Ned Kelly Outlawed: The Victorian *Felons Apprehension Act 1878*

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Australian bushranger Ned Kelly is famously remembered as an outlaw, but few know what the process of outlawry involved or what it meant for those outlawed and any who aided them. This article provides the first contextual study of the Felons Apprehension Act 1878 *(Vic), under which Kelly and his gang were outlawed, complementing the one study of colonial outlawry to date, which focuses on New South Wales. This study is significant because the Kelly gang were the only persons ever outlawed in Victoria. Although the outlawry Act is often represented as a statute hastily adapted from NSW legislation that allowed and encouraged anyone to kill an outlaw on sight with impunity, this is not correct. Outlawry drew on a long common law tradition, but its colonial form was unique in that it did not constitute a criminal conviction. The colonial outlawry Acts imposed stringent conditions on the circumstances under which an outlaw might be killed, the breach of which would constitute murder. They did so because of a deep conviction that the summary slaying of an outlaw was not a furtherance of justice but an act of barbarity.*

Keywords: *Felons Apprehension Act*, outlawry Act, Australian outlawry, Ned Kelly, iron outlaw, outlawry in colonial Australia, colonial outlawry

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The Kelly gang were the only persons ever to be outlawed in Victoria, under the *Felons Apprehension Act 1878* (Vic) [hereafter *Felons Act* (Vic)], often referred to as the outlawry Act.[1] The gang consisted of larrikin stock

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1 Alex C. Castles, *Ned Kelly's Last Days* (Sydney: Allen & Unwin, 2005), 27.

thieves Edward (Ned) and Daniel Kelly, Joe Byrne and Steve Hart. The four took to the bush after Ned Kelly shot and wounded a police officer in April 1878 during the attempted arrest of Daniel, who was wanted on a warrant for horse theft. The *Felons Act* (Vic) was passed on 1 November 1878, within a week of the gang's 26 October killing of three policemen who were searching for the Kelly brothers at Stringybark Creek. As legal scholar Michael Eburn describes: 'outlawry was a process applied to a person who failed to appear at court when called upon to do so … 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'.[2] In contrast, the vast popular and historical literature on the Kelly gang has almost universally taken section 3 of the *Felons Act* (Vic), which provided for the apprehension or taking of an outlaw 'alive or dead', as a blanket licence to kill an outlaw on sight, without any demand to surrender and without having to account for the outlaw's death. In this conception, an outlaw was beyond the normal protection of the law and regarded as legally guilty without the usual process of a trial.[3] Yet, as will be seen, there was a radical difference between outlawry for a capital crime under the colonial Acts, which sought to capture the outlaw for trial, and outlawry under the common law of England, which amounted to conviction.[4] This article corrects these historical misunderstandings, situates the Victorian outlawry Act in its historical context and examines its application in the pursuit of the Kelly gang.

2 Michael Eburn, 'Outlawry in Colonial Australia: The Felons Apprehension Acts 1865-1899', *Australian and New Zealand Law and History E-Journal* (2005): 88.

3 J .J. Kenneally, *The Complete Inner History of the Kelly Gang and Their Pursuers* (Melbourne: Ruskin, 2nd edition, 1929), 78; Max Brown, *Australian Son* (Melbourne: Georgian House, 1948), 79; Frank Clune, *The Kelly Hunters: The Authentic, Impartial History of the Life and Times of Edward Kelly, the Ironclad Outlaw* (Sydney: Angus and Robertson, 1954), 176; Brian Carroll, *Ned Kelly: Bushranger* (Sydney: Lansdowne, 1976), 76; John McQuilton, *The Kelly Outbreak 1788–1880: The Geographical Dimension of Social Banditry* (Melbourne: Melbourne University Press, 1979), 102; John Molony, *I Am Ned Kelly* (Melbourne: Allen Lane, 1980), 133; Keith McMenomy, *Ned Kelly: The Authentic Illustrated History* (Melbourne: Hardie Grant Books, 2nd edition, 2001), 107; Nikki Cowie, 'The Felon's Apprehension Act (Act 612)', Bailup.com, 5 July 2002, http://www.bailup.com/outlaws.htm (last accessed 4 March 2018); Peter FitzSimons, *Ned Kelly: The Story of Australia's Most Notorious Legend* (Sydney: Heinemann, 2013), 243.

4 *Felons Apprehension Act 1865* (NSW), s. 1, and *Felons Apprehension Act 1878* (Vic), s. 2, 'to abide his trial for the crime of which he stands accused'. Castles, *Ned Kelly's Last Days*, 92.

The Historical Origins of Outlawry

Social anthropologist Paul Dresch observed that 'justice may be done within a community or by exclusion from it'.[5] In the ancient world, part of what would later come to be understood as outlawry was related to the concept of exile. The modern conception of outlawry is essentially medieval in origin, reaching back to at least the tenth century.[6] For Pollock and Maitland, in their 1895 *History of English Law*, 'outlawry, at first a declaration of war by the commonwealth against an offending member, became a regular means of compelling submission to the authority of the courts, as in form it continued so to be down to modern times'.[7] They insisted that the older time, in which 'an outlaw might be killed with impunity', had passed.[8] Yet the conception of an outlaw as a 'wild beast' or 'a wolf' was retained: '*Cuput gerat lupinurn* [let his be a wolf's head] — in these words the courts decreed outlawry'.[9] Dresch explains that 'already by the thirteenth century, outlaws could not simply be killed on sight. If they resisted [capture], they could be killed by anyone; if they did not … they were for the king or his officers to deal with, albeit without trial, and for others to kill them was almost everywhere an offence against the king'.[10]

In one of the few scholarly studies of outlawry in Australia, Michael Eburn posited that, under 'early law' as described by Pollock and Maitland, 'it was "the right and duty of every man to pursue [the outlaw] … to hunt him down like a wild beast and slay him"'.[11] Importantly, what Eburn termed 'early law' here refers to pre-thirteenth-century law, a time when,

5 Paul Dresch, 'Outlawry, Exile and Banishment: Reflections on Community and Justice', in *Legalism: Community and Justice*, ed. Fernanda Pirie and Judith Scheele (Oxford: OUP, 2014), 97.

6 Dresch, 'Outlawry, Exile and Banishment', 106, 119, referencing *Felony and Misdemeanor: A Study in the History of English Criminal Procedure*, volume I, ed. Julius Goebel Jr (New York: Commonwealth Fund, 1937).

7 Frederick Pollock and Frederick W. Maitland, *The History of English Law Before the Time of Edward I* (Cambridge: Cambridge University Press, 2nd edition, 1898), volume 1, 54.

8 Pollock and Maitland, *History of English Law*, volume 1, 58.

9 Pollock and Maitland, *History of English Law*, volume 2, 449.

10 Dresch, 'Outlawry, Exile and Banishment', 108-9.

11 Eburn, 'Outlawry in Colonial Australia', 88-89, citing Pollock and Maitland, *History of English Law*, volume 2, 449.

according to Pollock and Maitland, 'law was weak'.[12] Eburn noted that, under eighteenth-century English common law, an outlaw 'could not be killed on sight or dealt with "summarily". He could only be killed if he was resisting, or fleeing from arrest'.[13] William Blackstone's 1769 *Commentary on the Laws of England* affirmed that an outlaw's life 'is still under the protection of law [and] to avoid such inhumanity [as anciently applied when he might be killed by anyone], it is holden that no man is intitled to kill him wantonly or wilfully; but in so doing is guilty of murder, unless it happens in the endeavour to apprehend him'.[14] Eburn thus went too far in holding that the *Felons Apprehension Act 1865* (NSW) [hereafter *Felons Act* (NSW)] was 'clearly intended to restore the "early law" and allow an outlaw to be shot on sight', regardless that it did not allow an outlaw to be lynched if he was taken alive.[15] Both the colonial New South Wales and Victorian statutes prescribed strict conditions under which an outlaw may be killed.[16] As will be seen, these constitute a clarification of Blackstone's understanding of 'wilfully' killing, rather than the restoration of an early, pre-thirteenth-century law, as presented by Pollock and Maitland, in which an outlaw could be killed summarily.

The First Australian Outlawry Act, New South Wales, 1865

The *Felons Act* (NSW), on which the later Victorian Act was modelled, was introduced in response to a prolonged epidemic of bushranging.[17] Beginning with the Gardiner gang in NSW in 1861, bushranger gangs presented a new challenge to law enforcement: 'not only have these robbers remained long at large, being harboured by many persons, but … they have murdered officers of justice sent for their pursuit, and now are associated together in gangs mounted and armed, and prepared therefore

12 Pollock and Maitland, *History of English Law*, volume 2, 449.

13 Eburn, 'Outlawry in Colonial Australia', 89.

14 William Blackstone, *Commentary on the Laws of England,* volume 4 (Chicago: University of Chicago Press, 1979), 314-15.

15 Eburn, 'Outlawry in Colonial Australia', 89.

16 *Felons Apprehension Act 1865* (NSW), s. 2; *Felons Apprehension Act 1878* (Vic), s. 3 is identical.

17 Frank Clune, *Wild Colonial Boys* (Sydney: Angus & Robertson, 1948), 615; New South Wales Supreme Court, *Reports of Cases Argued and Determined in the Supreme Court of New South Wales,* volume 4, Appendix. Sydney: Maxwell, 1865 [hereafter (1865) 4 SCR Appendix], 1.

to resist all opposers'.[18] The *Felons Act* (NSW) allowed that, 'after [due proclamation of outlawry], the outlaw may at any time – either by a constable or a private individual, and either with or without demand to surrender – provided he be armed or reasonably suspected of being armed, be shot dead'.[19] This contrasted markedly with the common law requirement that no more than reasonable force could be used in the apprehension of felons, 'traditionally interpreted as requiring warning or challenge before the use of force'.[20] Although Eburn found no direct authority that the common law of 1865 required a call to surrender before the use of force, he observed that, in 1825, Forbes CJ, of the NSW Supreme Court, held that persons including officers of the law 'are not allowed to resort to force unless opposed by force, and then only in proportion to the measure of resistance'.[21] He noted that '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"'.[22] The emergence of armed gangs gave impetus to more stringent measures intended to combat bushranging and bring felons to justice.

In an address on 24 April 1865, some two weeks after the passage of the *Felons Act* (NSW), Chief Justice Alfred Stephen 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 [i.e. of murder], for an act righteously meant – but perhaps not in strictness legally justifiable. The most humane will hardly contend, that … a proclaimed and armed felon of that stamp, who has set

18 (1865) 4 SCR Appendix, 6 (Gardiner); 2 (gangs).

19 (1865) 4 SCR Appendix, 2. See *Felons Apprehension Act 1865* (NSW), s. 2; ditto, *Felons Apprehension Act 1878* (Vic), s. 3.

20 Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Sydney: Federation Press, 2002), 205.

21 Eburn, 'Outlawry in Colonial Australia', 81; *R v Byron* (Supreme Court of NSW, 7 October 1825).

22 Eburn, 'Outlawry in Colonial Australia', 82. Eburn noted that *An Ordinance for the Suppression of Violent Crimes Committed by Convicts Illegally at Large 1854* (WA), s. 5, required an officer to identify himself as such and to call upon the escapee to surrender; and that he could only use 'any weapon, including a firearm' to effect arrest if the escapee gave 'reasonable cause to believe that he is about to use [weapons] for the purpose of preventing his apprehension': 'Outlawry in Colonial Australia', 87.

all law at defiance, may be allowed one more chance of his life, and of escape, by requiring a challenge'.[23] The question of a call to surrender was a key issue that the Act was designed to address. Two years before the NSW Act was introduced, Stephen CJ had proposed that 'any Consolidated Statute in this Colony ought to confer the fullest protection on all persons, acting bona fide in such cases – whether officers of police or not'.[24] The 1865 Act afforded this protection to those seen to be acting in the interests of the law.

For NSW colonial lawmakers, the harbouring of those who had committed a capital felony was of equal, and perhaps greater, concern. In 1863, Stephen CJ had urged, in phrasing similar to that subsequently incorporated in section 4 of the *Felons Act* (NSW), that it 'be made an offence, severely punishable, knowingly to harbour, relieve, or in any manner assist, any such person'.[25] For Stephen CJ, 'the harbouring clauses [were] the most important portion, probably, of the measure'.[26] He explained: 'Those robbers traverse … an extent of country nearly as large as that of Ireland … thickly wooded in most parts, and of a very broken surface in many others … throughout every portion of which the latter had friends, ready to assist them in every way'. Typically, harbourers were outliers descended from or related to ex-convicts who were willing to aid relatives and others on the run to elude the police by acting as 'bush telegraphs' for a share of their ill-gotten gains.[27] Under the Act, any harbourer, 'besides forfeiting all his property, may be sentenced to hard labour for fifteen years … and, by the aid of upright and intelligent juries … we may hope that the great scandal and reproach to these districts … will at length be wiped away'.[28]

To Stephen CJ, the *Felons Act* (NSW), which he largely drafted, was 'a measure as just and (in the true sense of the word) merciful in its

23 (1865) 4 SCR Appendix, 2.

24 Stephen, letter, September 1863, point 6; published in *Sydney Morning Herald*, 18 January 1865, 5.

25 Stephen, letter, September 1863, point 5; published in *Sydney Morning Herald*, 18 January 1865, 5.

26 (1865) 4 SCR Appendix, 3.

27 George Boxall, *The Story of the Australian Bushrangers* (London: Swan Sonnenschein, 1899), 188, 190.

28 (1865) 4 SCR Appendix, 3.

provisions, as these are likely to be beneficial to the community' and 'entirely … in accordance with the principles of our ancient English law'.[29] However, crucially, as he made clear, 'It is evidently not meant by this, that the outlaw is needlessly and wantonly to be killed; for the words are, "may be taken alive or dead"'.[30] To Stephen CJ, the Act was also more 'careful of the accused's safety' than is English law: he does not stand already convicted of the charge for which he is outlawed; he has 'ample means of knowledge' with time to surrender before outlawry; and 'if he be not armed, and so may be approached without danger to the taker's life, the colonial outlaw is (as to apprehension) on the footing of any other indicted person'.[31] This affirms that the criminal courts have the ultimate authority, and state-sanctioned violence is to be used only if the accused is not otherwise able to be brought to justice. For Stephen CJ, the intent of the Act rejected the 'barbarity' of the law of England, when an outlaw 'might be killed by anyone … without pretence of the furtherance of justice'.[32] It became law on 8 April 1865.

Introduction of the Victorian *Felons Apprehension Act 1878*

Following calls in the press for urgent action against Ned and Dan Kelly and their as yet unidentified accomplices for the Stringybark Creek killings, widespread consternation led to demands for those involved to be outlawed by a process similar to that adopted in NSW in 1865, in that colony's response to ongoing outrages by bushrangers Ben Hall and Dan Morgan. As documented in *Hansard*, Victorian Premier Graham Berry told the Legislative Assembly on 30 October 1878 that he had that morning suggested to Chief Commissioner of Police Frederick Standish 'that a law should be enacted similar to that in force in New South Wales when bushranging was rife there, outlawing the bushrangers, and making it penal on any one to harbour or assist them'. Standish had then 'perused the Sydney (now expired) Statute', thought its provisions 'all that could be desired' and advised that the necessary amendments were being prepared, 'should the Government carry out their intention of enacting a similar measure without delay'.[33] Berry further said that, 'If the Bill were

29 (1865) 4 SCR Appendix, 1; 2.

30 (1865) 4 SCR Appendix, 2.

31 (1865) 4 SCR Appendix, 3.

32 (1865) 4 SCR Appendix, 3.

33 Parliamentary debates (Hansard), Victoria [hereafter *Hansard*], 30 October 1878, 1562.

ready that afternoon, the House would be asked to assent not only to its introduction, but also to the suspension of the standing orders to enable the measure to be passed through all its stages', which duly occurred.

During debate of the Bill in the Assembly, Attorney-General Sir Bryan O'Loghlen argued: 'The haunt of the ruffians who murdered three police officers a day or two ago is a small district of Victoria, but it is mountainous, rugged, inaccessible, and thinly populated, and I don't think the Government would be justified in neglecting any conceivable means of putting an end to the outrages which we have to deplore'.[34] In urging the Bill's passage, O'Loghlen said that a NSW Supreme Court judge had told him that, before NSW had passed a similar law, 'it was found impossible to cope in that colony with those who committed acts of the kind recently perpetrated here [in Victoria], but in a year after it was passed such crimes were so repressed that they never got ahead again'.[35] Member of the Legislative Assembly Dr Madden noted that, 'The distinction [between the law as it exists at present, and the law as it will be on the passage of this Bill] is this: If any person were to venture to shoot one of those 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'.[36] This was precisely the issue that the *Felons Act* (NSW) had been drafted to address, and the effectiveness of the measure there suggested it as a solution to the later parallel situation of a bushranger menace in Victoria.

The next day, the Bill was introduced to the Victorian Legislative Council by Henry Cuthbert. Cuthbert has been slated by historians sympathetic to the Kellys for saying:

> The Bill is framed for the purpose of enabling the ends of justice to be carried into effect against a gang of ruffians that have committed grave and serious outrages during the last few days … We are always very lenient in our endeavours to assume that a person is not guilty until he be convicted … But sometimes occasions arise – and the outrages lately committed form one – in which we may fairly assume from the

34 *Hansard*, 30 October 1878, 1588.

35 *Hansard*, 30 October 1878, 1592.

36 *Hansard*, 30 October 1878, 1589.

> facts revealed that the accused is guilty, and we may come to that conclusion even before conviction.[37]

Cuthbert was not saying that the outlaws would stand convicted under the Act. He was saying that the known facts of the killings, from Stringybark Creek survivor Constable McIntyre, would inevitably lead to conviction and that therefore the extreme nature of the legislation was justified. Cuthbert conceded: 'It may be said that it is a blot on our legislation to have such a penal enactment as this on our statute-book; but it is only a temporary measure, and I think honorable members will agree with me in the opinion that it is necessary to have such a measure to stamp out the iniquity which has disgraced the colony'.[38]

Kelly biographer Ian Jones was correct to term the *Felons Act* (Vic) 'draconian'.[39] However, this says no more than was evident at the introduction of the Bill, when Attorney-General O'Loghlen said: 'the House will perceive that the Bill is a very stringent one, but it is necessary that it should be so'.[40] It was clear in its title and preamble that its intent was 'to facilitate the taking or apprehending of persons … and the punishment of those by whom they are harboured', not to outlaw them for summary execution. The press typically approved the measure.[41] The Bill became law on 1 November 1878. From the first, the *Felons Act* (Vic) was intended as a temporary emergency measure with effect only until 'the next Session of Parliament' was prorogued, by which time it was hoped that the Kelly gang would have been brought to justice.[42]

37 *Hansard*, 31 October 1878, 1593. Cowie, in 'The Felons Apprehension Act (Act 612)', bolded Cuthbert's last sentence in the passage quoted here and incorrectly held that 'the Act was a reversal of the assumption of innocence for the outlaws'. Cf. Molony, I A*m Ned Kelly,* 134; FitzSimons, *Ned Kelly: The Story of Australia's Most Notorious Legend,* 218.

38 *Hansard*, 31 October 1878, 1594.

39 Ian Jones, *Ned Kelly: A Short Life* (Sydney: Hachette, 2008), 197.

40 *Hansard*, 30 October 1878, 1588.

41 *Ovens and Murray Advertiser* (Beechworth, Vic), 7 January 1879, 2: 'extreme cases demand extreme measures'.

42 *Felons Apprehension Act 1878* (Vic), s. 10. Prorogation is 'the process where the Governor issues a proclamation ending the current session of the Parliament': *Victorian Parliamentary Fact Sheet No. 4*, https://www.parliament.vic.gov.au/archive/Assembly/FactSheet4/facts4A.html (last accessed 9 January 2019).

Process of Outlawry under the *Felons Act* (Vic)

The following summarises the Act's clearly defined steps and provisions.[43] It provided that any judge of the Supreme Court, if satisfied that a person who was accused on oath of a capital offence would 'probably resist all attempts by the ordinary legal means to apprehend him', could issue a bench warrant for his arrest. A summons would then be published in the *Government Gazette* 'and in such newspapers … best calculated to bring such summons to the knowledge of the accused', requiring the accused 'to surrender himself on or before a day and at a place specified to abide his trial' (s. 2). If the accused failed to surrender, he was liable to be officially proclaimed an outlaw. If an outlaw then 'be found at large armed or there being reasonable ground to believe that he is armed it shall be lawful for any of Her Majesty's subjects, whether a constable or not and without being accountable for the use of any deadly weapon in aid of such apprehension whether its use be preceded by a demand of surrender or not to apprehend or take such outlaw alive or dead' (s. 3).

The Act also provided that any person convicted of harbouring or giving any aid to a proclaimed outlaw, or of giving him 'information tending or with intent to facilitate the commission by him of further crime or to enable him to escape from justice', or who withheld information from, or gave false information to, the police concerning an outlaw was liable to fifteen years' imprisonment 'with or without hard labor'. There was a safeguard in that any person compelled to render aid could defend himself by making a sworn declaration of the facts 'as soon as possible afterwards' (s. 5). Any justice of the peace or police officer was authorised to demand entry and, if necessary, to break and enter any premises in which he had reason to suspect outlaws were harboured (s. 7). The police were authorised to commandeer 'any horses not being in actual employment on the road' and any arms, forage, food or equipment which they might require for the purposes of the pursuit, with compensation paid by agreement or, if disputed, by determination of the Supreme Court (s. 8). Finally, no sale or transfer of land or goods by a person sought under warrant for outlawry would be valid (s. 9). The Act was limited in its application 'until the end of the next Session of Parliament'.

43 *Felons Apprehension Act 1878* (Vic), no. 612. Supplement to the *Government Gazette*, 1 November 1878.

In accordance with the Act, notices were placed in the *Government Gazette* and ten designated newspapers requiring Daniel and Edward Kelly, and two others physically described 'whose name is unknown', to surrender at Mansfield by 12 November 1878, 'to abide … trial for the … crime of which you stand accused'.[44] The Mansfield Court House was open from 9am to 4pm: 'the men … did not surrender' and were proclaimed outlawed on 16 November.[45]

Provision of the *Felons Act* (Vic) for the Killing of an Outlaw

It is widely held in the Kelly literature, and was at the time, that, as in English common law, an outlaw could be killed on sight without any qualifying criteria. This mistaken view results from both a cursory reading of the *Felons Act* (Vic) and excessive reliance on newspaper commentary and speeches in support of it. For example, the *Ballarat Courier* wrote that the Act 'renders it lawful for any peaceful citizen encountering one of [the outlaws] to shoot him down like a beast of prey'.[46] The Beechworth *Ovens and Murray Advertiser*, which consistently railed against the Kellys and their associates through all phases of the Kelly outbreak, trumpeted that the Act 'places Ned Kelly and his comrades altogether outside the pale of humanity, and makes them animals to be got rid of by any means, fair or foul'.[47] In Melbourne, *The Age* declared that 'the Kelly gang are now outlaws by act of Parliament, and may be shot down whenever and wherever found within the limits of the colony'.[48] Such generalisations have been uncritically quoted by later writers as proof of the harshness of the Act.[49] In Parliament, Henry Cuthbert similarly generalised that, after being declared an outlaw, 'any person will be at liberty to follow and pursue the outlaw, and take him alive or dead'.[50] Dr Madden has been selectively quoted as urging that, under the Bill, a person 'may stalk [the

44 *Argus* (Melbourne), 16 November 1878, 8; sample government advertisement, Public Records Office of Victoria (PROV), Victorian Public Record Series (VPRS) 4969, Unit 1, Item 61.

45 Pewtress, note, 12 November 1878, PROV, VPRS 4969, Unit 1, Item 61; *Government Gazette*, Supplement, 16 November 1878, 2927-28.

46 *Ballarat Courier*, 2 November 1878, 2.

47 *Ovens and Murray Advertiser* (Beechworth, Vic), 16 November 1878, 4.

48 *The Age* (Melbourne), 16 November 1878, 5.

49 See fn. 3 for examples.

50 *Hansard*, 31 October 1878, 1593.

outlaws]; he may steal upon them, and shoot them down as he would shoot kangaroo', despite his subsequent clarification that 'the meaning of the clause was that if any person had reason to believe that a man who had been proclaimed an outlaw was armed he could steal upon him and shoot him, without previously calling upon him to surrender. That could not be done under the law as it was at present'.[51]

Even summaries by knowledgeable people of the day tend towards unqualified sensationalism by omitting mention of the strict conditions under which an outlaw might legally be killed. G. W. Hall's February 1879 *Outlaws of the Wombat Ranges* said that 'the Government had prepared, and passed quickly through all its stages, an Outlawry Bill, under the provisions of which an outlaw might be taken dead or alive, provided he failed to surrender to take his trial after due notice by proclamation'.[52] C. H. Chomley, nephew of Crown prosecutor Arthur Chomley, borrowed closely from Hall's paragraph in his own Kelly narrative of 1900, again misrepresenting the legislation.[53] Against these inaccurate generalisations, Ian Jones has noted that 'the fine print offered a member of the Kelly Gang a slightly better deal than is sometimes claimed. He could be killed without challenge, "if … found at large armed or there being reasonable ground to believe that he is armed"'.[54] The Act was conditional: police or citizens 'could lawfully kill [an outlaw] in certain circumstances'.[55] Colonial outlawry sought to bring the outlaw to trial at law. The very expression 'alive or dead' implied that the object was justice by trial if possible, not summary execution, precisely as Stephen CJ had expounded in NSW in 1865.[56] As Member of the Legislative Assembly Charles Duffy asked in debating the Bill, 'What would the civilized world think if a law was passed condemning the men to be shot unheard?'.[57]

51 *Hansard*, 30 October 1878, 1589, 1591. For selective quotation, see, for example, Cowie, 'The Felon's Apprehension Act (Act 612)'.

52 G. W. Hall, *The Kelly Gang, or The Outlaws of the Wombat Ranges* (Mansfield: G. W. Hall, 1879), 88-89.

53 C. H. Chomley, *The True Story of the Kelly Gang of Bushrangers* (Melbourne: Pater & Co., 1900), 40.

54 Jones, *Ned Kelly: A Short Life*, 197.

55 Ian MacFarlane, *The Kelly Gang Unmasked* (Melbourne: Oxford University Press, 2012), 81.

56 (1865) 4 SCR Appendix, 2.

57 *Hansard*, 30 October 1878, 1591.

Legal discussions support Duffy's moral perspective. Joseph Gabbett's *Treatise on the Criminal Law* (1835) stipulated that 'a mistake in point of law is in criminal cases no defence; and therefore if a man should kill a person excommunicated or outlawed, conceiving that he had a right to kill him, whenever he met him, this is murder'.[58] This sentiment accorded with the intent of the original *Felons Act* (NSW), which was examined in an appeal to the Full Court of the Supreme Court of NSW in *R v Jimmy Governor* (1900). It was this case that conclusively determined 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'.[59] In that case, Cohen J affirmed that 'the only outlawry we have in this colony is the outlawry under this statute'.[60] As Justice Matthew Henry Stephen (the son of Chief Justice Alfred Stephen) described it: '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'.[61] He stated that, 'if a person was outlawed [under the law of England], the outlawry was equivalent to a conviction, and punishment might follow whether the man outlawed was innocent of the crime or not'.[62] By contrast, the NSW Legislature 'never intended that [an outlaw] should be looked upon as convicted … but that the conviction contemplated was conviction by a jury, not by outlawry … The Act was passed for … the apprehension of bushrangers and those who harboured them – and not for a purpose which involved the incidents of outlawry, amounting to a conviction'.[63] Simpson J said that the Act 'intended to introduce into the colony a system for the apprehension of certain offences quite different to that of common law ... The very object of issuing the [bench] warrant was to bring the person to trial … [The] intention [was] to constitute a man under certain circumstances a statutory outlaw,

58 Joseph Gabbett, *A Treatise on the Criminal Law*, volume 1 (Dublin: John Cumming, 1835), 13.

59 Simpson J, in *R v Jimmy Governor* (1900) 21 LR (NSW) 278, 287; Eburn, 'Outlawry in Colonial Australia', fn. 59.

60 *R v Jimmy Governor* (1900) 21 LR (NSW), 289.

61 *R v Jimmy Governor* (1900) 21 LR (NSW), 285.

62 *R v Jimmy Governor* (1900) 21 LR (NSW), 285.

63 *R v Jimmy Governor* (1900) 21 LR (NSW), 286.

in order that he might be apprehended by any [person], without the risk of prosecution'.[64]

Consistent with the above, nothing in the NSW outlawry Act or the later Victorian Act gave any warrant for the extrajudicial execution of a captured outlaw.[65] This same understanding was clear to a writer at Melbourne newspaper *The Herald* upon the capture of Ned Kelly in Victoria on 28 June 1880, when his status as outlaw was then unclear to many. *The Herald* astutely noted, after Kelly's capture, that 'A widespread impression prevails that Kelly, being an outlaw, can … be summarily executed … This impression is incorrect. It is stated on the best authority that being now in legal custody, he is under the protection of the law, which must be precisely carried out … He will … have to be brought before a magisterial bench and committed for his trial before a jury'.[66] The law was not as draconian as it could have been had it allowed extrajudicial execution of an outlaw.[67]

The Offence of Harbouring or Aiding an Outlaw under the *Felons Act* (Vic)

In the Kelly literature, section 5 of the *Felons Act* (Vic), or the harbouring section, is its most controversial provision. For Jones, it was, 'as [the first pro-Kelly biographer] J. J. Kenneally put it, "a declaration of war"'.[68] It provided that, if 'any person shall voluntarily and knowingly' shelter or assist a proclaimed outlaw in any way, or give 'to him or any of his accomplices information tending or with intent to facilitate the commission by him of further crime, or to enable him to escape from justice, or shall withhold information or give false information concerning such outlaw from or to any officer of police or constable in quest of such outlaw, the person so offending shall be guilty of felony' and, if convicted, 'shall be liable to imprisonment, with or without hard labour, for such period not exceeding 15 years'. No defence of compulsion would be valid

64 *R v Jimmy Governor* (1900) 21 LR (NSW), 287-88.

65 Eburn, 'Outlawry in Colonial Australia', 90-91.

66 'Ned Kelly's Trial', *The Herald* (Melbourne), 30 June 1880, 3.

67 Eburn, 'Outlawry in Colonial Australia', 92.

68 Jones, *Ned Kelly: A Short Life*, 197; Kenneally, *The Complete Inner History of the Kelly Gang*, 78. For a representative chronological list of popular works (all broadly sympathetic to Kelly), see fn 3.

'unless he shall as soon as possible afterwards have gone before a justice of the peace or some officer of the police force' and given full information as to the circumstances. As the Attorney-General stated at the time, all this was intentionally a 'very stringent provision', and any who gave aid risked weighty punishment.[69]

Shortly after the enactment of the earlier *Felons Act* (NSW), Stephen CJ had reflected, 'It has long been obvious … that the [bushrangers' outrages] could not have continued unchecked … unless these men received extensive and ready assistance, by shelter and information, calculated to enable them to elude capture, and thus also to commit further crimes. [This] Bench, therefore, [recommended] enhancements of a comprehensive and more stringent character, against the harbourers and abettors of bushrangers; and to this, probably, in a greater or lesser degree, the late statute known as the Felons Apprehension Act is owing'.[70] Similar concerns arose in Victoria.

In supporting the Victorian Bill, Member of the Legislative Assembly Angus Mackay asserted that it was 'required owing to the fact that in the Mansfield district there are a certain small number of settlers who sympathize with the ruffians who have committed the murders. The Government, in my opinion, are justified in taking this extreme course in the best interests of humanity'.[71] The *Ovens and Murray Advertiser* promptly urged that this provision 'should be enforced to the letter, and if it be so, if the police with respect of persons follow out its provisions, long time should not elapse ere the cowardly murderers are brought to that punishment their horrible crimes deserves'.[72] Yet, the *Felons Act* (Vic) was not as punitive towards abettors as its NSW predecessor. Under section 4 of the *Felons Act* (NSW), a person convicted under its otherwise identically worded provision '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'. Section 5 of the *Felons Act* (Vic) omitted the property forfeit.

69 Sir Bryan O'Loghlen, *Hansard*, 30 October 1878, 1588.

70 (1865) 4 SCR Appendix, 1.

71 *Hansard*, 30 October 1878, 1590.

72 *Ovens and Murray Advertiser* (Beechworth, Vic), 16 November 1878, 4.

Sympathisers Remanded under the *Felons Act* (Vic)

In the Kelly literature, sympathisers are broadly understood to be those who aided and abetted the gang during their outlawry or who expressed sympathy by a wilful refusal to supply information about them to the authorities that might facilitate their arrest. The number of sympathisers has been greatly exaggerated by Kelly enthusiasts.[73] The highest estimate of the outlaws' 'friends' in any source was 300, made in December 1878.[74] Police Magistrate Wyatt's tally of seventy-seven Kelly relatives spread from Wallan in Victoria to NSW is not far off Superintendent Sadleir's estimate of 'a hundred … heads of families ready to supply' the gang with provisions.[75] Yet, those who actively assisted the gang to evade the police or by disrupting the Kelly hunt were far fewer. In December 1878, senior police met to identify the core sympathisers in each of their districts for prosecution under the Act.[76] As John McQuilton summarised it, 'on 2 January 1879 warrants were sworn out and over 30 men arrested. Of these, 23 were detained in police custody. Some were released [within a few weeks, with nearly a third held for five to seven weeks], but a core group of [nine] men were remanded week after week' for almost three months.[77]

Although the arrested sympathisers were charged, 'that they did cause to be given … information tending to facilitate the commission by [the outlaws] of further crime, contrary to the *Felons Apprehension Act* 1878', Crown prosecutor Bowman 'did not ask for a committal, merely a remand'.[78] In other words, the Crown did not press for trial but was apparently content to temporarily prevent those who had been arrested as the most active sympathisers from aiding the Kelly gang. As Kelly commentator Nikki Cowie noted, 'undoubtedly the police were also

73 For a comprehensive analysis of this question, see Stuart Dawson, *Ned Kelly and the Myth of a Republic of North-Eastern Victoria* (Melbourne: Dawson, 2018), 17, 19-21.

74 *Ovens and Murray Advertiser* (Beechworth, Vic), 14 December 1878, 4.

75 Police Commission, *Minutes of Evidence taken before the Royal Commission into the Police Force in Victoria, together with Appendices* (Melbourne: Government Printer, 1881), Victorian Parliamentary Paper No. 31 [hereafter *RC*], Q.2351-3 Wyatt; Q.1942 Sadleir.

76 *RC*, Q.1266-9 Hare.

77 Brendan Kelson and John McQuilton, *Kelly Country: A Photographic Journey* (Brisbane: University of Queensland Press, 2001), 73; see table of arrest and release dates, McQuilton, *The Kelly Outbreak 1788–1880*, 114.

78 Carroll, *Ned Kelly*, 107.

mindful of the example they were making for any other persons who might have been considering giving assistance to the gang'.[79] The failure to prosecute was the result of a lack of sufficient direct evidence and witnesses willing to testify to secure a conviction.[80] Superintendent John Sadleir had strongly opposed the remanding from the first, holding that 'it would have been a very good step if it had been lawful … but it was both unlawful and we could not keep them'.[81] That is, Sadleir thought it not lawful to hold them either at all or indefinitely on suspicion only, without evidence. Superintendent Francis Hare later wrote that it was his 'painful duty … every Friday [to] apply for a further remand for seven days, without being able to adduce a tittle of evidence against them. This … did no good, and evoked sympathy for the men in custody. The police, I found out, had no evidence against these persons beyond the fact that they were known to be associates, relatives, and friends of the outlaws'.[82] This is not saying that they did not actively assist the outlaws; he wrote elsewhere that several of them 'were setting the police at open defiance. They were galloping round the search parties, watching the movements of the police and insulting the men [and] aiding the gang by giving them information of our movements, and in other ways'.[83] This was no secret: the *Argus* reported in November 1878 that, 'when Captain Standish arrived by train [one] evening, two of the Lloyds and Isaiah Wright were seen on the platform, and … later on, the same party … attempted by cutting the railway telegraph wires to frustrate the object of the expedition'.[84]

By May 1879, Superintendent Charles Nicolson had a list of eighty-four 'suspected persons and criminals' believed to be aiding the outlaws.[85] For all the serious (and mostly self-created) consequences that affected those who had been remanded, had the situation really been 'a declaration of

79 Cowie, 'The Felons Apprehension Act (Act 612)'.

80 Standish, letter, 9 January 1879, PROV, VPRS 4969, Unit 1, Item 22, record 3, page 3, reverse.

81 *RC*, Q.2064-5 Sadleir.

82 Francis Hare, *The Last of the Bushrangers: An Account of the Capture of the Kelly Gang* (London: Hurst and Blackett, 1892; facsimile, Uckfield: Naval & Military Press, n.d.), 193-94.

83 Hare, *The Last of the Bushrangers,* 192-93.

84 *Argus* (Melbourne), 13 November 1878, 6.

85 Nicolson, letter, 7 May 1879, and accompanying list of suspected persons, PROV, VPRS 4965, Con. 2, Unit 4, Item 177.

war', as Kenneally labelled it, some fifty further sympathiser arrests, over and above the initially arrested thirty, could easily have been made.[86] As early historian of bushranging George Boxall saw:

> … the magistrates of Beechworth and other parts of the disturbed district had learned by experience that, as long as the sympathisers and 'bush telegraphs' were at liberty, the police had very little chance of capturing the bushrangers … a number of people were kept locked up because they were suspected of giving food or assistance to the outlaws and, more important than all, of giving the bushrangers information as to the movements of the police … But the authorities … acted in a half-hearted and inefficient manner. They arrested only men and boys [but] the women were quite as active and quite as efficient in affording assistance and information to the bushrangers as the men could have possibly been.[87]

Indeed, the temporary suspension of habeas corpus was advocated by some of the press of the day, yet nothing of the kind was attempted.[88] Hare later reflected: 'Had the women been arrested, such as Kelly's sisters, the act [of remanding] might have done some good, but it was thought advisable not to interfere with the women'.[89] When asked by the 1881 Royal Commission whether he thought the remanding 'would put the outlaws doubly on their guard', Superintendent Sadleir replied, 'I was more afraid it would breed bad blood with those men'.[90] Those remanded were progressively released under a growing public outcry of breach of habeas corpus, with the last of the remanded men released by Police Magistrate Foster on 22 April 1879.[91] It appears that the police had tried a measure that they thought would flush the gang out of hiding, but which did not achieve this object and was in practice an abuse of the remand process. At the time of its implementation, the measure had wide support

86 Kenneally, *The Complete Inner History of the Kelly Gang*, 78.

87 Boxall, *The Story of the Australian Bushrangers*, 358.

88 *Argus* (Melbourne), 24 April 1879, 4; *The Mercury* (Hobart), 1 December 1879, 2, from the *Wangaratta Dispatch*.

89 Hare, *The Last of the Bushrangers*, 194.

90 *RC*, Q.2066 Sadleir.

91 *Ovens and Murray Advertiser* (Beechworth, Vic), 24 April 1879, 2.

across the community and press, but this dropped rapidly after a few weeks when court prosecution did not commence, and concerns about the justice of repeated remanding were raised in Melbourne as much as in the north-east of the state, where the Kelly gang was active.[92] As Kelly historian Doug Morrissey has emphasised, however, 'the disquiet over remanding did not indicate support for the Kelly gang … Rather, respectable people were disturbed at the flouting of the hallowed British principle of *Habeas Corpus*, which required that a person under arrest be brought promptly to court to face his or her accuser and that the case against them be produced'.[93] That does not mean that the Act was ineffective in curtailing the outlaws' activities.

Impact of the *Felons Act* (Vic) on the Pursuit of the Kelly Gang

To the surprise of the authorities, the *Felons Act* (Vic), together with escalating reward monies, failed to result in a speedy apprehension of the outlaws.[94] On 29 October 1878, after the Stringybark Creek murders, an £800 reward at £200 per head was offered for information leading to the arrest of Edward and Daniel Kelly and two unknown persons. By mid-February 1879, with all four gang members identified, and after their Euroa and Jerilderie bank robberies, the combined Victorian and NSW reward totalled £8,000 at £2,000 per head, at a time when a skilled labourer might earn £2 to £3 per week.[95] The Victorian warrants for the Kelly gang, 'outlaws in the Colony of Victoria', were endorsed 'to have force' in NSW.[96] On 4 March 1879, NSW re-enacted its then-lapsed 1865 Act as the *Felons Apprehension Act of 1879* (NSW). Section 3 allowed 'any person adjudged an outlaw … in any [other] Colony' to be outlawed in NSW following the same procedures of its 1865 Act. On 20 April 1880, the Victorian Government announced that the reward would be withdrawn,

92 See especially Police Commission, *Second Progress Report of the Royal Commission of Enquiry into the Circumstances of the Kelly Outbreak* (Melbourne: Government Printer, 1881) [hereafter *RC2*], xv.

93 Doug Morrissey, *Ned Kelly: A Lawless Life* (Ballarat: Connor Court, 2015), 151.

94 *The Age* (Melbourne), 30 October 1880, 6: 'There seemed to be a spell cast over the people of this particular district, which I [Barry J] can only attribute either to sympathy with crime or dread of the consequences of doing their duty.'

95 H. Mortimer *Franklyn,* A *Glance at Australia in 1880* (Melbourne: Victorian Review, 1881), 21.

96 *NSW Gazette* (Extraordinary No. 58), 18 February 1879, 807.

with effect from 20 July 1880. The lengthy notice period suggests that the intention was to increase the likelihood of someone betraying the gang, as had happened when bushranger Harry Power was 'sold' in May 1870 by Kelly relatives Jack Lloyd and James Quinn for a £500 reward.[97]

In December 1878, Ned Kelly had written, 'I was outlawed without any cause and cannot be no worse and have but once to die'.[98] To folk historian Frank Clune, 'the legal rigmarole had no reality for them. A man who is proclaimed an outlaw … can only be made more desperate by that proclamation than he was before'.[99] This further underlines that the dual purpose of the Act was to enable an outlaw, if armed, to be shot without challenge and to place aiders and abettors in peril. Ian Jones suggested that 'perhaps the Outlawry Act's main effect was to place an added pressure on Ned to live outside the law and try to depend less on friends and relatives for food and supplies'.[100] This is not correct. The gang did not take to highway robbery but came to depend on a progressively smaller circle of close relatives and associates.[101] With some one hundred sympathiser families, comprised mostly of relatives and larrikin criminals, the north-east of Victoria was kept in a state of terror such that, as Glenrowan school teacher Thomas Curnow testified to the 1881 Royal Commission, fear kept many residents from speaking of the Kellys outside of family.[102] Nikki Cowie held that as 'the gang was not crushed for some [nineteen] months after outlawry, and the Act had lapsed two days before its defeat', the Act 'did nothing to shorten their freedom'.[103] Against this, the Act pressured the gang to limit their interactions to a narrow circle of trusted close relatives and associates, with constant fear of betrayal. It was the realisation of betrayal that led Joe Byrne, on the evening of Saturday,

97 *Bendigo Advertiser*, 29 June 1880, 2: 'we can only surmise … it may induce some one aware of their proceedings, and in a position to deliver them into the hands of justice, to take immediate action.' Jones, *Ned Kelly: A Short Life*, 66, 69.

98 Edward [Ned] Kelly, 'Euroa/Cameron letter', 14 December 1878, PROV, VPRS 4966, Unit 1, Item 3, 16.

99 Clune, *The Kelly Hunters,* 177.

100 Jones, *Ned Kelly: A Short Life*, 197.

101 Dawson, *Ned Kelly and the Myth of a Republic of North-Eastern Victoria*, 19.

102 *RC*, Q.17603, 17625 Curnow; *Ovens and Murray Advertiser* (Beechworth, Vic), 15 July 1880, 2: 'wherever the inhabitants were not influenced by relationship of blood, marriage or crime, they were controlled by terror.'

103 Cowie, 'The Felons Apprehension Act (Act 612)'.

26 June 1880, while en route to Glenrowan, to shoot dead his lifelong friend turned double agent Aaron Sherritt in front of Sherritt's young wife and her mother, saying, 'The bastard will never put me away again'.[104]

Although the mass remand tactic of January–April 1879 notably failed, that does not mean the Act was not effective. Indeed, for all its controversy, the Act worked as it was designed. As the later Royal Commission noted, information from the public increased over time: 'At first the intelligence gleaned would be about a month old, then it was reduced to a fortnight, in time about a week, and sometimes a day only would elapse, before the receipt of news of the appearance of the gang, or the doings of their sympathizers'.[105] In May 1880, Superintendent Nicolson wrote, 'the precautions taken against a successful raid have baffled the outlaws. Their funds are almost exhausted, their *prestige* has failed considerably, and, consequently, the number of their admirers has decreased … [T]heir few friends … are confined to their blood relations and a few chosen young men of the criminal class, who have known them from childhood … [T]heir exhausted means compels them to expose themselves more and more to danger of betrayal and (or) capture'.[106] Their spectacular downfall came a month later at Glenrowan.[107]

When did the *Felons Act* (Vic) Expire?

Section 10 of the *Felons Act* (Vic) states, 'This Act shall continue in force until the end of the next Session of Parliament'. The 1878 Session was prorogued on 6 December 1878.[108] The 1879–80 Session began on 8 July 1879.[109] It was prorogued on 5 February 1880 and dissolved on 9

104 *RC*, Q.3657 Duross. Sympathiser James Wallace also thought Sherritt a double agent, Q.14535, cf. Q.14518. For the details of Sherritt's death, see Ian Jones, *The Fatal Friendship: Ned Kelly, Aaron Sherritt and Joe Byrne* (Melbourne: Lothian, 2003), 177-81.

105 *RC2*, xviii.

106 Nicolson, letter, 19 May 1880, in *RC*, Q.915.

107 *Bendigo Advertiser*, 29 June 1880, 2: 'It is many years since such excitement existed in Sandhurst [Bendigo] as that which prevailed yesterday … the news respecting the encounter with the desperadoes being the sole absorbing topic of interest, and the greatest satisfaction was expressed that their career had at last met with a thorough check.'

108 Legislative Council, *Votes and Proceedings 1878,* 136.

109 Legislative Council, *Votes and Proceedings 1879–80*, 1.

February, in order to hold a general election.[110] J. J. Kenneally asserted on this basis that 'the Outlawry Act lapsed with the dissolution of the Berry Parliament on February 9, 1880'.[111] He did not notice that, in December 1879, Parliament had passed a Bill that received assent on 20 December as *The Expiring Laws Continuance Act 1879*.[112] It stated that designated Acts, which included the *Felons Act,* 'will expire at the end of this present session of Parliament, and whereas it is expedient to provide for the continuance of such Acts … [they] are hereby continued in full force and effect until the end of the next session of Parliament' (s. 2). The *Felons Act* (Vic) was not again continued, and, as was clear to Superintendent Hare, it expired upon the prorogue of Parliament on Saturday, 26 June 1880.[113] The prorogue occurred the day before the Glenrowan siege began and two days before Ned Kelly's capture on Monday, 28 June 1880, together with the deaths of the other three gang members.

Kenneally correctly held that, upon the expiry of the outlawry Act, 'the two Kellys stood before the law just the same as any other men for whose arrest warrants had been issued', but he was wrong to assert that 'the only warrants issued for [Joe Byrne and Steve Hart] were contained in the "Outlawry Act," and now that that Act had lapsed there was not even a warrant in existence for their arrest'.[114] In fact, warrants for Edward and Daniel Kelly and two unknown persons who 'can be identified' for the wilful murder of Constables Scanlan and Lonigan were issued on 29 October 1878, the day before the outlawry Bill was put forward.[115] Legal historian Alex Castles' review of potential legal complications arising from the expiry of the outlawry Act similarly erred in holding that Kelly could 'no longer be tried in the ordinary way as he was an outlaw when the alleged offences were committed'.[116] He linked this to an argument, drawn from English common law, that Kelly's outlawry amounted to a conviction, and hence he could not be tried for a crime for which he had already been

110 Legislative Council, *Votes and Proceedings 1879–80,* 108; *Government Gazette*, Supplement, 9 February 1880, 351.

111 Kenneally, *The Complete Inner History of the Kelly Gang*, 176.

112 *The Expiring Laws Continuance Act* 1879 (Vic), Supplement to the *Government Gazette,* 24 December 1879, 75-76.

113 *Government Gazette,* Extraordinary, 26 June 1880, 1661; *RC*, Q.1485 Hare.

114 Kenneally, *The Complete Inner History of the Kelly Gang*, 176.

115 Warrants, 29 October 1878, PROV, VPRS 4965, Unit 5, Item 352 (a-d).

116 Castles, *Ned Kelly's Last Days*, 92.

convicted.[117] As has been shown, however, colonial outlawry did not constitute a conviction for the crime for which a person was outlawed. Kelly's trial was for the murder of Lonigan under the 29 October warrant. He was not tried for contumacy under the outlawry Act or for any offences committed while outlawed.

Interestingly, Kelly and his gang appeared in armour for the first and only time after the outlawry Act had lapsed. When captured, he was no longer an outlaw. The expression 'iron outlaw', often used in reference to Kelly, is, strictly speaking, a fiction.[118] Regardless of the Act's lapse, the magisterial inquiry into Joe Byrne's 28 June death at Glenrowan found 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'.[119] Castles noted that Byrne thereby became 'the only person known in Victoria to have his occupation registered in death as "Outlaw"'.[120]

Conclusion

Outlawry was a response to contumacy, when a person had refused to come forward to stand trial for an alleged capital felony. It was a rarely invoked process that reached back centuries in English common law. However, the colonial statutes replaced English common law in respect of outlawry. Outlawry under the *Felons Apprehension Acts* in both NSW and Victoria, unlike in English common law, was not the equivalent of a conviction. As was determined in the Jimmy Governor case, it was the intention of the legislature to constitute a man under certain circumstances as a statutory outlaw so that he might be apprehended by any person without the risk of prosecution. The Act did not permit simply shooting on sight or summary execution. An outlaw who was captured did not stand convicted but had to stand his trial. Against a widespread belief that the *Felons Act* (Vic) placed the Kelly gang outside the protection of the law and liable to be killed by anyone on sight with impunity, it has been shown that the power to kill an outlaw was strictly conditional, for both officers of the law and citizens. An outlaw could only be killed if he was

117 Castles, *Ned Kelly's Last Days*, 92.

118 From Clune, *The Kelly Hunters,* subtitle, 'ironclad outlaw'; originally, 'ironclad bushranger' (from James Borlase, *Ned Kelly, the Ironclad Australian Bushranger,* 1881).

119 *Argus* (Melbourne), 30 June 1880, 6.

120 Castles, *Ned Kelly's Last Days*, 219; cf. *RC*, Q.2905-8 Sadleir.

found at large armed or reasonably believed to be so. Any person who killed a proclaimed outlaw outside of these clearly defined circumstances would have committed murder. The colonial statutes thereby reflected a deep conviction, best expressed by NSW Chief Justice Alfred Stephen in 1865, that Australian outlawry facilitated the apprehension of an outlaw to stand trial, while rejecting the barbarity of the law of England, under which an outlaw might be killed by anyone without pretence of the furtherance of justice.

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