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David Dudley Field's visit to Australia, 1874

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DAVID DUDLEY FIELD'S VISIT TO AUSTRALIA, 1874

*Greg Taylor**

Abstract

Legal contacts between the United States of America and Australia in the nineteenth century appear to have been quite exiguous. One important episode about which little is known is the visit of the famous American codifier David Dudley Field to Australia in 1874. Field was an inveterate traveller but also related by marriage to the Governor of South Australia, Sir Anthony Musgrave. His visit included four colonial capitals – Adelaide, Melbourne, Sydney and Brisbane – and was extensively reported in the press of the day. He had several meetings with important legal personages. This paper tells the story of this unusual event on the nineteenth-century Australian legal scene, and then asks whether Field's visit caused Australians to seek inspiration for legal ideas outside the usual Imperial sources – and whether Field himself was enthused by Australian innovations such as the Torrens system of lands titles registration and the secret ballot.

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1. Introduction

Famously, Prince Otto von Bismarck was asked, near the end of his life, what the most important historical fact of his time was. Presciently both as far as the English language and the history of his own country were concerned, he answered : the fact that the North Americans speak English.

Twentieth-century history proved him right through at least two major incidents. Yet much foresight was needed to make the observation just quoted in 1898; Prince Bismarck made it only at the very start of what later became known to some historians as the “Great Rapprochement” between the United Kingdom and the United States of America. This paper deals with an event that, by comparison with wars and revolutions, is quite small beer : the visit of David Dudley Field to Australia from 10 March to the end of April 1874. Nevertheless, this event in Australian legal history – I am tempted to say, given the lack of use that was made of this opportunity for mutual exchange of ideas : this non-event in Australian legal history – shows how foreign the United States of America and the British colonies remained towards each other in the 1870s, before the start of the “Great Rapprochement”. The Australian colonies, at least, still looked almost exclusively to London, or occasionally to their own indigenous resources, for ideas for improving the law; they did not look across the Pacific, and while they treated David Dudley Field with courtesy, they, as a rule, did not look even on the famous American codifier as a possible source of inspiration. Even the few attempts to emulate some part of Field’s Codes in some way or other ultimately failed; at times, their un-British, American heritage was a point that actually worked against them.

2. The love story

Field’s visit was not undertaken with the aim of improving Australian law. Rather, he went to see his daughter. Thus, this paper begins, perhaps unusually in the law, with a love story – that between Jeannie

Lucinda Field, one of the codifier's three children, and (Sir) Anthony Musgrave, who became Governor of many places within the British Empire.

In chronological order, Mr Musgrave, or Sir Anthony as he became in 1875, was Vice-Regal representative in : St Vincent; Newfoundland; British Columbia; Natal; South Australia; Jamaica; and Queensland. He had been a student in the Inner Temple, but for him the Caribbean must have seemed as much home as London, for he was born in Antigua, where he also became Colonial Secretary well before his thirtieth birthday (the appointment to which office caused him to suspend his legal studies). He was clearly a man of capacity and intelligence as well as blessed with good luck, for he managed those seven Vice-Regal appointments in colonies of different shapes and sizes without once being recalled or severely reprimanded by his superiors in London or causing any local discontent of any significance.

According to the *Australian Dictionary of Biography*, Anthony Musgrave met his new wife on the way from the Vice-Regal office in Newfoundland to that in British Columbia in mid-1869. But he had met her uncle, David Dudley Field's brother Cyrus, in 1866, as Governor of Newfoundland, upon the laying of the Trans-Atlantic Cable – Cyrus being one of the chief movers and shakers behind its construction.¹ There being then no trans-Canadian railway, in order to effect his transfer from Newfoundland to British Columbia Musgrave was compelled to travel *via* San Francisco, where he took a steamer north to Victoria, British Columbia. There his appointed task was to prepare for the admission of British Columbia into the Canadian confederation, something which he successfully managed and which resulted, among other things, in the construction of the trans-Canada railway.

On 20 June 1870, Musgrave was back in San Francisco marrying his second wife, David Dudley Field's daughter – 'a beautiful American',² according to a report written fifty years later by a person who might still have remembered her. It was his second marriage; his first wife had died while he was still in the Caribbean, in 1858. His second wife, formerly Miss Field, was five years his junior, but was to outlive him

¹ Field, *The Life of David Dudley Field* (Charles Scribner's Sons, New York 1898), p. 244.

² "Register" (Adelaide), 29 September 1920, p. 8.

for over thirty, dying in 1920 in England. There seems to be no correspondence between them that survives, or any other direct evidence of their relationship, but there is nothing to suggest that it was anything other than a successful marriage. It lasted eighteen years : Sir Anthony Musgrave himself died in office in Queensland in 1888 having just lost a constitutional battle with the Premier of that colony regarding the prerogative of mercy – a controversy which showed that, perhaps, he was ready for retirement, although hardly for death.

David Dudley Field outlived his son-in-law – he died only in 1894 – but there is already, before Sir Anthony Musgrave’s death, one report of the ‘large private income’³ supposedly settled by him on his daughter. Thanks to his practice, Field was a wealthy man, and the death of her husband, while it was clearly an emotional wrench for Lady Musgrave, was not the financial catastrophe it might otherwise also have represented. At the time of her death in 1920, it was noted that the town of Lucindale in South Australia’s south-east district had been named for Lady Musgrave, and that the Queensland government yacht had also borne her name.⁴ This is of some significance given that it was on this yacht in 1891 that first drafts of the Australian Constitution were revised by a small party of leading lights; Monash University still runs a yearly Lucinda lecture named after the yacht, and thus also after Lady Musgrave.

3. Itinerary

An enthusiastic traveller, David Dudley Field was not one to pass up the chance to visit his daughter even at the end of the world. It need hardly be said that the greatest volume of American traffic was to the

³ Times, 18 December 1888, p. 11. Contrast the “Brisbane Courier”, 20 October 1888, p. 6, contradicting some in-essential details of that report and also suggesting that some of the money came from the Musgrave side.

⁴ “Register” (Adelaide), 28 September 1920, p. 4.

United Kingdom and Europe, and for Americans Australia was on the way to nowhere. At least the arduous journey between New York and San Francisco or another suitable western port had been made much less demanding by the railway.

The "South Australian Register"⁵ reported the arrival of Mr & Mrs Dudley Field in Adelaide, coming, however, not from the American west coast but Calcutta, on 10 March 1874. (Mrs Field was not Mrs Musgrave's mother, but her step-mother; her mother had died as long ago as 1836.) It was a propitious day for Field's arrival. His daughter, Mrs Musgrave, had given birth to another grandson for him on the very morning of the day of his arrival (in the early afternoon).⁶ The future Brigadier-General Arthur David Musgrave was the only one of her four children to survive Lady Musgrave herself.

The happy co-incidence of the arrival of the grandfather with the birth caused the resident humourist at the "South Australian Register"⁷ to write a pastiche of Longfellow, whom he chose to honour the mother's nationality :

The Two Strangers

Two Strangers, one unknown and one renowned,
Came to our City in the early morn;
The while upon the wind the jingling sound
Of Adelaide's Albert Bells was harshly borne.

Their face and figure were not quite the same —
The one with life-long study growing grey,
The other, as the cherubs whence he came,
Looked fat and dimpled where he sleeping lay.

And he who wore the greybeard's learned mien
Had lately left the Western World behind,
Where Massachusetts to his youth had been
A second mother and a mentor kind.

⁵ 11 March 1874, p. 4.

⁶ "South Australian Advertiser", 11 March 1874, p. 2. A lightly amended translation of this report into German may be found in the "Südaustralische Zeitung" (Tanunda), 17 March 1874, p. 9.

⁷ 17 March 1874, p. 5.

His was the hand that seized the tangled skein,
 And swift unravelled all the knotted threads,
 And made the network of the law more plain
 To weary clients with bewildered heads.

His was the voice which ever has been heard
 In vindication of the priceless boon,
 That free-trade has invariably conferred
 On mortals resident beneath the moon.

His was the name unto whose high renown
 All Western Jurists due obeisance yield,
 For he, the Stranger, coming to our town
 Was Law's Reformer, David Dudley Field.

But he who simultaneously arrived,
 A welcome stranger to our southern shore,
 And in his nurse's arms fed, slept, and thrived,
 No lines of care upon his forehead bore.

He knew not and cared less how fared the world,
 Or how the bad might triumph o'er the good;
 But lay there with his limbs in slumber curled,
 His one desire at present simply food.

What cared he though his sire's Vice-Regal rank
 Ensured him honours other babes beyond,
 It lent no sweetness to the fount he drank
 Nor made the mother's heart a wit more fond.

What cared he though this Stranger from the West
 Might call her daughter, whom his sire called wife?
 Though he of Jurists might be far the best—
 He'd never heard of him in all his life.

Grandsire and grandson, welcome Strangers twain
 Together reaching this our southern strand.
 Oh, may ye joy, peace, comfort, and true blessing rain
 On her our own dear Lady of the Land.

It was fortunate that Field had not come to Australia for the poetry, or the humour.

Field's activities confirm that his visit was indeed, as the newspapers⁸ put it, 'mainly for a holiday trip', as well as seeing his family in Adelaide. Field, usually accompanied by his own daughter and her husband – Her Majesty's representative in South Australia – visited, in Adelaide itself, the Supreme Court of South Australia (of course),⁹ the Emerson troupe of Californian minstrels,¹⁰ the Botanic Gardens,¹¹ a charitable concert,¹² the flower show,¹³ a cricket match,¹⁴ a gymnastic exhibition,¹⁵ the model school (where Field's appearance was the occasion for a half-holiday for the pupils, and he gave them a little speech about their good fortune in attending such an excellent school in a colony in which all positions but the very highest were open to them)¹⁶ and the Lunatic Asylum (where there was presumably no half-holiday).¹⁷ When the Governor was accompanied on these visits by his aide-de-camp/private secretary, it was a real family affair, for that gentleman was his Excellency's nephew and also named Anthony Musgrave. Field also took the opportunity to visit the Province's mid-north with George Hawker, a leading colonist and Cambridge graduate who had been away from the Province for some years and had been on the same boat into Adelaide as Field. Hawker owned the large property "Bungaree" near Clare.¹⁸ A pen portrait of Field taken from a standard biographical dictionary also appeared in the colony's leading newspaper, the "South Australian Register".¹⁹

Despite these many and varied public appearances, the Adelaide correspondent of the "Border Watch"²⁰ newspaper of Mount Gambier on the Province's eastern border declared that Field 'has excited but little

⁸ "Brisbane Courier", 23 April 1874, p. 2; "Queenslander" (Brisbane), 25 April 1874, p. 2. In relation to South Australia, this is underscored by the fact that searches of various indexes in the State Archives have found no official correspondence from him to the provincial government. Presumably he arranged his visit by private letters to his daughter and son-in-law.

⁹ "South Australian Advertiser" (Adelaide), 26 March 1874, p. 2.

¹⁰ "South Australian Advertiser" (Adelaide), 13 March 1874, p. 2.

¹¹ "South Australian Advertiser" (Adelaide), 20 March 1874, p. 2.

¹² "South Australian Chronicle and Weekly Mail" (Adelaide), 21 March 1874, p. 1.

¹³ "South Australian Register" (Adelaide), 27 March 1874, p. 6; "South Australian Advertiser" (Adelaide), 27 March 1874, p. 3.

¹⁴ "South Australian Register" (Adelaide), 27 March 1874, p. 6; 28 March 1874, p. 6.

¹⁵ "South Australian Register" (Adelaide), 24 March 1874, p. 5.

¹⁶ "South Australian Register" (Adelaide), 20 March 1874, p. 5; 28 March 1874, p. 2; "South Australian Advertiser" (Adelaide), 20 March 1874, p. 2. Field would hardly have intended the exception he stated, that of the highest position in the Province (Governor), to constitute advocacy of republicanism before his youthful audience and the Governor himself.

¹⁷ "South Australian Register" (Adelaide), 20 March 1874, p. 5.

¹⁸ "Northern Argus" (Clare), 24 March 1874, p. 2.

¹⁹ 18 March 1874, p. 4.

²⁰ 21 March 1874, p. 3.

notice' during his stay in South Australia, but 'possibly the legal profession of which he is so distinguished an ornament will be prevailed upon to do him hono[u]r in some public way'. There was a dinner at the Adelaide Club presided over by the Chief Justice, Sir Richard Hanson²¹ – who was far more interested in history and critical studies of the Bible than in the law, and at which Field made no speech.²² In the following year (Sir) Samuel Way Q.C. recalled another occasion, a 'meeting of the legal profession' that

had not been reported, but he would tell them what Mr Field had said about law reform. He had said that the Anglo-Saxon race in all parts of the world were determined that persons who wished to ascertain the law should not be driven to search for it in reports and in the so-called unwritten law, but that the law should be consolidated into a code; and that if the legal profession did not do it for them they would do it for themselves. And he (Mr Way) was glad to tell them that the Lord Chancellor of England had promised that a code should be prepared and brought into Parliament. It would be impossible to ask a law officer of the colonies to bring down a code of our laws, but much could be done at consolidating the law.²³

His predecessor as Attorney-General, Charles Mann, had said similar things about Field's message in dealing with a private member's proposal to introduce the *Indian Evidence Act 1872* in South Australia only a few months after Field's departure.²⁴ So it was not just flower shows and cricket matches after all. But although Mann A.-G. proclaimed himself convinced by Field's evangelisation for codification and Way Q.C. referred to imminent Imperial codification, South Australia remains codeless to this very day.

The Fields left Adelaide after three weeks on Tuesday 31 March 1874 and undertook the two-day voyage to Melbourne – the railway was not yet complete – arriving there with their servant on Maundy Thursday, 2 April.²⁵ In this much larger pond, as shortly also in Sydney, Field was a noticeably smaller fish; he had

²¹ "South Australian Register" (Adelaide), 26 March 1874, p. 5.

²² "Border Watch" (Mount Gambier), 1 April 1874, p. 2.

²³ "South Australian Register" (Adelaide), 2 February 1875, Supplement p. 1; see also a similar statement by (Sir) James Boucaut in South Australian Parliamentary Debates, House of Assembly, 5 May 1874, col. 30.

²⁴ South Australian Parliamentary Debates, House of Assembly, 29 July 1874, col. 1131.

²⁵ "South Australian Register" (Adelaide), 1 April 1874, p. 4; "Argus" (Melbourne), 4 April 1874, p. 4.

not announced his arrival in advance to anyone of importance,²⁶ and he had no influential relations to fall back on either. It was also Easter, so many people must have been on holidays or preoccupied with religious duties. His arrival was noted in the newspaper,²⁷ as was a day trip he made to the gold town of Ballarat where he was conducted around the sights of the town and its environs by a fellow-countryman named Ned Brayton.²⁸ There is no evidence that he met any legal luminaries.²⁹

Field's biographer tells us that in Melbourne he

was surprised to find a city not forty years old (it was first settled in 1835), with over two hundred thousand inhabitants; with streets as wide as our New York avenues; with stately Parliament Houses; an University and a Cathedral; libraries and museums; a Royal Park and other public gardens; with Courts of law and banking houses, representing the great firms of London; and clubs and theatres and all the signs of European civilization. Best of all were the private residences, whose architecture and tasteful surroundings showed that they were the abodes, not only of wealth, but of English culture and refinement.³⁰

No doubt he knew that this wonder of the world was due to gold. But a wonder it still was.

Arriving in Sydney on 10 April³¹ – which must have meant less than a week, most of it over the Easter break, in Melbourne – Field managed, unlike (it seems) in Victoria, to make two important contacts : Sir Henry Parkes and Sir Alfred Stephen. The latter had just resigned from the Chief Justice's office in New

²⁶ At least, a search for letters from Field in several likely indexes to correspondence in the Victorian Archives threw up nothing.

²⁷ "Argus" (Melbourne), 4 April 1874, p. 5.

²⁸ "Ballarat Courier", 6 April 1874, p. 2.

²⁹ The Chief Justice, Sir William Stawell, was on leave in England. Sir Redmond Barry, another prominent and long-serving Judge, has left voluminous and well-indexed papers in the State Library of Victoria; Field's name does not appear in them.

³⁰ Field, *Life of Field*, pp. 252f.

³¹ "Empire" (Sydney), 11 April 1874, p. 2. The "Sydney Morning Herald", 11 April 1874, p. 6 has the Fields arriving from Brindisi – I attribute this to error.

South Wales and had also taken the lead, as President of the Law Reform Commission, in drafting what was eventually to become the *Criminal Law Amendment Act 1883*. This was not quite a Fieldian code, but rather more than a mere consolidation of the existing statutes also. The party made an excursion on the Zig Zag Railway (still a tourist attraction in the Blue Mountains around Sydney) and then proceeded to lunch and speeches (in the absence of Sir Henry Parkes, who had had to return to Sydney for parliamentary duties). The reported speeches consisted largely of the usual complimentary bromides, but Field did express the hope that Australians, despite their close ties with the British Empire, would also ‘reach out [...] towards us, who desire to shake hands with you across the Pacific sea’.³² There was no talk in his public speech, as reported in the newspapers, of codification, but it was one of the topics of conversation during the private talks. Of particular interest to Sir Alfred Stephen was how Field managed to have some of his Codes passed with comparative speed³³ – for Sir Alfred was then four years into what would turn into a twelve-year battle to have his own more modest proposal passed.

At all events, the “Sydney Morning Herald”³⁴ expressed the hope that Field, ‘in his intercourse with the government’, had ‘succeeded in impressing on them the desirableness and the feasibility of simplifying laws and legal procedures’. This statement was followed by a reasonably long account of Field’s life and works, with particular emphasis on his proposed international code and the fusion between law and equity that he had actually brought about in some American States. It noted that Field had presented copies of his Codes to the Parliamentary Library,³⁵ and concluded with the hope ‘that they will not be allowed to sleep in undisturbed and ignominious dust’. Parkes and Field were to meet again in 1884 in the United States of America,³⁶ but a letter to Field from Stephen in 1892 suggests that the two gentlemen had barely been in contact in the eighteen years’ interval. Stephen wrote to ask whether the Field Codes had been passed into law anywhere, given that he proposed to become ‘more deeply interested in the question of criminal law codification’³⁷ – a strange and optimistic goal for one in his ninety-second year!

³² “Sydney Morning Herald”, 18 April 1874, p. 9 (see also 21 April 1874, p. 4); “Empire” (Sydney), 20 April 1874, p. 3.

³³ “Sydney Morning Herald”, 19 January 1875, p. 7.

³⁴ 21 April 1874, p. 4.

³⁵ It had none according to the *Catalogue of the Library of the Parliament of New South Wales* (Government Printer, Sydney 1866).

³⁶ Field, *Life of Field*, p. 298.

³⁷ The letter is preserved in the Australian Joint Copying Project, reel M412 – a copy of materials preserved in Duke University, U.S.A.

Field left Sydney on Saturday 18 April, along with his servant and a Master Field, who is not mentioned in the records before this.³⁸ The party enjoyed a night's stop-over in Brisbane on 21/22 April.³⁹ On Tuesday 21 April Field was able to squeeze in a visit to the Legislative Assembly of Queensland, where he occupied the post of honour at the Speaker's right and was said to have been 'very much gratified with the courtesy shown him during his stay in Brisbane'.⁴⁰ He again presented a set of books to the local Parliamentary Library, probably his Codes.

4. Echoes

a. Fusion and civil law

It was just as well that Field had come to Australia 'mainly for a holiday trip'⁴¹ and not to spread the word of codification, for the results of his sojourn were meagre indeed on the legal front.

It was of course the case that some Australians were already aware of Field's Codes; they had been mentioned in Australian discussions as far back as the 1850s, sometimes as reprints of discussions in England on the idea of fusing the equity and law Courts that was then under consideration there but which Field had helped to achieve in the early 1850s across the Atlantic.⁴² Field's innovation on this front had been

³⁸ "Empire" (Sydney), 20 April 1874, p. 2.

³⁹ Arrival and departure are both recorded in "Queenslander" (Brisbane), 25 April 1874, p. 12; the missing mention of Field himself as an arrival (repeated in "Brisbane Courier", 22 April 1874, p. 2) is no doubt a mere error on the list, given that he is clearly recorded as having departed from Sydney on the same ship as his family.

⁴⁰ "Brisbane Courier", 23 April 1874, p. 2.

⁴¹ See above, fn 8.

⁴² "Sydney Morning Herald", 6 September 1851, p. 3; "South Australian Register" (Adelaide), 14 October 1851, p. 3; 29 December 1851, p. 3 (pleading and practice rather than fusion); 12 June 1856, p. 2 (merits and supposed ease of codification).

the subject of much interest and attention in England,⁴³ given that the topic was clearly something that would have to be tackled sooner or later. In 1868 (Sir) Richard Chaffey Baker – a member of Lincoln’s Inn who was later a very prominent, but at this point a mere novice twenty-seven-year-old member of the South Australian Parliament – said that he hoped ‘in the future [to] see his way clear to adopt the New York Code’.⁴⁴ He never quite got around to this, even though he remained in the South Australian Parliament, with a few years’ interruption, until Federation in 1901. On the other hand, another barrister-politician, Edward MacDevitt, declared in the Parliament of Queensland in 1872 that the New York Code ‘had been found to be very defective, and had continually been amended’.⁴⁵

Once Field had come and gone, his name was occasionally trotted out to lend support to this or that particular cause. This might be the cause of continued immigration, which Field was said by the South Australian Premier, (Sir) Arthur Blyth, to have expressed great surprise at opposition to,⁴⁶ or the need for more railways in the mid-north of South Australia;⁴⁷ a more obvious topic with which Field’s name could be associated was legal reform, most notably the fusion of law and equity. The South Australian Attorney-General, Charles Mann, said in Parliament on 6 May 1874, only five weeks after Field’s departure, that he ‘had a conversation with Mr Dudley Field, the eminent jurist, and he believed the real remedy would be the adoption of a system something similar to that in force in America’⁴⁸ rather than the judicature system, although wherein the difference lay and why the American system rather than the British promised success he did not state. Mann A.-G. also proposed a Local Courts Bill in the same year which, he said, contained some clauses inspired by the Field Codes; it did not pass.⁴⁹ His visit left no further traces in South Australia beyond these abortive moves. South Australia adopted the English version of fusion in 1879.⁵⁰

⁴³ Dorsett, “Procedural Innovation : the First Supreme Court Rules of New South Wales and New Zealand” (2011) 35 Aust Bar Rev 128, 129.

⁴⁴ South Australian Parliamentary Debates, House of Assembly, 25 November 1868, col. 932.

⁴⁵ Queensland Parliamentary Debates, Legislative Assembly, 16 August 1872, p. 913.

⁴⁶ South Australian Parliamentary Debates, House of Assembly, 6 May 1874, col. 60; see also “South Australian Advertiser” (Adelaide), 7 May 1874, p. 3.

⁴⁷ “Northern Argus” (Clare), 5 February 1875, p. 3.

⁴⁸ “South Australian Advertiser” (Adelaide), 7 May 1874, p. 3. There is a slightly different version in South Australian Parliamentary Debates, House of Assembly, 6 May 1874, coll. 80f.

⁴⁹ South Australian Parliamentary Debates, House of Assembly, 10 September 1874, col. 1610.

⁵⁰ *Supreme Court Act 1878*.

In New South Wales, Sir Alfred Stephen also advocated the amalgamation of law and equity in a speech in the Legislative Council in 1876, referring to Field and the example of New York as well as that of England.⁵¹ Field also found himself mobilised in the debate on what became the partial reform introduced by the *Married Women's Property Act 1879* of New South Wales : Mr (later Mr Justice) William Windeyer informed the House⁵² that Field had declared that 'Scarcely any one of the great reforms which have been effected in this State has given more entire satisfaction than this'. He appears, however, to have got his knowledge of Field's views from a recent debate in the House of Lords which he was quoting more or less unchanged;⁵³ and indeed the preamble of the Act of 1879 referred to the need to adopt English law in New South Wales. As for the judicature system, it was, famously, not adopted in New South Wales until 1972.⁵⁴

b. Criminal law

As already noted, New South Wales was engaged, at this point, in the process of consolidating its statutory criminal law, which had started in 1870 and eventually bore fruit in 1883. A recent history of the criminal law of New South Wales claims that 'although Sir Alfred Stephen and David Dudley Field were both law reformers, their views on codification were diametrically opposed. Stephen was an authoritarian pragmatist [...]; Field was a Benthamite codifier.'⁵⁵ Certainly Stephen rejected any attempt at codifying the criminal law, as that history records,⁵⁶ largely because he considered it impracticable to ask Parliament to deal with such a huge topic. Nevertheless, the source just quoted overstates the honour due to Field and thus also the differences between him and Stephen. It should first of all be noted that what is commonly

⁵¹ "Sydney Morning Herald", 20 April 1876, p. 2.

⁵² "Sydney Morning Herald", 2 November 1878, p. 3. There is a similar statement by the Premier of South Australia, (Sir) William Morgan, in South Australian Parliamentary Debates, Legislative Council, 22 June 1880, col. 171.

⁵³ Parliamentary Debates, House of Lords, 21 June 1877, col. 75. The ultimate source of this appears to be House of Commons Parliamentary Papers, 1867-68 VII 339, 343, 349. No acknowledgement of any source appears; but it is possible that Mr Windeyer made his indebtedness clear by, for example, obviously reading from the source without actually naming it.

⁵⁴ *Supreme Court Act 1970*.

⁵⁵ Woods Q.C., *A History of Criminal Law in New South Wales : The Colonial Period, 1788 – 1900* (Federation, Anandale 2002), p. 294. It has to be said this work's reach sometimes exceeds its grasp. Thus, at p. 292 fn 1, the author states that it 'may have been' a purpose of Field's to visit his daughter, and records that at this point she was known 'in republican style' as Mrs Musgrave. This had nothing to do with any form of republicanism; a Knighthood had not by then been conferred on her husband.

⁵⁶ Woods Q.C., *History of Criminal Law*, p. 345.

thought of as Field's Penal Code is in fact largely the work of one W.C. Noyes, a fellow-commissioner of Field's; and he carried out the work of codification with such 'undiscriminating thoroughness'⁵⁷ in incorporating existing statutes, combined with such reluctance to replace case law with legislative definitions even in relation to crucial terms in common offences such as larceny and breaking and entering, that it has been truly said that '[t]he Field Code marked the death of the codification spirit. Having begun with Bentham as "the clearing of the brain", it became at the end a re-arranging of the attic.'⁵⁸ The point of interest at present, then, is that Field/Noyes and Stephen were hardly occupying diametrically opposed positions; both had, after all, to struggle with the great practical problem of criminal law reform in every democracy, namely the difficulty of finding enough legislative time for it, which in turn provided an in-built incentive not to attempt too much innovation; but still Stephen learnt little from Field/Noyes, and borrowed less.

One clause of Stephen's proposed consolidation that, however, certainly was taken from the New York Code is the final one, abolishing the rule that penal statutes should be construed strictly. One "Touchstone" – pen-names were often used in newspaper correspondence then – took the trouble to write to the "Sydney Morning Herald"⁵⁹ in order to object to this innovation and the idea of an 'elastic criminal code', whereupon one of the Law Reform Commissioners, styling himself "Senex" (Latin for "old man"), wrote in reply that the clause was, in fact, taken from the Penal Code of David Dudley Field,⁶⁰ 'one of the ablest and most distinguished jurists of the age, and eminent especially for that precision and accuracy of language which have made his Civil Code famous throughout Europe'.⁶¹ On "Touchstone's" providing perhaps the obvious reply, namely that an appeal to authority in this form did nothing to justify the clause,⁶² "Senex" responded that the proposal was 'just and reasonable in itself, opposed to no sound principle, and calculated to avoid much inconsistency and absurdity'.⁶³ The concluding shot was fired by "Touchstone", who displayed a fine awareness of the grand sweep of legal history by pointing out that

⁵⁷ Kadish, "The Model Penal Code's Historical Antecedents" (1988) 19 Rutgers LJ 521, 535.

⁵⁸ Kadish, (1988) 19 Rutgers LJ 521, 536. See also Pound, "David Dudley Field : An Appraisal" in Reppy (ed.), *David Dudley Field : Centenary Essays* (New York University School of Law, New York 1949), p. 6.

⁵⁹ 26 January 1877, p. 5 (emphasis in original).

⁶⁰ Thus, s 4 of the Californian Penal Code, for example, runs to this day as follows : 'The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.'

⁶¹ "Sydney Morning Herald", 3 February 1877, p. 5.

⁶² "Sydney Morning Herald", 6 February 1877, p. 5.

⁶³ "Sydney Morning Herald", 8 February 1877, p. 5.

such maxims of interpretation as he was defending from statutory abrogation had been stretched beyond good sense in the days of the “Bloody Code”, but still had a proper and more limited role in present times.⁶⁴ The discussion concluded there; the proposed final clause was abandoned; no such section may be found in the *Criminal Law Amendment Act 1883* when it finally made it to the statute books.⁶⁵ Two-and-a-half years later, however, it was probably this that an anonymous book reviewer had in mind in stating that, among other things, ‘some most un-English provisions taken from the New York Code has [sic] been serious obstacles to the attainment of any substantial reform in our criminal law’.⁶⁶ At least, there is no other clear evidence of any American influence on the Act of 1883; for, perhaps as a result of such rebukes, Sir Alfred Stephen’s *Manual of Criminal Law*,⁶⁷ published as a guide to the newly enacted Act of 1883, nowhere mentions Field/Noyes as a model, although their provision about murder is given, alongside several others, in a comparative note that forms an appendix to an Appendix!⁶⁸

The clause to which “Touchstone” objected may, however, be found in the Bill as it existed in 1873, showing that even this minor homage to Field cannot have been the fruit of his visit in the following year.⁶⁹ There is no further mention of Field in any official or unofficial sources.

The only major area in which it can be said that the work of Field & Co. was exploited in Australia, whether in the criminal law or outside it, was in a few sections of Sir Samuel Griffith’s Criminal Code for Queensland – which, given its subsequent adoption in many places around the world, from Malawi to Israel,⁷⁰ is no small honour. If attributable to personal contacts at all, this was not, however, due to Field’s sojourn in 1874, but rather to Sir Samuel Griffith’s own visit to the United States of America, on the way back from

⁶⁴ “Sydney Morning Herald”, 10 February 1877, p. 5.

⁶⁵ Woods Q.C., *History of Criminal Law*, pp. 313-315.

⁶⁶ “Sydney Morning Herald”, 6 November 1879, p. 10.

⁶⁷ Government Printer, Sydney 1883.

⁶⁸ At p. 203.

⁶⁹ Woods Q.C., *History of Criminal Law*, p. 314. As noted at fn 35, the most obvious place in which a copy of the Field Codes might be found, the Parliamentary Library, does not seem to have possessed one until the following year, when they were presented to it by Field. There are various other ways in which the knowledge of the Field Code might have spread in advance of his visit, however. It is barely conceivable that the two provisions were invented independently of each other, but this seems less likely.

⁷⁰ O’Regan Q.C., “Sir Samuel Griffith’s Criminal Code” (1992) 7 Aust Bar Rev 141.

London, in 1887, when he was Premier of the Colony. The principal historian of the Queensland Criminal Code comments :

Griffith based nine sections of his draft upon the Penal Code of New York. [...]his does not appear to be a significant number, but they include provisions dealing with bribery of members of Parliament (misconduct which in the United Kingdom was treated as a breach of the privileges of Parliament and punished accordingly) and with the bribery of witnesses in Court proceedings. It is perhaps unnecessary to say that these sections continue to be of some practical importance in Queensland.⁷¹

Even more significantly, perhaps, than refinements of drafting and definition in relation to existing offences, the contact with the Field Code resulted in the addition to the Queensland Criminal Code⁷² of offences on the American model relating to contempt of Parliament – an example followed also in Western Australia⁷³ – in the place of the usual British/Australian approach of leaving such contempts to be dealt with by Parliament itself. This is a very desirable reform partly for separation-of-powers reasons that are too obvious to spell out, and partly because it would allow for a judicial determination of assorted

⁷¹ O'Regan Q.C., (1992) 7 Aust Bar Rev 141, 144f. See also Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984), p. 142. The sections based squarely on the New York Code are discernible in the draft, in which the sources appear in a marginal note : Queensland Parliamentary Papers, 1897 I 657. A further similarity is pointed out by Cadoppi (transl. Cullinane J.), "The Zanardelli Code and Codification in Countries of the Common Law" (2000) 7 JCU LR 119, 147, although this is not acknowledged by Griffith C.J. in his marginal notes and is quite minimal : the – now repealed – second half of s 13 of the Code of 1899 does show some similarities with s 15 (4) of the draft Field/Noyes Code issued as *Penal Code of the State of New York – Reported Complete by the Commissioners of the Code* (Weed, Parsons & Co, Albany 1865).

⁷² Criminal Code (Qld) ss 56, 57, 58, as restored to the Code by the *Criminal Law (False Evidence Before Parliament) Amendment Act 2012* following the six-year interlude produced by the *Criminal Code Amendment Act 2006*. Despite its name, the Act of 2012 deals also with refusal to attend. In his draft (Queensland Parliamentary Papers, 1897 I 657), Griffith C.J. refers to the New York Code as models for these provisions.

⁷³ Criminal Code (W.A.) ss 56 – 59. The other Australian jurisdictions that have adopted the Griffith Code do not seem to have taken over this portion of it. A failed attempt to have the same reform made at federal level is mentioned in Campbell, *Parliamentary Privilege in Australia* (M.U.P., 1966), pp. 182f; however, some specific legislation, such as the *Public Accounts and Audit Committee Act 1951* (Clth) ss 15, 17, 21 makes such provisions in relation to the committee they establish.

Before all this, South Australia had already adopted – and then, two years before Field's visit, abandoned in favour of the inherited English law – the idea that failure to give evidence, or giving false evidence, should be a crime : *Parliamentary Privilege Act [1858]* ss 5, 13, 15; Act No. 14 of 1872, s 3. Although the brains behind the 1858 legislation, (Sir) Richard Hanson, was very widely read, a quick review of the second-reading speeches for the former Act betrays no trace of American influence, and it was too early to be influenced by Field's Penal Code anyway.

issues of law and practice, starting with the long-standing controversy about the amenability of ministerial advisers to parliamentary summonses;⁷⁴ but it has borne no fruit : a search for prosecutions under these provisions was unsuccessful.⁷⁵ New South Wales, for its part, had been considering its law of parliamentary privilege a few years after Field's visit. It made giving false evidence to Parliament an offence, which was easily done on the analogy of perjury and the *Parliamentary Witnesses Oaths Act 1871* (U.K.) s 1, but it made no attempt to copy the American innovation of making complete refusal to give evidence an offence.⁷⁶

The author just quoted goes on to mention that Griffith knew Lady Musgrave, the widow of the former Governor of the colony; but in fact Sir Anthony Musgrave was very much alive in 1887 – he died only towards the end of the following year, shortly after Griffith had ceased to be Premier. There is no mystery about the contacts between the Governor and Premier of a Colony, and this is no doubt how Griffith came to meet Field when he was in the United States of America in 1887. Accordingly, the New York Penal Code and its derivations in other parts of the United States of America are sometimes referred to even today in settling disputed points on the interpretation of the Queensland Criminal Code, although it has to be said that the emphasis in that statement is very much on the word 'sometimes' and the most extensive reference occurs in a dissenting judgment.⁷⁷

c. Victoria and the Hearn Code

In Victoria traces of Field's visit were even harder to detect. Unlike in Sydney, he had made no influential friends; unlike in Adelaide, he had not stayed for weeks and left behind many memories. Field's Code was, however, subjected to comparison with Victoria's own home-grown draft Code, the Hearn Code, by

⁷⁴ For a discussion of this with further references, see book review, (2010) 31 Adel LR 271.

⁷⁵ I conducted the search both personally and by asking the officers of the two Parliaments concerned whether they knew of any cases.

⁷⁶ *Parliamentary Evidence Act 1881* (N.S.W.) ss 5 – 7; and see the Bill for this Act, as re-printed in "Sydney Morning Herald", 9 May 1878, p. 3, cl. 13 – 15. The current law is the same : *Parliamentary Evidence Act 1901* ss 11, 13.

⁷⁷ *R v. Gatti; ex parte Gatti* [1997] 2 Qd R 481, 495-501, 508-522. The question in the case was whether it was an essential element of the offence of interfering with witnesses that the offender and the witness should conclude an agreement; the Court held that it was not; Lee J. dissented, citing numerous American authorities based to a greater or lesser extent on the Field/Noyes Code.

J.W. Rogers Q.C. at a sitting of a Joint Select Committee on 6 September 1888. Rogers Q.C. rightly damned the Victorian production of Professor Hearn, calling its arrangement ‘terribly defective and very unpractical’ and one that would be ‘utterly preventive of the general public acquiring the use which they ought to get from the Code’. Unlike the practical business-like New York Code, which was ‘drafted by very able men in America’ and arranged in an understandable way ‘irrespective of these peculiar theoretical, scientific divisions’, Hearn’s was an academic’s Code.⁷⁸

This was a very penetrating and by no means unfair criticism of Hearn’s production, which had been infected by the scientific spirit of the age – the view that science was the acme of all human knowledge which all other disciplines should aim to copy, and that it was possible to make the law more like science in its supposed precision and exactness.⁷⁹ Field himself subscribed to this view,⁸⁰ but it was so pervasive that even American opponents of Field’s codes made use of it;⁸¹ nevertheless, it was always an illusory goal based on a mirage, and Field had enough sense, unlike Hearn, not to take it to extremes. Even so, no-one in Victoria was galvanised by this realisation, as expressed by Rogers Q.C. and others, into adapting better Codes, such as those of Field, that were less tainted with the “scientific” mind-set. Hearn himself did not mention, in his chapter explaining his codification in his book *The Theory of Legal Duties and Rights*,⁸² the Field Codes in any way.

This is not surprising, for Hearn himself elsewhere cordially returned the judgments that were passed upon his own work, finding Field’s Codes ‘of much inferior value to the Indian Acts’.⁸³ Nevertheless, for

⁷⁸ Victorian Parliamentary Paper D5/1888, pp. 19f.

⁷⁹ Some extra steam may have been given to this concept by a simple, although very common mis-translation of German *Wissenschaft*, which means not, as it is too often translated, “science”, but rather “scholarship” in the sense of scholarly endeavours in both the humanities and the sciences. See further Bennett, “Historical Trends in Australian Law Reform” (1970) 9 UWALR 211, 216; Masferrer, “The Passionate Discussion among Common Lawyers about *post-bellum* American Codification : an Approach to its Legal Argumentation” (2008) 40 Arizona State LJ 173, 202-205.

⁸⁰ Subrin, “David Dudley Field and the Field Code : A Historical Analysis of an Earlier Procedural Vision” (1988) 6 Law & Hist Rev 311, 315, 328.

⁸¹ Reimann, “The Historical School against Codification : Savigny, Carter, and the Defeat of the New York Civil Code” (1989) 37 Am Jo Comp Law 95, 108-110.

⁸² Government Printer, Melbourne 1883; chapter 17.

⁸³ Hearn, “The Revision of the Law” (1879) 4 Melb Rev 237, 237.

the reasons just given it causes no surprise that it was Hearn's rather than Field's productions that remain to the present day unadopted by any legislature anywhere.

Despite his evident admiration for the Field Code, Rogers Q.C., in discussing the fusion of law and equity in Victoria proposed and carried to completion regardless of the (later) failure of the Hearn Code, made no reference to any American procedure.⁸⁴ However, the evidence taken before a parliamentary committee records an exchange stating that, in contributing to the revision of the Hearn Code for its final attempt at enactment in 1888, he did make use of the Field Code's provision on damages at least. The full exchange ran as follows :

(Sir) Henry Wrixon : At the suggestion of the Committee last year, all the new matter was omitted from the Code?

Rogers Q.C. : No, it is old law; a great deal was taken from the New York Code, and it referred to damages and the mitigation of damages, and so on.⁸⁵

Hearn had died on 23 April 1888, and any ban on borrowing from the New York Codes he might have imposed thereupon ceased. However, there is no further information to amplify this exchange just quoted in any records I have found. Even a copy of the draft of 1888 cannot be found.⁸⁶ The drafting no doubt largely happened in the privacy of barristers' offices. There is also something half-hearted about the exchange just quoted : Rogers Q.C. probably knew that, after Hearn's death and given the multiple defects of the Code, he was flogging a horse that had long ago died.

⁸⁴ Rogers Q.C., "Fusion of Law and Equity" (1880) 1 Vic Rev 469.

⁸⁵ Victorian Parliamentary Paper D5/1888, p. 24.

⁸⁶ *E.g.* State Archives of Victoria, VPRS 13580/P1/60.

5. Conclusion : why such a non-event?

In May 1875, almost exactly on the anniversary of Field's departure from Australia, some Australian newspapers re-printed a speech of his made in New York. After referring to the size and extent of what he called 'the English Empire' and to its extension to Australia and the Pacific in particular, he concluded :

America and England hold more things in common than they hold in severalty. It is time that the tone of disparagement, in which some on both sides indulge, should cease, and that the hates of past ages should be buried; that the light of the coming Centennial may shine on kindred peoples, rejoicing together in that mysterious Providence which parted them, that they might travel by different roads to the same goal, and which makes them at once rivals and mutual well-wishers. The name of Washington, our great leader and father, whose birthday we are celebrating, is held in honour and reverence by a majority of the English people. For myself, I am free to say that while I love my own starry flag, the best of all that float, I love next the fiery cross of England.⁸⁷

Whatever the position may have been in international relations with the United Kingdom proper or on any other broader stage, this paper has suggested that interchange between the white settler communities of Australia and their cousins across the Pacific were marked more by cordial curiosity than by any burning desire to learn and (if possible) borrow from each other.

It would have been far too much to expect an Australian jurisdiction to take on the New York Code *holus bolus*, but the severity of the reaction against Field/Noyes' provision on the strict interpretation of penal statutes enables us to provide a richer account of what otherwise would simply be silence in the face of that possible external source of ideas coupled with the usual reluctance to codify. Why was there such a lack of interest in the ideas offered to Australians by their visitor? Those offered by Professor Alan Watson

⁸⁷ *E.g.* "Sydney Morning Herald", 6 May 1875, p. 5. I have searched various original American sources looking to see whether this was transcribed from somewhere, and found nothing. Perhaps it was sent directly to the Australian newspapers by someone.

to explain the general lack of use of American law in Scotland – the multiplicity of American jurisdictions and the lack of source materials in local libraries⁸⁸ – do not fit the Field Codes under discussion here. The first reason for Australians’ lack of interest in ideas-mining using the Field Codes was the considerable strain of elite anti-Americanism in the nineteenth century based upon perceptions of American backwardness, uncouthness and arrogance.⁸⁹ Perhaps newly established colonies which were also open to criticism for such reasons were particularly in need of inferiors to look down on. It is important not to over-generalise – but, secondly, views such as “Touchstone’s” show that the British identity of Australia often went hand in hand with a more or less automatic rejection of any type of American influence (a phenomenon which can still regularly be seen today in the field of language – the present author being no exception). Thirdly, by 1874, the very recent catastrophe of the American Civil War had given an added reason to be cautious about political and legal imports from the United States of America.

On the more specifically political and legal front, America was, fourthly and finally, often seen as the home of rampant democracy, in which the will of the people – an uncouth, backward and arrogant people at that – trumped all considerations of justice, the rule of law and human rights (as we should now call it). Thus, one reason given even in the very democratically minded Province of South Australia by (Sir) Richard Hanson, who generally advocated for progressive democratic reforms, in favour of an appointed rather than an elected upper House during the constitution-making of the 1850s was the poor example set by excessively democratic America – a country in which ‘the will of the people was above all law’ as contrasted with the British Empire, where ‘there was greater freedom of opinion and greater safety for the person and for property than in any part of the United States’.⁹⁰ Twenty years later, on the very day in which it reported Field’s visit to Ballarat in Victoria, one of the local newspapers, for totally unrelated reasons, provided the following review of the American governmental system :

It has not been favo[u]rable to moral progress; for their [Americans’] commercial morality has been the lowest in the world. They have not upheld the national credit with very good fortune; for the States[’] governments have repudiated in several instances. It has not been successful in

⁸⁸ Watson, *Legal Transplants : An Approach to Comparative Law* (Scottish Academic Press, Edinburgh 1974), p. 92.

⁸⁹ O’Connor, “A Brief History of Anti-Americanism : from Cultural Criticism to Terrorism” (2004) 23:1 *A’sian Jo Am Stud* 77, 79f.

⁹⁰ “Register” (Adelaide), 6 August 1853, p. 3; Taylor, *Sir Richard Hanson* (Federation, Annandale 2013), p. 129.

executing justice between man and man; for the elective Judges, holding their offices for brief periods, have been in most places the creatures of the people, and the mob has always set the law at defiance whenever it thought fit.⁹¹

There was much more along the same lines; but too much could, however, be made of this sort of thing. Not only did Hanson lose the argument in the 1850s so that both Houses became elected; it was only a few years after Field's visit that Australians began organising a national polity on a partly American plan – except with an elected Senate and, of course, parliamentary responsible government. As we have seen, a yacht named after Lady Musgrave played an important role in the early stages of that endeavour.

The most often proposed reform in the direction of codification in the second half of the nineteenth century was a criminal code, and it may be that in the field of criminal law anti-American views lingered longer owing to the spectres of lynch law and the Jacksonian election of Judges. Perhaps those features of American life were in the background of the objections to the proposal based on the New York Penal Code to dispense with the rule that criminal statutes were to be interpreted strictly.

But the wariness of Americanisms was starkly apparent even in the field of the fusion of law and equity, which – except in New South Wales – occupied the time of the Australian colonies' legislatures from 1877 to 1883.⁹² The other colonies copied the English legislation more or less faithfully; despite awareness of Field's legislation, there appears to have been no attempt at all to take as a model, despite the occasional suggestions to this effect noted above. Field himself claimed that England's judicature reforms had an 'American parentage';⁹³ this claim could be exaggerated, even though there is certainly something in it; but, equally certainly, the Australian colonies knew little to nothing of the supposed grandparent of the

⁹¹ "Ballarat Courier", 6 April 1874, p. 2.

⁹² See Bennett, (1970) 9 UWALR 211, 227-230. Tasmania waited until 1932; but it was not geographically part of Australia, and that political entity did not yet exist when Field visited. It can therefore be ignored.

⁹³ Field, *Law Reform in the United States and its Influence Abroad* (Review, St Louis 1891), p. 14.

judicature statutes they themselves adopted, and did not turn to America for guidance on the drafting or the operation of them.⁹⁴

The New York Codes had given procedural effect to the abolition of the separate equity Court in New York and the consequent need to reform the law of procedure in the direction of fusion. It may be, as Field's biographer recorded, that he found the Codes' system of practice in use in India in 1874, immediately before his arrival in Australia, using 'the rules that he had prescribed, word for word as he had written them in his library in New York'.⁹⁵ It seems that the Field Codes' influence on Indian law still remains to be determined by scholarship – surely a fruitful area for further research.⁹⁶ No such pleasant surprises awaited him in Australia, and there are reasons for thinking that Australians would have regarded a code coming *via* India as unsuited to their needs anyway.⁹⁷

Nor can the Australian colonies' indigenous efforts at statutory consolidation and re-printing be said to owe anything to the New York Codes. The two pioneers, Victoria and Queensland, began their work in the 1860s, before Field's visit and probably before any sufficient knowledge of his Codes had penetrated into Australia; the others waited until the twentieth century, many decades after Field's visit.⁹⁸

Field, too, seems to have made little to no effort to transplant anything he learnt in Australia. The best that can be said for Field is that he did once, near the end of his life, cast his vote by Australian (*i.e.* secret) ballot.⁹⁹ He also made suitably appreciative noises about South Australia's pride and joy, the Torrens system, during his time there¹⁰⁰ – surely a compulsory sentiment for every legal visitor of any tact – but,

⁹⁴ The "Victoria Law Times and Legal Observer", 2 August 1856, p. 98, mentions Field's name and the New York fusion laws with approval (see also 16 August 1856, p. 114), but by the 1870s, when the work was taken in hand, English models were resorted to.

⁹⁵ Field, *Life of Field*, p. 96.

⁹⁶ Van Rhee, "Introduction" in *id.* (ed.), *European Traditions in Civil Procedure* (Intersentia, Antwerp 2005), p. 17.

⁹⁷ I point some of these out in the context of the criminal law in "Macaulay's I.P.C. – A Success at Home, Overlooked Abroad" [2012] *Jo Clth Crim Law* 51, 64f.

⁹⁸ Bennett, (1970) 9 *UWALR* 211, 217-226; Mackinnon, "The Consolidation of the Statute Law of Victoria" (1916) 16 *Jo Soc Comp Leg* (N.S.) 220.

⁹⁹ Field, *Life of Field*, p. 323.

¹⁰⁰ Harcus, *South Australia : Its History, Resources and Productions* (Sampson Low, Marston, Searle & Rivington, London 1876), p. 78; South Australian Parliamentary Debates, House of Assembly, 22 June 1875, col. 235.

as is well known, that system does not flourish well south of Canada even today, and there is no record of Field's attempting to have it introduced in his home country. He sat on a committee on lands titles reform in 1887; there is no record in its report of any serious consideration of the Torrens system, although it started by reciting the sorts of difficulties with traditional lands titles registration that, in South Australia, had largely caused the introduction of the Torrens system in the first place.¹⁰¹ Of course, the Torrens system was a very different proposition in New York to that which it was in newer Australia, a place that was also unencumbered by established title insurance companies. When the Torrens system was finally introduced in New York in 1908, it never caught on, and was recently, by Act of the Legislature, closed.¹⁰²

It requires, perhaps, no great feat of explanation to account for the fact that Americans did not take to an import. It would be a gross caricature to say that Americans spurn legal imports, and many counter-examples could be cited, but in so doing they are living up – or down – to their reputation. On the other hand, a small country like Australia, which was, throughout its formative years, part of a world-wide system of law and government, and whose foundational myth does not include a complete break largely without the help of external influences, might be expected to look more favourably on Field's reforms, especially in cases where, such as the fusion of law and equity, they embodied reforms generally agreed to be necessary. That it did not do so is a testament to Australia's sense of British – and implicitly anti-American – identity at this period of its history.

¹⁰¹ The report is re-printed in Olmstead, *Reforms in Land Transfer with Suggestions for an Improved System* (Burr, New York 1902), pp. 235-251. It is interesting to observe that the author of this work originally advocated the Torrens system for New York, but changed his mind on some points at least before it was introduced : *ibid.*, pp. 288f; "New York Times", 29 February 1880, p. 2; 29 March 1892, p. 4; 2 April 1892, p. 9.

¹⁰² *Real Property Law* (New York) s 436.