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THE "COORONG MASSACRE": MARTIAL LAW AND THE ABORIGINES AT FIRST SETTLEMENT

1. Historical Background: the Execution of Two Aborigines

Towards the end of July, 1840, news reached Adelaide that a vessel had been shipwrecked on the southeast coast and that its passengers and crew had been murdered by the Aborigines in the area.[1] The vessel was the ship Maria: all twenty-six persons on board were found murdered in a most brutal manner. The circumstantial evidence available pointed clearly to the guilt of members of the Milmenrura, or Big Murray, tribe. This tribe was suspected of having committed at least one other murder in this area of the Coorong in previous years and was considered by many "to be of brutal and ferocious character".[2]

On 12th August, Governor George Gawler wrote to Judge Charles Cooper of the Supreme Court requesting an immediate opinion on whether British law could deal with the murderers of the Maria's passengers and crew.[3] Judge Cooper replied on the same day saying that British law could not take effect here:

> "I feel it impossible to try according to the forms of English Law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion, and between whom and the Colonists, there has been no social intercourse."[4]

Some months later his Honour gave a more detailed opinion on the matter:

> "My objection to try the natives of the Big Murray tribe is founded, not on any supposed defect of right on their part, but on my want of jurisdiction. It is founded on the opinion that such only of the native population as have in some degree acquiesced in our dominion can be considered subject to our laws, and that with regard to all others, we must be considered as much strangers as Governor Hindmarsh and the first settlers were to the whole native population when they raised the British standard, on their landing at Glenelg."

He pointed out that no one would have thought of trying, according to British forms, an Aborigine who had attacked a colonist the day after the settlement was established. He continued:

> "I will not attempt to define with accuracy the circumstances which bring one class of natives within and leave another without the pale of our laws . . . I must content myself with saying, that to bring them within the pale, there must be some submission or acquiescence on their part, or at least, some intercourse between us and them."[5]

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* LL.B.(Hons.)(Adel.).

1. First news of this reached Adelaide on either 25th or 26th July (reports conflict). Reports are to be found in all local newspapers after this time.
2. A description of the tribe given by Advocate-General Smillie in his remarks at the Council meeting of 15th September, 1840; *The South Australian Register*, 19th September, 1840; also contained in South Australian Archives (hereafter S.A.A.) 193.
3. Colonial Secretary's Office (hereafter C.S.O.) 511/1840.
4. *Ibid.*
5. Address to Grand Jury, Supreme Court, 3rd November, 1840; *The Adelaide Chronicle*, 4th November, 1840.

Judge Cooper does not seem to have been concerned with the abstract question of whether the Aborigines were to be regarded as British subjects. Whether or not they were, he would adopt the practical approach of not trying persons who had had little or no contact with the settlers and knew nothing of the British laws. He persisted in this view throughout his term of office,[6] though not without criticism.[7]

On the same day as his letter to Judge Cooper (12th August, 1840), Gawler called the Council together for a special meeting to discuss the reports of the massacre. In addition to the normal members, the judge was also summoned to attend. All present concluded that the ordinary British law could not deal with the crimes in question.[8] Gawler thereupon issued instructions to the Commissioner of Police, Major O'Halloran, which in part directed:

> "The object of your expedition is to apprehend, and bring to summary justice, the ringleaders in the murder, or any of the murderers (in all not to exceed three), of eight or more white persons, some of whose bodies were found about fourteen days since, about nineteen miles to the south-eastward of the sea mouth of the Goolwa or Murray."[9]

O'Halloran immediately set out for the Coorong to carry out these instructions.[10] His party set about rounding up members of the Milmenrura tribe for questioning. In their possession were found articles of clothing, pieces of jewellery, letters and other items identified as having belonged to the passengers and crew of the Maria. Through interpreters, communication with the captives was possible. Soon the captives had, voluntarily we are told,[11] given the names of two murderers: one connected with the murder of a European in the district two years before and one connected with the massacre.

A crude trial was then held in which evidence was taken, through interpreters, from members of the tribe. The leaders of the expedition then passed judgment on the two accused persons, unanimously agreeing that they were guilty of murder and should be sentenced to death. In addition to the evidence given by the members of the tribe, the fact that they looked like murderers may have sealed the fate of the two Aborigines.[12]

The day after the trial the two convicted men, along with the other captives, were marched to the place where the majority of the murdered Europeans had been buried. It was thought that, in using this site for the hangings, the other members of the tribe would relate the hangings to the crimes committed by the men and see, more dramatically, the answer which British justice would

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6. See his opinion of 30th October, 1846, C.S.O. 1276/1846 and his Report of 17th March, 1847, contained in C.S.O. 1564/1851.
7. See, for example, Robe to Earl Grey, 21st April, 1847, Government Record Group (hereafter G.R.G.) 2/6/4; see also Hope to Law Officers of the Crown, 26th October, 1841, Colonial Office (hereafter C.O.) 396/3, 351-352.
8. Minutes of Council, 12th August, 1840; S.A.A. 193.
9. The instructions were tabled in Council, 15th September, 1840; *Register*, 19th September, 1840; S.A.A. 193.
10. This expedition and its results are comprehensively described in the writings of one of the party, Alexander Tolmer: *Reminiscences of an Adventurous and Chequered Career at Home and at the Antipodes* (1882) (S.A. State Library facsimile edition, 1972), Vol. I, ch. 18.
11. *Id.*, 188.
12. The demonological notions of the time that criminals looked ugly and were evil in appearance shows through in Tolmer's statement that the men "were powerfully made, and stood nearly six feet high, with countenances the most ferocious and demon-like I ever beheld": *ibid.*

have to future acts of violence. The two men, after waiting for a gallows to be erected, were then hung in front of the rest of the captives, assembled in a semi-circle in front of the gallows.[13] The proceedings ended with a speech by O'Halloran to the Aborigines present, pointing out that they had seen "the white's punishment for murder",[14] after which he allowed them all to go.

The hanging over, peace was again restored to the Coorong. But O'Halloran could not have begun to realize what he was to face on his return to Adelaide. Over the following few months he and Gawler were to be subjected to severe and damaging criticism; criticism which seems to have contributed to an early end to Gawler's commission as Governor. They were both about to become the centre of a debate as to the legality of the procedure adopted to try the two Milmenrura Aborigines, which was to reach a climax with the declaration by the Colonial Department that the hanging was an act of murder and that all those who had taken part were guilty of this crime.

2. *The Official Justification*

The most severe local criticism of the procedure adopted came from one of the Adelaide newspapers, *The South Australian Register*. From the very beginning the paper made it clear that, although the procedure might have been morally justifiable, it doubted the legality of what had taken place.[15] At the Council meeting of 15th September, Gawler reviewed the events and attempted to answer this criticism. At the same meeting Advocate-General Smillie delivered an extensive opinion to the Council in which he expounded the legal principles which he thought supported the Governor's actions.[16]

Gawler began by adverting to the fact that, at the Council meeting of 12th August, all assembled (including the judge) had concluded that the crimes by the Aborigines "were beyond the reach of the ordinary British law".[17] Besides the jurisdictional problem adverted to by Judge Cooper,

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13. It is interesting to note an example of how official reports often attempt to keep less savoury matters from the public eye. In describing the hanging O'Halloran reported to Gawler that "they died almost instantly, and both evinced extreme nerve and courage to the last": *Register,* 12th September, 1840:
Tolmer describes the event more fully:
"When everything was reported ready, the culprits were made to stand on a box, expressly brought for that purpose. The nooses were then passed over their heads, and the slip-knots having been properly adjusted, the box was suddenly withdrawn at a given signal, but unfortunately the fall was not sufficient to cause the dislocation of the neck, besides which the ropes stretched to such an extent, with the immense weight of the condemned men's bodies, that they remained simply suspended, their toes touching the sand, and their eyes glaring upwards at the cross-beam.
Horrified at the failure of the execution, the Major sat on his horse almost paralysed, and knew not what to do, when one of Captain Pullen's crew, named Barber, quickly stepped forward, and saluting the Major, said,—
'I beg pardon, Major, but I'll soon hang them if you'll let me'.
'Do, Barber, anything; but be quick!'
In a few moments a couple of lines were procured from the whaleboat; the ends were then thrown over the cross-beam and securely fastened behind the men's pinioned arms, and then pulled up some height from the ground. Barber then said, 'Now, Major, when you drop your handkerchief we'll let go', which was no sooner said than done, and thus the unfortunate wretches were launched into eternity, dying instantaneously. Some of the sand, however, had to be removed from under their feet, so as to allow the bodies to swing freely without touching."
Op. cit., 189-190.
14. *Id.*, 190.
15. See *Register,* 12th September, 1840.
16. Minutes of Council, 15th September, 1840; *Register*, 19th September, 1840; S.A.A. 193.
17. *Ibid.*

Gawler had appreciated another problem of equal importance. Because all of the Europeans at the scene of the crime had been murdered, the only witnesses to the murders were Aborigines. Being non-Christians they could not give evidence on oath as British law required at the time. This meant that it would have been impossible to convict the murderers in a British court.

Gawler pointed out that the district in which the murders had taken place was notorious for its crimes and that these particular murders had been both brutal and unprovoked. This factor, together with the problems of jurisdiction and evidence, had led him to conclude that:

> "Beyond the limits of ordinary British justice, there remained for me, in conformity with usage in Great Britain, the course of considering the district in question as a disturbed state, and of proceeding on the principles of martial law. This course I adopted."[18]

He pointed out, however, that martial law was not publicly declared. Had it been so:

> "it would have cast a reflection injurious, undeserved, and most liable to be misunderstood on the province at large, it would have altogether exceeded the character of the case, and towards those especially concerned in it, would have been an empty form."[19]

At this time the Governor seems to have felt that the principles of martial law provided sufficient justification for his actions. Indeed, he told the Council that "the proceeding was regulated on strict principles of martial justice".[20] However, it will become clear in due course that Gawler either did not fully understand what those principles were, or did not intend to make martial law the sole ground upon which to justify his actions.

The Advocate-General went into the legal justification of Gawler's actions in far more detail.[21] His arguments, though poorly set out, seem to have involved two interrelated proposals. First, the Milmenrura Aborigines were not British subjects and so were not entitled to a British-style trial. Secondly, the tribe was, in fact, a separate "nation" posing a threat to a British colony, which colony was entitled to take any action necessary to protect itself.[22]

With respect to the former proposition, he rejected any claims that Governor Hindmarsh's proclamation in December 1836 had invested all of the colony's Aborigines with the status of British subjects. His opinion was that the only Aborigines to be given the protection afforded to British subjects were those who lived close to the settled districts, in harmony with white settlers, and who were "making advances towards civilization". Such protection was certainly not to be given to those unfriendly tribes which inhabited areas beyond the limits of settlement.

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18. *Ibid.*
19. *Ibid.* We later find Gawler saying that such a declaration would have scared off potential emigrants: Minutes of Council 30th September, 1840; *Register*, 3rd October, 1840.
20. *Ibid.*
21. William Smillie was appointed Advocate-General and Public Prosecutor on 1st April, 1840 after migrating to the colony from Scotland. Although he was often criticized during his term of office for his ignorance of English law (especially land law) it seems that he was very knowledgeable in Scottish law and worked conscientiously at his job. His training would have been based very much upon the Roman law; this may help to explain his reliance upon the principles of the Swiss jurist, Vattel (*infra*).
22. Minutes of Council, 15th September, 1840; *Register*, 19th September, 1840; S.A.A. 193.

This argument seems to be very similar to the jurisdictional approach of Judge Cooper which was discussed earlier. However, there seems to have been one vital difference. Advocate-General Smillie was not simply suggesting that Aborigines who had not acquiesced in the British laws (or had considerable contact with the settlers) were to be deprived of some of the benefits of British subjects. He seems to have been suggesting that such Aborigines were not British subjects at all. This opinion led him to his second proposal:

> "[C]ircumstances may occur in which for the safety of the colonist, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however insignificant their numbers, or however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to British interests and authority."[23]

Smillie relied on a passage in Vattel which, he said, "establishes that savage erratic tribes are to be considered as nations".[24] He then pointed out that the tribe responsible for the murders was, in fact, known for its cruel and murderous nature and was in constant conflict with its neighbouring tribes. He described the massacre of the passengers and crew of the Maria as "the crime of the nation", and a crime of a description likely to be repeated "unless measures summary and severe" were taken to display the power of the Colonial Government and to show the consequences such acts would attract in the future.

Smillie conceded that the testimony of the Aborigines, relied upon to reach the finding of guilt, would have been inadmissible in a British court. However, he again cited Vattel[25] to show that the method of dealing with the Milmenrura tribe was completely in accordance with the law of nations. This was a case where the crime was to be regarded "not as that of individual British subjects, but of a whole hostile tribe, that is, of a nation at enmity with Her Majesty's subjects". As we have seen, he denied claims that the Aborigines of the colony had all become British subjects in 1836 as a result of Hindmarsh's Proclamation: the most important aspect of that document was simply the expression by the Government of its determination to protect the Aborigines from violence or injustice at the hands of the settlers. He declared that it was the peaceful nature of the tribes surrounding the settled areas which justified the extension to them of British rights and privileges. "But", he said,

> "no such formality, I apprehend, can be interpreted to restrain the Colonial Government from acting on the principles already stated, with reference to a distant, hostile, murderous tribe, only nominally within our territory, who, by their whole maxims and conduct, set our laws at defiance, and have no intercourse with us, or even with those peaceable native tribes (to whom this proclamation properly applies), except what is characterized by rapine, and blood, and outrages which it is impossible for our laws or judicial forms to reach. That ruthless nation of assassins has never, directly, or by implication recognized

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23. *Ibid.*
24. Emmerich de Vattel (1714-1767); his *Le Droit des Gens, ou Principes de la Loi Naturelle* (1758) was by far the most frequently cited work on international law in the nineteenth century. Smillie was referring here to Bk. I, Ch. VII s.81 of this work.
25. *Id.*, Bk. II, Ch. VI, s.78; Bk. III, Ch. III, s.34.

> allegiance, or submitted to the authority of our laws; and on no intelligible ground is it entitled to their protection."[26]

The Advocate-General concluded that all of these arguments were sufficient to show that the ordinary judicial forms of the municipal law could have been dispensed with in this case. He then went on to consider the proceedings which had actually taken place. He pointed out that the effect of the punishments (to deter future crimes) on the other members of the tribe would have been lost had the punishments been carried out long after the murders, or at a settlement far removed from the tribe's territory. The Advocate-General believed that the procedure adopted had been quite proper. He was even led to conclude that, however revolting it might seem, "an indiscriminate slaughter among the tribe . . . [was] . . . within the scope of our right, by international law, to inflict". Smillie concluded by saying:

> "Necessity warranted the Executive Government, in abandoning ordinary forms, which were inadequate to the emergency, to take upon itself the responsibility of putting forth those more ample powers and prerogatives, with which, for the welfare of the state and the peace of society, it is constitutionally vested."[27]

Unlike the *Register*, the other main contemporary newspaper, the *Southern Australian*,[28] fully supported the action which the Government had taken. It presented a two-fold argument. It accepted that if the Milmenrura tribe were British subjects then Gawler's reliance upon the principles of martial law was well founded. But, if they were not British subjects, then they could be treated as a separate and hostile nation upon whom war could be declared. The paper felt that both of these arguments supported the procedure adopted, but of the two it was inclined to favour the second, in full agreement with the views of the Advocate-General. With respect to the proposition that the Aborigines were not British subjects, the paper was of the view that no one nation had a *moral* right to force its laws upon another. The Aborigines of the colony could only become British subjects by consenting to become such; only by acquiescence could they be bound by British laws. This moral argument was advanced by many people in the context of Britain's colonization of foreign countries in the nineteenth century.

However, even if it is accepted that no *moral* right to treat the Aborigines as British subjects existed, it is important to ask whether a *legal* right to do so existed. And not only should we consider whether the law allowed the Aborigines to be treated as British subjects, we should ask whether the law required that they should be. As far as the *Southern Australian* was concerned, the only legal argument which could be raised in this regard had to be derived from Hindmarsh's Proclamation, but that, it was said, had not effectively granted the rights of British subjects to the Aborigines. The Proclamation was not supported by any Act of the Legislative Council or the British Parliament. Without such support a proclamation only had binding force to the extent that it enforced existing laws and was based upon those laws. Preferring the view that the Milmenrura tribe were not British subjects,

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26. Minutes of Council, 15th September, 1840; *Register,* 19th September, 1840; S.A.A. 193.
27. *Ibid.*
28. On this see the editorials of 15th, 22nd, and 25th September, 1840 and 2nd October, 1840.

the *Southern Australian* was able to conclude that the Government's actions could be justified as a declaration of war on a separate and hostile nation.[29]

3. *Legality of the Execution*

(A) GENERAL CONSIDERATIONS

The feelings of the settlers in the colony seem to have been divided on the question of the justification of Gawler's actions. The majority spoke in terms of the necessity of the actions to quell the unrest in the area and to prevent future disturbances, but many others spoke indignantly of the way in which the rights of British subjects had been so readily discarded.[30] However, George Stevenson, the editor of *The South Australian Register*, purported to look at the matter from a purely legal point of view. Stevenson had come to the colony with the first group of settlers in 1836, accompanying Governor Hindmarsh as his private secretary. His arguments can conveniently be used as a basis for examining the legality of Governor Gawler's actions. An attempt will be made to assess the accuracy of his opinions by referring to other authoritative sources.[31]

In replying to the claims of the Governor and the Advocate-General, Stevenson expressed his arguments in the following way:

> ". . . two [Aborigines] have been summarily put to death by hanging, by the Commissioner of Police, acting under instructions of His Excellency the Governor, for a murder alleged to have been committed by one of these natives, and participated in generally by their tribe, without legal trial, legal evidence, or the legal sentence of a Court of Justice. The questions therefore naturally arising from these premises are—
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> 1st. The constitutional position of the Aborigines, and their rights as British Subjects.
>
> 2nd. The power of the Governor, by his own act, to order the summary execution of native inhabitants under any circumstances, and
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> 3rd. Whether the safety of the Colonists was so endangered, the public emergency or necessity of the particular case so urgent, as to warrant a departure from constitutional law, upon the inviolability of which rests the sole security of life and property throughout the British Dominions."[32]

With respect to the first question Stevenson cited the Proclamation of 1836 as conclusive evidence that all of the colony's Aborigines were to be regarded as British subjects.[33] He pointed out that it had been his suggestion that this document should confer this right upon the Aborigines; he had drafted it for Hindmarsh on the journey out to the colony from England. But, even if this document was not legally sufficient to grant this status to the Aborigines, its effect in this regard could not now be doubted since the Home Government

29. The *Southern Australian* went so far as to quote from certain Regulations pertaining to the Governor's office to support this approach; *ibid.* The relevant Regulations are discussed *infra,* pp.34-35.
30. This can be seen from the letters written to, and published by, the local newspapers at this time.
31. It must be kept in mind when reading *Register* editorials of this period, that Stevenson was not known for his love of the colonial authorities and was always quick to criticize actions by the Government. This is clearly shown by the emotive language used in his discussion of the Maria incident.
32. *Register,* 19th September, 1840.
33. *Ibid.*

had given its full approval to it (though not in legislation). As one of the persons responsible for the drafting of the Proclamation, it was easy for him to rebut the claim of the Advocate-General that the object of the document was merely to express the Government's determination to protect the Aborigines from violence or injustice at the hands of the settlers. He pointed out that the Proclamation was intended to cover (and by its terms, did cover) all of the colony's Aboriginal population—not just those who showed a friendly disposition towards the colonists.[34]

We have already seen the way in which the *Southern Australian* rejected the view that the Proclamation of 1836 granted the colony's Aborigines British status. The question whether the Aborigines of the colony in 1840 were, in law, British subjects is not an easy one to answer. There were no clearly enunciated principles at the time relating to the status to be accorded to the Aborigines of the foreign countries colonized by Britain. The distinction between *conquered* and *settled* colonies was often arbitrarily applied and there was no great certainty in the principles relating to either category.

The *Southern Australian* thought that the Proclamation of 1836 did not make the Aborigines British subjects, and that they could not be regarded as such. A possible contrary argument is that, because South Australia was a *settled* colony established along common law principles, its Aboriginal population *in toto* became British subjects by the mere fact of settlement. If the latter argument is correct, the Proclamation would not be relevant to the question of the Aborigines' status. Stevenson eventually adopted this approach and rejected his earlier reliance upon the Proclamation as the crucial factor:

> "When the Imperial Parliament gave Her Majesty power to erect certain defined portions of this continent into a British province, the Order in Council, in execution of that power, necessarily conferred upon the natives all the privileges—especially the protective privileges—of British subjects; and Governor Hindmarsh's proclamation was no more than an official intimation of that fact."[35]

The two opposing arguments can now be stated in simple terms. Stevenson's revised view was that the Aborigines became British subjects at the date of settlement by the mere fact of settlement. The view of the Advocate-General and the *Southern Australian* was that the Aborigines did not automatically become British subjects; individual tribes could only be treated as such as they came into contact with the settlers and showed, by their friendly disposition, their implied agreement to be bound by British laws.

Two factors will be referred to here which suggest that the better *legal* argument was probably that all of the colony's Aborigines became British subjects on settlement. First, a directive was issued in 1837 by the Secretary of State for the Colonial Department to the Governor of New South Wales requiring that thereafter all of the Aborigines within his jurisdiction should be considered as British subjects.[36] This directive was necessary because of the great confusion existing in the eastern colonies as to the status of the Aborigines. Because of the Australian Courts Act of 1828,[37] and other statutes applying to the eastern colonies, there was uncertainty as to whether those

34. *Ibid.*
35. *Register*, 3rd October, 1840.
36. Glenelg to Bourke, 26th July, 1837; *Historical Records of Australia* (hereafter *H.R.A.*) Series I, Vol. XIX, 47.
37. 9 Geo. IV, c.83. This Act did not apply to South Australia.

colonies were established upon common law or statutory principles. This may have been a significant factor in the confusion as to the status of the Aborigines. The fact that this directive of 1837 did not apply beyond the boundaries of the eastern colonies lends support to the argument that the Aborigines in South Australia were, in 1837, regarded as British subjects and as having become so at settlement the year before.

Secondly, the British Law Officers of the Crown, in considering the Maria incident, implicitly accepted the view that the colony's Aborigines were British subjects.[38] These two factors suggest that the Government should have treated the Milmenrura Aborigines as British subjects in dealing with the murders. They do not, however, decisively settle the matter. The remainder of this article will discuss the legality of the Government's actions, first, on the assumption that the Aborigines were not British subjects and, secondly, on the assumption that they were.

(B) THE LAW OF WAR

Because of the complexity of the issues raised by Stevenson's second question, discussion of it will be deferred until the matters arising from his final question have been dealt with.

In tackling his third (and final) question, Stevenson rephrased it in terms of "whether the necessity of emergency of this particular case was such as to warrant measures confessedly extra-judicial and unconstitutional".[39] Under this rubric, Stevenson proceeded to discuss the constitutional right of a colonial Governor to declare war on threatening forces. It is well recognized now, as it was then, that the prerogative of declaring war does not permit the Executive to declare war on its own subjects. The Governor's right to declare war can only be relevant to the present discussion if the Milmenrura Aborigines were not regarded as British subjects. It is, therefore, upon this basis that the following discussion proceeds.

It has already been pointed out that the main justification of the Advocate-General and the *Southern Australian* for the Government's actions was the Governor's right to declare war against a separate and hostile nation. It has also been pointed out that this was not the view which the Governor himself originally expressed. Gawler thought the principles of martial law sufficient to justify his actions. However, it appears that he later changed his opinion and chose to rest his case on the principles of war.

Gawler expounded his views in some detail at the Council meeting of 30th September, 1840. He agreed with the Advocate-General's view that the Aborigines did not become British subjects at settlement and were only gradually to acquire this status as communication between the Aborigines and the settlers gave them a sufficient degree of civilization. He referred to the Council meeting of 12th August and said:

> "Receiving the full concurrence of the Council in the affirmative, I proceeded to act decidedly, as it was my duty to do, on the only law that remained to me—the law of war."[40]

Quoting from various Regulations relating to his office, Gawler pointed out that as Governor of a British colony he had . .

38. See further, *infra*.
39. *Register*, 19th September, 1840.
40. Minutes of Council 30th September, 1840; *Register*, 3rd October, 1840 and S.A.A. 193.

> "full authority to commence and carry on war as far as such measures may become necessary 'for preventing or repelling hostilities'."[41]

Gawler described the acts of the Milmenrura tribe as acts which if not punished would have led to "certain future hostilities", and so concluded that he, "therefore, had full authority to prevent and repel them by war". He continued by referring to certain well recognized rules of war:

> "The general of an army has absolute power over those against whom his hostilities are directed, and should any of them be guilty of crimes, he has full power to try those crimes by that kind of tribunal which he may conceive the most suitable for the ends of justice."[42]

The question to be asked is whether the Governor, in this instance, was justified in exercising his power to declare war; was this necessary "for preventing or repelling hostilities"? Stevenson faced the Governor's claims head on:

> "That a governor has the power to defend a colony, and to repel aggression by force of arms, is undoubted. What this has to do with the question, however, we cannot discover . . . [W]e can discover . . . no act of aggression against the colonists or settlers of South Australia. The tribe is admitted to inhabit an unsettled part of the Province: they had made no attempt to carry their *warfare* into the settled districts; they had perpetrated no act of aggression against the lives of the Colonists; and we assert—and defy our assertion to be gainsayed—that no reasonable fear of such an act was ever entertained by any individual."[43]

Stevenson was principally concerned with the fact that, because the ship Maria had been carrying colonists from Adelaide to Hobart, the persons on board were persons who had decided to reject their status as South Australians, and so the murders by the Milmenrura tribe were not acts of aggression "against the colonists or settlers of South Australia". It is submitted that this is not a convincing argument. Gawler's position should be considered upon the assumption that the murdered persons were, in fact, colonists or settlers of South Australia. The question which must be considered is whether the acts of the Milmenrura tribe could have been regarded as a threat to the colony worthy of a declaration of war.

There does not appear to have been any evidence that the tribe had adopted a permanent course of aggression against the colonists of South Australia. There was no evidence that future travellers in the area would receive a hostile reception; the tribe itself had not made known such an intention.[44] However, in support of the Governor's actions, it must be

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41. *Ibid.* The *Southern Australian* (25th September, 1840) gives the source of these last five words as: *"Rules and Regulations for the information and guidance of the principal Officers and others in H. Majesty's Colonial possessions,*—Chap. I, vol. 4, s.14."
42. Minutes of Council 30th September, 1840; *Register*, 3rd October, 1840; S.A.A. 193.
43. *Register*, 3rd October, 1840.
44. A letter to the *Register* of 3rd October, 1840 claimed that the Milmenrura Aborigines were not the brutal, murderous tribe that Gawler and Smillie had asserted them to be. The writer referred to the friendly disposition of the tribe towards the survivors of the Fanny wreck two years before. *Cf.* also Reece, *Aborigines and Colonists* (1974), pp.101-102:
"While it was asserted by O'Halloran that the Milmenrura were notorious among

remembered that the judge had indicated his inability to try the Aborigines. If some action had not been taken by the Government this tribe, and neighbouring ones, would have been led to believe that aggressions against the settlers would go unpunished. This factor lends support to Gawler's view that the situation was such that it was necessary to act as he did to prevent future hostilities. If the Milmenrura Aborgines were not British subjects there was no course of action open to him other than that of treating the tribe as one at war with the colony.

(C) MARTIAL LAW

(i) The Extent of Martial Law

We must now return to Stevenson's second question which related to the "power of the Governor, by his own act, to order the summary execution of native inhabitants". He used the question as the basis for a discussion of the power of a Governor of a British colony to declare martial law and the extent to which such a declaration affected the jurisdiction of the civil courts. It was pointed out earlier that Gawler originally relied solely on the principles of martial law to justify his actions. Even when he changed his view and chose to rely on the law of war he did not ignore his earlier opinion. He pointed out that "if [he] had considered the murderous tribe as entitled to the full privileges of British subjects, [he] should not have hesitated to have made a formal proclamation of martial law".[45] If the Milmenrura Aborigines were British subjects and war could not be declared on them, the principles of martial law emerge as the only possible constitutional foothold for Gawler's actions.

In replying to the Governor's original reliance upon these principles, Stevenson said:

> "There is claimed, we acknowledge, for Governor Gawler no *judicial* power. His Excellency states that though no proclamation of martial law was made, he adopted the course 'in conformity with usage in Great Britain', of considering the district of the offending natives in 'a disturbed state', and 'proceeding on the principles of martial law'. We grieve to say that the matter is thus placed in no better position. The usage of Great Britain allows the Sovereign to invade no privilege of the subject. It requires the consent of Parliament to declare a district disturbed, and to suspend the *habeas corpus* act. Even then, however, we know of no usage of law which, in the case of rebellion or insurrection within the British dominions, would authorize a military force to hang *prisoners* taken in action or seized in disturbed districts, without trial by the recognized civil authorities."[46]

Stevenson cited authorities, including Coke and Hale, to show that "martial law, indeed, has no legal existence in the dominions of England".[47] He pointed out that in this case martial law had not, in fact, been declared at all. He

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44. (Continued)
the Aborigines themselves for their brutal and fierce character, no significance was attached to the cruel exploits of a whaler, Roach, and his companion who had been murdered by Aborigines in the same area a short time before. Some years earlier, members of the same tribe had distinguished themselves by rescuing the crew of another ship but the activities of the whalers may have radically changed their attitudes to whites."
45. Minutes of Council 30th September, 1840; *Register*, 3rd October, 1840; S.A.A. 193.
46. *Register*, 19th September, 1840.
47. For discussion of these and other authorities see *infra*,

then adverted to the claim by Gawler that the trial of the two Aborigines was conducted according to strict principles of martial justice and declared that even in a military court no testimony can be admitted that is not given on oath. In this case, however, the principal evidence against the two men had been given by other Aborigines. Stevenson was led to conclude, in somewhat crude terms:

> "The natives have been condemned and executed, not merely by an unauthorized, illegal, and unconstitutional tribunal, but upon evidence, which in a court either civil or military would not be sufficient to hang a dog."[48]

Stevenson questioned the right of the Executive in England or Australia to declare martial law. He thought that it was only the Parliament itself which had this power. The validity of this opinion is doubtful and it may be that he was confused by British statutes dealing with certain powers of emergency.[49] Even if there was some substance to the view it would have been difficult to apply it to the system of government in South Australia in 1840. It is submitted that the early Australian Governors were intended to have the right to invoke martial law by virtue of the reception into the colonies of British law. This assumption is supported by the way in which martial law has been compared with the right of every individual to defend his person in self defence; the right to use martial law is a "right inherent in [a] Government".[50] The Commission of the first Governor of New South Wales (Governor Phillip) expressly gave him the right to invoke martial law.[51] This was probably no more than an express statement of what would otherwise have been assumed.

If, then, Governor Gawler did have the power to rely upon the principles of martial law, a more difficult problem presents itself: what circumstances must exist before martial law can be relied upon? It is difficult to discover any precise rules relating to the declaration of martial law at least in the context of the early nineteenth century. In fact we find Blackstone saying that martial law "is built upon no settled principles, but is entirely arbitrary in its decisions".[52] In Australia, as in the United Kingdom, the principles involved are probably as unclear now as they were in 1840. An attempt will be made, however, to extract the most obvious, and most widely recognized, rules in this area.

Stevenson had cited Coke and Hale in support of his arguments. Coke's view was that . . .

> "If a lieutenant, or other that hath commission of martial authority, in time of peace hang, or otherwise execute any man by colour of martial law, this is murder, for this is against Magna Charta cap. 29 and is done with such power and strength, as the party cannot defend himself; and here the law implieth malice."[53]

Hale was only slightly less emphatic:

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48. *Register*, 19th September, 1840.
49. On this see Chitty, *Prerogatives of the Crown* (1820), 45.
50. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1915), 543-545.
51. *H.R.A.* Series I, Vol. I, 5.
52. *Commentaries* (1809), Vol. I, 413.
53. *3 Institutes*, 52.

> "[I]n Truth and Reality it is not a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance."[54]

Hale added that martial law is only permitted "in Cases of Necessity, in Time of open War", but not "in Time of Peace, when the ordinary Courts of Justice are open".[55]

Though the opinions of both these commentators seem to lend support to Stevenson's argument, both opinions are of questionable generality. Their statements fail to distinguish the gradations of martial law which can exist and to clarify the rules which apply to each. The term "martial law" is most commonly used to describe the state of affairs which is brought into existence in a time of extreme emergency.[56] The situation becomes such that the military authority has to extend its control over persons in military service to include civilians as well. In its strictest sense the term is used to describe the control which such a military body exercises in time of full-scale war, when the civil authorities are unable to execute the civil law. In such a situation the military authorities have powers and discretions of a very wide-ranging nature. However, such powers and discretions could not be exercised to the same extent to control a civil disturbance in a time of relative peace.

The major problems in this area arise in the context of civil disturbances in a time of relative peace—cases of rebellion or insurrection. For a disturbance to amount to a rebellion or insurrection there must be some armed opposition by rebels to the established government of their country. It is difficult to decide whether the murders committed by the Milmenrura tribe could be regarded as such opposition.[57] If the murders did not amount to opposition of such a kind then arguably the actions taken by Gawler cannot be supported by the principles of martial law.

Let us assume, however, that Gawler not only had the power to declare martial law, but that the circumstances warranted such a declaration. Was the summary trial conducted by O'Halloran justified under martial law? There seems little doubt that in the surroundings of a full-scale war a military commander would be justified in summarily trying and executing a civilian if necessity warranted this.[58] However, in situations other than full-scale war it will be rare that the circumstances will warrant a military tribunal taking the place of a civil court in trying a civilian. The position seems to have been correctly stated in the following terms:

> "While it has been stated broadly that martial law supersedes all civil authority during the period, and within the territorial limits, of its operation, the power of the military under martial law, over persons not in the military service, is limited by the reasonable necessities of the occasion, and this is true even where the term 'martial law' is used

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54. *The History of the Common Law of England* (1713), 26-27.
55. *Ibid.* Blackstone, *op. cit.*, 413, in discussing martial law, merely refers to the comments of Coke and Hale.
56. For the history of martial law, see Capua, "The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right", [1977] *Cam. L.J.* 152.
57. *Cf.*, the discussion as to the Governor's power to declare war against a separate and hostile nation, *supra*.
58. Wade and Phillips, *Constitutional Law* (8th ed., 1970), 409; *American Jurisprudence* (2nd ed.), Vol. 54, 50, n.5.

> in its strict sense. The same rule applies where a modified form of martial law is declared in cases of internal insurrection or disorder which is beyond the power of the civil authorities to quell."[59]

The test of *necessity* has been stated as follows:

> "The degree to which the military may interfere with civilians will vary with the circumstances. The test is whether the interference is necessary in order to perform the duty of repelling force and restoring order."[60]

The conclusion seems to be that even where martial law is declared the jurisdiction of a civil court will not be affected unless the circumstances of the battlefield warrant this, or the civil courts have been forced to close their doors because of the disorder in the district. If extreme circumstances do present themselves, and civil trial can be dispensed with, two methods of dealing with offenders exist. If the circumstances demand prompt action, summary punishment without trial may be justified. If such promptness is not vital, a military tribunal may be convened to advise the military commander. Such a tribunal is not a judicial body of the nature of a court-martial which would be set up to try offences by military personnel.[61]

The result appears to be that the procedure adopted by Major O'Halloran in trying the two Aborigines may have been legal if the circumstances were such as to require dispensing with civil trial. If so, Stevenson's criticism that evidence on oath is the only testimony which can be received by a military court is not relevant—no military court of the nature of a court-martial would have been necessary.

The situation we are considering does not seem to have been one where the circumstances of the battlefield required that the civil courts should be excluded. It is arguable, however, that the procedure adopted was warranted because the civil courts had closed their doors. The doors of the Supreme Court *had* been closed in the sense that Judge Cooper had indicated that he would not try the two Aborigines. The problem here is that the Court had not closed its doors because of the disorder created by the Aborigines; the doors were closed because the Judge thought he lacked jurisdiction in the case. It is arguable that the murders by the Aborigines could not be regarded as having amounted to a rebellion or insurrection. The Aborigines posed little present or future threat, and the course adopted was probably motivated by the practical consideration that the Aborigines could not be punished by employing the ordinary forms of British law.[62]

Two further possible criticisms of the use of martial law in this case should be referred to. First, it might be argued that the exercise of martial law can only be put in the hands of a military officer, and that a civil officer such as O'Halloran was not entitled to exercise such a power. It appears that this would be the position today where we have distinct military and police

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59. *Id.*, 53.
60. Wade and Phillips, *op. cit.*, 409.
61. *Ibid.* In addition to the authorities dealing with martial law which have been cited see de Smith, *Constitutional and Administrative Law* (1971), 72, 497-502; Brownlie, *The Law Relating to Public Order* (1968), 124-125; *Halsbury's Laws of England* (3rd ed.), Vol. VII, 260-262.
62. This argument also has force in denying Gawler's right to declare war upon the tribe as a separate nation.

forces.[63] It must be remembered, however, that there was no military force in South Australia in 1840. The early police force had jurisdiction over the whole of the colony and carried out both police and military functions. In the other colonies, where only a military force existed at this time, the military exercised both of these functions. In this light the South Australian police force in 1840 can be seen as having been a quasi-military body. As such it would probably have been vested with the powers allowed to the military under the principles of martial law. Secondly, it might be argued that Gawler's failure to proclaim martial law formally meant that its use was invalid. It is doubtful whether this argument would be successful. It seems clearly established that "it is not the proclamation which makes martial law, but the events which have created the emergency".[64]

One final matter may be considered. It seems well recognized that the law enforcement agencies must at times go beyond their normal powers to control lesser disturbances such as riot. Indeed, if the law enforcement agencies cannot control the situation, civilians may lawfully be called upon to aid them. If the principles relating to riot and other similar disturbances (rout, affray, unlawful assembly) are different from those already discussed, the actions of Governor Gawler may be seen in a different light. It seems clear, however, that the principles involved here are, in fact, no different and are "determined by nothing else than the necessity of the case".[65] Dicey concluded that:

> "the principle which determines the limits of martial law is the principle which also determines the rights and duties of magistrates, of constables, and of loyal citizens generally when called upon to disperse or prevent unlawful assemblies or to suppress a riot."[66]

It is only the degree of resistance permitted which would be different in the two cases.[67] Common law powers in relation to the suppression of riots and other similar disturbances do not, therefore, add to the powers of martial law.

(ii) Use of Martial Law in the Other Colonies

The use of martial law in New South Wales and Van Diemen's Land, around the time of the Maria incident, may be looked at to see if these principles find support.

In 1804, Governor King declared martial law in New South Wales to aid in the suppression of what has since become known as the "Irish insurrection".[68] Many of the participants in the insurrection were tried by court-martial and a number were hanged. Martial law was arguably more warranted in this situation than in the South Australian case. Reports to the Governor indicated that at least several hundred Irishmen were involved in the uprising. Their aggression was directed towards the authorities of the colony and could arguably have been regarded as a threat to the colony as a whole.

The question which presents the most difficulties is whether King was justified in dispensing with the civil courts in bringing the offenders to justice. As we have seen that can only be done in cases of extreme necessity.

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63. This is clearly stated as being the position in *American Jurisprudence* (2nd ed.), Vol. 54, 54.
64. Wade and Phillips, *op.cit.*, 410. See also Dicey, *op. cit.*, 545.
65. *Id.*, 284.
66. *Id.*, 543.
67. *Ibid.*
68. See *H.R.A.* Series I, Vol. IV, 563-577.

In such cases two types of procedure can be adopted: summary justice without any form of recognized trial, or "trial" by military tribunal (not amounting to a court-martial) in order to advise the military commander. If it was accepted that such an extreme situation did exist, it could be argued that the court-martial merely took the place of the military tribunal and thus gave greater protection to an individual's rights than was required.

However, even if the circumstances did not warrant dispensing with the civil courts another argument can be made in support of the use of a court-martial. In 1804 New South Wales had no Supreme Court. The Court of Criminal Judicature exercised the criminal jurisdiction within the colony.[69] In this Court there were several important departures from English practice of the time (*e.g.*, there was to be no trial by jury, and the members of the Court only had to reach a majority decision, not a unanimous one). One requirement was that evidence be taken under oath, but this was also the case in courts-martial. The Court did not sit continuously and it may have been more expedient to summon a court-martial rather than the Court of Criminal Judicature. It can probably be said that in New South Wales, in 1804, the court-martial theoretically (if not in practice) gave the same protection to an individual's rights as did the civil court.

The declaration of martial law in Van Diemen's Land in 1828 came about as a result of Aboriginal hostilities.[70] For many years prior to this it seems undisputed that the Aborigines had been subjected to harsh treatment at the hands of the settlers. Their people had often been killed indiscriminately, and their women raped. In the latter years of the 1820's the Aborigines hit back. There was no planned assault against the white administration as a whole; their retaliation came in the form of frequent attacks against Europeans found travelling in small numbers or living in fringe areas. The Aborigines were retaliating in a general way against the aggression of the settlers, but they were regarded by most as themselves the aggressors.[71]

In 1828 Governor Arthur declared martial law in those areas affected by the hostilities. The aim of the declaration was to allow the military, combined with as many settlers as would help, to use such force as was necessary to remove the Aborigines from the settled districts. Whether this aim supported the use of martial law is doubtful, especially when this statement by Arthur is considered:

> "With regard to the alarm which it is stated in the Minute of Council exists among the settlers, it is doubtless very distressing that so many murders have been committed by the Natives upon their stockmen, but there is no decided combined movement among the Native tribes, nor, although cunning and artful in the extreme, any such systematic warfare exhibited by any of them as need excite the least apprehension in the Government, for the blacks, however large their number, have never yet ventured to attack a party consisting of even three armed men."[72]

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69. On this see Castles, *An Introduction to Australian Legal History* (1971), ch. 3.
70. See Turnbull, *Black War* (3rd ed., 1973), ch. 4 and Appendices B and C; *Copies Of All Correspondence Between Lieutenant-Governor Arthur and H.M.'s Secretary Of State For The Colonies, On The Subject Of The Military Operations Lately Carried On Against The Aboriginal Inhabitants Of Van Diemen's Land* (1971), introduction by A. G. L. Shaw (hereafter *Military Operations*).
71. See Turnbull, *op. cit.*, esp. ch. 4.
72. Arthur to Sir George Murray, 4th November, 1828; *Military Operations*, 9.

It seems clear, however, that Arthur was not merely relying on the power to declare martial law. In 1826, Aboriginal hostilities were a serious problem in New South Wales. Attorney-General Bannister urged the Governor to declare martial law but Governor Darling pointed out that he could use the military to put down the hostilities without such a declaration.[73] Darling was probably correct in his assertion, for in 1825 the Secretary of State, Lord Bathurst, had informed him that:

> "In reference to the discussions, which have recently taken place in the Colony respecting the manner in which the Native Inhabitants are to be treated when making hostile incursions for the purpose of Plunder, you will understand it to be your duty, when such disturbances cannot be prevented or allayed by less vigorous measures, to oppose force by force, and to repel such Aggressions in the same manner, as if they proceeded from subjects of any accredited State."[74]

It appears that a copy of this letter was sent to Arthur to guide him in his treatment of Aboriginal problems.[75] The direction suggests that the Aborigines were to be treated as a separate nation threatening the colonies and, as such, war could be declared on them. There seems little doubt that this treatment was what Arthur intended, for we find that he described the measures he had taken as, in effect, "treating [the Aborigines] as open enemies".[76]

Two problems present themselves. Why did Arthur declare martial law in 1828 when Darling had interpreted (correctly, it is submitted) Bathurst's direction as allowing him to use the military, in suppressing hostilities, without reliance on the principles of martial law? Secondly, why did Bathurst direct Darling and Arthur in the way he did, and did he correctly state the rights and duties of a Colonial Governor? The answers to both questions seem to lie in the fact that great confusion existed at this time as to the status of the Australian Aborigines. Some people felt it just and proper that they be treated as British subjects while others rejected such a claim. The confusion continued until 1837 when Lord Glenelg informed Governor Bourke that the Aborigines of the eastern colonies were thereafter to be considered as British subjects.[77] Because of this confusion, there is little doubt that any use of military force to quieten Aboriginal unrest in New South Wales and Van Diemen's Land before 1837 could have been supported on the ground adverted to by Bathurst in 1825. In this light we can see Arthur's declaration of martial law as a means of making doubly sure of his legal position; it was a means of protecting his actions from all lines of criticism.

It seems clear that, if Gawler and Smillie were correct in regarding the Milmenrura Aborigines as a separate nation, the direction of Bathurst in 1825 lends considerable support to the Governor's actions in the Maria incident. If, however, those Aborigines were British subjects, Bathurst's approach was probably inapplicable.

4. The Colonial Department's Reaction

The Colonial Department in England requested the Law Officers of the Crown to give their opinion on the procedure adopted in bringing the two Milmenrura Aborigines to justice:

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73. See generally Reece, *Aborigines and Colonists* (1974), 112ff.
74. *H.R.A.* Series I, Vol. XII, 18, 21.
75. See introduction to *Military Operations*.
76. *Military Operations*, 9.
77. Glenelg to Bourke, 26th July, 1837; *H.R.A.* Series I, Vol. XIX, 47.

> "On the 27th of March the Law Officers reported their opinion that the murders with which the Aborigines were charged having been committed within the limits of the province defined under the authority of an Act of Parliament the Aborigines might have been brought to Trial for them in the ordinary legal Tribunals of the Colony; that the summary execution of the supposed murderers was contrary to Law; that the legal character of the Act, was murder—Major O'Halloran and those who were present assisting him being guilty as Principals, and Gov. Gawler being guilty as an accessory before the fact; and that they could only be indemnified by Act of Parliament, or by a Pardon under the Great Seal."[78]

In a letter from the Secretary of State, Lord Stanley, to South Australia's Governor Grey in 1841 we find that the Law Officers later recommended that no indemnification would be necessary unless some prosecution or other proceeding was commenced against those concerned.[79]

It is clear from this opinion, which was accepted by the Colonial Department, that the Law Officers regarded the Milmenrura Aborigines as British subjects. They expressly regarded the Aborigines as within the jurisdiction of the British courts. As the preceding discussion has shown this opinion was by no means an indisputable one. It is obvious that there was great uncertainty as to the way in which the law should treat the Aborigines in the early years of colonization in Australia. The better legal position may have been that the Aborigines were British subjects. However, Judge Cooper had decided that he would not try Aborigines who had had little, or no, contact with the settlers whether or not they were British subjects. Realizing that it was necessary to indicate quite clearly to the Aborigines that such hostilities could not be tolerated, the Colonial Government was therefore placed in a difficult position.

It would be difficult and quite unprofitable to attempt to pass judgment upon the propriety of the Government's actions. However, it should be said that the legal arguments which were put forward in support of the Government are not convincing. The British law showed itself in this case to be unable to cope with the situation which arose. It is difficult not to conclude that any justification of the Government's conduct would have to be based upon notions of practical necessity rather than principles of law.

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78. Hope to Law Officers of the Crown, 26th October, 1841; C.O. 396/3, 351-352. An attempt by the writer to find an actual copy of the opinion of 27th March, 1841 in the South Australian Archives, and the Public Record Office in London has failed. It is probable, however, that the actual opinion would have told us little more than the above statement does.
79. Stanley to Grey (confidential), 14th December, 1841; S.A.A. 13 (1840-41); also contained in C.O. 396/2.