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Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History

By William Wirt Blume*

In his Personal Reminiscences of Early Days in California, dictated to a stenographer at San Francisco in 1877,1 Stephen J. Field, then a justice of the Supreme Court of the United States, stated:

In addition to the act concerning the courts and judicial officers referred to, I took up the Code of Civil Procedure, as reported by the Commissioners in New York, remodeled it so as to adapt it to the different condition of things and the different organization of the courts in California, and secured its passage. It became what was known as the California Civil Practice Act, and was afterwards adopted in Nevada and in the Territories west of the Rocky Mountains.2

Pointing out that California was the second state to adopt the New York Code of 1848, known as the “Field Code,” Hepburn, in his Historical Development of Code Pleading,3 called attention to an act passed by the California Legislature in its first session (December 15, 1849-April 22, 1850) and to “a more elaborate act of wider scope but of the same general tenor and effect” passed during the second session of the Legislature (January 6, 1851-May 1, 1851). According to Hepburn:

The relation between New York and California in these matters was closer than appears on the surface. From 1841 to 1848, which was within the period of Mr. David Dudley Field's greatest activity in the cause of law reform, he had as his law partner his brother, Mr. Stephen J. Field, now of the Supreme Bench. In 1848 the latter removed to California, and became a member of the judiciary committee of the first California legislature. As such, he was very influential in shaping the progress of California legislation. Nor did this influence...

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*Professor of Law, Hastings College of the Law.
1 S. J. Field, Personal Reminiscences of Early Days in California (copyright 1880). ("Printed for a few friends—NOT PUBLISHED").
2 Id. at 76.
3 Hepburn, Historical Development of Code Pleading 93-94 (1897).
ence cease with this. Other commonwealths in the west looked to California for guidance.\(^4\)

Hepburn's assumption that Stephen J. Field was responsible for the original (1850) adoption in California of the New York Code of Procedure of 1848 is not correct. Field was not a member of the Legislature during its first session (December 15, 1849-April 22, 1850) at which the New York Code was originally adopted. He was a member of the Legislature during its second session (January 6, 1851-May 1, 1851) and was appointed to the Judiciary Committee of the House. Swisher, in *Stephen J. Field—Craftsman of the Law*, states:

Field was a member of the Judiciary Committee. Another man was chosen as chairman, for political reasons, but Field declared, "I was foremost in the Committee." As a member of this Committee, his greatest contribution was in the writing of the civil and criminal practice acts. He took most of the work upon himself. He disregarded the work of the preceding legislature and took the civil and criminal codes of procedure recommended by David Dudley's committee to the New York legislature as his guide. He modified and added to these codes to meet the particular needs of California. He said of the task: "The amount of labor bestowed on these acts will be appreciated when I say that I recast, in the two, over three hundred sections, and added over one hundred new ones."\(^5\)

In "The History of the Adoption of the Codes of California," Miss Parma, Law Librarian, University of California, Berkeley, stated in 1929: "The 'First Report of the Commissioners on Practice and Pleading. Code of Civil Procedure, Albany, Charles von Benthysen, Public Printer, 1848' forms the base of the Practice Act of California of 1850 as drafted by Mr. E. O. Crosby.\(^6\) Whether or not Mr. Crosby had access to the First Report of the New York Commissioners it seems clear that he had before him and made use of the New York Code of Procedure (not "Code of Civil Procedure") as amended and re-enacted by the New York Legislature April 11, 1849. This is shown by the fact that amendments to the New York Code made in 1849 were included in the California act of 1850. Where Deering's legislative history of a particular section of the present California code contains a reference to New York, the section cited will be found in the New York Code of 1848 as amended in 1849.

The New York Commissioners on Practice and Pleading filed four

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\(^4\) Id. at 94 n.1.
\(^6\) 22 L. Library J. 8 (1929).
\(^7\) Id. at 12.
reports dealing with civil procedure, the first dated February 29, 1848, the last dated December 31, 1849. The fourth, or final, report was printed in 1850 and will be referred to as the draft code of 1850. In the first two reports the code recommended by the Commissioners was called a “Code of Procedure,” in the others it was referred to as a “Code of Civil Procedure.” David Dudley Field—brother of Stephen J. Field—was one of the Commissioners, and took the lead in drafting the reports.

In their “Chronology of the Development of the David Dudley Field Code,” Coe and Morse state that the code recommended by the Commissioners in 1848 was adopted by the New York Legislature in 1848 “with very little change.” Reppy in “The Field Codification Concept” states that “On January 22, 1849, the Commissioners presented their Second Report, which proposed a number of additions and amendments to the existing act. In response, the Legislature, on April 11, re-enacted the original code, including the additions and amendments, thus increasing its size from 391 sections to 473 sections.” Following the final report of the Commissioners (printed in 1850) the New York Legislature took further action. Eighty-eight sections of the Code of 1849 were amended by an act passed July 10, 1851. One other section was repealed and another amended in 1851. Forty-one sections of the Code of 1849 were amended by an act passed April 16, 1852. One other section was amended in 1852. Other sections were affected by changes, though not expressly amended.

Miss Parma, in “The History of the Adoption of the Codes of California,” referred to above, made the following statements concerning the final report of the New York Commissioners published in 1850:

Although the draft code of 1850 was not adopted in New York, it had a marked influence on California law. The California Practice Act of 1850 was repealed by the Act of 1851 which was drafted by Stephen J. Field, based chiefly on the New York Draft Code of Civil Procedure of 1850.
The draft code of 1850 as “reported complete” by the New York Commissioners was divided into four parts. In the words of the Commissioners: “The first relates to the courts of justice, their organization and jurisdiction, and the functions and duties of all judicial and ministerial officers, connected with them. The second embraces the subject of civil actions, with all their incidents; the third relates to special proceedings; and the fourth to evidence.”

One of the Commissioners, David Graham, dissented “upon the subject of evidence, the change of the name of the writ of habeas corpus, and the organization and functions of the courts of conciliation.”

As a member of the House Judiciary Committee of the second session of the California Legislature (1851), Stephen J. Field drafted two statutes: (1) “An act concerning the Courts of Justice of this State, and Judicial Officers” passed March 11, 1851. (2) “An act to regulate proceedings in civil cases, in the Courts of Justice of this State” passed April 29, 1851. Reviewing his “Life in the Legislature” Field stated:

Immediately after the election I commenced the preparation of a bill relating to the courts and judicial officers of the State, intending to present it early in the session. The Legislature met at San José on the first Monday of January, 1851, and I was placed on the Judiciary Committee of the House. My first business was to call the attention of the Committee to the bill I had drawn. Its principal provisions remained in force for many years, and most of them are retained in the Code, which went into effect in January, 1873.

The statute referred to followed the scheme of Part I of the draft code of New York as “reported complete” in 1850, but, of course, had to be related to the court system set up by California’s first Constitution (1849) which had provided for a Supreme Court, District Courts, County Courts, and Justices of the Peace. Field’s statute covered in detail the organization and jurisdiction of these courts and provided for the establishment of other courts, but did not provide for “Courts of Conciliation” although such courts were authorized by California’s constitution, and had been recommended by the New York Commissioners in their draft code “reported complete” in 1850.

As noted above, the New York draft code “reported complete”
in 1850 was divided into four main parts. These parts, following eighteen sections of "Preliminary Provisions," were:

Part I. Of the Courts of Justice.
Part II. Of Civil Actions.
Part III. Of Special Proceedings.
Part IV. Of Evidence.

In California, Stephen J. Field's first statute (passed March 11, 1851) dealt with the topics of Part I, his second statute (passed April 29, 1851) dealt with areas covered by Parts II, III, and IV with one major exception. His Title XI ("Of Witnesses, and the Manner of Obtaining Evidence") parallels a division of Part IV of the New York draft, but does not include the remainder of David Dudley Field's proposed code of evidence. That Stephen J. Field was reluctant to include features of the New York draft not previously adopted by the New York Legislature is indicated by other omissions. The following are illustrations selected at random:

Section 113 of the New York Code of Procedure as re-enacted by the New York Legislature April 11, 1849, reads as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted." Section 599 of the draft code of New York "reported complete" in 1850 repeated section 113 of the Code of 1849 with this addition: "A person with whom, or in whose name, a contract is made, for the benefit of another, is a trustee of an express trust within the meaning of this section." The New York Commissioners stated in a note: "The last sentence is added to remove a doubt which has been expressed." Section 8 of California's first practice act (April 22, 1850) reads exactly the same as section 113 of the New York Code of 1849. And the same is true of section 6 of Cali-

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20 Cal. Stat. 1851, ch. 5, § 394, at 114 (California Practice Act of 1851) added the following witness disqualifications not found in Sec. 1708 of the draft Code of New York of 1850: "3d. Indians, or persons having one fourth or more of Indian blood, in an action or proceeding to which a white person is a party. 4th. Negroes, or persons having one half or more Negro blood, in an action or proceeding to which a white person is a party." In 1854 the Supreme Court (as stated in a headnote) "Held, that the words, Indian, Negro, Black and White, are generic terms designating race. That, therefore, Chinese and all other people not white, are included in the prohibition from being witnesses against Whites." People v. Hall, 4 Cal. 399 (1854). Stephen J. Field, who drafted the statutory provisions involved, was not a member of the Supreme Court at the time this case was decided, but was a member of the Court when the same question was presented in 1859 in Speer v. See Yup Co., 13 Cal. 73. The only error assigned in the 1859 case—a civil action—was "the exclusion of a Chinese witness offered by [the] plaintiff." The Court affirmed on the authority of the case decided in 1854. "TERRY, C.J. delivered the opinion of the Court—FIELD, J. concurring."
forma's second practice act (April 29, 1851), although at that time
Stephen J. Field had before him the amendment recommended by the
New York Commissioners in 1850. The later history of this added sen-
tence may be of interest. On July 10, 1851, section 113 of the New York
Code of 1849 was amended by the New York Legislature by adding:
"A trustee of an express trust within the meaning of this section shall
be construed to include a person with whom, or in whose name, a con-
tract is made for the benefit of another." In 1854 this sentence was
added by the California Legislature to section 6 of the California act
of 1851. In California's draft code of 1871 the sentence was changed
to read as proposed by the New York Commissioners in 1850.21 And
this is the language of section 369 of the present Code. Deering's legis-
 lative history of the section states that it was enacted in 1872, based
on "N.Y. Code § 113", "Stats. 1850 Ch. 142 § 8", "Practice Act (1851)
§ 6" as amended in 1854.

Sections 604 and 605 of the draft code of New York "reported
complete" in 1850 provide:

An unmarried female may prosecute, as plaintiff, an action for her
own seduction, and may recover therein such damages as shall be
assessed in her favor.

A father, or in case of his death or desertion of his family, the
mother, may prosecute as plaintiff for the seduction of the daughter,
and the guardian for the seduction of the ward, though the daughter
or ward be not living with, or in the service of, the plaintiff, at the
time of the seduction or afterwards, and there be no loss of service.

These sections are not found in the New York Code of Procedure
(1849-1852) or in the California Practice Acts of 1850 and 1851, but
do appear in almost exactly the same language in sections 374 and 375
of the present California Code as enacted in 1872. The California Code
Commissioners in a note to their section 374 as proposed in 1871 stated:
"This, and the succeeding section, are new—introduced by the
commissioners."22 Section 371 of the present California Code of
Procedure as enacted in 1872 provides: "If a husband and wife be
sued together, the wife may defend for her own right, and if the
husband neglect to defend, she may defend for his right also." A note
to this section in the code as proposed in 1871 states that "the words
'and if the husband neglect etc.' were added by the Commissioners
to section 8 of the Practice Act of 1851.23 The added words were in the

21 Revised Laws of the State of California—In Four Codes—Code of Civil
Procedure § 369 (1871) (printed before enactment).
22 Id. § 374.
23 Id. § 371.
draft code of New York "reported complete" in 1850 (section 601), but were not included by Stephen J. Field in California's Practice Act of 1851.

The Code of Civil Procedure proposed by the California Commissioners in 1871 was divided into four parts:

- Part I. Of Courts of Justice.
- Part II. Of Civil Actions.
- Part IV Of Evidence.

These parts were preceded by twenty-five sections of "Preliminary Provisions," the entire arrangement being that of the draft code of New York "reported complete" in 1850. The most striking development beyond Stephen J. Field's Court and Practice Acts of 1851 was the inclusion in 1871 of the code of evidence recommended by the New York Commissioners in 1850. Part IV of California's draft code of 1871 begins with a note: "The New York Commissioners say..." The material quoted is found at the beginning of Part IV of the New York draft of 1850, at 694-696. Following this quotation the California Commissioners stated: "In 1851 the legislature of this state adopted the major portion of the Provisions of the New York Code relating to evidence, and incorporated the provisions so adopted in the practice act. We have taken those provisions and made them the basis of part IV of this code, and have supplied the omitted portion." Other quotes from the 1850 report of the New York Commissioners will be found in California's draft code of 1871 following sections 1825 and 1864.

Part IV of the California draft code of 1871 was made up of 214 sections. In 42 of these sections earlier California statutes are cited as sources. Following each of the other 172 sections, except one, there is a reference to a particular section of "N.Y.C.C.P" A check of the section numbers given will show that these references were to the draft code of New York as "reported complete" in 1850.

Stephen J. Field was not a member of the Commission which drafted the California Code of Civil Procedure proposed in 1871, but was a member of the "Commission to Examine the Codes" appointed by the Governor in 1873. The report of this Commission, dated October 11, 1873, stated:

We found the four Codes—the Political Code, the Penal Code, the Civil Code, and the Code of Civil Procedure—as prepared by the Commissioners and enacted by the Legislature, perfect in their analy-
sis, admirable in their order and arrangement, and furnishing a complete code of laws, the first time, we believe, that such a result has been achieved by any portion of the Anglo-Saxon or British races.\(^\text{25}\)

In its enactment of the Court and Practice Acts of 1851 and of the Code of Civil Procedure of 1872 the California Legislature did not adopt or copy New York legislation, but, in reality, originated a new code of civil procedure. This fact is significant, and its significance points in two directions. Use of the draft code "reported complete" by the New York Commissioners in 1850, as a source, meant that the persons who drafted the California code had the full benefit of the ideas of procedure reform generated by the genius of David Dudley Field. On the other hand, David Dudley Field and his co-commissioners were not omniscient, and the New York Legislature found it desirable to add provisions not recommended by the Commissioners. Additions to the section dealing with joinder of causes of action will serve as illustrations:

Section 167 as adopted by the New York Legislature in 1849 provided:

The plaintiff may unite several causes of action in the same complaint, where they all arise out of,
1. Contract, express or implied; or,
2. Injuries with or without force, to the person; or,
3. Injuries with or without force, to property; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same; or,
6. Claims to recover personal property, with or without damages, for the withholding thereof; or,
7. Claims against a trustee by virtue of a contract or by operation of law.

But the causes of action, so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Section 663 of the draft code of New York of 1850 omitted classes 2 and 3, substituting after former class 4: "Other injuries to person or property, or either." A note by the Commissioners stated that "Amended Code, § 167" had been "altered, so as to allow some causes of action to be united, which cannot be united under the section."

Section 61 of California's Practice Act of 1850 reads almost exactly the same as section 167 of the New York Code of 1849. Section 64 of California's Practice Act of 1851 reads the same as section 663 of the draft code of New York of 1850 except for one addition (waste committed on real property) and two slight changes in language and form. Section 427 of California's proposed code of 1871 reads the same, with this addition: "but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person." Section 427 of the proposed code of 1871 was enacted in 1872 as section 427 of the present code. In the meantime in New York (1852) section 167 as adopted in 1849 was amended by the Legislature by adding the words following indicated by italics:

The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of,

1. The same transaction, or transactions connected with the same subject of action.

These important provisions were not in the draft code "reported complete" by the New York Commissioners in 1850, and were not adopted in California until 1907 when the following was added to section 427

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

In New York prior to the amendments made by the Legislature in 1852 there were no provisions for joining causes formerly "equitable" in nature, and no provisions for joining "legal" and "equitable" actions. And there could be no joinder of claims for "legal" relief unless all the causes could be fitted into one of the classes set out in the joinder section of the Code. 27

26 This provision had been added to the section by the California legislature in 1855. Cal. Stat. 1855, ch. 155, § 4.

27 Referring to the provision for joinder of causes of action arising out of the same transaction or transactions connected with the same subject of action, Professor John Norton Pomeroy ("Hastings College of the Law: University of California") in the second edition of his treatise on *Civil Remedies* (1883), stated in sections 463-65: "The principal design was undoubtedly to embrace the vast mass of equitable actions and causes of action which could not be classified. [B]ut the language is not confined to them; it includes legal controversies as well. I quote the language used by an eminent judge of the New York Court of Appeals, which, while it contains some unjust remarks upon the authors of the New York code, is a very pointed and accurate description of the clause and of its immediate design. “The authors of the code, in framing this and most of its other provisions, appear to have had some remote knowledge of
Stephen J. Field in his Reminiscences (quoted at the beginning of this paper) stated that his practice act of 1851 had been “adopted in Nevada and in the Territories west of the Rocky Mountains.” One of the other territories which adopted the act was Montana. The lan-

what the previous law had been. This provision as it now stands was introduced in the amendment of 1852, because the successive codes of 1848, 1849, and 1851, with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. It is certainly impossible to extract from a provision so loose, and yet so comprehensive, any rules less liberal than those which have long pre-
vailed in courts of equity.” New York & N.H.R.R. v. Schuyler, 17 N.Y. 592, 604 (1858). Referring to the joinder of causes section of the Field Code (§ 143 as drafted in 1848) Professor McCaskill, in a memorandum included by Coe and Morse in their Chronology of the Development of the David Dudley Field Code, 27 Cornell L.Q. 238, 240 (1942), stated: “Not by any stretch of the imagination can sec. 143 include any equit-
able remedy. Secs. 97 [permissive joinder of plaintiffs]—99 [required joinder of parties united in interest] apply the equity rules on joinder of parties, supposedly to all types of claims, but they can have no application to cases where there is but one plaintiff and one defendant. They probably provide adequately for all joinders in equity cases, and do not subject the commissioners to the criticism aimed at them by Comstock, J., in N. Y. & N. H. R. R. Co. v. Schuyler, 17 N.Y. 592, but they do not bridge the gap between legal and equitable remedies. There was no attempt to do this. By amend-
ment of the code in 1852, the counterclaim section of the final report [December 31, 1849, printed in 1850] was adopted, and immediately after it came an amendment of section 143, expressly providing for a joinder of legal and equitable remedies in one suit. This was an important step in code procedure.” In 1857, the Supreme Court of California held that § 14 of the California Practice Act of 1851, requiring joinder of parties united in interest, “was intended to apply to suits in equity, and not to actions at law.” Andrews v. Mokelumne Hill Co., 7 Cal. 330, 333 (1857). Commenting on this case in the third edition of Pomeroy’s treatise on Civil Remedies (1894) John Norton Pomeroy, Jr., in a note at 251, stated: “The same court has, in later cases, pursued a course of decision more in accordance with the spirit of the code, and has, as completely perhaps as any other tribunal, abandoned all attempt to preserve a distinction between actions at law and suits in equity.” Stephen J. Field was not a member of the California Court when the Andrews case was decided, but was a member when Jones v. Steam-

ship Cortes, 17 Cal. 487 (1861), was decided, and concurred in the opinion of the court. In this case the court held that under the California system of pleading “a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction.” Ibid. Cope, J., delivering the opinion of the court, stated: “Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation.

The [New York] code contains a special provision upon this subject, but we think that the effect of our statute is the same, and that the construction would not be altered by the incorporation of a similar provision.” Id. at 497-98. This somewhat startling attempt to “amend” the California Practice Act of 1851 by adding the “trans-
action” provision added to the New York Code in 1852, seems to have been forgotten when Stark v. Wellman, 96 Cal. 400, 31 Pac. 259 (1892), was decided.

28 Hepburn, op. cit. supra note 3, at 106, states: “Montana also has received its legislation very largely from California. Early in 1865 the provisions of the California practice act were substantially adopted by the first legislature of Montana in an act to regulate proceedings in civil cases. There was a revision in 1879, when a code of civil procedure framed on the lines of the California statute was adopted.”
guage of the Montana joinder section as adopted in 1865 is set out in Toelle, "Joinder of Actions—With Special Reference to the Montana and California Practice." 2 Referring to "the California experience," Toelle stated: "Prior to 1907, California, as is still true of Montana, had no provision for the joinder of claims arising out of the same transaction, or transactions connected with the subject of the action. This omission was the subject of comment and disapproval," citing Stark v. Wellman. 31 In that case, Temple, C., stated:

The classification of causes of action which may be united under section 427 of the Code of Civil Procedure, while intended to be founded upon manifest reason, is nevertheless to some extent arbitrary, and differs materially from that which prevails in most states.

In nearly all, for instance, causes of action arising out of the same transaction, or transactions connected with the same subject of action, may be united. Had this been in our code, it would have authorized the joinder of the causes of action in this case. It was in the code from which it is supposed ours was copied, and if so, was, of course, designedly omitted. 32

From the history of the joinder section, reviewed above, we know that the provision referred to was not "designedly omitted" but simply was not in the draft code "reported complete" by the New York Commissioners in 1850 which served as the basis of the California Code. 33 The story in Montana came to an end in 1961 when the code provisions for joinder were repealed, and a rule adopted providing for free joinder as in the Federal Rules. 34

In his historical account of the "Extraordinary Writs" in California, 35 B. Abbott Goldberg stated: "It is important to note that the California Practice Act of 1851 followed the spirit and in many cases the letter of the [New York] Proposals of 1850 because these give us the clue to what may have originally been intended by the statutory provisions in regard to certiorari." 36 This and other references to the New York Draft Code of 1850 well illustrate the use that must be made of his particular source in tracing the history of California procedure.

20 18 CALIF. L. REV. 459 (1930).
21 Id. at 466.
22 96 Cal. 400, 31 Pac. 259 (1892).
23 Toele, Joinder of Actions—With Special Reference to the Montana and California Practice, 18 CALIF. L. REV. 459, 468 (1930).
31 An attempt to add this provision by judicial interpretation was made in Jones v. Steamship Cortes, 17 Cal. 487 (1861).
34 MONT. R. CIV. P. 18.
35 36 CALIF. L. REV. 558 (1948).
36 Id. at 561.
Judicial Reception and Interpretation

Stephen J. Field was appointed to the Supreme Court of California October 13, 1857, became Chief Justice September 12, 1859; and served as Chief Justice until May 20, 1863, when he resigned to become a justice of the Supreme Court of the United States.37 Prior chief justices of the California Court had been: Serranus Clinton Hastings—Dec. 22, 1849-Jan. 1, 1852; Henry A. Lyons—Jan. 1, 1852-March 31, 1852; Hugh C. Murray—March 31, 1852-Sept. 18, 1857, David S. Terry—Sept. 18, 1857-Sept. 12, 1859. Other members of the court during this period were Nathaniel Bennett, Solomon Heydenfeldt, Alexander Anderson, Alexander Wells, Charles H. Bryan, Peter H. Burnett, Joseph G. Baldwin, W W Cope, and Edward Norton. In a "sketch" published in 188138 "John Norton Pomeroy, LL.D., Professor of Law in the Hastings Law Department of the University of California" stated that "The Court, in its early years," that is, before Field became a member, "had not always commanded [the] entire confidence and respect of the public." This "sketch" had been submitted to Field who altered it "in several particulars." Field's changes in the "sketch" were explained to Pomeroy in a letter dated June 21, 1881.

The severe condemnation you expressed of the old Supreme Court of the State is also omitted. It still states—what is true—that the court did not at all times have the confidence of the public, but that this was owing to the character—intellectual and moral—of persons who are now dead. The living members of the old court are Judge Hastings—the founder of your Law Department, Judge Hydenfeldt, Judge Bennett, Judge Burnett and Judge Terry. No one ever questioned the integrity or ability of Hydenfeldt and Bennett, or the integrity of Burnett or Terry. Hastings you know, and he was never regarded as a shining light. Terry had ability but his Southern prejudices and partizanship affected his judgment. The judges who brought the greatest reproach upon the bench, were Wells, Murray and Anderson, all of whom are dead. I think the sweeping language you used would create much unpleasant feeling.40

In the "sketch" referred to, Professor Pomeroy further stated that the "most important work of Judge Field was after Judges Baldwin and

37 I CALIFORNIA JURISPRUDENCE 2d xlviii (1952).
39 Id. at 27 (both editions).
Cope had become his associates on the Bench. They were able and learned judges, and fully bore their share of the labors of the Court.”

According to Professor Pomeroy the Court had risen rapidly in “the estimation of the profession,” until it had reached a position in the country “second to no other State tribunal.” A representative of a leading law publishing house of Boston had told him that of “late years the demand had changed from the New York to the California reports. Everywhere through the Western and Northwestern States, he said, the profession generally wished to obtain the California reports as next in authority after those of their own States.”

Before giving a summary of Field’s accomplishments as a member of the California court, Pomeroy undertook an estimate of Field’s “judicial character” mentioning these “qualities” (1) Ample legal learning. (2) Devotion to principle. (3) Creative power. (4) Fearlessness. In his estimate of Field’s “creative power” Pomeroy wrote:

Judge Field’s peculiar talent as a legal reformer was shown in his purely legislative work done while a member of the State Assembly, and described in a previous division of this essay. He exhibited the same power and tendency upon the Bench. They were shown in his constant rejection of ancient common-law dogmas, no matter how firmly settled upon authority, which had become outgrown, obsolete, and unfitted for the present condition of society, and in the substitution of more just, consistent, and practical doctrines adapted to the needs of our own country and people. I merely mention, as sufficient examples of this class, his decisions upon the nature and effect of mortgages, and those concerning the ownership of gold and silver while in the soil, by which he boldly swept away the common-law rules on the subject, with all the absurd reasoning upon which they had been founded. The same power and tendency were shown in his accurate perception of those principles and rules contained in foreign systems of jurisprudence which should be borrowed and incorporated into the judicial legislation of the State, both for the purpose of protecting many peculiar rights of property and special interests, and of regulating social relations, existing in California but unknown in nearly all the other States. Illustrations of the first kind may be found in his series of most important decisions concerning “pueblos” and the municipal and proprietary rights belonging to them; and concerning Mexican land-grants, in which the rules were borrowed from the Spanish-Mexican codes; and in those concerning the occupation of public lands and mining and water rights. A most illustrative example of the other kind is seen in his decisions relating to the community

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41 Pomeroy, supra note 38, at 27.
42 Id. at 28.
43 Id. at 28 n.
44 Id. at 28-37.
property of husband and wife—an incident of the marriage relation derived from the Spanish-Mexican jurisprudence—which placed the rights of the two spouses in that unique species of property upon a firm and equitable foundation. The same power and tendency are shown in his decisions concerning procedure, in which he more ably and consistently, perhaps, than any other judge, has carried into operation the true spirit and intent of the reformed American procedure.45

Professor Pomeroy's estimate (last sentence quoted above) that Field as a state judge "more ably and consistently, perhaps, than any other judge" had "carried into operation the true spirit and intent of the reformed American procedure" is entitled to emphasis, not only because of Pomeroy's familiarity with Field's work on the California Court, but also because Pomeroy was the author of a justly-celebrated treatise on the "new procedure" originally published in New York in 1876.46 Pomeroy knew the "spirit and intent" of the reformed procedure, and, having examined the decisions of all the code states and territories, was in a position to know whether Field, as a state judge, had "carried into operation the true spirit and intent of the reformed American procedure more ably and consistently, perhaps, than any other judge," meaning any other judge in the United States. When it is recalled that Field drafted the California court and practice acts of 1851 from the draft Code of Civil Procedure "reported complete" by the New York Commissioners in 1850, and that he had been closely associated with the chief author of the New York draft—his brother, David Dudley Field—during a period in which David Dudley was very active in advocating his ideas of codification and procedure reform, it seems reasonable to accept Pomeroy's estimate without too much doubt.

Two of Field's opinions delivered in 1860 will serve as illustrations. The first paragraph of Field's opinion in Coryell v. Cam47 reads:

This is an action of ejectment to recover a tract of land situated within the county of San Francisco. The complaint is of a character which has frequently elicited observations of disapprobation from this Court. It is filled with matters relating to the title of the plaintiffs, which have no place in pleadings, and should only be presented as evidence in the case. Had the defendant made the application, these matters would, undoubtedly, have been stricken out, as redundant, at the cost of the plaintiffs. It is not within the wit of man to devise

45 Id. at 32-33.
46 See sketch of "John Norton Pomeroy" by his son, John Norton Pomeroy, Jr., in 8 GREAT AMERICAN LAWYERS 91, 110-11 (Lewis ed. 1909). A second edition of Pomeroy's Civil Remedies was published in 1883 after Pomeroy had become a member of the Hastings faculty. A third edition was published by Pomeroy, Jr., in 1894.
47 16 Cal. 567 (1860).
more simple rules of pleading than those prescribed by the Practice Act of this State, and there is no excuse for any departure from them. That facts, and not the evidence of facts, should be alleged, is not less a rule of pleading in our system than it was under the former system, which has been superseded. Thus, in the present case, the complaint should only have alleged, that on some day designated the plaintiffs were possessed of the land, describing it; that whilst thus possessed, the defendant entered upon the same, and ousted them, and has ever since withheld the possession from them, to their damage; specifying such sum as might cover the value of the use and occupation from the date of the ouster. 48

The first two paragraphs of Field's opinion in Green v. Palmer 49 read:

The complaint, in this case, as a pleading, has no precedent, and, we trust, will never serve as one. It is stuffed full of irrelevant matter—suggestions, charges and statements, which subserve no useful purpose, and are only calculated, when read to the jury, to excite prejudice against the defendants.

The action is for the seizure and conversion of a bag of gold coin, of the value of $4,000, alleged to be the property of the plaintiff. After the usual, and the only necessary averments as to the plaintiff's ownership and possession of the property, its value, and its forcible seizure by the defendants, and its conversion to their use to his damage, the complaint proceeds to detail the manner in which the seizure was made, with the incidents occurring on the street, and everything done by the defendants, the plaintiff and the "crowd," relating to or constituting the evidence of the wrongful conversion. All this narration should have been stricken out, as irrelevant and redundant matter, and the Court erred in refusing the motion made for that purpose. The rules of pleading, under our system of practice, are very simple, and can be readily followed; yet we find, in numerous instances before us, pleadings filled with recitals, digressions and stones, which only tend to prolixity and obscurity. We extract from a manual, written by one of the commissioners engaged in framing the New York code, some rules of pleading, with the observations of the writer thereon, as expressive of our views as to what should be stated in the pleadings under our Practice Act. The greater portion of the Practice Act, it is known, is taken from that code. We omit the first rule given in the manual, and commence with what is there designated as the second 50

The quotations from the manual referred to occupy three and a quarter pages of the opinion as printed. The rules selected for inclusion in the opinion, and renumbered, were:

48 Id. at 571.
49 15 Cal. 411 (1860).
50 Id. at 414.
First Rule.—Facts only must be stated.
Second Rule.—Those facts, and those only, must be stated which constitute the cause of action, the defense, or the reply.
Third Rule.—All statements must be concisely made, and when once made, must not be repeated.

Deering's current Code of Civil Procedure, following section 426, gives "the entire manual written by David Dudley Field, from which the court makes only certain extracts." The omitted First Rule was that "pleadings must be true."

Codes of Civil Procedure based on the "Field Code," as enacted in New York or California, were adopted in: Minnesota, 1851, Oregon, 1854; Washington, 1854; Nebraska, 1855; Kansas, 1859; Nevada, 1861, Dakota, 1862; Idaho, 1864; Arizona, 1864; Montana, 1865; Wyoming, 1869; Oklahoma, 1890. Lawyers and judges seeking to understand the "new procedure" quite naturally looked to New York for guidance. But, "unfortunately the code in New York came to be construed by able judges who were opposed to its spirit." In California, on the other hand, after Stephen J. Field became a member of the state Supreme Court in 1857, the code had a champion—an articulate and forceful judge who understood the nature of the reform and who, according to Professor Pomeroy, "more ably and consistently, perhaps, than any other judge" in the United States "carried into operation the true spirit and intent of the reformed American procedure." This may have been the chief reason why lawyers and judges of the western and northwestern code states were interested in obtaining reports of the decisions of the California court.

61 Id. at 414-17.
62 H. M. FIELD, THE LIFE OF DAVID DUDLEY FIELD 69 (1898) lists A SHORT MANUAL OF PLEADING UNDER THE CODE as one of a series of "law reform tracts" published by David Dudley Field.
63 HEPBURN, op. cit. supra note 3, at 90-113.
64 CLARK, CODE PLEADING 47 (1928). According to Professor (later, Judge) Clark the attitude of the New York judges was well expressed by Winslow, C.J., of Wisconsin: "The cold, not to say inhuman, treatment which the infant code received from the New York judges is a matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators." McArthur v. Moffett, 143 Wis. 564, 567, 125 N.W 445, 446 (1910).
65 Pomeroy, supra note 38, at 33.
Influence of the Frontier

In an extensive study of “Territorial Courts and Law” the present writer assisted by Research Associate Elizabeth Brown attempted to identify some of the unifying factors in the development of American legal institutions. Part I of the study traced developments which led to the establishment by Congress of a simple judicial system for the territories of the United States. Part II discussed some of the influences which tended to unify territorial law. In both parts of the study a look-out was kept for legal developments that would support Turner’s “frontier theory” of American history. Nothing was found to support the Turner theory, but much was found to support Tocqueville’s views expressed in the 1830’s:

A defective English law (and there are many) is imported into America by the first emigrants. They modify it, adapt it after a fashion to their social condition; but they still retain for it a superstitious respect, and are unable to rid themselves of it entirely. The second emigration takes place; these same men plunge once again into the wilderness. This time the law is modified in such a way that it has almost lost the stamp of its origin. But it requires still a third emigration before it ceases to exist.

The second emigration referred to was into the Ohio and Mississippi valleys. The third plunge into the wilderness envisioned by Tocqueville was a migration from these valleys to areas farther west. The settlement of California was a part of this third emigration as a consequence of which “superstitious respect” for “defective” English law “ceases to exist.”

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57 For Turner’s theory and attempts to apply it see Blume, Civil Procedure on the American Frontier, 56 Mich. L. Rev. 161, 204-206 (1957).
58 Pierson, Tocqueville & Beaumont in America 567 (1938).
59 Of interest is Bryce, The Character of California, in 3 The American Commonwealth 226 (1888): “This mixed multitude, bringing with it a variety of manners, customs, and ideas, formed a society more mobile and unstable, less governed by fixed beliefs and principles, than one finds in such North-Western communities as I have just mentioned. Living far from the steadying influences of the Eastern States, the Californians have developed, and are proud of having done so, a sort of Pacific type, which though differing but slightly from the usual Western type, has less of the English element than one discovers in the American who lives on the Atlantic side of the Rocky Mountains. Add to this that California is the last place to the west before you come to Japan. That scum which the westward moving wave of emigration carries on its crest is here stopped, because it can go no farther.” Bryce was in San Francisco in the fall of 1881, id. at 244, and again in 1883, id. at 228.
In an account of "The Acquisition of California, Its Influence and Development Under American Rule," Cushing stated:

The very fact that the pioneers of the fifties were here is sufficient to demonstrate that they were not men who cared to walk in the well-trodden paths of the older communities. They braved the dangers of the plains, the tropics and the seas to cast their fortunes in the new land. They had dared themselves to experiment in the untrodden paths of adventure, and it is little wonder that they were seemingly equally willing to experiment in legislation. It has in fact been pointed out that one of the distinctive features of the history of legislation in California is the willingness of the inhabitants to try experiments.

The judicial system established by California's first Constitution (1849) was similar to that established by Congress for the territories of the United States beginning in 1836. This uncomplicated territorial system designed for frontier areas was "the end-product of a long period of experimentation commenced by the preliminary drafts of the Northwest Ordinance prior to 1787, and carried forward by Congress and the governments of the twelve territories organized before 1836." First established in Wisconsin in 1836, the system was continued in Iowa Territory when it was created out of Wisconsin Territory in 1838, and when Iowa Territory became a state in 1846 the territorial system served as the basis of the first judicial system of the state. It is generally recognized that Iowa's Constitution of 1846 was one of the sources of the California Constitution of 1849.

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60 8 CALIF. L. REV. 67 (1920).
61 Id. at 75.
63 See "Introduction" by Judge William W Morrow to 1 CALIFORNIA JURISPRUDENCE 2d xxx (1952), quoting from The Establishment of a State Government in California by Cardinal Goodwin, and from The Genesis of California's First Constitution by Rockwell D. Hunt. In portions of Hunt's account not quoted by Morrow the author (at 37 and 55) stated: "There was a great dearth of books of reference in Monterey during the session of the Convention. It was believed that there were not above fifty volumes of law and history in all the town, [one writer stating later] that 'copies of the State Constitutions of Iowa and New York were the only ones that could be obtained.' But precedents were not so scarce. Gwn, with politic foresight, had brought with him a copy of Iowa's Constitution of 1846 and this he proposed as a model for the present Constitution. For a time, since there was a great dearth of reference books, it seemed as though this model might be closely followed. But other State Constitutions were obtained, and that of New York soon became a favorite. Hastings proposed the Constitution of the United States as a guide, since he urged 'the record of the debates on that Constitution embraced the principles of all the State Constitutions.'" Hastings, originally from New York, had been admitted to the bar in Indiana in 1836 and had practiced law in Iowa Territory from 1837 to 1846, when Iowa became a state. He was for a time president of the Territorial Council, and was elected Chief Justice of
The act of Congress which established a government for Iowa Territory in 1838 provided: "[T]he judicial power of the said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice, and two associate judges, any two of whom shall be a quorum."64 Article VI of California's first Constitution (1849) provided:

Sec. 1. The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, and in Justices of the Peace. The legislature may also establish such municipal and other inferior courts as may be deemed necessary.

Sec. 2. The Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum.

An elected "County Judge" was to hold the County Court, perform the duties of "Surrogate, or Probate Judge," and, with two Justices of the Peace, hold "Courts of Sessions." "Tribunals for conciliation" were authorized.

Having been developed to serve frontier settlements as the American frontier moved westward, the territorial system of court organization was readily adaptable to the frontier conditions which faced the people of California in 1849-1851. It must be noted, however, that the simple court system contemplated by California's first Constitution (1849) was made unnecessarily complex by Field's Court Act of 1851 which provided in Chapter I.

The following shall be the Courts of Justice of this State. 1st. The Supreme Court. 2d. The District Courts. 3d. The Superior Court of the City of San Francisco. 4th. The County Courts. 5th. The Courts of Sessions. 6th. The Probate Courts. 7th. The Justices' Courts. 8th. The Recorders' Courts. 9th. The Mayors' Courts.65

Field had had no prior frontier experience and, obviously, was influenced by his acquaintance with the court systems of the eastern states. His complex system, after some modification, became the basis of Part I of the draft Code of Civil Procedure of 1871.

Governor Peter H. Burnett in his first message to the first session of the California Legislature (December 21, 1849) recommended the adoption of the following codes:

1. The definition of crimes and misdemeanors as known to the Common Law of England.

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64 5 Stat. 237 (1838).
65 Cal. Stat. 1851, Ch. 1, ch. 1, at 2.
February 1, 1850, a petition was presented to the Legislature by a group of San Francisco lawyers recommending that the Legislature "retain, in its substantial elements, the system of the civil law, as passed by His Excellency the Governor, in preference to the English Common Law". In a report dated February 27, 1850, the Judiciary Committee of the Senate rejected these proposals, and, after a full and interesting comparison of the civil law and common law legal systems recommended adoption of "the English Common Law, as received and modified in the United States; in other words the AMERICAN COMMON LAW". In the course of this report the Committee stated:

To undertake, by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man, must forever remain impracticable and absurd. In truth, all the provisions of constitutions, and statutes, and codes, are but pebbles on the sea-shore—the vast ocean of legal science lies beyond. The most therefore, that can be expected from the present Legislature is, to set the machinery of government in operation in all its departments, establish a system of pleadings and practice, enact certain statutes providing for the most common cases of judicial investigation; and for the rest, resort to one of the two great repositories of legal learning, the Common or the Civil Law.

Though rejecting the idea of complete codification, the Committee did "recommend the establishment of the system of pleadings and practice" which had been laid before the Legislature. This concession to the concept of codification paved the way for the enactment of the Practice Act of 1850 which was based on the New York Code of Procedure as amended in 1849. Elisha Oscar Crosby, who was chairman of the Senate Judiciary Committee and who drafted the Practice Act of 1850, was a New York lawyer who came to California in 1849.

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66 Shuck, Adoption of the Common Law, in History of the Bench and Bar of California 47 (Shuck ed. 1901).
67 Id. at 48.
68 1 Cal. 588, 604 (Appendix) (1850).
69 Id. at 591.
70 Shuck, op. cit. supra note 66, at 48-49.
In his address to the Legislature in 1849 Governor Burnett pointed out that "a sufficient number of copies of both the civil code and the code of practice [of Louisiana] could be procured in New Orleans at a much less cost than they could be published here." The Senate Committee, in support of its recommendation made February 27, 1850, that the Common Law be adopted instead of the Civil Law, stated:

Books are to a lawyer or a judge what tools are to a mechanic, or surgical instruments to a surgeon; and it is important that such books should be cheap, accessible, and convenient for use. Adopt the Common Law, and lawyers, and judges, and the community at large can readily procure all necessary books, at a moderate price, in their own tongue. On the other hand, substitute the Civil for the Common Law, and it will be with great delay and expense, in limited supplies, and in strange tongues, that books can be procured which will be found absolutely necessary for the lawyer and judge in the intelligent administration of the system.

How far the Legislature was influenced by the argument over "books" is difficult to determine, but it is known that the availability of particular law books in a particular frontier community was sometimes a factor in the selection of law for the community. For instance, the fact that Governor St. Clair of the Northwest Territory brought with him a compilation of Pennsylvania statutes—and the judges, who were from New England, failed to bring their statutes—resulted in the adoption from Pennsylvania of most of the laws of the Northwest Territory.

Where, as in California, the English common law was made the rule of decision, questions arose as to which English statutes, if any, should be considered a part of the common law. A review of the manner in which these questions were dealt with in the western territories will be found in the study of Territorial Courts and Law referred to above. In California the questions were causing difficulty as late as 1917.

\[71 Id., at 47.\]
\[72 1 Cal. 588, 602-03 (Appendix) (1850).\]
\[73 Blume, Legislation on the American Frontier, 60 Mich. L. Rev. 317, 324, 334 (1962).\]
\[75 In Martin v. Superior Court, 176 Cal. 289, 293, 168 Pac. 135, 136 (1917), Henshaw, J., stated: "It would be strange, indeed, if our legislature should have designed to limit the applicability of the code section to the ancient and frequently most barbarous rules and customs of the common law, and in so doing refuse to take into account the mitigation of their harshness and the broadening of the rules themselves which followed the successive enactments of the English statutes. To the con-\]
Due to the absence in frontier areas of the books necessary to determine how far the English common law had been modified by English statutes, and due to the absence of the statutes themselves, attempts were made to have the applicable English statutes listed or reprinted or re-enacted as American statutes. Another solution to the problem was the adoption of codes which would in effect re-enact all English statutes that otherwise would be in force as part of the common law. Referring to the decision of California's first Legislature to adopt the common law, Kleps, in "The Revision and Codification of California Statutes 1849-1953," states:

While this decision avoided the necessity for the legislature's attempting to enact a complete code of laws, that first session did enact detailed statutes governing crimes, criminal procedure, civil and probate procedure and corporations, with the result that substantial portions of the law were in effect codified for the time being.

The concept of "complete" codification was kept alive, and ultimately prevailed.

An influence of the California frontier—as distinguished from frontier influences common to all frontier areas—will be found in section 621 of Field's Civil Practice Act of 1851.

In actions [in justices' courts] respecting "Mining Claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar, or diggings, embracing such claim; and such customs, usages, or regulations, when not in conflict with the Constitution and Laws of this State, shall govern the decision of the action.

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77 Blume & Brown, supra note 74, at 512-13.
79 Ibid.
80 Id. at 766-779.
81 Cal. Stat. 1851, ch. 5, § 621, at 149. The San José Daily Herald, November 18, 1879, after quoting this section of the Practice Act, stated: "The principle contained in the fifty-two words above quoted was adopted in other mining regions of the country, and finally by the Congress of the United States. The author of it has seen its wisdom vindicated by more than twenty-eight years of experience, and for it the people of the State and of Nevada should ever hold him in grateful remembrance. When they think of him only as a judge deciding upon the administration of laws
An adaptation to California conditions will be found in a provision that in the courts of specified counties "it shall be lawful, with the consent of both parties, to have the process, pleadings, and other proceedings in a cause in the Spanish language." Section 219 of the Civil Practice Act of 1851 contained liberal exemptions from execution including mining equipment and the "law libraries of an attorney or counselor." Field's biographer—Swisher—states:

Although generous humanitarian legislation has characterized much of the frontier law-making experience, it is to be noted that at this time Field's leadership in the movement suggested a tolerance and human sympathy quite different from the rigid attitude toward debtors which had been taken by his forebears, and which seemed more nearly to characterize him in his later years. He took pride in the fact that he supported a homestead exemption bill, and that he helped successfully to resist a reduction of the exemption from five thousand to three thousand dollars.

In an attempt to explain certain paradoxes in Stephen J. Field's career, Howard J. Graham, in "Justice Field and the Fourteenth Amendment" points out that "until about 1870, in matters affecting property rights, Field was a liberal, restrained judge, tolerant of legislative innovation," but then a change took place. "The mild paternalist of the fifties become the arch-individualist of the seventies and eighties." Roscoe Pound of the Harvard Law School in The Spirit of the Common Law, after referring to "nineteenth-century decisions as to the right to pursue a lawful calling and liberty of contract, which bore so grievously upon social legislation," stated:

Here it is significant that the prophet of a belated individualist crusade, the late Mr. Justice Field, had added to a Puritan ancestry and Puritan bringing up, careful study of the common law and practice of his profession on the frontier at a time and in a place where the individual counted for more and the law for less than has been usual even on the frontier. No doubt the latter circumstance had its influence. (Reprinted in Pomeroy, op. cit supra note 38, at 5 (both editions).

Cal. Stat. 1851, ch. 5, § 646, at 152.

The exemptions provided were more extensive than those provided by § 839 of the draft Code of Civil Procedure of New York "reported complete in 1850."


52 YALE L.J. 851, 856 (1943).

Id. at 856.


Id. at 43-49.
But Pound's speculation that a Puritan background plus experience on the California frontier shaped Field's thinking in later life is not supported by the facts. Almost immediately after his arrival in California Field was engaged in strenuous efforts to bring legal order out of the chaos of individual action by drafting elaborate statutes establishing a court system, a system of criminal procedure, and a code of civil procedure. He had no reverence for the common law. He was buoyed by the hopes and promises of the new frontier. In an account of his "First Experiences in San Francisco" Field stated:

There was something exhilarating and exciting in the atmosphere which made everybody cheerful and buoyant. As I walked along the streets, I met a great many persons I had known in New York, and they all seemed to be in the highest spirits. I caught the infection. I found myself saying to everybody I met, "It is a glorious country."

While the specific reference in this statement was to the "glorious" weather of the particular day, more than that was involved. The exhilaration experienced was that of a person who on a "glorious" day in a "glorious" country is engaged in an "exciting" and "glorious" adventure.

As California ceased to be a frontier community and the exhilaration originally generated by the "new" frontier gradually faded, there may have been a return to Puritan ideas, or, as suggested by Graham, new influences may have entered the picture:

The two historic events which served to crystallize Field's fears and affect his reorientation were the Franco-Prussian War and the Paris Commune. Like many Americans living in the chaos of the Reconstruction period, fearful that their new industrial order might be jeopardized almost at the moment of its birth, Justice Field was appalled at the recrudescence of revolution in Europe. Under the cumulative impact of successive shocks, and because his personal experiences abroad and in California rendered him particularly sensitive to these influences, he became an apostle of reaction, determined, in his own later phrase, "to strengthen, if I could, all conservative men."

In the 1850's while the last western frontier was still "new" Field as a legislator, according to Professor Pomeroy, exhibited a "peculiar talent as a legal reformer," and "exhibited the same tendency upon the Bench" as shown by his "constant rejection of ancient common-law

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89 Field, op. cit. supra note 1, at 12.
90 Graham, Justice Field and the Fourteenth Amendment, 52 YALE L.J. 851, 857 (1943).
dogmas.” Field in his early life was not “an apostle of reaction,” and any development in this direction should not be attributed to his early experiences on America’s “last” frontier.

91 Pomeroy, op. cit. supra note 38, at 32-33.