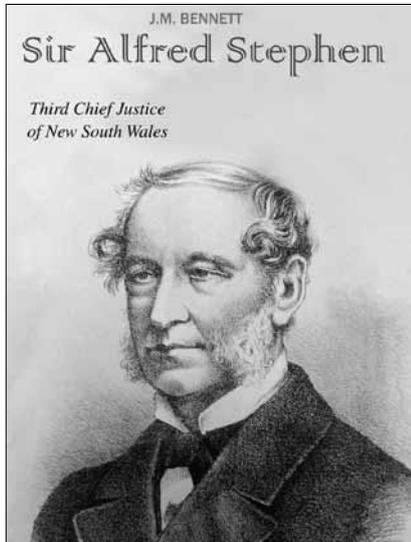


Sir Alfred Stephen: Third Chief Justice of New South Wales

By JM Bennett | The Federation Press | 2009



You could be forgiven for thinking that the latest in Dr Bennett's series on the lives of Australian chief justices is, at 540 pages, the granddaddy of them all. You would be wrong: when Stephen's grandson took a permanent appointment on 10 June 1929, he was the fourth generation of the family to sit on the New South Wales Supreme Court.

While the Stephen family has inhabited Sydney's legal world for almost two hundred years, it is necessary to start from the other end of things to find out just how saturated in the dark arts of law and public service they always were. Alfred's father was a barrister, his uncle a noted abolitionist and Wilberforce's brother-in-law and, significantly for Alfred, the father of James, the British under-secretary of state for the colonies from 1836 to 1847 who was said by a colleague to rule the empire.

This James was father of the anti-Millian criminal codifier James Fitzjames Stephen and grandfather

via mountaineer Sir Leslie Stephen of Virginia Woolf and Vanessa Bell. Is it apt or bemusing that the one person the eagle but not legal Leslie trusted to put together his Life and Letters was F W Maitland? Bennett sets out Maitland's summary of James the eldest, Alfred's grandfather and the person who with his wife caused it all:

On many a page... his progeny have left their mark, for, whatever else a true Stephen might do, he would at all events publish some book or at least some pamphlet for the instruction of his fellow men. Solid and sober, for the more part, were the works of the Stephens: grave legal treatises – for

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theirs was pre-eminently a family of the long robe – or else pamphlets dealing argumentatively with some matter of public importance.

Alfred Stephen was born in 1802, when George III was still king and not merely father of a regent. Stephen died on the threshold of our federation, in 1894; his early career was spent advising (and disagreeing with) Lieutenant Governor Arthur of Van Diemen's Land, while among his last correspondence was a congratulatory note to the new chief justice of Queensland which concluded 'I have no doubt that in your new sphere you will continue to do honour to your name - & be of eminent service to the Commonwealth'. And so 'Damn

Sam' Griffith did and was.

It was not only a long life but a long career which enabled Stephen to walk across as well as through history; he served an unbeatable time as chief in New South Wales, being given the job in 1844 upon the death of Dowling and only after some vigorous lobbying of cousin James, and standing down in 1873. (Stephen's father, our first puisne judge, served under Forbes and Dowling but not, for the curious, his son.)

Stephen was no Forbes; while he would describe his predecessor 'as a liberal, in advance of the age', I think an objectivising Alfred – and despite

his vanity, he had that lawyer's gift – would have regarded himself as a humanitarian rather than a humanist, expressing himself through an often stern paternalism. One mighty step back was in the arena of civil procedure; Stephen's long stewardship heralded a withdrawal from the prescient pre-Judicature stance adopted by (or thrust by circumstances upon) Forbes and continued by Dowling. This is not merely of academic interest, as I suspect Stephen's efforts may have been the initial cause of why the Supreme Court Act was passed in 1970 and not 1870.

Stephen became antediluvian, but was rarely an antiquation. He didn't have the time. Our age is so specialised that

one needs a doctorate to find where the wood leaves the trees. For Stephen, life was simpler and infinitely more complicated; if there wasn't a law, one drafted one. Divorce, insolvency, court procedure, crime, admiralty, constitutional law, all was grist for Stephen's quill.

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One of Stephen's later interests was the source of Australian geographical names. Statistically it may seem likely that Port Stephens was named for his family, but in fact and as Stephen ferreted out, it was named by Cook for the then first secretary of the admiralty, Philip Stephens, in whose sister's service Cook had been as a boy. Jackson was the then second secretary.

For the pedantic among the bar – and God knows... – please chastise your friends and relatives when they use 'Sydney Harbour'. Apart from being boring, they're wrong. As the Geographical Names Board puts it, Port Jackson is much more, 'A harbour which comprises of all the waters within an imaginary line joining North Head and

South Head. Within this harbour lies North Harbour, Middle Harbour and Sydney Harbour.'

Stephens left no family and Jackson had to change his surname to keep the wife – and property owner – happy. I think there's something rather sweet in the singular Stephen, who was not content

with a bundle of cousins but was survived by two sons and a daughter of his first wife and by three sons and four daughters of his second, wanting to lay down these two forgotten men for posterity.

Bennett does an excellent job of reminding us of the importance of gongs. We live in an age when any shibboleth can be seduced, so long as you have enough money. That's probably a good thing, something for which we can thank 'democracy' (no friend of Stephen). In Stephen's age, the pecking order was defined not by the purse but by the position. Stephen was just as keen as the rest of them, grateful for a CB (got up for him by one of his London champions, erstwhile

Sydney albino barrister and the founder of modern company law Robert Lowe), a KCMG, a deserved upgrade to GCMG, and a PC. William Bede Dalley, the Catholic barrister who keeps one eye on the court and one eye on the cathedral from a plinth in Hyde Park, beat Stephen as the first councillor from these colonies.

Stephen had a high opinion of himself and was often justified in holding it. He performed many and varied roles in two colonies; indeed, his work as a politician and as lieutenant-governor while a judicial officer will amaze those of us who have been brought up to believe that a strict separation of powers is a totemic feature of the common law system. His last words are held by his family to have been to his doctor: 'My dear friend, you know this is getting beyond a joke'. This is the difficulty of life lived so full, when your family motto is *virtus ubique*.

Reviewed by David Ash