John C. Frémont and *The Biddle-Boggs Case*: Property Rights versus Mining Rights in Early California

By Paul Kens*

In Mariposa County, California, John Frémont is today revered as a hero, great explorer, and founder. But in the eyes of many of the gold miners who settled the region in the 1850s, Frémont was their worst nightmare – a land grabber and claim jumper who was bent on having the wealth of the Sierra Nevada foothills to himself.

On July 9, 1858, a group of about 100 disgruntled miners, who named themselves the "Hornitos League," tried to jump a Frémont digging called the Black Drift tunnel. Frémont's tunnel was just one entrance into a large gold deposit known as the Pine Tree Mine. The Pine Tree was, in turn, only one of many mines located along a gold-bearing quartz vein some thought to be the mother lode. Although the Pine Tree was first opened by a large company called the Merced Mining Company, many of the region's hard rock mines, and hundreds of placer claims, were operated by independent miners and prospectors.

The Merced Mining Company, which grew to a fairly large consortium funded with foreign investments, had one very important thing in common with the lone prospectors working small claims in Mariposa County. All their claims were located within the boundaries of Frémont's rancho "Las Mariposas." Frémont believed that he alone had the night to mine deposits located under his grant. Up to this point, however, he had been unable to keep the Merced Mining Company and independent miners from prospecting on his land. He had opened the Black Drift Tunnel in order to compete in a race to take gold out of this rich deposit.

There is no way to know for certain who were the men who formed the Hornitos League.[1] It is likely that some were employees of the Merced Mining Company, which had a practical interest in keeping Frémont from removing gold from a mine it had claimed earlier. It is just as likely that others were independent miners, whose dreams and livelihood were jeopardized by what they viewed as Frémont's intentions to claim ownership of just about every strike in Mariposa County. In any case, the attack on the Black Drift Tunnel came to symbolize the miners' support for the traditional mining law based on the principles of discovery and capture, and their opposition to Frémont and the threat he posed to that tradition.

On the night of the attack, The Hornitos League men armed themselves to the teeth. Hoping to easily get inside and then defend their position, they made their move at a time when the Black Drift Tunnel would likely be deserted. When they arrived at the entrance they found, to their surprise, that a small group of Frémont's employees, also well armed, were inside. Faced with resistance, the Hornitos men decided to lay siege to the entrance and starve out the defenders.[2]

As soon as he learned about the siege at the Black Drift Tunnel, Colonel Frémont set out to defend the mine with another small group of his men. When he arrived the siege settled into a tense stalemate with Frémont's men in the mine, the Hornitos men at the entrance, more Frémont men surrounding them, and even more Hornitos sympathizers blocking the roads out of the county. Tension increased when the wife of one of Frémont's miners boldly forced her way into the tunnel with food and ammunition. It rose again when rumors spread that the Hornitos men had found a back way into the tunnel. One of the Frémont men, "A tall, broad-shouldered giant, clad

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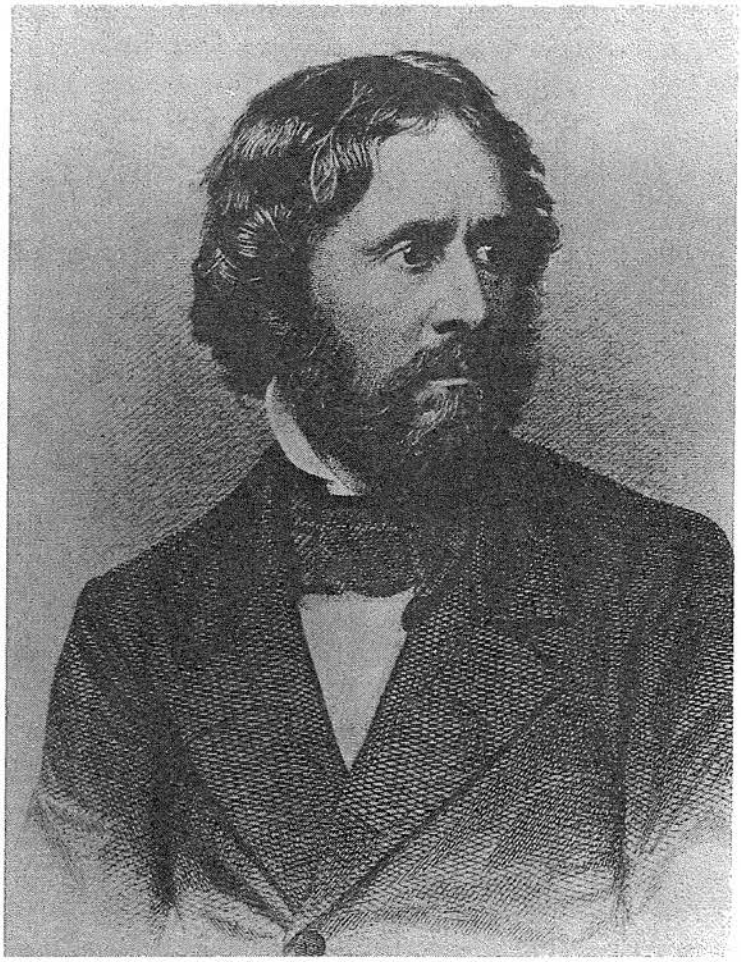

Figure 1. John C. Frémont. Courtesy of the Mariposa Museum, Mariposa County, California.

in brown velvet, with belt and shiny appurtenances, a wide sombrero shading his blond curling hair and tawny mustache," stood up and shouted a warning to watch out behind. "Click-click- click went the cocking of firearms on all sides," another remembered. "Everyone seemed to be waiting for some one else to begin the fray"[3] But no one did, and the stalemate went on for several more days. "Frémont's men are well fortified in their tunnels," reported the *San Francisco Evening Bulletin*, "and if attacked by the party which has surrounded them, there will be a terrible slaughter."[4]

The terrible slaughter never occurred. On July 12, a group calling themselves a committee on behalf of the citizens of Mariposa County sent written terms to Frémont. If Frémont would withdraw his forces and quit mining the shaft, they would also withdraw, placing the mine in the hands of two neutral individuals until the California Supreme Court could finally decide who owned the mineral rights in the area. Frémont, calling the demands a flagrant violation of common right, would hear nothing of it. "I hold this property by law, by occupation, and even by mining regulations," he replied. "This demand you make upon me is contrary to all my sense of justice, and what is due to my own honor."[5]

Although the roads were blocked, a young Englishman staying with the Frémont's managed to slip through the back country with a message to the governor. Time, along with rumors that the state militia was moving in the direction of Mariposa, weakened the Hornitos miners' resolve. The siege quietly dissipated, leaving Frémont in control of the mine.

The siege of the Black Drift Tunnel was an event tinged with violence. It was a minor episode in a much larger conflict over how the land and minerals of California would be distributed and exploited. Incredible wealth, wild dreams, hope, and individual livelihood were part of the mix. The broader conflict was played out in a setting in which the stabilizing force of government was at best unsettled. In all, it provided an ideal recipe for violence. It is not surprising that violent confrontations over land and mineral rights did occur in the 1850s and 1860s in California. Given the circumstances, what may be more surprising is how relatively few incidents there were, and how quickly the violence dissipated.

The episode at Black Drift Tunnel was more typical than not. Neither the siege nor the conflict that spawned it would be settled by force of arms, nor even by legislation. The conflict was ultimately settled by the judiciary in courts of law. And, it was settled by judges playing fast and loose with formalities of law and principles of equity. Premier among these judges was Stephen J. Field who sat on the California Supreme Court from 1857 to 1863, and then on the Supreme Court of the United States from 1863 until almost the turn of the century.

In this paper I hope to illustrate Field's impact on

the settlement of California by focusing on one particular case, *Biddle Boggs v. Merced Mining Company* (1859). This case which marked the climax of a long battle over the right to mine gold located under John Frémont's *Rancho Las Mariposas*, reflected a clash of views about how the California frontier should be settled. The case also demonstrates the ascendancy of formal law over popular ideals of justice. Most of all, it illustrates the skill and influence of one man, Stephen Field, who was often able to capture formal law and mold it to suit his own ideals of justice and his own views about how the West should be settled.

For the independent miners and settlers who supported the Hornitos League, the siege of the Black Drift tunnel was not a matter of claim jumping. It was a matter of asserting their rights to lay claims and mine in some of the richest gold-producing lands in California. The race for gold began in Mariposa County when, in 1850 a prospector named John R. Johnson discovered and claimed a better part of Mariposa's "mother lode." Within the year, Johnson joined with some partners to form the Merced Mining company. The company set out to exploit "the great Johnson vein" with operations at the Mt. Ophir, Josephine, and Pine Tree mines. John Frémont himself also made one of the early strikes, a quartz mine he called Mariposas. But Frémont did not merely claim the right to mine the veins he had discovered. Most of the Great Johnson vein lay beneath land Frémont claimed under his 44,787 acre (70 square miles) Mexican land grant "Las Mariposas." And he maintained that he had the exclusive night to all the minerals that lay beneath his land.

Frémont and the Merced Mining Company were the two major players in the drama that unfolded in the Mariposa region, but countless other prospectors ". . . combing the hills with pick, shovel, and magnifying glasses discovered hundreds of veins."[6]

The potential wealth of the region was staggering. The question of who had the right to appropriate this wealth depended on whether mineral rights under a Mexican land grant belonged to the grant holder or whether they were part of the public domain. Roughly speaking, under United States law mineral rights would belong to the owner of the surface land. Under Mexican law – the law by which Frémont claimed the land in the first place – mineral rights remained part of the public domain. Mixed into the conflict was a clash of ideals and theories of the best and fairest way to exploit the mineral wealth of California. Should one land owner have exclusive right to the minerals lying beneath thousands of acres of land or should the land be open for mining and exploration and subject to traditional mining laws based on the principles of discovery and capture.

Most independent miners and settlers of Mariposa County believed that Frémont did not own the land in the first place. Under a strict reading of Mexican law his claim to the land grant was seriously deficient. Nevertheless, with its 1854 decision in *Frémont v. United States*, the U.S. Supreme Court validated Frémont's grant and placed his legal claim to the surface land in the mining region beyond dispute.[7]

There was still hope for the independent miners, however. Most of them believed that mineral rights did not belong to the land owner. That was the rule under Mexican law, at least, and it would be a major issue in the final battle over *Las Mariposas*. "You say that the highest Judicial tribunals have confirmed his grant," J. Boling wrote to the *Alta California*. "This I do not deny, but I do deny that these high tribunals of Justice have decided or confirmed the *minerals* (the great bone of contention) in that grant of land is to belong to Frémont; and until they do so, I for one will use all my energy and resources to prevent him from wrenching, by force or otherwise, the hard earned labor of those men who have in good faith acquired their possessions."[8]

The legal battle for the mineral rights began in January 1857 when Frémont's agent, J. E. Clayton, published a demand that the Merced Mining Company turn over possession of their Mt. Ophir works, including all the machinery, buildings and out-houses, and leave the premises. Counterattacking, the Merced Mining Company quickly won an injunction in the state court which prevented Clayton from enforcing his demand and kept the Frémont interests from working the Merced claims. Frémont then appealed to the California Supreme Court. In a decision upholding the injunction, Justice Peter Hart Burnett emphasized the urgency of Merced's plea. The only real value of a gold mining claim, he reasoned, were the minerals. Allowing this wealth to be taken away by outsiders would destroy the very substance of the estate.[9] The first minor legal skirmish was thus a victory for Merced. More important, however, miners saw that they could depend

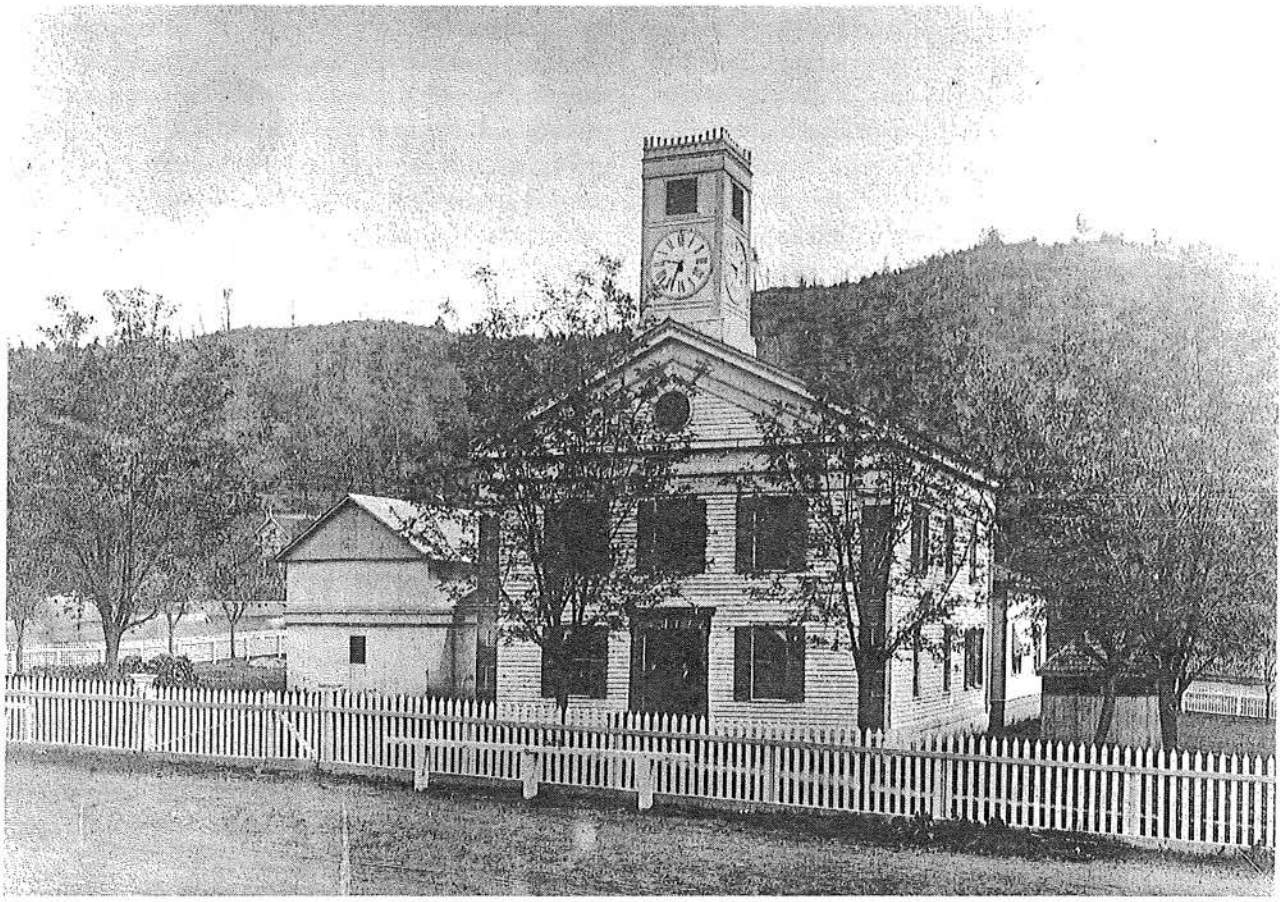

Figure 2. The Mariposa County Courthouse. Built in 1854, this site of early legal battles between John C. Frémont and the Maripo sa Mining Company is the oldest courthouse in California. Courtesy of the Mariposa Museum, Mariposa County, California.

on Justices Burnett and David Terry. Field was not yet on the court. Burnett's opinion was drawn from on legal theories that most miners favored and thereby provided a signal of the court's leanings. The most important of these theories came from the California case of *Hicks v. Bell* (1853) which held that minerals on public lands belong to the state. Neither the state nor the federal government had expressly granted miners a right of property in their claims, the court had admitted, but by allowing miners to take gold from the public domain both governments had implied that miners had some kind of right.[10]

Even with the injunction in place, Frémont continued his efforts to drive Merced off the land he claimed. In April 1857, he leased Mt. Ophir to a man named Biddle Boggs, who then filed suit to eject Merced from the property. John R. Howard, the son of Frémont's business associate, described Boggs as, "the most 'Dickensy' character I ever knew." He was a jack-of-all-trades on the Frémont estate: "tireless on foot or horseback, lazy as to all regular employment, shrewd of judgment, deliberate in speech, with a perfectly delightful conceit in his own wisdom and importance."[11] And, he was unlikely to have been able to afford the array of legal talent that gathered in the Mariposa Courthouse to represent his interests. Among the eight attorneys representing Boggs were Joseph Baldwin and William T. Wallace, both of whom were soon to become justices of the California Supreme Court, and former California Supreme Court Justice Solomon Heydenfeldt. Merced's attorneys included the powerhouse San Francisco firm Halleck, Peachy, and Billings.[12]

Although sympathizers for both sides packed the courtroom, most independent miners hitched their future to Merced's. Whether large operations or lonely prospectors they were, in one sense, kindred souls. Merced's claim, after all, hinged on theories

that supported a public right to mine for the minerals located under both public and private lands in California. The same general ideas formed the basis for most of the prospecting claims in the state. Most of the miners in the audience must have been disappointed, therefore, when this second preliminary skirmish resulted in a victory for Frémont. On July 2, 1857, District Judge Edward Burke ruled that Merced had no equitable rights to the minerals at the Mt. Ophir works. Consequently, he concluded, Frémont was entitled to possession of the disputed property plus damages for loss of revenue.[13]

Frémont's claim to the minerals beneath *Las Mariposas* was still not completely secure, however. Less than a month later the Merced Mining Company filed an appeal to the California Supreme Court. Merced maintained that under Mexican law, the law upon which Frémont's claim was based, ownership of minerals did not pass to a grantee along with the surface rights. Frémont's attorneys argued that it did not matter whether title to minerals passed to grant holders under Mexican law. Under United States law ownership included both the land and the minerals under the surface. Once the United States had issued a patent, they reasoned, its law should govern. Besides, they said, to hold that one man had the right to bring a troop of men to dig up another's farm in order to hunt for gold or silver would be "an odious doctrine." It would amount to taking private property and appropriating it to the private uses of another.[14]

In March 1858, the Supreme Court of California delivered an opinion in *Biddle Boggs v. Merced Mining Company*. Judge Peter Hart Burnett's opinion for the court was, once again, all that Merced and independent miners could have hoped for. First, Burnett addressed the issue of who owned the mineral rights. When it passed the California Land Act of 1851, Congress did not grant any new rights, Burnett observed. The purpose of the Act was to confirm old titles. Hence, the United States patent that recognized Frémont's claim to *Las Mariposas* could not vest in him any title that was not already included in the original grant. Since the laws of Mexico reserved all mineral rights to the state, title to the minerals beneath *Las Mariposas* did not pass to a grantee when the Mexican governor made the original land grant. The state still owned the minerals and, when Mexico signed the treaty of Guadalupe Hidalgo in 1848, its rights to those minerals passed to the United States government.[15]

But what was the United States to do, and what had it done, with those minerals? The answer to this question, Burnett implied, would determine whether prospectors had a right to mine for government owned gold on privately owned land. Burnett began with a practical observation. The government's right to the gold, he said, necessarily carried with it the right to enter private property and search for and dig that gold. The ownership would be worthless without the power to take possession of the minerals. Burnett then noted that the government had not done the work of mining itself. Rather, it has adopted a policy of allowing private individuals to mine the gold. By doing so, the federal government had implicitly transferred its right to dig for those minerals to miners, he reasoned. The government had, in other words, given them what amounted to a general license to mine below private lands. It followed, according to Burnett, that government policy, combined with traditional mining law, had the practical effect of giving the owners of mining claims a good vested title to the property of their claim.[16] Even if that claim lay within the boundaries of a confirmed Mexican land grant.

Justice David Terry agreed with the outcome of the *Biddle Boggs* case, but wrote a separate opinion saying that it was sufficient to rule that Frémont did not own the rights to the minerals under his land. Stephen Field, who had just recently been elected, dissented without comment.[17] The Merced Mining Company and the independent miners of Mariposa County appeared to have secured a final victory. For them the decision meant that Frémont had no more claim to minerals on *Las Mariposas* than did other miners – "He could not claim the fruits of labor of others nor prevent their operations."[18] The result of the *Biddle Boggs* case was not as certain as it appeared, however. Frémont's forces quickly filed for a rehearing in the California Supreme Court. This type of motion was usually a technicality. Rehearing was seldom granted. Frémont's legal maneuver, therefore, would not have been very threatening to miners, had it not been for intervening factors. Confident of their rights to the Pine Tree Mine and other claims in the area, the miners and settlers, or "Hornitos League," set out to shut down or appropriate Frémont's diggings at the Black Drift tunnel.

The drama that the siege at the Black Drift tunnel produced in the summer of 1858 was matched only by the political intrigue surrounding the California Supreme Court. Just as Judge Peter Hart Burnett, author of the *Biddle Boggs* decision, was nearing the end of his term, the slavery issue caused a split in the Democratic Party. With state elections coming up, the Lecompton (pro-slavery) wing chose Joseph Baldwin over the incumbent Burnett as candidate for the state's highest court. John Curry, was the Anti-Lecompton (anti-slavery) nominee, and also the Republican nominee.[19] Burnett, the incumbent, was left out of the race altogether.

Although the slavery debate now began to cloud local issues more than it had earlier in the decade, local issues remained in the forefront of this contest for the state supreme court. Both sides agreed. "Nothing was so important to the people as election of a proper person to fill the seat on the Supreme Court," said Baldwin supporters. They called for consistency, honesty, and intellect on the bench. Under past courts, they argued, ". . . titles to property have been unsettled, well settled principles of law have been overturned, the rulings of the court have been variable, fluctuating, and often contradictory; and as a necessary result, we have been floating on a sea of uncertainty and doubt, in respect to our most sacred rights of person and property." The public, they concluded, should no longer submit to the rule of men who color their decisions in accordance with what they believe to be the current public Sentiment.[20]

The choice was clear to California's miners and settlers. They knew they could have depended on Burnett and they knew just as well that Baldwin's leanings would be with Frémont. The miners' and settlers' attack on Baldwin was fierce. They questioned Baldwin's honesty, his integrity, and his intelligence. They painted him as the candidate of politicians and demagogues. "We have seen him arm in arm with pot-house politicians, with legislative brokers, treasury thieves and public gamblers," wrote the *San Francisco Evening Bulletin.* Worse yet, opponents claimed, Baldwin was the candidate of "that objectionable class . . . the tricky and scheming lawyers."[21]

If these drawbacks were not enough, settlers and miners only needed to recall that a few months earlier Baldwin had argued the *Biddle Boggs* case on rehearing – as one of the attorneys for Frémont![22] Settlers and miners considered the *Biddle Boggs* decision to be a vindication of their position on land issues. Now their greatest concern was that the court would grant a rehearing and change its opinion. Naturally, settlers and miners condemned Baldwin for his role. One reported that "We regard the doctrines of Mr. Baldwin, as expressed in his brief, as subversive of and fatal to the holding and enjoyment of property in the mineral districts in this state."[23] If politicians were successful in electing Baldwin to the bench, warned another, " [A man's] very homestead, bought and paid for, under a solemn decision of the Supreme tribunal made last year, might be wrested from him by an adverse decision of the same tribunal made to-marrow . . ."[24]

Despite heavy opposition from the miners and settlers, Baldwin was elected to the California Supreme Court on September 1, 1858. He took his seat on the second day of October. With Burnett gone, Justices David Terry and Stephen Field canceled each other out on issues relating to land policy. Terry, who had proven to be a staunch and outspoken supporter of the settlers and miners, was unlikely to compromise. He and Field both possessed the same unbending will and they seemed to clash on virtually every kind of issue. Baldwin's presence may actually have presented a quandary. Under normal conditions, he would be the deciding vote and there was no question that he would side with Field. The two, who saw eye to eye on every issue, soon became the best of friends. Baldwin even named his son, Sidney Field Baldwin, in Field's honor.[25] But his recent status as Frémont's attorney made it difficult for Baldwin to participate in the *Biddle Boggs* case. Although the standards of judicial ethics were different in those days, this close a connection would have been difficult to justify and possibly would have weakened the value of any decision the court made.[26] Apparently in deadlock, the *Biddle Boggs* case sat on the court's docket for almost an entire year. It remained dormant until Justice Terry's actions off the bench ended the stalemate.

Terry's term on the Supreme Court was due to end in January 1860. In the Fall of 1859 he sought the nomination of the Lecompton Democrats. Always a vocal and loyal southerner, Terry spoke passionately to the convention about the right to own slaves and the doctrine of states' rights. He also had harsh words for Anti-Lecompton forces who he re-

ferred to as "personal chattels of a single individual, whom they are ashamed of."[27] Anti-Lecomptonites, he said, belonged "heart and soul, body and breeches" to Senator David Broderick. Somewhat surprisingly, the Lecompton convention chose W. W. Cope, over Terry, as its candidate for the state supreme court. But the event ultimately had a more important impact on California political history. Broderick, apparently insulted by Terry's comments, struck back. In earshot of one of Terry's friends, he said: "I have hitherto spoken of [Terry] as an honest man – as the only honest man on the bench of a miserable, corrupt Supreme Court – but now I find I was mistaken. I take it all back. He is just as bad as the others.[28]

Although dueling was outlawed in California, David Terry was one of those who clung to its outmoded code of honor. When he learned of the insult, he resolved to "receive satisfaction" from Broderick. Terry waited until the general elections were over. Then he sent his challenge. Broderick accepted and on Tuesday September 13, the two men faced off. In a matter of minutes, Broderick lay mortally wounded. Three days later he died.

Rumor spread that the duel was rigged and that the entire event was a conspiracy perpetrated by Southerners. Broderick, never before so popular and admired, became a martyr for the northern cause. The duel had a significant effect on the state supreme court as well. Terry, now a political pariah, resigned before the end of his term. His resignation allowed the governor to appoint W. W. Cope to his place. Cope then won the general election in November, and the path was now paved for a final decision in *Biddle Boggs*. Because Cope sided with Field, his appointment changed the balance on the court so that it was no longer necessary for Baldwin to participate. Field, who had become chief justice when Terry resigned, wrote the opinion in the second *Biddle Boggs* case.[29] It proved to be all of what the miners' had feared.

The second *Biddle Boggs* case addressed an issue that had not been part of the earlier decision. The Merced interests added to their legal argument a new element founded upon theories of fraud and equitable estoppel. This argument focused on the fact that there had been two surveys of *Las Mariposas*. Frémont's land grant, as originally surveyed, did not cover most of the rich mining region. After Frémont filed his claim in 1852, the land commission ordered that a survey of the claim be made according to Frémont's wishes and his first map of the grant, or diseño, filed with the Mexican government in 1849. Following the commission's order, surveyor Allexey W. Von Schmidt drew a panhandle shaped map of *Las Mariposas*. Half of the land was a six by five mile rectangle that included the town of Mariposas and adjacent mineral lands. The other half of the rancho ran in a long narrow line encompassing farming and grazing lands for thirty miles down the watershed of the Mariposa River. For the most part, it appeared that conflict over mining operations had been avoided since the survey did not extend north into the central region of the mother lode. Most claims in the region, it seemed, would continue to be recognized on the basis of traditional mining law – discovery and appropriation. By the time the United States Supreme Court finally validated Frèmont's claim to *Las Mariposas* in 1854, the Merced Mining Company had resumed control of its operations and was having better success. Smaller companies and individuals also operated profitably in the region.

Astonishingly, as part of its ruling in *Frémont v. United States* (1854), the United States Supreme Court ordered that a new survey be taken.[30] This order created an incredible opportunity, which Frémont eventually turned to his advantage. Following the Supreme Court's directive, the United States District Court appointed former Texas Ranger John C. "Jack" Hays to make the new survey. In order to make the rancho more compact, Hays proposed cutting off the long extension down the Mariposa River. He retained the six-by- five- mile rectangle as Von Schmidt had laid it out. Hays then asked Frémont's manager, J. E. Clayton, for suggestions about where the remainder of the grant should be located. The resulting Hays survey in 1855 created an estate that was very different from the rancho laid out in the Von Schmidt survey of 1852. It certainly was a much more compact area. But the new survey also shifted onto Frémont's estate most of the valuable mineral lands in the region; including the Merced Mining Company's Mt. Ophir, Josephine, and Pine Tree mines.[31]

The theory of equitable estoppel argued that Frémont's second survey produced an unfair result. Acting on the basis of Frémont's earlier survey and his actions, others had staked claims in these areas.

They had expended hundreds of thousands of dollars and their own labor to develop these claims. It would be unfair now, the argument ran, to take this property from them.

The charges of equitable estoppel and fraud had more emotional appeal than legal merit. Equitable claims such as these faced technical legal hurdles. To win under a theory of fraud, Merced would have to prove Frémont had intended to deceive them or that Frémont misrepresented his claim. Merced would also be required to prove Frémont intended that Merced rely on that misrepresentation. Either would be a difficult task since technically the Supreme Court of the United States, not Frémont, had ordered that a new survey be taken. Also, even though Frémont had agreed to the result, the federal government had commissioned the new survey that encompassed the mineral lands. Field had no difficulty disposing of the fraud claim. It had no basis, he ruled. Besides, Field reasoned, *Biddle Boggs* and Merced were the parties to this suit. Frémont's rights could not be impaired in a suit between third parties.[32]

Equitable estoppel required the same kind of proof. Even if Frémont had made misrepresentations about the location of his claim, Merced would have to prove that he willfully made them and that he intended to deceive Merced and other miners. Once again, Field had no problem disposing of the claim. Merced knew the grant was a floating one, he pointed out. To transfer Frémont's rights to them now would result in the highest degree of inequity.[33]

Technical rules of law did not convince miners and settlers. With just a bit of sarcasm, Horace P. Russ, of the Quartz Miners' Association, reported what the Court had said to Frémont regarding the mineral lands:

> Yes, take them; they are yours. You did not claim the land when these people were building the works, in fact you disclaimed it, but that was a mistake for which you must not be prejudiced; you did not find the vein or make the tunnel, or build the mills, or level the roads; you have done nothing except manage a survey skillfully; but take the property, the law gives it to you.[34]

With the equity claims out of the way, Field turned to the issue that had dominated the first *Biddle Boggs* decision. Directly reversing the earlier case, he ruled that Judge Burnett's theory that the government had given miners an implied license to take the minerals had no merit. There could be no license in the legal meaning of that term, he reasoned, because such a license could only be created by an Act of Congress and Congress had adopted no specific legislation on the subject. Field had always maintained that requiring strict construction of Mexican laws would be an injustice to grant holders. Now he was requiring strict construction of American law – regardless of any injustice it might bring to miners and settlers.

The doctrine of unlimited general license to take minerals from private lands was, Field said, "pregnant with the most pernicious consequences." What value would there be to a title in one man, with a right of invasion in the whole world, he asked?

> There is something shocking to all our ideas of the rights of property in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface, or if existing, that he wishes to extract and remove it.[35]

The second Biddle Boggs opinion did not determine who owned the minerals under private land. Field had assumed, for purposes of the case, that they belonged to the United States. Neither did the opinion completely reject the notion of implied license. All it did was to hold that any presumption of an implied license did not take precedence over the rights of private land owners. Miners thus did not have a right to enter private land. But the effect of the opinion, as a practical matter, was to shift the implied license to extract materials from miners to landowners. In a way, it gave Frémont a monopoly of access to the public resources within the area he claimed.

Devastating as this decision might have been to miners and settlers, the court had not gone so far as to rule that mineral rights belonged to the landholder. Perhaps the Biddle Boggs decision was only a stop gap measure made necessary because of Baldwin's earlier participation in the case as Frémont's attorney.[36] One year later, in combined

cases of *Moore v. Smaw and Frémont v. Flower* (1861), Field did rule that the right to minerals passed to the landholder who had received a United States patent.[37] Field professed to believe that "the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution."[38] In *Moore v. Smaw and Frémont v. Flower*, however, he was willing to give to the grant holder something that Mexican law definitely did not give – mineral rights. The Mexican law, under which ownership of the minerals would remain with the state, was based upon an archaic theory of *jura regalia* under which mines of value were held for the crown, Field reasoned. In America the government did not own property by right of sovereignty but rather by right of ownership like everyone else. Unless it had expressly reserved mineral rights, when the government gave a patent to land owners, it transferred everything. Field's opinion was a masterpiece of legal reasoning.[39] But it required a leap of legal logic that non-lawyers were not likely to appreciate.

The beauty of Field's opinion was that it put miners in the awkward position of having based their claim on a particularly odious form of sovereignty (*jura regalia*). The opinion placed land owners on the philosophical high ground, claiming that their rights represented freedom from government interference. In this respect it was a good Jacksonian argument. When applied to protect small property holders, as it later was in *Dubenspeck v. Grear* (1861), this appeal to the sanctity of private property had an attractiveness for every one raised on that tradition. Even the pro-settler and pro-miner Sacramento *Union* admitted that the "luminous and voluminous" opinion reflected some credit upon the ability of its author.[40]

However much some intellectuals among the miners might admire the opinion, most miners were more aware of the practical effect the opinion would have on their way of life when applied to Frémont's vast claim. Mining rights must be free to all so that the poor have as good an opportunity as the rich, cried one letter to the *Union*. Predicting the worst, the author warned that, "To allow the mining districts to be monopolized by a few land holders would result in them having the white laboring population as much under their control as a Southern planter has his black slaves."[41] Although exaggerated and racist, the letter accurately reflected miners' fears that the court's policy would reduce them to wage earners or peasants. Their fears were not totally unfounded. By the 1860s it was becoming obvious that the California dream of an egalitarian paradise would never materialize.[42]

The second *Biddle Boggs* opinion did not bode well for settlers either. It reflected a long cherished prejudice against squatters and squatter rights, reported the *Union*, and a belief that "no amount of evidence could shake the opinion of the Court in the infallibility of land patents – no matter how acquired."[43] Field made no secret of his insistence on the infallibility of land patents nor of his belief that the government should make every effort to protect rights based on Mexican land grants. He was proud of it. In the many land cases he faced in his judicial career, he seldom deviated from it.[44]

While on the California Supreme Court, he regularly held that people claiming estates under Mexican land grants were not required to prove they had strictly complied with the formalities of Mexican law.[45] When elevated to the United States Supreme court, Field continued giving claimants every benefit of the doubt. He ruled, for example, that the words in a grant "five leagues more or less" supported a grantee's claim to eleven leagues. The phrase was not a limitation on the quantity of land granted, he reasoned, but rather a conjectural estimate of the amount of property described.[46] Where fraud was clear, Field did not hesitate to rule against the claimant.[47] But, in his opinions, the benefit of the doubt usually seemed to go to the claimant. In *Malarin v. United States* (1863) he validated a grant of two leagues even though the original document had been altered, changing it from one league to two.[48] In another decision the same year, he validated a grant even though it was dated after the time Mexican authorities said they had quit issuing grants.[49] In still another case he held that the decree of the Board of Land Commissioners was valid even if it granted different land to an individual than that which was described in the original grant.[50] Field also strove to smooth the procedure affecting suits over land titles, making it as favorable as possible to the claimants.[51] He undoubtedly believed that the United States had a duty to protect even the imperfect and equitable titles of Mexican grantees.[52]

Where settlers were involved, however, Field's

generosity abated. He required strict compliance with United States homestead laws. The most revealing cases involved the issue of whether homesteaders had an equitable interest in property they had settled on, even though they had not yet fulfilled all of the requirements of federal preemption law. Roughly speaking, the law required that a homesteader occupy the land, cultivate it, and pay a small fee. In the *Yosemite Valley Case* (1872) Field ruled that the act of occupying land and cultivating it did not give homesteaders a vested interest in their claims. Until they paid the fee, the government technically still owned the land.[53] The homesteaders' attorney argued that, once the land was occupied and cultivated, the settler had a vested interest. The government, he reasoned, was thus bound by its good faith to protect settlers at this stage of their claims. But Field ruled that settlers on public land had absolutely no right to the land until they had paid the purchase fee. In contrast to his treatment of grant holders, Field was willing to hold settlers to the technical requirements of the law.

It was not only the policy outcome of the *Biddle Boggs* decision and *Moore v. Smaw and Frémont v. Flower* that frustrated miners and settlers, but also the fact that the court had seized the power to determine that policy. Field's opinion amounted to legislation and was undemocratic, complained a letter to the *Alta California*. Public use, custom, and opinion had not done away with the Mexican mining laws, the letter explained. America's written law had not repealed them. The people had adopted them. Equity protected all rights secured by them.[54] Yet Judge Field had ignored them. It was not the last time Field would be charged with legislating from the bench.

To many miners and settlers *Las Mariposas* now seemed like a small principality. The result of Field's opinions, wrote the Sacramento *Union*, was that every species of property included within the metes and bounds of the "notoriously fraudulent survey" belonged to Frémont. "The Court House, even, is at the mercy of the Colonel, and its occupants are liable to vacate the building at his bidding."[55] Although clearly exaggerating, the *Union* was not far off the mark. In the town of Mariposa and other settlements, people were forced to pay Frémont for the land upon which they had settled and believed they already owned. The Merced Mining Company lost all it had developed. Its claims, its equipment, and its investment went to Frémont. With Frémont controlling both the land and the minerals, independent mining companies could work only under leases from him. Placer miners were affected as well when Frémont instituted a "tax" for the privilege of working the region.[56]

Although Frémont emerged as the winner of this long legal battle, he was not destined to keep *Las Mariposas* for long. In 1863, desperately in debt, he turned to New York financiers Morris Ketchum, James Hoy, and George Updike to bail out his mining operations. The group formed a company which bought Frémont out, leaving him little interest in *Las Mariposas*: and no control. The miners and settlers of Mariposa County must have had mixed feelings about Frémont's destiny. The vengeful among them surely found some satisfaction in his downfall. But the Jacksonian in them was just as surely amazed and depressed that the great wealth of the Sierra Nevadas had simply dissipated and ended up in the pockets of bankers and financiers.

Justice Field's brother, David Dudley Field, represented Frémont in the transaction with Ketchum, Hoy, and Updike. His fee was 2000 shares of Mariposas stock (worth $200,000 at par value). Many people thought Frémont had been cheated and David Dudley Field had been part of the conspiracy.[57] Frémont, however, apparently held no animosity toward the judge or his brother. He later employed David Dudley Field's services again in his final financial disaster, the bankruptcy of the Memphis and El Paso Railroad.[58]

The business relationship between Frémont and David Dudley Field must have added fuel to charges that Justice Field had a financial interest in the outcome of *Biddle Boggs*. Complaints of this sort were not uncommon during the 1850s. Charges of corruption seemed to accompany every significant case before the California Supreme Court and every election of the state's supreme court justices. With respect to *Biddle Boggs*, a pamphlet entitled "The Gold Key Court or the Corruptions of a Majority of It" claimed that both Baldwin and Field had profited. Field, it said, had received $50,000 in Frémont bonds for his services in reversing the former judgment of the Court.[59] As might be expected, there is no hard evidence that Field was involved in any bribery scheme. The only thing that is certain is that he was of like mind with those who had an interest in

Frémont's success. He admired men like Frémont and John Sutter, respected Frémont's attorney Heydenfeldt, and became great friends with Baldwin. These men shared a belief that the fate of the nation depended on the sanctity of private property, as they saw it. Their faith may have been convenient in the way it was applied to the California mining and land cases but, in the absence of any other evidence, one can only assume it was genuine.[60]

Despite charges that the court had ignored property rights and ignored traditional mining law – despite complaints of injustice, threats of violence, and charges of bribery – ultimately the miners and settlers acquiesced to the final decision of the California Supreme Court. John Phillip Reid has long maintained that, far from being the lawless society often depicted, the frontier West, and gold rush California in particular, was characterized by an amazing degree of lawfulness.[61] Immigrants brought with them "norms of legal conduct," Reid explains. In their new homes they followed rules pertaining to sales, contract, property rights, and other relationships that were similar to the rules they had followed in their former homes. Perhaps the *Biddle Boggs* case reflects that, in addition to norms of legal conduct, settlers also brought West an abiding respect for formal law.

Stephen Field, more than any other figure of his time, seemed to understand and appreciate this. He also took advantage of it by masterfully molding formal law to suit his vision of how the West should be settled. It was a vision that clearly reflected admiration for power and privilege.

California miners and settlers detested Stephen Field. They complained about him, they probably would have voted him out of his office on the Calfornia Supreme Court had he not first been appointed

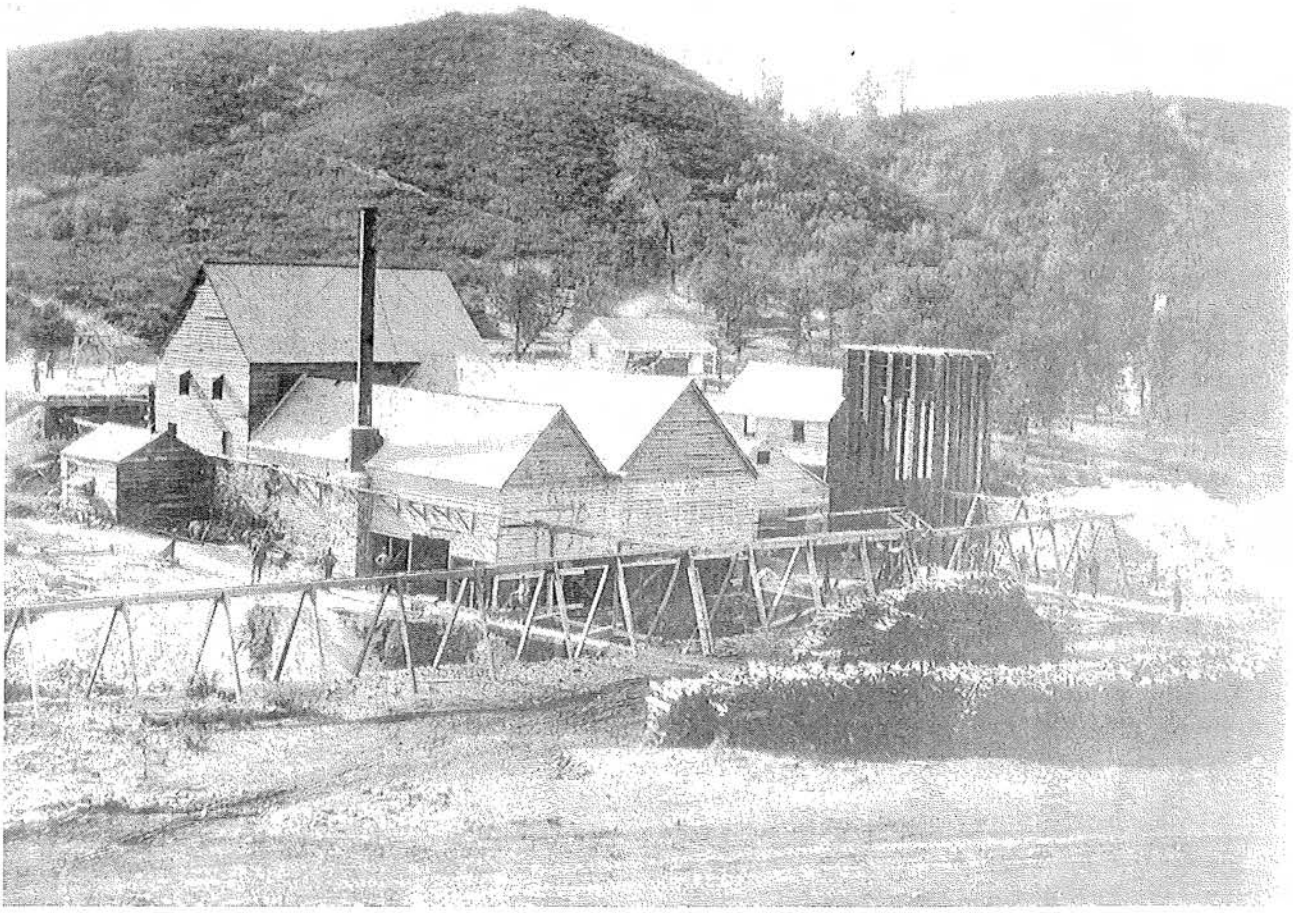

Figure 3. The Mt. Ophir Mill (1860). The *Biddle Boggs* decision resulted in the ownership of property such as this passing from t he Mariposa Mining Company to John C. Frémont. Courtesy of the Mariposas Museum, Mariposa County, California.

to the federal bench, they tried to impeach him from the United States Supreme Court, and one person even tried to assassinate him.[62] But once the court had finally ruled, once Field's view became attached to formal law, miners and settlers complied. Understanding this respect for formal law allowed Field to deeply influence the development of California and the West.

NOTES

1. Hornitos was the name of a nearby California mining town with a reputation for lawlessness. Thus, Jessie Benton Frémont thought many of the men were common criminals.
2. For the story of the siege of the Black Drift Mine, I have relied upon: Charles Gregory Crampton, "The Opening of the Mariposa Mining Region, 1849-1859, with particular Reference to the Mexican Land Grant of John Charles Frémont." PhD diss., University of California, Berkeley, 1941, 250-253; John Raymond Howard, *Remembrance of Things Past* (New York: Thomas Y. Crowell, 1925),84-87; Allan Nevins, *Frémont: Pathmarker of the West* (Lincoln: Bison Books, University of Nebraska Press, 1992), 464-65; Jessie Benton Frémont, *Far West Sketches* (Boston: D. Lothrop Company, 1890) 53-83.
3. Howard, *Remembrance of Things Past*, 86-87.
4. San Francisco *Evening Bulletin*, July 15,1858, 2-3.
5. Both letters are reprinted in the San Francisco *Evening Bulletin*, July 15, 1858, 2-3. By this time, even the *Bulletin* considered the Merced group aggressors.
6. Charles Gregory Crampton, "The Opening of the Mariposa Mining Region, 1849-1859," 172; also see, Hubert Howe Bancroft, *History of California Vol. VI 1848-1859,* in The Works of Hubert Howe Bancroft, vol. 23 (San Francisco: The History Company, Publishers, 1888) 416; Ira B. Cross, *Financing an Empire: History of Banking in California*, 4 vols. (Chicago: The S.J. Clarke Publishing Co., 1927) vol. 1, 131.
7. *Frémont v. United States*, 58 U.S. (17 How.) 551 (1854).
8. *Alta California*, August 2, 1858, 3-1. Boling was a member of the Central Committee of the Miners and Settlers Association of Mariposa: see, San Francisco *Evening Bulletin*, June 4,1858, 3-3.
9. *Merced Mining Company v. Frémont*, 7 Cal 317 (1857). Terry concurred in the opinion and Murray wrote a separate opinion. Merced's supporters also argued that the Company's gold was being robbed; see *Alta California*, August 2, 1858, 3-1.
10. *Hicks v. Bell.*, 3 Cal. 219 (1853).
11. John Raymont Howard, *Remembrance of Things Past* (New York: Thomas Y. Crowell Company, 1925), 81. *Biddle Boggs* is also described in Nevins, Allan Nevins, *Frémont: Pathmarker of the West*, 460; and in Rolle, 180.
12. Newell Chamberlain, *The Call of Gold: True Tales on the Gold Road to Yosemite* (Mariposa, CA: The Gazette Press, 1936) 64.
13. Crampton, "The Opening of the Mariposa Mining Region, 1849-1859," 246.
14. *Biddle Boggs v. Merced Mining Company*, 14 Cal. 279, 289-91, arguments of Joseph Baldwin and S. Heydenfeldt, for Respondent. Interestingly, *Biddle Boggs I* was not immediately published in the California Reports. It is reported along with the later opinion in 1859. A reprint of the first opinion appeared in *Alta California,* March 19, 1858, 1-3.
15. *Biddle Boggs*, 14 Cal. at 305-07. Frémont actually purchased the land from Juan Alvarado who was the original grantee. Following a chain of title, Burnett reached the logical conclusion that Alvarado had no mineral rights to give when he sold his property to Frémont.
16. *Biddle Boggs*, 14 Cal. at 312-314.
17. *Biddle Boggs*, 14 Cal. at 314; For pro-Frémont editorials and letters see, *Alta California*, March 24, 1858, 1-5, 2-1; May 24, 1858, 1-5.
18. Crampton, "The Opening of the Mariposa Mining Region, 1849-1859," 249.
19. Davis *History of Political Conventions in California*, 90, 92, 94.
20. *Alta California*, August, 6, 1858, 2-1; August 29, 1858, 2-2; July 16, 1858, 2-1.
21. San Francisco *Evening Bulletin*, August 13, 1858, 2-1; August 25, 1858, 2-1.
22. *Biddle Boggs*, 14 Cal. at 315, notes that a rehearing having been granted, the case was again argued at the July term, 1858. Baldwin's argument is summarized on pages 332-33.
23. San Francisco *Evening Bulletin*, June 4, 1858, 3-3.
24. San Francisco *Evening Bulletin*, August 7, 1858, 2-1; August 13, 1858, 2-1; August 25, 1858, 2-1; August 31, 1858, 2-1; June 10, 1858, 2-1.
25. Davis, *History of Political Conventions in California, 1849-1892* (Sacramento: California State Library, 1893) 95; *Johnson, History of Supreme Court Justices of California 1850-1900* 2 vols. (San Francisco: Bender-Moss Company, 1963), 77.
26. Field sat on a few cases to which he had been connected as an attorney. He even argued some cases before the California Supreme Court after he had already been elected; see *People v. Barbour*, 9 Cal. 230 (1858). I have not found any cases in which he participated in the decision afterwards, however.
27. A. Russell Buchanan, *David S. Terry of California: Dueling Judge* (San Marino, Ca.: The Huntington Library, 1956), 94.
28. Buchanan, *David S. Terry of California*, 95-110; David A.

Williams, *David C. Broderick: A Political Portrait* (San Marino, Ca: The Huntington Library, 1969), 230-61; Davis, *History of Political Conventions in California*, 104.

29. *Biddle Boggs v. Merced Mining Company*, 14 Cal. 279 (1859), the second opinion begins on page 355. Cope concurred.
30. *Frémont v. United States* 58 U.S. (17 How.) 542, 565 (1854); also see Crampton, "The Opening of the Mariposa Mining Region, 1849-1859," 224; also see *U. S. v. Frémont*, 59 U.S. (17 How.) 30, 31-34 (1855) which upholds the district court order of Judges Hall McAllister and Ogden Hoffman to carry out the ruling of *Frémont v. United States*.
31. Crampton, "The Opening of the Mariposa Mining Region, 1849-1859," 231-34, explains Hays's rationale for removing the pan handle from the survey.
32. Ibid., 357-66
33. Ibid., 366-73. Attempting to sway public sentiment, Frémont's attorneys argued it was the Government that insisted on the second survey. Frémont, they claimed, had never wanted it. San Francisco *Evening Bulletin*, June 8, 1858, 3-3.
34. *Alta California*, November 26, 1859, 1-3; This article may also be found in a scrapbook of newspaper clippings covering the *Biddle Boggs* case which are held at the Huntington Library.
35. *Biddle Boggs*, 14 Cal. at 379.
36. Ibid, 375.
37. *Hicks v. Bell*, 3 Cal. 219 (1853).
38. *Hornsby v. United States*, 77 U.S. (10 Wall) 224, 237 (1869). Field was citing the *Frémont* case.
39. *Moore v. Smaw and Frémont v. Flower*, 17 Cal. 199 (1861); for an admiring contemporary review see, 10 *American Law Register* 462 (1862).
40. See *Daubenspeck v. Grear*, 18 Cal. 443 (1861) for a case applying the doctrine to a small plot. Sacramento *Union*, November 26, 1859, 2-3;
41. Sacramento *Union*, December 15, 1859, 1-7.
42. Robert A. Burchell, "The Faded Dream: Inequality in Northern California in the 1860s and 1870s," *Journal of American Studies* 23 (August 1989) 215-234., see 216.
43. Sacramento *Union*, November 26, 1859, 2-3; November 25, 1859, 1-3,; December 8, 1859, 2-3.
44. His memoirs, written years later, highlighted his accomplishments in this respect, Stephen J. Field, *Personal Reminiscences of Early Days in California*, 121-36; also see, John Norton Pomeroy, *Some Account of the Work of Stephen J. Field* (rpt. 1881, Littleton, Co: Fred B. Rothman & Co., 1986), 20-30. On the basis of a Westlaw search, I estimate that Field wrote about sixty-five opinions in cases dealing with Mexican land grants. For an example of Field's later favoritism toward grant holders opinions, see *Hornsby v. United* States, 77 US (10 Wall) 224 (1870). For his attitude regarding squatters, see *Van Reynegan v. Bolton*, 95 U. S. 33 (1877). Admirers maintained that Field's record reflected his superior intellect, devotion to principle, creative power, and courage. They were certain that the path he chose to follow would protect property rights and enhance the economic development of the state. He had neither courted personal popularity nor shrunk from unpopularity by means of his decisions, wrote John Norton Pomeroy, see John Norton Pomeroy, *Some Account of the Work of Stephen J. Field*, 34, 29-35.
45. See, *Ferris V. Coover*, 10 Cal. 588 (1858); also see, *United States v. Augisola*, 68 U.S. (I Wall) 352 (1863)
46. *United States v. D'Aguirre*, 68 U.S. (1 Wall) 311 (1863)
47. *Pico v. United States*, 69 U.S. (2 Wall) 279 (1864); *Graham v. United States*, 71 U.S.. (4 Wall) 259 (1866).
48. *Malarin v. United States*, 68 U.S. (1 Wall) 282 (1863).
49. *United States v. Yorba*, 68 U.S. (1 Wall) 412 (1863).
50. *United States v. Halleck*, 68 U.S. (1 Wall) 439 (1863).
51. Field's first significant opinion for the U.S. Supreme Court held that, prior to an 1860 Act of Congress, the United States District Court had no jurisdiction to correct surveys or revise the action of the Surveyor General, *United States v. Sepulveda*, 68 U.S. (1 Wall) 104 (1863). Following his California rule, he held that the issue of fraud could not be raised for the first time on appeal, *United States v. Augisola*, 68 U.S. (1 Wall) 352 (1863). Yet he was willing to allow the claimant of a grant to unite his claim for rents and damages to a suit for ejectment, *Beard v. Federy*, 70 U.S. (3 Wall) 478 (1865). Following another doctrine he had developed on the state court, he ruled that when boundaries designated in the grant contain more land than confirmed by the Board, the grantee has the right to select the location of his land, *United States v. Pacheco*, 69 U.S. (2 Wall) 587 (1864).
52. *Hornsby v. United States*, 77 U.S. (10 Wall) 224 (1867). Even in conflicts among people claiming Mexican grants to the same land, he displayed a generous sense of equity, *United States v. Armijo*, 72 U.S. (5 Wall) 444 (1866).
53. *The Yosemite Valley Case (Hutchings v. Low)*, 82 U.S. (15 Wall) 77 (1872); this opinion followed *Frisbie v. Whitney*, 76 U.S. (9 Wall) 187 (1869) in which Field joined the majority in ruling that a homesteader gained no vested right until the fee had been paid. Frisbie was not an especially good case by which to measure the Court's attitude toward homesteaders. It involved a conflict between speculators who purchased land from the holders of an invalid Mexican grant and opportunistic squatters who quickly settled the land after the grant was declared invalid. See, Paul W. Gates, *Land and Law in California: Essays on Land Policies* (Ames, Iowa: Iowa State University Press, 1991) 209-28.
54. *Alta California*, December 24,1859, 4-1; Sacramento *Union*, November 25,1859, 1-3.
55. Sacramento *Union* November 26, 1859, 2-3, reporting on *Biddle Boggs*.
56. Crampton, "The Opening of the Mariposa Mining Region, 1849-1859," 263-65; Newell D. Chamberlain, *The Call of Gold: True Tales on the Gold Road to Yosemite* (Mariposa, Ca: the Gazette Press, 1936), 111, 112; San

Francisco *Evening Bulletin*, December 15, 1859, 4 -2.

57. Nevins, Frémont, 583-601; na, *The Great Libel Case: Opdyke vs. Weed* (New York: The American News Company, 1865).
58. Frémont to David Dudley Field, Sept. 26,1878; Frémont to Stephen J. Field September 27, 1878, Field -Musgrave Collection, Special Collections Duke University.
59. na, "The Gold Key Court or the Corruptions of a Majority of it," A copy of this pamphlet is held at the Huntington Library, it is signed "Ex-Supreme Court Broker," and has no date. It includes charges relating to a variety of other land cases, including the San Francisco cases.
60. PR, 108-09, Stephen J. Field to J. DeBarth Shorb, Oct ober 27, 1886, Huntington Library. 61.
61. John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino CA: The Huntington Library, 1980): Also see, John Phillip Reid, *Policing the Elephant: Crime, Punishment, and Social Beha vior on the Overland Trail* (San Marino CA: The Huntington Library, 1997).
62. New York *Times*, May 19, 1870. Although Justice Miller wrote the *Frisbie* opinion, some California homesteaders insisted on attributing the outcome to Field. Shortly after the decision, a lawyer named W. Hastings petitioned the U.S. House of Representatives to impeach Field and Cal ifornia federal district judge Ogden Hoffman. According to Field, Hastings was a man carrying a grudge. Less than a year earlier, in an unrelated incident, Hoffman had di sbarred Hastings from practicing law in California federal courts.