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BOOK REVIEW

Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873

By J.M. Bennett (Lives of the Australian Chief Justices series).

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The Hon. Michael Kirby AC CMG

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J.M. Bennett, *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873*

(Lives of the Australian Chief Justices series)

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In his opening acknowledgements, the author of this new biography, Dr. John Bennett AM, puts his finger on one of the problems that haunts legal history. 'It is too legal for historians and too historical for lawyers'. This feature may help to explain the decline in the teaching of legal history at Australian law schools¹. If there are occasional glimmers of light, as in this book and in the recent publication of the *Kercher Reports* (Federation Press, Sydney, 2009), edited by Bruce Kercher and Brent Salter for the Francis Forbes Society of Australian Legal History, it is no small thanks to the efforts of Dr. Bennett and a small team of dedicated Australian lawyers, one of whom is the editor of this Journal.

This is the thirteenth volume in Dr. Bennett's *Lives of the Australian Chief Justices*. The many references throughout this volume to Sir Samuel Way, Chief Justice of South Australia, at the time when Sir Alfred Stephen served as the third chief justice of New South Wales, suggests that there are interesting volumes still to come. All believers amongst us must pray for Dr. Bennett's long life. His work is unique. This volume is the largest and, though not the most amusing, the finest in the series so far.

¹ A fact noted in this reviewer's article, "Is Legal History Now Ancient History?", (2009) 83 ALJ 31, noted by Dr. Bennett at p514.

Sir Alfred Stephen was one of the famous Stephen legal family. The author traces his forebears in Scotland and England. They included Sir James Stephen, Under-Secretary at the Colonial Office in London who (although he denied and covered it up) did much to advance the hero's early career. There was also Sir James Fitzjames Stephen, who was to play such an important part in law reform in India, England and throughout the British Empire. These were truly members of the 'heavenborn' who served the British Empire in its heyday with intelligence, dedication, ambition and uncorrupted zeal. If the common law and the English language are still powerful unifying forces in contemporary globalism, much is owed to people like the Stephens.

As Dr. Bennett remarks towards the end of his story, there was a member of the Stephen family on the Supreme Court of New South Wales virtually for a hundred years. Alfred Stephen's father, [Sir] John Stephen was the first puisne judge of that Court, appointed in 1827. Alfred's son (Sir Henry), was appointed a judge in 1887. His younger brother, Edward Milner Stephen, held office from 1829-1839. The family name is still famous in Sydney legal circles. Sir Ninian Stephen, a Justice of the High Court and later Governor-General, seems to have been no relative. But so large was the Stephen family (Alfred had 18 children) that one could not be quite sure.

Dr. Bennett's biography adopts a chronological approach, although towards the end, it breaks into special chapters to analyse Sir Alfred Stephen's contributions to legal doctrine and decisional law; to parliamentary life (he served as President of the Legislative Council); and to vice-regal affairs (where he served on many occasions as

Administrator and later Lieutenant-Governor of the colony). These break-out chapters can at first be a little confusing in re-adjusting the mind to the time sequence. But given the multifarious activities in which the subject was engaged, often at the same time, it is difficult to see how otherwise due attention could have been paid to the three important areas of colonial government to which Sir Alfred Stephen contributed.

The book opens with some background on the family and the story of the young Alfred's birth in St. Kitts, in the Caribbean, in 1802. As a boy, the young Alfred was described as 'pleasant, lively and talkative', but although well informed, he was 'not profound' and rather shy as a young man. He travelled to England on a couple of occasions. On one journey, his vessel had to evade Napoleon's hostile ships which might have brought an end to the career chronicled in this book before it was started. At the age of 22, Alfred married his first wife, Virginia, in London. Immediately after, the young couple set sail for Hobart Town in Van Diemen's Land, with two servants and not a little uncertainty as to what the future would hold. When Stephen arrived, he was something of a pariah for the Tasmanian legal profession. In his legal work, eventually as Attorney-General of the colony, he was often perceived as arrogant and abrupt, causing offence to the local Governor and Chief Justice which was rather unwise for the career aspirations of a man on the make.

However, the one great quality that marked Alfred Stephen out throughout his legal career was his astonishing work ethic. This was quickly recognised as 'unremitting' and demonstrating a ready 'capacity to learn quickly'. He evinced an early interest in law reform. Although no radical, he became an advocate for a number of causes, such as the

introduction of trial by jury, a procedure resisted by the authorities as unsuited to the small population and rustic colonial circumstances. In most such causes, Stephen was to prove a formidable adversary. For the most part, he was successful in the end. But in his early days in Hobart, he caused needless offence by his calculated disrespect towards the Chief Justice, Sir John Pedder, evinced not only in his oral submissions (many faithfully recorded for the historian), but also in repeatedly arriving late for court and without his court 'costume'.

By all surviving accounts, the young Alfred was blessed with a long and happy home life. However, this was shattered in 1837 when his wife Virginia died giving birth to their ninth child. Within a year, he had re-married Eleanor Bedford, daughter of a Church of England priest. She was to give birth to nine further children, making in all nine boys and nine girls surviving: nine born in Tasmania and nine in New South Wales. Nine were born when Stephen was at the Bar. Nine followed during his judicial life. As Dr. Bennett observes, there was an interval of thirty years between the birth of his first and last child, making his complaints of constant exhaustion and impecuniosity entirely understandable. By every account, his home life a great support for his frenetic public activities.

When a vacancy arose on the Supreme Court of New South Wales in 1838, an offer of an acting appointment was sent south to the still young Alfred Stephen by the second Chief Justice of New South Wales, Sir James Dowling. At first, the Sydney profession was as hostile as that of Hobart had been, towards the arrival of the new blood. Word quickly spread of his reputation for conflict in Hobart. Yet on his arrival, he was found to be 'clever, gentlemanly and cordial'. He soon won over most of

his professional colleagues except, of course, the irascible J.W. Willis. Happily, Willis was soon thereafter appointed resident judge in Port Phillip. His 'removal' from office lay in the future, beckoning a further biography from Dr. Bennett, whenever he gets time. Typically, Willis resisted Stephen's appointment to a permanent post on the Supreme Court of New South Wales on the basis that his status in Van Diemen's Land had not been that of a true barrister but of an amalgam practitioner. This objection was brushed aside by the Governor, Sir George Gipps who treated it as of 'no importance', infuriating Willis, repeatedly described as a 'roughian'. Somehow, on his translation to Sydney, Alfred Stephen had grown up. Even Willis he treated with politeness, albeit of the icy variety. His conduct as a judge in court was near perfect. As is usually the case, this won over the sharp-eyed practitioners and colleagues, watching his every early move.

Not content with carrying more than a full load as a judge in Criminal Assizes, and a short time appointment as an Equity judge, Stephen single-handedly wrote a practice book for the Supreme Court of New South Wales. This was so greatly valued by legal colleagues that it cemented his reputation as an admirable judge. When the second Chief Justice, Dowling, died in 1844 after an extended illness, Alfred Stephen was appointed Acting Chief Justice until the rivalry between him and Attorney-General J.H. Plunkett, Australia's first indigenous Queen's Counsel, could be resolved.

Plunkett, as an outstanding advocate and long-time Crown officer (Attorney-General) in the colony, probably had the greater claim of merit to the office. But Alfred Stephen moved with ruthless energy to overtake him, invoking friends back 'home', including his somewhat reluctant

cousin in the Colonial Office. In the end, in August 1946, the appointment as third Chief Justice of New South Wales went to Stephen. He was aged 42 when he ascended to the highest judicial office in the Australian colonies. It was an office that he was determined to tackle with 'unwearying industry'.

The years of Stephen's service as Chief Justice of New South Wales are divided by Dr. Bennett into the first period (1844-1856) where he was at the height of his judicial powers; a second period (1856-1865) where he became involved in political affairs through service in the Legislative Council; and the final period (1865-1873) when he seems to have engaged himself in every manner of civic activity on which he could lay his energetic hands.

Something of the vanity of the man was demonstrated when he made his first appearance as Chief Justice wearing robes of violet. These were described by the local media as 'purple' and attributed to mourning for the late Chief Justice, whom he certainly had befriended. More likely, given the interval from the latter's death, was it that Stephen was marking the new era by a conscious colour coding. It was not until Sir James Martin, the fourth Chief Justice and Stephen's successor, that the tradition of wearing scarlet robes edged with fur was initiated to establish the dress for ceremonial occasions that persists into the current era.

By this time, Stephen boasted a knighthood and was active in social engagements, hosting many engagements at his home, still overrun by children. He played a flute as his wife sang to the assembled, admiring crowd. Another positive attribute was that he showed no interest whatever in sport, a feature of his personality that was no doubt noticed

by the already enthusiastic local sporting community. Interestingly, on his death, a successor, Sir William Manning, described his characteristic of 'boyish playfulness of disposition'. But that was as far as the 'playing' instinct went in this man. Basically, he was entirely focused on his work and public activities. One of his few disappointments recorded in the book was when he finished a circuit with not enough cases to keep him pre-occupied. This is not an unusual trait in a successful lawyer. This reviewer has known a number of similar dispositions only too well.

The old proverb about the Devil and idle hands soon got the better of Chief Justice Stephen. His work as Chief Justice became insufficient to satisfy his desire for civic engagement. It was at this point that he was persuaded ('with alacrity', according to Dr. Bennett) to accept appointment to preside in the Legislative Council under the new constitutional dispensation that followed the advent of responsible government in the colony in 1856. Stephen CJ saw no incompatibility in accepting this role. He invoked the precedent of the Lord Chancellor in the House of Lords in England. The idea of a strict separation of governmental powers was still in its nascency in the Australian colonies.

In his legislative role, Stephen pursued a number of worthwhile initiatives. These included the establishment of the first Law Reform Commission in the colony in 1870, with himself as head. However, the proposed body did not enjoy much political support. Still, Stephen thought this was a way he could usefully spend his spare moments. Like many a judge before and since, he became intensely frustrated at the indifference of the elected legislature to his well-meaning judicial suggestions for reform of the law. Often, it seemed, they were overlooked for no reason better than that they had no popular appeal.

In the latter part of his judicial service, which is described by Dr. Bennett in detailed analysis of his leading cases, Stephen often came under criticism in the local profession and press for his alleged 'predilection ... to punishment by strangulation'. In matters of murder, bushranging and rape, he was a stern advocate of law and order. In the sometimes primitive circumstances of the colony, he felt a need to assert British civilisation, in order to hold back the forces of chaos.

Yet, he was an advocate of reforms in many other things. Rules of Court and procedural reform interested him intensely. He took a leading and humane role in the reform of divorce law, ultimately achieving his goal in the years following judicial retirement in 1873. More than thirty years before Federation, he advocated the appointment of a "High Court of Appeal for Australia", believing that a trans-colonial court would act as an effective final court in the place of the far-away Privy Council. Doubtless, he already had his eye on appointment as the first Australian judge to become a Privy Councillor, although this was an achievement delayed until virtually the end of his life in 1893.

Unlike some later judges and politicians, Stephen made a wise decision to leave the office of Chief Justice in his own time. This he did on Guy Fawkes Day 1873 to the seemingly genuine and virtually unanimous praise of a grateful profession and community. There was cheering from spectators at his farewell ceremony. Even the *Sydney Morning Herald*, often a critic, acknowledged his 'grand service' to the colony; his ability as a judge to go directly to 'the gist of the subject' before him; and his service in providing a 'guide to our own jurisprudence'.

Following his retirement as Chief Justice, Stephen went on a seemingly endless round of adulatory functions. But he was soon tempted to return to the Bench as an Acting Judge to help in the backlog of criminal trials. He was also quickly engaged in a furious campaign to repair the increased impecuniosity caused by early retirement. His original demand for an *ex gratia* payment to add to his pension rights (doubtless depleted by the demands of his many children) was rejected by the government of Prime Minister Parkes and, when ultimately put to the vote, by his colleagues in the NSW Parliament. Eventually, a compromise was struck by which he received a single sum to quieten this debate. Although he regarded this sum as 'miserable', Dr. Bennett appears to justify the hostility of Parkes to making a special provision by demonstrating that, when he died, Stephen left an estate which was extremely large by the standards of the colony.

Deprived of judicial work to satisfy his unflagging energies, Stephen turned his attention to the vice-regal role. Eventually he was appointed Lieutenant-Governor in 1875. This was an office quite frequently called into service because the delays in appointment and absences of governors, still a significant power in the land.

In this new role, Stephen quickly became to target of criticism in the press for his alleged blood-thirstiness as for example in his opposition to removal of the crime of rape from the list of crimes attracting capital punishments, a reform already achieved in England. The attacks on Stephen on this account were, as Dr. Bennett points out, quite unreasonable, given that the Royal Instructions to the holders of vice-regal office in the colony commanded them not to commute a death sentence until first receiving advice from the Executive Council, meaning

the elected government. In a particularly controversial rape case, Stephen was approached by the mother of the prisoner who fell to her knees begging for the life of her son. He demanded that she rise, exclaiming that he found her prostration demeaning and embarrassing. He had not forgotten his own early impecunious life and was not disengaged from the lives of ordinary people. In the end, the Executive Council advised him to commute the sentence, which he immediately did. He was then attacked by the conservative press who were puzzled because they were ignorant of the convention and rule he was required to follow. Naturally enough, in such matters, Stephen played by the book. He knew that this was both the law and the expectation of informed people.

In 1891, full of years, Stephen resigned as Lieutenant-Governor. Still he was not finished, inviting re-appointment to the Legislative Council as a nominee so that he could work on drafting amendments to legislation which all too often irritated his colleagues and delayed the legislative process. His last years were saddened by the loss of his second wife in 1886. Yet civil honours fell repeatedly into his lap. In 1874, he was created KCMG and in 1884, GCMG, the rarest honour by then and afterwards confined to Australia's highest judges and politicians. It is hard to think of any honour that the imperial government or local authorities could have given Stephen that did not eventually come his way. The achievement of divorce law reform in 1889, advocated by him to protect women who were abandoned by their husbands, and thus could not prove spousal adultery, was an achievement that led the way to like reforms throughout the British Empire.

Stephen died in October 1894 after a short illness patting his doctor on the arm and saying quite cheerily, in reflection upon his remarkable life and great age: 'My dear friend, you know this is getting beyond a joke'. His funeral, at St. Jude's Church, Randwick, was supposed to be a private family affair. Yet 120 carriages followed the cortege down South Dowling Street on the way to the obsequies.

John Bennett brings out enthusiastically the many fine qualities of Sir Alfred Stephen. He was an energetic, hard-working and accomplished judge who would have made his mark on the higher courts of England at a time when several of the Australian colonial courts were bedevilled with appointments of eccentric misfits with very difficult personalities. Stephen also exhibited the strong sense of duty which was a feature of leading citizens of Imperial times. If he sometimes inappropriately crossed the proper line, both in his membership of the Legislative Council and in his engagement in controversial civic affairs, doubtless this was because, at the time, the colony derived its values from 'home'. Stephen would have thought, with some justification, that there were no other locals of his standing and experience with the talent to do the many things he ventured to address.

His involvement in civil activities was extraordinary and probably unequalled in Australian judicial history. Not only did he take part in the creation of the University of Sydney. He helped establish St. Paul's Anglican College within that University. He promoted women's education, supported the creation of the Women's College, and strongly opposed the exclusion of women from learning modern history which he regarded as highly useful for women as for men. He was troubled by his own lack of university education. But ultimately, he accepted election as

a Fellow of the Sydney University Senate. As well, he took a leading part in the moves for the enactment of the *Public Education Acts* in the colony that so transformed the education of the children of ordinary subjects. He was a strong proponent of secularism, which he saw as a gift of the Protestant tradition, then dominant in Australia. He invoked this tradition in his support for divorce law reform which was powerfully (and for a time, successfully) opposed both by the Church of England and the Roman Catholic Church.

Perhaps connected with his Protestant upbringing, Stephen was, throughout his life, a strong supporter of the temperance movement. He engaged himself in countless large and small activities, including Boards of hospitals, the committee to erect the statue of Captain Cook in Sydney and the strong push (ultimately unsuccessful) to change the 'uncouth' name "New South Wales" before it became immortalised in the federal Constitution of 1901. He supported the early moves in the direction of federation, but was deeply suspicious of the demands of the other Australian colonies and the price that they might exact from New South Wales. He was one of the early proponents of conciliation and arbitration for the prevention and settlement of labour disputes in Australia, an idea borrowed from New Zealand.

As against these many good qualities, Dr. Bennett does not gloss over Stephen's faults. He acknowledges that he was vain, and quotes with apparent support the obituary of the *London Times*. Whilst honouring Stephen's large contribution to Australia, this described him as 'arrogant, conceited, with unbridled ambition and craving recognition'. The author brings out his occasional inconsistency, as in his acceptance of appointment as an Acting Judge twice in his life, despite his earlier

opposition to the system when he was free from its attractions. He was rather old-fashioned in his values and like many of the time, reflected and cherished the English virtues that he had learned in his boyhood. Such was his busy engagement in so many activities that he must, to some extent, have left it to his wife, perhaps with servants, to raise her large brood of children and step-children. He loved the baubles of office and gathered them up gleefully. Yet he was a shrewd counsellor and, whilst not an old-fashioned Tory, as *The Times* obituary suggested, he was a cautious reformer and therefore successful in many of the causes he took on.

Dr. Bennett's book does not really tell us a great deal about the private and family life of Alfred Stephen. Shortly before his death, Stephen began jottings of a personal character and some of these are publicly available and are used in the writing of this book. Perhaps it would have been helpful to assessing the man as a human being, to have known more of his personal foibles and inclinations. Perhaps the series in which this book now takes an honoured place, forbids attempts at 'pop psychology'. Clearly, the original sources of personal insights into such a high public office-holder have now dried up so that we are left with no more than the published records. In the habits of earlier times, these are discreet, restrained and mainly unrevealing. What emerges is, therefore, a somewhat waxen figure.

One stares at the official portraits, sketches and early photographs of Sir Alfred Stephen. All that one sees is a face, not dissimilar to faces that currently still occupy senior posts in the Australian legal profession. The steady gaze, the studied pose, the robes and decorations, the spectacles held in the hand as a touch of vanity. The well-cut suit, apt

for a senior official, a guardian of the rule of law and of civil society. But more than this, Stephen, the man, remains a mystery, unknowable to us his successors who look back on his career with admiration mixed mainly with indifference.

To what extent are Stephen's judicial opinions considered today, for the light that they throw on the law that governs the Australian people in an age so different. His namesake, Sir Ninian Stephen, in *New South Wales v The Commonwealth*² cited his opinion in *Attorney-General v Brown*³ as settling any legal controversy that surrounded the passage of title in all land in Australia to the Crown as 'the universal occupant'⁴. This holding was re-affirmed in many later cases. It was not really doubted until the majority decision of the High Court in *Mabo v Queensland [No.2]*⁵ reached for the universal principles of civilised nations, found in international human rights law, to establish a new and different legal rule, less discriminatory and more modern in its approach to land tenure in Australia⁶. Dr. Bennett suggests that: 'It must remain a question whether a major reform of social policy and established legal principle of law was properly to have been initiated by judges rather than by parliament'.

Whatever be the answer that lawyers might earlier have given to that question, the outcome of the High Court's decision in *Mabo [No.2]* is now the settled law of this nation. So much is made clear by the passage of amendments to the *Native Title Act 1993 (Cth)*. That statute

² (1975) 135 CLR 337 at 439

³ (1849) 1 Legge 505 at 508-509.

⁴ A similar holding had been made earlier in *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71 by Windeyer J.

⁵ (1992) 175 CLR 1.

⁶ (1992) 155 CLR 1 at 29, 44.

proceeded on the footing that, upon this important subject, the High Court has spoken, clearly, with near unanimity, and finally. What Sir Alfred Stephen wrote in *Brown's Case* may well have been a correct understanding of the law at the time it was written. But new considerations in the many decades since have brought with them new insights of law and justice which Stephen CJ did not enjoy. All of which simply demonstrate that law is a living thing. Judges, however considerable, necessarily reflect in their decisions the values of the society and world that they inhabit.

Dr. Bennett's book is beautifully produced by Federation Press, already justly honoured for quality publications of this kind. There are marvellous and detailed endnotes which cover 70 pages. These are often interesting in their own right. I refrain from expressing once again my preference for footnotes, which can quite easily be incorporated by the miracles of modern electronics.

The book's index is detailed and covers 35 pages. Although I found a few omissions (the pagination of references to the Stephen judges in NSW) in the big picture of such an achievement, they are entirely inconsequential. The illustrations are gloomy but evocative. Even the "Pedantic note on judicial titles" (insisting on "Mr Justice" in keeping with the age), show John Bennett as the invariable stickler for accuracy. That hallmark is on display throughout this book.

I leave this biography with a better than thorough understanding of the public life of Sir Alfred Stephen. But what internal forces made Alfred tick, save duty and ambition, remains a mystery.
