A copy of the Felons' Apprehension Act, 1865, can be found on https://www.legislation.nsw.gov.au/acts/1865-2a.pdf.

The Felons' Apprehension Act. was introduced into Parliament on the 10.3.65 and passed 8.4.65.

Summary of the Act.

- If charged with murder, robbery with arms accompanied by wounding, or other capital offences and attempts to capture them have not met with success, and they have committed further robberies, and have resisted and killed officers of justice, they can be subject to the Felons' Apprehension Act..
- The Felons' Apprehension Act. provides for a declaration of outlawry. For this to happen there are steps to follow. Firstly an oath is made before a Justice of the Peace (JP) and a warrant is then issued charging the person with the felony. If a Judge is satisfied of the facts he issues a Bench Warrant requiring the felon to surrender by a certain date. This warrant needs to be proclaimed in the *Gazette* and in newspapers and on posters so the felon and any harbourers are informed.
- If the felon is not apprehended or has not surrendered by the date proclaimed he is declared an outlaw.
- If the outlaw is found and is armed or thought to be armed he can be taken dead or alive.
- Any person who then harbours, conceals or gives any aid, sustenance, weapons, ammunition, horse or horse equipment to the outlaw is guilty of a felony and shall forfeit his lands, goods and liable to imprisonment not exceeding fifteen years. The harbourer does not have any defence unless he voluntarily goes before a JP or member of the police force and gives full information about his interaction with the outlaw.
- Any Justice or policeman that suspects that the outlaw is concealed or harboured in a house, may break and enter, apprehend every person, and seize all arms. All persons so apprehended shall be put on trial.
- Police in pursuit of outlaws may demand, take and use any horses, horse equipment and feed from property owners. Compensation will be paid if claimed.
- Outlaws cannot transfer land or goods after the issue of the warrant.

Research on the Felons' Apprehension Act, and noting the actions of the police at the time indicates there was much confusion about the implications of the act in the newspapers and in the legal behaviours of the police.

This confusion can be attributed to the fact that not every question had an answer in the above act, and not every judge used the full sentencing powers for the harbourers. In 1769 Blackstone had stated that if a colony is planted by English subjects, all English laws are immediately in force.

As a result police often acted outside their legal parameters of Common Law, ie shoot first, ask questions later when coming upon the felon and his associates; newspapers interpreted the act as they saw fit, and they were believed by their readers. Confusion

can also be attributed to applying ideals of the Common Law, which were better understood as they had been in vogue for many years. The Act was Legislated Law. Common Law is judge-made law.

The Act did not specify

- There was no definitive requirement in the common law that the suspected felon had be called on to surrender before force was used. Many considered this a warning which then gave the felons time to escape. In 1825 when acquitting a constable for murder, Chief Justice Forbes 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.*[1]

And 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"** [2]

Chief Justice, Sir Alfred Stephen perhaps confused the issue for future police actions when he said in 1865

> *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.*[3]

The response to this legal position was to introduce outlawry so that a home owner, seeing a bushranger, could take aim, shoot and kill without first calling upon the outlaw to surrender or waiting for them to commit an offence, or presumably

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1 Michael E Burn, *Outlawry in Colonial Australia: The Felons Apprehension Acts 1865-1899.* p 81. https://law.anu.edu.au/sites/all/files/users/u4810180/anzlhs_e-journal.pdf

2 Michael E Burn, *Outlawry,* p 82

3 *SMH,* 18 Hanuary 1865.

observing if they were armed. 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."

The editor of the Sydney Morning Herald said,

> *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.*

This opinion does not agree with what Stephen was suggesting – but that is all Stephen's statement was, a suggestion. It was not legislated and should not cause a misinterpretation of the law. The Felons' Apprehension Act stated force could only be used if the offender was escaping and/or was armed.

The Common Law ideal was still in vogue 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.* [4]

This also is not entirely correct. Again they can only be shot if armed and escaping.

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. Fortunately there is no evidence that anyone was killed after being mistaken for an outlaw so the issue never arose. [5]

The Courts believed that outlawry under the Felons Apprehension Act was not the equivalent of a conviction. It was a result of not surrendering by the due date. If the offender was 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.

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5 Burns, *Outlawry,* p 82

6 Burns, *Outlawry,* p 83.