹⁰¹ From this point, it entered mainstream cultural mythology. Molony’s *I am Ned Kelly* grew the tale to savagely abuse Fitzpatrick. While he did not detail an assault on Kate in his description of the Fitzpatrick incident, he cited the 1933 recollections of Samuel Jamieson, an old local who (despite glaring errors in his story) claimed to have known the Kellys well. Jamieson claimed that the “half drunk” Fitzpatrick “sat down beside Kate on the couch” and attempted “to make free with Kate” while Mrs Kelly was making tea in the same room, upon which Mrs Kelly “ran from the stove and felled him with the fire shovel”.¹⁰² To Molony, Jamieson’s story “repeats the universal family tradition that Fitzpatrick forcibly attempted to make love to Kate”; from this base he subsequently decried what he described as Fitzpatrick’s “old habit of molesting young women”.¹⁰³ In his 2011 National Portrait Gallery lecture, he went even further, alleging the literal rape of Kate.¹⁰⁴

Yet the worst Mrs Kelly had to say of it some 30 years later, despite great bitterness about her life ruined in the aftermath of that incident, was that Fitzpatrick had tried to kiss

⁹⁷ *Herald*, 14 February 1879, 3.

⁹⁸ Kelly, *Jerilderie Letter*, 22-3; Ned quoted, *Age*, 9 August 1880, 3.

⁹⁹ Jones, *Short Life*, 106, cf. 101-3. Jones co-wrote the screenplay for the 1970 film *Ned Kelly*, depicting a violent assault by a slobbering, hairy Fitzpatrick; he also co-scripted and produced *The Last Outlaw* mini-series (1980), depicting an aggressive seizure of Kate whilst in the kitchen with her family; cf. Dean and Balcarek, *Ned and the Others*, 173-4.

¹⁰⁰ Brown, *Australian Son*, 42.

¹⁰¹ Hare, *Bushrangers*, 155 (newspapers); Hall, *Outlaws*, 26; Kenneally, *Inner History*, 50. Douglas Stewart, *Ned Kelly* (1943) Act 1 Sc.2 has Ned say, “If the trap Fitzpatrick had kept his dirty hands off the Kelly girls, none of this would have happened”, and “Fitzpatrick wanted Kate, that started it all”. Cf. Sidney Nolan’s *Kate Kelly* paintings (1945, 1946), and the collection of Kelly songs etc. in Meredith and Scott, *Acrimony*.

¹⁰² Molony, *Ned Kelly*, 98, (Fitzpatrick’s “breach of hospitality”); 271 n.6; Samuel Jamieson articles, *Dubbo Liberal*, 23 September to 30 November 1933, “Drunken Trooper Started Kelly Gang”, 11 November, 2.

¹⁰³ Molony, *ibid.*, 204.

¹⁰⁴ National Portrait Gallery, 2011, *Convicts to Colonies*, “Ned Kelly, our heroic outlaw with John Molony”, 6:14-32ff. Molony there postulated a cover-up, ignoring Kate’s own public allegations of February 1879.

her daughter.¹⁰⁵ The story was dismissed out of hand by staunch Kelly defender Max Brown, who said that “the myth does not fit the evidence”.¹⁰⁶ Clearly nothing adverse occurred during the hour or so of Fitzpatrick’s first call. Any alleged assault must be located upon his return some half an hour later, while he was in the kitchen with Dan and Mrs Kelly. Both Mrs Kelly and Kate eventually admitted Ned’s presence, and the last word on Kate should go to Ned after his capture, in line with Fitzpatrick’s explicit denial: “If he or any other policeman tried to take liberties with my sister, Victoria would not hold him”.¹⁰⁷

In 1911 Jim Kelly claimed that he himself (although then gaoled) had been present at the fracas. He recycled the Kelly tale of Fitzpatrick shooting himself in a drunken struggle to arrest Dan, though without molesting Kate, whom he has sitting in a chair at the time.¹⁰⁸ In that account Ned did not appear; but Jim had given a different version in 1909 which had a drunken Fitzpatrick tearing “half the clothes” from Kate, before Ned came and shot him from the doorway as Mrs Kelly knocked him down with her shovel. This version closely parallels Fitzpatrick’s testimony. It too had the gaoled Jim present as “only a kid” (he was 20 in 1878), and ended with Fitzpatrick shot dead.¹⁰⁹ Jim later endorsed Kenneally’s 1929 *Inner History* which has Ned present (and unique to Kenneally’s version, Fitzpatrick firing a shot), as a true and reliable account of events, as did James Ryan, another Kelly cousin.¹¹⁰ Jim also told a relative that Ned had shot Fitzpatrick, when he had no reason to lie about Ned’s presence.¹¹¹

Standish testified that in a prison interview ‘some months after’ the incident, probably 30 October, Williamson corroborated Fitzpatrick’s statement, necessarily including that he was shot by Ned.¹¹² Other statements by Williamson admit that despite his denials upon arrest, he was present at the incident and its immediate aftermath.¹¹³ But it was not until his 1881 remission application that he stated he was outside the house when Ned rushed to the door and fired 2 shots at Fitzpatrick, reconfirming much of Fitzpatrick’s description of events in the process.¹¹⁴ Ned’s uncle, Patrick Quinn, also said he believed Fitzpatrick was shot by Ned, “from what I heard and can make out”.¹¹⁵

¹⁰⁵ Mrs Kelly in Cookson, “*Kelly Gang*”, 8 (28 August).

¹⁰⁶ Brown, *Australian Son*, 42.

¹⁰⁷ Ned quoted, *Age*, 9 August 1880, 3; Fitzpatrick in Cookson, “*Kelly Gang*”, 94 (23 September). At Benalla Fitzpatrick testified, “Know Miss Kelly; never attempted to take any liberties with her”, *Federal Standard*, 25 May 1878, 3.

¹⁰⁸ Jim Kelly in Cookson, “*Kelly Gang*”, 16-7 (30 August). Jim gaoled in NSW for 3 years from 27 June 1877 (RC Appendix 10); discharged 18 January 1880, telegram, VPRS 4965 Unit 2 Item 141.

¹⁰⁹ Datas, *The Memory Man, by Himself* (London: Wright and Brown [1932]), 170-2.

¹¹⁰ Kenneally, *Inner History*, 102, 312, 314.

¹¹¹ Jones, *Short Life*, 102, 382, citing his own interview with a descendant.

¹¹² Standish, RC Q3; telegram, 30 October 1878, VPRS 4965 Unit 3 Item 85.

¹¹³ Williamson to Green, 29 October 1878 (VPRS 4965 Unit 5 Item 353); cf. Williamson in Kenneally, *Inner History*, 54. Denial on arrest, Steele statement, 17 May 1878, VPRS 4966 Unit 1 Item 4.

¹¹⁴ Williamson, 6 August 1881, VPRS 4969 Unit 1 Item 52.

¹¹⁵ Quinn, RC Q17967; uncle, Q17713.

The sum of evidence from all angles is compelling: Ned's presence is amply attested. He rushed up to the house, possibly to prevent the arrest of Dan without then knowing of Dan's consent, and probably also, as Jones argued, because he thought the intruder was Const. Flood,¹¹⁶ and fired a revolver at Fitzpatrick. Until Ned burst onto the scene, Dan was willing to go with Fitzpatrick, and would likely have escaped conviction in court as his identically-charged cousin John Lloyd did just three weeks later.¹¹⁷ The alleged assault on Kate was fabricated in a series of inconsistent, often self-contradictory attempts by the Kellys to claim provocation and generate sympathy; and it was remarkably successful in doing so.¹¹⁸ The only consistency in all Kelly versions, excepting Kate's, is violent resistance to the attempted arrest of Dan, initiated by Mrs Kelly.¹¹⁹ Having established Ned's presence, it is possible to more rigorously review the events of 15 April.

WHAT HAPPENED DURING THE FRACAS?

While Jones claimed that Fitzpatrick's account "has been widely discredited throughout the years" and was "far from the truth",¹²⁰ it has never been reconstructed from its different sources and presented in full such that it may be properly reviewed, corroborated, and indeed vindicated. In this the starting point is Fitzpatrick's deposition in the Benalla Police Court on 17 May 1878, which led to the subsequent trial at the Beechworth Assizes in October. The official record of Fitzpatrick's deposition was written down by a law clerk as it was delivered in court. Another record by a journalist was printed in the *Federal Standard*.¹²¹ The two records of this same testimony each contain important details missed by the other; both because law clerks did not use shorthand in this period and so could not record every spoken word, and because newspapers typically edited text down to save space.¹²²

The narrative below follows the structure of the official record, incorporating Fitzpatrick's cross-examination responses, along with additional testimony from the

¹¹⁶ Jones, *Short Life*, 105; 383. This is consistent with Ned asking Skillion after the fracas, "Why didn't you tell me it was Fitzpatrick?", and telling Fitzpatrick that if he had known it was him, he would not have fired; a position supported editorially by *O&M*, 10 October 1878, 4: "The arrest [of Dan] would have involved serious consequences to himself and others, and imagining the Constable was a man against whom he had a special hatred, he rushed in and fired, with a deliberate desire to commit murder".

¹¹⁷ RC2 1881, x; cf. McMenemy, *Illustrated History*, 79.

¹¹⁸ Cf. "Insult to Kate - An old theory denied", *Mirror* (Perth), 20 January 1923, 2.

¹¹⁹ Mrs Kelly to Steele, "you would not like to see a son of yours taken", RC Q9214; cf. Hall, *Outlaws*, 26.

¹²⁰ Jones, *Short Life*, 99, 100.

¹²¹ Fitzpatrick, Benalla deposition, VPRS 4966 Unit 1 Item 4; *Federal Standard*, 25 May 1878, 3.

¹²² Shorthand, see McIntyre, "True Narrative", 103. An almost identical report to the *Federal Standard*'s was printed in the *Argus* (22 May, 10), but the *Argus* cut it down from what is obviously the same original text.

Federal Standard's record, shown in italics, such that both are read together. To this combined record of the Benalla deposition have been added further details from Fitzpatrick's depositions both at the Beechworth Assizes in October 1878 and the 1881 Royal Commission, and other evidence. All such supplementations to the combined Benalla record are referenced as they occur. Although Fitzpatrick's original statement to Whelan upon his return to Benalla is lost, Whelan attested that his depositions both at Benalla and Beechworth "did not prevaricate in the least from the statement he first made".¹²³ The resulting amalgamated statement provides for the first time a comprehensive narration of Fitzpatrick's version of events, which was highly consistent over time and survived rigorous cross-examination. Additional notes, particularly from Williamson's 1881 remission letter, are given in square brackets.¹²⁴

Fitzpatrick deposed that on 15 April he was on duty in uniform when he left Benalla for Greta about 2:30pm, *having been instructed to relieve Sgt. Strahan there*. He stopped at Lindsay's public house at Winton, for information, and had some lemonade and brandy.¹²⁵ He did not stop anywhere else before reaching the Kellys between 4 and 5pm. He dismounted and went in to see if Dan was about. Mrs Kelly and three children *were in the house*.¹²⁶ He stayed about an hour *or more* talking with Mrs Kelly, to see if there was a chance of Dan coming in.¹²⁷ Hearing the sound of chopping up the hill behind the hut, he said he would go up and see who it was. He rode about half a mile up towards the range where he found Williamson, a man who used to live with the Kellys, splitting rails.¹²⁸ Fitzpatrick spoke with him, and asked him if he had a splitting licence, to which Williamson said that he did not need one as he was on selected land. [On Williamson's statement, the conversation lasted about ten minutes and ended shortly before sundown.¹²⁹]

Fitzpatrick had started again for Greta when he saw two horsemen *riding towards Kelly's house, and enter the slip panels in front of the old hut*.¹³⁰ He followed them down there and rode around the paddock to see who they were.¹³¹ By the time he got there, however, one of them had disappeared. He went down and spoke to Skillion, who was

¹²³ Whelan, RC Q5947.

¹²⁴ Williamson, remission letter, 6 August 1881, VPRS 4969 Unit 1 Item 52.

¹²⁵ Fitzpatrick, Beechworth Assizes, *O&M*, 10 October 1878, 5. Ned Kelly (*Euroa Letter*, 16-7) hated Lindsay as a police informant.

¹²⁶ For Kate included in the children, see Fitzpatrick in Cookson, "*Kelly Gang*", 93 (23 September). The baby is nowhere mentioned and may have been in a bedroom.

¹²⁷ Fitzpatrick, RC Q12821.

¹²⁸ Fitzpatrick, RC Q12822; Fitzpatrick, *O&M*, 10 Oct 1878, 3. Williamson, who lived there, gave the distance as "about a quarter of a mile" (remission letter), so somewhat over a quarter of a mile seems likely.

¹²⁹ Williamson, *ibid*.

¹³⁰ Started for Greta, Williamson, *ibid*. This paragraph is heavily supplemented from Fitzpatrick, RC Q12822.

¹³¹ Fitzpatrick reckoned the time between leaving the Kellys and returning as "about a quarter of an hour" (Benalla cross-examination). On this analysis it would be about 20 minutes from his leaving Mrs Kelly's new hut and returning to the old hut on her property in search of the two horsemen he followed there.

leading one horse by the bridle and another by the mane, just inside the slip-panels.¹³² [Against Jones' theory that Fitzpatrick here mistook Joe Byrne for Skillion, he did not know Byrne, and Williamson corroborated that Fitzpatrick spoke with Skillion then at the Kelly's fence.¹³³] There was a third horse in the panel, recently ridden, with a saddle on but the bridle taken off. He asked Skillion who had been riding it, and Skillion said he did not know. Fitzpatrick examined the horse, saw it was the *mare* he had seen Dan riding two or three days previously [at Cashel], and asked where Dan was. Skillion said *he supposed* Dan was up at the [new] house.

Fitzpatrick rode back to Mrs Kelly's and called to Dan, who came out in his shirt sleeves with a knife and fork in his hand.¹³⁴ [Williamson stated that Skillion started for home about the time Fitzpatrick called to Dan.¹³⁵] He *spoke to Dan about some stray horses, and* said he would have to arrest him as there was a warrant *out for him* on a charge of horse stealing. Dan did not refuse to be arrested. He said, "Very well, but let me get something to eat, as I have been out riding all day". Fitzpatrick *consented to this, and* followed Dan inside. It was just getting dusk. [Dusk was 6:17pm.¹³⁶] He drank no alcohol at the Kelly's, and was perfectly sober at the time of the fracas.¹³⁷ Mrs Kelly and Kate [and from the foregoing, two other girls] were in the room *while Dan was getting his supper*.¹³⁸ Mrs Kelly whispered something to the girls, who [excepting Kate] ran out to the back hut, to alert Ned as Fitzpatrick later realised.¹³⁹ She then accosted him, calling him a "deceitful little bugger; she always thought he was", and said, "You won't take him out of this [house] tonight". He said it was no use talking that way, he had to do his duty.¹⁴⁰ Dan said, "Shut up, mother, that's all right".

[To this point both sides agree that Dan was still willing to accompany Fitzpatrick to Greta under arrest.¹⁴¹ There is now a major divergence between Fitzpatrick's and the principal Kelly version of the incident: they allege that Fitzpatrick then drew his gun and

¹³² Fitzpatrick, *O&M*, 10 October 1878, 5.

¹³³ Jones, *Short Life*, 105; Fitzpatrick, *RC* Q12950; Williamson (*ibid.*) said that shortly after speaking to Fitzpatrick on the hill, he started for home about sundown (5:51pm). An average walk is 3mph or 20 minutes per mile (Yahoo Answers). A walk somewhat over a quarter of a mile would take him around 6 or 7 minutes, likely passing Kelly's fence shortly before 6:00pm.

¹³⁴ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹³⁵ Williamson, remission letter, which also places Skillion outside Mrs Kelly's just after the fracas.

¹³⁶ Geoscience Australia, Sunrise&Sunset results (Eleven Mile Creek, 15/04/1878). After dusk, "artificial illumination is normally required to carry on ordinary outdoor activities", sunrisesunset.com/definitions.

¹³⁷ Benalla cross-examination, VPRS 4966 Unit 1 Item 4; *contra* the Kellys' tale in Hall, *Outlaws*, 25.

¹³⁸ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹³⁹ Fitzpatrick, in Cookson, "*Kelly Gang*", 93 (23 September). Unsurprisingly Ned later bragged that he would "never attempt to fire into a house ... full of women and children" (Kelly, *Jerilderie Letter*, 35); Fitzpatrick never said he did. This also matches Williamson's remission statement that he quieted two of Mrs Kelly's children outside the house; that would be just before he entered the house during the fracas.

¹⁴⁰ Fitzpatrick, *RC* Q12822; cf. Fitzpatrick, in Cookson, "*Kelly Gang*", 93 (23 September).

¹⁴¹ Kelly, *Jerilderie Letter*, 22; Ned quoted, *Age*, 9 August 1880, 3.

told Mrs Kelly not to interfere or he would shoot her.¹⁴² Why he would do this when Dan was still willing to go to Greta is never explained; certainly Fitzpatrick did not feel that any crisis or resistance had arisen up to this point.¹⁴³ According to the Kellys, Mrs Kelly then said he would not have drawn his revolver if Ned were there. Dan then said falsely, “Look, there’s Ned”. As Fitzpatrick looked around, Dan leapt up, seized the gun, put Fitzpatrick in a wrestling hold, and threw him out of the house, with Fitzpatrick injuring his wrist on a door latch on the way, and Ned not present at all.¹⁴⁴ While certainly an exciting tale, it is also hollow. Fitzpatrick had obliged Dan, perhaps foolishly, by letting him finish his dinner, but Dan’s consent recognised that resisting or evading arrest could only add to his charge sheet.¹⁴⁵

Fitzpatrick then saw Skillion passing the house in the dusk [about 6:17pm], leading a horse. It was about 15 minutes since Fitzpatrick had seen Williamson chopping wood.¹⁴⁶ Fitzpatrick had been in the house barely 3 minutes when Ned came to the doorway and *without a word* fired at him with a revolver, but did not hit him.¹⁴⁷ Fitzpatrick was standing with his back to the partition, *about a yard and a half inside* [from it], *rather behind the door, with his back towards it*. Mrs Kelly was standing with her back to the fire. Dan was sitting at the table. Fitzpatrick was standing up alongside him, with his right side to Dan.¹⁴⁸ His left side was to Ned, who was about two yards off him.¹⁴⁹

[There is only one arrangement that meets all these criteria: Fitzpatrick stood about halfway between the front door and the rear passageway entrance directly opposite; 2 yards from either doorway in a 12 foot wide room, facing the fireplace centred in the far wall, and about 1½ yards in from the main bedroom partition, in line with the bedroom door behind him, as Ned fired from the front doorway, which was just over 2 feet wide.¹⁵⁰]

Immediately after the shot Ned said “Out of this you bugger”,¹⁵¹ as Mrs Kelly rushed at him and struck him *a heavy blow* with [the flat of] her fire shovel on the left side of his helmet, which he had not taken off, *making a large dent in it, and* smashing it down on

¹⁴² Kelly, *Euroa Letter*, 6-7 (cf. *Jerilderie Letter*, 22-3); *Age*, 9 August 1880, 3.

¹⁴³ Fitzpatrick, *RC Q12822*.

¹⁴⁴ Kelly, *Euroa Letter*, 6; Ned quoted, *Age*, 9 August 1880, 3.

¹⁴⁵ Hall, *Outlaws*, 23; Standish, *RC Q2*.

¹⁴⁶ Fitzpatrick, *RC Q12866*. Possibly about 25 minutes. It would be about 10 minutes since Fitzpatrick first spoke to Dan outside the new hut with Williamson nearby (remission statement), and another 15 since he earlier left Williamson on the hill and came there via the old hut.

¹⁴⁷ Fitzpatrick, *RC Q12822*. Some short time; in Cookson, “*Kelly Gang*”, 93 (September 23), he said he “had not been inside more than 10 minutes” when Mrs Kelly sent the girls with a message to Ned.

¹⁴⁸ Fitzpatrick, *RC Q12823*.

¹⁴⁹ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹⁵⁰ There is a faithful replica of Mrs Kelly’s new hut behind the “Kate’s Cottage” shop and museum in Glenrowan. (All doorways are similarly narrow.) The kitchen/living room is 15’ by 12’; see McMenemy, *Illustrated History*, 75 for an exterior illustration. In *RC Q12824* over 3 years later, Fitzpatrick said he was about 1½ yards from Ned when shot; but the 1878 depositions produce the above coherent scenario.

¹⁵¹ *O&M*, 10 October 1878, 5; Fitzpatrick to Crown Solicitor, 20 September 1878, VPRS 4966 Unit 1 Item 4.

his head.¹⁵² [She later admitted this, but was not believed.¹⁵³] He had raised his arm to ward off the shovel when Ned fired again.¹⁵⁴ This second ball lodged in his left wrist. Fitzpatrick knocked the shovel down with his right hand, and then turned to draw his revolver, but Dan had snatched it from his belt while his attention was drawn to Mrs Kelly and Ned, and was now holding it pointed at Fitzpatrick. Skillion came to Ned's side at the door just as the second shot was fired, trying to force his way in beside Ned; he had a revolver in his hand, but he did not use it.¹⁵⁵

[Williamson's remission letter stated that the man he called King went to the house at that point "with a revolver in his hand". He would not have been able to enter the room past Ned due to the narrow 2'2½" (673mm) doorway. By then Fitzpatrick would have been looking towards the doorway into the night, and hardly in a calm state. On both Ned's comment to McIntyre and Williamson's statements, a misidentification of this man occurred and it was Joe Byrne.¹⁵⁶ This explains Ned's subsequent protestations of Skillion's innocence; but the narrative here presents Fitzpatrick's belief and deposition. While much would be said about Fitzpatrick's "perjury", Ned could have named Byrne after his death to try to exonerate Skillion, who was still doing hard labour; yet Ned did not do so. Years later, Lloyd, as Kenneally's informant, said nothing to settle it.]

¹⁵² Fitzpatrick, *RC* Q12825. The dented helmet was produced in court: "It was not the edge of the shovel [that] struck me"; "it was like a contractors shovel worn down"; Benalla deposition, VPRS 4966 Unit 1 Item 4.

¹⁵³ In her Beechworth trial, "that she knocked Fitzpatrick down with a shovel", *Argus*, 10 August 1880, 7; see Morrissey, *Lawless life*, 61.

¹⁵⁴ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹⁵⁵ Reconstructed in order from *RC* Q12828, Q12865, *Federal Standard* (Benalla), *O&M* (Assizes), Q12827-8.

¹⁵⁶ In the Jerilderie letter, Ned said that Skillion was not there "at the time of the row" (Kelly, *Jerilderie Letter*, 24), and he told McIntyre that the men with him at Stringybark Creek were the ones that were there (McIntyre prosecution brief, VPRS 4966 Unit 1 Item 6). As Hart was then gaoled, this identified Byrne. Williamson said the police "discovered [in 1881] Byrne was at Kellys hut at the time", and later wrote (in Kenneally, *Inner History*, 54) that Byrne, whom he stopped from "going into Fitzpatrick's presence after the brawl", was mistaken for Skillion (whom he "closely resembled", McQuilton, *Kelly Outbreak*, 86); see Prison Register descriptions, VPRS 515 Vol. 24, 99; Vol. 28, 272.

Williamson came to the door of the bedroom as the second shot was fired.¹⁵⁷ He was also armed with a revolver or pistol, and from his position he could see Mrs Kelly.¹⁵⁸ Neither of these men were in the house when Fitzpatrick first came in.¹⁵⁹ Ned remained in the same position [in the doorway], with his revolver pointed at Fitzpatrick. Fitzpatrick slewed around, took hold of the muzzle of Ned's pistol, and turned it away from himself. In the struggle, the pistol went off a third time, *the bullet passing through the sleeve of Fitzpatrick's jumper*.¹⁶⁰ They all had their revolvers levelled at him. Fitzpatrick said to Ned, "You cowardly wretch, do you want to murder me?", and Ned said, "That'll do boys". Ned said to Skillion, "You bugger, why didn't you tell me who was here?" Williamson muttered something which he could not hear. Skillion did not say anything. *Turning to Fitzpatrick*, Ned said "If I had known it was you I would not have fired, but none of the other buggers would have left here alive". Miss Kelly was in the house while the firing was going on; she sat down and cried.

The wound in Fitzpatrick's arm was bleeding *all the time*, and he fainted. *As he was coming around he heard the men talking*, whilst lying on the floor.¹⁶¹ Ned said to Skillion,¹⁶² "Bill would have given that bugger who went by a pill [bullet] the other day" if not for him. Skillion said, "What, the Benalla cove?" Ned said "No, Sgt. Steele, and I've got a pill for him yet". [The *Federal Standard* here interpreted "Bill" as "(meaning Skillion)", but it more likely meant Billy King, the name Byrne had assumed, who had just been briefly present.¹⁶³]

¹⁵⁷ Fitzpatrick, RC Q12826. Official Benalla record, "came in from the bedroom"; *Fed. Std.* report, "came out of the bedroom"; Beechworth deposition, "came in armed with a revolver". The Benalla depositions locate Williamson in the bedroom just prior to the fracas; the Beechworth and Commission depositions have Williamson "come in" as far as the bedroom door. This is viable if Williamson came in the back, up the passage, and was first noticed near the main bedroom door during the fracas. Williamson (remission letter) said that Fitzpatrick "had his back to that part of the hut where the bedroom was and was excited in struggling with Kelly at the door of the hut". Fitzpatrick said he didn't know how Williamson got into the house before him. When asked were there two doors, he incorrectly answered that there was only the entrance door (RC Q12868-9). He may have disregarded the passage doorway to the two rear bedrooms and back door. It had no door fitted, and was possibly curtained with blanketing or calico like the old hut (RC Q1024) and Sherritt's (Jones, *Short Life*, 207). Williamson's remission letter claimed he was outside the house, not "coming out of the bedroom" as Fitzpatrick said; but he could only have seen Dan holding Fitzpatrick's "right arm and Mrs Kelly ... holding a spade against [his] chest" from within the house.

¹⁵⁸ Williamson had seen 'some revolvers and ammunition' that Skillion had purchased in Melbourne the previous year (Statement to Green, 29 October 1878, VPRS 4965 Unit 5 Item 353), and Fitzpatrick had previously seen a revolver at the house (Benalla cross-examination).

¹⁵⁹ Fitzpatrick, RC Q12826.

¹⁶⁰ Fitzpatrick subsequently claimed the cost of a replacement uniform jumper due to his having a bullet hole in the sleeve and having to be kept for evidence (VPRS 4969 Unit 1 Item 30, 24 May 1878). Sgt. Steele similarly grappled with Ned's revolver during his apprehension at Glenrowan (*Argus*, 29 June 1880, 6).

¹⁶¹ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹⁶² Fitzpatrick named Skillion here in both his Benalla and Beechworth depositions; the *Federal Standard* mixed the names in its report of the Benalla testimony and had Ned speaking to Williamson.

¹⁶³ Ned spoke to Bill Skillion; Williamson was "Bricky". Williamson stated to Green that the man called Billy King was then staying at the Kellys; a man "that would fire on anyone that would attempt to arrest him" (29 October 1878, VPRS 4965 Unit 5 Item 353). Skillion thus entered the house after Fitzpatrick

He was then in the act of getting up, and Skillion and Williamson went outside.¹⁶⁴ [It would be then that Williamson “pulled Burns (Byrne) back in the dark, when he was going into Fitzpatrick’s presence . . . after the brawl”.¹⁶⁵] *They left soon after.*¹⁶⁶ Mrs Kelly remained, and Fitzpatrick got up *from the floor. Ned’s sister [Kate] was present then.*¹⁶⁷ Ned said to him, “I’m sorry that this happened, as it was you; it will get me into trouble. I’ll get it pretty heavy”. Fitzpatrick said it was nothing.¹⁶⁸ When he got up his revolver was on the table, taken to pieces and unloaded. He put it together, then Ned took it out of his hand, and asked if he had any more ammunition. He said no. Ned kept the ammunition from the revolver, then began to examine Fitzpatrick’s wrist. *It was swollen, and the bullet was seen under the skin.* He said, “Here’s the bullet, we must have it out”, and got a rusty razor *to cut it out.* Fitzpatrick wanted to go home and get a doctor to remove it, but Ned *refused,* saying, “You can’t go away with that in your hand”. Fitzpatrick said he would operate himself. He cut the ball out *with a sharp pen knife.* It was a small pointed ball, like the one produced [in court]. Ned took the bullet and Mrs Kelly bandaged his arm. He saw a bullet mark in the bark partition where he had been standing.

Fitzpatrick went outside, and sat on a log.¹⁶⁹ *Ned followed him,* and called Dan to bring in his horse [to put behind the house].¹⁷⁰ Ned said he was very plucky to suffer the pain, and said, “Now I spared you, you must spare me. How will you manage to say you were shot?” He replied that he would not mention who shot him. Ned said, “say you shot yourself, or you had better say this, that you went up to arrest Dan who was in company with Williamson,¹⁷¹ *that you had your revolver out, and in putting the handcuffs on it went off and shot you,* and then Dan took the ammunition from you”.¹⁷² *Afterwards* Ned asked him if he knew a man named Whitlow, and he answered no. Ned told him to say this, *as it would do better:* “two men rushed from behind a tree as you were arresting Dan, two big men, one like himself, who they would think was his brother Jim, and the other was Whitlow. Then say you heard one of them cry out, “‘Oh! Whitlow, you’ve shot him.””

had fainted, and Williamson stated that Skillion was subsequently despatched for horses. Fitzpatrick never suspected Byrne’s existence, but saw Skillion immediately prior, and heard him talking while recovering.

¹⁶⁴ This paragraph is sourced largely from Fitzpatrick’s Beechworth deposition, *O&M*, 10 October 1878, 5.

¹⁶⁵ Williamson, in Kenneally, *Inner History*, 54.

¹⁶⁶ Corroborated by Williamson, remission letter: Ned told him “to run into the yard some horses which were on the flat and to tell Skillion to go to Harty’s [sic] . . . four miles away and bring two more horses”, a roughly two hour return task.

¹⁶⁷ Dan had already left the room; cf. Beechworth deposition, “Ned Kelly, Mrs Kelly and her daughter were then in the house” (*O&M*, 10 October 1878, 5).

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *O&M* (*ibid.*) has Skillion here; possibly a reporter’s error.

¹⁷² This may be the origin of the Kelly variant that Fitzpatrick shot himself inside the house during a struggle with Dan.

He gave as a reason for saying this that both the men were miles away *at the time*.¹⁷³ Ned told him to say a lot of other things that Whitlow was supposed to have said. [He should say that the one like Jim] was the man who stole Jackson's and Frost's horses, and altered the brands from G to OO, one a little chestnut horse with a bad back, which he sold to Kennedy on the other side of the Murray.¹⁷⁴

Ned also *compelled* him to make an entry in his *notebook* at the time of the conversation, so that he would not forget it. (*Book produced and entry read to somewhat similar tale as above.*)¹⁷⁵ Fitzpatrick wanted to leave, but Ned would not return his revolver, making the excuse that they were catching the horses.¹⁷⁶ He said, "If you go home and say I shot you, you'll get no credit for it. The Government won't reward you, but I'll make it worth your while. I'll give you a few hundred which I will have after the Baumgarten case is over. They only want me to keep out of the way until the case is over".¹⁷⁷ Fitzpatrick said he wouldn't mention it.¹⁷⁸ Mrs Kelly was there then, and she told Ned to say that if Fitzpatrick told of it *he'd not be alive long*, as they had plenty of friends about. Ned said it would be no use the police attempting to hunt him down, as he was too well acquainted with the country and could watch the police without himself being seen, and that he would never again be taken alive.¹⁷⁹ Fitzpatrick then went and got his horse *from behind the house*, where Dan had tied it at Ned's instruction so as not to be seen. *His hand was very painful*.¹⁸⁰ Ned gave him his revolver and Dan brought his handcuffs. They bade him good night and shook hands with him.¹⁸¹

Ned showed him out of the panel about 10pm, *and he started for Benalla*.¹⁸² Ned accompanied him as far as the pound, with Dan following them. It was a fine, starry, moonlight night.¹⁸³ When he was about 2½ miles from Kelly's, about 10.15pm, he saw Williamson and Skillion about 100 yards behind, coming after him on horseback.¹⁸⁴ He

¹⁷³ Jim was gaoled; Whitlow was the Oxley pound-keeper (Williamson, remission letter).

¹⁷⁴ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹⁷⁵ At Beechworth Fitzpatrick replied to Barry that he "made the pencil entry in the book while sitting on the log; the other entries a few days afterwards", *O&M*, (ibid.). Fitzpatrick's notebook cannot be located.

¹⁷⁶ Corroborated by Williamson, remission letter.

¹⁷⁷ Fitzpatrick, *O&M*, 10 October 1878, 5. "A few hundred" (Benalla deposition) matches Fitzpatrick's Beechworth deposition, and rules out the alternative reporting of "five hundred" in the *Federal Standard*. The words sound similar.

¹⁷⁸ Ibid.

¹⁷⁹ *Argus*, 22 April 1878, 3.

¹⁸⁰ Cf. Williamson, remission letter: "Kate Kelly said he was in great pain".

¹⁸¹ Fitzpatrick, *O&M*, 10 October 1878, 5.

¹⁸² Fitzpatrick to Crown Solicitor, 20 September 1878, VPRS 4966 Unit 1 Item 4; he erroneously said 11pm in RC Q12859. The time of departure was more likely around 9:45-9:50pm, as the soon-mentioned 2.5 miles would take almost 30 minutes at 5.3mph. All timings are obviously approximate, but viable.

¹⁸³ Fitzpatrick with Lindsay, *O&M*, 10 October 1878, 5); two days before full moon ("1878 Australia", www.timeanddate.com).

¹⁸⁴ Fitzpatrick to Crown Solicitor, 20 September 1878, VPRS 4966 Unit 1 Item 4; timing corroborated by Williamson's remission letter, that Ned told him and Skillion "to take the horses up on the range and wait there till they came. [They] waited there about an hour when Dan and King [Byrne] came up and took the

spurred on [for the remaining 1½ miles] to Lindsay's at Winton [which he reached "between 10 and 11 at night", i.e. around 10:30pm].¹⁸⁵ He dismounted, but was too weak to stand up.¹⁸⁶ David Lindsay and his brother Richard helped him inside and gave him some brandy [and water].¹⁸⁷ [David testified that "he could not take it at first".¹⁸⁸ He also testified that Fitzpatrick was quite sober upon arrival.¹⁸⁹] Fitzpatrick told them what had happened. They re-banded him, and Richard accompanied him to Benalla, which he reached about 2am.¹⁹⁰ [Fitzpatrick's narrative ends here. On this estimate he would have left Winton somewhere between 12:00 and 12:30am. Seven miles to Benalla at a gentle walk, around 4mph,¹⁹¹ would take over 1.5 hours.]

Whelan corroborated that Fitzpatrick woke him at 2am. He deposed that he "saw a mark like a bullet wound" and sent for Dr. Nicholson. The doctor examined and dressed his wrist, while Whelan took a statement.¹⁹² Nicholson later testified "there was the smell of brandy on him", but that he "was certainly not drunk".¹⁹³ (This did not prevent FitzSimons claiming that on his way back through Winton, Fitzpatrick drank himself "into a stupor until the early hours of the morning".¹⁹⁴) Whelan trusted the integrity of Fitzpatrick's statement, which would be rigorously tested by cross-examination in the courts, and set in motion the issuing of warrants against the accused in accordance with law. Allegations that Fitzpatrick was impaired by alcohol before or during his call on the Kellys, or got drunk afterwards, should be rejected on the independent testimonies of Nicholson, Lindsay, and his daughter, as malicious fabrication.

horses and started. Skillion and I then started for home, near which place we met Ned Kelly who said that he had been seeing Fitzpatrick on the road".

¹⁸⁵ Report of David Lindsay's testimony: "Fitzpatrick was at his house between 10 and 11 at night. He appeared faint and sat down." (*O&M*, 10 October 1878, 5) The context is clearly the time Fitzpatrick arrived at Lindsay's, and he was still 1.5 miles away at 10:15pm.

¹⁸⁶ Corroborated by Lindsay, *ibid*.

¹⁸⁷ *Ibid*.

¹⁸⁸ Lindsay deposition, Benalla, 17 May 1878, VPRS 4966 Unit 1 Item 4.

¹⁸⁹ Lindsay testimony, *O&M*, 10 October 1878, 5; ditto Mrs James (Lindsay's daughter), *Northern Star*, 30 December 1930, 7.

¹⁹⁰ The official Benalla record says "Rd" (Richard) accompanied him to Benalla; the *Federal Standard* has David; but Richard is corroborated by Lindsay's daughter, *Northern Star*, 30 December 1930, 7.

¹⁹¹ Horse gait, "walk", https://en.wikipedia.org/wiki/Horse_gait#Walk, accessed 17/8/2015.

¹⁹² Whelan, *RC Q5947*.

¹⁹³ Nicholson, *O&M*, 10 October 1878, 5; corroborated by Mrs James, *Northern Star*, 30 December 1930, 7, "A drink Fitzpatrick had with [Richard] Lindsay in Benalla before he reported was the only other one Fitzpatrick had, and that may have given rise to the rumours that he was drunk".

¹⁹⁴ FitzSimons, *Kelly*, 134.

NED'S SHIFTING TALE

In the Euroa letter, Ned claimed he was not present; that Fitzpatrick spoke to Williamson on the hill, then to a man he falsely swore was Skillion, Skillion being away after horses at the time which witnesses could prove. Fitzpatrick then rode to the house to arrest Dan. They went inside. While Dan was eating, Mrs Kelly said Dan need not go unless he chose because Fitzpatrick did not have a warrant. According to Ned, Fitzpatrick drew his revolver. Dan said Ned was coming, and while distracted, Dan seized the gun, threw Fitzpatrick “and part of the door outside, and kept him there until Skillion and Ryan came with horses”. Fitzpatrick invented a story about being shot, and advised Dan to “clear out” as Steele or Brown would be there in the morning. The Jerilderie letter gave a wordier presentation of the same narrative.¹⁹⁵ Skillion’s alleged early absence is refuted by Williamson’s 1881 remission letter, which also told a story by Ned, similar to the one he gave Fitzpatrick, of Fitzpatrick’s injury resulting from a man shooting at him on the hill. (Williamson said he could never have thought of that, and would say nothing.)

On 7 August 1880 the *Age* published a short version of the “affair” from Ned’s solicitor David Gaunson. It has Mrs Kelly asking Fitzpatrick if he had a warrant, and explicitly states that after a struggle Dan “made him a prisoner”. On 9 August the *Age* published a longer narration of Ned’s version, said to be from a reporter’s interview conducted three days earlier in the Beechworth gaol. The *Argus*, however, reported that both the gaol governor and the sheriff “state emphatically that no such interview took place”. The only permitted visitors were his solicitor, priest, and doctor. “The only reasonable deduction ... is that the report [was supplied by] Gaunson”.¹⁹⁶ There is nothing remotely approaching its highly polished prose anywhere in Ned’s other writings or reported speeches. (A four paragraph excerpt was recycled unchanged as the much-quoted Condemned Cell letter of 1 November 1880.¹⁹⁷)

In the report, Ned asserted that Fitzpatrick had been drinking while watching for Dan to come home. He saw Dan and said he was wanted on a warrant, agreeing to let Dan eat dinner. Mrs Kelly asked why Dan was going with Fitzpatrick; in this version it was Dan who asked to see the warrant. Fitzpatrick drew his revolver. Dan disarmed him as previously, but then “gave it him back and let him go, not offering any violence whatever. A day or two afterwards my mother, Skillian, and Williamson, both of whom were not present on that occasion, were arrested.... Fitzpatrick’s statement is false from beginning to end”. In this version, Ned’s previous statements that Dan made Fitzpatrick a prisoner after seizing his revolver have disappeared. It challenges Fitzpatrick’s integrity, sobriety, and Dr Nicholson’s not probing the wound, all lines pursued in the Assizes. There is also

¹⁹⁵ Kelly, *Euroa Letter*, 5-7; *Jerilderie Letter*, 21-4.

¹⁹⁶ *Age*, 7 August 1880, 6; *Age*, 9 August 1880, 3; *Argus*, 10 August 1880, 7; visitors refused: telegrams, VPRS 4967 Unit 2 Items 33, 50. Gaunson was named as the author by “Peerybingle” in *O&M*, 17 August 1880, 3.

¹⁹⁷ E.g. Meredith and Scott, *Acrimony*, 80; Dean and Balcarek, *Ned and the Others*, 379.

a unique claim that “since the trial the doctor has told Fitzpatrick that his wound was never caused by a bullet”, completely at odds with Nicholson’s evidence.¹⁹⁸ In sum, Ned’s story keeps changing (as did those of his family and associates), and the defence arguments vary accordingly. Much of it demonstrates pathological lying, a trait that would continue in his endlessly shifting stories about Stringybark Creek and Glenrowan.¹⁹⁹

THE AFTERMATH

Williamson, Skillion, and Mrs Kelly were each arrested by Steele over the following night on charges of aiding and abetting the attempted murder of Fitzpatrick.²⁰⁰ Fitzpatrick returned to Mrs Kelly’s some days later “with Sgt. Whelan and Const. Reilly and looked for a bullet mark *where he had noticed one strike*, but found two sheets of bark removed from the place where he had previously noticed the bullet mark”. He stated that he had no doubt about the identities of Ned, Dan, Williamson and Skillion.²⁰¹ Williamson’s remission letter confirms they were all present at various times throughout that evening. Fitzpatrick’s testimony holds true.

Fitzpatrick was temporarily transferred to Beechworth in May 1878, and then to the Richmond Depot on 13 September for his own safety.²⁰² Kelly confederate Aaron Sherritt approached him in Beechworth on more than one occasion and offered to lead him to the Kellys, as he would also try with Detective Ward in January/February 1879.²⁰³ Jones speculated that this was an attempt to provide the Kellys with a “valuable hostage” towards the release of their mother.²⁰⁴ But it would more likely have resulted in the Kellys – who had gone bush – disposing of their most hated trooper.²⁰⁵

Marked ‘sick’ with “general mounted duty and drill” throughout October 1878, after the Stringybark Creek ambush Fitzpatrick applied to rejoin the hunt for the Kellys, and

¹⁹⁸ Kenneally, *Inner History*, 60 repeated Ned’s claim as fact. Dr Nicholson testified that the wound “might have been produced by a bullet ... The wounds are consistent with Fitzpatrick’s statement. Either of the bullets produced could have caused the wound”, *O&M*, 10 October 1878, 5. On bullet wounds see Gregory Blake, *Eureka Stockade: A ferocious and bloody battle* (Newport: Big Sky, 2012), 203. Graham Fricke, *Ned’s Nemesis: Ned Kelly and Redmond Barry in a Clash of Cultures* (North Melbourne: Arcadia, 2007), 104, n.18, noted that as Nicholson had not witnessed the incident, his testimony was proper and correct.

¹⁹⁹ Russ Scott and Ian MacFarlane, “Ned Kelly – Stock Thief, Bank Robber, Murderer – Psychopath”, *Psychiatry, Psychology and Law*, 21.5 (2014), esp. 732-734.

²⁰⁰ Steele, Statement 17 May 1878, VPRS 4966 Unit 1 Item 4.

²⁰¹ Fitzpatrick, Benalla deposition, VPRS 4966 Unit 1 Item 4 with *Federal Standard*, 25 May 1878, 3.

²⁰² Fitzpatrick, RC Q12808; *Record of Service*; Muster Rolls, VPRS 55 Units 8-9.

²⁰³ Fitzpatrick, RC Q12925; Ward, RC Q13847.

²⁰⁴ Jones, *Friendship*, 62.

²⁰⁵ Ned said he would “roast him”, McIntyre, prosecution brief, VPRS 4966 Unit 1 Item 1; “he would rush through a hundred bayonets to get at [Fitzpatrick]”, *O&M*, 21 December 1878, 4.

joined others on special duty in NE District search parties from 1 November to 28 February 1879.²⁰⁶ He was then sent to Sydney, NSW to watch for any of the gang attempting to escape by ship. He soon identified Jim Kelly, who was in Darlinghurst Gaol under a false name.²⁰⁷ Working 12 to 14 hour days he was twice reprimanded for lateness in mid-March.²⁰⁸ In early May he appears to have been playing detective in an obscure intrigue in which a servant woman he had befriended was accused of stealing jewellery from her employer, and his honesty was called into question.²⁰⁹ Although he denied any wrongdoing he was bluntly recalled to Victoria, paid up to 14 May.²¹⁰ Standish saw his conduct as “calculated to bring discredit on the Victoria Police” and said he was only retained in the Force “due to the injuries he sustained in the discharge of his duty last year and the probability of his being required to give evidence at some future inquiry”, warning him that he would be dismissed for any further serious misconduct.²¹¹ From 18 June to 16 September 1879 he was recorded as in the Police Hospital, and on 27 July was fined for laughing there after hours.²¹²

He transferred to Lancefield on 17 September 1879, Standish having given instructions that he was to be kept “under a tight hand”. He fell out with his OIC, Const. Joseph Mayes, and further charges of misconduct (to which he pleaded not guilty) followed. He was cautioned twice in early 1880, and Standish held him to be “unsteady and unreliable”.²¹³ Eventually, on Mayes’ report that he “had associated with the lowest persons in Lancefield, and could not be trusted out of sight, and never did [his] duty”, he was dismissed from the force.²¹⁴ Mayes had a strongly negative view of the adequacy of many young officers and was especially hostile to Fitzpatrick, whom he held personally responsible for the Kelly outbreak.²¹⁵ Discharged by Standish on 27 April 1880 “for inefficiency and insubordination”, Fitzpatrick was denied any opportunity to reply.²¹⁶

On learning of his dismissal, over 100 residents of the Lancefield district petitioned the Chief Commissioner that Fitzpatrick had given excellent service throughout his time there, and urged his reinstatement. Specifically, the petitioners said he was “zealous, diligent, obliging, and universally liked, while we never saw him in company of any but the best citizens. Had he been what [Mayes’] report was said to allege it could not have

²⁰⁶ Fitzpatrick, *RC* Q12945-7; Muster Rolls, VPRS 55 Unit 8.

²⁰⁷ Fitzpatrick, Report, 5 March 1879, VPRS 4969 Unit 1 Item 31.

²⁰⁸ Fitzpatrick, *RC* Q12921; *Record of Service*.

²⁰⁹ Police correspondence, VPRS 4969 Unit 1 Item 30.

²¹⁰ Fitzpatrick, Report, 7 May 1879; Standish, Memo, 12 May 1879, VPRS 4969 Unit 1 Item 30.

²¹¹ Standish, Memo, 25 May 1879, *ibid*.

²¹² Fitzpatrick, *RC* Q12897; *Record of Service*; Muster Rolls, VPRS 55 Units 8-9.

²¹³ Fitzpatrick, *Record of Service*; Standish, Memo, 14 February 1880, VPRS 678 Unit 70 file z265.

²¹⁴ Fitzpatrick, *Record of Service*; *RC* Q12903-6; Q12892; Standish, Memo, 25 May 1879, VPRS 4969 Unit 1 Item 30.

²¹⁵ Mayes, *RCP* Q2481-8; at Q2481, “I had a great deal to do to get rid of him, and at last had him dismissed”.

²¹⁶ Standish, letter to Chief Secretary, with file note, 23 April 1880, VPRS 3991 Unit 1257 Item 81/5048; Fitzpatrick, *RC* Q12893.

escaped our attention. He made several clever captures and appeared to us as one of the most efficient and obliging men in the force”.²¹⁷

The signatories included “what appears to be nearly all the prominent merchants, publicans and farmers of the district”.²¹⁸ Standish replied on 10 May, writing that in his opinion “the Ex-Constable’s conduct during the time he was a member of the Force, was generally bad and discreditable.... I cannot hold out any hope of his ever being reinstated”.²¹⁹ Fitzpatrick’s 18 May request to the Chief Secretary for an enquiry into his dismissal, supported by Robert Harper MP, was declined, and an appeal to the Premier on 28 May by Lancefield J.P. James Lockwood to reconsider Fitzpatrick’s case had no effect.²²⁰

The matter did not end there, however. A second petition, addressed to the Chief Secretary and ignored to date in the commentary, was drawn up by the citizens of Lancefield twelve months later, and forwarded on 15 June 1881 by Alfred Deakin MP.²²¹ The petitioners were “aggrieved that no notice whatever was taken of the earlier petition”, and asked that the Chief Secretary “either cause a Board of enquiry to be held so that Alexander Fitzpatrick could answer the charges made against him or reinstate him into the Police Force”. In response, Acting Chief Commissioner Chomley wrote to the Chief Secretary that Fitzpatrick’s file showed him “quite unfit for the Police Force”, and that he had heard him spoken about “in places where he was known before he joined the service and I have always heard him described as a liar and a larrikin”.²²² Chomley ignored both that Fitzpatrick had come well recommended and that three years of Kelly-obsessed publicity doubtless encouraged such beliefs. With no allowance for his extraordinary experience at the hands of the Kellys, Fitzpatrick felt harshly treated after three years of service. He told the 1881 Commission that the petitions should have counted for more than Mayes’ report, and that his character had been “greatly injured” through his discharge “and being mixed up with the Kellys”.²²³ He would hold to the end of his days that in that regard, he had properly done his duty.²²⁴

Given strong public support for Fitzpatrick by the people of Lancefield, that his sworn testimony is largely corroborable, and that he had a good service record through to March 1879, he appears to have been justified in believing himself to have been wrongfully dismissed. The grounds for his dismissal are to be found in Standish’s memo of 23 April 1880. Proposing Fitzpatrick’s immediate discharge, Standish wrote that Fitzpatrick had

²¹⁷ Lancefield petition, VPRS 4969 Unit 1 Item 30.

²¹⁸ MacFarlane, *Unmasking*, 170.

²¹⁹ Standish, letter, VPRS 4969 Unit 1 Item 30.

²²⁰ Fitzpatrick, endorsed letter to Chief Secretary, 18 May 1880, VPRS 3991 Unit 1257 Item 81/5048; Lockwood, letter, 28 May 1880, *ibid*.

²²¹ Petition, 15 June 1881, VPRS 3991 Unit 1257 Item 81/5048.

²²² Memo, Chomley to Chief Secretary, 23 June 1881, VPRS 3991 Unit 1257 Item 81/5048.

²²³ Fitzpatrick, RC Q12923-4, Q12994 (26 July 1881).

²²⁴ Fitzpatrick, in Cookson, “*Kelly Gang*”, 93-4 (23 September).

“deteriorated”, listing first, his unforgotten disapproval of Fitzpatrick’s initial refusal to marry his pregnant fiancée in 1877; second, the displeasure Standish felt at complaints about his officer from the NSW Inspector-General of Police; and third, Mayes’ view that Fitzpatrick was “useless and unreliable ...an unreclaimable larrikin”. The unforgiveable offence for which Fitzpatrick had ultimately been discharged was “a piece of gross impertinence to his superior officer”, Mayes.²²⁵

CONCLUSION

Fitzpatrick’s call at the Kellys to arrest Dan Kelly was lawful, planned and sanctioned. He broke no regulations, was not intoxicated, was never infatuated with Kate Kelly, and did not assault or molest her. Mrs Kelly would not countenance Dan’s arrest despite his consent. She initiated the fracas by summoning Ned, whose presence is amply attested, and who shot at Fitzpatrick without a second thought. In Fitzpatrick’s view, “any constable would have been in the same position”.²²⁶ Had it been a better aimed bullet, or from a more powerful revolver (such as a .44 Webley or Colt) rather than a .31 or similar small ball, it could well have been fatal.²²⁷ The charge of attempted murder was not at odds with Ned’s intention, and indeed murder was freely discussed. Kate admitted to Steele “that only for her they would have finished Fitzpatrick off”, an intention corroborated by Williamson.²²⁸ From Fitzpatrick’s testimony, Ned’s letters, Mrs Kelly’s initial admission to Steele, and Williamson’s remission letter, charges of aiding and abetting were clearly appropriate for Mrs Kelly and Dan. Williamson was present on his own admission and was at least an accessory after the fact, as was Skillion on Williamson’s statement, regardless of his likely absence during the fracas.

It was almost certainly Byrne, not Skillion, at the fracas. It is viable that Skillion walked past with a horse just before the incident as Fitzpatrick stated, was there directly afterwards as Williamson corroborated, but, as Ned insisted, was not part of the actual fracas. The only man who could have saved Skillion – by admitting his own presence – was Joe Byrne. As he never did so, Skillion’s cause was lost. Ned had only himself (and his mother) to blame for the fracas and its outcome, regardless that the resulting prison

²²⁵ Memo, Standish to Chief Secretary, 23 April 1880, VPRS 3991 Unit 1257 Item 81/5048. Standish found one of the two complaints (Campbell’s) about Fitzpatrick at Lancefield unwarranted, and saw no “cause or justification for official interference”, Memo, Standish to Under Secretary, 19 April 1880, loc. cit.

²²⁶ Fitzpatrick, *RC* Q12879.

²²⁷ Jones, *Short Life*, 105 claimed Ned was “a deadly marksman” but this is based on Ned’s own claims, and signs of target practice around the Stringbark Creek log hut. With small black powder revolvers such as the .31 Colt, both the precision and the “man-stopping power” was unpredictable (Blake, *Eureka Stockade*, 30, cf. 131, 196-7). Ned fired three shots with apparent intent to kill, ceasing only upon Fitzpatrick’s courageous grappling with him, once he realised who Fitzpatrick was.

²²⁸ Steele, *RC* Q9215; Williamson to Green (29 October 1878, VPRS 4965 Unit 5 Item 353), “King [Byrne] said that in place of being shot through the arm, he should be shot through the heart”.

sentences were arguably excessive. Fitzpatrick's vilification was a product of the attempt by the Kellys and some close associates to escape punishment for involvement in the fracas. When this failed, they continued to decry Fitzpatrick as part of a desperate effort to obtain the release of Mrs Kelly, Skillion and Williamson from prison.

Ned's various statements are a series of ever-shifting fabrications with the central theme of being victimised by the inevitable police response to his extensive, ongoing criminal activity, much of which preyed on passing drovers and on other small selectors' livestock and plough horses.²²⁹ He was certainly no Robin Hood or 'social bandit' before the incident.²³⁰ By contrast, this paper has presented a comprehensive reconstruction of Fitzpatrick's testimony from its several partial sources. The amalgamated narrative provides a coherent account of the April incident, with independent corroboration of many key points and timings. The differences in its source iterations are minor and not self-contradictory. As Insp. Winch said to the Commission, "There was a great deal of talk that this business was owing to the misconduct of Fitzpatrick. You will see by [Williamson's affidavit] that that was mere nonsense".²³¹

Since 1878 Fitzpatrick has almost universally been the subject of hostile treatment based on partisan prejudice and selective presentation of the evidence.²³² Certainly his service record sank from March 1879, but there is no reason to extrapolate that deterioration backwards into his successful first year and a half, as many writers have done. There is likewise no excuse for presenting piecemeal excerpts from his depositions interspersed with comments like "extraordinary" and "preposterous" to justify a more favourable image of Ned Kelly.²³³ Similarly, the presentation of pure invention, such as FitzSimons having Fitzpatrick drink himself "into a stupor" after the fracas, in direct contradiction to source evidence, undermines efforts to construct reliable history.²³⁴ Kelly history is riddled with misrepresentations of documents and records that are then recycled as fact.²³⁵ Redeeming the integrity of Fitzpatrick's testimony and of his service record, at

²²⁹ Kelly, *passim*; Doug Morrissey, "Ned Kelly and Horse and Cattle Stealing", *Victorian Historical Journal* 66.1 (1995), esp. 40-2; cf. Fitzpatrick, *RC* Q12888-90; Whelan, Report, 3 November 1880, VPRS 4969 Unit 1 Item 29.

²³⁰ Cf. George Boxhall, *History of the Australian Bushrangers*, 3rd ed. (London: Unwin, 1908), 189, "I have no desire to raise any doubts as to the generosity and benevolence of Robin Hood, but I can find no evidence of any such beneficence on the part of any of the Australian bushrangers".

²³¹ Winch, *RC* Q14296.

²³² Fitzpatrick to Cookson, "*Kelly Gang*", 94 (23 September), the public "listened greedily to any tale at that time, and my position was most unenviable". Kenneally's entire "loaded dice" argument is built on selective evidence.

²³³ Jones, *Short Life*, 98-9; FitzSimons, *Kelly*, 138; cf. Clune, *Kelly Hunters*, 132-4, "fantastic and improbable".

²³⁴ FitzSimons, *Kelly*, 134.

²³⁵ E.g. Corfield's much-cited *Encyclopedia*, 165, states that Fitzpatrick was discharged "as a perjurer and a drunkard", wrongly lending authority to the Kelly's allegations of perjury and drunkenness. As noted, it was rather for "inefficiency and insubordination", with all issues dated after his posting to Sydney.

least through to March 1879, is a key part of setting the record straight. As a historical figure Ned Kelly will likely always occupy a contested ideological space; nonetheless, the maltreatment of Fitzpatrick by so many hands suggests that a rigorous reappraisal of much other Kelly mythology is in order.

ABBREVIATIONS

- O&M* *Ovens and Murray Advertiser* (Beechworth).
RC *Police Commission, Minutes of Evidence taken before the Royal Commission into the Police Force in Victoria, together with Appendices*. Melbourne: Government Printer, 1881.
RC2 *Police Commission, Second Progress Report of the Royal Commission of Enquiry into the Circumstances of the Kelly Outbreak*. Melbourne: Government Printer, 1881.
RCP *Royal Commission on Police, Proceedings of the Commission, Minutes of Evidence, Appendices etc.* Melbourne: Government Printer, 1883.
SLV State Library of Victoria.
VPM Victoria Police Museum.
VPRS *Victorian Public Record Series*, in the Public Records Office Victoria.

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