



Peter Hardeman Burnett, first governor of California, circa 1860. Photo: California Supreme Court.

# Peter Hardeman Burnett's Short but Notorious Judicial Legacy

BY R. GREGORY NOKES

**H**ISTORIANS HAVE NEVER quite figured out how to judge Peter Hardeman Burnett, and so mostly have ignored him. Yet in the sweep of western history, he's a hard man to ignore. He held more positions in the early American West

than any other leader, including a short term on the California Supreme Court in 1857–1858.

There are two ways of looking at Burnett's career, one, that he was prepared as few men were for high leadership positions, or, two, that he stumbled from one office to another, seldom accomplishing much and leaving behind a legacy of racism-infested decisions.

Burnett is scarcely mentioned in California histories, even though he played a major role in advocating for California self-rule following the Mexican-American War in 1848. He organized rallies, made speeches and wrote long newspaper articles. However, his role was not as great as he boasted to a colleague in 1850: "I believe I have a right to claim the responsibility of making the first public movement toward the formation of a state government."<sup>1</sup>

Notably, and impressively, Burnett was elected in 1849 to a two-year term as the first civilian governor of the new state — not just elected, but elected overwhelmingly by those early Californians who voted.<sup>2</sup> Yet, scarcely 13 months after taking office, he resigned in disgrace on January 9, 1851, widely judged as ineffective and inept. His resignation letter to the Legislature cited "unexpected and unforeseen" circumstances that required him to attend to his "private affairs" without additional explanation.<sup>3</sup>

Typical of Burnett's up-and-down career, he was up again when he was appointed to the California Supreme Court in 1857, and down again after he ruled on behalf of a slave holder in *In re Archy*,<sup>4</sup> a fugitive slave case. Historian Stacey L. Smith called the ruling "the dying gasp of slaveholder rights in California."<sup>5</sup> It also proved the dying gasp of Burnett's long and controversial political and judicial career.

Burnett's racism had both geographical and family origins. He came of age in the slave states of Tennessee and Missouri — he was born in Nashville on November 15, 1807.<sup>6</sup> His father owned slaves, as did his prosperous grandfather, Thomas Hardeman. In Missouri, Burnett would acquire two slaves of his own.<sup>7</sup> When a storeowner in Tennessee, he shot and killed a black slave who allegedly broke into his store — an accident, Burnett claimed.<sup>8</sup>

Burnett was ambitious from an early age, aspiring to both wealth and prestige — "I determined that I would employ my energies in the accumulation of a fortune," he wrote in his autobiography.<sup>9</sup> In Missouri, he taught himself law and served on the defense team for Mormon leader Joseph Smith — Smith had been charged with treason, arson and robbery for his role in the 1838 Mormon War.<sup>10</sup> Burnett also was a three-term district attorney for northwest Missouri. But facing huge debts from failed business adventures, he decided to seek his fortune in the West. He organized and led the first major wagon train from Missouri to Oregon in 1843, known as "The Great Migration." In Oregon, he was elected to the provisional legislature, served as judge

4. *In re Archy* (1858) 9 Cal. 147.

5. Stacey L. Smith, *freedom's frontier: California and the Struggle Over Unfree Labor, Emancipation and Reconstruction* Chapel Hill: Univ. N. Car. Press, 2003, 77.

6. Burnett's surname at birth was Burnet, with one T. He added a second T when he was 19, believing his name spelled with two Ts was more "emphatic." Nokes, *The Troubled Life*, 6.

7. The 1840 U.S. Slave Census listed Burnett with two slaves in Missouri, a female age 10–23, and a male, under age 10. They may have been a mother and son, or a sister and brother. One of Burnett's slaves may have drowned in the Columbia River during the 1843 emigration. Nokes, *The Troubled Life*, 34.

8. *Id.* at 1–2.

9. Peter Burnett, *Recollections and Opinions of an Old Pioneer*. New York: D. Appleton & Co., 1880, 24.

10. For more on the Mormon War and details of Burnett's role, see Stephen C. LeSueur, *The 1838 Mormon War in Missouri* Columbia: Univ. of Missouri Press, 1978 and John Krakauer, *Under the Banner of Heaven; A Story of Violent Faith*. New York: Doubleday, 2003.

1. Burnett to Samuel Thurston, Aug. 7, 1850, Peter Burnett Papers, 1849–1895, Bancroft Library, Berkeley, California. Thurston was a delegate to Congress from the Oregon Territory.

2. Burnett received 7,783 votes in a sparse turnout, partly blamed on adverse weather. Of the other candidates, Winfield Sherwood received 3,220 votes; John Sutter, 2,201; John W. Geary, the future mayor of San Francisco, 1,358, and William Stewart, 619. "1849 California gubernatorial election," Wikipedia, [https://en.wikipedia.org/wiki/1849\\_California\\_gubernatorial\\_election](https://en.wikipedia.org/wiki/1849_California_gubernatorial_election). Burnett was elected November 13, 1849, and inaugurated November 20. California became a state September 9, 1850.

3. R. Gregory Nokes, *The Troubled Life of Peter Burnett: Oregon Pioneer and First Governor of California*. Corvallis: Or. State U. Press, 2013, 161.

of the provisional supreme court, and, after Oregon gained territorial status in 1848, he was elected to the first territorial legislature. However, he never served a day, departing for California before the legislature met. He also wrote that President James Polk appointed him to the territorial supreme court, after he had already left Oregon.<sup>11</sup>

When serving in Oregon's provisional legislature in 1844, Burnett won passage of an exclusion law aimed at banning African Americans from settling in the region, yet allowing slaveholders to keep slaves for up to three years, reversing an earlier flat prohibition against slavery.<sup>12</sup> Under the statute, after three years, the slave would have to leave Oregon — the onus was on the slave, not the slaveholder — or face a whipping of up to 39 lashes. Known in Oregon history as “Peter Burnett’s lash law,” it was abolished the following year.<sup>13</sup>

Burnett headed to California along with tens of thousands of other would-be gold miners following the discovery of gold at Sutter’s Mill in 1848. He organized his own wagon train of 46 wagons and 150 mostly men, and opened the first wagon road connecting Oregon and California. He briefly mined gold on the Yuba River before setting up a law practice at Sutter’s Fort where he teamed with August Sutter, son of John Sutter, and others to establish the new city of Sacramento. As young Sutter’s land agent, selling lots for homes and businesses, he finally gained the fortune he’d always wanted, which bankrolled his successful run for governor at a time when California was primed for statehood.<sup>14</sup>

Burnett wasted no time as governor in revealing his prejudices. In his first address to the new California Legislature on December 21, 1849, he urged enactment of an exclusion law against blacks as an issue “of the first importance.” Anyone opposing such a law, he told the legislators, was guilty of “weak and sickly sympathy.”<sup>15</sup>

Burnett wasn’t by any means alone in his racist attitudes during this period. There was considerable pro-slavery sentiment in California. Many of the early settlers and miners came from the slave states of the south, and many brought slaves to help mine gold. One of California’s first U.S. senators, William McKendree

Gwin, was a former plantation owner with — by one count — nearly 200 slaves in Mississippi.<sup>16</sup>

The proposed exclusion law was only narrowly defeated, but Burnett was back the following year, again urging “the necessity and propriety of excluding free persons of color from the state.”<sup>17</sup> This and several tone-deaf policies, such as recommending the death penalty for robbery and theft, and changing the date of the Thanksgiving holiday, subjected him to widespread ridicule, resulting in his resignation as governor on January 9, 1851.

The *Daily Alta California* of San Francisco — California’s leading newspaper — which had supported Burnett, did a 180-degree shift and welcomed his resignation in an editorial: “It is not to be denied that the people were most shamefully deceived and egregiously disappointed in their selection for the head of the state government.”<sup>18</sup>

Gov. J. Neely Johnson nevertheless resurrected Burnett’s career by appointing him to the Supreme Court on January 13, 1857, replacing Solomon Heydenfeldt, who resigned before the end of his term, which would have expired in January 1858. Following the death of Justice Hugh Murray on September 17, 1857, Johnson next appointed Burnett to Murray’s term, which expired in October 1858. Voters, perhaps also forgetting Burnett’s hapless time as governor, affirmed Johnson’s appointment by electing Burnett to the Murray position in January.<sup>19</sup> Stephen J. Field, a future associate justice of the U.S. Supreme Court, was appointed to the Heydenfeldt position vacated by Burnett. The third member of the court was Chief Justice David Terry, who had been elected in 1855 and would be remembered for shooting and killing U.S. Senator David Broderick in a duel.<sup>20</sup>

Throughout Burnett’s long career in Missouri, Oregon and California politics, there is no record of his ever having spoken disparagingly of slavery or slave owners. Indeed, in his autobiography, he expressed admiration for slaveholders he knew. He said his own family treated its slaves well,

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16. The 1840 Slave Census listed Gwin with 23 slaves. Gwin had multiple plantations and nearly 200 slaves. The other of the first two senators was John C. Fremont, a slavery opponent. Leonard L. Richards, *The California Gold Rush and the Coming of the Civil War*. New York: Vintage Pub., 2008, 39.

17. *Journals of the Legislature of the State of California*, (1851) 19–21.

18. *Daily Alta California*, Jan. 11, 1851.

19. Burnett received 54,991 votes, more than twice that of the five other candidates. *Sacramento Union*, Oct. 6, 1857.

20. Terry, who favored slavery, was later involved in a famous duel, shooting dead Senator David Broderick in 1859. After service in the Confederate army during the Civil War, Terry was himself shot dead by a federal marshal bodyguard after assaulting then United States Supreme Court Associate Justice Stephen Field in 1889. Nokes, *The Troubled Life*, 193–94. See also, “Telling the Tale of California’s Most Colorful Justice,” *CSCHS Newsletter*, Spring/Summer 2014, at 20, <https://www.cschs.org/wup-content/uploads/2014/05/2014-Newsletter-Fall-Most-Colorful-Justice.pdf>.

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11. Burnett’s governmental offices are compiled in Nokes, *A Troubled Life*. Regarding the Polk appointment, see Burnett, *Recollections*, 194, and *Oregon Blue Book, Almanac and Fact Book 2011–2012*. Salem: Or. Office of the Secretary of State, 2011, 318.

12. The 1843 prohibition against slavery was contained in a so-called organic law adopted by a committee and approved by voters prior to the arrival of the 1843 wagon train. Nokes, *A Troubled Life*, 65–66.

13. Nokes, *A Troubled Life*, 65–66.

14. Burnett details his wagon train to California, his mining experience and role in establishing Sacramento in *Recollections*.

15. The text of Burnett’s address was published in the *Daily Alta California*, Dec. 26, 1849.

and that the slaves reciprocated with appreciative obedience.<sup>21</sup>

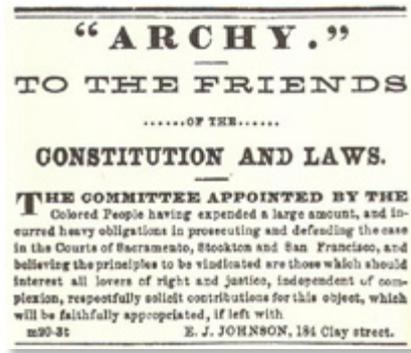
So it should not be surprising that Burnett took the side of a slave owner in the most important case to come before the Supreme Court while he was a member. The case, *In re Archy*, concerned Archy Lee, a 19-year-old house servant in Mississippi, who was brought to California by his owner, Charles Stovall, in 1857. When Stovall prepared to return to Mississippi several months later, intending to bring Archy Lee with him, Lee escaped.

Stovall tracked him down and had him taken into custody as a runaway slave.<sup>22</sup>

California's active black community came to the aid of Archy Lee and took the case to a district court where Judge Robert Robinson ruled in Lee's favor, declaring him a free man under California law on January 23, 1858. Stovall, however, obtained a new warrant and had Lee rearrested. Stovall next sought relief in the California Supreme Court, where Burnett and Terry heard the case at its January 1858 term.<sup>23</sup> Field, the newest member of the court, evidently did not participate.

Stovall's attorney, James J. Hardy, claimed that Stovall had been only a visitor in California, giving him a "right of transit" and should be allowed to return home with his slave. He also argued that even though the California Constitution prohibited slavery, that provision was unenforceable because the Legislature had failed to enact implementing legislation.<sup>24</sup>

Burnett's majority opinion dismissed Hardy's argument that Stovall had a right of transit, and thus could keep his slave. Burnett noted that Stovall had worked for two months as a schoolteacher in Sacramento and had hired Lee out for work. Said Burnett: "If the party engages in any business himself, or employs his slave in any business, except as a mere personal attendant upon himself, or family, then the character of visitor is lost, and his slave is entitled to freedom."<sup>25</sup> As for Hardy's argument that the Legislature failed to implement the constitutional prohibition against slavery, Burnett said the constitutional provision is self-executing, and requires no legislation to be effective: "It is negative and restrictive in its terms and effects, and by its own force accomplishes the end aimed at . . . that the state of slavery should not exist therein."<sup>26</sup>



Archy Lee defense advertisement, 1858.  
Image: Public Domain.

Nevertheless, Burnett referred by implication to the state's expired fugitive slave act as justification to return Archy Lee to Stovall's custody. As enacted by the Legislature in 1852, the California Fugitive Slave Act supplemented the 1850 federal Fugitive Slave Act, which gave slaveholders the right to claim a runaway slave who escaped across state lines, but did not apply to slaves who escaped after being voluntarily taken by owners to free states. The California act provided

that owners of slaves who escaped *prior* to statehood could claim escapees as their property.<sup>27</sup>

The California Supreme Court had earlier upheld the state act in a ruling that Stacey Smith called "one of the most deeply proslavery decisions[] ever rendered in a free state."<sup>28</sup> In that 1852 opinion, Chief Justice Murray and Associate Justice Alexander Anderson had pronounced the constitutional prohibition against slavery a mere "declaration of a principle, looking to the aid of [a] future legislature to carry it out."<sup>29</sup> And without such legislation, that opinion held, the provision was thus "inoperative."<sup>30</sup> Initially set to expire after a year, the act was extended for an additional two years before finally expiring in 1855, three years before the Supreme Court took up the *Archy Lee* case.<sup>31</sup>

Had Burnett simply ruled that the constitutional prohibition against slavery was valid, self-executing, and enforceable, and then set Archy Lee free, he might well have been praised by anti-slavery interests for upholding the Constitution. However, Burnett bizarrely ruled that Stovall was entitled to an exemption from the prohibition against slavery.

"This is the first case that has occurred under the existing law," Burnett wrote. "The petitioner [Stovall] had some reason to believe that the constitutional provision would have no immediate operation. . . . [U]nder these circumstances we are not disposed to rigidly enforce the rule for the first time. But in reference to all future cases, it is our purpose to enforce the rules laid down strictly, according to their true intent and spirit."<sup>32</sup>

The court's holding directed that "*Archy be forthwith released from the custody of the chief of police and given into the custody of the petitioner, Charles A. Stovall.*"<sup>33</sup> Chief Justice Terry concurred.

21. Burnett, *Recollections*, 4, italics added.

22. Rudolph M. Lapp, *Blacks in Gold Rush California*. New Haven: Yale Univ. Press, 1995, 148.

23. *In re Archy*, 9 Cal. 147.

24. *Id.* at 148 [summary of counsel's arguments].

25. *Id.* at 168.

26. *Id.* at 170.

27. *Compiled Laws of California* (1852) ch. 65, p. 231 ["An act respecting Fugitives from Labor, and Slaves brought to this State Prior to her admission into the Union"].

28. Smith, *freedom's frontier*, *supra* note 4, at 71, commenting on *In re Perkins* (1852) 2 Cal. 424.

29. *In re Perkins*, 2 Cal. at 456.

30. *Ibid.*

31. Smith, *freedom's frontier*, 74.

32. *In re Archy*, *supra*, 9 Cal. at 171.

33. *Ibid.*, italics added.

The decision was widely condemned. The *Sacramento Union*, which once supported Burnett, said his ruling “caps the climax of all human absurdity and lowers the dignity of the Supreme Court to a degree wholly unparalleled . . . in the history of any state in the Union.”<sup>34</sup> Similarly, the *Daily Alta California* said Burnett and Terry “have prostituted the supreme legal tribunal of California to a point of degradation from which it will not rise, until they cease to pollute the court chambers with their presence as judges.”<sup>35</sup>

There were other cases in which Burnett participated, although none of the magnitude of the *Archy Lee* case. One dealt with land sales in Sacramento.<sup>36</sup> Another, which Burnett authored, held a Sunday closing law unconstitutional.<sup>37</sup>

The decision in *In re Archy* effectively ended Burnett’s political as well as judicial career. He left the court when his term ended in October 1858, and apparently never looked back. In his autobiography, *Recollections*

*and Opinions of an Old Pioneer*, published in 1880, he mentioned nothing that happened on the court, only the dates he was a justice. Burnett moved on to private life and became a prominent San Francisco banker. He died May 17, 1895 at age 87 and is buried in Santa Clara Mission Cemetery in Santa Clara.

As for Archy Lee, he would not be returned to slavery. Legal moves in other courts set him free,<sup>38</sup> and he eventually moved with other African Americans to Canada. Stovall would return to Mississippi empty-handed. ★

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38. See Grodin, 31 *Hastings Const. Law Q.* 141, 148, describing the “surprising and gratifying (if somewhat confusing) sequel to the case”: After the Supreme Court’s decision, Archy again escaped and was recaptured. He was then “put on a boat to San Francisco for transport back to Mississippi, but in San Francisco a friend of Archy by the name of James Riker sought a second writ of habeas corpus, this time for the release of Archy on the ground he was a slave. That case came to be heard before a state judge in San Francisco, but while it was pending Stovall invoked the jurisdiction of a United States Commissioner (George Pen Johnson) on the ground (inconsistent with Stovall’s previous declarations) that Archy had escaped from Mississippi, and at the request of Stovall’s lawyers, Archy was turned over to the custody of Commissioner Johnson. On April 14, 1858, Johnson decided that Archy was not a fugitive slave after all, and discharged him from custody.” *Id.* at 149.

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34. *Sacramento Union*, Jan. 16, 1858.

35. *Daily Alta California*, Feb. 14, 1858. See also Grodin, “The California Supreme Court and State Constitutional Rights: The Early Years” (2004) 31 *Hastings Const. Law Q.* 141, 147–49 [describing other similar criticisms].

36. *Brannan v. Mesick* (1858) 10 Cal. 95.

37. *Ex Parte Newman* (1858) 9 Cal. 502. See Keiter, “Never on Sunday: Religious and Economic Liberty in Gold-Rush Era California,” *CSCHS Newsletter*, Spring/Summer 2019 at 5, <https://www.cschs.org/wp-content/uploads/2019/06/2019-Newsletter-Spring-Never-on-Sunday.pdf>.