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POSITIONS TO PLUNDER UNDER COVER OF LAW

JOHN D. GORDAN, III*

The contexts and concepts which illuminate this article are not novel, but the two tales here which illustrate them seem to be virtually unknown. These are the stories of two government officials who lost their jobs in territories recently acquired in war on the remote margins of empires on different sides of the world in different centuries: one, James Sutherland (17?-1791), as Judge of the Vice-Admiralty Court in Minorca from 1763 to 1780, and the other, James Collier (1789-1873), as the first Collector of Customs in California from November 1849 to January 1851. In each instance, however, the official prevailed in the subsequent litigation with governmental antagonists, although for one the dispute ended fatally. What also makes the two cases parallel, despite their differences in geography, office, and time, is that each arose from appointment to an official position in an inadequately developed and projected governmental structure which, in loosely controlled circumstances with distant superiors, provided these officials with opportunities for immense self-enrichment – which they took and in which they were supported by the outcomes at trials. Each also chose his counsel wisely.

MINORCA

The major British periodicals for August 1791 carried the news, this from *The Bee*:[1]

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* The author would like to thank his constant editor and friend, Conrad K. Harper, Esq., and Professors Lauren Benton and Christian G. Fritz for their comments on earlier drafts of this article.

[1] *The Bee*, IV (Edinburgh 1791), p. xxxi.

> On Wednesday, the 17th ult. a little before one o'clock, as his Majesty was passing in his carriage through the Park to St. James's, a gentleman dressed in black, standing in the Green Park, close to the rails, just as the carriage came opposite where he stood, was observed to pull a paper hastily from his pocket, which he stuck on the rails, addressed to the King, throw off his hat, discharge a pistol in his own bosom, and instantly fall. Though surrounded with people, collected to see the King pass, the rash act was so suddenly perpetrated, that no one suspected his fatal purpose till he had accomplished it. He expired immediately.
>
> In his left hand was a letter addressed – "To the Coroner who shall take an inquest on James Sutherland ..."
>
> This unfortunate gentleman was Judge of the Admiralty Court in Minorca …
>
> As the deceased was a man of great probity, and highly respected by all who knew him, we sincerely lament his loss …

Minorca is a small island in the Mediterranean Sea, midway between Spain, France and Italy. In the eighteenth century, because of its strategic location, it was of vital interest to the major European powers and the frequent subject of invasions and rotating occupation.[2] England took Minorca from Spain in 1708 and held it until 1756, when France ejected the British in the first battle of the Seven Years War; the failure of Admiral John Byng (1704-1757) to relieve the besieged British garrison there led to his court martial and execution by a firing squad in 1757.[3] At the conclusion of the Seven Years War in 1763 the British re-occupied Minorca and held it until the Governor, General James Murray (1721-1794), was forced to surrender to Spain on 5 February 1782, after a siege of almost four months following the Spanish landing on Minorca in August, 1781.

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[2] Desmond Gregory, *Minorca, the Illusory Prize – A History of the British Occupations of Minorca between 1708 and 1802* (1990).

[3] Dudley Pope, *At 12 Mr Byng Was Shot* (1962)

Local vice-admiralty courts were common in British colonies in the seventeenth and eighteenth centuries.[4] As the leading scholar in this field has put it:

> Vice-Admiralty courts had traditionally operated in the British Empire at the intersection of local and imperial interests. On the one hand, in adjudicating prize cases and prosecuting crimes aboard ships, the courts represented a thread of consistency across the varied legal landscape of the empire. On the other hand, the courts responded closely to local interests and created valuable fees and commissions as well as opportunities for graft.[5]

With these courts often came high-level administrative confusion[6] and, understandably, disputes between the governor of the colony and the vice-admiralty judge about the authority of the governor over the court and its personnel. According to Ubbelhohde:

> In the colonies, the royal governors were commissioned vice-admirals of their provinces by the Lords Commissioners of the Admiralty in England … [T]he commissions as vice-admirals might have become mere titular honors if they had not also granted the governors the right to make temporary appointments to the vice-admiralty courts in their provinces.[7]

Professor Charles McLean Andrews elaborated:

> Throughout the first quarter of the eighteenth century the matter of appointment was the subject of a good deal

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[4] See, for example, Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960); Kevin Costello, *The Court of Admiralty of Ireland, 1575-1893* (2011); John Restano, *Justice So Requiring – The Emergence and Development of a Legal System in Gibraltar* (2012), pp. 59-63; Bevan Marten, "Constitutional Irregularities in the British Imperial Courts of Vice Admiralty during the mid Nineteenth Century", *Journal of Legal History*, XXXVII (2016), p. 215.

[5] Lauren Benton, "The Melancholy Labyrinth: The Trial of Arthur Hodge and the Boundaries of Imperial Law", *Alabama Law Review*, LXIV (2012), p. 105. I am grateful to Professor Benton for bringing her article to my attention. The title of this article is derived from an expression in her article. See note 12 below.

[6] George Louis Beer, *The Old Colonial System, 1660-1754* (1912), I, pp. 292-307.

[7] Ubbelohde, note 4 above, p. 6.

> of correspondence, for it affected the patronage of the governor, who was not always convinced that, in the face of his commission, the entire control of the vice admiralty courts should be vested in the authorities in England. The difficulty was never wholly settled in colonial times, for … the governors seem to have had at least a traditional right to name the officers of the court and certainly did so in some instances…" [8]

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[8] Dorothy S. Towle (ed.), *Records of the Vice-Admiralty Court of Rhode Island 1716-1752* (1936), p. 19. Scholarly sources contain varying data points of time and place on the issue. George Louis Beer states:

> At a later period, toward the end of the century, the English government claimed that the admiralty jurisdiction had not been granted to the proprietary colonies, and it was by means of imperial vice-admiralty courts erected in the colonies that the laws of trade and navigation were enforced.

Erastus C. Benedict is categorical that the "commission to the Judges of the Vice-Admiralty Court … issued from the High Court of Admiralty". *The American Admiralty Its Jurisdiction and Practice with Practical Forms and Directions* (1850), p. 65. George Reese (ed.), *Proceedings in the Court of Vice-Admiralty of Virginia 1698-1775* (1983), pp. 81-82, states: "In 1770 the judge of the court of vice-admiralty in Virginia was John Randolph, appointed by royal commission … The other officers of the court were presumably appointed by the governor, lieutenant governor, or acting governor in Virginia". However, earlier charters, as a rule, gave the patentees this jurisdiction. *The Origins of the British Colonial System 1578-1660* (1908), p. 335. The Governor of Maryland was authorized by its Provisional Council to establish a vice-admiralty court and did so in 1695; the authors assert that "there is no question that Governor Nicholson was acting under his commission as Vice Admiral from the 'Lords of the Admiralty'". David R. Owen and Michael C. Tolley, *Courts of Admiralty in Colonial America – The Maryland Experience 1634-1776* (1995), p. 93. In 1774 and 1776 the Governor of East Florida appointed the judge of the vice-admiralty court there. M. C. Mirow, "The Thistle, the Rose and the Palm: Scottish and English Judges in British East Florida", in Michael Lobban and Ian Williams (eds.), *Networks and Connections in Legal History* (2020), pp. 88, 109, 115. In a third variation, Judge Charles Merrill Hough reported that two of the judges of the Vice Admiralty Court for the Province of New York "held no Royal Commission, but exercised admiralty functions under his designation as Chief Justice of the Province" (Lewis Morris 1715-21) or "acted as Judge in Admiralty, being at that time a Justice of the Supreme Court of the Province (Daniel Horsmanden

Abuses of this authority required statutory correction in the nineteenth century "…to put an end to the improper execution of certain offices in the Vice-Admiralty Courts abroad, which had been filled without the correct authorization of the Lords Commissioners or patent from the High Court of Admiralty".[9] This ambiguity was dispositive of what happened in Minorca and its aftermath.

There were four royal governors and three lieutenant governors of Minorca during Britain's second occupation. Relevant for our purposes are James Johnston (1721-1797), who served as Lieutenant Governor from 1763 to 1774, and General John Mostyn (c. 1709-1779), who served as governor from 1768 to 1778. Mostyn's lieutenant governor, beginning in 1774, was James Murray (1721-1794), who succeeded Mostyn as governor and whose place as lieutenant governor was then taken by Sir William Draper (1721-1787). Murray, a Major-General, had served as military governor of Quebec from 1760 to 1768,[10] and his appointment included being Vice-Admiral of Minorca, something Mostyn had not been.

A Vice-Admiralty Court had been established in Minorca during the first British occupation of the island. During the second British occupation its work continued under James Sutherland, a judge appointed in July 1763 by a patent under the Great Seal of the High Court of Admiralty of England, who served until he was suspended by General Murray on 3 August 1780.

Sutherland did not make himself popular either with the occupying army or the indigenous merchant population. Sutherland's predecessor for the last twenty-five years of the first British occupation was a native Minorcan; Sutherland was a Scot. Judges of vice admiralty courts were not paid a salary then: instead they remunerated themselves from fees paid to the court and percentages calculated on the value of condemned vessels and goods.[11] In 1764 the local merchants complained that Sutherland had increased the court fees ten times from what they had been at the end of the first

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(1736-38)". *Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York 1715-1788* (1925), pp. xxi-xxiii.

9 F. L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice since 1800* (1970), p. 61.

10 R. H. Mahon, *Life of General James Murray – A Builder of Canada* (1921).

11 Ubbelohde, note 4 above, pp. 6-7.

British occupation. When Lieutenant Governor Johnston asked for an explanation, Sutherland's only response was to send a complaint to England about Johnston's interference.[12] Similarly, in 1774, when Murray assumed the Lieutenant Governor's position, Mostyn wrote to him referring to "the greatest of all the rascals that creep upon the earth, Mr. Judge Sutherland".[13] Finally, comments made in the subsequent litigation by Sutherland's lawyer were suggestive

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[12] Gregory, note 2 above, p. 149. As Benton puts it, note 5 above, p. 106, an Admiralty Court appointment was "a position to plunder under cover of law". Admiralty Court fees could be calculated in such cases as prize on the value of the subject of proceeding, which could be substantial in the case of a fully-loaded merchant vessel, for example. However, "… the expenses of condemning small craft were ruinous, being for the most part the same as those charged by the court for the condemnation of large vessels". Complaints were frequent that recourse to an Admiralty Court by the captors of a prize left them in worse financial condition than if they had not taken the prize to begin with. An eloquent presentation of a personal experience in the Vice-Admiralty Court in Malta by Admiral Lord Thomas Cochrane (1775-1860), not reputed for his honesty after his conviction and imprisonment for securities fraud, consumes a chapter in his *The Autobiography of a Seaman*, (1860), 2, from which the above quote is taken. Chapter 31, "A Visit to the Admiralty Court at Malta" in 1811, is as entertaining as it is informative, with Admiral Lord Cochrane sneaking into the Admiralty Judge's private bathroom and making off with the only copy of the court fee schedule, attached to the back of its door, for which he was arrested. See also Costello, note 4 above, pp. 156-172 (the larcenous escapades of Sir Jonah Barrington (1756-1834), for decades judge of the Vice-Admiralty Court in Ireland).

[13] Item 1125, dated 11 November 1774, Thomas Thorpe, *A Catalogue of Very Choice, Rare and Valuable Books* (1839), p. 120. Two days after writing that letter, Mostyn would achieve everlasting legal fame as the unsuccessful appellant in *Mostyn v. Fabrigas,* 98 E.R. 1021, 1 Cowper 161 (K.B., 14 November, 1774), an action successfully brought by a Minorcan against Mostyn for unjustified, degrading imprisonment and then exile to Spain; damages of £3000 were awarded. Mostyn claimed immunity by reason of his position as Governor, an assertion which failed in the Court of Common Pleas at trial in 1773 before Justice Henry Gould (1710-1794) and in 1775 on appeal before Lord Chief Justice William De Grey (1719-1781), and in the Court of King's Bench before Lord Chief Justice William Murray, 1st Earl of Mansfield (1705-1793), whose opinion appears to have rested on Mostyn's faulty pleading.

of earlier instances of oppressive conduct by Murray towards Sutherland, who acquiesced.

The triggering event was Murray's demand in the summer of 1780 that Sutherland discharge the deputy Register of his Vice-Admiralty Court, a politically controversial Minorcan named Pons, justified after the fact on the grounds of aggravated corruption in office, and to appoint a replacement selected by Murray, Dr. Salord, a highly-regarded local lawyer. Sutherland refused to administer the oath of office to Salord for the stated reason that Salord did not speak English, the language in which the court was conducted. In response, on 3 August 1780, Murray suspended Sutherland from office "until his Majesty's pleasure should be known" and appointed a substitute of his own choosing, Joseph Collins, in Sutherland's place. When Sutherland refused to surrender the seals of the court, which he had locked up, Murray had the drawer broken into and took them. Subsequent efforts involving officials in London to mollify Murray and reinstate Sutherland were thwarted by the termination of the British occupation.

Sutherland filed suit against Murray in the Court of the Exchequer for illegally removing him from office. However, before that case was tried, in December 1782 and January 1783 Murray was obliged to defend a court martial instigated against him by his immediate subordinate, Sir William Draper, the last Lieutenant Governor of Minorca. Some two dozen charges and their subparts were considered by the court, mostly to do with allegations concerning Murray's conduct before, during and after the siege of Fort St. Philip's by the Spanish forces and its surrender in February 1782.

The court acquitted Murray of all but two of the charges, on which he was reprimanded: the first, that in October 1781 he had ordered that no ordnance could be fired at the Spanish attackers without his direction, which facilitated their approach; and second, that although his compensation as Governor was to be a fixed salary only, he had "taken a perquisite improperly, and contrary to the apparent intention of Government", as the court found.[14]

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[14] *The Sentence of the Court-Martial, held at the Horse-Guards, for the Trial of The Hon. Lieut. Gen. James Murray, Late Governor of Minorca, on the Twenty-Nine Articles exhibited against him by Sir William Draper, and His Majesty's Order thereon, taken in short-hand by Joseph Gurney* (1783), pp. 5, 8, 30-33.

Specifically, the evidence showed that, although Murray had a fixed annual salary of £3035 as Governor, he had detached the function of auctioning prizes from the Admiralty Court and assigned it to an individual with whom he split the 1½% fee charged against the proceeds. The auctioneer testified that his half for six months had been $2,861 – presumably about £700. Murray's defense — which the court did not accept – was that this money had not come to him as Governor, but rather as Vice Admiral, and that in taking it he was following the practice of the Governor of Gibraltar.

The result of the court martial was confirmed by the King, who declined to add any other penalty "in consideration as well of the zeal, courage and firmness, with which Lieut. Gen. Murray appears to the Court to have conducted himself, in the defense of Fort St. Philip, as of his former long and approved services".[15]

The Trials of Sutherland v. Murray

The available printed sources of information in news periodicals are meager and not entirely consistent. The rock upon which any analysis is founded is the rare[16] printed report of the jury trial proceedings on 23 July 1783 in the Court of the Exchequer before Lord Chief Baron Skynner (c. 1724-1805) and a "special jury" of "merchants", taken in shorthand by the then-leading shorthand writer, William Isaac Blanchard (17?-1790), which resulted in a verdict for Sutherland of £5000.[17]

However, it appears that this was the second time the case was tried. Part of the evidence for that appears in an oral argument before Chief Justices Mansfield and Alexander Wedderburn, Baron Loughborough (1733-1805) at the Serjeants' Inn, apparently made by Thomas Erskine (1750-1823) on 4 November 1786, in an appeal

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[15] Ibid., p. 10

[16] The only copies identified in the ESTC or WorldCat are in the Library of Congress and the Lewis Walpole Library at Yale University. My particular thanks are due to the staff of the latter, which had a scanned copy of the trial in my hands the day after I sent my request.

[17] *The Trial in the Court of the Exchequer before Chief Baron Skinner at Guildhall, on Wednesday the 23d of July; wherein James Sutherland, Esq., late Judge of the Admiralty at Minorca, was Plaintiff, and the Hon. General James* Murray*, late Governor of that Island, was Defendant* (1783)(hereafter "Exchequer Trial").

from the judgment of the Court of the Exchequer in a later, unrelated case.[18] Erskine's argument stated:

> The analogy between the present case and that of *Sutherland v. Murray (a)* is very strong, to shew that a person representing the King in all functions, civil and military, where the act complained of is expressly legal, shall answer for an abuse of his authority.

The report added the following footnote:

> *(a)* Sittings at *West.* After *East.* 1783, cor. *Eyre*, Baron. That action was tried twice, the first verdict being imperfect; and the damages were given on the second trial.

Erskine, who in 1783 was just beginning his meteoric rise at the Bar after service as an officer in the British Navy, knew whereof he spoke, because he had been one of the juniors representing General Murray at the trial before Chief Baron Skynner in July 1783. Erskine's argument continued:

> There the declaration stated, that the defendant was the governor of *Minorca,* and vice-admiral of the island; that the plaintiff was judge of the Vice-Admiralty Court, with all the fees, emoluments, &c. and that the defendant, to injure and oppress him, *maliciously, and without any reasonable or probable cause, suspended him from his office, per quod* he lost his profits, &c. On the evidence it appeared, that General *Murray* had legal authority to suspend till the King's pleasure was known; that he had so suspended him, and directed the secretary of state to take the King's pleasure on it. The General professed himself ready to restore him if he made a particular apology; the King approved of the suspension, unless the terms were complied with. There the plaintiff recovered 5000*l.* and it never occurred to any lawyer, that there was any pretence to move in arrest of judgment. The gist of the action was admitting the legality of the suspension thus confirmed, but complaining of the defendant's exercise of this original

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[18] *Sutton v. Johnstone,* 1 Durnford and East, *Term Reports of the King's Bench,* 493, 538 (1786). The judgment of the Court of the Exchequer was apparently reversed by the Lord Chancellor on the opinions of the two Chief Justices but reinstated by the House of Lords. Ibid., pp. 544, 784.

> authority, and his malicious and false representations, by which the suspension had been confirmed.

Erskine was taking liberties with the precedent. Although Sutherland's counsel clearly did assert that soon after his arrival in Minorca, Murray "looked upon Mr. Sutherland with an evil eye", "manifest[ing] spleen and ill will", and had acted maliciously and without legal cause, the thrust of his opening was wider than Erskine's characterization of it:

> Mr. Sutherland held his office by a patent under the Great Seal of the High Court of Admiralty of England, and he was removable only at the will and pleasure of his Sovereign.
>
> Governor Murray had no authority to violate a patent the King had thus granted. In the very patent by which he is appointed Vice-Admiral of the island of Minorca are these emphatical words – "Saving and excepting the rights of our High Court of Admiralty of England, and also of the Judge, and of the Register of said Court, from whom, or either of them, it is not our intention in any thing to derogate by these presents".
>
> The Defendant General Murray, who was in Minorca under this authority, was by that very authority, told in express terms, that he had no power over the Judge of the Court of Admiralty, and that he had no power delegated to him, which could give him an authority over Mr. Sutherland. – In defiance of that authority, with the words of the patent staring him in the face, by the plenitude of his own will, he dismissed Mr. Sutherland without any just reasonable or probable cause.
>
> Permit me to say, if he had possessed the power of dismission, he must have had some legal reason for so doing. – Did he assign any? No, my will is the law. That is the only reason that General Murray deigns to assign.[19]

What is also striking, and amplifies the terse footnote in the *Term Reports*, is what Sutherland's counsel was permitted, without objection, to tell the jury in his opening at the second trial about what had happened at the first:

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[19] Exchequer Trial, p. 5

> … in February last we dragged him [Murray] into Court, when he had not a single witness to call in his defense.
>
> It happened that upon an objection being made by the counsel on a point of law, the learned Judge thought that the Plaintiff ought to be nonsuited, and that he ought not to take the opinion of a Jury; but we thought otherwise, and the Jury were obliged ultimately to decide it.
>
> Unhappily for us, the Jury, instead of finding a general verdict, thought proper to find a general verdict in their own form of words, and gave 3000l. damages to this Plaintiff.
>
> As the Plaintiff had lost 4000l., besides additional expenses, we thought the sum inadequate, and were happy to lay hold of the impropriety of the Jury: we therefore made an application to the Court for a new trial, which was granted.[20]

At the second trial Sutherland called just one witness, Joseph Collins, Murray's choice as Sutherland's replacement, who testified to the events of Sutherland's ouster and to the money he had earned in his place – "17,750 dollars", evidently "Spanish dollars" or "pieces of eight", which Sutherland's counsel treated, without dispute, as the equivalent of £4000. Having in mind that (1) Sutherland was dismissed on 3 August 1780, (2) Minorca was invaded by the Spanish in August 1781, and (3) its capital was under siege by November 1781 and surrendered in February 1782, Collins collected the equivalent of $600,000 in today's dollars for about a year and two months work, at most.

The defense consisted of the evidence of two witnesses. One was Dr. John Burrows, who, although the Register (Chief Clerk) of the Vice-Admiralty Court in Minorca since 1763, had never been there; he testified about the timing of the appointments and qualifications and detriments of Pons and his predecessor and successor. Documents were also introduced showing General Murray's efforts, but only after Pons's dismissal, to obtain evidence of his improper behavior. In addition, Murray's counsel also had him authenticate a letter dated 21 August 1780, from Sutherland, who was then in Italy returning to England, which stated that he had been unable to obtain any information from Murray at the time

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[20] Exchequer Trial, p. 6

about his reasons for wanting to discharge Pons and replace him with Salord.

The other defense witness, Lord Hillsborough (1718-1793), Secretary of State For the Southern Department, testified by answers to interrogatories that Sutherland had applied to him for reinstatement, justifying his conduct, but later acknowledged that he had acted improperly towards General Murray. In turn, Lord Hillsborough "recommended to the plaintiff that he make proper submission to the defendant, which the plaintiff ultimately agreed to do" and did do in writing. Sutherland then set out for Minorca to be reinstated, but was prevented from reaching it by the onset of the Spanish invasion.[21]

After a closing argument by Sutherland's lawyer – asserting damages of 20,157 dollars, evidently including, above the £4000 in lost fees, unproven amounts for such losses as hiring a vessel to carry him to England after he was removed[22] -- Lord Chief Baron Skynner summed up the evidence and then essentially directed a verdict for Sutherland. He said that there was no proof of the reason and manner of the removals of Pons or Sutherland when General Murray did it:

> … so far as appears from the defendant's evidence, he [Pons] was removed for a charge, of which he had not such evidence as he thought positive and compleat evidence, till some days subsequent to the time he states he had removed him; and directs witnesses to be examined to enquire into it. … [N] one of the circumstances respecting it appear, but only this; the witness Collins was appointed in Mr. Sutherland's, the plaintiff's place; who says Pons was removed as he had heard, and because the plaintiff Sutherland did not swear in another person appointed in place of Pons, he was himself suspended.
>
> Now, Gentlemen, the office of Mr. Sutherland the plaintiff is an office appointed by the Crown, and of course removeable by the Crown.
>
> It was said by Sir Thomas Davenport [senior defense counsel], that there are certain exigencies, or cases, of such a nature, as must supersede all regular proceedings; and in these foreign

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21 Exchequer Trial pp. 15-23.

22 Exchequer Trial pp. 6, 22

> distant governments, they admit of the Governor to act in a manner, that, without those exigencies, would not be in a due course of law. – But supposing that to be the case, there does not seem to me to be any exigency in this case, that did immediately require that the plaintiff should be suspended from his office.
>
> For all he had done, in fact, was, upon one person being suspended from his office, he had refused to swear in another man, who was presented to him as his successor…[T]he defendant has not at all said why, or upon what ground, positively, he did remove Mr. Sutherland and suspend him from his office. -- I profess there does not appear to me, in point of law, such a sufficient ground as did authorize the defendant to suspend the plaintiff from his office.
>
> If you are of the same opinion, of course your verdict will be for the plaintiff. [23]

And the jury was of the same opinion, and thus the central legal issue in the case – the breadth of the Governor's power – was finessed by the Chief Baron.

But this strange case did not end with the trial. General Murray did not appeal – he paid the judgment and the costs, apparently from his own funds, and then he applied to the King and Parliament for reimbursement.

Proceedings in Parliament

General Murray's petition was read in Parliament on 10 August 1784.[24] It charged that Sutherland:

> did commit divers things, tending to involve the former Governors, as well as the Petitioner, in Disputes with the Natives of the Island, by raising Jealousies and Discontents among them, and did likewise hold a secret correspondence with Doctor *Franklin*, the *American* Ambassador to the Court

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[23] Exchequer Trial, pp. 27-28.

[24] *Journal of the House of Commons* (reprinted 1803), XL, pp. 429-430.

> of *France*, as appears by his intercepted Letters in the Office of His Majesty's Secretary of State …[25]

The petition proceeded to recited the events of Sutherland's suspension and the refusal of Earls of Hillsborough, Secretary of State, and Sandwich (1718-1792), First Lord Commissioner of the Admiralty, to reinstate Sutherland without Murray's consent and only upon Sutherland's "public Submission" to Murray for his misconduct, which Sutherland was on his way to Minorca to do when the island fell to Spain. Soon after Murray arrived in England in July 1782, Sutherland sued him and obtained the £5000 judgment for which Murray petitioned the King for reimbursement. The petition was referred to the Board of Treasury, which first approved it and then changed its mind, leading to Murray's petition to Parliament. The petition was referred to a committee, but two days later it was withdrawn.[26]

On 2 February 1785, the House declined to consider a petition by Sutherland. [27] Then on 20 April 1785, Murray filed another petition, seeking the same relief as the first; shorn of its gratuitous invective – quoted above - about Sutherland stirring up the Minorcans and about his correspondence with Benjamin Franklin (1705-1790), its introduction was adorned by a statement of the Chancellor of the Exchequer that "His Majesty, having been informed of the Contents of said Petition, recommends it to the Consideration of the House". It was referred to a Committee, and once again the House refused to consider a petition by Sutherland.[28] On April 27 the Committee reported the evidence of Sutherland's suspension; the Treasury Minute in December 1783, later abrogated, authorizing Murray's reimbursement for the judgment and legal costs; proof of those legal costs and of Murray's payment. The House again declined to hear a petition by Sutherland.[29] After further consideration on

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25 Ibid.; italics in original.

26 Ibid., p. 435.

27 Ibid., p. 476. The *Journal* does not report the contents of Sutherland's petitions, but they may be fairly surmised from his later publications, discussed below.

28 Ibid., p. 867.

29 Ibid., pp. 903-904.

6 May, on 9 May 1785, the House passed the bill authorizing full reimbursement for Murray.[30]

An undated 62-page pamphlet, evidently written by Sutherland but with no identified author, publisher or date,[31] and entitled *The Case of Mr. Sutherland, Late Judge of the Vice Admiralty Court of Minorca. Stated in a Memorial to the King*, gives the backstory on Sutherland's fruitless opposition to Murray's efforts in Parliament during the 1784-85 period in documents that Sutherland sent to the King and high government officials, who ignored him. Among other things, it reproduces a letter from Sutherland and a portion of an affidavit of his, explaining that, as passenger in a neutral vessel returning from London to Minorca in 1778, he was carrying concealed government dispatches for General Murray. The vessel was intercepted by the French, the dispatches found, and Sutherland was taken into custody, carried to France and ultimately incarcerated as a State prisoner in a fortress in Marseille. His letter to Franklin, whom he did not know, simply solicited assistance because of the extreme deterioration of Sutherland's health in jail.

Sutherland did not cease his protests or his publications. *A Letter to the Electors of Great Britain,* printed for the author and sold by J. S. Jordan[32] with a publication date of 1791, starts with a letter to the reader by Sutherland dated 1 August 1791 and chronicles Sutherland's intensifying but ineffective efforts to get the attention of the King and high government officials to take notice of his complaints. This failure had apparently become too hard for Sutherland to bear, because two weeks later came his fatal rendezvous with the King in Green Park. As his counsel had claimed at the trial eight years earlier that Sutherland was nearly 70, he may have been close to 80 years old when he took his own life.

SAN FRANCISCO

The recent scholarship of leading legal historians explores, from the founding of this country, the major role of the customs house in government and the marketplace and the operational significance

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30 Ibid., pp. 950, 967-968

31 It is assigned the date of June 1785 in the English Short Title Catalogue,

32 Less than a year later Jordan published *The Rights of Man* (Second Edition), for which Paine was tried *in absentia* and Jordan incarcerated.

over time of an evolving compensation system which by the mid-eighteenth century gave customs officers a personal financial interest in the outcome of their enforcement of the customs laws.[33] The vagueness of the governing laws and the tendency towards liberality shown by customs officers to merchants in their communities induced the central government to tighten controls by allowing customs officers to share in the proceeds of goods forfeited for evasion of duties. This, in turn led to abuses in enforcement and resistance by the merchants who were penalized and, sometimes, by the judges to whom they appealed.[34]

California is an outlier in this story, since it was not an American territory until the victory of the United States in the war with Mexico in 1846. It was ceded to the United States by Mexico in the Treaty of Guadalupe-Hildalgo, signed 2 February 1848 and proclaimed after ratification on 4 July 1848, but it was not admitted to statehood until 9 September 1850.

However, Congress did not wait for statehood to extend the customs laws to California. It passed an act "to extend the Revenue Laws of the United States over the Territory and Waters of Upper California, and to Create a Collection District therein",[35] which was approved by the President on 3 March 1849. Specifically, the statute established the Collection District for Upper California in San Francisco and authorized the President to appoint the collector and the collector, with the approval of Secretary of the Treasury, to appoint three deputy collectors, one to be at Monterey; the compensation of the former was to be $1500 per year and the latter $1000 a year, but all were to receive *in addition* "the fees and commissions allowed by law". The fifth and final section, remarkable to modern eyes, provided;

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[33] Nicholas R. Parrillo, *Against the Profit Motive – The Salary Revolution in American Government, 1780-1940* (2013); Gautham Rao, *National Duties – Customs Houses and the Making of the American State* (2016).

[34] Parrillo, note 33 above, pp. 31-42, 221-241; Rao, note 33 above, pp. 81-92, 141, 149, 173-183, 189-195.

[35] 9 Stat. Ch.112. This statute replaced an *ad hoc* system of customs duties established and administered by the American military government and applied to its support. Neal Harlow, *California Conquered- The Annexation of a Mexican Province 1846-1850* (1982), pp. 303-304, 334-337.

> That, until otherwise provided by law, all violations of the revenue laws of the United States committed within the district of Upper California shall be prosecuted in the District Court of Louisiana, or the Supreme Court of Oregon, which Courts shall have original jurisdiction, and may take cognizance of all cases arising under the revenue laws in the said district of Upper California, and shall proceed therein in the same manner and with the like effect, as if such cases had arisen within the district or territory where the prosecution shall be brought.

The seeds of much of this story are in this one paragraph of the Act.

The first collector, James Collier, was one of three brothers who were lawyers in a larger family originating in Litchfield, Connecticut. A veteran of the War of 1812, in 1819 he migrated to Steubenville, Ohio, where he and his younger brother Daniel went into practice[36] and James also went into Whig politics.[37]

John Allen Collier (1787-1873), their older brother, had attended the Litchfield Law School and then moved to New York State, where he settled in Binghamton. He served as district attorney for Broome County (1818-1822) and in the House of Representatives in the 22nd Congress (1831-1833). A member of the Whig Party supporting Millard Fillmore (1800-1874)) and opposed to William Henry Seward (1801-1872), John A. Collier's speech in support of

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[36] James and Daniel Collier appeared as counsel associated with Humphrey H. Leavitt (1796-1873), State's Attorney, in the criminal trial in 15-26 October 1828, arising out of the violent confrontation of antagonistic members of the Society of Friends at its Ohio Yearly Meeting. *Report of the Trial of Friends at Steubenville, Ohio* (1829).

[37] William Marvel, *Lincoln's Autocrat - The Life of Edwin Stanton* (2015), p. 12. The only biographical study of James Collier, 61 pages long, is Grant Foreman, *The Adventures of James Collier – First Collector of the Port of San Francisco*, "Printed and Published by the Black Cat Press, Chicago, Illinois, 1937" in a limited edition of 250 copies. Mr. Foreman, a Chicago lawyer, appears to have been a leading – and prolifically published – historian of Oklahoma. Bob L. Blackburn, "Foreman, Grant." *The Encyclopedia of Oklahoma History and Culture* (available online). No explanation of his selection of James Collier as a topic appears in the book or elsewhere, and the "adventures" included in his book omit two of the occasions when Collier's appointment as collector landed him in court as a defendant.

the nomination of Zachary Taylor (1784-1850) for President at the Whig 1848 convention paved the way for the nomination of Millard Fillmore for Vice-President as his running mate. Zachary Taylor was inaugurated on 5 March 1849, and ten days later he nominated James Collier to be "collector of the customs at the port of San Francisco, for the district of Upper California".[38] His appointment was confirmed by the Senate on 19 March 1849.[39]

Collier, who was in Washington at the time, secured the approval of William Meredith (1799-1873), the Secretary of the Treasury, to employ his son Edwin Collier as deputy collector and another son, John A. Collier, as an inspector of customs.[40] He returned to Steubenville and in April began a transcontinental trip to San Francisco via Fort Leavenworth, Santa Fe and San Diego with a large party including his sons and a military escort. It took him six months to reach San Francisco, where he arrived on 13 November 1849.[41]

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[38] *Journal of the Executive Proceedings of the United States Senate*, VIII (15 March 1849), p. 87.

[39] Ibid., p. 90.

[40] "California and New Mexico", *Message from the President of the United States*, H. Reps., 31st Cong., 1st Sess., Ex. Doc. No. 17 (24 January 1850), pp. 12-17 (hereinafter "*President's Message*").

[41] More than 20% of the text (pp.14-28) of Foreman's biographical study (note 37 above) concerns the cross-country journey that the Colliers and others took to reach San Francisco. However, there is no hint of the events summarized at the beginning of the report of the decision of the California Supreme Court in *Lawrence v. Collier, et al.,* 1 Cal. 37 (March 1850):

> This was an action brought in the Court of First Instance of San Francisco, against James Collier and his two sons Edwin D. Collier and John A. Collier, to recover damages for an assault and battery claimed to have been committed by them on the plaintiff, while crossing the country from Santa Fe to California. Much conflicting evidence was given at the trial, but no questions of law were raised. The cause was tried before a jury, who found a verdict for the plaintiff in the sum of $1675, upon which judgment was rendered by the court.

The Supreme Court sustained the jury's verdict, about $56,000 today. Collier, on the other hand, reported to Meredith on arrival that "I have suffered much of hardship, of privation, and toil, and encountered no little peril. We were compelled, for several days in succession, to fight our way

Correspondence before Collier's arrival in San Francisco between Meredith, Collier, and others reprinted in the *President's Message* reflects a recognition that there were virtually no customs facilities in San Francisco.[42] Once there, Collier's report to Meredith shows that he was overwhelmed by the high volume of customs business, the costs of office help, the price of food and lodging, and his facilities in the "old Mexican custom-house… a long, dark, one story building, in miserable condition" including a leaky roof. He complained of the lack of enforcement support against smuggling and questioned how he was expected to prosecute seizures in courts in Oregon and Louisiana.[43]

Not long afterwards, Collier wrote to Meredith that he conceived that he was terminating, as illegal, practices that had grown up prior to his arrival, most importantly "licenses to *foreign vessels* to engage in the coasting trade". In addition, he was responding to the attempted evasion of customs duties – by importing spirits in smaller than fifteen gallon containers – by seizing and selling the spirits. French flag vessels which picked up cargo in Mexico on their way to San Francisco were also being seized.[44]

When protests were received in Washington about some of Collier's actions, a "special agent" of the Treasury, Gilbert Rodman (1800-1862), was dispatched to San Francisco to investigate. In a series of reports to the Secretary of the Treasury in the late spring and summer of 1850, Rodman not only confirmed the private sales of goods illegally carried on French vessels and spirits in undersized containers, but also noted that this was done before any decree of forfeiture had been entered by a court, a legally unauthorized course of action Collier justified by the lack of storage space and the request of the French consul to sell the seized merchandise

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through hostile bands of Indians, but escaped without the loss of life …". *President's Message,* p. 24.

[42] *President's Message,* pp. 24-26. Prior to his departure from Steubenville, Collier, with Meredith's subsequent approval, had finalized arrangements for the construction of customs warehouses according to an earlier proposal by George Law (1806-1881), the proprietor of the United States Mail Steamship Line between the west coast of Panama and San Francisco. See, for example, *Law v. Cross,* 66 U.S. 533 (1861).

[43] *President's Message,* pp. 26-28.

[44] Ibid., pp. 29-33. Collier also voiced concerns about meeting the high salaries required for clerical personnel.

immediately and hold the proceeds pending adjudication. However, Rodman went further and reported that John A. Collier was collecting from private parties rents on government land which were not accounted for on the customs house books. Rodman also asserted that, irrespective of statutory limits, Collier was claiming the entirety of the cash he collected as official fees, keeping it in sacks at the customs house and not depositing it with other public funds. Similarly, having rented out the decrepit Mexican customs house for $9000 a year, Collier was appropriating the rent and not accounting for it on the customs house books.[45]

Rodman made one more report, not specific to Collier, but dispositive of Collier's future, transmitted to the Senate as *Report of the Secretary of the Treasury, in obedience to the resolution of the Senate calling for 'information relating to the security and collection of the revenue in California, &c.'; accompanied by a report from Gilbert Rodman, esq., special agent,* U.S. Sen., 31st. Cong., 1st Sess., Ex. Doc. No. 82 (18 September 1850). In it, Rodman recommended the complete reconfiguration of customs enforcement in California, establishing additional collection districts at Monterey, San Diego, Benicia, Sacramento City and Stockton, with maximum compensation specifically provided for the full panoply of customs house workers.

From this report events and consequences moved swiftly. California had been admitted to the Union a few days before, on 9 September 1850. On 28 September 1850, two acts became law. One extended to California all of the laws of the United States

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[45] Rodman's reports dated 31 May, 17 June, and 15 August 1850 were provided to the Senate and collected in *Report of the Secretary of the Treasury, communicating, in compliance with a resolution of the Senate, the report of Gilbert Rodman, esq., upon the subject of the custom-house at San Francisco, Cal.,* U. S. Senate, Special Session, Ex. Doc. No. 5 (9 April 1853). The bulk of the Secretary's transmittal, however, were affidavits obtained by Rodman in 1852 alleging private sales of seized goods on Collier's behalf and a private financial partnership, Wells & Co., which Collier funded with the government's money. This last allegation finds further support in a subsequent opinion of the California Supreme Court describing a transaction involving a note and a mortgage, dated 7 March 1850, for a loan of forty to sixty thousand dollars made by Thomas G. Wells, "as agent for James Collier". *Gunter, Executrix v. Janes, Guardian,* 9 Cal. 643-644 (1858).

"not locally inapplicable" and established the United States district courts for the Northern and Southern Districts of California with jurisdiction in proceedings under those laws. The other reconfigured the existing sole collection district of Upper California into six separate districts, not all described as proposed in Rodman's report. President Fillmore immediately nominated Collier to be "collector of customs for the district of San Francisco … the district having been changed from Upper California to San Francisco"; the Senate rejected Collier's nomination the same day.[46]

On 14 January 1851, Collier turned over to his successor $893,705 in government funds, an amount that the Treasury was later to claim was $391,364 short.[47] On 6 February 1851 a farewell dinner was given in his honor – to "express to you our feeling of regard as a public officer and a man" – by the merchant community, accompanied with the gifts of a golden goblet and an inscribed silver dish.[48]

The Litigation Begins

The Secretary of the Treasury's report of 10 August 1852[49] announced the filing of lawsuits against Collier "in the district of Ohio, and also in the northern and southern districts of New York, where his sureties, John C. Collier and George Law reside". The parties agreed that the merits would be tried in the Southern District case, filed 10 May 1852; the other two cases were stayed. But before that April 1854 trial, on 30 June 1853, an indictment in five counts was returned against Collier in the United States district court for the Northern District of California for misappropriating three hundred thousand dollars of government money while collector, investing it and loaning it both at interest and without interest to Wells & Co., a private bank. Although no statute is cited in the

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46 *Journal,* note 38 above, pp. 260, 264 (28 September 1850).

47 *Report of the Secretary of the Treasury made in compliance with a resolution of the Senate calling for information in relation to the revenue collected by James Collier, late collector of the customs at San Francisco,* U.S. Senate, 32d Cong., 1st. Sess., Ex. Doc. 103 (10 August 1852); Foreman, note 37 above, p. 51.

48 *Daily Alta California,* 7 February 1851, p. 2; Collier plate inscribed (UC Berkeley, Bancroft Library).

49 Note 47 above.

indictment, in an opinion by the Attorney General, Caleb Cushing (1800-1879), addressed to the Secretary of the Treasury, it is stated that the indictment was founded on the 1846 "act to provide for the better organization of the Treasury, and for the collection, safe keeping, transfer and disbursement of the public revenues" (9 Stat. at Large, Ch. 90), which by its "general terms … and its various provisions, is clearly one of the 'revenue' laws of the United States" made applicable to California by the Act of 3 March 1849.[50] In the second week of August, Collier was arrested in Ohio on the indictment.

For the first time, but not the last, Collier was extraordinarily lucky in his lawyer – Edwin McMasters Stanton (1814-1869), Abraham Lincoln's future Secretary of War during the Civil War and the nemesis of his successor. Stanton was the son of a physician practicing in Steubenville who died there when Stanton was thirteen years old, leaving an estate administered by his attorney, Daniel Collier, James's brother, who also served as Stanton's guardian, putting him through Kenyon College and finding him employment as a young man. However, Stanton fell out with the Colliers politically and personally and, once admitted to the bar, established a practice in significant cases outside of Ohio, notably the so-called Wheeling Bridge case.[51] On a visit to Steubenville in August 1853, as his biographer tersely put it, "Stanton helped defend his old political foe, Colonel James Collier, from a charge of misappropriating public funds; he freed the old man from jail on a writ of habeas corpus".[52]

Nothing more is said about the remarkable combination of skill and circumstances which brought about this result, either in Stanton's biography or anywhere else, so far as research has

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[50] Opinion of Attorney General Caleb Cushing to James Guthrie, Secretary of the Treasury (9 September 1853) in *Official Opinions of the Attorneys General of the United States,* VI (1856), pp. 103, 112. Counsel for Collier do not appear to have challenged the applicability of the statute to the offenses pleaded in the indictment, perhaps presciently. *United States v, Hartwell,* 73 U.S. 385 (1868).

[51] Marvel, note 37 above, pp. 8-68. Elizabeth Brand Monroe, *The Wheeling Bridge Case – Its Significance in American Law and Technology* (1992).

[52] Marvel, note 37 above, p. 485, n.16.

disclosed. His defense of James Collier was as brilliant as it was swift and impregnable.

The warrant upon which Collier was arrested was issued on 9 August 1853, on a certified copy of the indictment by Judge Humphrey H. Leavitt, United States District Judge for the District of Ohio.[53] Collier was apparently arrested the same day. Just a week later, on 16 August 1853, Stanton filed his application for the writ of habeas corpus on behalf of Collier.

But Stanton did not apply to Judge Leavitt; instead he applied to the local state judge in Steubenville, Thomas L. Jewett (c. 1810-1875) of the Court of Common Pleas of Jefferson County, Ohio.[54] Stanton's legal position[55] was succinctly overstated in the Attorney General's 9 September 1853 opinion:

> [B]ecause Congress has repealed the fifth section of the act of March 3d. 1849, which directed that all breaches of the revenue laws of the United States committed in Upper California be tried in the District Court of Louisiana or in the Supreme Court of Oregon, and instead thereof provided for the trial of such offenses in the district wherein they were committed, therefore James Collier, for the alleged felony in the embezzlement of $300,000 committed by him at San Francisco, in California, while he was Collector of the

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[53] One cannot help but wonder what Judge Leavitt thought about issuing an arrest warrant for counsel associated with him at the trial of Friends in Steubenville almost exactly 25 years earlier. See note 36 above.

[54] Note 50 above, p.115. According to an account from the Steubenville *Herald* of 17 August 1853, republished in the Washington *Republic* on 22 August, the application was made to Judge Jewett:

> … the district court which had been sitting for the last week in this county having just adjourned. The district court commences to-day in Belmont county, and had it not been for this, we understand the counsel for Colonel Collier would have taken out the writ from that court, as their decision would probably have settled the points raised.

Since the article continues with the acknowledgment that "what the precise points raised by counsel for Colonel Collier are we have not learned", this explanation for the choice of courts may be taken with a grain of salt.

[55] Stanton's petition has been printed as *The Case of James Collier, (Late Collector of Upper California) on Habeas Corpus before the Court of Common Pleas of Jefferson County, Ohio* (1853). The petition has been reproduced in the *Making of Modern Law Series.*

> Customs in that collection district, shall not be prosecuted at all, but is to be taken virtually amnestied or pardoned by the repeal of said fifth section and the substitution of the District Courts of California for that of Louisiana or for the Supreme Court of Oregon, to have jurisdiction in California.[56]

The report of the state court proceeding, and a possible explanation of the indictment as hardball by the government in the civil litigation over Collier's accounts, appeared in the 23 August 1853 issue of the *Republic*:

> Judge Jewett, of the Ohio State court, issued a *habeas corpus*, under which Colonel Collier was brought before him and admitted to bail by the judge, who postponed the hearing of the case until the 27th September, the counsel for the United States not being ready to argue the writ. It is not denied by Colonel Collier that he withholds from the Treasury money which he acknowledges to be due the Government, refusing to pay up until the Department is prepared to settle other and disputed items. He has the means to pay, and I doubt not will pay, whatever the disputed sums any court may declare to be due by him… .

Some of the newspaper coverage went to the opposite extreme, but Stanton was ready. A letter to the *Evening Post* on 26 August characterized the application for habeas corpus as "some feigned suit invented for the purpose of screening him from the penalty of the United States laws which he has violated" and continued that "[t]he State Judge is a Whig, and, of course, is a conniver at, or most probably a party to, this scheme to thwart the ends of justice, by bringing to punishment a most dishonest defaulter". Stanton responded on 4 September that a man of "advanced age and feeble health" had the legal right to apply to the courts of his state to resist an unlawful removal which would have led to an arduous trip across the country away from his family to face charges with his witnesses dispersed in a court with no jurisdiction. Furthermore, Judge Jewett

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[56] Note 50 above, p. 115. Stanton's petition did ***not*** claim immunity from prosecution for Collier. Rather, he asserted that because of the change in criminal jurisdiction to California, prosecution of Collier was required to take place "where the offender was apprehended" – Ohio. Note 55 above, p. 3.

had the legal obligation to issue the writ, is not Whig and "[i]in the State of Ohio, there is no one more distinguished than Judge Jewett, as a learned jurist, a sound Democrat, and an upright man".[57]

On the adjourned date, the Marshal moved to quash the writ for lack of jurisdiction and because the court had no power to discharge or bail a person held under process of a court of the United States. The court overruled the motion and, holding that Collier's arrest and detention were unlawful, ordered the Marshal to discharge the prisoner.[58]

It is hardly surprising that Judge Jewett's action was contrary to Attorney General Cushing's view of what it should have been. In his letter of 9 September, three weeks before Judge Jewett's decision, Cushing expressed the view, not that the state court had no right to inquire into Collier's detention, but that production of the warrant issued to the Marshal by United States District Judge Leavitt was as far as the inquiry should have gone. At most, any further inquiry should have been limited to confirming the jurisdiction of the United States District Court for the Northern District of California over the offense, and, asserted the Attorney General, Judge Jewett "cannot fail to see the fallacy of all the objections to the jurisdiction of the District Court of California …".

Collier was not idle following his discharge on 27 September. In Binghamton on 15 November he executed a lengthy petition, addressed to the district court in San Francisco, seeking the dismissal of the indictment. Remarkably, half of its length was devoted to the accusation that an unsworn affidavit, reproduced in the final Rodman report and alleging his relationship with Wells & Co., had been put before the Grand Jury, supporting his claim by quoting from a letter he had received from one of the Grand Jurors![59] However, Collier also asserted that the indictment was barred by the then three year

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[57] *The Intelligencer,* Wheeling Va., 19 September 1853.

[58] See *In the Matter of James Collier – on Habeas Corpus*, 6 Ohio St. 55 (December 1856). No counsel appeared for Collier on the appeal.

[59] The petition is in the district court case file for *United States v. James Collier* at the San Bruno, CA National Archives branch and bears a filing date of 17 January 1854. It refers to an accompanying printed pamphlet of the papers Stanton had filed in the Ohio state court. No action appears to have been taken on it. The only other document in the case file besides the petition and the indictment is a *nolle prosequi* dismissing the indictment, dated 8 April 1916! I am immensely grateful to the staff at San Bruno that

federal statute of limitations, an assertion that appears to have been correct,[60] that the statute under which the charges were laid was not in force in California at the time and that the district court had no jurisdiction over the "supposed offense".

In his report to Congress in December 1853, two months after Collier's release, the Secretary of the Treasury, with reference to the discharge of Collier by the Court of Common Pleas stated: "There is no law to transfer such cases to a United States judge, and no provision for any appeal from the decision of the State judge".[61] However, the United States Marshal apparently did appeal, supported by both the United States district attorney and a separate submission by Attorney General Cushing, for there is a reported decision in the matter by the Ohio Supreme Court – over three years later, in December 1856.[62] That decision insisted upon the right of state courts to examine the custody of federal prisoners by the writ of habeas corpus; the contrary position advanced by the United States district attorney "will endanger the personal liberty of the citizen, and open, dangerously wide, the door of oppression". However, the Ohio Supreme Court declined to reach the merits of Collier's discharge by the Court of Common Pleas because the United States Marshal had appealed by petition for certiorari, whereas from 1 July 1853 on, Ohio law had provided that such an appeal must be by a petition in error.

Remarkably, the United States district attorney responded to the opinion with an application to substitute a petition in error for the certiorari proceeding. The Court's response – this time in an opinion by Chief Justice Thomas Welles Bartley (1812-1825) – was that its power to do so would be justified only by "the urgency and magnitude of the subject-matter". As the United States district attorney had been "frank" in acknowledging a willingness to lose on the merits in the Ohio Supreme Court to be able to position the issue raised by the case for review settled by the Supreme Court of the United States for the nation as a whole, the Chief Justice responded:

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located and imaged the petition for me despite the closure of the branch to the public.

60 *United States v. Cook*, 84 U.S. 168 (1872).

61 *Report of the Secretary of the Treasury on the Finances*, H. Rep., 33d Cong., 1st. Sess., Ex Doc. 3, p. 22 (6 December 1853).

62 Note 58 above, p. 58.

> … [W]hile some of us have scruples, and others even more than scruples, about the supervisory power of the federal courts over the state courts, we are none of us enabled to perceive how it would tend to the furtherance of justice, to allow a party to amend a proceeding in this court, with a simple view of placing himself in a condition to invoke the exercise of an alledged [sic] power, in the Supreme Court of the United States, over this Court.

The motion was denied.[63]

This outcome, if intended by Stanton on 16 August 1853, is either a demonstration of tactical genius or extremely good luck. As noted by G. Edward White:[64]

> By the 1850s, the politics of Supreme Court review of state high court decisions became more complicated with the growing sectional tension over slavery and its possible extension, resulting in northern as well as southern courts protesting against the power of the Court to engage in constitutional review of their actions. In 1854, the Court in a Section 25 case from Ohio held that an Ohio statute depriving a bank of an exemption from taxation, which was granted in the bank's charter of incorporation, violated the Contract Clauses of the Constitution. When the Ohio Supreme Court received notice of the Court's reversal and a mandate to enter judgment for the bank, the Chief Justice of the Ohio Supreme Court initially persuaded his colleagues to ignore the mandate; they did not do so until 1856, when the case was reargued before them. In his dissent from the Ohio court's 1856 decision, Chief Justice Bartley argued that Section 25 was unconstitutional.

Whether the attitude illustrated here was known when Stanton picked the state court in 1853 is not known. Either way, Chief Justice Bartley was the right judge for Collier's case.

Whether the merits of the case were correctly decided is another matter. The argument in Attorney General Cushing's letter to the Secretary of the Treasury in support of exclusive federal jurisdiction

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63 Note 58 above, pp. 62-64.

64 White, "Recovering the Legal History of the Confederacy", *Washington & Lee Law Review,* LXVIII (2011), pp. 467, 524-525 (footnotes. omitted).

certainly became the law; however iniquitous its origins and purposes, *Ableman v. Booth,* 62 U.S. 508 (1859), and, later, *Tarble's Case*, 80 U.S. 397 (1872), settled the jurisdictional issue against the outcome here.[65] But the Attorney General's argument on the merits – that the District Court in California had jurisdiction – is less clear.

Cushing's argument depended on his assertion that:

> Whether any felony or other infamous crime, which had been committed in Upper California, in violation of the laws of the United States, between the 3d day of March, 1849, when the revenue laws of the United States were extended over that Territory, and the 28th of September, 1850, when, as we have seen, the judicial system of the United States was extended over the State of California, would have been rightfully tried in Louisiana or Oregon, it is unnecessary to inquire; for by the said act of September 28, 18[5]0, *Congress virtually repealed the fifth section of the act of March 3, 1849,* and invested the District Courts of the Northern and Southern Districts of California with jurisdiction of all crimes against the United States not capital, in strict consonance with the above sixth amendment of the Constitution. [emphasis supplied][66]

First, however, there is nothing in the Act of 28 September 1850 or elsewhere addressing the jurisdiction of the district of Louisiana or the Oregon Supreme Court for federal crimes during the period March 1849 to September 1850, "virtually" or otherwise; Cushing's argument depends on his assertion that once California joined the union:

> … it is very clear that Collier, or any other person, could not have been tried in either the District Court of Louisiana or in the Supreme Court of Oregon for any felony or other infamous crime committed in California, because of the sixth amendment of the Constitution, which assures to the accused, in all criminal prosecutions, a speedy public trial by an impartial jury of the State or [sic] District wherein the crime shall have been committed.

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[65] See Ann Woolhandler and Michael Collins, "The Story of *Tarble's Case*: State Habeas and Federal Detention", in Vicki C. Jackson and Judith Resnick (eds.), *Federal Courts Stories* (2010), p. 141.

[66] Note 50 above, pp. 114-115.

It is too long ago to determine whether Cushing's use of the word "or" when the Amendment uses "and" was an inadvertent error or a deliberate attempt to strengthen his position, especially with his omission of the words following: "which district shall have been previously ascertained by law". Indeed, his argument appears inconsistent with the position on which he prevailed before the Supreme Court of the United States the following January.[67] Years later, the Supreme Court settled the law in a way that did authorize Collier's indictment in California, but not before Stanton had saved Collier the return to San Francisco and a criminal trial.[68]

The Civil Trial in the Circuit Court (S.D.N.Y.)

Once again James Collier was fortunate in his choice of lawyers. They were both from his birthplace, Binghamton, New York. One was Daniel Stevens Dickinson (1800-1866), a bit younger than his co-counsel, but sometime New York State Senator (1837-40), Lieutenant Governor of New York State, United States Senator from New York (1844-1851), and, in later years, Attorney General of New York (1862-1863) and United States district attorney for the southern district of New York from 1865 until his death in the

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[67] *United States v. Dawson,* 25 Fed. Cas. 788 (Case No. 14,933) (C.C.D.Ark.1853), on ce*rtificate of division,* 56 U.S. 467, 477-484 (1854).

[68] *Cook v. United States*, 138 U.S. 157 (1891). Although not mentioned in the applicable volume of the *Oliver Wendell Holmes Devise,* there must be a story behind this case, which involved the conviction at trial of multiple defendants for a murder in Indian Country in 1888. The report shows the appearances for plaintiffs in error of five lawyers, two arguing and three on the brief. One of the counsel on the brief was William Rufus Day (1849-1926), later in the decade Secretary of State, Judge of the United States Circuit Court for the Sixth Circuit (1899-1903) and then Justice of the Supreme Court of the United States (1903-1926). One of the two counsel who argued, John Forrest Dillon (1831-1914), had been a Justice and then Chief Justice of the Supreme Court of Iowa and then a Judge of the United States Circuit Court for the Eighth Circuit, serving with great distinction, following which he resigned, served as a professor at Columbia Law School for three years and in the year following *Cook* taught at Yale Law School and served as president of the American Bar Association, and otherwise practiced law in New York City representing major railroad clients. The other lawyer who argued, George R. Peck, was also a lawyer for major railroads.

following year. Collier's other lawyer was his brother, John A. Collier, described in *The Bench and Bar of New-York*:[69] "Close, terse, unimpassioned, but deeply learned in the law, particularly in evidence, in contracts, in equity and in the common law, he was one of those leading spirits which gave to the bar of New York its superiority".

The case being tried was filed in the circuit court for the Southern District of New York, so their opponent at the trial in April 1854 was the United States district attorney for that district, Charles O'Conor (1804-1884), famous for his representations of the slaveholders in *Jack v. Martin* and the *Lemmon Slave* case[70] and of Jefferson Davis on federal treason charges after the Civil War.[71] The case was tried to a jury before District Judge Samuel Rossiter Betts (1786-1868), sitting in the circuit court, and the jury's special verdict left their factual determinations of the disputed claims to the court for resolution by rulings of law. There is no transcript of the trial, only an occasional brief newspaper report; however, Daniel Dickinson's speech for the defense is printed in full.[72] Although he did not sit at the trial, Justice Samuel Nelson (1792-1873) joined with Judge Betts in the post-verdict hearings in 1855 and the decision.[73]

The Court found that, far from owing the Treasury the $791,065 it originally demanded, Collier owed the Treasury nothing; in fact, the Treasury owed him $8110.29. Crucial to this result, and emphasized by Dickinson in his summation, were the facts that

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[69] By L. B. Proctor (1870), p. 550

[70] 12 *Wendell's Reports* 311 (N.Y. Supreme Court 1834), *aff'd,* 14 *Wendell's Reports* 507 (Court for the Trial of Impeachments and the Correction of Errors 1835). He was also retained by the State of Virginia to argue in the New York Court of Appeals for the slaveholders in the *Lemmon Slave Case* in 1860. See John D. Gordan, III, "The Lemmon Slave Case", *Judicial Notice*, IV (2005), p. 1 (Historical Society of the New York Courts) and Albert M. Rosenblatt, *The Eight – The Lemmon Slave Case and the Fight for Freedom* (2023).

[71] Bradley T. Johnson, *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit* (1876), pp. 1-124; Cynthia Nicoletti, *Secession on Trial – The Treason Prosecution of Jefferson Davis* (2017).

[72] *Speeches, Correspondence, etc., of the late Daniel S. Dickinson* (1867), I, pp. 407-473.

[73] *United States v. James Collier,* 25 Fed. Cas. 527 (Case No.14,883) (C.C.S.D.N.Y.1855).

by March 1853 the Treasury had reduced its claims to $216,712, without crediting the voluntary payment of $118,546.05 Collier had made on 16 September 1853, after his arrest, the amount due the Government which the August 1853 news article in *The Republic* reported that he was holding back pending full resolution of his accounts and so described in Dickinson's summation, leaving in dispute for trial $63,250, one half of the proceeds of sale of illegally imported goods from the cargos of seized vessels, the other half having been paid to the Treasury, and the balance of $34,915 commissions which Collier had charged on his collections. In September 1853 the Treasury added to these amounts another $24,617 for estimated fees and interest.[74]

The Court's opinion fully sustained Collier on all the disputed items, which arose basically from Collier's liberal self-indulgence in "fees and commissions allowed by law", as provided in the Act of 3 March 1849, in addition to the $1500 annual salary set by the Act. The Court parsed the Act's provisions and, basing its interpretation on what the Court called "contemporaneous, antecedent and subsequent enactments", rejected the Government's assertion that Collier's retention of those "fees and commissions" in excess of his statutory salary was unauthorized.

How fortunate Collier was with this outcome can be measured by the assertion in the report of the case in Volume III of the Second Circuit *Reports* by Samuel Blatchford (1820-1893) – soon to be Judge Betts's successor and later a Justice of the Supreme Court – and reprinted in *Federal Cases,* that "[t]his case was taken to the Supreme Court by writ of error, and the judgment of the Circuit Court was affirmed by a divided Court. For that reason, the case does not appear in the Reports of the Supreme Court".[75] Ultimately,

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[74] Note 72 above, Dickinson summation, pp. 450-451. The dollar in 1851 was worth about 33 times what one is worth today.

[75] Much the same statement appears at the outset of the published account of Dickinson's summation cited at note 72 above:

> The case subsequently went before the Supreme Court of the United States, where it was argued by Attorney-General Black, for the United States, and by Mr. Dickinson for Col. Collier, and the finding below was confirmed.

However, although generously providing me with a copy of the 255-page printed record on the Government's appeal to the Supreme Court, the Supreme Court Library advised that its research identified no other case

Collier was required to petition Congress to provide funds to pay the judgment the circuit court had awarded to him of $8110.29 plus interest at 6%.[76]

CONCLUSION

It is interesting to place Sutherland and Collier as data points in the scholarly analyses of the contexts in which their cases arose. Except for his continuous battle for his reputation after prevailing at trial, Sutherland's history appears to be paradigmatic, both in his use of his position to charge massive fees that enriched him, and in General Murray's assertion of authority over the Vice-Admiralty Court, which it is not clear that he had in any case.

Collier's history, however, is subtler, and it seems to arise at a unique point at the height of the bounty/moiety phase of the customs house model identified by Parrillo. Clearly Collier had strong relationships with the senior members of the merchant community. George Law, one of his two sureties, was the owner of an important shipping line between Panama and San Francisco, and, as Bancroft puts it: "Collier, the first collector, was a popular villain, and received a fine testimonial from his friends and confederates in Cal. on leaving the country".[77] Second, although the disorganized statutory scheme gave him the many opportunities he took for personal self-enrichment at the expense of others, his primary identifiable "victims" do not appear to have been local – rather they were French vessels importing illegal goods. Also, Collier was not involved in a jurisdictional tug-of-war with another government official on the spot, as seems often to have been the case with colonial admiralty judges like Sutherland.

What both cases have in common is a situs on the edge of the country or empire, of recent acquisition by force of arms, and far away from the central government, making continuous oversight, whether executive or legislative, impossible. What does distinguish

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papers and that the Supreme Court did not hear the case. The circuit court file could not be located in the National Archives, and the surviving page of docket entries was uninformative on this point.

[76] An Act for the Relief of James Collier, 35th Cong., 2d Sess., 11 Stat. 568, Ch.XCVI (3 March 1859).

[77] H. H. Bancroft, *History of California* (1888), VI, p. 673, note 50.

these two situations is that both occurred despite the absence of the aggravating factors, often present, of the direct involvement of conquered non-citizens or contemporaneously challenged territorial jurisdiction.[78] In addition, both Sutherland and Collier were more sinned against than sinning.

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[78] For example, Lauren Benton, *A Search for Sovereignty – Law and Geography in European Empires, 1400-1900* (2010).