From the Bag

They do each other honor.

Thomas Nast

Satan and David Dudley Field in Field's law office, Harper's Weekly, February 24, 1877

[David Dudley Field] was widely known, however, not more for his efforts to bring about the codification of law than for his malodorous influential connections with the schemings of Jay Gould and other ruthless capitalists in New York, and for his service as counsel for the notorious Tweed. His principles stood in low repute, but his opponents feared him for his driving energy and his matchless ingenuity in the defense of his clients.

Carl Brent Swisher

Stephen J. Field: Craftsman of the Law 274 (1930)

THE JUDICIARY FUNDED

THE GENEROSITY OF DAVID DUDLEY FIELD

Ross E. Davies

IN MID-1894, SHORTLY AFTER THE DEATH of David Dudley Field (one of the most powerful and famous, and least-loved, American lawyers of the 19th century), the following improbable anecdote written by lawyer-journalist Irving Browne appeared in a few legal publications:

> David Dudley Field was very frugal in small matters [in other words, he was an unreformed American Scrooge to his dying day[1]], the result of his humble circumstances in youth [not true – his father was a respected Congregational minister, neither rich nor poor[2]] and the paternal inculcation of wholesome New England thrift, but in large matters he was generous. A little more than a year ago he wrote me – certainly with no design of having it heralded, at least in his life-time: "It may interest you to know, since I have been charged with parsimony, that in my chagrin at the failure of the bar of the country to keep its prom-

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Ross Davies is an editor of the Green Bag and a law professor at George Mason University. *This article is a sequel to The Judiciary Fund, 11 GREEN BAG 2D 357 (2008).*

[1] In a fawning and devoutly Social Darwinist biography of David Field, his brother Henry writes, "Certainly he was not of the number of those who throw away money right and left, where it might do as much harm as good. . . . But the gift of money is the least of gifts, for if given unwisely, it will only make the poor poorer, and more dependent than before. It is not charity that men want, but justice." HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD 352, 354 (1898).

[2] *Id.* at 12-25.

> ise, made at a meeting in Washington, after the death of Chief Justice Taney, to look after his family, I gave to the clerk of the Supreme Court my personal bond to pay to a daughter of the chief justice $500 a year, during her life or mine, I forget which; and that I paid this annuity from the date of the bond in 1873 till the daughter's death in 1891, so that I actually contributed out of my private funds $9,000 to save the credit of the bar. I had never seen the two daughters, nor the chief justice himself, except on the bench, and I loathed his decision in the Dred-Scot case."[3]

An experienced observer of public affairs in 1894, or in 2011, surely could be forgiven for doubting the veracity of such a self-serving, out-of-character story, retailed only posthumously by a friendly journalist, and with no evidence to back it up. The Gilded Age was, after all, a time when politicians and power-mongers like Field could rely on select reporters and editors to serve as virtual publicists – mixing innuendo with truths, half-truths, and non-truths (often supplied by unidentified sources) in news stories that boosted their favorites.[4] Neither Browne nor anyone else seems to have made any effort to verify Field's story, even though the Clerk of the Court at the time, J.H. McKenney, had been in office since 1880 and thus presumably had administered the Field-to-Taylor annuity from 1880 to 1891. It is perhaps for those reasons that Browne's parable of the secretly saintly David Dudley Field, revealed only post-mortem in all the glory of his selfless kindness and generosity, was largely ignored at the time and has been ever since.[5]

But the story is true, or true at least as to Field's initial generosity. And there is evidence to back it up.

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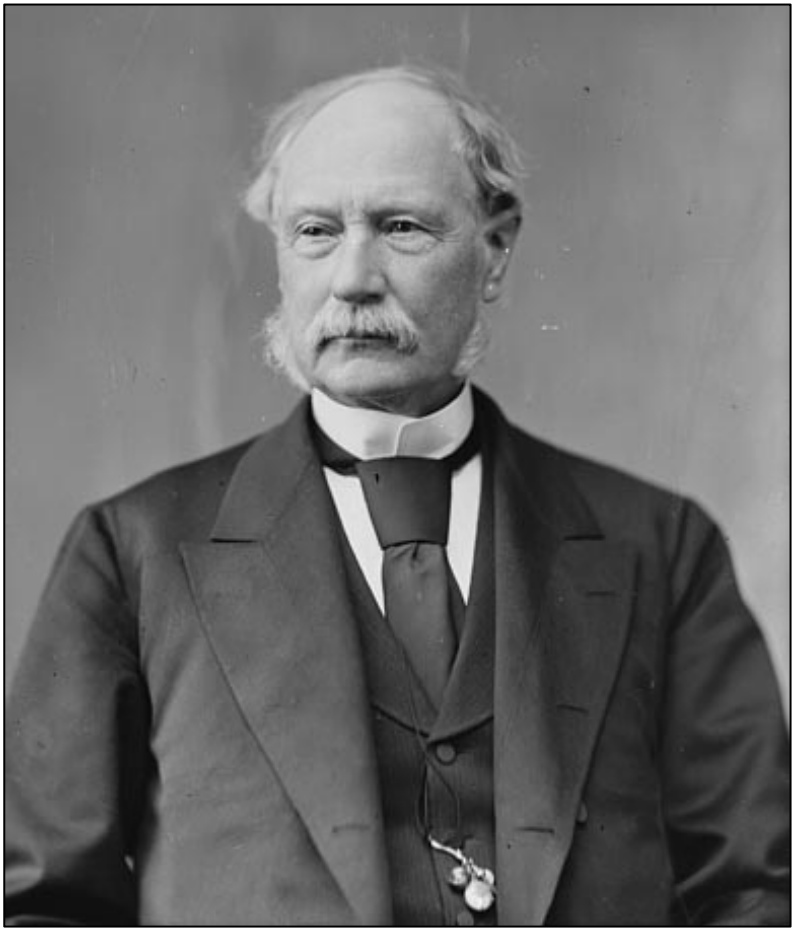
[3] Irving Browne, *Notes*, ALBANY L.J. (quoting his own earlier report in the *London Law Journal*); *see also The Judiciary Fund*, 11 GREEN BAG 2D at 366 n.34.

[4] This conniving knew no limits in the late 19th century. As Professor Paul Kens observes in his leading biography of David Field's brother, Supreme Court Justice Stephen J. Field, "If friendly newspapers were unavailable it was possible to establish or buy one." Another Field brother, Cyrus, did just that, buying the *New York World* in 1880 to increase journalistic support for brother Stephen's presidential candidacy. PAUL KENS, JUSTICE STEPHEN FIELD 178 (1997).

[5] The story does appear on page 353 of Henry's biography of David.



David Dudley Field (1805-94), spent most of his life as a rich and influential practicing lawyer in New York, often at the center of great affairs. He was, among other things, leader of the codification movement and author of the Field Code, a campaigner for world peace through international arbitration, and counsel in several important Supreme Court cases, including Ex parte Milligan (1866), Ex parte Garland (1867), Ex parte McCardle (1868), and U.S. v. Cruikshank (1875). But he was probably most famous in his own day for his representation of great industrialists and financiers (aka robber barons) and corrupt New York politicians (aka the Tweed Ring), which made him a favorite target of cartoonist Thomas Nast. See, e.g., page 435 above, and Renee Lettow Lerner, Thomas Nast's Crusading Legal Cartoons, 2011 Green Bag Alm. 59.

THE TANEY FUND, UNFUNDED

Let us begin with the first part of that self-congratulatory letter that Field sent to Browne in 1893, and that Browne published in 1894:

> It may interest you to know, since I have been charged with parsimony, that in my chagrin at the failure of the bar of the country to keep its promise, made at a meeting in Washington, after the death of Chief Justice Taney, to look after his family . . .

Field has it right. Leaders of the bar – including such giants of the day as Attorney General Amos Akerman, former Attorney General William Evarts, and Representative (and future President) James A. Garfield – made that promise at a meeting in Washington, DC, on February 11, 1871. They announced the establishment of "The Taney Fund" to provide for "the daughters of one who for thirty years presided as chief in this illustrious court [and] are now actually in want, within the very shadow of the National Capitol."[6] (At the time of the 1871 meeting there were two needy Taney daughters. One, Ellen Taney, died later that year, leaving Sophia Taylor as the only beneficiary of Field's largesse that was to come later.[7])

According to later news reports, the bar did indeed fail to keep its promise.[8] In fact, it was a rather unsavory episode. Chief Justice Taney had died in 1864, and the bar ignored the two needy women until 1871. Then, in the midst of a lobbying campaign for a pay raise for federal judges, Akerman, Evarts, Garfield, et al. plucked the Taney daughters from their seven years of impecunious obscurity to serve as poster children for the suffering caused by the "niggardly compensation which is made to the judicial magistrates of this country."[9] Once the desired legislation was enacted – which it was in

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[6] *The Taney Fund: Proceedings of the Meeting of the Bar of the United States* (1871), *reprinted in* 11 GREEN BAG 2D 373, 377 (2008).

[7] *The Judiciary Fund*, 11 GREEN BAG 2D at 359, 365-66.

[8] *See id.* at 364-66.

[9] *The Taney Fund*, 11 GREEN BAG 2D at 376.

March of that year[10] – the Taney daughters were no longer useful tools, and the ungentlemanly gentlemen of the bar cast them aside.[11]

FIELD'S FUNDING

Next, the second part of Field's letter to Browne:

> . . . I gave to the clerk of the Supreme Court my personal bond to pay to a daughter of the chief justice $500 a year, during her life or mine, I forget which . . .

Again, Field has it right. It appears that on May 10, 1873, Field wrote about his plan to Daniel W. Middleton, who was then Clerk of the Supreme Court. Middleton replied promptly:

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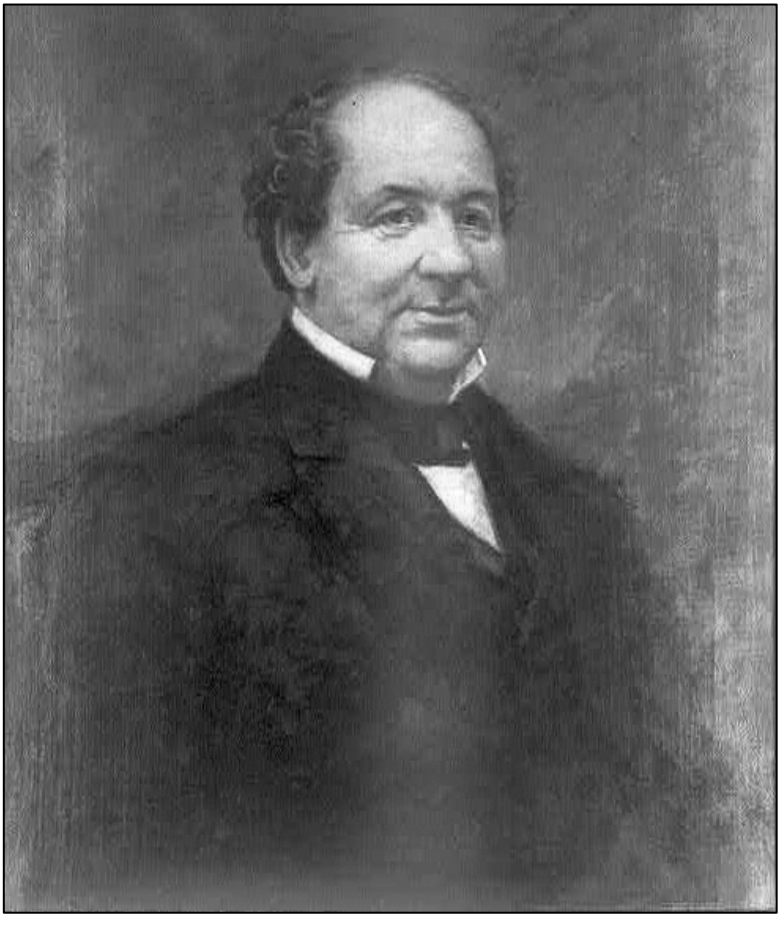
[10] *An Act making Appropriations for the legislative, executive, and judicial Expenses of the Government for the Year ending June thirty, eighteen hundred and seventy-two*, 16 Stat. 493-95 (Mar. 3, 1871)

[11] The behavior of the bar was made all the more shameful by the inaccuracy of its portrayal of the Taney daughters' situation. In short, to the extent the Taney daughters were short on money, they brought the situation upon themselves – or at least exacerbated it – by quitting their jobs. *See A Misstatement Corrected*, N.Y. TIMES, July 16, 1869, at 5:

> A story has been put in circulation to the effect that Mrs. TAYLOR and Miss TANEY, daughters of the late Chief-Justice TANEY, had been removed from their positions as lady clerks in the Patent Office. This story is, no doubt, put in circulation to create the impression that the Secretary of the Interior and the Commissioner were intolerantly prescriptive toward these ladies. It is well known that by a recent act Congress provided that all the writing for the Patent Office which heretofore had been done by ladies at their residences should, after the 1st of July, be done at the office. When the clerical force was reorganized, circular letters were sent to all the old lady employees inviting them to positions in the building . . . . In the case referred to above both the ladies declined the position, preferring not to leave their homes to perform the clerical duty. If, therefore, any blame is attached to their loss of position, it rests between themselves for declining all the Department had to offer, or with Congress for passing the bill requiring the work to be done in the Patent Office.

In addition, one daughter was receiving a military widow's pension, which was doubled in 1880. *See An act to amend an act entitled "An act granting a pension to Sophia Brooke Taylor, widow of the late Major Francis Taylor,"* 21 Stat. 545, June 7, 1880; *see also* Senate Report No. 507, 46th Cong, 2d Sess., Apr. 21, 1880.



Daniel W. Middleton (1805-80), spent most of his life in the office of the Clerk of the Supreme Court, first as an assistant (ca. 1822-27), then as deputy (1827-63), and then as Clerk (1863-80). In 1880, Chief Justice Morrison Waite eulogized him as "courteous . . ., dignified . . ., faithful in every duty, and never unmindful of the confidential relations he had with the Court." Field's enlistment of Middleton in 1871 to arrange for payments to Taylor would have seemed quite natural at the time, because in those days the "Clerk's office performed innumerable personal services for the Justices." Charles Fairman, Reconstruction and Reunion 1864-88 Part One 80, 81 (1971); see also Death of Mr. Middleton, Wash. Post, Apr. 29, 1880, at 4; Hampton L. Carson, 2 The History of the Supreme Court of the United States 643 (1904).

May 19, '73

David Dudley Field, Esq.

My dear Sir,

I am this date in receipt of your esteemed favor, dated 10 May '73, enclosing authority to me to draw on you for $500, a year, in half yearly payments, for the benefit of Mrs. Sophia B. Taylor of Baltimore, daughter of the late Chief Jus. Taney, which trust I cheerfully accept.

It is ~~indeed~~ a munificent gift, and will gladden the heart of the needy and worthy recipient, and for such a noble charity you will surely be fully rewarded.

Do me the favor to say when I shall make the first draft . . . .

Yours very truly
DWM[12]

Middleton was undoubtedly fully aware of every aspect of the matter. Not only was he Clerk of the Court (a position he had held since 1863), he also served as secretary of the bar group that had met in Washington in February 1871 to establish the Taney Fund in the first place.[13]

Why did Field wait until May 1873 – nine years after Chief Justice Taney's death and two years after the meeting establishing the Taney Fund – to step in with aid for Sophia Taylor? Two developments may well have played a part.

First, his attention might have been drawn to Taylor's plight by media coverage of the continuing "failure of the bar of the country to keep its promise." For example, in February 1873, the *Atlanta Constitution* reported that, "The daughters [by this time Taylor was the only surviving Taney daughter[14]] of the late Chief Justice are in

[12] *See* page 446 below, D.W. Middleton to David Dudley Field, May 19, 1873, Records of the Office of the Marshal, Subject Files, 1864-1913, President's Receptions, 1864 thru Telephones, Installation of 1894 and 1897, RG267: Records of the Supreme Court of the U.S., Entry 72, Box 5, National Archives and Records Administration, Washington, DC (hereafter "*Records of the Marshal*").

[13] *See The Taney Fund*, 11 GREEN BAG 2D at 373.

[14] *See* note 7 above.

straitened circumstances, being compelled to earn their subsistence by working as copyists for lawyers in Baltimore."[15] Chief Justice Taney had been dead for nearly a decade. If Taylor was worthy and her need genuine, such a delay was an outrage that could have inspired a previously unmoved Field to step in.

Second, Field might have been inspired by events in his own life to engage in a little soul-cleansing charity. He had spent the winter and spring of 1872-73 struggling mightily, and successfully, in the New York courts to keep the blatantly corrupt William "Boss" Tweed out of jail. The Tweed prosecution was by many accounts a truly appalling travesty of justice.[16] Maybe Field was feeling a bit of guilt and was looking for a little balance in the moral books. If he was, though, the feeling did not last long. After Tweed was convicted in a second trial (without Field as defense counsel), Field returned to handle the successful appeal. As a result, Field was vilified in the media. Indeed, Field's reputation has never recovered from his deep involvement with Tweed's infamous Tammany Hall political operation in New York.[17]

But enough psychologizing. Maybe Field helped Taylor simply because he thought it was the right thing to do and he could afford to do it. The essential fact is that unlike his fellow members of the legal elite, Field followed through on his gift promise. He quickly responded to Middleton's inquiry about the timing of payments, writing on May 20, 1873:

> You may draw immediately for the first half-yearly installment. Please make all your drafts at three days sight, to guard against mischance owing to absence from my office.[18]

Field's money seems to have been flowing through Middleton to Taylor by the end of the month. On May 24, Middleton reported:

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[15] ATL. CONST., Feb. 5, 1873, at 4.

[16] *See* Lerner, 2011 GREEN BAG ALM. at 59, 70-71.

[17] *Id.*

[18] *See* page 447 below, David Dudley Field to D.W. Middleton, May 20, 1873, *Records of the Marshal*.

> I have this date drawn on you for $250, for [the account] of Mrs. Sophia B. Taylor, as authorized by you, and yesterday I communicated to her the joyfull intelligence of your bountiful gift, for which she will no doubt thank you herself.[19]

THE FUND'S FUTURE

Finally, the last lines of Field's letter to Browne:

> . . . and that I paid this annuity from the date of the bond in 1873 till the daughter's death in 1891, so that I actually contributed out of my private funds $9,000 to save the credit of the bar. I had never seen the two daughters, nor the chief justice himself, except on the bench, and I loathed his decision in the Dred-Scot case.

Field may well be right again (his track record so far is good), but most of these claims defy verification, at least for now. His anti-*Dred Scott* stance is quite believable, given his impeccable anti-slavery credentials,[20] and I have been unable to find anything that suggests a social connection between Field and the Taney family. In other words, his generosity seems not have been inspired by personal affection or professional association.

More importantly for the funding-oriented focus of this article, there is some evidence that Field did continue to support Taylor over the years, although not enough to trace that support up to the time of Taylor's death in 1891.

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[19] *See* page 448 below, D.W. Middleton to David Dudley Field, May 24, 1873, *Records of the Marshal*. Middleton included a rather paternalistic postscript:

> It has occurred to me that I had better make special deposits of the amounts as received of you, and pay the same to her in monthly installments, which will enable her, with her other little means, to make her expenditures more judiciously. If this suggestion should meet with your approbation, I will at once adopt that course.

See id. at page 449 below. Field did approve. *See* page 450 below, David Dudley Field to D.W. Middleton, May 26, 1873, *Records of the Marshal* ("I have just rec'd your letter of the 24th & quite agree with you, that you had better make special deposits of the amounts received & pay her. Transfer in monthly installments?").

[20] *See* KENS, JUSTICE STEPHEN FIELD at 96.

In August 1873, Field left New York for a prolonged around-the-world tour.[21] A few days before his departure he wrote to Middleton to arrange for a steady flow of cash to Taylor.

> I am going abroad next week Saturday, to be absent one or two years. My absence however need make no difference in your drafts for Mrs. Taylor, which, if drawn on me here will be honored, as if I were present.[22]

And the cash did continue to flow, at least into the late 1870s. The last documentary fragments of the Field-Middleton correspondence are three notes – one from 1874, one from 1878, and one with no date – relating to payments from Field to Middleton "for the use and benefit of Mrs. Sophia B. Taylor."[23]

Recall that publicity about the financial plight of Taylor and her sister was originally fostered by the bar to raise awareness about low pay for federal judges and to showcase the willingness of prominent lawyers to put their money where their mouths were. There is a simultaneously pleasing and disturbing irony in the fact that in the end it was Field – the demonized servant of the trusts and Tammany Hall – who stepped in to preserve the honor of the bar after the grandees of American law proved to be rather slippery about their commitments.

[21] *See Passengers Sailed*, N.Y. TIMES, Aug. 31, 1873, at 8; FIELD, THE LIFE OF DAVID DUDLEY FIELD 243-61.

[22] *See* page 451 below, David Dudley Field to D.W. Middleton, Aug. 21, 1873, *Records of the Marshal*.

[23] *See* page 452 below, Drafts on David Dudley Field, Nov. 5, 1874 and Nov. 4, 1878, and an undated, unsigned note, *Records of the Marshal*.

CORRESPONDENCE, 1873-1878

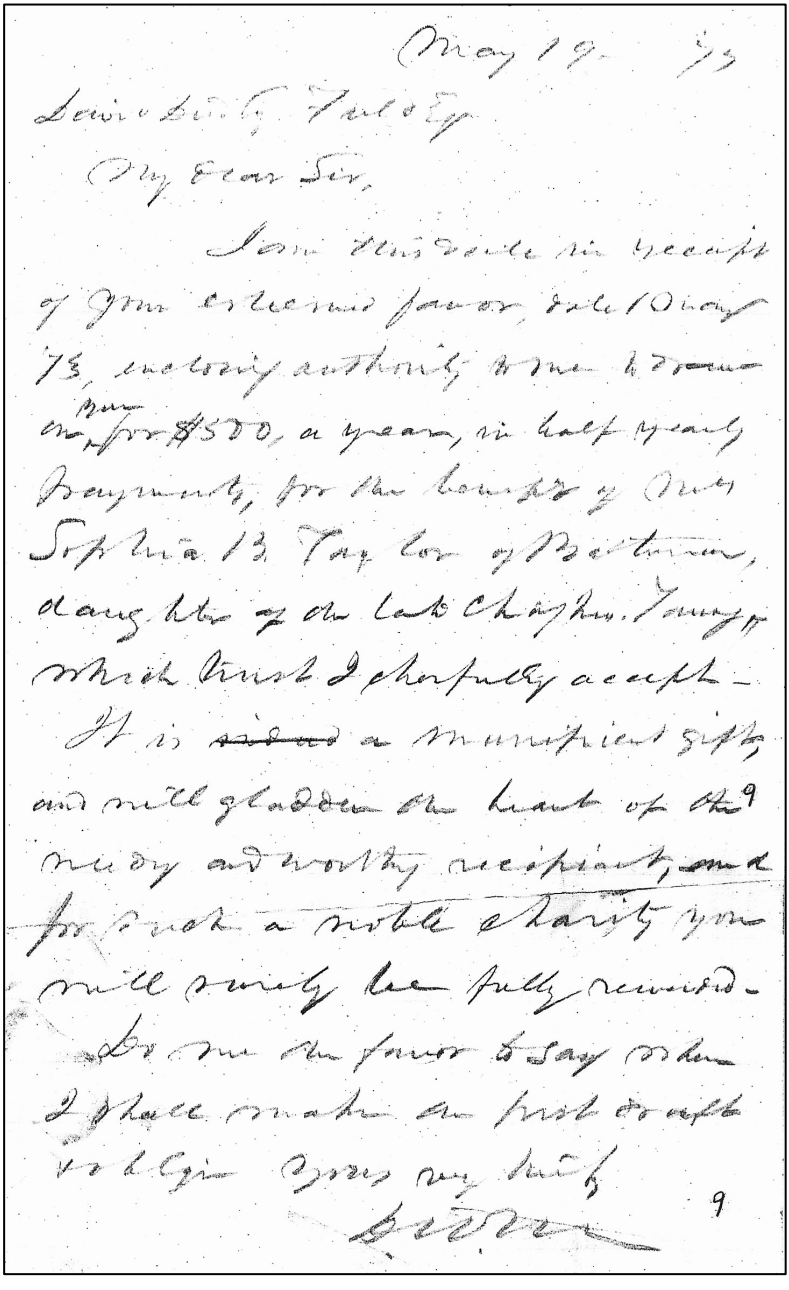
David Dudley Field & Daniel W. Middleton

THIS CORRESPONDENCE BETWEEN David Dudley Field (see page 437 above) and Daniel W. Middleton (see page 440 above) is preserved at the National Archives in Washington, DC, in the files of the Marshal of the Supreme Court.[1] Why the Marshal's files rather than the Clerk's, when Middleton was Clerk of the Court when he and Field were corresponding? The *Green Bag* has no idea. There is a Clerk's office envelope in the file, on which there are two notes. A typed one: "Correspondence between the Clerk (Middleton) and Dudley Field, Esq., of New York City (lawyer) authorizing the Clerk to draw on him for $500 per year for the benefit of the daughter of the late Chief Justice Taney." And a handwritten one: "Rec'd from Mr. James R. Browning, Clerk of Sup. Ct. of U.S., on 8/29/61." Browning left the Clerk's Office in September 1961 to take a seat on the U.S. Court of Appeals for the Ninth Circuit. He took senior status in 2000,[2] and due to poor health has not been available to comment on the provenance of the documents reproduced here.

At the time of this correspondence, David Dudley Field was a partner in the firm of Field & Shearman in New York City, a predecessor of today's Shearman & Sterling LLP. Daniel W. Middleton was Clerk of the Supreme Court of the United States.

[1] Records of the Office of the Marshal, Subject Files, 1864-1913, RG267: Records of the Supreme Court of the U.S., Entry 72, Box 5, National Archives and Records Administration, Washington, DC.

[2] *Judge James R. Browning Marks 50 Years of Service*, Ninth Circuit Public Information Office, Sept. 19, 2011, www.ce9.uscourts.gov/absolutenm/templates/template_ce9.aspx?articleid=368 (vis. Sept. 19, 2011).



May 19 73

Lewis Benj. Taylor Esq

My Dear Sir,

I am this day in receipt of your esteemed favor dated 10 May 73, and duly authority to draw on you for $500, a year, in half yearly payments, for the benefit of Miss Sophia L. Taylor of Baltimore, daughter of our late Chaplain. Yours which I shall thankfully accept.

It is a munificent gift, and will gladden the heart of the needy and worthy recipient, and for such a noble charity you will surely be fully rewarded.

Do me the favor to say when I shall make an first draft and oblige

Yours very truly

D. D. Field

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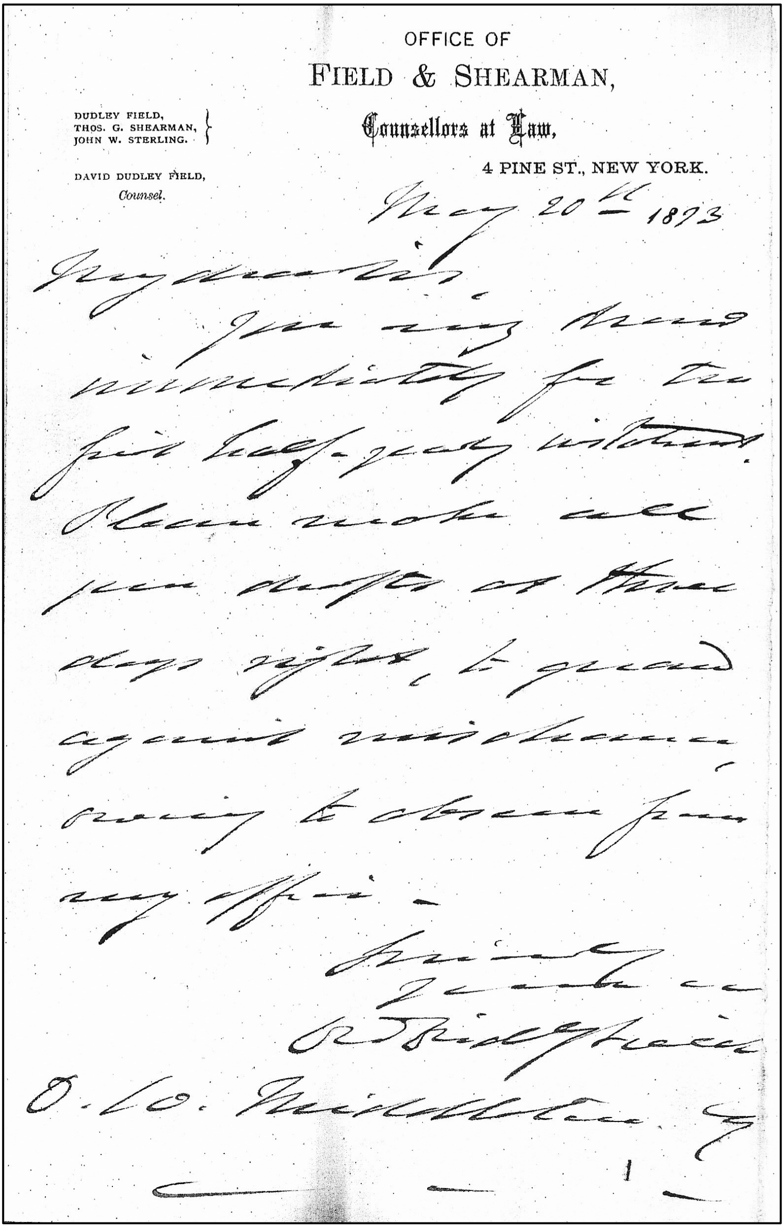


OFFICE OF
FIELD & SHEARMAN,
Counsellors at Law,
4 PINE ST., NEW YORK.

DUDLEY FIELD,
THOS. G. SHEARMAN,
JOHN W. STERLING.

DAVID DUDLEY FIELD,
Counsel.

May 20th 1873

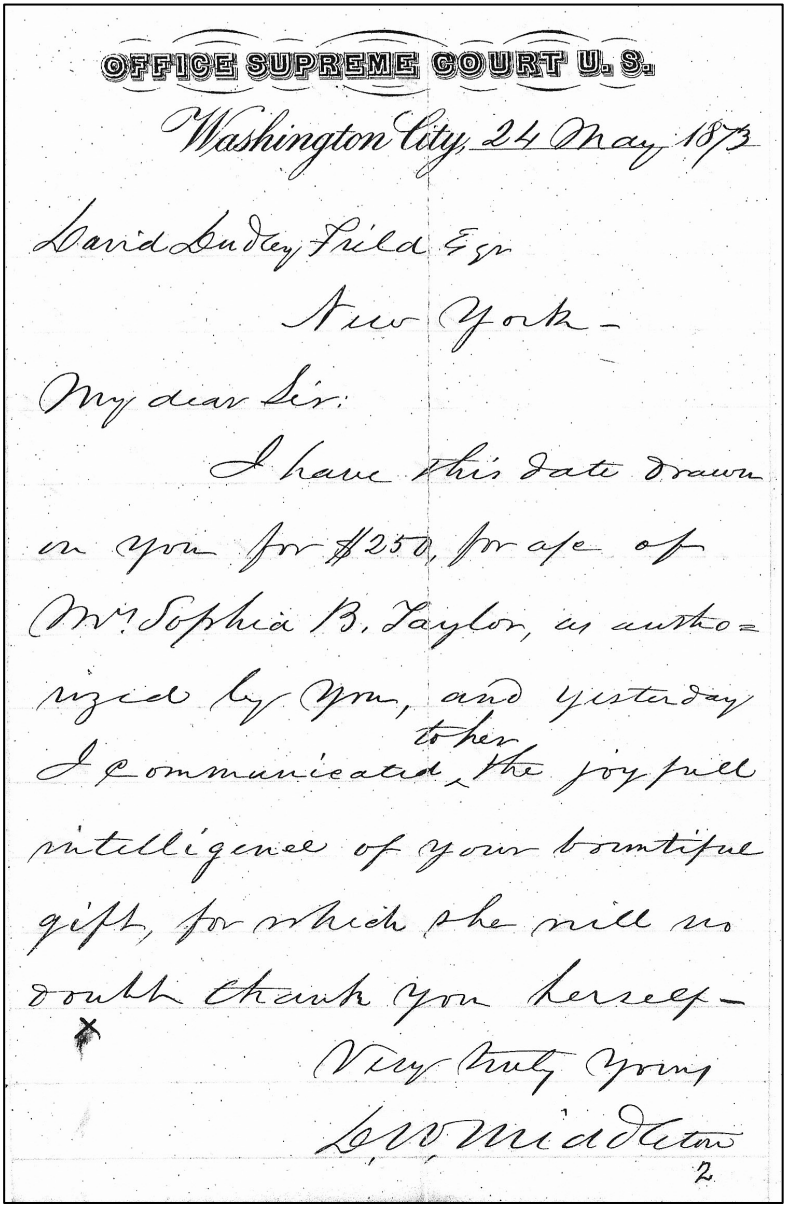
My dear Sir,

You may draw immediately for the first half-year's interest. Please make all your drafts at three days sight, to guard against mischance owing to absence from my office.

Yours truly

[illegible]

O. W. Middleton Esq



OFFICE SUPREME COURT U. S.

Washington City, 24 May 1873

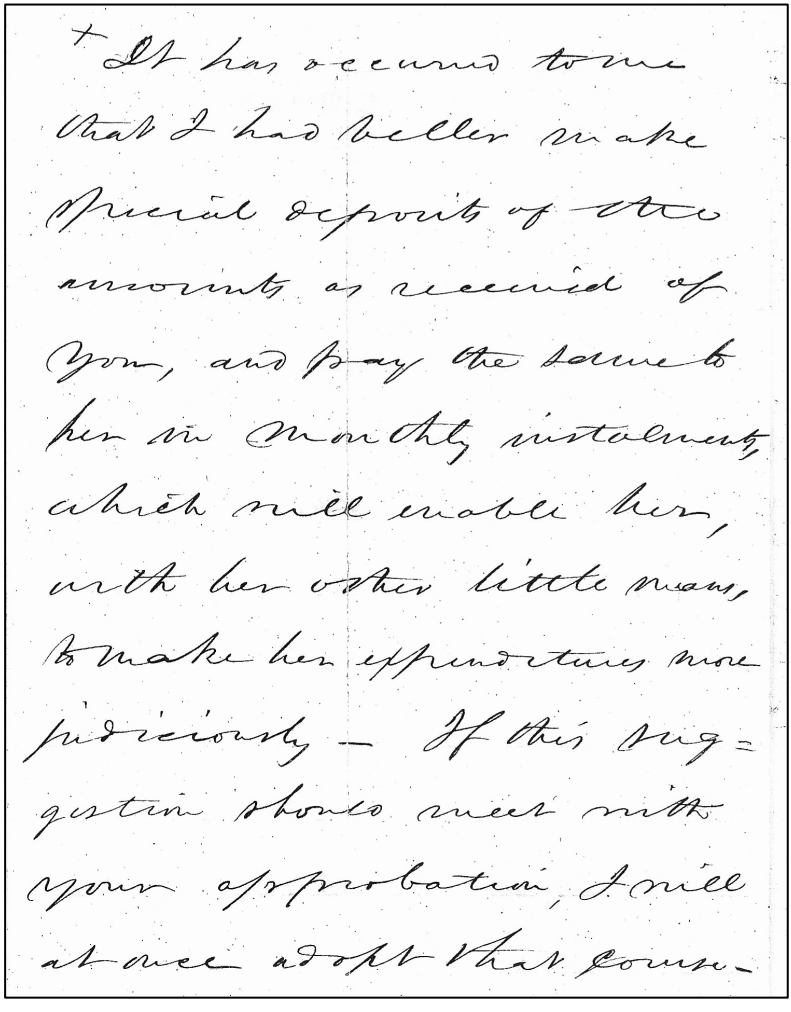
David Dudley Field Esq
New York –

My dear Sir:

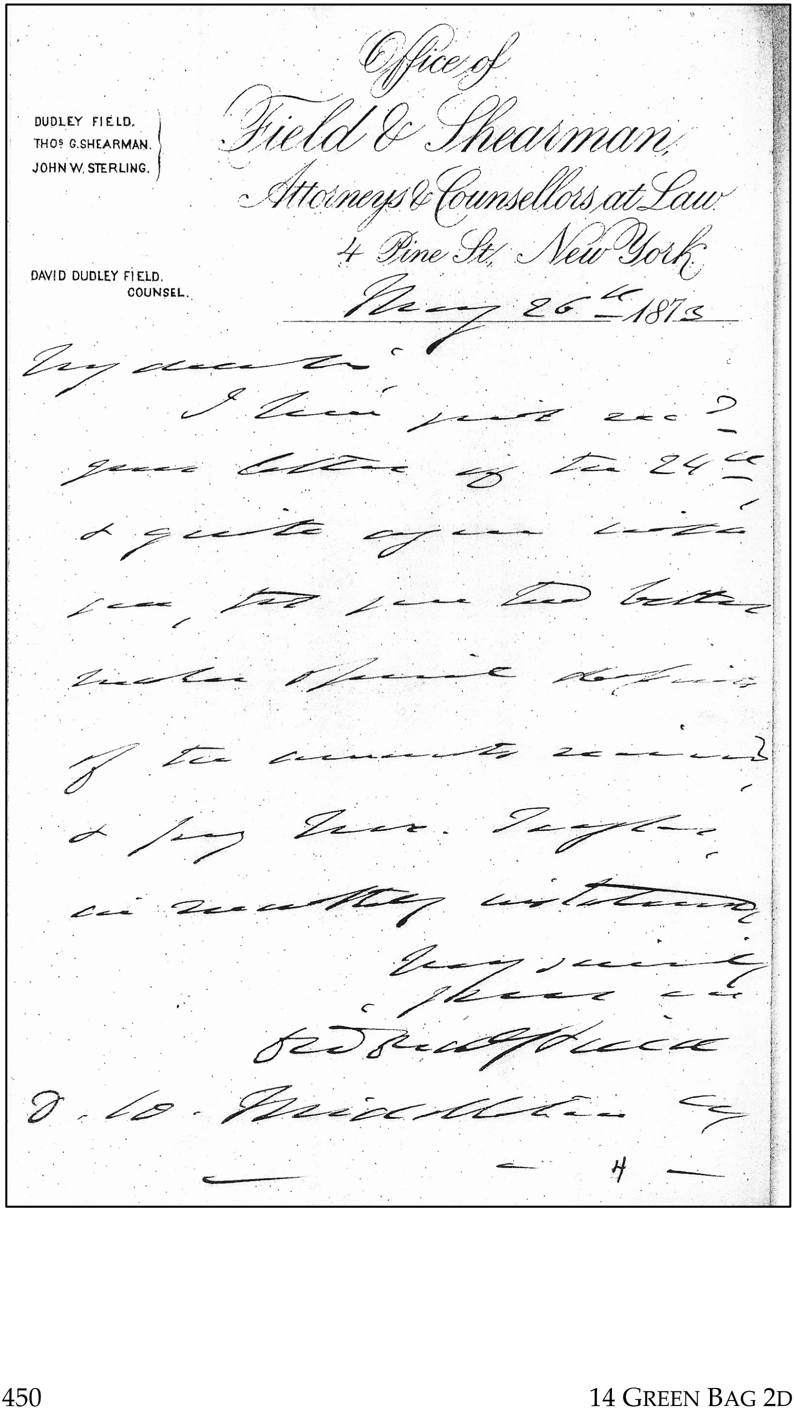
I have this date drawn on you for $250, for use of Mrs Sophia B. Taylor, as authorized by you, and yesterday I communicated to her the joyfull intelligence of your bountiful gift, for which she will no doubt thank you herself –

Very truly Yours
D. W. Middleton

2



+ It has occurred to me that I had better make special deposits of the amounts as received of you, and pay the same to her in Monthly instalments, which will enable her, with her other little means, to make her expenditures more judiciously — If this suggestion should meet with your approbation, I will at once adopt that course —



DUDLEY FIELD,
THOS G. SHEARMAN,
JOHN W. STERLING.

DAVID DUDLEY FIELD,
COUNSEL.

Office of
Field & Shearman,
Attorneys & Counsellors at Law
4 Pine St, New York

May 26th 1873

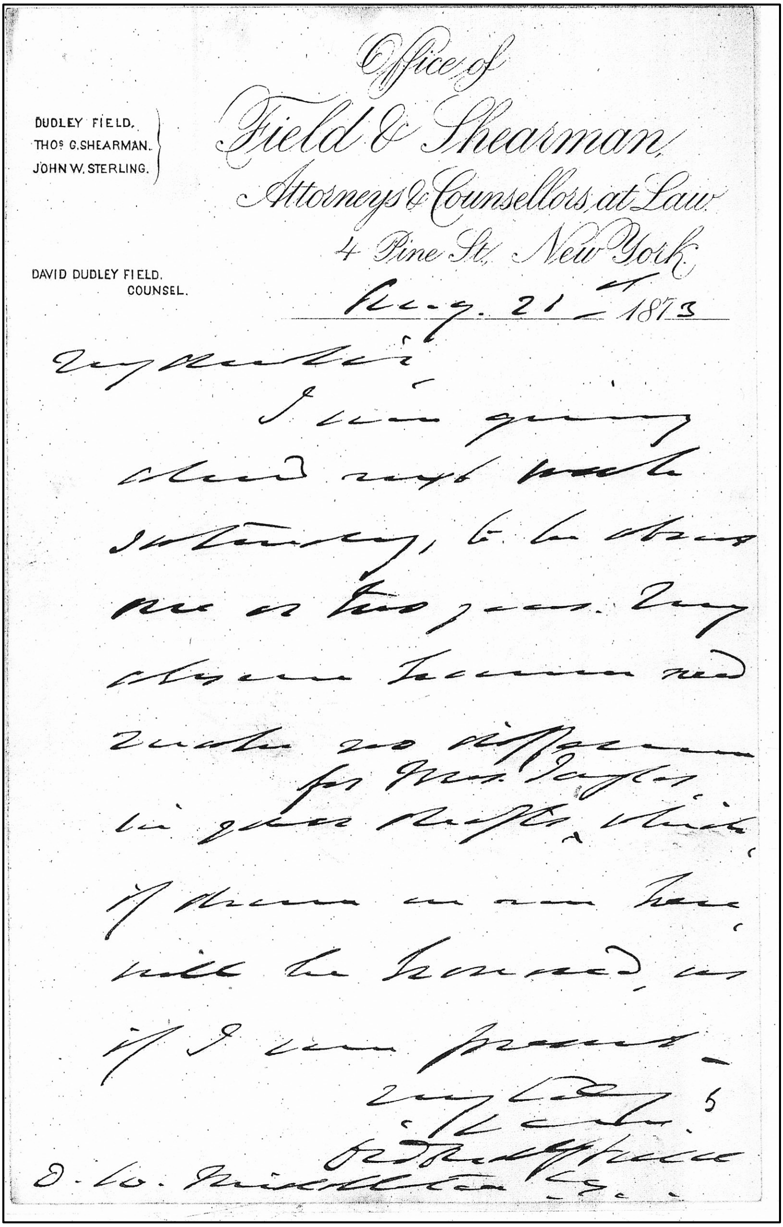
My dear Sir:

I have just rec'd your letter of the 24th & quite agree with you, that you had better make special deposits of the amounts received & pay Mr. Taylor in monthly instalments.

Very truly
Yours &c.
David Dudley Field

D. W. Middleton Esq.

— 4 —



DUDLEY FIELD.
THOS G. SHEARMAN.
JOHN W. STERLING.

DAVID DUDLEY FIELD.
COUNSEL.

Office of
Field & Shearman,
Attorneys & Counsellors at Law,
4 Pine St, New York.

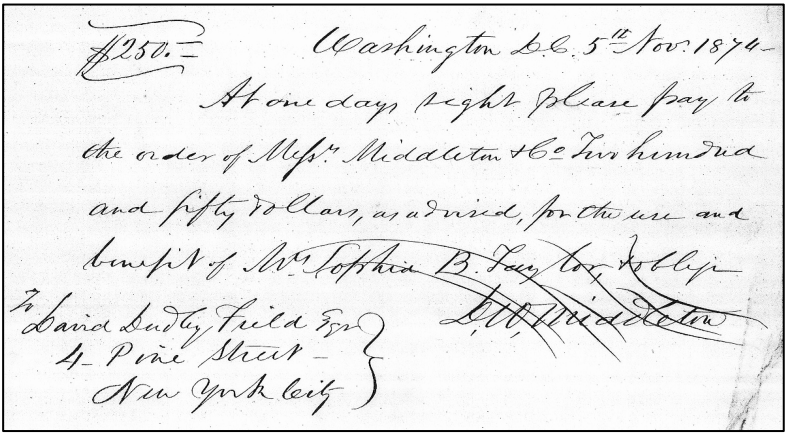
Aug. 21st 1873

My dear Sir,

I am going abroad next week Saturday, to be absent one or two years. My absence however need make no difference for Mrs. Taylor in your matters, which, if drawn in our hands, will be honored, as if I were present.

Very truly Yours,
David Dudley Field

D. W. Middleton Esq.

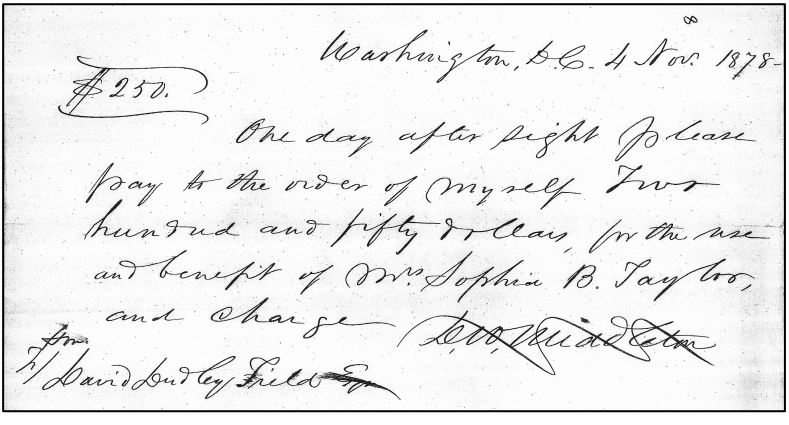


$250.— Washington D.C. 5th Nov. 1874.

At one days sight please pay to the order of Messrs. Middleton & Co Two hundred and fifty Dollars, as advised, for the use and benefit of Mrs. Sophia B. Taylor, & oblige

To David Dudley Field Esqr
4 Pine Street
New York City

D.W. Middleton



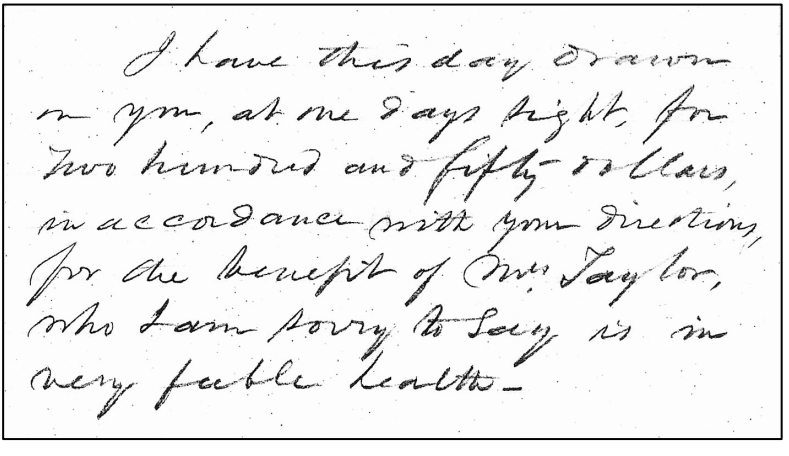
Washington, D.C. 4 Nov. 1878.

$250.

One day after sight please pay to the order of myself Two hundred and fifty Dollars, for the use and benefit of Mrs. Sophia B. Taylor, and charge

D.W. Middleton

To
D. David Dudley Field Esq



I have this day drawn on you, at nine days sight, for Two hundred and fifty Dollars, in accordance with your directions, for the benefit of Mrs. Taylor, who I am sorry to say is in very feeble health.