

CRIMINAL COURT.

CONVICTION OF THOMAS AND JOHN CLARKE, AND SENTENCE OF DEATH RECORDED. Tuesday. Before His Honor Sir Alfred Stephen, C J.

Thomas Clarke and John Clarke were indicted for that they did, on the 27th April last near Jinden, in the colony of New South Wales, wound one William Walsh, with intent to murder the said William Walsh. The prisoners pleaded not guilty, and were defended by Messrs. Dalley and Blake, instructed by Mr. Joseph Leary. Mr. Isaacs, Solicitor- General, prosecuted on behalf of the Crown.

His Honor directed the strictest order to be maintained in Court, and announced that the constables had been ordered to arrest any one attempting to contravene that command. Mr. Isaacs then proceeded to open the case to the jury, pointing that no case had ever come before them in which they would require to exercise more caution in weighing the evidence, and separating it from those circumstances which, in point of law, could form no subject for their consideration.

It would be necessary for certain purposes of the case to prove that one of the prisoners at the bar was an outlaw under an Act of the Legislature passed two years ago. It must be shewn that on the occasion when the offence was committed the police were endeavouring to apprehend the prisoners in consequence of a felony or felonies previously committed by them. With respect to the prisoner John Clarke, it would be shewn that he was present aiding and abetting the outlaw in resisting the police.

He (Mr. Isaacs) felt it his duty to caution the jury to exclude from their minds all that they might have heard or read about the prisoners at the bar, and to consider the evidence alone which was about to be adduced against them. The evidence which went to substantiate the specific charge would be given by several persons who had been actively engaged on the occasion, and that evidence would, he thought, leave no doubt on the jury's minds of the guilt of the prisoners at the bar.

A party, consisting of sub-inspector Wright and five other persons under his command viz., constables James Wright, Lenehan, Egan, Walsh, and a black tracker named Sir Watkin, arrived at a place called Jinden in search of the prisoners, and concealed themselves behind a haystack which was some distance in the rear of a hut. A little before daylight, Wright, having heard horses moving in the paddock in which the hut was situated, went in the direction from which the sounds proceeded, captured two horses, and was leading them away when the two prisoners came out of the hut. Wright called out to them to surrender, but they retreated and fired upon the police, who returned their fire. The prisoners retreated to the hut which they gained, and from which they continued to fire. Constable Walsh was wounded in the thigh by a shot fired from a small square hole in the end of the hut, and evidence would be given that the shot which wounded him was fired by John Clarke. Both the prisoners knew Walsh and knew him to be a policeman, Walsh was

afterwards sent for assistance, and on his return with reinforcements the prisoners surrendered, Thomas Clarke saying to Walsh,

If you had been here I would have surrendered before; and I called out to you several times.

There could be no doubt that the police were legally in pursuit of the prisoners, and that the resistance of the latter was illegal.

It would be shown that some persons had left the hut immediately the first shots were fired, and that when the police took possession of the place no other persons but the prisoners were found there. Consequently the shot which wounded Walsh could have been fired by no one but the prisoners. Upon the verdict of the jury would depend the lives of the prisoners, and he hoped that there were none of the jurors who objected to the principle of capital punishment. He was sure that, without regarding the consequences of their verdict, they would return one that accorded with their honest convictions. [The learned gentleman then proceeded to discuss at considerable length the merits of the question of capital punishment, and said that he trusted none of the jury entertained opinions adverse to the principle.] He believed that the evidence in the case would be given in a straightforward manner, and that it would be impossible to show that the police were actuated by any feeling of malice against the prisoners at the bar. Nor did he believe that the police were animated by the hope of obtaining any reward on the conviction of the prisoners. If the witnesses detailed the circumstances as they had occurred, the guilt of the prisoners would, he thought, be fully established. Stained as the prisoners might be with numerous crimes, they stood in the dock with the right to be considered innocent of a particular charge, until they were proved guilty. They were privileged to have the assistance of an attorney or attorneys to do everything for them in the preliminary part of their case; and they had the higher privilege of being defended by counsel of great learning, ability, and eloquence. They had also the further privilege of being tried by a magistrate of vast experience in criminal cases, and who would check any undue pressure on his (Mr. Isaacs's) part against the prisoners, and remedy any neglect of their counsel to show the redeeming features of their case. The previous career of the prisoners must be altogether sunk. They stood their trial simply for a single offence. The jury would have to apply their minds simply to the consideration of the case, as it appeared from the evidence put before them. If the evidence should appear to the jury to warrant them in finding a verdict of guilty, he hoped they would do so fearlessly. With the sentence they had nothing whatever to do. It formed no part of their consideration. It was for them simply to say whether the facts proved justified them in finding a verdict of guilt or innocence.

The first witness called was, **William Wright, Sub- Inspector of Police**, who, being duly sworn, said:

I have been stationed in the Braidwood district for the last four months; I was there in February; I was at a place called Jinden on the 26th April last; it is about fifty miles from Braidwood; the nearest police station to it is Fairfield; there is a place called Ballalaba about thirty miles from Jinden; I arrived there about 3 o'clock in the afternoon, and with my party crossed the Jinden Creek and went

into a paddock in which there was a hay stack; I was in search of the prisoners, Thomas and John Clarke; there were six in my party Lenehan, Walsh, Egan, another constable named James Wright, the black tracker, and myself; we concealed ourselves behind the haystack in the paddock; the noise of horses attracted my attention about 9 o'clock at night, and previous to that we heard the sound of horses' feet as if some persons were riding by; there was a hut about 250 yards away from the stack; about 1 o'clock in the morning, I left my party behind the stack and walked about the paddock; after some time I found two horses near the slip-rails, about forty yards from the hut; one was hobbled and the other was not; I took them with me up to within a short distance of the stack and then returned to my party; I then, about 2 o'clock in the morning, took constable Walsh with me and proceeded to reconnoitre the paddock; I then arranged my party in three companies, and placed the horses on a plot of grass close by; the three parties formed a triangle, with the horses in the centre: one party was on my right, outside the paddock fence, another was on my left, at the haystack; I was behind a log and was opposite to the hut; at about 6 o'clock in the morning I saw smoke rising from the chimney of the hut, and shortly afterwards I saw the prisoners Thomas and John Clarke come out of the hut; Thomas Clarke is the shorter of the two; I was facing; the hut, and constable James Wright was with me; we were concealed behind a log; the party on my left consisted of Lenehan, and the black tracker; the party on my right consisted of Egan and Walsh, we were all concealed; about five minutes before the prisoners came out the horses moved to the left, towards Lenehan and the black tracker who were outside of the paddock fence; I and Wright shifted our position when the horses moved; the prisoners came towards the horses, but all of a sudden I saw John Clarke turn; I rushed out and cried 'Stand and surrender' then I saw the prisoners draw their revolvers, and as they did so I fired; the fire was not returned just at the moment, but retreated, and after running about twenty yards the prisoners waited, and John Clarke fired; the firing was kept up from that time until the prisoners ran to the hut; I called out to them again to surrender, and added that we were police; I was about 120 yards from them at the time; I cannot say whether the prisoners heard me as there were shots being fired in every direction; the prisoners were firing at us, and we were firing at them, and the prisoners kept advancing and retreating until they got to the hut; Walsh was on my right and advanced towards the end of the hut; I found he was wounded after the prisoners reached the hut.

MR. BLAKE:

Your Honor, I appear for Thomas Clarke, and he is charged with feloniously wounding constable Walsh. There is a great deal of matter that comes after the wounding. I think that everything that takes place after that is irrelevant to the case. The offence he is charged with is the wounding of Walsh, and evidence as to every thing that occurred after that is irrelevant.

His Honor:

Why is it irrelevant? Does it not tend to throw light on what preceded? The whole was one transaction. You are not to stop short at the time that the shot was fired, but you must take the circumstances surrounding the act into consideration. All the facts will be material us showing the character of the crime. As yet the time of the wounding has not been fixed.

MR. BLAKE:

I submit that what takes place after the wounding is not evidence as to the intention of the prisoner in firing the shot. The prisoner is said to have fired a shot and wounded Walsh, and what subsequently took place can have no bearing on the intention which dictated that particular action. Suppose that the shot was accidental, and that after it was fired a collision took place between the police and the prisoners which lasted a considerable time — what could that have to do with the intention which had led to the firing of the previous shot? What can the circumstances of the collision have to do with what took place before any collision occurred at all?

His Honor:

You should have urged all you intended to urge at first. I have given my decision on the point, and see no reason to alter it. Of course, I shall make no conclusion between the two points. The point for the jury to address themselves to will be the intention at the moment of firing. Still light is thrown upon that by the subsequent transactions.

William Wright continued:

I saw Thomas Clarke fire at Walsh before the prisoners reached the hut; they got inside about half a minute afterwards.

His Honor:

Q. How do you know he fired at Walsh? What makes you think he aimed at him?

William Wright:

A. He fired in the direction in which Walsh was coming; certainly Walsh fired first; I saw Thomas Clarke fire in the direction in which Walsh was coming; I was about fifty yards from them: I afterwards saw that Walsh was wounded in the thigh; a great many shots were fired from the hut, and from all parts of the premises; I think the shots must have been fired by two persons at first, because they were fired from different parts of the hut in rapid succession; there was a verandah to the hut, and there were two verandah rooms in it; there was a porthole in the end verandah room on the right as you went towards the hut; shots were fired from that porthole; which was about six inches by nine; I afterwards

sent constable Walsh away; the firing was kept up from about 6 o'clock to half-past 11, and a reinforcement of police under the command of sergeant Byrnes arrived at half past 12; a few minutes afterwards the prisoners came out of the hut, and Thomas Clarke said 'We surrender!' They threw up their arms; when I went up to them Thomas Clarke said 'Don't blame me; I've done my best to get away, and you've done your best to take me; you've done so, and now treat me as I ought to be treated;' I said 'You all right, old boy' I then said 'Where are your arms?' Thomas Clarke said 'They are in the hut.' I did not see any persons come out of the hut after the prisoners surrendered; early in the morning a man named Thomas Berry, a woman, and a child ran out of the hut; the woman and child ran away; the man remained with us until we captured the prisoners; I asked Thomas Clarke what their weapons consisted of, and he said they had two revolvers and two revolving rifles; I searched the hut, and found therein two revolvers, two revolving rifles, two double-barrelled guns, a single-barrelled gun, and a pistol; I took the two revolvers and the two revolving rifles to Thomas Clarke, and I said 'Are you sure these are yours?' he said 'Yes, that's mine,' pointing to one of the rifles, 'and that's Johnny's' I asked him which of the revolvers was his; he said there was no difference between them; I did not show the other weapons to Thomas Clarke; he said that they were not his, but that the double-barrelled guns were in the hut and he had used them; I think it is very probable that at the time I called to the prisoners to surrender they did not hear me.'

Cross-examined by **MR. BLAKE:**

Q. Just tell me how you and the other two parties were placed?

A. We were placed in the form of a triangle; one party was against the stack.

Q. You say the stack was about 250 yards from the hut?

A. About that.

Q. You stood at the door of the hut. Was the stack right opposite to you

A. Rather more to the end.

Q. When standing at the door of the hut, was the stack to the right or to the left of you?

A. To the left.

Q. You said that the tracker and Lenehan were stationed at the stack; now, where were you placed?

A. I was about fifty yards from them.

Q. Which side of the stack as you faced the house?

A. To the left.

Q. About how far from the stack?

A. Fifty yards.

Q. Was there any bush or covering there to conceal you?

A. Yes.

Q. How were you concealed ?

A. Behind a fallen tree.

The CHIEF JUSTICE:

Q. Not all six?

A. No; only myself and constable Wright.

MR. BLAKE:

Q. Then you and constable Wright were behind this log?

A. Yes.

Q. Where were Walsh and Egan ?

A. Out of the paddock.

Q. How far was this tree where you were from the fence?

A. About forty yards.

Q. Lenehan, Walsh, and Egan were outside the fence?

A. Yes.

Q. I suppose they were also concealed?

A. Yes.

Q. You said you changed your position?

A. Yes.

Q. That is, when went to the right of the stack?

A. The stack was on the left of me.

Q. Were Walsh and Egan further on your right or on the left ?

A. On the right.

Q. You say the horses went to the other side of the stack, and that caused you and Wright to go to the stack?

A. Yes.

Q. So that at the moment the men issued from the hut there were four of you at the stack?

A. Yes. They might have got into the slip rails before I got to the stack. I had just time to get to the stack when they were about a couple of hundred yards from the fence.

Q. Were Walsh and Egan as far from the hut as you?

A. When at the stack they were about the same distance.

Q. When the men came out of the hut how soon did the firing begin?

A. About five, or six, or seven minutes.

Q. Was the sun up?

A. It was a very cloudy morning. About a quarter of an hour after daybreak. Just about the time the sun was rising.

Q. But you say it was a cloudy morning?

A. Yes.

Q. What was the land between where you were placed, and between Walsh and Egan and the hut?

A. Cultivation in the paddock.

Q. Was there a crop on it at the time?

A. No.

Q. Was it ploughed land?

A. Yes.

Q. Was it wet?

A. Very wet indeed.

Q. It was raining I believe for a considerable time before?

A. It was raining the day before, and had been for several days.

Q. How soon after you saw the men come out did the general firing commence?

A. From six to eight minutes.

Q. Were the shots fired quickly?

A. Very quickly.

Q. I suppose there was a great deal of smoke?

A. We were pretty well separated, so that the smoke was not very great.

Q. Was there any wind?

A. A strong breeze.

Q. Were all your party firing?

A. Not at the commencement.

Q. But afterwards at the time you say you say there were a great many shots firing in all directions— now were all the party firing at that time?

A. No, they were not.

Q. Who were actually firing?

A. Four of them and Johnny Clarke.

Q. You and the three that were with you?

A. Yes,

Q. Then Walsh and Egan were not firing?

A. Not at that time.

Q. When did they fire— when the prisoners got outside?

A. Walsh was not firing then.

Q. Was your party firing at the same time that Walsh was firing?

A. Yes. We fired as long as we could see them.

The CHIEF JUSTICE:

Q. How many minutes had elapsed from the time the firing commenced before Walsh fired?

A. About three or four minutes.

MR. BLAKE:

Q. You and your party were firing when Welsh fired?

A. Yes.

Q. And when Thomas Clarke fired?

A. We were all firing then.

Q. Would you kindly put on paper the position of all the parties at that moment—the hut, the stack, your party, Walsh and Egan? [The witness did so.]

Q. This is a description of the position of the parties at the time, not at the commencement of the firing, but when you and your party were firing, when Thomas Clarke fired, and when Walsh fired?

A. Yes.

Q. How long was it after that that the bushrangers retired into the hut?

A. About half a minute.

Q. You say that it was not more than half a minute from the time that the firing took place to the time when the bush rangers went into the hut?

A. Yes.

Q. After the bushrangers went into the hut, did you and your party continue firing?

A.

Yes,

Q. Then you sent away constable Walsh?

A. Yes.

Q. What time elapsed until constable Walsh returned?

A. About five hours.

Q. Were were you and the rest of the party at that time?

A. Round the hut.

Q. When round the hut just tell me how you were placed?

A. I myself shifted several different times to see how the men were placed; I sometimes shifted the men also.

Q. Were you in concealment?

A. We could see what we were doing; we could see the hut and everything.

Q. Were you visible from the hut?

A. Sometimes, not always.

Q. Were you yourself visible from the hut at different periods during those five hours?

A. Yes.

Q. Were the men also visible?

A. Yes.

Q. During the times that you and the men, or any of you were visible from the hut, were any shots fired?

A. Yes, on one or two occasions.

Q. Was there much firing from the hut during the first two hours?

A. Not after the first hour and a half; there were a few rounds on both sides fired afterwards.

Q. There were shots fired while you were visible?

A. Yes; a great number.

Q. Were you visible at any time that shots were not fired?

A. Yes.

Q. Can you say how often when you were visible from the hut as you were going from one place to another, and no shots were fired?

A. On two or three occasions.

Q. Can you say how often the constables were visible from the hut when no shots were fired?

A. Several times.

Q. About what distance were you from the hut at those times you were going backwards and forwards placing the men?

A. Sometimes fifty yards, sometimes not more than thirty.

Q. What distance could you say the men were?

A. Various distances, from thirty to fifty yards.

Q. You say that you and the men were on different occasions within thirty yards of the hut?

A. Yes.

Q. At thirty yards a man with a rifle and having a rest could take very deliberate aim?

A. Yes.

Q. Or even at fifty?

A. Yes, or a hundred.

Q. During these occasions no shots were fired?

A. On several occasions shots were fired; on two or three there were none fired.

Q. You have had a good deal of experience as a rifle shot?

A. Yes, lately.

Q. It would not take a very good shot to hit a man at thirty yards?

A. Any person ought to shoot an object the size of a man at thirty yards, with a good rifle and a rest.

Q. You say you examined the rifles in the hut; were they good ones?

A. Yes, very good.

The CHIEF JUSTICE:

Q. During the time that you were visible did you stand still?

A. Not on every occasion.

Q. On some occasions you did?

A. Sometimes,

MR. BLAKE:

Q. But you were occasionally standing still?

A.

On some occasions. When I loaded my rifle I was, of course, concealed.

Q. When moving about were you walking?

A. I went pretty quickly from place to place— ran in fact.

Q. Had you any communication with the bushrangers during this time?

A. No.

Q. You did not call out to them?

A. Yes, I did; and I heard something in reply, but could not tell what it was.

Re-examined by the SOLICITOR-GENERAL:

Q. Did you at any time when in view of persons in the hut stand still?

A. Yes, I had to stand still when I fired at them.

Q. At any other time?

A. I was talking to Berry on two occasions when I was in sight and stationary.

MR. DALLEY:

Q. May I ask what distance from the hut were you then?

A. About forty yards.

The CHIEF JUSTICE:

Q. You saw Berry then?

A. He had been there all the while.

The SOLICITOR-GENERAL:

Q. Did you find much ammunition in the house?

A. Yes, a large quantity.

The CHIEF JUSTICE:

Q. Could you see who were firing from within?

A. No,

Q. How were the shots fired from the hut?

A. At the port hole, the back windows, and the front door.

The SOLICITOR-GENERAL:

Q. There was no back door, but there were two back windows?

A. Yes.

The CHIEF JUSTICE:

Q. Was the front door left open?

A. Yes; all the time.

Q. Did you pass the door?

A. No, I had two men stationed on each side. The bushrangers coming in front of the door would be seen by one or both of the men stationed at the side, distant about forty yards.

A juryman:

Q. Was there a porthole at the side where Walsh was stationed?

A. Walsh was wounded and went away.

The CHIEF JUSTICE:

Q. Walsh did not again appear on the scene until the new party came up?

A. About five minutes afterwards.

Q. He was not visible at all?

A. He was visible. Any person in the hut could see him going across the paddock.

Q. You sent him away?

A. Yes.

The SOLICITOR-GENERAL:

Q. After he got 200 or 300 yards away Walsh came in sight of the house to cross the river, which was up at the time?

A. Yes.

Q. Did you know the person, Berry, who came out of the house?

A. Yes.

Q. Previously?

A. Yes.

Q. Did you know that he was living in that house?

A. Yes.

Edmund Egan, examined by the Solicitor-General, deposed:

I am a police constable; about the end of last month I was stationed at Braidwood; I had been in the district about twelve months, and had been about a good deal; I did not know the bushrangers by sight; I was one of the party under sub-inspector Wright, on the 26th of April, when we were at a place called Jinden; there was a paddock there and a haystack; we came to the stack at about 9 o'clock at night; there was a hut near which was occupied by a man named Thomas Berry; the stack was 300 or 400 yards away; I had been at the hut several times; soon after we got to the hut I heard the hobbles of some horses, and at about 1 o'clock sub-inspector Wright brought the horses round to near the stack; we watched until about 3 or 4 o'clock in the morning, and then we divided into three parties; sub-inspector Wright and James Wright took a position behind a log fronting the end of the house, further away from the house than the stack; constable Walsh and I went outside the paddock fence and stooped behind a log there; I was to the right of Wright; the other two men stayed at the stack; as the day began to dawn, I saw the two prisoners coming out of the hut; we remained in our position until the prisoners got to where the horses were, the horses having cantered over the paddock from the place to which they were taken by sub-inspector Wright; Walsh and I did not move until we heard some firing from the stack, and then we ran to the hut; I was outside the fence and a hundred yards from the stack; I was about twenty yards from the bushrangers when they got to the hut; constable Walsh and I saw both the prisoners turn round and fire; I noticed the prisoner Thomas Clarke take aim at constable Walsh; I saw the other prisoner fire at that time in the direction where we were, but I cannot say which of us he fired at; there was not more than two yards between us; immediately after I saw Thomas Clarke fire at Walsh; I saw Walsh go towards the end of the hut, and heard him say that he was wounded; when the prisoners got inside I had to retreat a short distance from the hut to where the tracker was; when I came up to the tracker I heard two shots fired, they came from the right end of the house where I

was standing; there was a small hole in the end of the hut and the shots came through it; I saw the point of a rifle through it; at the time when the shots were fired by which it is supposed Walsh was wounded the prisoners were running towards the hut; they turned round, fired, and then ran; they fired with revolvers; I saw the revolvers; if I were at the front door of the hut looking out, the loophole through which the muzzle of the gun was pointed would be at the left; the tracker was in direct line of fire from that hole; I was standing by his side; I looked up and saw a face which at the time I believed to be the face of John Clarke, and I still think it was John Clarke; I should have seen him plainly but for the smoke; I saw the black tracker immediately drop his rifle, and the blood came out of his arm; I took him behind a tree and tied up the wound, which was in the left wrist; I remained some time at the tree firing occasionally at the window, but I afterwards thought it better to get in front of the house; the firing continued for several hours; when I left the tree to get to the front of the house there were three shots fired out of the porthole in quick succession, as if from a Tranter's revolver; directly I got behind the fence in front of the verandah there were two more shots fired from the verandah by the prisoner Thomas Clarke; the shots were fired at me, and one of them struck the rail near where I was standing; from the report I supposed that the shots were fired from a double-barrelled gun; the shots were fired quickly, and the sound was different from the report of a rifle or pistol; the firing continued on both sides until sergeant Byrnes, with more police, arrived; at intervals there was a cessation of firing; I think there was firing between 11 and 12; I had a watch but did not look at it, and cannot speak positively as to any hour; Walsh did not come up with Byrne's party, which came up at the end; he came up in front of the house; Walsh rode up to where Lenehan and I were, thirty or forty yards from the hut; there was no firing going on at that particular time; I heard Walsh say something; he spoke very loud and I think the prisoners in the hut could easily hear it; he said, 'Tommy you had better surrender now or you will be shot,' or words of that purport; I heard one of the prisoners sing out 'We'll surrender, don't fire;' and immediately afterwards I saw Thomas Clarke coming to the door; he came outside and threw up his hands; he called his brother John Clarke, to come out after him; John Clarke also came out; the police ran up and took them into custody; Thomas Clarke said 'Walsh, I will give myself up to you;' when they were arrested, I went into the hut after sub-inspector Wright had taken out the arms; John Clarke was close by when Thomas Clarke said to Walsh, "will surrender to you" it was a few minutes after that that I went into the hut; I did not see any one come out excepting Berry, his wife, and children; I was about thirty yards from the opening at the end of the hut; Berry was taken into custody; from the time that the three shots were fired out of the porthole, there were only a few seconds elapsed when the two shots were fired from the verandah; it is my opinion that those five shots must have been fired by two different persons; Berry is now up the country on bail.

By **MR. BLAKE:**

Q. Where was the black tracker when you say he was wounded?

A. He was standing alongside me.

Q. What was his position with respect to the hut?

A. He was standing about 30 yards from the end.

Q. How long after the bushrangers had retreated to the hut did this take place?

A. A few seconds.

Q. Were the other men who were with you firing?

A. Yes, occasionally, all of them.

Q. Were they firing before the men ran into the hut?

A. Yes, I believe all the police fired at them before they reached the hut.

Q. It was while they were running into the hut that Walsh was struck?

A. Yes.

Q. Were the police firing when that took place?

A. Not at that particular time.

By **MR. DALLEY:**

Q. All of your party had revolvers?

A. Yes, except the tracker.

Q. Had you any other arms?

A. Yes, rifles. We discharged the rifles and part of the revolvers before they reached the hut. We had no revolving rifles. Some of us had more than one revolver.

Q. How many shots did you fire?

A. Only two, out of a revolver and a rifle.

Q. Walsh was near you, and he fired before he was wounded?

A. Yes, he fired the rifle.

Q. What did the blackfellow have?

A. A pistol and a carbine.

Q. You all fired as rapidly as you could as the bushrangers approached the hut?

A. All were running and firing, but not very fast.

Q. There was great confusion I suppose?

A. Oh, no.

Q. You never saw prisoners before?

A. Yes, I had seen them. previously.

Q. Where?

A. In the bush, I had seen them 200 yards off on horseback.

Q. Did you then see their faces?

A. Not to recognise them again; but I think from his description I should know John Clarke.

Q. Not from your own recollection of his face?

A. No.

Q. Could you see any face to identify at the porthole?

A. After the rifle was fired a face appeared as if to look for the police.

Q. How long did it remain visible to you?

A. A second or two. I was in the act of firing, and heard two shots from the porthole.

Q. How long after was it you heard shots from the verandah?

A. It may be about half an hour. There were three other shots from the porthole when I was running from the end of the house to the front. It was between a quarter and half an hour before I heard these last three shots from the porthole.

Q. Did any of your party fall in running towards the house?

A. I fell when I was running after prisoners.

Q. That was before they reached the hut?

A. Yes. I just slipped on the ground.

Q. How far from the house?

A. About 100 yards.

Q. The ground was rotten and wet?

A. Yes, very wet.

Q. Did you see Walsh fall?

A. No.

Q. Besides the slipperiness of the ground were there any stumps before you got to the hut?

A. Yes a great number of stumps and saplings, making it difficult to get through them.

Q. Had you to jump over these things?

A. No, we ran through them.

Q. Those difficulties existed from the point whence you first started, to that you reached?

A. There were none close to the hut.

Q. Between the time the three shots were fired from the porthole, and the shots fired from the front, could a person have come round without you seeing him?

A. No.

Q. For that reason you believe John Clarke was not the person who fired the three shots?

A. Yes.

His Honor:

Q. Did the front room from which the three shots were fired extend the length of the building?

A. No. There are three rooms.

Q. To get to the front door he would have to pass through three rooms?

A. Yes.

Q. There were two windows at the back?

A. Yes.

Q. None at the front?

A. No.

Q. The loopholes from which the shots were fired were in an end room?

A. Yes.

MR. ISAACS:

Q. Was there any other door?

A. There was no other door but the front door.

Q. Could you get into the verandah without going in by the front door?

A. Yes.

Q. It would take a longer time to get from the room where the porthole was to the verandah than the time within which the three shots and the two shots were fired?

A. I think so, and if they were fired by the same person he must have come out by the first door.

MR. DALLEY:

Q. Did you see any person come outside between the two events?

A. No.

Q. Is there no door besides the front door in the whole house?

A. I do not know that there is any other door.

Q. There are openings from room to room?

A. Yes, I cannot say whether there are doors.

Q. When the shots were fired from the verandah you saw no one come out?

A. No, not until Thomas Clarke came out.

His Honor:

Q. Two shots were fired from outside the verandah?

A. Yes.

Q. By someone from within who must have passed from the inside to the outside of the house?

A. Yes, to the verandah.

Q. Whoever fired the shots, they were from what you took to be a double-barrelled gun?

A. Yes.

MR. DALLEY:

Q. Did you keep your eyes on the door the whole time previous to the firing, or see any one come out?

A. Yes.

Q. And the first glimpse you had of any one was Thomas Clarke?

A. Yes.

Q. There was a time during which you had no sight of the door?

A. Yes, I had run some distance while the shots were being fired from the porthole, but was standing when the shots were fired from the verandah.

Q. You did not see who fired the shots from the verandah?

A. I saw Thomas Clarke run in at the door.

Q. You did not see him fire the shots?

A. I did not see him till the shots were fired; I saw him with the piece presented, and he then ran in at the door.

Q. You did not see him fire any shot?

A. I saw him fire the first shot.

Q. You were standing at this time?

A. Yes.

Q. You did not see him come out?

A. No, I saw him go in.

Q. How soon was this after the firing of the shots from the porthole?

A. Five, six, or ten minutes.

Q. Were the whole of the rooms open one into the other?

A. Yes.

Q. There are no doors?

A. I did not see any.

Q. Had you not a view of the front of the hut before you commenced to run these thirty yards?

A. No, I had a view of the end, not of the front; I ran round the corner to get in front of the house.

Q. How far had you to run before you got a view of the door?

A. About fifteen yards.

Q. Were you stationary or running when you got a view of the firing from the porthole?

A. Running.

Q. And the side of your face was towards the porthole?

A. Yes, it might be three-quarter face towards the porthole.

MR ISAACS:

Q. You did look towards the porthole after the three shots were fired and saw a face there?

A. No, not after the three shots were fired, but when the tracker was wounded.

Q. That is a different time?

A. Yes.

Q. Did you continue running after the three shots were fired till you got to the front where the two shots were fired?

A. Yes, I continued running.

Q. The person who fired the two shots must have been on the verandah before you got a view of the front?

A. Yes.

Q. How he got there you do not know?

A. No; on the verandah there was a cask two or three yards from the door on the side where the porthole was, and I think Thomas Clarke was behind this cask previously.

Q. How many rooms are there in the house?

A. Four rooms two verandah rooms and two other rooms; the verandah extends about thirty feet.

MR. DALLEY:

Q. Where was the porthole?

A. In the end room.

MR. BLAKE:

Q. Did the verandah go the whole length of the house?

A. No.

Sub-inspector Wright recalled by His Honor;

Q. Can each of the verandah rooms be entered from the outside?

A. No; Only one; the hole is in the right hand verandah room as you enter; you have to pass from the front room, then into the bedroom, then into the verandah room.

Q. Where is the loophole?

A. At the end of the verandah room.

Q. You were in command of the party?

A. Yes,

Q. They were all constables or police?

A. Yes.

Q. Including the black tracker?

A. Yes.

Q. What took you there; had you any warrant?

A. I was in search of the two prisoners.

Q. What for?

A. For several depredations for which warrants had been issued and published in the Government Gazette.

Q. What were the depredations?

A. Murder and highway robbery

Q. Felony?

A. Yes

Q. You swear you were there with no warrant but to apprehend these two prisoners if you could for felonies?

A. Yes; there were two murders.

Q. Was that stated to the party you were with?

A. Yes, they all knew well the duty they were on.

Q. They had orders to apprehend these men?

A. Yes; I was sent from the western district in search of them.

Q. Did you suspect that these were the parties charged with these felonies?

A. Yes; I heard that they were outlawed.

William Walsh, being sworn, deposed:

I was stationed near Jingera, in the Braidwood district; I had been stationed there about four months, and I had been in the district about four years; I know the prisoners at the bar; I have known them close upon the four years; I have spoken to them, and they know me; they are brothers; I was one of the party of police who went in search of them; on the night of the 26th April I went to a hut on Jingera Creek, the party being under the command of Inspector Wright; in that hut a man named Thomas Berry lived; he had been there about two months, having come from a place about six miles off; we arrived in the neighbourhood about half past 8 o'clock; we took up our positions behind a haystack, about 200 yards from the hut, and the first thing we noticed was the noise of horses in hobbles; Wright left us about 1 o'clock and returned with two horses, one hobbled; I found that they did not belong to any one resident in the neighbourhood, and concluded they belonged to the bushrangers; about 3 o'clock in the morning we divided our party and took up our respective positions; at daylight I saw Thomas Clarke come out of the hut followed by John Clarke; they each had a bridle; there was light enough for me to recognise them at this time; they went towards a slip rail in front of the hut, and the stack was rather in front of them; they came towards the horses and within about fifty yards of the stack when I heard firing, and the first thing I saw was the Clarkes retiring towards the hut; I got within about twenty five yards of the hut, and was near enough for Thomas Clarke to recognise me; I fired on him, and he returned the fire; he turned round and took aim at me, and the bullet bounded from the ground and struck me on the leg, and inflicted merely a flesh wound; he was then within about twenty yards of me; John Clarke fired directly afterwards, and he also injured me; they then effected their retreat to the hut; I afterwards went to a position at the back of the house, about 100 yards from it, and within view of it; there was a window facing the direction in which I was placed, and persons looking through it could recognise me; I afterwards went away to Balallaba riding, and when I returned I went in front of the house, and called upon prisoners to surrender; I said 'Tommy, you had better surrender or we will storm the house over you;' I was then, standing about fifty yards from them; one of them, whose voice I recognised to be that of Thomas Clarke, said, "I will surrender to you, and if you had been here I would have surrendered to you long before" he said he had called upon me several times; that was after he came outside the door; I asked him to throw up his arms to see that he had no firearms about him; he did so; Thomas Clarke came out first, and John came out after him, and also held up one hand, being wounded on one arm; they were arrested, and then they asked me to shake hands with them; I did so; they also said they hoped I would forgive them for trying to escape — that they had done their best to do so, and that I had done my best to take them; it was in consequence of a proclamation in the Government Gazette in which Thomas Clarke was named, that I went in search of him and arrested him; I

knew there were charges of felony against John Clarke; I am sure John Clarke fired at me after Thomas Clarke.

By **MR. BLAKE:**

Q. When the men came out of the hut, where were you?

A. I was between the hut and the slip rail of the paddock fence.

Q. What is the distance?

A. 200 yards.

Q. Was not Egan along with you?

A. Yes.

Q. Where did you see him last after the men came out of the hut?

A. When we started from our position he was behind me.

Q. What, description of ground was it?

A. It was good ground; rather down hill, but not rough.

Q. Were there any stumps there?

A. Not in the direction in which I was.

Q. Was it wet?

A. No.

Q. Was it dry?

No, it was not dry.

A.

Q. Well, describe what sort of ground it was.

A. It was rather heavy ground.

Q. Was the incline of the hill towards the hut or from it?

A. Towards the hut.

Q. Was it grassland?

A. Yes.

Q. Were there any stumps there?

A. There were no stumps on the ground that I ran over.

Q. Now, if Egan swore that it was full of stumps and there was great difficulty running there, did he speak truly or falsely?

A. There might have been stumps where he ran. The ground was clear in the way I ran.

Q. And you ran a distance of 200 yards?

A. About that.

Q. Did Egan take the same way as you went?

A. I don't know.

Q. Not at the start?

A. I don't know.

Q. Do you think he would have run through a place that was full of stumps when by following you he might have escaped them?

A. When we started he took the opposite direction to me; he went round the top of a large tree that was lying on the ground.

Q. But you were both running towards the hut?

A. I was; I don't know whether he was.

Q. There were no stumps where you ran?

A. No.

Q. Nor was the ground wet and slippery?

A. No.

Q. Then if constable Egan has sworn that the ground was wet and slippery, he has sworn falsely?

A. I don't know; I did not notice it.

Q. The other constables were in the paddock?

A. Yes.

Q. Was there any firing going on?

A. Yes.

Q. Where was Thomas Clarke when he fired the shot at you?

A. About thirty yards from the door of the hut.

Q. Was he running?

A. Yes; but going slowly.

Q. There was a great deal of firing going on at the time?

A. Yes.

Q. When you fired at Tommy Clarke were you walking or running?

A. I stood still and fired.

Q. But had you been running from the station where you were placed?

A. I was running until I came within twenty yards of Tommy Clarke; then I stopped.

Q. Did you fire before Clarke fired?

A. I did.

Q. When he fired, he took aim at you?

A. Yes.

Q. Will you state how he did it?

A. Directly I fired at him, he fired at me.

Q. Describe what he did.

A. He took his revolver out like this [showing how it was done] and fired.

By His Honor:

Q. He turned round and faced you?

A. Yes, your Honor.

By MR. BLAKE:

Q. You saw the shot strike the ground?

A. I did.

Q. Where did it strike the ground?

A.

About four yards from me.

Q. What sort of ground was it?

A. It was stony ground— hard sort of ground— gravelly.

Q. Was there any water there, or soft mud?

A. I did not notice; there might have been some soft mud.

Q. If Egan was close to you, and has sworn that the ground between you and Clarke was all soft mud, is that true or false?

A.

A. Egan was not with me.

Q. But he has sworn he was three or four yards behind you?

A. I don't know where he was

Q. He has sworn that there was soft mud between you and Clarke— is that true or false?

A. I don't know; he was behind me.

Q. Do you know where he was?

A. No.

Q. Then how can you say he was behind you?

A. I don't know where he was.

Q. You have sworn he was behind you, how then can you say you don't know where he was?

MR. ISAACS:

It was because he was behind him that he didn't know where he was. He didn't see him.

MR. BLAKE:

But he has sworn that Egan was behind him.

MR. ISSACS:

That's just the reason why he did not see him.

MR. BLAKE:

Q. How do you know that the bullet struck the ground?

A. Because I saw it. I saw the dirt rise up.

Q. Did the other prisoner fire?

A. Yes he fired a few seconds afterwards.

Q. What did Thomas Clarke do when as you say he fired at you?

A. He stood still for about a second and took aim at me.

*Q. If Egan has sworn that he fired as he was running; is that true or false? I
can't say; I can't say what he saw; I can only speak of what I saw myself.*

Q. How high did he raise the pistol?

A. About as high as his chest.

Q. And at a distance of about four yards from you the bullet struck the ground?

A. Yes.

Q. Although the pistol was raised as high as that?

A. Yes.

Q. How long did he stop?

A. About a second.

Q. Could he, if he was running very fast, stop, and in a second raise his arm as high as that to take aim and fire?

A. I was closer to him than Egan, and saw that he did so.

MR. DALLEY:

Q. How far were you stationed from the hut?

A. About 300 yards.

Q. Were you and Egan placed together?

A. Yes.

Q. By the leader of your party?

A. Yes.

Q. To act together and co-operate with the others?

A. Yes.

Q. Did you commence with Egan to leave that point when you saw the bushrangers?

A. Yes.

Q. How far did you go with Egan?

A. I don't know. I never saw Egan from the time we started until I took up my position at the rear of the house.

Q. You say that you stopped within twenty yards of Clarke, and that for the whole of the previous distance your course was uninterrupted?

A. Yes.

Q. There were no stumps or any difficulties of that kind in your way?

A. No, there might have been on my right or left but none where I went.

Q. Oh, so the space along which you ran was clear?

A. Yes, there might have been a stump or so perhaps.

Q. Was the descent to the hut continuous from the place where you were stationed?

A. It was.

Q. Was it steep?

A. No; it was very slight.

Q. Was it steeper as you approached the hut?

A. Yes, a little.

Q. Was there a pretty steep descent at the spot where Thomas Clarke fired at you?

A. No.

Q. Was there a descent?

A. Very slight. Tommy Clarke, might have been a little higher than I was when he fired.

Q. Then, in point of fact, there was an ascent?

A. Yes.

Q. There was no decent at all?

A. Yes, there was.

Q. Understand me, was there an ascent, were you lower than him?

A. Yes, I think so.

Q. How much?

A. About three or four feet lower.

Q. About three or four feet lower?

A. Yes, about three feet lower, or perhaps less.

Q. And he was twenty yards off; and when he fired he held the pistol straight out from his shoulder— so? [extending his arm.]

A. Yes.

Q. Without dropping the point of the pistol?

A. No.

Q. Why did you say first that there was a descent from you towards Clarke, when it appears that the positions when actually the reverse?

A. I forgot it.

Q. Well, but you were asked about the nature of the ground, and why did you not then say that there was a descent from Clarke to you?

A. It was very slight.

Q. Well, but why did you not say that?

A. I forgot it.

Q. You forgot it?

A. Yes.

Q. How far were you from Clarke when he fired?

A. Twenty yards.

Q. The bullet struck the ground four yards from you?

A. Yes.

Q. Did you see it?

A. I saw the gravel rise, and just then this bullet struck me on the thigh.

Q. Was the ground level between you and the place where the bullet struck?

A. I cannot say there might be a slight I fall, but it could not be much in four yards.

Q. Was John Clarke running when he fired?

A. Yes.

Q. He never stopped at all?

A. No.

Q. Not even for a second?

A. No.

By His Honor:

Q. Could he run backwards then?

A. Yes, your Honor, he could.

Q. Did he turn round when he fired?

A. Yes.

Q. And did he turn his whole body?

A. Yes, your Honor.

Q. And still retreated?

A. Yes, towards the house.

By MR. DALLEY:

Q. Is it a fact that everybody present was firing as rapidly as possible from the time the bushrangers retreated towards the hut?

A. There was firing, but it was not very quick.

Q. Did you hear Egan firing?

A. I can't say I did; he was in rear of me.

Q. Did you see Wright firing?

A. No.

Q. Did you see Sir Watkin firing?

A. No; I don't know whether he fired.

Q. Did you see Lenehan?

A. No; I don't know; I never looked to see who fired: I was watching Tommy Clarke.

Q. Where were Wright and Lenehan at the time?

A. In the paddock.

Q. Where was Sir Watkin?

A. He was in the paddock at the time.

Q. As you were advancing had you not a view of the paddock?

A. Yes,

Q. And could you not see the flashes of the pistols fired by the others?

A. No; I was watching Tommy Clarke; I heard the firing but did not know who it was that fired the shots.

Q. I understand you to say that between the place where you were stationed and the hut there were stumps and rough ground, but that your course was all the time over good ground?

A. There might have been stumps, but I did not see them.

Q. Did you fall?

A. No,

Q. Did you bound over any stumps or logs?

A. No.

Q. Did Egan fall?

A. I don't know, the men told me he did.

Q. Did you hear him?

A. No, I never saw Egan from the time I started until I reached the rear of the hut.

By **MR. BLAKE:**

Q. You left after that to go for some more police, did you not?

A. Yes, a short time afterwards.

Q. How far did you ride?

A. Forty-four miles, twenty-two each way.

Q. What was the length of the wound you received?

A. It was about four inches long, but very slight.

Q. Point out where it is?

A. About half way up the thigh. The bullet grazed my thigh, taking some flesh away.

By **His Honor:**

Q. Was there any blood?

A. Oh, yes, your Honor.

By **MR. ISAACS:**

Q. Did the bullet go upwards or down wards?

A. Upwards.

By **His Honor:**

Q. How can you tell whether it went upwards or not?

A. By the wound, sir.

Q. How long is it?

A. About two inches, your Honor.

Q. You have said it was only a flesh wound?

A. Yes, but there was a good deal of blood, Sir.

Q. When you stopped at the time you were shot, you were within twenty-five yards of the hut?

A. The house was on my right and Clarke was on one side of me; we were going round the end of the house towards the front.

Q. He was making for the front of the house?

A. Yes, and I was going to the end of the house.

Q. You were not behind him?

A. No, I was at the side.

Q. Then he would have to make a three quarter face to gain the house?

A. He would only have to make a quarter face; he did not see me until just before he fired.

Q. The house is on a descent?

A. Yes, your Honor.

Q. The ground descends through the house from the back?

A. Yes.

Q. The descent is towards the house at the back, and from the house in the front?

A. Yes. It stands on a slight ridge.

Q. There are inequalities in the ground?

A. Yes.

Q. So that at one time you may have been ascending and at another descending?

A. Yes, Sir.

Q. Did the blood from the wound come through your trousers?

A. Yes, your Honor.

Q. Did the bullet make more than one hole in them?

A. No; it cut a slit through them.

Q. Were they tight fitting trousers?

A. No, I had rather a loose pair of pants on: they were not tights.

Charles John Pattison, being duly sworn, said:

I am a duly qualified surgeon; towards the end of April, I forget the precise date, I examined a wound in the thigh of the last witness constable Walsh; it was a slight flesh wound, downwards from the front, about half an inch long; the skin was entirely removed from that portion; the muscular tissues were exposed, and blood was oozing from the wound; the bleeding was very slight; I cannot fix the date on which I examined the wound; I think it was on a Saturday; I saw it at Stoney Creek, near Jinden, about 6 o'clock in the evening; it was a very trifling wound, and seemed to have been caused by a bullet grazing the thigh; it was about an inch or an inch and a half from the femoral artery; penetration of the femoral artery would be fatal, and even if immediate assistance were rendered I question whether a person wounded there could recover; the person who fired the shot must have been slightly above the person struck; I heard the constable say something about the bullet striking the ground first; I think that is very questionable; from the form of the wound, I think the bullet must have come direct although I will not undertake to swear positively that it must have been so.

The witness was not cross examined.

Francis Henry Stephen, chief clerk of the Supreme Court, being duly sworn, produced the proclamation of outlawry and other documents, proving that the prisoner Thomas Clarke had been outlawed in due form on the 31st May, 1866; he had not got the original summons to surrender; he

recollected that there was an amended summons; he did not know where they were, but believe that they must be in the hands of the Crown Solicitor.

Archibald Frazer, chief clerk of the Crown Law Offices, being duly sworn, said:

I produce the Government Gazette of the 15th May, 1860, containing the summons charging Thomas Clarke to surrender; and the Government Gazette of the 6th June, containing the proclamation of outlawry against Thomas Clarke; I got these gazettes at the Government Printing Office.

By **MR. BLAKE**:

Q. Do you know whether there was more than one summons issued? A.

I do not know.

Q. Did you see all the proceedings?

A. No.

MR. BLAKE:

Well, your Honor, I believe there was a second summons, and that it is not authorised by the Act.

His Honor:

Q. Is there any evidence that there was a second summons?

MR. BLAKE:

Mr. Stephen, your Honor?

His Honor:

He talked of an amended summons and an original summons, but I don't know whether they were distinct documents.

(To Mr. Stephen) [Chief Clerk:]

Q. Were they distinct documents?

MR. STEPHEN [Chief Clerk:]

A. I don't know, your Honor.

His Honor:

I don't see that they belong to that office at all. They would go to the Crown-Solicitor or direct to the Inspector of Police, and then they would get to the Government Printing Office, where no doubt they will be found.

MR. BLAKE:

A. What I suppose is, that there was a second summons, the first being too late.

His Honor:

A. Perhaps so; but I go according to the evidence, and there is no evidence of that.

MR. BLAKE:

If it is so, then the outlawry must be abandoned under the Act. The Act says this:

“1. Whenever an information shall be filed in the Supreme Court by her Majesty's Attorney-General after oath made before a Justice of the Peace and a warrant thereupon duly issued charging any person therein named or described with the commission of a felony punishable by law with death, any Judge of the said Court upon being satisfied by affidavit of these facts and that the person charged is at large and will probably resist all attempts by the ordinary legal means to apprehend him may forthwith issue a Bench warrant under the hand and seal of such Judge for the apprehension of the person so charged in order to his answering and taking his trial upon the said information and such Judge may thereupon either immediately or at any time afterwards before the apprehension or surrender or after any escape from custody of the person so charged order a summons to be inserted in the Gazette requiring such person to surrender himself on or before a day and at a place specified to abide his trial for the crime of which he so stands accused. Provided that the Judge shall further direct the publication of such summons 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.”

There was no power under the Act to issue an amended summons; and although there was no mention of such a summons in the Gazette: yet there was the evidence of Mr. Stephen that there had been a second, or an amended summons. If that were actually so, the outlawry was not in accordance with the provisions of the statute, and the whole proceeding grounded upon an irregularity, was invalid.

MR. DALLEY said that:

It having transpired that the summons originally issued had been replaced or altered in some particular by a summons subsequently issued, the whole proceeding was illegal. The Act never contemplated the issue of two summonses, and such a practice would be dangerous in the highest degree; for if a summons were issued requiring the attendance of an offender at a specified place on a date named, and if a second summons were issued bearing a different date, a man might be shot down before he had time to comply with the summons or had had an opportunity of becoming acquainted with the fact that a summons had been issued at all. The whole of the proceedings in this instance were invalid.

His Honor said that:

He should receive the evidence simply on this ground. There was nothing in the statute to say that a second summons could not be issued. It might be that the Judge had no power to order the drawing up of a second summons, but there was nothing in the statute to say that there should be a single summons, or as to whether he might issue two, or any number of summonses. It simply said that he may order a summons to be inserted in the Gazette. It might be this in that case a summons had been issued, and it had been afterwards found that sufficient time had not been given for the prisoner to appear, and that therefore another summons had been ordered to be inserted in the Gazette. It had not even been suggested that two summonses had been ordered to be inserted in the Gazette; and there was in fact no clear evidence that there had been a second summons. The documents were admitted in evidence, and were read by the Judge's Associate. The first was a proclamation in the Government Gazette, dated March 15th, and was a summons calling upon Thomas Clarke and Patrick O'Connell to surrender. The second was dated June 5th, and was the proclamation of outlawry.

William Walsh was recalled, and asked by the Solicitor-General as to whether it was possible the ball may have struck him otherwise than in the way he had described in his evidence in chief. He replied that he had correctly stated the manner in which he was wounded; namely, by the ball striking the ground first.

Mr. Williams, the Crown Solicitor, was recalled, and examined by **Mr. Blake**.

Q. Was there a previous summons, Mr. Williams?

A. There was.

Q. What became of that summons?

A. I don't know where it is. It was gazetted.

Q. Was it on the same information?

A. It was.

Q. Have you got that summons?

A. I don't know.

Q. You do not produce it?

A. I have not looked for it.

Q. Was it on a return day different to this?

A. It was.

Q. Was it issued before this summons?

A. It was.

Q. This is the summons referred to in the proclamation?

A.

Yes; the first summons expired before this was issued.

His Honor:

Q. The first summons had expired, had it?

A. It had. A return had been sent in from the place where it was posted, and it was found to be defective and not in proper time.

MR. BLAKE:

Q. The information and the affidavits were the same?

A. The information was the same.

His Honor:

Q. Was there more than one Bench warrant?

A. I believe not.

Sub-inspector Wright recalled, and examined by His Honor:

Q. When you first saw the two prisoners coming out of the hut, did you know who they were?

A. I did not exactly, but I had good reason to believe that they were the persons for whom I was searching.

Q. Did you observe at that time whether they were armed?

A. Well, I did not observe that they were armed at that time; but I fancied, from the way their coats were projecting from the side, that they had revolvers underneath.

Q. You did not fire until after they had drawn their revolvers?

A. No.

Q. Not before you saw their firearms?

A. Oh, no.

Q. But you thought that arms were under their cloaks?

A. I was satisfied of it.

Q. At that moment where was Walsh?

A. Outside the paddock.

With respect the point raised by the counsel for the prisoner, as to the legality of the outlawry, **His Honor** said that;

He should probably put the case to the jury in both aspects against both prisoners, taking their opinion on the assumption that the outlawry was valid, and on the assumption that it did not exist.

MR. BLAKE: addressed the jury for the prisoner Thomas Clarke.

Upon the indictment the jury would have to find that the prisoner, Thomas Clarke wounded constable Walsh with intent to kill and murder him. As the learned

Solicitor-General had told them, they would have to put from their view every circumstance excepting what was then to be detailed in evidence. A greater writer had said that the mind of man when he entered the world was a perfect blank, and the ideas with which it afterwards became stored were obtained in his passage through life. As regarded this case, the minds of the jury should be in a similar state, and every idea which they were to have should be derived from the testimony they heard during the progress of the trial and from that source alone. They must exclude all that they had heard and read respecting the real or supposed delinquencies of the prisoners at the bar. If they found that the prisoner had fired the shot by which Walsh was wounded they would also have to consider the intent with which he fired. At an early stage of the case he proposed to exclude all evidence of what took place after the firing of the shot which was the alleged cause of offence; but His Honor decided that all the circumstances of the case subsequent as well as antecedent to the firing were material for the purpose of enabling the jury to form a conclusion as to what was the intention of the prisoner. He thought that that decision had been of great advantage to a correct understanding of the case, more especially with reference to what was the intent of the prisoners. It was material for the jury to consider what was the respective positions of each of the parties at this time of the collision between the police and the prisoners. Clarke was in the house of Berry, where he had spent the night. There was nothing to show that he was not there with the assent of Berry, and on his lawful business. The police had gone there the night before for the purpose, as had been stated, of capturing the prisoners. They were there in a dress which was not the general uniform worn by policemen, and they went there secretly for the purpose of capturing the prisoners in any way. He need scarcely mention that if an attack was made upon any person, even by a policeman not armed with proper authority, the person assailed was justified in resisting and repelling that attack. We had it in evidence that an attack was made by the police. The shots fired by the prisoners were fired after the police had fired upon them, when they were not engaged in the commission of any offence recognisable by the law, but engaged in their proper business at the house of Berry, where it was not unlawful for them to be at the time. The right of the police to effect the capture of the prisoner Thomas Clarke by any means, to hunt or shoot him down, was derived altogether from the outlawry of which they had heard. Outlawry was the most extreme course known to the law; and, therefore, however necessary it might be under certain circumstances to have recourse to it, it was a proceeding which must be strictly guarded in its use. The proceeding must be in accordance with the letter of the statute which gives the authority, and unless it was strictly regular the prisoner was perfectly justified in resisting the attempt to capture him, excepting he knew at the time the persons who sought to capture him were constables. A good deal would depend upon whether the jury believed on the evidence that the prisoners had reasonable ground to be satisfied that this attack was made upon them by

constables armed with a sufficient authority for the purpose. Unless the prisoners knew that they would be justified in resisting the police equally as in resisting any other individuals in the community. A good deal had been stated about the marshalling of the police during the night, but what was of real importance was the occurrences at the time the prisoners came out of the hut with the bridles in their hands; Wright told them that the moment the prisoner appeared the firing commenced; he fired the first shot, which was returned by the prisoner, and the firing was continued on both sides up to the time when the prisoners retreated into the hut; sub-inspector Wright said that there were then a great many shots fired in all directions; before that he said that when at a distance of sixty yards he cried out "We are police" he was then 120 yards from the house; and that was all the intimation which was given to the prisoners. He could not say whether the prisoners heard him, but his impression was that they did not. At all events the firing was going on, and the jury could have no great difficulty in concluding whether they heard the intimation of Wright given at so great a distance. The police were not dressed in their uniform, but wore an ordinary bush dress, for the purpose of disguise. they adopted these dresses for the purpose of disguising themselves, not wishing to be supposed to be police, so that they might be the better able to make this capture. The important question in the case is by whom was the shot fired that wounded Walsh. Walsh swears that Thomas Clarke was in the act of running towards the hut, but he (Walsh) attempted to intercept him, that Clarke stopped to draw his revolver, and fired, the ball striking the ground four yards from him, and immediately afterwards he was struck by a ball. If this was correct it must be clear that, the wound was not inflicted by the shot from Clarke. Walsh says he got in front of Clarke. Was it likely that Clarke who was endeavouring to escape from these men, should leisurely stop as Walsh said he did, and was it not more reasonable to suppose that, as other witnesses had stated, he was running as fast as he could? Neither of them took deliberate aim, but it no doubt seemed necessary, as Walsh was wounded, to prove that Thomas Clarke was most careful about his aim. The evidence of Dr. Pattison, too, was quite inconsistent with the idea that the shot from Thomas Clarke was the one that struck Walsh in the thigh, and there is ample evidence that the firing by the police was carried on rapidly from revolvers and rifles, and the position of the parties made it quite as likely that he was shot by one as the other. Indeed, it was stated in evidence that Wright's party ceased firing because Walsh was in a line with them and the Clarkes, and it must be recollected that this part of the affray did not last more than a few seconds. It was manifest from the rest of the evidence that the deliberate aim deposed to by Wright could not have been taken. The wound, too was so slight as not likely to have been inflicted at so short a distance as that between Walsh and Clarke. Did it not resemble one inflicted by a spent ball? If the intention of Thomas Clarke was to kill and murder, how was it that with so many opportunities to fire with unerring aim at constables within range of the hut

only this slight wound was received? His object was to reach the hut in order that in some manner he might effect his escape without implicating himself in the murder of any of the constables. Their intent must be considered in connection not only with the antecedent, but also with subsequent transactions. It must be borne in mind that as soon as the firing of the police ceased, the firing in reply ceased. It was not sufficient that it may be probable that the wound was inflicted by Clarke's ball, you must find as a fact that it could be no other; and if the evidence conveys a reasonable doubt, prisoner must have the benefit of it. As to the intent, the evidence showed the firing was for protection, which he was entitled to do unless he was legally outlawed, or knew that the party were constables in the discharge of their duty. This involved a matter of law, to be considered in another place. No doubt, prisoner knew Walsh, but there was no evidence that he recognised him till after the lapse of a considerable period, when he said 'If you had been here I would have surrendered long ago,' This was the man he was charged with wilfully attempting to shoot. The whole evidence from beginning to end negatived the intent alleged in the indictment, and prisoners were not guilty unless you find that they acted with this felonious intent to kill and murder Walsh. If there was any doubt upon that point prisoners were entitled to the benefit of it.

MR. DALLEY said:

He was charged with the defence of the prisoner John Clarke, and he implored the jury to dismiss from their minds all other matters that might affect their determination upon the simple case before them. It was their duty as far as they were able to effect a victory over prejudice and preconceived impressions, and to bring themselves to an impartial discharge of their duty. John Clarke was no outlaw, and has not lost that protection which the laws of England hold out to every man. It is said all that was necessary to declare Thomas Clarke an outlaw had been done, but his brother is not an outlaw. It is, however, said he had been charged with felonies. But no one had a right to shoot him down or condemn him without trial. This bloodthirsty statute (the Felons' Apprehension Bill) cannot be regarded otherwise than as a disgrace to our civilisation, or looked upon without shame by those who value the character of their country in the eyes of the world. Yet it had not stripped John of all his privileges: they could not blow his brains out without calling upon him to surrender. He had a right to be where he was found, engaged as he was, in the commission of no crime. He was leaving the hut in the morning with his brother, when suddenly they are fired upon by men from all sides. You must have a strong foundation of fact on which to rest in the discharge of your duty. The evidence of the constable was to the effect that the prisoners did not hear what he said when he called out to them. What is the first thing that is done? In the grey dawn the prisoner John Clarke goes out, and the first thing he knows is that he is fired at. You will not find that he was engaged in any enterprise with his brother, who was an outlaw at the time. He came out of the

hut that morning, and was suddenly amazed at finding himself in the midst of a perfect hail of shots which came from all sides. The man would be so perfectly dazed as to be for the time incapable of forming an opinion at all. You are asked to find him guilty of wounding this man Walsh, with intent to murder him, and you might find the Intent as clearly as you find the foot. Is it not likely that he fired to back his own retreat to the house, and with a view of showing the police that he was armed. It is difficult to ask you, who are men of peace, to transport yourselves in imagination in such a scene as this, and endeavour to put yourselves in the position of these men on that morning. Endeavour to realise that, coming out of this hut, you find yourselves surrounded by men who fired at you with the greatest violence. Do you think that a man in such a position would be capable of forming an intent? Would he not, if he were in the position of the prisoner John Clarke, rather say to himself, "These men cannot shoot me down, I am committing no crime now. I may have committed a felony; I may be charged with felonies, but I am committing no crime now. I'll just fire off a pistol and run to the house as fast as I can." It is proved that the man was running away all the time. He does not stop as Thomas Clarke does, and fire at anybody. The evidence is clear that he did not do so. He was stopping in the same house as his brother, but even under this bloodthirsty statute it is not a crime to be in the same house as an outlaw occupies! He sought his own personal safety, and was not facilitating the escape of his brother. What proof is there that he knew these persons to be policemen? You have heard that the police were not dressed in any way that would call specific attention to their occupation. They were dressed precisely as the bushrangers were dressed, and I dare say they copied the costume of the latter in order to deceive them. There was one policeman who knew Thomas Clarke, and was probably therefore known to that prisoner. The rest of the party came from distant parts of the country, and were strangers. You have no evidence that John Clarke saw Walsh; Indeed, the evidence has an opposite tendency. You have heard that Tommy Clarke said he was looking for Walsh to surrender himself. Under all the circumstances I submit that there is nothing to show that John Clarke knew that these persons were policemen. I will now direct your attention to the narrative of the transaction. I don't wish to cast any reproach on the officers concerned in this case. I don't wish, to say one word against the unfortunate man who was wounded — though slightly?—in this affray, but I contend that he is not a reliable witness. It is not a man who has the wilful intention of deceiving who is the most dangerous because such a man may be unmasked. He may have done something which causes his detection, He may have overlooked some trifling circumstance which exposes his conduct. But it is those men who believe in what they are saying, though they may be speaking untruly, who mislead the world. In the history of our own jurisprudence there has occurred a case in which one of our best and most venerated magistrates has been led to do a grievous injustice, by being misled in this way. The comparatively obscure person who gave evidence

here to-day may have done the same. I am not impugning his morality, but attacking the grounds on which he forms a conclusion. I am attacking his credibility, he tells you how he is wounded, and he is the only witness who does so; yet in a skirmish like this, the last person who can give satisfactory testimony as to how a wound was received is the person who received it. He is not in a position to observe, but others observe. Each man is engaged in watching some particular enemy. All the eyes of the constables were fixed on the bushrangers. All eyes were on Thomas Clarke, and all would have seen him point his pistol. Walsh is the only person who tells you that the pistol pointed at him by Tommy Clarke is the one from which the ball sped that wounded him. Although Walsh started from the same point with Egan, and Egan was within a few yards of him when he was shot, yet he never saw Egan. He never sees the man supporting him, and he never sees a shot fired by any other person of all those who are engaged. The four other constables were advancing in an opposite direction to Walsh and Egan. Egan was firing rapidly, but Walsh never saw anything— not a single circumstance that occurred except his own wound. Egan says he followed Walsh and was within three or four yards of him when he was struck—that he passed over difficult country, over stumps, that the ground was rotten and broken, and that he himself was thrown down in his endeavour to keep up to Walsh. We hear from Walsh that the ground was not wet, but was a hard rocky soil. When he was asked about the situation of the house he most certainly led us to believe that he was descending towards a place which was situated below him. He then recollected that he was ascending up to where Clarke was standing at the time he was wounded. He said that Thomas Clarke was standing some three feet above him— twenty feet from him and three feet above him. You have to find the double fact that the wound was inflicted, and that it was inflicted with intent to kill and murder the person named in the indictment. I have this to point out to you, that if you can reconcile all these statements with those of the other witnesses, you will have to come to the difficulty presented to you by the doctor. It is often that the clear light of science is superior to any testimony of men who are describing what they think they saw at a time when they were agitated and confused. The witness Walsh tells you that from the ricochet of the ball at a distance of four yards he was struck. If so, the bullet must have struck the top of his thigh, and turned back downwards. The wind must have been upwards. The wound must have been upward, if the ball did ricochet. The doctor says that the ball did not bound in the way described, and that the wound could not have been inflicted in the way described by Walsh. Is it not probable the injury was caused by a spent ball from the other police who were gradually bringing Walsh and Egan into the line of their fire? People have often been shot down in this way. Stonewall Jackson fell by the bullet of one of his own soldiers, who would very likely have died for him if he could. I will now say a few words on the intention. My learned friend has pointed out to you that you will have to find that the prisoner shot Walsh, and that before you convict him you must find that

his intention was to kill and murder Walsh. The law calls upon you to pass into the secret chambers of men's minds, and under circumstances which you are unable to weigh correctly, to discover a man's intent. You have to find out the tone of a person's mind at the time that he did some act. It is a dreadful responsibility to be imposed on any one. You have a dreadful duty to discharge. After all what do we know of the secret motives of a man? The law says, however, that men are presumed to know what the consequences of their actions are, and this gives you a clue to the motive of their actions. There does not seem to have been any hostile feeling against the police on the part of the Clarkes, and they shook hands with them when captured. These are the observations I have to offer to you. If they have been unnecessarily protracted, you must pardon me and consider the earnestness that must animate one who feels that on what falls from his lips may hang the extinction of human life. One almost feels afraid to resume one's seat in such a case. In this atmosphere of justice, unpolluted by either the passions or prejudices of mankind; in this temple into which the exaggerations of terror, the misrepresentations of fear, the sensational horrors of journalism ought to find no entrance, you will discharge your duty as if God alone were the only witness of your conduct. The responsibility cast upon you is yours, and yours alone. No man, no number of men, can lighten it by the weight of a feather. You have no public to satisfy, no orders to obey, as you have no hope of consolation, no prospect of atonement, if you wilfully or negligently err. Under the guidance of Heaven, the fate of these prisoners is now left in your hands.

The **SOLICITOR-GENERAL** addressed the Court in reply. he said that:

After the very able, argumentative, and fervid addresses which had been delivered by the learned counsel for the prisoners, he felt that it was incumbent upon him to offer a few observations on the case — to recall the minds of the jury to a consideration of the facts to which they ought now to address themselves. Sometime in the discharge of their onerous duties learned counsel felt themselves at liberty to indulge in sophistry, in invective against the laws of the land, and to employ all their powers of rhetoric in order to obtain the acquittal of the accused. His own duty on this occasion was simply to direct the attention of the jury to those facts which were strictly pertinent to the case, and to divest the trial from all that was irrelevant to the issue. All that his learned friend had said in reference to the principles of law applicable to a case such as this accorded with his views, but he must take exception to the peculiar application of those principles contended for in the present instance. With respect to the evidence, he should not attempt to reply to the criticisms of his learned friends on the discrepancies in the statements of the witnesses, for he regarded those very discrepancies as strong confirmation of the general accuracy of the statements given. They were capable of being reconciled as a matter of fact, and were consistent with the veracity of the witnesses. The witnesses described circumstances which they saw from different

points of view, and which they may have regarded with different degrees of attention. In regard to the evidence given by Egan and Walsh, for instance, as to the positions they severally occupied when the shot was fired wounding the latter, if their testimony was not capable of being harmonised in the principle he had indicated, then it was impossible that Walsh himself could have spoken the truth. But the fact was, that the evidence was not only consistent with the veracity of the witnesses but with their ability to know. It was impossible to suppose that Walsh could be mistaken, or that he had misstated the circumstances attending the wounding of himself by Thomas Clarke. The learned counsel had argued that from the nature of the ground it was impossible that the ball could have struck Walsh in the manner described in evidence; but it must be in the experience of every man how erratic were the courses of balls discharged from firearms, when they come into contact with objects offering resistance. Whatever might be the precise scientific explanation of the course which the ball took, there was nothing improbable in the statement of the fact by Walsh. The medical evidence in the case had been greatly commended by the learned counsel because it tended to throw a doubt on the testimony of Walsh; but medical practitioners, like other scientific men, were greatly given to theorise, and their conclusions were not to be received with absolute confidence in all cases. They had their preconceived idea, and like, other people, were liable to err. Dr. Pattison did not tell the jury that it was impossible that the ball could have taken the course described by Walsh, but he said that it was highly improbable that it had done so. Bishop Butler had said, 'one well attested fact outweighs a thousand a priori improbabilities,' and this was a sentiment so profoundly true and philosophical that it was worthy of a more severe and constant application to the affairs of every day life. There was not the slightest imputation of perjury against Walsh, and the fact so fully attested by him was more worthy of credence than the suppositions of Dr. Pattison. Mr. Dalley dwelt upon the fact that nobody except Walsh saw how he was wounded, and he asserted that nobody but Walsh saw the prisoner fire. With respect, however, to this latter statement he thought the learned counsel was in error, for the evidence of Egan or sub-inspector Wright afforded an express corroboration of Walsh's testimony. If the intent to kill and wound was not made out, he freely confessed that the case for the Crown had failed. The jury, in judging of the question of intent, must fairly take all the surrounding circumstances into consideration. It was said that Thomas Clarke, in surrendering to the police, knew that he was walking into the arms of death, and it was alleged that had he have been murderously disposed he could have shot down those by whom he was assailed. But that way of accounting for his conduct was, to say the least, most improbable. The firing of a revolver loaded with ball, within a distance of thirty yards of the police at whom the weapon was levelled was not consistent with a mere intention to terrify, but indicated, on the part of the prisoners, a settled determination to take life. An argument was founded upon the statement that with all the means of

taking a deliberate aim only this slight wound upon Walsh was the result of their firing. But desperate as had been their design and deadly their intended aim, we could not in the remotest degree estimate to what extent the power of conscience or some other internal feeling operating upon men so circumstanced might in the Providence of the Almighty have prevented them from carrying out their designs. It might have been, through a want of skill or owing so these disturbing causes, that their aim did not prove so effectual as might have been intended. This was a more rational conclusion than that they fired without taking aim. It was said there existed no bad feeling on the part of prisoners towards the police, and in support of this reference was made to their conduct when they surrendered. One of the prisoners said at that time ' You must forgive me.' Forgive him for what? For firing without taking aim? Was it not rather for endeavouring to get rid of those police by shooting them, in order that prisoners might escape. It would be a most strange inference that, looking at this conduct after their surrender, there did not previously exist during the conflict an intention to take life. Considering all the circumstances and the deadly nature of the weapon used, the conclusion must be that there was an intention to kill. With regard to the intent, which it was urged was not proved, it was not likely that they would be less energetic in their efforts to get rid of the police if they knew, which did not appear to be the case, that Walsh had gone away for reinforcements. They might have felt that their last card having been played, they would, in order to retain the good opinion of those whose opinion they valued, prefer to surrender to a force of ten or twelve rather than to one of four or five. With regard to the distinction in the positions of the prisoners before the Court, his learned friend, Mr. Dalley, said his client, John Clarke, was not outlaw, and therefore had not been deprived of the rights and privileges which, as a citizen, he was entitled to enjoy. Both were charged with offences (of which, certainly, they might be innocent); one was outlawed, and John Clarke knowing it, was assisting his brother, that outlaw, in the proceedings during which Walsh was shot. They were acting, therefore, with a common design. If that design was illegitimate, then both were equally guilty. John Clarke, it was shown, fired immediately after his brother fired his first shot, and in the same direction. The case of the Crown was based upon grounds that would be unaffected by the circumstance whether an outlawry had been established or not. It was not a necessary inference that prisoners drew their pistols when near the police that they, therefore, did not hear the sub-inspector words, ' We are the police.' The proper inference ought to be the reverse. Besides, they knew Walsh, and he was near enough to be recognised by them. It would be immaterial whether John Clarke identified him if Thomas Clarke knew him to be a police officer. It could scarcely have been imagined by prisoners that they were attacked by rival bushrangers, and the conviction must immediately have forced itself upon them that this was a body of police. His learned friend Mr. Dalley took occasion to characterise the Felons' Apprehension Act as a bloodthirsty statute, the

necessity for which reflected disgrace upon our community. He (the Solicitor-General) completely concurred, but with regard to the other portion of the sentence he must confess that the learned gentleman had transferred to the Act by a figure of speech an epithet which properly applied to those who made the Act necessary. The learned Solicitor-General, in concluding, requested the jury to give the prisoners every favourable consideration which fairly arose upon the evidence, either as tending to show their innocence or to raise reasonable doubts of their guilt, and reminded them they were not to be swayed by any consideration of the consequences of their verdict.

His Honor, in summing up, said:

Whatever the importance of this case in principle or result, I think I may be permitted to express regret at the great length to which the trial has extended. I think one may see much that has occurred to-day tending to complicate rather than to simplify a very plain case - the case, I believe, to which it is not difficult to apply the law, whilst the facts lie in an extremely narrow space. Prisoners are charged with shooting at and wounding Walsh, with intent to kill him. The first question is, did Thomas Clarke fire the shot and wound Walsh; and, secondly, what was his intention when he fired that shot. As to the first there is the evidence of Walsh, supported by the evidence of more than one other witness, that the shot proceeded from the revolver fired by Thomas Clarke. Whether the shot fired from that pistol reached the body or first touched the ground and then entered Walsh's thigh is a matter of no importance - the simple question upon the evidence being, was the wound inflicted by the hands of the prisoner Thomas Clarke at all, if not, there is no evidence that it was inflicted by the other. If you should be of opinion that it was not inflicted by either prisoner, it would seem an absurdity to suppose it was inflicted by persons standing behind them; because Walsh is proved by all witnesses to have been in advance of prisoners in running to the hut. Whether they turned round or presented only half or quarter face, you must be of opinion that it was fired by no one from behind, as the wound was in front. I shall not go into the propriety of the punishment of death in cases of this sort. I shall take it for granted that you will return a verdict upon the matters of fact and inference according to a conscientious view of your duty, and not be induced to swerve from the truth or violate that duty by any consideration of what the result of your verdict maybe. The counsel for the Crown has made some reference to a remark from one of the counsel for the defence in reference to the Felons' Apprehension Act. I did not understand Mr. Dalley to say that Act was a disgrace to the community, but that the necessity for it was a disgrace to our civilisation. In that sense I agree with him, because I understand him to mean that the outrages which gave birth to it are a disgrace to us. This very Bench recommended such an Act years before it was passed by Parliament. After all, it was in part only a re-enactment of laws as old as the time of Alfred, sprung from our Saxon ancestors and adopted by the

ablest and most enlightened Sovereigns England has known. It is founded upon a series of outrages without precedent in any portion of the dominions of the Queen for at least a century and a half - outrages that would disgrace any community on earth, and such as if continued would paralyse all industry and render property and even life itself insecure - a system of outrages not addressed to large properties or a tax upon men of higher station, but addressed to all classes of the community, rich and poor, high and low. Were these robbers ever known to pass by the home or the store of the poor men, the labouring men, the widow or the orphan, when it suited their purposes of outrage to attack? They have been common robbers of all classes of the community, and murderers of the worst kind. The slightest attempt at resistance has been followed by an attempt to take life. To meet such outrages the law has been passed; but it is directed simply against persons found with arms in their hands, or reasonably suspected to have arms, and be likely to use them in taking the lives of those who, in pursuance of their duty, endeavoured to apprehend them; and does not operate until such persons are outlawed - having committed some crime punishable with death, or have been charged with it, and indicted for it, and notwithstanding every effort made to capture them it is found that they cannot be taken alive. The law says they may be taken, every precaution having been used and notice given them, they may be shot at. But for the purposes of this trial I am of opinion it is of no earthly importance whether Thomas Clarke was an outlaw or not. If you find that the constables who endeavoured to apprehend him, supposing them to have acted with one common design and purpose, believing this man was outlawed, endeavoured to arrest him for that cause; or believed him to have committed a felony without outlawry; or if a reasonable charge of felony is imputed; or even if a policeman suspects a man to have committed a felony, he has power by law to endeavour by all means, and if he cannot other wise take him, is entitled to shoot him down. The law always has been so, and is it to be supposed that a minister of justice is to expose his life to murderer's knives and pistols, or the attacks of robbers without protection from the law? Is a constable in the discharge of a duty like this, finding felons with arms in their hands, that they may use, to be shot at before he uses his? Do they meet in single combat or in honourable warfare? Although I make every allowance for the gallant feeling of a man who, finding himself shot at, shoots at another, and may thus be considered to have balanced accounts personally, I cannot but regard with a feeling of humiliation that this constable, perhaps with the feelings prompted by a generous mind, knowing as he did that these men were I charged with felony and murder - one an outlaw, should shake hands with them. It was a humiliation to a man in his position to hold out his hand to those who stood before him as robbers and murderers. To treat them cruelly would be barbarous and unEnglish. But he might have said: No sir, you have shot at me, I forgive you; I have shot at you in return ; you are my prisoner; I am a constable who have done my duty, and my hand does not meet that of a person I believe to

be a felon. I speak these things warmly, being a colonist as much as anyone can be, and the remarks arise as incidental to the facts as they came out in evidence. The question of the crime of these men, however, is irrespective of such topics. They must be supposed to be innocent of this particular crime with which they stand charged, or of the other crimes imputed to them until they are found guilty. But if a person is charged with felony, it is the duty of that man to surrender, and it is the duty of the constable to arrest. If Thomas Clarke did not fire, or, on a consideration of the whole evidence, you have a reasonable and fair doubt whether he did so or not, then both must be acquitted. The next question is this: was Walsh, when shot, in the due execution of his duty as a constable, endeavouring to arrest the Clarkes because one or both are charged with felony, or one because he was supposed to be an outlaw. The evidence is that a party of men was formed for the purpose of arresting these two men, whom they believed to be guilty of several offences, and more than one murder; If, then, Walsh when shot was in the due execution of his duty, the next question is, were the Clarkes conscious of the fact that these men were constables endeavouring to arrest them for crime. As to that, I may as well read to you a few lines from a well known authority (Archibald's Criminal Law). As to the defendant's knowledge of the deceased's authority or intention, when any officer is in the legal execution of his duty endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed, if it appears the slayer knew the officer's business either expressly from him or implied from the circumstances, the killing is murder. If a constable interfered to prevent an affray within his own township and be killed by one of the inhabitants or any other person who knows him to be a constable it is murder; if by a stranger, who does not know him, it is manslaughter. You will remember that according to Walsh's testimony, supported by at least one other witness, Thomas Clarke, when within twenty yards of him, distinctly turned round and fired at him, and that Walsh was perfectly well known to both prisoners, having been in the district four years, and spoken to both of them when in the execution of his duty. The alleged offence took place in the very district in which he had been acting as constable. It is said that Thomas Clarke did not know Walsh, because he said at the conclusion of the firing, when the reinforcing party came up, something to this effect, "If I had known you to be here I should have surrendered long ago" He might have known or guessed that Walsh was sent away, for he said, "I called for you several times." But why should he call for a man unless he knew he was there? He may have supposed he had gone to the rear or to a place out of sight for some reason connected with the firing. How could he call upon Walsh several times unless he knew him? The next question is, did Walsh do more than was reasonably necessary to protect himself in effecting the prisoners' apprehension? Because he had a right to protect himself as a constable. I have expressed my opinion upon that point of law, that a constable is not bound to wait until he is shot at, I do not dwell upon the seriousness of the wound. The results of injuries to

the body may rest in the hands of the Divine, power. But a man who fires, aims at, or strikes another in the body in a probably fatal part, whether the person dies or not, or however serious the wound, must be dealt with as to intention with regard to the probable effects of his act, Walsh says, "I fired before Clarke, and then Thomas Clarke turned round and faced me, running as he fired, but not fast; he stood still as he fired; it was with a revolver aimed at my chest." There are some discrepancies in the evidence, but they are not of importance as regards the credibility or truthfulness of the main points. Then comes the great question, had or had not Thomas Clarke at the moment of firing an intention to take life? With what he intended afterwards you have nothing to do. Looking at the matter as men of common sense, you must determine, from a consideration of the circumstance, not conjecture, whether these men did intend to take life. As to the statement that there was no bad feeling, because they might have taken life afterwards, you must consider that they may have felt themselves out numbered, that sooner or later they would have to surrender or be shot, and under the circumstances may have thought it better not to take life; or, knowing themselves to be surrounded by six men, they may have considered that by taking the lives of two or three the number of their enemies would be as far diminished as to afford them a chance of escape. After looking at these probabilities comes the presumption in law, established almost as a maxim, that a man is presumed to intend the natural and probable consequences of his act. Then what is the probable consequences of a man turning round and firing a revolver at a pursuer, the result being that a wound is inflicted? What would be the natural consequences of such an act? This presumption is not merely a rule of law, but founded on experience and reason. When men do any act whatever, is it not natural, taking the generality of mankind, that it is likely to effect the man's intents. What is the natural effect of shooting at a man's body with a deadly weapon? This is the whole of the case as it affects Thomas Clarke. Now comes the question, which is a more difficult one, as to John Clarke. The rule of law applicable is this - if two or more men are engaged in an unlawful act, one, as a general rule, is responsible for the acts of the others. If men go out with one purpose, and one does something inconsistent with that purpose, there is no reason why he should be included in the common application. That rule pervades the whole criminal law, and is founded on common sense. It tends to deter men from joining and conspiring together to do unlawful things. All must be responsible for the prosecution of a common design. The present difficulty is this, what illegal design were the two prisoners concerned in? If they had been inside the house, and both trying to shoot these constables, then both would have an intent to commit felony, being engaged in a common design. But at the time Thomas Clarke fired the shot John Clarke was committing no crime, but endeavouring to run away. If so, there is no crime. The constables were entitled to shoot Thomas Clarke, and if he turned round and tried to shoot them he is guilty of a felony, and the other participating and helping him would be equally guilty.

But the difficulty, which is not insuperable, is that at the time the shot was fired they were both running away. It is then difficult to say that John Clarke is responsible for the act of Thomas Clarke, seeing that the common design was not to kill. Can this difficulty be overcome? Did John Clarke know that Walsh was endeavouring to arrest either him or his brother? Because if he knew the constables were about to arrest his brother John, and in helping his brother to resist Walsh, then the common design of resistance took place. Did he throughout act in aid of his brother, whether the attempt was to apprehend him or his brother, did he act in concert with his brother in resisting Walsh? It is stated in the evidence that when Thomas Clarke fired John Clarke fired immediately afterwards. Therefore I say was his intent at the moment when the shot was fired, equally with his brother's, to kill and wound the constables, or some of them, to prevent his own or his brother's apprehension? You cannot find Thomas Clarke guilty without an intent to kill. But if in consequence of John Clarke helping his brother without an intention to kill or intent to commit a felony, as by wounding, whether the capital felony or not, for then the common design arises to help each other by resisting the constables at all hazards. If you think that the common design is established - a common design not only to resist or get away by wounding any one of the constables it may be necessary to wound, and it is done in prosecution of that design by Thomas shooting with intent to kill, then although John Clarke may not have intended the consequence of his brother's act yet he is responsible for the capital felony just as if he fired the shot himself. This is a point of law perfectly new, and no case can be found upon it in the books; but I can reason it out from the general principles I have endeavoured to explain. With these remarks I leave the case in the hands of the jury,

The jury retired at ten minutes before 10, and returned at three minutes before 11 with a verdict of guilty against both prisoners. The prisoners were asked in the usual form whether they had anything to say why sentence of death should not be pronounced against them. Thomas Clarke said "No, I have nothing to say," John Clarke simply answered "No."

His Honor said:

Prisoners Thomas Clarke and John Clarke, if in the opinion of most of those who hear me, and of a large portion of the community, it should be thought that you are about to receive a just retribution for your crimes, it will be proper for me to say that no such feeling influences this Court, or is known to our laws. You are not to receive sentence of death as retribution - which belongs not to mortals - but the taking of your life is believed to be necessary for the peace and good order, for the safety as well as the welfare of the community; because of the example and warning that a capital execution may hold out to others to restrain them from committing similar crimes to those for which you stand convicted. This is the principle upon which all our punishment - certainly the punishment of death -

rests, or it has no justification whatever. Now, I told the jury that they were to believe you innocent of those various crimes in respect to which the effort was made to apprehend you; and for which you were finally apprehended; and of course the jury took it for granted that you were innocent. But now I am not restricted by any such necessity or duty; on the contrary, without wishing to wound your feelings or add any sense of shame or humiliation, I must address you for the good of the community, and also to show what really is the extent of the crime committed by, or reasonably supposed to be committed by you, in respect to which the Executive will have to pronounce whether they can with propriety, or with any sense of decency commute the sentence about to be passed upon you. Thomas Clarke, I hold in my hand a list of the offences on which you stand charged within the last two years. They amount in the whole, exclusive of murders of which you are suspected, to nine robberies of mails, and thirty-six robberies of individuals. Among these individuals robbed were all classes of persons Chinamen, labouring men, publicans, storekeepers, tradesmen, and settlers. With respect to you, John Clarke, I find that offences are charged upon you, committed within the last year, most of them in company with your brother, numbering twenty-six. Now this is the result, you see, of a long career of bushranging. You have had many abettors; you must have had a large number of them in the district from which you have come. I believe that not only those but others - violent and infamous as they are - sympathise with you in your crimes, - I hope not in the murders of which you are suspected. I shall not waste words in respect to such people. The community is disgraced by such crimes, but I would ask others, - not you - and possibly it will be well for you to reflect before you die - what is the value of this course of violence and outrage that you have been pursuing for so long a time? In all cases - and I have tried many - of robbery, it has been a question with me, as with others, where is the money they have gained - where are the results? You have not one shilling in the world to call your own, and therefore you have not profited by it in the way of money. I never knew a bushranger, except one, who is now suffering a sentence of thirty-two years hard labour; who made any money by it. Well, if you have not made anything by it, what could have induced you to pursue it? Crimes must end eventually in murder. Human life taken, life imperilled, misery inflicted upon hard working men, and all this for no earthly good to any one of you! And yet you, young men, might have been happy - happy fathers of families, living happily with your wives - happy, because happiness is confined to the virtuous. Instead of which you are to die a dishonoured death on the gallows. Another consideration; all along from the beginning you must have had the idea of the gallows hanging over you. You must have known that the result of all this must be death, shocking and infamous to think of. I hope all those who ever think of pursuing such a course will only reflect that there is this horrible feeling of a public execution hanging over you for years or months that they can never escape from. You must have been constantly in

terror; [AS thinks he can predict the thoughts of others to account for their behaviour.]always in a state of alarm less the police should track you out in your haunts. I have no wish to harrow your feelings - God forbid; I am saying this that it may sink into the hearts of others, and that it may restrain them from entering on a career so fatal. I say that during all this time men like you must have been dreading the intrusion of the police in your hiding places. Hunted about like wild beasts, you must actually have undergone an amount of labour and fatigue greater than you would had you been working on the roads - an amount of fatigue which, through honest labour, might have resulted in happiness, with a consciousness of virtue, and finally competence and honour, I say the amount of fatigue and want of comforts of all kinds surrounding you must be taken into consideration. The balance is all against you. I have said I never knew a man, or heard of one, who through a course of bushranging gained a shilling's worth of property that he could call his own, or could gain it if let loose to morrow morning. Where is there one flourishing in any single respect? I will read you a list of bushrangers, many of whom have come to the gallows within the last four and a half years. I believe they are all caught but one. Many of these were young men, capable of better things; but died violent deaths Peisley, executed; Davis, sentenced to death; Gardiner, sentenced to thirty-two years hard labour; Gilbert, shot dead; Hall, shot dead; Bow and Fordyce, sentenced to death, but sentences commuted to imprisonment for life -, Manns, executed ; O'Meally, shot dead; Burke, shot dead; Gordon, sentenced to death; Dunleavey, sentenced to death; Dunn, executed; Lowrie, shot dead; Vane, a long sentence; Foley, a long sentence; Morgan, shot dead; yourselves, Thomas and John Clarke, about to be sentenced to death; Fletcher, shot dead; Patrick Connell, shot dead; Tom Connell sentenced to death, but sentence commuted to imprisonment for life; Bill Scott, a companion of your own, believed to be murdered - by you. There is a list! The murders believed to have been committed by you bushrangers are appalling to think of. How many wives made widows, and children made orphans! What loss; of property, what sorrow have you bushrangers caused! I have a list here of persons killed or wounded in the perpetration of robberies since August, 1863 - six killed and ten wounded. Unfortunately, of the police seven have been killed and sixteen wounded in three years. I say this is horrible. Much as I dread crime, and much as I have had to do with the punishment of criminals, I don't know anything in the world that could furnish such a long list of horrors as that which I have laid before this crowded Court to-night. And yet these bushrangers, the scum of the earth, the lowest of the low, the most wicked of the wicked, are occasionally held up for our admiration! But better days are coming. It is the old leaven of convictism not yet worked out, but brighter days are coming. You will not live to see them, but others will. Others who may think of commencing a course of crime like yours may rely on it that better days are coming, and that there will be no longer that expression of sympathy with crime which sometime since disgraced the country, and sunk it

so low in the estimation of the world. Though the people among; whom I move are much above those who sympathised with crime, it humiliates me to think that in this very Court in which I am now sitting, one of the greatest ruffians of bushrangers, who was the very head and front of offenders, stood in the dock and was acquitted - and I say it,- acquitted wrongly; and when that verdict was announced there were expressions of rejoicing in the Court, such as would disgrace any community on earth. I am happy to think that those days are gone at last. There may be some here who were guilty of participation in that most abominable and most scandalous exhibition. You, young men, have now to receive the last sentence of the law. You will pass from the country which you might have helped to raise in the estimation of the world. You will pass out of the world? felons, convicts, bushrangers, and I very much fear, murderers. Sentence of death was then passed on the prison era in the usual form, and in the most solemn manner; and immediately afterwards they were removed from the dock. Both prisoners fixed their eyes on the Chief Justice while he was addressing them, and they appeared to be listening attentively, but there was scarcely any emotion perceptible from their manner. As soon as His Honor had ceased speaking, John Clarke turned to his brother and made some remark with a smile on his countenance. The police removed the prisoners from the dock, and the immense crowd of persons who had thronged the Court, and who had preserved the utmost silence, began slowly to disperse. The proceedings did not terminate till nearly half-past 11 o'clock.

See also <https://trove.nla.gov.au/newspaper/article/166795216?searchTerm=Thomas%20Clarke&searchLimits=l-decade=186|||l-state=New+South+Wales|||l-title=697|||l-year=1867|||l-month=6>