

## ***Outlawry in Colonial Australia: The Felons Apprehension Acts 1865-1899***

MICHAEL EBURN\*

### **I INTRODUCTION**

In 1865 the legislature in New South Wales introduced the concept of outlawry into Australian law. From a modern lawyer's perspective, such a law, which authorised citizens to kill wanted outlaws on sight, is contrary to what we believe are fundamental tenets of the criminal law. This article reviews the Felons Apprehension Acts 1865-1899 (NSW) as well as equivalent legislation in Victoria and Queensland. It goes on to identify how a person could be outlawed and the legal consequences of outlawry. The process and consequences of outlawry under the Act will be compared to earlier Australian law and the common law of England, to show that the law, although abhorrent today, was not such a radical departure from early Anglo-Australian law.

### **II OUTLAWS IN AUSTRALIA**

When Arthur Phillip arrived with the first fleet the colonists carried with them "...so much of the English law, as is applicable to their own situation and condition in any infant colony..."<sup>1</sup> Although New South Wales was a penal settlement, the colony was a society established and governed by law.<sup>2</sup> Neither the convicts nor the indigenous population<sup>3</sup> were considered outside the law's reach or protection: they were not outlaws.

By 1865, however, the public and legislature believed that outlawry was necessary to counter a law and order crises in the more remote areas of the colony. The activities of bushrangers, that is, gangs and individuals committing crimes in remote areas and enjoying widespread community support, led to demands for the offenders to be placed beyond the protection of the law.<sup>4</sup> On 10 February 1865 a correspondent to the *Sydney Morning Herald* using the name "Justice" asked the question: "Why should not bushrangers guilty of murder and refusing to surrender for trial be tried and

---

\* Senior Lecturer, University of New England, Armidale, NSW 2351. A version of this paper was written during the author's period as a visiting researcher at the University of Hull, Kingston-upon-Hull, UK. The author would like to acknowledge the contributions of Professor Gerry Johnstone and Dr Richard Burchill of the University of Hull, Professor Michael Stuckey of the University of Glamorgan and Associate Professor Mark Lunney of the University of New England for their helpful comments on earlier drafts of this paper.

<sup>1</sup> Blackstone, *Commentaries on the Laws of England* (1769) cited in Castles, *An Australian Legal History* (1982), 11. See also *R v Farrell, Dingle and Woodward* (1831) 1 Legge 5; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>2</sup> Neal, *The rule of law in a penal colony: law and power in early New South Wales* (1991); Paula-Jane Byrne, *Criminal Law and Colonial Subject: New South Wales 1810-1830* (1993).

<sup>3</sup> *R v Murrell* (1836) 1 Legge 72

<sup>4</sup> See for example: *Sydney Morning Herald*, Sydney, Australia (*SMH*) 11 July 1864, 4; 12 July 1864, 4; 2 February 1865, 4; 7 February 1865, 4; 6 March 1865, 4.

convicted ex parte, and then be outlawed?”<sup>5</sup> The Herald’s editorial writer agreed. He said:

The suggestions of our correspondent “Justice” ... deserve the careful consideration of the Cabinet and the Legislature. In our tenderness for the liberty of the subject, we are endangering the life of the subject.<sup>6</sup>

The legislature did take account of this pressure and proceeded to pass “An Act to facilitate the taking or apprehending of persons charged with certain Felonies and punishment of those by whom they are harboured”: the *Felons Apprehension Act 1865*.<sup>7</sup> The Act was introduced to Parliament on the 10<sup>th</sup> March 1865 and finished its passage through the legislature on the 8<sup>th</sup> April 1865.

Outlawry was the solution, but what was the problem?

In 1865, Chief Justice Stephen gave a speech at the start of the Goulburn Circuit Court where he defended the Felons Apprehension Act.<sup>8</sup> He argued that the Act was necessary to remove a defect in the common law. According to the Chief Justice, the law required a person to call upon an offender to surrender before force could be used to make an arrest. The fear was that if a citizen or police officer was required to call upon a notorious bushranger such as Ben Hall or Dan Morgan, the arrestor would lose any element of surprise and invite the bushranger to attack them. If the bushranger did attack then, and only then, could the arrestor use force in self defence. Given that the bushrangers were well armed, this posed a serious risk to anyone who might attempt to capture them. Stephen CJ said:

It is too much to expect, that persons encountering armed ruffians like these should, in addition to the risk of being themselves instantly killed, incur the danger of a charge of felony, for an act righteously meant – but perhaps not in the strictness legally justifiable. The most humane will hardly contend, that the life of the honest man and good subject should be more liable to sacrifice than that of an accused and notorious practised robber; or that a proclaimed and armed felon of that stamp, who has set all law at defiance, may be allowed one more chance of his life, and of escape, by requiring a challenge – and so giving him the opportunity of adding a murder (probably not the first to his list of crimes).<sup>9</sup>

No direct authority was given for the proposition that the common law of 1865 or 1879 required a person to call on a suspected felon to surrender before they could use force, however, in 1825 when acquitting a constable for murder, Forbes CJ said:

And let it be known by all persons in the like situations, that they are not allowed to resort to force unless opposed by force, and then only in proportion to the measure of resistance, or they subject themselves to be called to account which may lead to different results, from that which occurred to you [the defendant] this day.<sup>10</sup>

---

<sup>5</sup> *SMH*, 10 February 1865, 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> Felons Apprehension Act 1865 (NSW) s 10.

<sup>8</sup> (1865) 4 SCR Appendix.

<sup>9</sup> *Ibid* at 2.

<sup>10</sup> *R v Byron* (Supreme Court of NSW, 7 October 1825) Decisions of the Superior Courts of New South Wales, 1788-1899, online: <http://www.law.mq.edu.au/scnsw>.

In 1834 Burton J said that under the law of England everyone was empowered and required to arrest a felon if they were present when the felony was committed but force was only justified where "... the offender flees and cannot be otherwise apprehended".<sup>11</sup> In 1865 Stephen CJ relied on "[a] note on this important question in Blackstone" as his authority for saying that the power of a citizen to arrest a suspected felon was unclear.<sup>12</sup> The response to this legal position was to introduce outlawry so that a home owner, seeing a bushranger, such as Dan Morgan or Ben Hall, could take aim, shoot and kill without first calling upon the outlaw to surrender or waiting for them to commit an offence. The legislature wanted to reward citizens who would remove the threat of bushrangers and wanted to ensure that a person who killed a bushranger was not a "felon in law – patriot in fact – a murderer by statute, but a deliverer in morals."<sup>13</sup>

Dan Morgan<sup>14</sup> was shot and killed before the law could be applied to him. Notwithstanding this, the editor of the *Sydney Morning Herald* thought that the facts surrounding Morgan's death demonstrated why the Felons Apprehension Act was required. Morgan was killed during the hold-up of Peechelba Station in Victoria. At the time he was forcing the owner and three others ahead of him at gun point when a station employee, Quinlan, shot him in the back. The editor of the *Herald* said:

The law just passed for the apprehension of felons was not necessary to authorise the homicide. Morgan was then in the actual commission of crime. His pistol was pointed at the persons driven before him, who were in fearful peril. At any time a person so employed could be shot without challenge. It was because the man was behind him that he was able to take him and because he was unseen that he could fire in safety...

Had Morgan been approaching the house without having committed on the way any act of aggression, the man [Quinlan] could not have fired the gun which brought him down, without being liable to prosecution for murder.<sup>15</sup>

In 1879 when introducing equivalent legislation into Victoria, Dr Madden MP summed up the position this way:

If any person were to venture to shoot one of these men whose lives are now forfeit under the law, without previously calling upon him to surrender, that person would be liable to be placed on his trial for murder, and probably he would be convicted of manslaughter ...

But under this Bill a person may stalk them; he may steal upon them, and shoot them down as he would shoot a kangaroo. Under the law as it stands, for doing that, he would be liable to be tried for murder.<sup>16</sup>

---

<sup>11</sup> Letter from Burton to Burke 25 August 1834 in *Historical Records of Australia Series 1*, vol 17, 524-533 in *Decisions of the Superior Courts of New South Wales, 1788-1899*, *ibid.*

<sup>12</sup> *SMH*, 18 January 1865, 5.

<sup>13</sup> *SMH*, 30 March 1865, 4

<sup>14</sup> It was to facilitate the capture of both Morgan and Hall that the 1865 Act was passed, but in fact both these bushrangers were shot and killed before the Act came into force.

<sup>15</sup> *SMH*, 13 April 1865, 4.

<sup>16</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 1879, 1589 (Dr Madden).

### III THE PROCESS OF OUTLAWRY

In order to put a person outside the law, that is to make them an outlaw, several procedural steps had to be followed. First, an allegation had to be made, on oath before a Justice of the Peace, that the named person had committed an offence punishable by death.<sup>17</sup> Second, the Attorney General would commence proceedings against that individual by way of an information in the Supreme Court.<sup>18</sup> A Supreme Court judge, if satisfied that the offender was at large and would be likely to resist “all attempts by ordinary legal means to apprehend him” could issue a bench warrant “for the apprehension of the person so named.”<sup>19</sup>

The Judge then had to order that a summons be published in the *Government Gazette* and “... at such places and in such newspapers and generally in such manner and form as shall appear to him to be best calculated to bring such summons to the knowledge of the accused.” The summons required the person named to surrender on or before a specified day, at a specified place, to face his trial.<sup>20</sup>

After the date nominated for the person’s surrender, any Judge of the Supreme Court who was satisfied “upon proof thereof by affidavit” that the offender was not in custody, could declare the person outlawed.<sup>21</sup> The Governor was then required to have published “... in the Gazette and in one or more Sydney and one or more country newspapers...” a proclamation to the effect that the person had been outlawed.<sup>22</sup> Once the proclamation had been published, any person who located the outlaw could, if the outlaw was armed or if the person had reasonable grounds to believe the outlaw was armed, “apprehend or take such outlaw alive or dead” without “being accountable for using of any deadly weapon in aid of such apprehension whether its use be preceded by a demand of surrender or not.”<sup>23</sup>

The Act therefore provided a licence to kill the outlaw, the only pre-condition being that the outlaw was at the time armed, or there were reasonable grounds to believe he was armed.<sup>24</sup>

### IV OTHER CONSEQUENCES OF OUTLAWRY

#### Assisting an outlaw is an offence

Once a person was declared an outlaw, any person who assisted the outlaw by harbouring them, providing them with sustenance, or firearms committed:

---

<sup>17</sup> Felons Apprehension Act 1865 (NSW) s 1.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid s 2 (The section did not say who should file the affidavit to prove that the offender was not in custody).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid..

<sup>24</sup> The Act did not say what was to happen if a zealous citizen killed an innocent person supposing them to be an outlaw. During the course of an 1866 parliamentary debate on the Act, some speakers assumed that the citizen would have a defence in that case: *SMH*, 7 September 1866, 6 (Mr Buchanan and Mr Foster). Fortunately there is no evidence that anyone was killed after being mistaken for an outlaw so the issue never arose.

... a felony and being thererof convicted shall forfeit all his lands as well as goods and shall be liable to imprisonment with or without hard labour for such period not exceeding fifteen years.<sup>25</sup>

A person could not argue duress - that that they assisted an outlaw due to fear for their own safety - unless, as soon as possible after the event, they went before a Justice of the Peace or a police officer and gave "... full information respecting such outlaw and made a declaration on oath voluntarily and fully of the facts connected with such compulsion."<sup>26</sup>

### **Extra police powers**

Any Justice of the Peace or police officer could enter, by force if necessary any premises where they had reasonable cause to suspect that an outlaw, or a person summonsed under the Act, was in those premises. Once inside they could arrest any wanted felon as well as anyone they suspected of assisting an outlaw and could seize any firearms.<sup>27</sup>

A police officer in pursuit of an outlaw could demand and take any horse, saddle, firearms, food and ammunition that they required to continue their pursuit.<sup>28</sup> (Interestingly there was debate as to whether this power should be given to all police or only police of or above a certain rank or holding special authority. The President of the Legislative Council was reported as saying that he had heard reports of police acting in dereliction of their duty whilst intoxicated, and he "would not give up his horse to any constable, drunk or sober ... he did not trust the police".<sup>29</sup>)

There was an obligation upon the Colonial Treasurer to pay compensation for the use of any equipment taken by police, but the Act did not explain whether that compensation was to be offered at the time the equipment was seized or some later time. If there was no agreement as to the amount of compensation, it was up to the owner to bring an action in the either the District or Supreme Court to determine the amount of compensation to be paid.<sup>30</sup>

## **V THE FELONS APPREHENSION ACTS 1866-1899 – NEW SOUTH WALES, VICTORIA AND QUEENSLAND.**

As a response to a particular period of lawlessness, the Felons Apprehension Act 1865 (NSW) was to remain in force for a little over one year.<sup>31</sup> The Act's operation was continued for another year in September 1866<sup>32</sup> as there were then two outlaws, Clarke

---

<sup>25</sup> Felons Apprehension Act 1865 (NSW) s 4.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid s 6.

<sup>28</sup> Ibid s 7.

<sup>29</sup> *SMH*, 30 March 1865, 6.

<sup>30</sup> *Felons Apprehension Act 1865* (NSW) s 7.

<sup>31</sup> Ibid s 8.

<sup>32</sup> Felons Apprehension Act Continuation Act 1866 (NSW).

and Connell,<sup>33</sup> who were still at large and who would not be subject to the provisions of the Act should it be allowed to lapse.<sup>34</sup>

In 1866 the Queensland Parliament passed an act that was a “transcript” of the New South Wales Act.<sup>35</sup> It remained in force for one year.<sup>36</sup>

In response to the activities of the Kelly Gang, the Victorian Parliament passed the Felons Apprehension Act 1878 (Vic) which was also based on the NSW Act of 1865. This Act was also to remain in force for one year but its operation was extended “until the end of the next session of Parliament” (that is until 26 June 1880).<sup>37</sup>

Also in response to the activities of the Kelly Gang, the New South Wales Parliament re-enacted the legislation as the Felons Apprehension Act 1879 (NSW). This time there was no “sunset clause” limiting the operations of the Act to a limited time. The 1879 Act also included provisions that would allow a person outlawed in another colony to be outlawed in New South Wales if a Supreme Court judge was satisfied that the person had: been outlawed in another colony; was then, or had been, “at large” in New South Wales; and would probably resist “all attempts by ordinary legal means to apprehend him”.<sup>38</sup>

The 1879 Act was repealed by, and re-enacted as the Felons Apprehension Act 1899 (NSW). This Act remained in force until repealed by the Statute Law Revision Act 1976 (NSW). A provision that was originally intended to operate for just over one year remained on the statute books for nearly 110 years!

## VI WHO WERE THE OUTLAWS?

Ten people were outlawed under the legislation in New South Wales, Victoria and Queensland. In New South Wales they were John Gilbert and John Dunn<sup>39</sup> (who had operated as part of a gang with Ben Hall), Thomas Clarke and Patrick Connell<sup>40</sup> and Jimmy and Jo Governor.<sup>41</sup> No one was outlawed in Queensland.

In Victoria, the members of the Kelly Gang - Ned Kelly, Dan Kelly, Joe Byrne and Steve Hart - were outlawed.<sup>42</sup> Although they committed offences in New South Wales and could have been outlawed under the provisions of the 1879 Act, they were not outlawed in New South Wales. Interestingly enough, the Felons Apprehension Act 1878 (Vic) lapsed when parliament was prorogued on 26 June 1880.<sup>43</sup> The siege at Glenrowan, where Ned Kelly was arrested, and Dan Kelly, Joe Byrne and Steve Hart

---

<sup>33</sup> Clarke and Connell had been outlawed on 31 May 1866. Government of New South Wales, Return of all apprehensions, informations, prosecutions and proceedings under the Felons Apprehension Act, Parliamentary Papers (1868-9) vol A1 681, 684.

<sup>34</sup> *SMH*, 20 September 1866.

<sup>35</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 3 May 1866, 132 (Charles Lilley, Attorney General).

<sup>36</sup> *Alphabetical table of repealed Queensland legislation*, online: [http://www.legislation.qld.gov.au/ANNOTATIONS/REPEALED/Tab1\\_RepAlpha\\_F.pdf](http://www.legislation.qld.gov.au/ANNOTATIONS/REPEALED/Tab1_RepAlpha_F.pdf).

<sup>37</sup> Expiring Laws Continuance Act 1879 (Vic); Proclamation by the Hon George Augustus Constantine, Governor of Victoria, 26 June 1880 in Victoria, *Parliamentary Debates*, 1880.

<sup>38</sup> Felons Apprehension Act 1879 (NSW) s 3.

<sup>39</sup> New South Wales *Government Gazette* (Sydney), 10 May 1865, 1013.

<sup>40</sup> See supra note 33.

<sup>41</sup> New South Wales *Supplement to the Government Gazette* (Sydney), 23 October 1900, 8347.

<sup>42</sup> See New South Wales *Government Gazette* (Sydney) 18 February 1879, 807.

<sup>43</sup> Expiring Laws Continuance Act 1879 (Vic); Proclamation by the Hon George Augustus Constantine, Governor of Victoria, 26 June 1880 in Victoria, *Parliamentary Debates*, 1880.

were killed, occurred on the evening of 28 and the morning of 29 June 1880<sup>44</sup> so, presumably, at the time of their respective arrest and deaths, they were no longer outlaws. It is unlikely however that anyone at the time would have questioned that their deaths would have been justified under the common law on the basis that they were then in the act of committing various offences and/or resisting arrest. The magistrate's inquiry into the death of Jo Byrne received evidence that Byrne had been outlawed. The finding of the inquiry was that "The outlaw Joseph Byrne, whose body was before the Court and in the possession of the police, was shot by them whilst in the execution of their duty."<sup>45</sup> The Magistrate did not appear to address the issue of whether or not the declaration of outlawry remained in force, or whether or not the killing of Byrne was justified because of his outlaw status or on more general principles of law.

Many famous "outlaws" were never outlawed. Frank Gardiner was arrested and sentenced before the 1865 Act. Importantly, two bushrangers who were specifically in mind when the Act was being proposed, Morgan and Hall, were shot and killed before they could be outlawed.<sup>46</sup>

## VII THE LAW WAS NOT UNPRECEDENTED IN ANGLO-AUSTRALIAN LAW

### Early colonial law

Prior to 1865 laws had been passed that would justify the use of force to capture suspected offenders. The Robbers and Housebreakers Ordinance (NSW) was originally passed in 1830 but was renewed on a regular basis<sup>47</sup> and remained in force until 31 December 1853.<sup>48</sup>

---

<sup>44</sup> *The Argus*, Melbourne, Australia, 29 June 1880, 5.

<sup>45</sup> "The Magisterial Inquiry On Byrne", *The Argus*, Melbourne, Australia, 30 June 1880, 6.

<sup>46</sup> The death of Morgan was reported in the *SMH* on the same day as the paper reported that the Felons Apprehension Act 1865 had received Royal Assent: *SMH*, 13 April 1865, 4. A summons was issued calling on Hall, Gilbert and Dunn to surrender by 29 April 1865 (New South Wales *Government Gazette*, Sydney, 18 April 1865, 845; *SMH*, 20 April 1865). Hall was shot and killed on the 5<sup>th</sup> May 1865: White, *History of Australian Bushranging* (1970) vol 2, 117/ National Museum of Australia, *Gilbert-Hall Gang*, online: [http://www.nma.gov.au/exhibitions/outlawed/explore\\_the\\_outlaws/gilbert\\_hall\\_gang](http://www.nma.gov.au/exhibitions/outlawed/explore_the_outlaws/gilbert_hall_gang). Gilbert and Dunn were outlawed on 10 May 1865: New South Wales, *Government Gazette*, Sydney, Australia, 10 May 1865, 1013, the same day that Hall's death was reported in the *SMH*.

<sup>47</sup> Robbers and Housebreakers Act 1832 (NSW); An Act to continue for two Years, an Act of the Governor, with the advice of the Legislative Council, passed in the Eleventh Year of the Reign of His late Majesty, intituled, "An Act to suppress Robbery and Housebreaking, and the harbouring of Robbers and Housebreakers" 1832 (NSW); Robbers and Housebreakers Act 1834 (NSW); An Act further to continue an Act of the Governor with the Advice of the Legislative Council, passed in the Eleventh Year of His late Majesty, intituled, "An Act to suppress Robbery and Housebreaking, and the harbouring of Robbers and Housebreakers" 1834 (NSW); Transported Offenders and Suspected Robbers Apprehension Act 1834 (NSW); Absconding Offenders Act 1836 (NSW); An Act further to continue for a limited time, an Act, intituled "An Act to facilitate the Apprehension of Transported Felons and Offenders illegally at large and of Persons found with Arms and suspect to be Robbers" 1838 (NSW); Offenders Illegally at Large Act 1840 (NSW); Escaped Convicts Act 1842 (NSW); Offenders Unlawfully at Large Act 1844 (NSW); Offenders Illegally at Large Act 1846 (NSW); Offenders Illegally at Large Act 1848 (NSW).

<sup>48</sup> Offenders Illegally at Large Act 1848 (NSW) s 1.

The 1830-1853 legislation provided that anyone could detain a person who they reasonably suspected was a “transported felon unlawfully at large”<sup>49</sup> or who might be reasonably suspected of being an armed robber or armed with intent to commit a robbery,<sup>50</sup> and take them before a Justice of the Peace so that the Justice could enquire into their bona fides. The burden was on the person detained to prove that they were not unlawfully at large or engaged in unlawful activity and they could be detained until they could establish their innocence. A person found in possession of firearms and who could not prove that their possession of firearms was for an innocent purpose was guilty of an offence punishable by imprisonment for up to three years.<sup>51</sup>

As with the Felons Apprehension Acts, the 1830 to 1853 Acts gave wide powers to stop and search. Any constable or free man could stop and search anyone that they reasonably suspected was armed.<sup>52</sup> A Justice could issue a general warrants allowing any constable to enter and search any premises within a district and arrest any person reasonably suspected of being a robber or housebreaker, and seize any firearms that they found.<sup>53</sup>

Also as with the Felons Apprehension Acts, the 1830 to 1853 Acts provided a statutory defence that could be relied upon by any person who had acted pursuant to the legislation. This protection appears to be limited to civil actions but it certainly provided some protection from the “normal” legal consequences that might flow from detaining another citizen, particularly if it turned out that the person detained was in fact innocent.<sup>54</sup>

In 1854 the West Australian legislature passed An ordinance for the Suppression of Violent Crimes committed by Convicts illegally at large 1854 (WA). This Act applied to any Justice, police officer, constable or prison officer who was endeavouring to arrest an armed, escaped convict. In order to rely on the Act, the officer had to identify himself as an officer and scall upon the escapee to surrender. If the convict then failed to surrender and “by threats or gestures g[a]ve reasonable cause to believe that he is about to use such ... [weapons] for the purpose of preventing his apprehension”<sup>55</sup> the officer could use “any weapon, including a firearm” to overpower and arrest him. It was regarded as justifiable homicide should the convict die in the process of being arrested.<sup>56</sup>

These examples show that the colonial legislatures had been willing and able to develop legislative provisions to authorise the use of force to encourage law enforcement officials and citizens to take firm action to apprehend suspected offenders and to help reduce the level of crime. In this context the 1865 Act was not a radical departure from previous law, but a further development of the colonial law.

Cowie, when talking of the Felons Apprehension Acts 1865 (NSW) and 1879 (Vic), says:

---

<sup>49</sup> Robbers and Housebreakers Ordinance 1830 (NSW) s 1. In 1834 this Act was renewed and amended so that its provisions applied to protect a person who attempted to arrest any “offender unlawfully at large”, not just a “transported felon”. Transported Offenders and Suspected Robbers Apprehension Act 1834 (NSW) s 1.

<sup>50</sup> Robbers and Housebreakers Ordinance 1830 (NSW) s 3.

<sup>51</sup> Ibid s 7.

<sup>52</sup> Ibid s 4.

<sup>53</sup> Ibid s 5.

<sup>54</sup> Ibid s 9.

<sup>55</sup> An ordinance for the Suppression of Violent Crimes committed by Convicts illegally at large 1854 (WA) s 5.

<sup>56</sup> Ibid s 6.



...this type of Act had been unused in Britain for many centuries. So it was surprisingly archaic that as recently as the latter half of the 19th century, the Victorian and New South Welsh Governments revived this implacable and obdurate law.<sup>57</sup>

When seen in light of the colonial legislation between 1830 and 1854, the implementation of the Felons Apprehension Act 1865 is not so surprising or archaic.

### The common law

The earlier colonial law does not feature in the debates on the Felons Apprehension Act 1865, instead the parliamentarians and advocates of the law pointed to the common law of outlawry to argue that the new provisions were not unprecedented or foreign to Anglo-Australian law. In 1854, Stephen CJ assumed that it was possible to have a person outlawed according to the English common law<sup>58</sup> but no attempt was made to use the common law to outlaw a person in New South Wales.<sup>59</sup> He was of the view, however, that the 1865 Act was “entirely ... in accordance with the principles of our ancient English law”<sup>60</sup> In Queensland, when introducing their version of the Felons Apprehension Act, the Attorney General said “The Bill... brings up a very old provision of the common law in England, that a man who has one been outlawed does not come within the Queen’s peace...”<sup>61</sup> In the legislative Council the Honourable John Douglas said “I believe this Bill embodies the old principle of English law that those who are declared to be without Her Majesty’s peace can be dealt with summarily.”<sup>62</sup>

At common law, outlawry was a process applied to a person who failed to appear at court when called upon to do so.<sup>63</sup> Under both English common law and the New South Wales Act a potential outlaw had to be given the chance to surrender and steps had to be taken, consistent with the available technology, to notify the wanted person that he was required to surrender himself. At common law this required the Sheriff to demand the person’s appearance at five successive sittings of the County Court.<sup>64</sup> Under the Felons Apprehension Acts the demand had to be made via the newspapers and the Government Gazette.

Under both common law and the New South Wales Act, fatal force could be used to affect the capture of an outlaw, but the tests for when that force could be used where different. Pollock and Maitland argue that under “early law” it was:

---

<sup>57</sup> Cowie, “History in Detail – Outlaws; The Felons Apprehension Act (Act 612)” in *Ned Kell Bushranger* (2002) online: <http://www.bailup.com/outlaws.htm>.

<sup>58</sup> *Ramsay v Mayne* (1854) 2 Legge 72.

<sup>59</sup> The question of whether or not the common law of outlawry had travelled to Australia was not conclusively determined until 1900 when the Supreme Court of NSW held, in *R v Jimmy Governor* (1900) 21 LR (NSW) 278, 287 (per Simpson J) that:

The common law of England in respect of outlawry had no force or effect in this colony: it would have been impossible to have a man declared an outlaw here by the common law process of England.

<sup>60</sup> (1865) 4 SCR Appendix, 1.

<sup>61</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 3 May 1880, 133 (Charles Lilley, Attorney General).

<sup>62</sup> Queensland, *Parliamentary Debates*, Legislative Council, 19 June 1880, 300 (John Douglas, Postmaster-General)

<sup>63</sup> *R v Wilkes* (1770) 4 Burr 2527, 2549.

<sup>64</sup> Bracton, *On the Laws and Customs of England* (Thorne trans, 1968) 353-354; Hale *The History of the Pleas of the Crown* (1736) 194-198; Blackstone, *Commentaries on the Laws of England* (1979 ed) vol 4, 314.

the right and duty of every man to pursue ... [the outlaw], to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a friendless man, "he is a wolf"<sup>65</sup>

By the 18<sup>th</sup> century, however, an outlaw at common law could not be killed on sight or dealt with "summarily".<sup>66</sup> He could only be killed if he was resisting, or fleeing from arrest.<sup>67</sup> In 1769 Blackstone said that the outlaw's life:

... is still under the protection of law, ...; and though antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one who should meet him; because having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him; yet now, to avoid such inhumanity, it is holden that no man is intitled to kill him wantonly or wilfully; but in do doing is guilty of murder, unless in happens in the endeavour to apprehend him.<sup>68</sup>

The colonial Act was clearly intended to restore the "early law"<sup>69</sup> and allow an outlaw to be shot on sight, but it did not allow an outlaw to be lynched if they were taken alive. Cowie, a commentator on the Kelly Gang, says that under the Felons Apprehension Act 1878 (Vic):

Normal rights under the law, including "assumption of innocence", were revoked ... The offenders were legally considered guilty without the usual pre-requisite of a trial, ... the lives of an "outlaw" were considered forfeited, and so once the Act was in force against an individual, killing that person became a "legal" action.<sup>70</sup>

Under the common law, a person who was outlawed for failing to appear to answer an allegation that he was guilty of a felony, stood convicted of that offence. The outlaw could not be killed at will but there was no need to conduct further enquiry into his guilt. The only obligation upon the Court was to enquire of the outlaw whether or not he had anything to say before sentence was passed.<sup>71</sup>

The question of whether or not being outlawed under the provisions of the Felons Apprehension Act 1899 was equivalent to a conviction was considered in *R v Jimmy Governor*.<sup>72</sup> Jimmy Governor had been outlawed on 20 October 1900<sup>73</sup> but was subsequently arrested and charged with murder. At his trial Governor entered pleas of autrefois convict and autrefois attain. It was argued that outlawry under the 1879 Act was equivalent to outlawry under the common law, on the basis that the Act had changed the procedure by which a person was outlawed, but not the legal consequences of being outlawed. It was further argued that as an outlaw stood convicted of the felony for which he was outlawed, Governor, being outlawed, must stand convicted of murder and, having been already convicted could not now be tried for the offence charged. Counsel for Governor conceded that the Court could proceed to pass sentence of death

---

<sup>65</sup> Pollock and Maitland, *The History of English Law Before the time of Edward I* (1968 ed), vol 2, 449.

<sup>66</sup> Blackstone, supra note 64.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid at 314-315.

<sup>69</sup> Pollock and Maitland, supra note 65.

<sup>70</sup> Cowie, supra note 57.

<sup>71</sup> Hale, supra note 64 205; *Halsbury's Laws of England* (1 ed, 1909) vol IX, [830]; Blackstone, above n. 64, 314-315; *R v Wilkes* (1770) 4 Burr 2527.

<sup>72</sup> (1900) 21 LR (NSW) 278.

<sup>73</sup> Cowie, supra note 41.

but he would not be executed as, it was argued, no government would execute a man without giving him the chance to be heard.<sup>74</sup>

In 1770 the idea of executing a man on proof that he had been outlawed did not appear outrageous and “many men who never were tried [were] ... executed upon the outlawry”.<sup>75</sup> In 1900 that result was considered surprising and unacceptable. Stephen J said:

There is no doubt that the law in England appears to be ... that if a person was outlawed, the outlawry was equivalent to a conviction, and punishment might follow whether the man outlawed was innocent of the crime or not. One is startled at the consequences of such a law, when one realises what outlawry is. Outlawry was not punishment for the crime committed, but punishment for the contumacy or rebellion of the subject for not giving himself up to justice when certain proceedings were taken against him, and it does strike one as startling that the punishment for contumacy involved the consequences of conviction, and in the case of murder possibly execution without trial.<sup>76</sup>

There is no evidence in the parliamentary debates that the legislatures gave any thought to what would happen to an outlaw who was taken alive. Notwithstanding this, the Court felt that the Parliament could not have intended that execution without trial “should follow upon outlawry”.<sup>77</sup>

It is of course possible that many of the legislators would, had thought about it, have welcomed a result that an outlaw could be executed without the cost and inconvenience of a trial. Further if the consequences of outlawry under the Felons Apprehension Acts of 1865-1899 had been the same as outlawry at common law, it would have been incumbent upon the Court to ask the prisoner if there was any reason why sentence should not be passed. This would have given the outlaw the opportunity to put any mitigating factors (including an assertion that he was not in fact guilty of the offence charged) or to seek to have the outlawry set aside for procedural defects.<sup>78</sup> It would not be the case, as suggested by counsel, that there would be no opportunity for the outlaw to be heard.<sup>79</sup> In these circumstances, the Executive may have been more willing to execute the outlaw than counsel predicted!

In any event, the Court held that unlike common law, outlawry under the Felons Apprehension Acts was not the equivalent of a conviction. Although an outlaw could be killed by any person relying on the Act, when taken alive they did not stand convicted but had to face their trial and could, of course, enter a defence if they had one. If convicted they faced the full penalty of the law. It so happened that none of the outlaws who did stand trial were able to escape their inevitable punishment and Dunn, Clarke, Kelly and Governor were all hanged.

While it is true that the Felons Apprehension Acts of New South Wales, Queensland and Victoria had serious consequences, and did authorise citizens to “shoot on sight”, it has been shown that the Act was not completely unprecedented in Anglo-Australian law, nor were the consequences exactly as suggested by Cowie.<sup>80</sup> The Act created offences that could be prosecuted, and provided statutory powers that could be exercised when attempting to detain an outlaw, but it did not impact upon how an outlaw was to be dealt with if taken alive. Offenders were not presumed “guilty” and

---

<sup>74</sup> *R v Jimmy Governor* (1900) 21 LR (NSW) 278, 280.

<sup>75</sup> *R v Wilkes* (1770) 4 Burr 2527, 2549.

<sup>76</sup> *R v Jimmy Governor* (1900) 21 LR (NSW) 278, 285.

<sup>77</sup> *Ibid.*

<sup>78</sup> *R v Wilkes* (1770) 4 Burr 2527.

<sup>79</sup> *R v Jimmy Governor* (1900) 21 LR(NSW) 278, 289.

<sup>80</sup> Cowie, *supra* note 41.

their lives were not forfeit. If an outlaw was arrested and disarmed, the Act would provide no warrant for any form of extra judicial execution or lynching.

### VIII OUTLAWS OF MYTH AND LEGEND

The myth of, and stories about, the outlaw are a significant part of Anglo-Australian culture. These traditions have been explored in scholarly works<sup>81</sup> and in public exhibitions<sup>82</sup> but these myths are not necessarily linked to the legal concept of outlawry. It is clear that the social construct of the outlaw is different to the legal concept.

In exploring the outlaw myth, Seal has identified some continuing themes: the outlaw of folklore and myth “robs from the rich to help the poor”; is driven to crime through no fault of his own, usually due to oppression by authorities; must be chivalrous, a “gentleman” robber who treats the poor, the powerless and in particular women with respect and manners; is brave, noble and does not offer unnecessary violence. He is usually to be of greater moral virtue than his pursuers and must die game.<sup>83</sup> Seal says:

These outlaws [of myth] were celebrated because they were seen, rightly or wrongly, to embody a spirit of defiance and protest, a symbolic striking back of the poor and dispossessed against those perceived as their oppressors. The criminality of the outlaw hero has a definite political dimension...<sup>84</sup>

What is missing from this list that defines the “outlaw” of myth is that he must also be an “outlaw” according to law.

The 2003 exhibition at the National Museum of Australia, described as “the first major exhibition to investigate national outlaw legends from a global perspective”<sup>85</sup> identified the following Australian “outlaws”: The Clarke brothers, Frank Gardiner, The Gilbert-Hall Gang, the Governor brothers, the Kelly gang, Dan Morgan, Frank Pearson, Henry Readford, Walyer, Musquito and Frederick Ward.<sup>86</sup> Although these men may have been “outlaws” in a popular sense, supporting themselves by criminal activities, most were not outlaws in the legal sense.

As we have seen, this list of Australian criminals who have been considered worthy of mythologising as “outlaws” in the Robin Hood mould is much larger than the number of offenders who were, in fact, outlawed. As shown in the diagram below, not all “outlaws” of myth were outlaws according to law, but all people who were outlawed according to law have been found suitable subjects for treatment as the outlaw of myth.

---

<sup>81</sup> See for example Seal, *The Outlaw Legend: A Cultural Tradition in Britain, America and Australia* (1996).

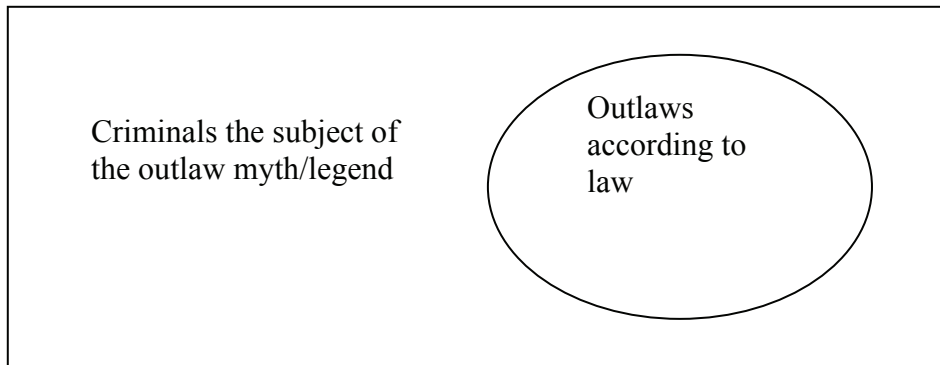
<sup>82</sup> See for example National Museum of Australia, *Outlawed!* (2003) online: <http://www.nma.gov.au/exhibitions/outlawed>.

<sup>83</sup> Seal, *supra* note 81, 4-9.

<sup>84</sup> Seal, *supra* note 81, 199.

<sup>85</sup> *Ibid.*

<sup>86</sup> National Museum of Australia, *Explore the Outlaws* (2003) online: [http://www.nma.gov.au/exhibitions/outlawed/explore\\_the\\_outlaws](http://www.nma.gov.au/exhibitions/outlawed/explore_the_outlaws).



Some of the bushrangers who were outlawed in Australia certainly had an extra, political, element to their crimes. Ned Kelly actively saw himself as seeking political objectives as evidenced by his correspondence to the authorities, such as the famous *Jerilderie* letter.<sup>87</sup> Ben Hall is reported to have turned to bushranging after being wrongly arrested and suffering loss of his property.<sup>88</sup> Many of the bushrangers had strong local support, effectively giving them a power base or constituency that threatened the order and control of the government. Their crimes, at the time, were not just crimes against individuals but could be seen as crimes against authority. The Kellys and Clarkes, for example, killed police who were searching for them. How much this political element, which as Seal has shown is so important for qualifying a person as a mythical “outlaw”, is relevant to the political decision to seek to have a person outlawed according to law, is beyond the scope of this paper. It may show that in these cases there was a common factor between the political decision to outlaw them and the community’s desire to make them the subject of the outlaw myth and legend.

## IX CONCLUSION

In 2000, an English judge said “the medieval concept of outlawry is unacceptable in modern society”<sup>89</sup> and we would consider that a law that allows a person to be killed on sight is repugnant to twenty-first century lawyers.<sup>90</sup> A review of the colonial outlawry legislation has shown that the *Felons Apprehension Acts* were a legislative response to the developments in the common law and were designed to take the law back before the 18<sup>th</sup> century, by restoring the right of citizens to kill the outlaw on sight. Although draconian, the law was not in fact introducing concepts that were totally foreign to English law and it did, to some extent, replicate the procedures of outlawry, although updated to be applicable to the colony in the mid 19<sup>th</sup> century.

As it came to be applied, the law was in fact not as draconian as it could have been. If it had been true that outlawry really did put the outlaw outside the protection of

<sup>87</sup> National Museum of Australia, *The John Hanlon transcription of the “Jerilderie Letter”* online: [http://www.nma.gov.au/exhibitions/outlawed/john\\_hanlon\\_transcription\\_of\\_the\\_jerilderie\\_letter](http://www.nma.gov.au/exhibitions/outlawed/john_hanlon_transcription_of_the_jerilderie_letter).

<sup>88</sup> Clune, *Wild Colonial Boys* (1948)

<sup>89</sup> *Cross v Kirkby* (Unreported, England and Wales Court of Appeal, Civil Division, Judge LJ, 18 February 2000).

<sup>90</sup> But perhaps not to 21<sup>st</sup> century legislators. In 2001 President George W Bush said he wanted Osama Bin Laden “dead or alive”: “Wanted dead or Alive” in *The best of ABC News* (2001) online: [http://abcnews.go.com/sections/us/DailyNews/WTC\\_MAIN010917.html](http://abcnews.go.com/sections/us/DailyNews/WTC_MAIN010917.html).

the law, then outlaws such as Jimmy Governor need not have been tried at all.<sup>91</sup> The fact that he, and others, were given their trial was an acknowledgment that outlawry under the Act, and as it had come to be at common law, had ceased to be a process allowing extra-judicial execution but had become a process designed to punish a person for failing to appear, and to facilitate the capture of the outlaw so that due judicial process could be applied.

---

<sup>91</sup> As noted above, Ned Kelly was no longer an outlaw at the time of his arrest.