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Field's Work as Lawyer and Judge in California

THE hundredth anniversary of the birth of Stephen J. Field is a fitting occasion to say a few words concerning a man who contributed perhaps more than any other individual to the creation of the legal system of California. It is not proposed to deal in detail with the events of Justice Field's life. That has been excellently done elsewhere.¹ Nor will the attempt be made to offer a complete estimate of Justice Field's contributions to the jurisprudence of state and nation.² It may be useful, however, to say something of his work at the bar and on the bench of California, if it serve only to fix attention upon the fact that though our law is ultimately a result of economic and social force, commanding personalities have none the less been the means through which those forces have acted.

I.

It is a singular and characteristic fact that while Field's personal opinions never obtrude themselves in his decisions, while he never permits an impatient word to escape him, as did his rugged contemporary, Harlan, while he never makes a judicial pronouncement the occasion for giving utterance to a philosophical theory as does his brilliant successor, Mr. Justice Holmes, while his judicial

¹ See the very interesting sketch by Professor John Norton Pomeroy, Jr., of the University of Illinois, in *Great American Lawyers*, vol. VII, pp. 3-51; also the *Introductory Sketch* (1881), reprinted in 1895, in the *Legislative and Judicial work of Justice Field*. Field's own "Personal Reminiscences of Early Days in California, with other Sketches," 1877; 2d Ed., 1893 (privately printed) should be made more generally accessible.

² Professor Jones publishes in another part of this Review an article on "Justice Field's Opinions on Constitutional Law" which undertakes a critical discussion of this important phase of Field's work. A less complete treatment by Horace Stern, of Philadelphia, may be found in *Great American Lawyers*, vol. VII, pp. 52-85, entitled "An Examination of Justice Field's Work in Constitutional Law."

theory seems to have been that the man should merge himself in the judge, a fairly complete life of Field could be written from the law reports, if all other sources of information should fail. By some strange freak of fortune the most dramatic events in Field's career found their way into the sheep bound volumes where one rarely looks for such things. At the beginning of his life in California we find a considerable portion of the first volume of reports of the new State occupied with an account of his conflict with Judge Turner, his punishment for contempt, his arbitrary disbarment, and his ultimate victory by a series of extraordinary writs.³ When his judicial career was not far from its close, the one hundred and thirty fifth volume of the United States Supreme Court reports contains the story of the assault on Field by Terry and the killing of the latter by Deputy Marshal Neagle.⁴ Earlier volumes of the same reports and of the Federal Reporter give the story of the remarkable scene in the Circuit Court of the United States in which the Terry's defied the court and insulted its judges—the prelude to the case of *In re Neagle*.⁵ And one who was seeking merely the materials for the external facts of the man's life would find in the reports the account of other less dramatic incidents in connection with his romantic career. For example, the fact that he was compelled to make an assignment of his property for the benefit of his creditors, which he tells us in his "Reminiscences" was the penalty for his neglect of his private affairs while he was a member of the Legislature, is duly set forth in the case of *Benham v. Rowe*.⁶

The reports embracing Field's judicial work give us a much better picture of the man than could be gleaned merely from a narrative of the events of his life, however full. They would not indeed tell us that he was born in Haddam, Connecticut, on November 4, 1816, of revolutionary stock; that he was one of four brothers, David Dudley, Cyrus W. and Henry M. Field, each of whom in his own way achieved great things; that he was educated

³ *People ex rel. Mulford v. Turner* (1850), 1 Cal. 144; *People ex rel. Field v. Turner* (1850), 1 Cal. 152; *Ex parte Stephen J. Field* (1850), 1 Cal. 187; *People ex rel. Field v. Turner* (1850), 1 Cal. 188; *People ex rel. Field v. Turner* (1850), 1 Cal. 190.

⁴ *Ex parte Neagle* (1890), 135 U. S. 1, 34 L. Ed. 55, 10 Sup. Ct. Rep. 658.

⁵ *In re Terry* (1888), 36 Fed. 419; *Sharon v. Hill* (1885), 24 Fed. 726; *Ex parte Terry* (1888), 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. Rep. 77; *Sharon v. Terry* (1888), 36 Fed. 337.

⁶ *Benham v. Rowe* (1852), 2 Cal. 387.

in part in the Orient and was familiar to some extent with modern Greek and Oriental languages; that he had it in mind to train himself to become a professor of Greek; that he graduated at Williams College at the head of his class; that he travelled in Europe, was admitted to the New York bar, and practiced in the office of his distinguished brother, David Dudley Field, in New York City, from 1841 to 1848, while the latter was in the midst of his fight for codification. But the essential things that resulted from this heredity and this rather unique training are visible in the opinions which constitute his life work. The logical mind, the conscientiousness in detail, the tenacity of opinion, the reserve in mode of expression, the solidity and massiveness of character, visible in Justice Field's written opinions, betray the Puritan origin; the breadth of view, the openness to new ideas, the ability to adapt himself to a strange and rough environment, are the results of the training.

II.

Field's superior mind and training are apparent from the outset of his career in this State. His contest with Judge Turner has already been mentioned. It is in connection with the various writs brought to set aside his commitment for contempt and his disbarment by that judge that Field's name first appears in the reports. He won a complete triumph, and it may be well believed that the courage, energy and ability displayed in this contest made Field a striking figure in the eye of the bar and of the public. From the date of his first appearance *in propria persona* in *People ex rel. Mulford v. Turner*, until his resignation to take the office of an Associate Justice of the Supreme Court of the United States, Field's name appears as counsel or judge several times in every volume of the California reports. His career as counsel seems to have been very successful. In sixty-nine appeals in which his name appears as a counsel, he was on the victorious side fifty-two times.⁷

It may be of some interest to follow Field's work as a counsel,

⁷ His arguments as counsel are to be found in vols. 1 to 10, inclusive of the California Reports; his work as judge in vols. 8 to 21, inclusive. During the period of his work on the bench of California—from September, 1857, to May, 1863, he wrote three hundred and fifty opinions (including a few dissents). He was absent from the State with the consent of the legislature during a portion of the April term, during the entire July term, and during a portion of the October term, 1859. He became Chief Justice, September 12, 1859, upon Terry's resignation.

especially in view of the fact that so far as we are aware it has not been done by his biographers in detail, and because it serves in some degree to illustrate the eternal "paradox of form and substance in the development of law."⁸ In theory the development of the law is through the application of the rules of formal logic to facts and established principles found in legislation or judicial precedents. In reality it is the result of human forces of which the personalities of the judges are not the least important. Lord Mansfield, the associate of the wits and the great merchants, approached the law from a point of view quite different from that of his successor, Lord Kenyon, who cared nothing for literature or a broad culture, and whose views on trade were those of the landed classes of the eighteenth century. Surely if the law "has to do not with a mere intellectual craft, but with a vital aspect of human and national history,"⁹ the personalities of those who make it cannot be neglected. And in studying the personality of a great judge, what he did and thought as a practicing lawyer is bound to shed light upon his subsequent life and opinions.

In Field's case, echoes from his work at the bar can frequently be heard in his utterances as a judge. Thus, is it unfair to say that his experience of judicial arbitrariness in his adventures with Judge Turner had much to do with his theories as to the relations of bench and bar, as to the nature and functions of the judicial power, as to the fundamental question of the position, duties and rights of counsel. In *Ex parte Garland*,¹⁰ Field delivering the opinion of the court says:

"The profession of an attorney and counsellor is not like an office created by an Act of Congress which depends for its continuance, its powers and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein, The attorney and counsellor being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the Court, or at the command of the legislature. It is a

⁸ Homes, *Common Law*, p. 35.

⁹ Pollock, *The Genius of the Common Law*, p. 1.

¹⁰ (1866), 71 U. S. (4 Wall.) 333, 379, 18 L. Ed. 366.

right of which he can only be deprived by the judgment of the court for moral or professional delinquency."

Of the three authorities cited by Justice Field to support this doctrine, one, *Fletcher v. Daingerfield*¹¹ was decided by himself, upon the authority of *People v. Turner*.¹²

Contrast with Justice Field's theory of the nature of the attorney's office that of Justice Miller, expressed in the dissenting opinion in the *Garland* case and concurred in by Chief Justice Chase and by Justices Swayne and Davis.

"The right to practice law in the courts as a profession is a privilege granted by the law, under such limitations or conditions in each state or government as the law making power may prescribe. It is a privilege and not an absolute right. . . . No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress, to the same extent that they are under legislative control in the States or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional action."¹³

In *Ex parte Wall*,¹⁴ Justice Field's strong feelings upon the subject of the necessity for the protection of the independence of the bar led him to dissent from the opinion arrived at by all of the other justices, sustaining an order striking the name of the petitioner from the roll of attorneys. Though notice had been given the disbarred attorney, the order had been made without any affidavit making a charge against him. It clearly appeared however, that he had been guilty of a most flagrant contempt of court and a violation of his oath as an attorney by advising and aiding in the lynching of a prisoner. Field, in his dissenting opinion, said:

"What then are the relations between attorneys and counsellors at law and the courts; and what is the power which the latter possess over them; and under what circumstances can they be disbarred? There is much vagueness of thought on this subject in discussions of counsel and in opinions of courts. Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar. . . . The power to disbar attorneys in proper cases . . . is not to be exercised arbitrarily or tyrannically. Under our institutions arbitrary

¹¹ (1862), 20 Cal. 427.

¹² (1850), 1 Cal. 143.

¹³ At p. 384 and 385.

¹⁴ (1882), 107 U. S. 265, 27 L. Ed. 552, 2 Sup. Ct. Rep. 569.

power over another's lawful pursuits is not vested in any man nor in any tribunal. It is odious wherever exhibited, and nowhere does it appear more so than when exercised by a judicial officer toward a member of the bar practising before him."¹⁵

If Field had a high opinion as to the dignity and independence of counsel, he had an equally high one with respect to the dignity and independence of the court. Delivering the opinion of the court in *Bradley v. Fisher*,¹⁶ he laid down the doctrine, against the dissent of Justices Davis and Clifford, that judges of superior courts are exempt from liability to civil action for any acts done in their capacity as judges, though such acts are in excess of their jurisdiction and are done maliciously and corruptly. The only remedy for such abuses lies in the impeachment of the corrupt judge. The natural temper of Field's mind, his intuitional sense of the necessity for the independence of courts in order that justice may be effectively administered, predisposed him toward the doctrine of the immunity of judges. Upon that side of the question, his views represent the prevailing doctrine; upon the other side, the question of the independence of counsel, the views expressed by him in the *Wall* case are by no means those which have generally commanded the opinion of the courts.¹⁷

Is it unworthy of the respect which lawyers and laymen alike should entertain for the law and the courts to suggest that a judge's opinions are in part an expression of himself; that one of the elements of Field's strength as a jurist lay in the fact that he made life into law; that he would never have been so great a judge had

¹⁵ At p. 302.

¹⁶ (1871), 80 U. S. (13 Wall.) 335, 20 L. Ed. 646. Cf. *Ex parte Bradley* (1868), 74 U. S. (7 Wall.) 364, 19 L. Ed. 214.

¹⁷ It is of interest to note that Justice Davis in the *Garland* case concurred with Justice Miller's theory that there is no right to practice law, but merely a privilege, while in *Bradley v. Fisher* he dissented from the view that judges were immune from civil action for malicious and corrupt acts done by them in excess of their jurisdiction. His theory, therefore, of the relation of court and council is sharply contrasted with that of Field. On one side, he recognizes an inherent and vaguely defined power on the part of the court over the conduct of counsel, on the other hand he views this inherent power as one that must be exercised with caution, for the arbitrary judge becomes merely a private citizen when he exceeds his jurisdiction and acts with malice. It would be an interesting study to work out the different types of individualism represented by the Field and by the Davis theory. In addition to the *Garland* case the *Wall* case, and *Fletcher v. Daingerfield* above cited, see *Ex parte Robinson* (1873) 86 U. S. (19 Wall.) 505; 22 L. Ed. 505; *In re Green* (1891), 141 U. S. 325, 35 L. Ed. 765, 12 Sup. Ct. Rep. 11.

he not been a man with a mind sensitive to experience? The solidity of Field's judicial character, his love of logic and order, his admiration for the system of the common law, made it impossible that he should be the slave of prejudice. The grand manner was his; the judicial style that rarely erred by overemphasis, by impatience, by smartness, by inattention to detail. But he was no logical machine. Had his ideas not been profoundly influenced by the arbitrary and violent conduct of Judge Turner of which he was the innocent victim, had this experience not served to increase his hatred of tyranny and oppression in every form, we may well be permitted to express a doubt whether in spite of his learning and industry he would have achieved his great work in the history of American law.

III.

Another case argued by Field before the Supreme Court which had something to do with his later views is that of *Hicks v. Bell*.¹⁸ In that case the Supreme Court held that "the mines of gold and silver on the public lands are as much the property of this State by virtue of her sovereignty as are similar mines in the lands of private citizens," and that "the several States of the Union, in virtue of their respective sovereignties, are entitled to the *jura regalia* which pertained to the King at common law." This theory was not suggested by counsel on either side, and its author, Judge Heydenfeldt seems to have relied upon authorities from Pennsylvania and New York, where, of course, there had never been public lands of the United States.¹⁹ In *Biddle Boggs v. Merced Mining Company* at the January term of the court in 1858, Burnett, J., delivered an opinion with which Terry, C. J., concurred specially and from which Field, J., dissented. While Justice Burnett criticized the case of *Hicks v. Bell*, he thought the precious minerals continued to belong to the United States, notwithstanding a patent had issued, by reason of its proprietorship in the gold and silver, though not by virtue of its sovereignty. Terry, C. J., declined to express an opinion as to *Hicks v. Bell*, but found that he could concur with his associate on the ground that, whether the title was in the State or in the United States, plaintiff could not claim the gold found within the limits of the United States patent. Field's dissenting opinion is not reported. A rehearing was

¹⁸ (1853), 3 Cal. 219.

¹⁹ Lindley, *Mines and Mining*, § 21.

granted in the case, and a change in the court having been made by the retirement of Terry and Burnett and the selection of Baldwin and Cope, the former decision was reversed at the October term, 1859. Field's opinion determines the question, however, without reference to the decision in *Hicks v. Bell*. He assigned as a reason for not discussing it the fact that Justice Baldwin had been counsel for the respondent, and that the court desired to have a question of such importance decided by a full court.²⁰

The occasion to discuss *Hicks v. Bell* soon came in *Moore v. Smaw*.²¹ Field's opinion in that case places the law upon this important matter where it has ever since remained. Speaking of *Hicks v. Bell*, he says:

"That decision has not met the approbation of the profession or retained the approbation of the distinguished Judge²² who delivered it. The question as to the ownership of the minerals was not raised by counsel, and its determination was not required for the disposition of the case."

He proceeds to show the court's fallacy in supposing that the states of the American Union had succeeded to any except the political rights and authority of the British Crown, and in confusing the King's personal prerogative with his political powers. He argues very forcibly that the English rule itself "had in truth its origin in an arbitrary exercise of power by the King, which was at the time justified on the ground that the mines were required as a source of revenue."

Possibly *Hicks v. Bell* might have been overruled if Field had never been counsel in the case, for to our present day view it was hopelessly wrong. But in our mental appraisal, the fact must not be forgotten that it represents a lost cause, and though a Matthew Arnold may rejoice that Oxford is the home of lost causes, the work-a-day world has little to say in their favor. It was a singular fate, however, that *Hicks v. Bell* should have been repudiated by the mind that gave it birth, and that its ultimate

²⁰ (January Term 1858 and Oct. Term 1859), 14 Cal. 279.

²¹ (1861), 17 Cal. 199.

²² Heydenfeldt, who as counsel in the Biddle Boggs case, had been confronted by the Frankenstein he had created in *Hicks v. Bell*. Justice Baldwin, writing in the *Sacramento Union* of March 6, 1863, points out some of the mischief to which the decision in *Hicks v. Bell* had led. Miners claimed the right to go upon private land to discover the gold which the State reserved, a claim naturally resisted by the owners of the lands. The decision in *Moore v. Smaw* put an end to this condition.

fate should be decided by a court of three judges, two of whom, Field, and Baldwin, must have had about as little sympathy with its doctrine as any lawyers in California.

IV.

In his Introductory Sketch, previously referred to, the late Professor John Norton Pomeroy says of Justice Field's decisions settling the foundations of the law of mortgage in California:²³

"His opinions explaining, advocating and enforcing this single equitable conception of the mortgage as purely a hypothecation, as creating no estate in the land, as a mere lien and not a *jus ad rem* nor a *jus in re*, have not been excelled in their clearness of statement and cogency of argument by those of any other court which has maintained the same view, and they have undoubtedly done much to promote its acceptance in other states. No opinions upon the subject are more instructive for the student in all parts of the country."

How much of Justice Field's doctrine upon the subject of the nature of the mortgage is the result of his work as an advocate? Of course, neither quantitatively nor qualitatively can we assay his judicial work in this respect with any degree of accuracy. But it is a matter of some interest to observe that the propositions argued by him as counsel even unsuccessfully are frequently adhered to by him with tenacity through the course of his long judicial career. Maitland's now trite saying that "taught law is tough law" may well be applied to Field's case. The law that he sought to teach the courts is, indeed, "tough."

Let us look at a typical instance. In *Lee v. Evans*²⁴ and in *Low v. Henry*,²⁵ he argued what is long since elementary doctrine, that a deed though absolute on its face is but a mortgage if intended as security. In the first of these cases, *Lee v. Evans*, Field did not advance the proposition dogmatically. He says in the course of his argument: "But whether parol evidence is admissible in the absence of any of these circumstances (of fraud, accident or mistake), there is some conflict in the authorities, although the weight of the authorities, is, I think, in favor of its admissibility," and he proceeds to cite the cases. The court held against his contention, though he won the appeal upon a point of pleading.

²³ At p. 38.

²⁴ (1857), 8 Cal. 424.

²⁵ (1858), 9 Cal. 538.

By a psychological process familiar to all advocates, that which was advanced with hesitation in *Lee v. Evans* is urged with confidence a year later in *Low v. Henry*, but the point meets the same fate.

On the first occasion when the question arose before the court of which Field was a member, he wrote a dissenting opinion in the case of *Johnson v. Sherman*, not reported.²⁶ In *Pierce v. Robinson*,²⁷ however, the personnel of the court having changed, the question is reconsidered, *Lee v. Evans* and *Low v. Henry* overruled upon this point, and to use Field's language—somewhat significant in view of the rather hesitating manner in which he spoke in *Lee v. Evans* only two years before—"the doctrine of this court (placed) in harmony with the received doctrine of courts of equity on this subject everywhere else." The "weight of authorities" of 1857 has in 1859 become the "received doctrine . . . everywhere." Many years later in *Peugh v. Davis*,²⁸ the decision, and in part the language, of *Pierce v. Robinson* is reiterated in the Supreme Court of the United States.

Other cases argued by Field before the Supreme Court show that much of his work of laying the foundation of the law of mortgage in California was done before he ever reached the bench. Indeed, the first case in the California reports which discusses the theory of the mortgage was one in which Field was not only counsel but was also one of the plaintiffs.²⁹ The case arose out of a sale under a power in a mortgage given by Field, and was an action brought by the latter and the trustees to whom in December, 1850, he had made the assignment for the benefit of his creditors previously mentioned, to set aside sales made by the mortgages under the power to themselves. It is interesting to note that the language attributed to Field in the argument to the effect that "The equity of redemption is inseparable from a mortgage and cannot be disconnected even by agreement of the parties,"³⁰ is almost precisely the language used by him twenty-five years later in deliver-

²⁶ Referred to in *Arguello v. Edinger* (1858), 10 Cal. 150, 160. Why is *Johnson v. Sherman* not reprinted in *California Unreported Cases*?

²⁷ (1859), 13 Cal. 116, 124-125.

²⁸ (1877), 96 U. S. 332, 24 L. Ed. 775.

²⁹ *Benham v. Rowe* (1852), 2 Cal. 387. The earlier cases of *Woodworth v. Guzman* (1850), 1 Cal. 203; *Walker v. Hauss-Hijo* (1850), 1 Cal. 184, and *Moore v. Reynolds* (1850), 1 Cal. 351, though they mention mortgages do not discuss their principles at all.

³⁰ At p. 401.

ing the opinion in *Peugh v. Davis*,³¹ "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage."

The Court held in *Benham v. Rowe* that where a mortgagee becomes purchaser under a power of sale, the equity of redemption still attaches to the property in favor of the mortgagor. Probably Field had in mind the proposition there established that a mortgagee may not purchase at his own sale under power, when he said in *McMillan v. Richards*:³² "The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance." And he had in mind the circumstances in *Benham v. Rowe* when in *Fogarty v. Sawyer*,³³ in the very act of establishing the doctrine that a sale could be made under a power in a mortgage, notwithstanding Section 260 of the Practice Act he said: "in the present case no question is made as to the regularity of the proceedings taken by the mortgagee, or the good faith of the sale made by him."³⁴

The argument in *Benham v. Rowe* indicates a thorough study of the law respecting sales under powers, and the influence of that study is reflected in the cases in which Field established the existence of the power of sale mortgage and the trust deed as security.³⁵ Professor Kidd suggests in his valuable article upon Trust Deeds and Mortgages in California,³⁶ that the language of Section 260 of the Practice Act, reenacted in Section 744 of the Code of Civil Procedure, might have warranted a construction which would have forbidden a sale under a power. The remark is very pertinent, and, indeed, suggests the more natural interpretation of the statute, if merely its language be looked at. The section provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." But Field's personal familiarity

³¹ (1877), 96 U. S. 332, 337, 24 L. Ed. 775.

³² (1858), 9 Cal. 365, 411. This is the general rule. Jones, *Mortgages* (5th ed.), § 1876.

³³ (1861), 17 Cal. 589.

³⁴ See, also, his opinion in *Bell Mining Company v. Butte Bank* (1895), 156 U. S. 470, 478, 39 L. Ed. 497, 15. Sup. Ct. Rep. 440, where similar language is used about regularity and good faith.

³⁵ *Fogarty v. Sawyer* (1861), 17 Cal. 589; *Koch v. Briggs* (1859), 14 Cal. 256.

³⁶ 3 California Law Review, 368.

with the power of sale mortgage had shown him that equity possessed ample means for the protection of the mortgagor, if there is injustice or oppression, and his legal sense taught him the utility in the California of that day of a form of security whereby the creditor could have a better guaranty, in view of the fluctuating values of land, than was afforded by the judicial sale with its six months' period of redemption. He had been forced, probably against his inclination, to follow in *McMillan v. Richards* the rule established in the earlier cases, that where a mortgagee sells at judicial sale, he sells like any other judgment creditor subject to the right of redemption, and *Fogarty v. Sawyer* was a natural supplement to that doctrine.

V.

What was thought by business men of the doctrine that the equity of redemption continues after the sale of foreclosure, is expressed in a little book by James de Fremery on *Mortgages in California*.³⁷ Mr. de Fremery writes as a business man, who had experience in investing for capitalists in California property, and from the considerable portion of his little book which is devoted to aliens, it would seem that he was writing largely for the instruction of foreign investors. At p. 73, Mr. de Fremery says:

"In this State the mortgagor has a statutory right of redemption after sale under foreclosure, and so has each of his creditors, holding a subsequent lien by judgment or mortgage. . . . It may be doubted whether the right of redemption, except as regards sales of property under execution for a deficiency, has been rightly held applicable to sales of mortgaged premises under foreclosure of the mortgage. In a strictly legal point of view it would appear unnecessary to stretch the meaning of the section so as to include such sales whilst certainly in equity the mortgagor can hardly be considered entitled to so much leniency. He has known when the debt would be due; he has had it in his power to avail himself of his equitable right of redemption until the suit in foreclosure, of which he had due notice, resulted in a sale of the premises mortgaged. He had ample time to save his estate, if he had the will and the means. . . . In but very few cases this right of redemption from sales on foreclosure of mortgage has been availed of by the parties in interest. The right alluded to has therefore been of very little benefit to mortgagors and at the present day this same statutory right of redemption

³⁷ *Mortgages in California*, a Practical Essay, by James de Fremery. San Francisco: J. J. Le Count, 1860.

operates greatly to their disadvantage, for lenders of money want a much larger margin in the value of the security than they would otherwise require, on account of the delays which may result from it."³⁸

The business needs of the community were met by the decisions in *Koch v. Briggs* sustaining the deed of trust as a form of security, and by *Fogarty v. Sawyer* recognizing the validity of the sale under a power in a mortgage. Justice Field was much better prepared to write these opinions, he understood better the real needs of the community, because this part of the law had been in a real sense a part of his life. The jurist no less than the poet or the painter or the sculptor, though subject of course to different limitations, embodies forth his own experience. The mere closet philosopher, the arid compiler of precedents, the mechanical repeater of legal formulae, never creates law, never embodies in legal institutions the needs of mankind struggling for utterance.

Scarcely had Field left the bench of California to enter upon his wider career as a Justice of the United States Supreme Court, than the effect of *Fogarty v. Sawyer* was much impaired by the dictum in the case of *Cormerais v. Genella*,³⁹ suggesting that possibly a right of redemption might exist where a sale was made under a power. This dictum which was squarely opposed to the passage in *Fogarty v. Sawyer* quoted above, which says that the title passes when the deed is made under the power, has served to prevent the general use of the power of sale mortgage. It is impossible to estimate the cost that mortgagors have paid for this *obiter dictum*. It is safe to say, however, that each has paid something for it; that every mortgagee, consciously or unconsciously, has taken into account the possibility of the difficulty in the enforcement of his mortgage in making his loan. If railroads and good roads are essential to the development of civilization, a clear and definite system of law is equally indispensable. The importance of the development of legal concepts even from the material point of view can hardly be overestimated. Field's judicial mind firmly held to the necessity of clearness in legal conceptions. He rarely indulged in the luxury of speculation as to what might or might not be the law with reference to situations not presented.

It was perhaps unfortunate that *Koch v. Briggs* was decided

³⁸ Compare Professor Kidd's conclusions in 1915 with Mr. de Fremery's in 1860, 3 California Law Review, 400-403.

³⁹ (1863), 22 Cal. 116.

before *Fogarty v. Sawyer*, for in the former case there was too much emphasis laid on the passage of the legal title under the deed of trust, and upon the proposition that there could be no foreclosure under such a conveyance. The obvious distinction between *Koch v. Briggs* and the ordinary mortgage was that the legal title passed to the trustee in the trust deed, whereas it had been decided that it did not in the case of the mortgage, and it was this obvious distinction that was emphasized. Field himself many years later in *Bell Mining Co. v. Butte Bank*⁴⁰ reconsidered the positions assumed in *Koch v. Briggs*, and treats the two forms of security as practically identical. He cites the *Fogarty* and the *Koch* cases as establishing the same principle, omits from his quotation of the former the statement that the instrument is a mortgage, speaks of "trust deeds in the nature of mortgages," and recognizes that the power of sale in the trust deed as in the mortgage is "an additional authority to the grantee or mortgagee." He makes it positively clear in this case that where there is a sale under a power in a mortgage, the mortgagor's right "is wholly divested, embracing his equity of redemption."

Field's most elaborate decision on the subject of the law of mortgage was *McMillan v. Richards*⁴¹ in which was finally established the proposition that no title, either legal or equitable, passes to the mortgagee in California. The point was by no means clear before that decision, as a reading of the very able argument of John Currey, reported with the case, will show. Field's views upon the subject may well have been affected by his study in the case of *Low v. Henry*, and in the earlier case of *Bryan v. Sharp*,⁴² where he had succeeded in maintaining the proposition that the mortgagee had no interest in the mortgaged land capable of being sold at sheriff's sale.

Dutton v. Warschauer,⁴³ where Field decided that the legal title did not pass even in the case of mortgages given before the Practice Act of 1851, was covered by the case of *Ferguson v. Miller*,⁴⁴ where Field himself had contended for the proposition which he declared unsound in the *Dutton* case. His contention, indeed, had received scant courtesy from *Heydenfeldt*, who

⁴⁰ (1895), 156 U. S. 470, 39 L. Ed. 497, 15 Sup. Ct. Rep. 440.

⁴¹ (1858), 9 Cal. 365.

⁴² (1854), 4 Cal. 349.

⁴³ (1863), 21 Cal. 609.

⁴⁴ (1854), 4 Cal. 97.

delivered the opinion. It is worthy of note that Field did not refer to this precedent in his decision in *Dutton v. Warschauer*. Possibly he thought it incorrect, for he recognizes that mortgages before the statute may sometimes be treated as conveyances, "when that character is essential to protect the just rights of the mortgagee," though mortgages since the Practice Act must always be considered as mere securities. It is characteristic of Field that he should have made this reservation. His intellectual honesty led him to doubt whether his position in that case had been fundamentally sound, but he had argued the point with sincerity as he argued all points. The reservation that in mortgages prior to 1851 the legal title might be considered to pass when "essential to protect the just rights of the mortgagee" left him a ground for justifying his argument in the earlier case.⁴⁵

VI.

Even in trifling matters, the influence of Field's work at the bar may sometimes be traced. One can imagine for example, that he had in mind his own experiences in practice (possibly in the case of *Live Yankee Company v. Oregon Company*),⁴⁶ when he gave utterance to one of the very few examples of humor to be found in his opinions. Like every other judge, with a proper conception of the judicial office, including Field's own brilliant associate, the author of "Flush Times in Alabama," the professional humorist, Joseph G. Baldwin, he was never guilty of the undignified practice of writing so-called humorous opinions, nor, indeed, of the hardly less dignified and more reprehensible practice of making his judicial decisions the vehicle for the expression of his personal predilections and opinions. The most scrupulous purist will, however, forgive his remarks in *Fuller v. Hutchings*, in answer to an argument that a new trial should have been granted for surprise: "The surprise alleged is only that the law was different from what the attorneys supposed it to be—a state of feeling which, in numer-

⁴⁵ *Clark v. Baker* (1860), 14 Cal. 612, was a case where Field deemed that the "just rights of the mortgagee" required the instrument to be treated as a conveyance, though executed after the Practice Act; *Sands v. Pfeifer* (1858), 10 Cal. 258, was another. A complete discussion of Field's theory of the mortgage would be of value.

⁴⁶ (1857), 7 Cal. 40.

ous instances, under like circumstances, has been experienced by other counsel, but has never availed to obtain a new trial."⁴⁷

Was the "other counsel" possibly Field himself?

VII.

In the hundred years since Field's birth, the world has swung far, and since his accession to the bench in September, 1857, our law has undergone many changes. The law of corporations, of public service, of employer and employee, to mention but a few examples, has developed in new directions since that time.⁴⁸ Courts, in 1857, had not yet enmeshed themselves in the maze of arbitrary rules of procedure and evidence from which, sometimes only through legislative aid, they are again succeeding in extricating themselves. The vital principles of the law were not yet in danger of being choked under an undergrowth of statutory detail and ill-reasoned precedents.⁴⁹ The great social questions of to-day were not demanding treatment from the courts. In spite of changes, however, Field's fundamental views of the judicial office in many respects bear a strikingly modern aspect. We have already mentioned his pronounced views upon the importance of an independent bench and an independent bar. Closely connected with this problem of relations of bench and bar is that of the relation of procedure of substantive law. Field's views on this question are in effect those of Professor Pound and the American Judicature Society.

Rules of court procedure are to him means to an end, administrative rather than legislative.⁵⁰ Such artificialities as an objection

⁴⁷ (1858), 10 Cal. 523, 526. Another example of Field's humor may be found in *Touchard v. Crow* (1862), 20 Cal. 150, 164, where he comments upon the conduct of a trial judge who went through the solemn process of charging himself as a jury.

⁴⁸ For an account of the development of the law between 1830 and 1860, see Warren, *History of the American Bar*, 446 et seq.

⁴⁹ In 1845, twelve years before Field went on the bench, it was estimated that there were 1608 volumes of English and American reports, (*Wallace, The Reporters, Preliminary Remarks*, § 20). In 1915, there were over 9,000 volumes of reports of United States courts, not to mention those of the English, Irish, Scotch and Colonial courts. (Dean Harlan F. Stone, *Law and Its Administration*, p. 211).

⁵⁰ In *Adams v. Town* (1853), 3 Cal. 247, and in *Brummagim v. Boucher* (1856), 6 Cal. 17, as counsel he successfully employed writs of error. The only occasion upon which such writ seems to have been used since the Code is *Ex parte Thistleton* (1877), 52 Cal. 220.

to an indictment for murder, because it is not stated that the wound was "mortal,"⁵¹ or an objection to the validity of a conviction, because one of the jury separated from the rest, while he helped to carry out a fainting witness,⁵² he readily brushed aside. On the other hand, though he knew how to meet that "subtilty that is fine" but "unrighteous," and that "wresteth the open and manifest law," he could employ equally well that "subtilty" which is "wise and judgeth righteously."⁵³ An evasive allegation or denial could not escape his lynx-like eye.⁵⁴ Though now and then he reads a homily on bad pleading, as in *Green v. Palmer*,⁵⁵—for, like Chief Justice Hobart, he, too, thought that "pleading is not talking"—he almost invariably decides cases on their merits. It is true that during the earlier part of his judicial career, he rather freely dismissed appeals for failure to produce proper records. But he was curing an intolerable abuse, causing annoyance, loss and confusion.⁵⁶ The stringent treatment soon effected a cure.

Typical of the way he handled such rules as are essential for the orderly discharge of judicial business is the case of *Barrett v. Tewksbury*.⁵⁷ In that case, the court, through Field, announced that in all pending appeals, in which the terms of the Practice Act respecting records on appeal had not been complied with, counsel should be permitted to file amended records, but that in the future the rule would be rigorously enforced. Could there be a clearer

⁵¹ *People v. Judd* (1858), 10 Cal. 314.

⁵² *People v. Lee* (1860), 17 Cal. 76.

⁵³ Chief Justice Hobart in *Pitts v. Jones* (1615), Hob. 121, 125, 80 Eng. Rep. R. 271. Cf. Thayer, *Treatise on Evidence*, p. 290; and Chief Justice Beatty's remark in *Dennis v. Bint* (1898), 122 Cal. 39, 49, 54 Pac. 378, about meeting a technicality with a technicality. The quaint force of Chief Justice Hobart's language warrants further quotation. "And so I commend the Judge, that seems fine and ingenious, so it tend to right and equity, and namely, that in these cases of captious misnomers doth mold the small disorders of the name to make good the contract and bargain. And I condemn them that either out of pleasure to shew a subtil wit will destroy, or out of incuriousness or negligence will not labor to support the act of the party by the art or act of the law."

⁵⁴ See, for example, *Letters, alias Cady v. Cady* (1858), 10 Cal. 533, where he points out that the allegation that plaintiff and defendant lived together "as husband and wife" is not an allegation that they were married. See his remarks on evasive denials in *S. F. Gas Co. v. S. F.* (1858), 9 Cal. 453, and in *Curtis v. Richards* (1858), 9 Cal. 33.

⁵⁵ (1860), 15 Cal. 411.

⁵⁶ See, e.g., *Wing v. Owen* (1858), 9 Cal. 247; *Marlow v. Marsh* (1858), 9 Cal. 259; *Meerholz v. Sessions* (1858), 9 Cal. 277; *People v. Edwards* (1858), 9 Cal. 286; *Waltham v. Carson* (1858), 10 Cal. 178 (frivolous appeal dismissed with 10 per cent damages); *McGill v. Rainaldi* (1858), 11 Cal. 391 (the same penalty).

⁵⁷ (1860), 15 Cal. 354.

recognition of the administrative nature of procedural statutes than by this temporary suspension of its effect? In *People v. Lee*,⁵⁸ speaking of a statute fixing the time for presentation of a bill of exceptions, he says: "The statute is not unlike a rule of Court, to be enforced to advance the ends of justice, and not to prevent their attainment." He held that a failure to comply with the requirement as to time of presentation did not absolutely require that the bill be refused settlement.

The doctrine which regards statutes respecting procedure as directory rather than mandatory is usually the corollary of a theory that courts possess inherent powers, independently of legislative action. A great English jurist, speaking of this rule-making power, says, "The best of all would be that the courts should never be wanting in the knowledge of their own inherent powers and the courage to use them."⁵⁹ Field both knew and dared to use these powers. If anything, he insisted too strongly upon the doctrine of the inherent powers of courts, as in *Houston v. Williams*,⁶⁰ where he denied the legislature's power to direct the judges to file written opinions.

Save in the matter of the independence of the judiciary, Field was not disposed, while a member of the California court, to insist on a strict construction of the legislative powers under the constitution. His dissenting opinion in *Ex parte Newman*⁶¹ is a forceful expression of the duty of courts to abstain from substituting their own judgment for that of the legislature in considering the constitutionality of statutes.

"The judiciary cannot say that the legislature was mistaken, and therefore the act unconstitutional without passing out of its legitimate sphere, and assuming a right to supervise the exercise of legislative discretion in matters of mere expediency Its assumption would be usurpation, and well calculated to lessen the just influence which the judiciary should possess in a constitutional government."⁶²

And in his opinion in *McCauley v. Brooks*⁶³ and his dissenting opinion in *Lin Sing v. Washburn*,⁶⁴ he shows how peculiarly the

⁵⁸ (1860), 14 Cal. 510.

⁵⁹ Pollock, *The Genius of the Common Law*, p. 74.

⁶⁰ (1859), 13 Cal. 24.

⁶¹ (1858), 9 Cal. 502.

⁶² At p. 529.

⁶³ (1860), 16 Cal. 11, 56.

⁶⁴ (1862), 20 Cal. 534, 586.

question of the constitutionality or unconstitutionality of a statute frequently turns upon a question of degree. The doctrine is not stated in the brilliant literary form which Holmes gives it in *Ellis v. United States*⁶⁵ and in *Haddock v. Haddock*,⁶⁶ but the thought is essentially the same. Field would have concurred with every word that James Bradley Thayer used in the following passage in his sketch of John Marshall:⁶⁷

"Courts, as has often been said, are not to think of the legislators, but of the legislature,—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a co-ordinate department of the government, charged with the greatest functions, and invested, in contemplation of law, with whatever wisdom, virtue and knowledge the exercise of such functions require."

VIII.

A crucial test, whereby to measure his judicial character is afforded by a judge's attitude towards the theory of precedent.⁶⁸ Between Lord Kenyon, who found it his "comfort" to "servilely tread" in the "footsteps" of his predecessors,⁶⁹ and Lord Stowell, who thought judges and lawyers overfond of precedent, there lies a wide chasm.⁷⁰ One who thinks upon the question must, indeed, recognize a certain necessary and psychological basis for the existence of the rule *stare decisis*, aside from its social importance. As Sir Frederick Pollock says, even the child appeals to precedent when it pleads "mamma lets me do it."⁷¹ Field recognizes the double foundations,—the habit of the human mind and the needs of certainty in business—on which the doctrine rests. He says:

"I do not assent to the proposition announced in *Bryan v. Berry*⁷² that the decisions of other courts are authority and to

⁶⁵ (1906), 206 U. S. 246, 260, 51 L. Ed. 1047, 27 Sup. Ct. Rep. 600.

⁶⁶ (1905), 201 U. S. 562, 631, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525. Compare his remarks in *Burnett v. City of Sacramento* (1859), 12 Cal. 76, 84, "no rule could be adopted which would work absolute equality. An approximation is all that can be obtained," with Holmes's dictum that "constitutional law like other mortal contrivances has to take some chances." *Blinn v. Nelson* (1911), 222 U. S. 1, 7. 56 L. Ed. 65, 32 Sup. Ct. Rep. 1.

⁶⁷ At p. 108-9.

⁶⁸ See diverse views on this subject mentioned by the writer, "Changing Conceptions of the Law," 3 California Law Review, 440, 450.

⁶⁹ *Bauerman v. Radenius* (1798), 2 T. R. 663, 668; Hosmer, C. J., in *Card v. Grinman* (1823), 5 Conn. 164, 168.

⁷⁰ W. W. Story, *Life and Letters of Joseph Story*, Vol. I, p. 556.

⁷¹ Pollock, "Laws of Nature and Laws of Man," in *Essays on Jurisprudence and Ethics*, p. 56.

⁷² (1856), 6 Cal. 398.

be respected only from the reasoning upon which they are based. The proposition is not sound except in a very restricted sense. The law is a science whose leading principles are settled. They are not to be opened for discussion upon the elevation to the bench of every new judge, however subtle his intellect, or profound his learning, or logical his reasoning. Upon their stability men rest their property, make their contracts, assert their rights and claim protection. . . . It is possible that some intellects may rise to the perception of absolute truth and be justified in questioning the general judgment of the learned of mankind. But before the legitimate and just inference arising from the general acquiescence of the learned can be avoided, the error in the principles should be clearly shown. We should not blindly adhere to precedents, nor should we more blindly abandon them as guides."⁷³

The perpetual antimony of the law, the conflict between law and equity, between form and substance, between statute and common law, between logic and experience, between legislation and interpretation finds illustration in this passage, as it does in the entire legal and judicial career of Stephen J. Field. The theory of an unchanging science of law, of an artificial perfection of reason has to be reconciled with that of the theory that the judge shall not in all cases "blindly" follow precedent. Fortunately for the pioneer State, Field possessed that respect for the system of the common law which every true lawyer must possess; fortunately also he had a learning in the law rivalled by few American judges of his day.⁷⁴ But most fortunate of all, his active life had been a part of the life of the State, and he had the rare power of translating life into law. If law is ultimately a product of social and economic forces, it is through great personalities, such as that of Field, that these forces must find their expression.

⁷³ *Ex parte Newman* (1858), 9 Cal. at p. 527.

⁷⁴ An enumeration of the contemporary American judges is sufficient to indicate that even in the matter of legal learning Field ranked very high among these great men. The Supreme Court of the United States in 1857 was composed of the following members: Taney, McLean, Wayne, Catron, Daniel, Nelson, Grier, Campbell, and Clifford. On the state benches we find such names as Shaw of Massachusetts, Denio of New York, Storrs of Connecticut, Green and Williamson of New Jersey, Ames of Rhode Island, Redfield of Vermont, Lewis of Pennsylvania, Caton of Illinois, Lumpkin of Georgia, Rice of Alabama, English of Arkansas, Bartley of Ohio, Gilpin and Harrington of Delaware, Tenney of Maine, Perley of New Hampshire, O'Neill of South Carolina, Allen of Virginia, Scott of Mississippi, Nash of North Carolina, Wheat of Kentucky, Caruthers of Tennessee, Martin of Michigan, Le Grande of Maryland, Merrick of Louisiana, and Perkins of Indiana.

Bagehot in his essay on Macaulay speaks of men who "think literature more instructive than life."⁷⁵ "There is a whole class of minds," he says, "which prefers the literary delineation of objects to the actual eyesight of them. To some life is difficult. An insensible nature, like a rough hide, resists the breath of passing things; an unobservant retina in vain depicts whatever a quicker eye does not explain. But anyone can understand a book; the work is done, the facts observed, the formulae suggested, the subjects classified."

Field's mind was the antithesis of all that is described by Bagehot as characteristic of Macaulay. It was a first-hand, not a second-hand mind; it was one not fed on pre-digested food; it was that of the man of affairs dealing with things of the mind, not that of the closet student dealing with affairs. Field looked at life directly; he required no smoked glasses.

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⁷⁵ Thomas Babington Macaulay in *Collected Works*, ed. by Mrs. Russell Barrington, Vol. II, p. 94.