The influence of Sir James Stephen on the law of evidence*

By J D Heydon

Stephen's career in summary

He was the grandson of James Stephen, who assisted his brother-in-law, William Wilberforce, in the campaign to end the slave trade. He was the son of Sir James Stephen, under-secretary of the Colonial Office from 1836 to 1847, who played a key role in the abolition of slavery itself, drafted the Slavery Abolition Bill in 48 hours in 1833, and was acclaimed by Deane and Gaudron JJ for anticipating the doctrine there recognised by 150 years.[1] His younger brother, Leslie Stephen, became a highly respected man of letters, and was the father of Vanessa Bell and Virginia Woolf. His eldest daughter was the first principal of Newnham College, Cambridge. He and his family were or became related to many leading intellectual and political figures like members of the Macaulay, Dicey, Trevelyan, Strachey and Thackeray families, and knew or came to know many others – for example, Carlyle (whose executor Stephen became), Maine (who taught him while he read for the bar), J A Froude, Harcourt and G H Lewes. He was educated unhappily at Eton. He claimed there to have learned 'the lesson that to be weak is to be wretched, that the state of nature is a state of war, and *Vae Victis* the great law of nature.'[2] He then went briefly to Kings College, London on his way to Trinity College, Cambridge. He left that latter university prematurely. He then read for and was called to the bar. Being conscious of the slightness of his legal education, he then read for an LLB from the University of London. In 1855 he married, and was to have nine children, of whom four predeceased him.

Until 1869 he practised at the bar on the Midland Circuit. Success was at best mild and inconstant. He did, however, appear in two causes célèbres. One was the defence, with mixed results, of the Rev Rowland Williams at trial on charges of heresy, one relating to a denial of punishment in the next world.[3] Stephen did not appear on Williams's successful appeal to the Privy Council,[4] when in the words of a mock epitaph, Lord Westbury LC had:

> … dismissed Hell with costs
>
> And took away from orthodox members of the Church of England
>
> Their last hope of everlasting damnation. [5]

The other cause célèbre took place later in the decade,

when Stephen was involved in the unsuccessful attempt to prosecute Edward Eyre, governor of Jamaica, for murder after his savage suppression of rioting in that colony in 1865.[6] His ability struck a young and then quite unknown screw manufacturer, Joseph Chamberlain, for whose firm he acted in a patent arbitration in the later 1860s.[7] In 1863 he published *A General View of the Criminal Law of England* – an able and original work, still well worth reading. Although it was not intended for students or practitioners of law, Mr Justice Willes 'kept it by him on the bench, … laid down the law out of it', and called it a 'grand book' .[8] Stephen took silk in 1868. In the same year he produced the seventh edition of *Roscoe's Digest of the Law of Evidence in Criminal Cases*. Throughout the 1850s and 1860s he published an enormous quantity of the higher journalism on a range of subjects, partly because of financial pressure and partly because of a strong urge to mould public opinion.

On the recommendation of his predecessor, Maine, Stephen was in 1869 appointed as legal member of the viceroy's Legislative Council in India – for five years, though he only stayed two and a half. That body

comprised the most senior British officials in India, some unofficial members and a couple of Maharajahs. It was unelected. It was not responsible to any legislature save, indirectly, the Imperial Parliament at Westminster. But for the rest of his life Stephen admired its unity of purpose, the expertise of the officials it relied on, and its efficiency. He there drafted twelve Acts and had a part in eight other enactments. Among his leading achievements were the *Indian Evidence Act 1872*[9] and the *Indian Contracts Act 1872*.[10] His term of office was regarded as an astonishing triumph by most contemporary and subsequent Indian and English opinion.[11] His career had turned the corner.

He returned to the bar in 1872 and practised there until 1879. In 1873 he published *Liberty, Equality, Fraternity*, an attack on John Stuart Mill. He resumed periodical journalism. But he also prepared an evidence code, a homicide code and a criminal code, introduced into parliament but not enacted, respectively, in 1873,[12] 1872 and 1874[13] and 1878–1882.[14] From 1875 to 1879 he was professor of common law at the Inns of Court. He published *A Digest of the Law of Evidence* in 1876,[15] which ran into 12 editions, *A Digest of the Criminal Law (Crimes and Punishments)* in 1877, which ran into seven editions, and, with his brother, Herbert Stephen, *A Digest of the Law of Criminal Procedure in Indictable Offences* in 1883. From 1879 to 1891 he served as a judge of the Queen's Bench Division. Despite the hard labours and harder responsibilities of that post, and despite other calls on his time, in 1883 he published *A History of the Criminal Law of England* in three volumes – a work some have criticised, but not the immortal Maitland.[16]

Up to this point in his life – when he was aged 54 – his prodigious labours had been sustained by excellent physical and mental health. But from this point onwards his health and vigour began to decline.[17] He seemed to find the burdens of judicial office, particularly in capital trials, oppressive. He still managed to publish, in 1885, *The Story of Nuncomar and the Impeachment of Sir Elijah Impey*, a defence of Chief Justice Impey against Macaulay's charge that he had committed judicial murder during the time of Warren Hastings's governorship of Bengal. But in that year he had his first stroke.[18] Six years later ill health compelled his retirement. Three years after that he died at the age of 65. He might have lasted longer if he had managed his life more carefully.

On 21 November 1877, Leslie Stephen wrote of his brother to the future Mr Justice Holmes: 'Nobody has worked harder for every step & has been less favoured by good luck.'[19] The second limb of that statement is probably true. The first limb is certainly true. All his life he recklessly and prodigally expended titanic energy in everything he did. These efforts led Stephen to become a towering figure in late Victorian England. For example, although Stephen's political activities had not extended beyond unsuccessful attempts to achieve election to the House of Commons in the Liberal interest in 1865 for the seat of Harwich and 1873 for Dundee (when he was bottom of the poll, with about 10 percent of the votes),[20] the dying Disraeli in 1881 told Lord Lytton: 'It is a thousand pities that J F Stephen is a judge; he might have done anything and everything as leader of the future Conservative Party.'[21] In 1873 Sir John Coleridge, Liberal attorney-general, urged the prime minister, W E Gladstone, to appoint Stephen, then aged 44, as solicitor-general on the ground that he 'is a very remarkable man with many elements of greatness in him.'[22] The vacancy in fact went to another highly regarded coming man, Sir Henry James. Stephen became regarded as a great authority on legal and Indian affairs. He had been the secretary of a royal commission on education in 1858–1861, he sat on royal commissions on copyright (1875 and 1876) and he sat on commissions on fugitive slaves (1876) and extradition (1878). He gave a great deal of advice to Lord Lytton, viceroy of India from 1876 to 1880. He was heaped with academic honours, both English and European, and state honours.

Stephen's appearance and character

Stephen was a man of striking and formidable personality. A Cambridge friend observed:

> his singular force of character, his powerful … intellect, his Johnsonian brusqueness of speech and manner, mingled with a corresponding Johnsonian warmth of sympathy with and loyalty to friends in trouble or anxiety, his sturdiness in the assertion of his opinions, and the maintenance of his principles, disdaining the smallest concession for popularity's sake. [23]

Until his decline late in life, those qualities never changed. He had a 'resounding, deep bass voice' and a 'knock-down manner'.[24] Radzinowicz said: 'In physical appearance [Stephen] bore a strong resemblance to a cliff, and his mental makeup was no less craggy.'[25] The warmth and affection he displayed in private life contrasted with his public image:

> A head of enormous proportions is planted, with nothing intervening except an inch-and-a-half neck, upon the shoulders of a giant. Force is written upon every line of his countenance, upon every square inch of his trunk … [H]e lacks geniality and play of fancy, but in their stead he has a grim and never-flagging perception of what he means and what he wants … [He treats] toil as if it were a pastime.[26]

Lytton Strachey, nephew of his friend John Strachey, said: 'His qualities were those of solidity and force; he preponderated with a character of formidable grandeur, with a massive and rugged intellectual sanity, a colossal commonsense.'[27] He was 'Johnsonian' not only in conversational style – the Johnson who said: 'Well, we had a good talk', to which Boswell replied: 'Yes, sir, you tossed and gored several persons.' He was also Johnsonian in his conservatism, his moral interests, his tragic sense of life, his contempt for praise.[28] He had a pitiless dislike for what he saw as sentimentality.[29] He did not merely refuse to evade unpleasant consequences, he welcomed them. He was a master of many methods of thought and styles of writing – precise analysis, vitriolic ridicule, ferocious invective, soaring rhetoric. Radzinowicz said of him:

> There was a puritan side to Stephen; and his Puritanism derived viability from an almost physiologically reasoned acceptance of the survival of the fittest. He was convinced of the damned unworthiness of mankind and of their incurable apathy towards salvation. He was a preacher of the inevitability of pain and sorrow, our everlasting companions from the cradle to the grave, and of the individual insignificance of human life, especially when conceived, felt and assessed in terms of a pleasurable experience.[30]

His whole life was dedicated to duty as he saw it. For him virtue and happiness flowed only from active, restless and endless struggle:

> He could see no alternative for mankind but to lead a life of submissiveness and rectitude, in heroic self-abnegation, like a regiment of soldiers engaged in battle, or a ship's crew bringing their cargo home in the teeth of a tempest.[31]

What is to be made of the many paradoxical aspects of Stephen's career? For it is paradoxical that a man who did so badly at Cambridge that he chose to leave prematurely because he knew he would never do well enough to be elected a fellow ended up writing two books on criminal law that continue to be read many decades after those of his contemporaries have ceased to be. It is paradoxical that a man whose long career at the bar wavered between failure and insecurity wrote three books – his digests – that influenced generations of barristers. It is paradoxical that so successful a legislator in India departed halfway through his term to spend the next decade failing to persuade the Westminster Parliament to follow suit. It is paradoxical that a man with his unpopular views on the government of India devised so many laws for India that are still in force today. It is paradoxical that someone who was never elected to any public position achieved a great national reputation based only on highly specialised legal studies and polemical periodical journalism. What was the key to this strange life? That is not a question for examination this evening. Instead the question is: what was Stephen's influence?

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The question can be approached from eight angles, some overlapping. They are: barrister, academic lawyer, publicist, political thinker, judge, criminal lawyer, advocate for codification and evidence lawyer. The first seven will be dealt with only briefly.

One: Stephen's influence as barrister

It seems that Stephen was a distinguished speaker, and a better barrister than solicitors thought him to be. His oratory at the Cambridge Union brought him some fame.[32] Chamberlain regarded his final address in the arbitration in which he had engaged Stephen as 'most masterly'.[33] Mr Justice Wills remarked in open

court that Stephen had defended an accused person, charged with murder, 'with a force and ability which, if anything could console one for having to take part in such a case, would do so', and a newspaper report of Stephen's speech at that trial stated that it 'kept his audience listening "in rapt attention" to one of the ablest addresses ever delivered under such circumstances'.[34] Leslie Stephen informed his friend, the future Mr Justice Holmes, in a letter of 25 June 1868, that his brother's 'talent is specially in the speaking line'.[35] An address by Stephen at Eton in the late 1870s had so powerful an impact on George Nathaniel Curzon, future viceroy of India, that Curzon recalled it all his life.[36] But whether or not he could be called 'great' as an advocate, he established no school. No particular tradition flows from him.

Second: Stephen's influence as academic lawyer

Stephen's time as an academic lawyer tends to be overlooked. But his tenure has some significance. To begin with, it seems that he was a successful teacher. His professional achievements as counsel gave him the background for it.

It is almost certain that the sole mode of instruction adopted by Stephen as professor of common law at the Inns of Court was lecturing. Someone of impressive physique and forceful personality who was good at riveting the attention of juries, judges, large assemblies and small groups is likely to have been capable, with practice, of lecturing well.

According to Leslie Stephen:

> He invariably began his lecture while the clock was striking four and ceased while it was striking five. He finally took leave of his pupils in an impressive address when they presented him with a mass of violets and an ornamental card from the students of each inn, with a kindly letter by which he was unaffectedly gratified. His class certainly had the advantage of listening to a teacher who had the closest practical familiarity with the working of the law, who had laboured long and energetically to extract the general principles embedded in a vast mass of precedents and technical formulas, and who was eminently qualified to lay them down in the language of plain commonsense, without needless subtlety or affectation of antiquarian knowledge.[37]

But Stephen's career as a teacher of law was only part-time, and too short to enable him to build up the kind of reputation which leads to influence. Its real significance is that it stimulated his interest in other activities in which he did establish a solid reputation – his digests and codes.

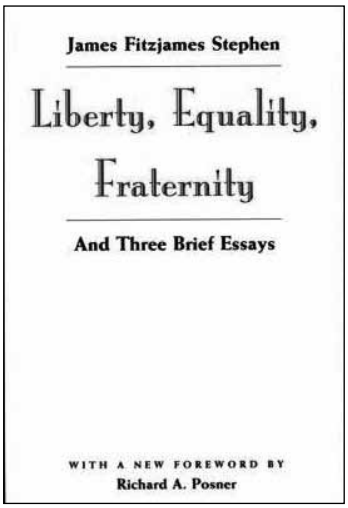
Third: Stephen's influence as publicist

Sir Keith Thomas recently remarked:

> By the end of the century, there had emerged in Britain a recognisably modern academic profession. The torch of literary culture, previously carried by the metropolitan man of letters and the serious Victorian periodical, was taken over by the professor and the learned journal.[38]

Stephen was a bridge between those two worlds. One of the many torches Stephen carried was the torch of literary culture, taking that expression in a broad sense. He was certainly a metropolitan man of letters. And if ever a man helped keep the serious Victorian periodical going, it was him. Although those activities were largely anonymous, it was through them that he first became well-known. Despite the bar being supposedly his primary career, between his youth in the early 1850s and his decline in the late 1880s, save for the period from 1869 to 1872 in which he was in India, he contributed on a prodigious scale to serious Victorian newspapers and periodicals, some published daily or weekly or fortnightly, some monthly, some quarterly. Some of the articles in those periodicals were on legal subjects, and there were also learned publications on legal questions in legal journals. In addition, he wrote numerous letters in his characteristically dramatic style to *The Times* in the 1870s and 1880s on Indian and Irish affairs. The quantity of these periodical contributions was enormous. For example, between 1865 and 1869 he contributed approximately 850 articles, 200 notes and 50 letters to *The Pall Mall Gazette*.[39] Between 1855 and 1868 he contributed at least 200 articles and notes to *The Saturday Review*.[40] Their range was wide, extending far beyond legal subjects to literary, historical, ecclesiastical and philosophical topics. At least to this reader, the quality seems high. Leslie Stephen, on the other hand, criticised them in various respects. Thus he said of the 55 articles published in *The Saturday Review* in the 1860s and collected in *Horae Sabbaticae* (1892):

> These articles deal with some historical books which interested him, but are chiefly concerned with French and English writers from Hooker to Paley and from Pascal to De Maistre, who dealt with his favourite philosophical problems. Their peculiarity is that the writer has read his authors pretty much as if he were reading an argument in a contemporary magazine. He gives his view of the intrinsic merits of the logic with little allowance for the historical position of the author. He has not made any study of the general history of philosophy, and has not troubled himself to compare his impressions with those of other critics. The consequence is that there are some very palpable misconceptions and failure to appreciate the true relation to contemporary literature of the books criticised. I can only say, therefore, that they will be interesting to readers who like to see the impression made upon a masculine though not specially prepared mind by the perusal of certain famous books, and who relish an independent verdict expressed in downright terms without care for the conventional opinion of professional critics. [41]



Although Leslie Stephen seemed to intend a pejorative element in the last sentence, the qualities there referred to may be thought to be quite attractive ones. Leslie Stephen also informed Charles Eliot Norton on 23 September 1894 that in fields of which he did not know much, his brother was 'like an elephant trampling through a flower garden'.[42] On the other hand, in the same letter he spoke of his brother's 'extraordinary powers'. On 19 May 1894 he told Norton that his brother was 'a very big man, with a great deal to say that was very valuable, even when he was apparently outside his proper ground.'[43]

There is considerable force in what Maitland said of Leslie Stephen's biography of his brother:

> a trifle too much may have been written of the great jurist's 'limitations' .... [T]hose who are better able than Leslie was to appraise what Fitzjames did in the field of law and legal history will wonder at the amount of vigour, industry and literary power that was displayed by him in other provinces.[44]

But Stephen as a publicist has had no influence beyond his own age. In his own lifetime he published four volumes containing 88 of his articles from *The Saturday Review*.[45] These volumes have not been reprinted, nor have any of his other articles. His position is similar to that of his contemporary at Eton, another of history's losers, Robert Cecil, future Marquess of Salisbury and prime minister,[46] whose many articles in *The Saturday Review*, *The Quarterly Review* and other journals were republished only to a small degree in book form shortly after his death,[47] and never reprinted. Yet in the case of both Stephen and Salisbury the enterprise of republication of all their works, or at least significant parts of them, would be at least as worthwhile as enterprises which have been or are being carried on in our age – the publication of the whole of Gladstone's often fragmentary diaries, and the publication of the whole of Disraeli's often trivial letters.

Fourth: Stephen's influence as political thinker

The most striking product of Stephen's role as a polemical journalist was *Liberty, Equality, Fraternity*, a collection of articles composed while, and after, returning from India, originally published in *The Pall Mall Gazette*, a daily newspaper, and appearing in book form in 1873, with a second edition in 1874.[48] Its lack of influence may be gauged from the fact that there was no further edition until 1967. There was a brief revival of interest in the work during the 'Hart-Devlin' controversy of the 1950s and 1960s. H L A Hart said in 1962[49] of *Liberty, Equality, Fraternity* and Sir Patrick Devlin's Maccabean Lecture on 'The Enforcement of Morals'[50] in 1959: 'Though a century divides these two legal writers, the similarity in the general tone and sometimes in the detail of their arguments is very great.' Devlin, having never read *Liberty, Equality, Fraternity*, was not conscious of any influence, and could only obtain a copy from the Holborn Public Library 'with great difficulty'; it was 'held together with an elastic band'.[51] John Roach, a sympathetic analyst of the work in the 1950s, said it was 'not easy to come by'.[52] The book has been described as the 'finest exposition of conservative thought in the latter half of the 19th century'.[53] Even a foe like Hart thought

it ' sombre and impressive'.[54] It is an attack on various of the writings of John Stuart Mill and his sympathisers, particularly *On Liberty*. But Leslie Stephen put his finger on a difficulty in grasping its virtues. On 30 March 1874 he wrote to Charles Eliot Norton: 'It is good hard hitting, but I think rather too angry, and not intelligible unless one remembers all that he said, and all that they said – which one doesn't.'[55] Naturally, modern readers are even less able to remember all that Stephen said, let alone all that his critics and targets said. However, its bleakly unsentimental hostility to democracy and liberalism only shocks such few modern readers as it has. It is of outstanding quality, but quite lacking in influence.

Fifth: Stephen's influence as judge

Stephen retired from judicial office in 1891 after Lord Coleridge CJ drew to his attention press criticisms of his performance, which led him to seek medical advice and to resign in consequence of it. The justice of this criticism of his closing years on the bench has been questioned,[56] but it has tended to overshadow his judicial reputation as a whole. There seems to be no doubt about his capacity to control his court. His 'strong physique, and the deep voice which, if not specially harmonious, was audible to the last syllable in every corner of the court, contributed greatly to his impressiveness.'[57] Twining described him as 'a forceful, if somewhat simple-minded, judge'.[58] Radzinowicz more justly said that Stephen's judgments had the same characteristics as his other work – 'an uncanny faculty for sifting the grain from the chaff, for brushing aside a multitude of details, irrelevant, inconsistent and confusing, and for dissecting out the nucleus of a legal argument.'[59] But while he was a criminal judge of real quality, he sat towards the end of a period which Sir Owen Dixon thought the future would hold to be the 'classical epoch' of English law . Sir Owen's ground was that '[a]mong legal historians, jurists and judges of that period the qualities of scholarship, penetration, clearness of exposition and felicity of expression appeared to an extent and in a degree that had not before been equalled.'[60] These qualities were revealed in Stephen's judgments, but not so as to make them pre-eminent amongst those of his contemporaries. Another factor which may have led to a discounting of Stephen's judgments is that on the bench he appears to have thought it right to have diluted and restrained the striking literary style he employed for other purposes.

Cross praised Stephen's judgments in crime thus:

> No one interested in *mens rea* can ignore Stephen J in *Tolson*[61] just as no one interested in possession can ignore his judgment in *Ashwell*.[62] The summings-up in *Doherty*[63] and *Serné*[64] are important on drunkenness and the felony-murder rule respectively, but none of these cases is a landmark in the sense in which *Rylands* v *Fletcher*[65] and *Donoghue* v *Stevenson*[66] are landmarks in the law of tort. Indeed, *Woolmington*[67] apart, it may be doubted whether there are any such cases in the criminal law. In the absence, until 1907, of a satisfactory appellate jurisdiction, the subject has been built up by judicial practice, legislation and authoritative textbooks rather than by climacteric judgments.[68]

In short, nisi prius judges largely engaged in trying crime, in the period before the Court of Criminal Appeal was introduced in 1907, tended to lack the opportunities to achieve a reputation which were open to those involved in civil non-jury work, like Sir George Jessel MR, or appellate work, like Bowen LJ. Despite the clouds over Stephen's judicial achievement, no thorough study of it has ever been undertaken, and the time for dispelling those clouds or identifying them precisely will not arrive until it is undertaken.

An estimate of Stephen's judgments on evidence will be postponed to a consideration of his influence on that subject as a whole.

Sixth: Stephen's influence on criminal law

As recently as 2005, Lord Bingham of Cornhill, in discussing the scope of duress, referred approvingly to Stephen's 'immense experience'.[69] That experience has generated respect. Respect has brought Stephen influence in this field. That influence proceeded down three channels. One was the influence of his judgments – limited, but real. A second and greater influence lay in his bills for a homicide code and a criminal code. Neither were enacted, but the latter had substantial influence on legislation adopted in Canada in 1892, New Zealand in 1893, Queensland in 1899,[70] Western Australia in 1902, Tasmania in 1924 and the Northern Territory in 1983. Thus Stephen's criminal code, despite rejection in England, has been the primary influence on the criminal

law of half the North American continent and most of Australasia. Thinly populated though these vast territories might be, this was not a trivial achievement.[71] A third was the extensive literature he produced on criminal law, particularly *A General View of the Criminal Law of England* (1863) and *A History of the Criminal Law of England* (1883). Here some of his personal ideas were more striking than influential, for example his theory that the primary goal of punishment is not reform, deterrence, incapacitation or retribution, but strengthening society and respect for the rule of law by denouncing the wrong done[72] – although Cross, writing in 1978, thought this was still influential with English judges.[73] Others of his proposals for change have come to pass many years after his death, though it is uncertain whether a direct line of influence is always traceable – abolition of the felony-murder rule (a campaign he began in 1857 and continued for over 20 years[74]), abolition of the felony-misdemeanour distinction, abolition of marital coercion, the recognition that words may constitute provocation, and simplification of the law of theft. Some of his ideas were rejected by future lawmakers. In 1883 he expressed the view that the criminal law should recognise a defence of necessity of the kind rejected the next year by the decision of five judges of the Queen's Bench Division in *R v Dudley and Stephens*.[75] Perhaps inconsistently, he did not favour a defence of duress, although he did consider that the lessened moral guilt of an accused person who committed a crime under duress should be punished less severely.[76]

Seventh: Stephen's influence on codification

Despite his failures to persuade parliament to enact his homicide, evidence and criminal codes, he had a marked indirect influence by changing the climate of opinion. Mr Justice Holmes rightly called him 'the ablest of the agitators for codification'.[77] It is doubtful whether major English commercial statutes like the *Bills of Exchange Act 1882*, the *Partnership Act 1890* or the *Sale of Goods Act 1893*, which were widely copied throughout the common law world, and remain in force essentially in their original form to this day, would have been enacted but for Stephen's work in familiarising English legal opinion with the idea of codes. Sir Frederick Pollock, the framer of one of those statutes and the author of a Civil Wrongs Bill for India drafted in 1882–1886 which was never adopted,[78] said they were 'distinctly attributable to his example',[79] and this was also acknowledged by the framer of others, Sir Mackenzie Chalmers.[80]

Eighth: Stephen's influence on evidence

The sources of Stephen's influence on evidence are to be found to a limited extent in his decisions, but primarily in the Indian Evidence Act and his *Digest on the Law of Evidence*. He drafted an evidence code for England, but for reasons to be given, its influence has been nil.

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Influence of Stephen's decisions

Some of Stephen's evidence decisions concern rules that have changed,[81] or are mere illustrations of established principle.[82] But others continue to be cited in that diminishing number of jurisdictions in which the common law of evidence has preserved its substantial immunity from codification or other statutory change – which rules out half the Australian jurisdictions, New Zealand and to some extent England. Some have interest in illustrating particular distinctions.[83] The principal judgment for which Stephen is remembered is *R v Cox and Railton*.[84] In that case he prepared the judgment of the court for Crown Cases Reserved (the other nine judges being Grove J, Pollock and Huddleston BB, Lopes, Hawkins, Watkin Williams, Mathew, Day and Smith JJ)

on the exclusion from legal professional privilege of communications to guide or help the commission of crimes. The court saw the case as being 'of great general importance',[85] and it was argued twice, the second time before an enlarged court. The judgment contains a full analysis of authority, and has been cited many times since. It remains the leading case in jurisdictions where the common law prevails. However, it must be said that if Stephen's influence rested on his evidence judgments alone, it would be as slight as that which his brethren on the bench in *R v Cox and Railton* have had.

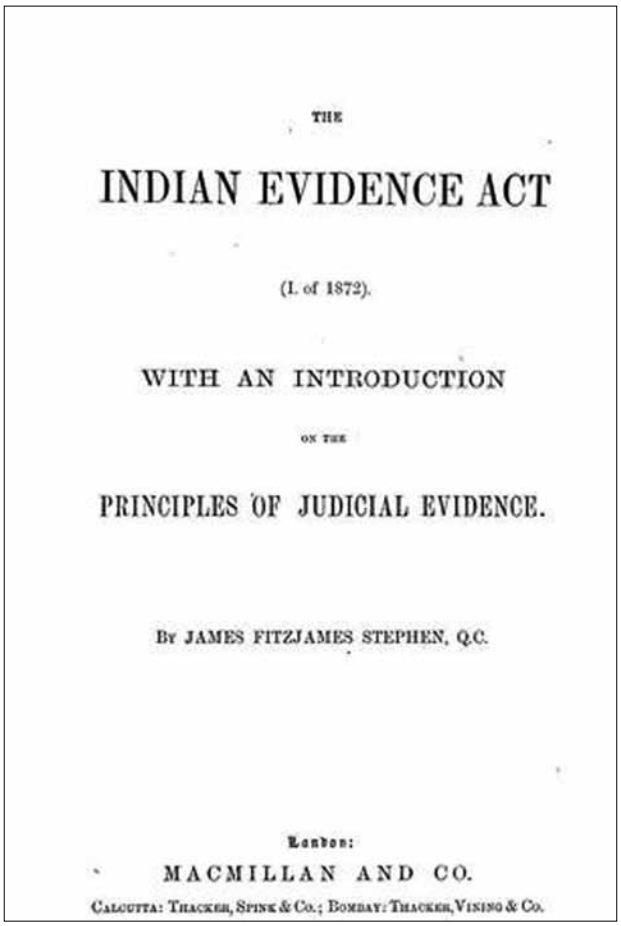
Direct influence of the Indian Evidence Act

The second source of Stephen's influence is the Indian Evidence Act. No one person has ever had so much influence on so important and far-reaching a piece of legislation affecting so many jurisdictions and so many people.[86]

After independence the Act was extended to, and remains in force in, the whole of the Republic of India (save for Jammu and Kashmir). It is also in force in Pakistan, Bangladesh, Sri Lanka and Burma. It has heavily influenced the laws of Malaysia, Singapore, Brunei, Kenya, Nigeria, Uganda, Zanzibar, parts of the West Indies and even, for a time, parts of Australia – the Christmas and Cocos (Keeling) Islands.

The Indian Evidence Act, a compact, terse and forceful enactment, 69 pages in length. It is the result of a complex and subtle combination by Stephen of parts of English law, some adopted without change, some modified; parts of earlier Indian legislation, some adopted without change and some modified (particularly Act II of 1855 and to a much lesser extent the *Code of Criminal Procedure* of 1861); to a limited extent parts of an Evidence Bill 1868 prepared by the Indian Law Commission in London; and numerous original ideas of Stephen's own. It was to be applied to the circumstances of India – the home of many races, tribes, castes, privileged and exclusive callings, communities and classes, adhering to a wide range of creeds and customs, living in varied regions and climates, and speaking innumerable languages. Indian circumstances, various as they were, were very different from English circumstances. In particular, in India there was, and is, little use of jury trial. Evidence was a field in which nineteenth century English law had been heavily influenced by the use of juries.[87] Despite English evidence law having grown up in a jury environment, the adoption of parts of it by the Act has largely survived in the non-jury environment of India.

The Act was enacted, fifteen years after British rule had nearly been ended through force, by an imperial government which, while in some ways open and sensitive to public opinion, was not democratic, representative or responsible. The Act remained in force under the relatively authoritarian governments of the late nineteenth century, under governments increasingly liberalised by a movement towards democracy and by the introduction of federal government from 1935, and in the independent federal democratic republic which has existed since 1947. Yet its creator was opposed to democracy anywhere, and opposed to independence for India. He saw Imperial rule as the rule of a trustee – but the duration of the trust was, if not perpetual, at least indefinite. From time to time after he left India he made public pronouncements along these lines, offering, as Sir Penderel Moon said, a 'sophisticated exposition of the views of the man in the street'.[88] His opinions on how India should be governed politically, as distinct from judicially, may have corresponded with those of the man in the street in England, but they began to fall out of favour, both with English establishment opinion and with Indian opinion, almost from the time they were enunciated. Modernising trends of a revolutionary kind came to invalidate them – the introduction of Western ideas; the rise of the press; an increase in tertiary education; an acceleration of Indian participation in administrative and judicial work; the development of a middle class which favoured liberal democratic institutions; the unifying influence of the telegraph, the road, the canal and the railway; and the



THE

INDIAN EVIDENCE ACT

(I. of 1872).

WITH AN INTRODUCTION

ON THE

PRINCIPLES OF JUDICIAL EVIDENCE.

BY JAMES FITZJAMES STEPHEN, Q.C.

London:

MACMILLAN AND CO.

CALCUTTA: THACKER, SPINK & CO.; BOMBAY: THACKER, VISING & CO.

growth of capitalism on a scale which made India one of the world's largest commercial and industrial powers by 1918. Nonetheless the Act – the work of so great an imperialist as Stephen – was retained after British rule ceased in 1947.

Some of the drafting has caused disputes. But the Act has never been repealed. Although it has been amended it has not been changed substantially. It was examined twice with great thoroughness by the Law Commission of India, in 1977 and 2003, but no proposal for radical amendment was made then, or at any other time. It was enacted only for British India (and thus for places like Aden which were technically part of British India). But it also went into force in numerous other parts of India (in some of the princely states) before 1947. After independence the Act was extended to, and remains in force in, the whole of the Republic of India (save for Jammu and Kashmir). It is also in force in Pakistan, Bangladesh, Sri Lanka and Burma. It has heavily influenced the laws of Malaysia, Singapore, Brunei, Kenya, Nigeria, Uganda, Zanzibar, parts of the West Indies and even, for a time, parts of Australia – the Christmas and Cocos (Keeling) Islands. T O Elias said it 'is a model of its kind', and he said of Stephen's *A Digest of the Law of Evidence*, which was partly based on it, that it 'seems to have become a kind of model for nearly all subsequent colonial legislation on the subject'.[89] So Stephen's vision of evidence law continues by regulating the litigious affairs of nearly two billion people. His immense stature in India is captured by a saying of Mr Gopal Subramanium, solicitor-general for India: 'We in India think that Stephen wrote Keats's 'Ode on a Grecian Urn'.'

On the strength of the Indian Evidence Act, Stephen may be described as being in some senses the greatest evidence codifier since the age of Bentham – perhaps the greatest in history. What explicit influence has he had on his modern successors? Very little. In Australia, the 639 pages of the Australian Law Reform Commission's *Interim Report on Evidence* (1985) (ALR 26) refer to Stephen only in relation to relevance. The Report said:

> The attempt by Stephen to elucidate in detail particular types of relevant evidence, while providing a useful guide, tends to be misleading. Since relevance is largely a matter of logic and experience, and since the variety of relevance problems is co-extensive with the ingenuity of counsel in using circumstantial evidence as a means of proof, it is suggested that any attempt to detail the kinds of relevant evidence is doomed to failure. Questions of relevance cannot be resolved by mechanical resort to legal formulae. In the circumstances of each case, the judge must be allowed flexibility in evaluating the probabilities on which evidence turns. [90]

ALRC 26 also joined the long line of those who had criticised Stephen's 'declared relevance' technique.[91] The only work by Stephen referred to in the bibliography is the second edition (1890) of *A General View of the Criminal Law of England*, which, unlike the first, contained little material on evidence. The 320 pages of the Australian Law Reform Commission's *Final Report on Evidence* (1987) (ALRC 38) did not refer to Stephen at all. The controversial *Eleventh Report of the English Criminal Law Revision Committee on Evidence (General)* in 1972, which after many years has come to have a decisive impact on the modern statutory law of evidence in England, only

referred to s 26 of the Indian Evidence Act (confessions made while in custody of a police officer only admissible if taken before a magistrate)[92] but declined to follow it, and quoted the criticism made in the *Digest*[93] of the common law rule permitting evidence of the good reputation of witnesses.[94] The Law Reform Commission of Canada did not mention Stephen – nor, indeed, anyone else – in its brief *Report on Evidence* (1975). The American Law Institute's *Model Code of Evidence* (1942) did not mention Stephen. Nor does he appear in the copious citations in the 1970 *Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, which led to the Federal Rules of Evidence.

What explicit influence has he had on his modern successors? Very little.

But the influence of one lawyer can be felt by later lawyers even though the latter make no express acknowledgment of it, and even though the latter are unaware of it. An idea can insensibly enter the consciousness of an age, even when those who come to share it are ignorant of where it came from.

Some techniques in the Indian Evidence Act are suitable for Indian conditions, but not elsewhere (e.g., s 165). One or two are not suitable elsewhere, and have been changed (e.g., s 54) or read down (e.g., s 30) in India. But quite a number of techniques in the Indian Evidence Act have been adopted in the West. In the Indian Evidence Act Stephen followed the earlier abolition in India of the 'Exchequer rule' by Act II of 1855, s 57.[95] That is, he favoured the rule not adopted in criminal cases in England until 1907 that errors in admitting or rejecting evidence should not justify an appeal being allowed if 'independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision' (s 167). But the 'Exchequer rule' began to depart the scene in England shortly after Stephen returned from India: it was abolished in civil cases by r 48 of the Rules enacted by the *Supreme Court of Judicature Act 1873*.[96] It is unclear whether this step was in imitation of s 167 of the Indian Evidence Act, or whether it followed the earlier Indian legislation on which s 167 was based, or whether it had an independent source.

The Indian Evidence Act also contained provisions (ss 32(2) and 34) for admitting business records not introduced in the West until many decades had passed. But the authors of those reforms do not seem to have used the Indian Evidence Act as an explicit source.

The modernity of the Indian Evidence Act can be illustrated in numerous other ways. The Indian Evidence Act relaxed the hostile witness rules in ss 154-155 in a manner very close to modern provisions like s 38 of the *Evidence Act 1995* (Cth). Section 157 also anticipated modern legislation permitting certain prior consistent statements to be used not merely on credit but as evidence of the fact. Section 58 anticipated modern legislation in permitting agreed facts in all cases, not merely non-felony cases. Section 158 anticipated modern legislation permitting challenges to the credit of hearsay declarants not called to give evidence. Section 19 widened the admissibility of statements by agents to a point beyond that marked in s 87(1)(b) of the *Evidence Act 1995*. Another example is s 132. The effect of s 132 was to abolish the common law rule that once a claim was successfully made in relation to self-incrimination, the witness was excused from answering and the evidence was unavailable. That common law rule had been subjected to various exceptions by English statutes commencing in 1849 in relation to bankrupts under compulsory examination. Under those exceptions, bankrupts could not claim the privilege, but the answers could only be given in prosecutions for offences against the bankruptcy law. A similar regime applied under various other statutes. That technique was adopted in India in s 32 of Act II of 1855, but on a completely general basis. Section 32 was substantially followed in s 132 of the Indian Evidence Act. The English exceptions were taken up in Australian state legislation in a manner which eventually led to s 128 of the *Evidence Act 1995*, which achieves a result equivalent to that achieves by Stephen in the Indian Evidence Act, and by the Indian precursor of 1855 on which he relied.

Another example of anticipation is found in s 24.

It provided that, if an inducement was to preclude reception of a confession, the inducement had to be sufficient to give the suspect reasonable grounds to hope for an advantage or fear an evil. This was a marked break from the formality of the 'inducement' test at common law. Something like s 24 came to be the common law in England in the 1970s, and elements of s 85 of the *Evidence Act 1995* correspond with s 24, at least in its general effect.

Another example of Stephen's anticipation of the *Evidence Act 1995*, s 41, was his concern for the protection of witnesses. In *A General View of the Criminal Law of England*[97] he criticised rules permitting excessive attacks on the credit of witnesses. He introduced s 148 of the Indian Evidence Act, which provides that the court has a discretion not to compel an answer to a question as to credit, and in exercising that discretion was to have regard to the following considerations:

> (1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;
>
> (2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies;
>
> (3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

Section 149 then imposed what is usually thought of as an ethical obligation not to ask s 148 questions unless there are reasonable grounds for thinking the imputation well-founded, and s 150 empowered the court to report the offending questioner to the appropriate professional disciplinary body. Although it is unorthodox to put provisions like ss 149-150 into a statutory code, and although an amendment was unsuccessfully moved in the Indian Legislative Council on 12 March 1872 to remove s 150, their inclusion is salutary. They back up Stephen's imperative of preventing an abuse of the power to cross-examine.

This is simply an illustration of the profound, crippling and tragic amnesia which has increasingly come to afflict English legal memory ever since the United Kingdom entered Europe – that is, became merely part of a large Continental bureaucracy. Its courts no longer administer the law of their own country and the laws of an Empire from Westminster, but administer laws of foreign origin.

On 12 March 1872 Stephen informed the Legislative Council:

> The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the court, without written instructions; that if the court considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation.... To ask such questions without instruction was to be a contempt of Court in the person asking them, but was not to be defamation.

This proposal caused a great deal of criticism, and in particular produced memorials from the bars of the three presidencies.[98]

Sections 148–150 represent a retreat from that position, but they do reveal Stephen as determined to enhance the dignity and fairness of trials from the point of view of the witness. In 1929 s 148 was adopted by Sankey LJ as reflecting English law in *Hobbs v Tinling (CT) & Co Ltd*.[99]

That is a relatively rare event. The Indian Evidence Act has not had much direct influence outside the jurisdictions in which it applies. The Indian Evidence Act has been discussed in the High Court of Australia a few times.[100] Section 25 was the subject of detailed argument by Sir Dingle Foot QC for the Crown in relation to the

meaning of 'confession' in *Commissioners of Customs and Excise v Harz and Power* and this is reflected in the judgment of Thesiger J in the Court of Criminal Appeal and the speech of Lord Reid in the House of Lords.[101] A disquieting sign of changing times, however, is offered by *R v Horncastle*,[102] a decision on the compatibility of United Kingdom hearsay legislation with the European Convention on Human Rights. In Annex 1 the House of Lords surveyed the treatment of the hearsay rule in certain Commonwealth jurisdictions. But, despite the status of India within the former Empire and since independence, and despite the stature of Stephen, nothing was said about the Indian Evidence Act. This is simply an illustration of the profound, crippling and tragic amnesia which has increasingly come to afflict English legal memory ever since the United Kingdom entered Europe – that is, became merely part of a large Continental bureaucracy. Its courts no longer administer the law of their own country and the laws of an Empire from Westminster, but administer laws of foreign origin, sitting, as George Orwell put it in *Nineteen Eighty-Four*, in 'London, chief city of Airstrip One, itself the third most populous of the provinces of Oceania'.[103]

Stephen has had more influence on writers. The early editions of *Cross on Evidence* contained criticisms of the common law hearsay exceptions which depended on the death of the declarant. Each of these criticisms had been met in s 32 of the Indian Evidence Act, and it is submitted that this circumstance prompted Cross's analysis. The Act has had some influence in the United States. The Act, and 'An Introduction on the Principles of Judicial Evidence' which Stephen published with it, are discussed in Wigmore occasionally, sometimes with high praise.[104]

The most striking feature of the Indian Evidence Act is its attempt to be clear and rational. While Stephen thought that the English law of evidence was 'full of the most vigorous sense, and is the result of great sagacity applied to vast and varied experience', he disliked its 'unsystematic character and absence of arrangement'.[105] Stephen saw the Act, and his other codificatory enterprises, not as freezing development, but as providing starting points for future growth in the law. Stephen thought that codes should be revised every ten years. He said:

> The process of codification consists in summing up, from time to time, the results of thoughts and experience. One of its principal merits is that in this way it continually supplies, or ought to supply, new points of departure; and this, instead of hampering or fettering the progress of the law towards the condition of a science, would contribute to it enormously. [106]

It is thus paradoxical that the Indian Evidence Act, though twice examined with great thoroughness by the Indian Law Commission, has never been systematically revised.

One aspect of the Indian Evidence Act turned out to be not only uninfluential, but much attacked. But a closely related feature of the Act has had near universal acclaim. It concerns Stephen's approach to relevance. The Act calls for three inquiries into relevance. First, s 5 makes evidence admissible if it goes to the existence of a fact in issue, which is defined in s 3 as meaning and including:

> any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

The Act does not describe this evidence as 'relevant', though it is a primary category of relevant evidence at common law, and Stephen's language is often relied on. Secondly, s 5 makes evidence admissible if it is 'declared to be relevant' under ss 6–9, 11 or 13–16. These are provisions which seek to express in statutory form the reasoning processes to be employed in relation to circumstantial evidence (including that major category known at common law as 'similar fact evidence'). Again, this is a type of relevance familiar at common law. Stephen claimed that these 'circumstantial evidence' sections were based on J S Mill's *System of Logic* (1843).[107] Practical comprehension of how they work, however, is assisted by reading the 'Introduction' to the Act published by Stephen in 1872. In it he explained how all the evidence in five murder cases would have been treated under the Act. Thirdly,

the Act renders evidence admissible if it is 'declared to be relevant' by ss 10, 12 or 17–55. These provisions do not use the word 'relevant' in a common law sense. Rather their function is, for the most part, to codify various hearsay exceptions in a streamlined form – though the word 'hearsay' is not used in the Act.

In 1875, three years after the Act was enacted, a member of the Bombay Civil Service published a pamphlet – *The Theory of Relevancy for the Purpose of Judicial Evidence*. Its capable author, G C Whitworth, deserves to be more widely known. He criticised the Act in two respects. The first criticism was that the meaning of 'relevant' differed between the 'circumstantial evidence' sections and the 'hearsay exceptions' sections. In the circumstantial evidence sections the word 'relevant' referred to the natural probative tendency of the evidence. In the hearsay exceptions sections the word 'relevant' referred to the question of whether inherently probative evidence should or should not be excluded for prudential reasons – reasons other than its lack of probative tendency. Employing the term 'relevant' in the latter context strained language. Whitworth's second criticism was that the theory of relevancy employed in the circumstantial evidence sections was too narrow. It rested on the view, stated in the 'Introduction', that relevance depended on a relationship of cause and effect. Yet one fact can be relevant to another, even though neither caused the other: they can be the effects of a single cause, for example.

Whitworth' s two criticisms were repeated by others over the next 20 years. The criticisms are generally thought to be sound. But the aspects criticised do not seem to have caused practical trouble in India. The scheme has not been changed. This seems to be a result of Stephen's skilful transposition of hearsay exceptions into categories of evidence 'declared to be relevant'.

In 1876, in his *Digest*, Stephen generously accepted Whitworth's second criticism, and stated the definition of 'relevance' in Art 9 accordingly.[108] It provided:

> Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been
>
> the cause of the other;
> the effect of the other;
> an effect of the same cause;
> a cause of the same effect:
>
> or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;
>
> or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other ….'

The following year Stephen modified this structure by abandoning that definition and inserting a new definition of relevance in Art 1.[109] That definition was:

> The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

There is here a combination of the elements of the definition in s 3 of the Indian Evidence Act and Art 9 of the *Digest* as it stood in 1876. That definition of relevance has been cited with approval innumerable times. Lord Oliver of Aylmerton said that 'relevant' could not 'be better defined',[110] and Brennan J agreed.[111] Other members of the High Court have approved it several times – in 1912,[112] 1998,[113] 2002[114] and in 2008.[115] The Privy Council approved it in 2003[116] and 2005.[117] So have members of the Supreme Court of Canada.[118] Despite the criticism in ALRC 26 of some aspects of Stephen's approach to relevance, the definition appearing in s 55(1) of the legislation modelled on the *Evidence Act 1995* (Cth) (which can be found in cl 43(1) of the Bill in ALRC 26 and cl 50(1) of the Bill in ALRC 38) was said by Gleeson CJ not to be materially different from that of Stephen in the *Digest*.[119]

Stephen's Digest

This discussion of Stephen's treatment of 'relevance' has moved from the Act to the *Digest*. What has been the influence of the *Digest* in other respects?

Stephen's *Digest* owed its origins to the following circumstances.

While in India he had decided that the works of the then current writers on evidence were unsatisfactory for use in India by practitioners or courts. That decision impelled his solutions in the Indian Evidence Act, particularly in relation to its structure and style. When he began lecturing on evidence at the Inns of Court, he concluded that those works were unsatisfactory for law students as well. Those works even now, with respect, are far from contemptible, and repay examination on particular points, but Stephen was right. The fourth edition of Starkie (*A Practical Treatise on the Law of Evidence*) was published in 1853, with 880 pages of text. The fifth edition of *Taylor on Evidence* published in 1869 was a substantial work in two volumes, containing 1,598 pages of text. The sixth edition, 1872, contained 1,596 pages of text. The fifth edition of *Best on Evidence* published in 1870 was 910 pages long. Stephen's own seventh edition of *Roscoe' s Digest of the Law of Evidence in Criminal Cases*, published in 1868, was 984 pages long. Of these works, Stephen said:

> The knowledge obtained from such books and from continual practice in court may ultimately lead a barrister to acquire comprehensive principles, or at least an instinctive appreciation of their application in particular cases. But to refer a student to such sources of information would be a mockery. He wants a general plan of a district, and you turn him loose in the forest to learn its paths by himself.[120]

When Stephen returned from India in 1872, the attorney-general, Sir John Coleridge, asked him to use the Indian Evidence Act as the basis for a bill for an evidence code for England. He had completed it by 7 February 1873.[121] Coleridge introduced the Bill to the House of Commons on 5 August 1873. He made a speech acknowledging Stephen's authorship, after saying:

> He had never proposed to do more with the Bill this Session than to introduce it, print it for the consideration of Members, and, if he should have the opportunity, endeavour to pass it into law in a future Session.[122]

The Bill – number 274 – was then withdrawn, and was never reintroduced after the fall of the Gladstone government. Despite Coleridge's statement that he proposed to print it, and Stephen's statement that he believed it was ordered to be printed,[123] it does not in fact appear to have been printed.[124] This author has never seen the 1873 bill, nor any discussion of it by anyone who claims to have done so. To examine a copy of it, if one still exists and can be located, would be of profound interest. On the evidence scholar it would have the same impact as the discovery of one of the lost books of Tacitus would have on the Roman historian. That is because it contained reforming elements, which, if we knew them, would reveal what Stephen thought English law ought to have been, as distinct from what he thought Indian law should be (as reflected in the Indian Evidence Act) and what he thought English law was (as reflected in the *Digest*).

Since the bill never proceeded and appears to have been lost, it had no direct influence on the law of evidence. But Stephen decided that his Evidence Bill could be used as the basis for a short work – *A Digest of the Law of Evidence*. He omitted the amendments to the law contained in the Evidence Bill, since, he claimed, the *Digest* was 'intended to represent the existing law exactly as it stands'. That statement is to some degree questionable, but the *Digest* is certainly much closer to received English law than the Indian Evidence Act. But the Privy Council was wrong to say, as it once did, that the *Digest* 'reproduced' the Indian Evidence Act 'in substance' for England.[125] They appear to have been misled by Stephen's statement in the first edition of his *Digest* that it was 'intended to represent the existing law exactly as it stands' – a reference to the *Digest*, not the Act. They may have been misled by Stephen's statements that the *Digest* was based on his Bill, and that the Bill 'was drawn on the model of the' Indian Evidence Act.[126] Many parts of the *Digest* are the same as the Indian Evidence Act, but many other parts diverge from it. This was partly because some of the origins of the Indian Evidence Act lay in earlier Indian legislation, and partly because Stephen often chose to modify English law. As just noted, the Bill probably diverged from Stephen's *Digest*. He saw the *Digest* as being:

> such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labour disproportionate to its importance in relation to other branches of the law.[127]

He also said:

> I have attempted … to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which … will, I hope, be useful, not only to professional students, but to everyone who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into questions of fact, as well as on every branch of litigation. [128]

Although the Indian Evidence Act is different in detail from the *Digest*, the goal of each was similar, for Stephen's aim with the Act was as follows:

> By 'boiling down' the English law, and straining off all the mere technical verbiage, it would be possible to extract a few common-sense principles and to give their applications to practise in logical subordination and coherence. That which seems to be a labyrinth in which it is hopeless to find the way until experience has generated familiarity with a thousand minute indications at the various turning points, may be transformed, when the clue is once given, into a plan of geometrical neatness and simplicity. [129]

Maine in 1873 saw the object of the Indian Evidence Act as being:

> to alleviate the labour of mastering the law of Evidence, whatever form it might take, and, so far as might be possible, to place the civil servant overwhelmed by multifarious duties, the native judge and the native practitioner on a level with the English lawyers of the Presidency towns, who have hitherto virtually claimed a monopoly of knowledge on the subject. [130]

Stephen's goal was reflected in the speech of Sir George Campbell, lieutenant-governor of Bengal, to the Viceroy's Legislative Council on 12 March 1872. He justified the Indian Evidence Act as enabling a non-specialist judge who might not be on an equal footing with a specialist advocate to say: 'I am as good a man as you: if you raise a question of evidence, there is the law by which your question can be decided'.[131] The needs of legally untrained officials and Indian barristers who had not been educated in England had much in common with those of law students.

The *Digest was* a short compact work, 184 pages in the first edition. It was organised into articles not unlike the sections of a statute or code, interspersed, like the Indian Evidence Act, with illustrations, and containing only limited citation of authority. Stephen understandably said of the work: 'The labour bestowed upon it has … been in an inverse ratio to its size.' [132] In terms of longevity at least, the *Digest* is one of the most successful students' works ever published. By 1936 there had been twelve editions, and the twelfth edition was reprinted with corrections in 1946 and with further corrections in 1948.[133] The 1948 version had grown, but only to 273 pages. Its structure and style had changed very little. In 1934 there was an adaptation for use in courts martial.[134] There were reprints in the United States.[135] There were numerous editions in the United States.[136] Some were published for particular jurisdictions, such as an edition in 756 pages published from the fifth English edition (1899) in 1904 for New Jersey, Maryland and Pennsylvania by George E Beers, assisted by Arthur L Corbin. There were local editions in other parts of the common law world, such as New South Wales.[137] It had some influence on Wigmore.[138] It had a large influence on other writers in the United States.[139] There are nineteenth and early twentieth century academic textbooks that have survived longer – for example, *Anson on Contract* (dating from 1876) and *Salmond on Torts* (dating from 1907). There are also practitioners' works of greater age, for example, *Chitty on Contracts* (dating from 1826), *Clerk and Lindsell on Torts* (dating from 1889) and *Dicey on the Conflict of Laws* (dating from 1896). But there are not many in either category. Few of those works changed as little from the form adopted in their first author's lifetime as Stephen's *Digest*. And, taking into account considerations of influence, a glance, for example, at the early English editions of Sir Rupert Cross's *Evidence* will reveal how it affected that master of 20th century evidence law .

A full account of the influence of the *Digest* would depend on the performance of tasks which it may now be impossible to perform. One would be to discover how many copies of each edition and impression were sold, where and to whom. Another would be to work out which institutions prescribed it for use by law students.

It may have been prescribed at the University of Sydney Law School, for example, as late as the early 1950s. Another would be a complete survey of all evidence cases since 1876 to see how often it was cited by the bar and by the bench.

There is certainly a steady stream of citation in the High Court. In 1907 O'Connor J did so in relation to the burden of proof.[140] In 1908 Isaacs J did so in relation to presumptions.[141] In 1913 Barton ACJ did so in relation to *res gestae*.[142] In 1915 Isaacs J did so in relation to presumptions.[143] In 1919 Barton, Isaacs and Rich JJ did so in relation to admissions of the contents of a document.[144] In 1928 Isaacs J did so in relation to satisfaction of the standard of proof,[145] and in relation to presumptions from silence.[146] In 1929 Starke J did so in relation to the meaning of evidence.[147] In 1931 Dixon J and Evatt J did so in relation to the competence of children to take oaths.[148] In 1936 Evatt J did so in relation to presumptions of fact,[149] and in relation to similar fact evidence.[150] In 1937 Evatt J did so in relation to the presumption of death.[151] In 1989 Toohey J did so in relation to *res gestae*.[152] In 2001 McHugh J did so in relation to admissibility of evidence by the accused.[153] In 2007 four justices did so in relation to the competence of the accused on summary charges.[154]

Counsel before the High Court have often quoted Stephen's *Digest* on such issues as circumstantial evidence;[155] burden of proof;[156] *res gestae* evidence;[157] the definition of evidence;[158] similar fact evidence;[159] the admissions of co-conspirators;[160] and the standard of proof of crimes in civil proceedings.[161]

Turning to other courts in Australia, and to English and Canadian courts, one can find extensive citation of the *Digest* from soon after it was first published in 1876. The topics include: the shifting of the burden of proof;[162] formal admissions;[163] confessions;[164] facts discovered in consequence of confessions;[165] admissions;[166] reception of depositions of deceased persons;[167] declarations against pecuniary interests;[168] competence of witnesses;[169] testimonial incompetence;[170] administering oaths to children;[171] proof of motive;[172] judicial notice;[173] leading questions;[174] police informers;[175] similar fact evidence;[176] expert evidence;[177] effect of judgments;[178] circumstantial evidence;[179] hostile witnesses;[180] power of party calling a witness to contradict that witness;[181] evidence of complaint;[182] non-existence of privilege for matrimonial communications;[183] reception of whole of admissible statement against interest;[184] evidence of witnesses in previous proceedings;[185] admissibility of parole evidence;[186] definition of 'document';[187] accreditation of witnesses after they have been discredited in cross-examination;[188] presumption of death;[189] cross-examination of witnesses on character;[190] finality of answers in cross-examination on credit;[191] evidence of reputation as going to character;[192] admissibility of evidence that witness would not believe another witness on oath;[193] power of court to prevent cross-examination as to credit where 'the truth of the matter suggested would not … affect the credibility of the witnesses to the matter to which he is required to testify';[194] admissibility of evidence on construction of documents to show 'the genesis and aim of the transaction';[195] and other questions of contractual construction.[196] Further, the *Digest* has often been cited in argument in leading evidence cases, from a time very soon after it was first published.[197]

The *Digest* has not lacked praise. In 1932 Judge Parry called it a 'great textbook'. He said: 'The big books of cases are valuable mines in which to quarry when you are in search of a jewel with which to illuminate your argument, but Stephen's book is a chaplet of pearls that should be worn unostentatiously under your gown.' [198] As late as 1968, in seeking to determine the meaning of 'character' in 1898, the House of Lords relied on the *Digest* and described it as 'a well-known textbook'.[199] In 2005 Lord MacPhail, sitting in the Outer House of the Court of Justiciary, described the *Digest* as 'influential'.[200]

These are laudatory remarks, but the stature of Stephen is greater than they might suggest. Isaacs J spoke of Stephen's restatement of a proposition of Lord Mansfield CJ's as 'clothed with the most eminent and most authoritative recognition'.[201] In 1909 Phillimore J, after quoting a passage in the *Digest* which F E Smith KC had cited, and referring to a passage in Taylor, said: 'The authority of Taylor is not so high as that which I have just cited, and before accepting [Taylor's] statement as conclusive one would prefer to look at the cases cited in support of his proposition.' [202] That is, a statement by

Stephen was seen as authoritative independently of its sources; not so a statement by Taylor. In similar fashion, in 1954 Harman J was prepared to accept a statement in the *Digest* that there was no authority on a point as conclusive of the proposition that there was none.[203] These judges viewed Stephen as not simply an able writer, but as having a more fundamental significance.

What is that significance? Evatt J said that Stephen 'endeavoured to explain the rules of evidence upon a rational basis'.[204] That points to one aspect of the power Stephen displayed in the *Digest*. Another was stated by Phipson in the introduction to the first edition of his book: he said he had tried to write a work which would take a middle place between 'the admirable but extremely condensed *Digest of* … Stephen, and that great repository of evidentiary law, *Taylor on Evidence*.'[205] There is here an element of criticism, which Cross repeated in 1978. He said of Stephen's digests on evidence and criminal law that they:

> were remarkable achievements and the succinct statements of the effect of the mass of case-law which they contain give Stephen claims to be regarded as the first nineteenth-century writer on the two subjects who could plainly see the wood for the trees, yet they tend to fall between two stools. From the point of view of the practitioner the citation of authority is insufficient, and from the point of view of the student the statements of principle are too concise.[206]

There is some truth in the latter criticism. Stephen's compressed expression makes it not easy to understand his world when one first enters it. What of the former criticism?

Stephen's approach to the citation of authority stems partly from his hostility not only to the swollen bulk of the textbooks available in the 1870s, but also to what he saw as the over-reporting which had led them into that condition. On 16 April 1872, just before Stephen left India, he told the Legislative Council:

> I do not believe that one case in twenty of those which are reported [in the Indian reports] is at all worth reporting; and when we think what the High Courts are, it seems to me little less than monstrous to make every division bench into a little legislature, which is to be continually occupied in making binding precedents, with all of which every Court and Magistrate in the country is bound to be acquainted. Careful reports of great cases are perhaps the most instructive kind of legal literature; but I know nothing which so completely enervates the mind, and prevents it from regarding law as a whole, or as depending upon any principles at all, as the habit of continually dwelling upon and referring to minute decisions upon every petty question which occurs. [207]

He saw it as important to concentrate on basic principle as expressed in a relatively low number of leading or illustrative cases, not on a thin stream of over-complex doctrine which meanders through a mass of footnotes and constantly changes direction. The law might change as conditions changed – that is why he favoured revising codes every 10 years – but excessive citation of authority was damaging both to codes and to the common law. While Stephen loved debate, and while he was capable of changing his mind, as he did throughout his life on many issues great and small, including evidentiary issues, his was a confident, naturally decisive, even authoritarian mind. English law as treated in evidence books in the 1870s, like Indian law before 1872, seemed piecemeal, jumbled, wordy and disorganised. In it really fundamental points were scattered amongst the mundane. One aspect of Stephen's skill was to separate out the former from the latter. The impression given by both the Indian Evidence Act and the *Digest* is their authorship by a mind having total confidence in its own abilities, and possessing the judgment to discriminate, to discard, to modify, and to clarify.

Stephen would have disliked the modern practices pursuant to which judges entertain debates, sometimes long debates, about admissibility; pursuant to which they deliver long judgments, sometimes reserved, rather than short decisive rulings; and pursuant to which masses of authority recorded on computer are available for citation. In part these practices have arisen because jury trial has declined, because even where it has not declined it has changed, and because avenues for discretionary exclusion of evidence have greatly increased. But he would have deplored the consequential effect in terms of delay. Stephen would have appreciated the following point made by Mr Justice Wells:

> The principles and rules [of evidence] were largely

> fashioned, not in the refined atmosphere of appeal courts or in courts of equity, but at *nisi prius*, in the heat and conflict of forensic strife. They comprise principles together with numerous associated corollaries in the form of working rules. They provide an enormous reservoir of guidance for trial judges, who have to resolve practical problems 'on the run'. [208]

In a world where evidentiary issues arose unexpectedly and suddenly, Stephen saw that what was needed was a volume which, with effort, could be readily assimilated into the practitioner's mental equipment, and appealed to quickly to resolve disputes. The *Digest* was an epitome of the guidance to be found in the decisions of earlier times for the resolution of contemporary forensic controversies.

The utility of the model employed in the Indian Evidence Act and the *Digest* is confirmed by three other instances in living memory in our country. First, in South Australia, in 1963, Andrew Wells published *An Introduction to the Law of Evidence*. It was a short work intended for police officers, but it ran into several editions. It had the same characteristics as Stephen's *Digest* – it was terse, spare, elegant and trenchant.

The second instance may be found in Harold Glass – the greatest evidence lawyer ever produced by the New South Wales Bar. He favoured an enterprise like that which evolved into the *Evidence Act 1995* (Cth) because of its capacity to simplify the materials available to solve evidentiary disputes and hence to shorten the time needed for that task. It is doubtful whether he would have been happy with the swollen case law which the last 15 years have produced in relation to that legislation, just as it is doubtful whether Stephen would have been happy with the latest edition of *Sarkar on Evidence*, which expounds the Indian Evidence Act in 2,586 pages.

Thirdly, until a couple of generations ago – ending during the professional lifetime at the bar of Mr Justice Meares's generation, from the 1930s to the 1950s – there was a tradition of the small book. Barristers would keep small books in which they would write down key propositions and the main authority for them. They reflected a lack of concern with anything other than principle and basic authority – for non-essential authority did not much matter and, anyway, would not have been brought to court. That was only an informal and crude exemplification of the much more sophisticated techniques employed in the *Digest*.

The Indian Evidence Act and the *Digest* reacted strongly against the contemporary evidentiary works and towards a search for first principles. The reactions were perhaps too strong, but they were beneficial. They illustrate an inevitable swing back and forth that is likely to be eternal, reflecting a tension between the search for fundamental principle and the search for universal coverage of detail in a case-based system of justice. Because Stephen's techniques form part of that inevitable action and reaction, they are likely to retain some influence.

Will Stephen's opinions on the substantive law retain any influence? No doubt as the law becomes more and more dominated by statutes, often increasingly detailed statutes, there is less room for the particular doctrines expounded by him or any other individual. But many of them operate at a deeper level. The opinions of a thinker like Stephen on matters of fundamental principle are likely to survive, if only because it is very hard to modify them by legislation.

Endnotes

***** Lecture delivered to the NSW Bar Association on 21 June 2010. I am indebted to Kim Pham and Jane Taylor for their assistance in preparing it.

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 107: on 14 March 1841 he wrote of the 'proprietary rights in the Soil' of the Australian Aboriginal people.
2. Quoted by R J White, 'Editor's Introduction' in R J White (ed), *Liberty, Equality, Fraternity* (1967, reprint of 2nd ed 1874) 4. Eton affected a contemporary, Robert Cecil, future Prime Minister, similarly. 'His pessimism about human nature, his assumptions about the cowardice of the silent majority, the cruelty of the mob and the vulnerability of the rights of the individual were instilled in him by his Eton experiences' : Andrew Roberts, *Salisbury: Victorian Titan* (1999) 11.
3. James Fitzjames Stephen, *Defence of the Rev Rowland Williams, DD* (1862).
4. *Williams v Bishop of Salisbury* (1863) 2 Moore PC (NS) 375; 15 ER 943.
5. J B Atlay, *The Victorian Chancellors* (1908) vol 2, 264.
6. See R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (2008).
7. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 231–232. Chamberlain's praise is significant – for though both were Liberals, both broke with Gladstone over Irish Home Rule, both declined to join the Conservative Party, both were fervent Imperialists and both employed aggression and asperity as standard tools of communication, the one was an autodidact, a left wing

radical, a republican, a self-made businessman, the most extreme of dissenters and a democratic demagogue, the other the product of famous institutions, a flower of upper class Evangelical culture, and a political conservative on the extreme right of the Liberal Party. Yet Chamberlain managed to peer through the fog of these distracting differences between them to detect and admire Stephen's strong points as counsel.

8. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 211.
9. See M C Sarkar, S C Sarkar and others (eds), *Sarkar's Law of Evidence*, 16th ed (2007).
10. See R G Padia (ed), *Pollock and Mulla: Indian Contract & Specific Relief Acts*, 13th ed (2006).
11. See, for example, Sir Courtenay Ilbert, 'Sir James Stephen as a Legislator' (1894) 10 LQR 222, 224; Sir Harold Nicolson, *Curzon: The Last Phase 1919-1925* (1934), 12; Sir George Rankin, *Background to Indian Law* (1946), Preface.
12. See below, text, notes 120-123.
13. James A Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (1983), 202-203.
14. John Hostettler, *The Politics of Criminal Law Reform in the 19th Century* (1992), 182-189; John Hostettler, *Politics and Law in the Life of Sir James Fitzjames Stephen* (1995), 175-197.
15. This is wrongly stated as 1874 in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 483, R J White (ed) 'Books by James Fitzjames Stephen', *Liberty, Equality, Fraternity* (reprint of 2nd ed,1874) 19 and John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882, 118 n 3.
16. Frederic William Maitland, *The Life and Letters of Leslie Stephen* (1906), 429.
17. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 428-429.
18. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 435-436.
19. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882 (1996), 218.
20. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 348.
21. Quoted in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 349.
22. K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988), 246.
23. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 94.
24. R J White, 'Editor's Introduction' in R J White (ed), *Liberty, Equality, Fraternity* (1967, reprint of 2nd ed 1874), 3.
25. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957), 5.
26. T H S Escott, *Society in London* (2nd ed, 1885), 142-143.
27. 'The First Earl of Lytton' (1907) 12 *Independent Review* 332, 333.
28. K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988), 2, 254 n 17.
29. He complained that Dickens portrayed so many deaths in order to show 'his skill in arranging effective details so as to give them this horrible pungency', and that '[a] list of the killed, wounded and missing amongst Mr Dickens's novels would read like an Extraordinary Gazette. An interesting child runs as much risk there as any of the troops who stormed the Redan': 'The Relation of Novels to Life' (1855) *Cambridge Essays* 148, 174, quoted by K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988), 14.
30. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957), 10-11.
31. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957), 12-13.
32. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 98.
33. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 232.
34. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 212.
35. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882 (1996) 60.
36. According to Sir Harold Nicolson, Stephen said: 'There is in the Asian Continent an empire more populous, more amazing and more beneficent than that of Rome. The rulers of that great dominion are drawn from the men of our own people.' These words 'produced upon George Curzon an apocalyptic effect. "Asia", "Continent", "Empire", "amazing", "beneficent", "Rome", "rulers", "dominion", "men", "our own people", – such were the watchwords which thereafter guided his life.' 'Ever since that day' he confessed in 1896, 'the fascination and ... *sacredness* of India have grown upon me' (emphasis in original): Curzon, *The Last Phase 1919-1925* (1934) 12. Curzon also retained 'a vivid recollection [of] the vast head, the heavy pendulous jaw, the long and curling locks ... as he stood at the desk': G J D Coleridge, *Eton in the Seventies* (1912) 225, quoted in K J M Smith, 'Sir James Fitzjames Stephen' 52 *Oxford Dictionary of National Biography* (2004) 439, 441. See also K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988), 156-157.
37. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 378.
38. Sir Keith Thomas, 'What Are Universities For?', *Times Literary Supplement*, 7 May 2010, 15.
39. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 213-214 n 2.
40. M M Bevington, *The Saturday Review 1855-1868: Representative Educat ed Opinion in Victorian England* (1966), 373-381.
41. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 226.
42. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 2, 1882-1894 (1996), 434.
43. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 2, 1882-1894 (1996) 428.
44. Frederic William Maitland, *The Life and Letters of Leslie Stephen* (1906), 429.
45. *Essays by a Barrister* (1862) (comprising 33 articles) and the three volumes of *Horae Sabbaticae* (1892) (comprising 55 articles).
46. Stephen had been driven to journalism in part by poverty, and in the case of Salisbury, that was the sole cause. He committed the scandalous act of marrying so far out of his class as to trigger the refusal of his father, the second marquess, to support him. By the lights of that nobleman, this point of view is reasonable. The lady was Georgina Alderson, daughter of Baron Alderson, who remains to this day a highly respected judge, but 'irredeemably middleclass' and wanting in money: Andrew Roberts, *Salisbury: Victorian Titan* (1999) 30.
47. *Essays by the late Marquess of Salisbury: Biographical* (1905) and *Essays by the late Marquess of Salisbury: Foreign Politics* (1905).
48. R J White (ed), *Liberty, Equality, Fraternity* (1967, reprint of 2nd ed 1874).
49. See *Law , Liberty and Morality* (1963), 16.
50. Reprinted as 'Morals and the Criminal Law ' in Patrick Devlin, *The Enforcement of Morals* (1965), 1-25.
51. Patrick Devlin, *The Enforcement of Morals* (1965) vii.
52. 'Liberalism and the Victorian Intelligentsia' (1957) 13 *Cambridge Historical Journal* 58, 65 n 38.
53. Ernest Barker, *Political Thought in England: 1848 to 1914* (2nd ed 1947), 150.
54. H L A Hart, *Law , Liberty and Morality* (1963) 16, where he also called Stephen a master of the common law and 'the great Victorian judge and historian of the Criminal Law'.
55. Frederic William Maitland, *The Life and Letters of Leslie Stephen* (1906) 140.
56. K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist*

(1988) 250-251, 317; James A Colaiaco, *James Fitzjames St ephen and the Crisis of Victorian Thought* (1983), 206-207.

57. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 441.
58. 'The Rationalist Tradition of Evidence Scholarship' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried* (1982), 234.
59. Leon Radzinowicz, *Sir James Fitzjames St ephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957), 37.
60. 'The Law and the Constitution' in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1997, reprint of 1965 edn), 38-39.
61. (1889) 23 QBD 168.
62. (1885) 16 QBD 190.
63. (1887) 16 Cox 306.
64. (1887) 16 Cox 311.
65. (1866) LR 1 Ex 265.
66. [1932] AC 562.
67. [1935] AC 462.
68. Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652.
69. *R v Z* [2005] 2 AC 467, 491 [22].
70. The Queensland legislation was based on Sir Samuel Griffith's *Draft of a Code of Criminal Law* (1897), which set out his draft provisions in the right hand columns and their sources in the left hand columns: the 'Bill of 1880' is often referred to – that is, the Draft Code of 1879, presented to parliament in that year, but referred to a select committee just before the Disraeli government fell in 1880.
71. See Barry Wright, ' Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples' (2007) 26 *University of Queensland Law Journal* 39.
72. *A General View of the Criminal Law of England* (1863) 99; *A History of the Criminal Law of England* (1883) vol 1, 80-85.
73. Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 661.
74. 'The Characteristics of English Criminal Law', *Cambridge Essays* (1857) 16; *A General View of the Criminal Law of England* (1863) 119; K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988), 62.
75. (1884) 14 QBD 273. For a discussion of the changing position in the 1878 and 1879 Bills, see Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 659.
76. *A History of the Criminal Law of England* (1883) vol 2, 106-107.
77. Richard A Posner (ed), *The Essential Holmes* (1996) 222 (speech to Suffolk Bar Association Dinner, 5 February 1885). Similarly, Sir Courtenay Ilbert, who is unlikely to have known of Holmes' s speech four years earlier, called him 'the ablest and most consistent advocate of English codification': 'Indian Codification' (1889) 5 *Law Quarterly Review* 347, 366.
78. It is set out in Pollock's *The Law of Torts*, 13th ed (1929), 618- 686. It has the style of Stephen's Indian legislation, flowing from Macaulay's *Penal Code*, with 'Illustrations' and the occasional 'Explanation'.
79. Editor's note to Sir Courtenay Ilbert, 'The Life of Sir James Stephen' (1895) 11 *Law Quarterly Review* 383, 386.
80. G H Knoll, 'Sir James Fitzjames Stephen, Bart' (1892) 26 *American Law Review* 489, 493-494.
81. For example, *R v Fennell* (1881) 7 QBD 147 (inducements to confessions); *R v Riley* (1887) 18 QBD 481 (holding that while a prosecutrix complaining of rape cannot be cross-examined about intercourse with persons other than the accused, she was open to cross-examination about other acts of intercourse with the accused); *R v Gibson* (1887) 18 QBD 537 (Exchequer rule in criminal appeals).
82. *Lamb v Munster* (1882) 10 QBD 110, 112-114 (followed in *Bell v Klein* [1954] 1 DLR 225, 227-228) (privilege against self-incrimination); *R v Downer* [1874-1880] All ER Rep Ext 1378 (proof of agency cannot be found in admission by agent); *R v Gibson* (1887) 18 QBD 537 (res gestae).
83. For example, *Brown v Eastern and Midlands Railway Co* (1889) 22 QBD 391, 393 (distinction between similar fact evidence and proof of public nuisance by establishing several instances of interference with a public right).
84. (1884) 14 QBD 153.
85. (1884) 14 QBD 153, 163 per Grove J.
86. It is worth bearing in mind that similar, though more modest, claims could be made for some of Stephen's other Indian legislation such as the Indian Contract Act and the Criminal Procedure Code of 1872 in which Stephen's originality played less of a role.
87. So thought Stephen's predecessor in India, Maine, who described the predicament of judges sitting without juries in India, particularly if they were administrators as well, in 'Mr Fitzjames Stephen' s Introduction to the Indian Evidence Act' (1873) 19 *Fortnightly Review* 51, 53. See also his speech of 4 December 1868 to the Legislative Council: Imperial Legislative Council (India), *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Laws and Regulations, 1868,* vol VII (1869) 507.
88. *The British Conquest and Dominion of India* (1989), 881.
89. *British Colonial Law* (1962), 253 n 16.
90. ALRC 26 (1985), vol 1, 158 [317]. The reference appears to be to the Indian Evidence Act ss 6-9, 11 and 13-16.
91. ALRC 26 (1985), vol 1, 158 [318]. See below, text, notes 107-108.
92. Cmnd 4991 27-28 [47].
93. 12th ed, 1948, 201.
94. Cmnd 4991 85 [134].
95. Wigmore erroneously states that this reform was originally introduced by Stephen: J H Wigmore, *Evidence in Trials at Common Law*, Tillers rev, 1983, vol 1, 888 [21], n 8.
96. Thus the *Digest*, Art 140, records r 48 as stating the civil rule, and the 'Exchequer rule' as stating the criminal rule: 130.
97. (1863) 297-298. See also *A Digest of the Law of Evidence* (1876), 174-175.
98. Imperial Legislative Council (India), *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Laws and Regulations, 1872,* vol XI (1873) 131.
99. [1929] 2 KB 1, 50-51.
100. See, for example, *Barry v Heider* (1914) 19 CLR 197, 217–218 (discussing s 115 on estoppel, as considered in *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 IA 203); *Williamson v Ah On* (1926) 39 CLR 95, 113, 115 (ss 101 and 106 on the burden and standard of proof); *Ahern v The Queen* (1988) 165 CLR 87, 98-99 (s 10 – admissibility of things said, written or done by conspirators in reference to their common intention); *Wilson v Anderson* (2002) 213 CLR 401, 445 [94] n 124 (general); *Weiss v The Queen* (2005) 224 CLR 300, 310 [24] (s 167 on appeals).
101. [1967] 1 AC 760, 780, 817.
102. [2010] 2 WLR 47.
103. Peter Davison (ed), *The Complete Works of George Orwell*, vol 9, *Nineteen Eighty-Four*, (1987), 5.
104. J H Wigmore, *Evidence in Trials at Common Law*, Tillers rev, vol 1, 1983, 689-690 [12] (relevance), 888 [21], n 8 and 894-895 [21] n 12 (test for appeal in relation to evidentiary error: s 167 of the Indian Evidence Act described as 'the only form consistent with common sense and the theory of trials'); Tillers rev, vol 2, 1983 [25] (circumstantial evidence); 966-967 [27] (nature of judicial investigations: Stephen is described as one 'of the most original thinkers in the law of evidence'); 1402 [64] (virtue of common law rules restricting proof of parties' character in civil cases).
105. 'An Introduction on the Principles of Judicial Evidence' in the Indian

Evidence Act (1872), 7.

106. 'Codification in India and England' (1872) 18 *Fortnightly Review* 644, 672.
107. 'An Introduction on the Principles of Judicial Evidence' in the Indian Evidence Act (1872), 18-51.
108. *A Digest of the Law of Evidence* (1876), 135-137.
109. The twelfth edition, reprinted with editions in 1948, described the publication containing the new definition as the first edition reprinted 'with many alterations 1877': *A Digest of the Law of Evidence*, 12th ed, (revd), 1948, iv.
110. *R v Kearley* [1992] 2 AC 228, 263.
111. *Pollitt v R* (1992) 174 CLR 558, 571.
112. *Harris v Minister for Public Works (New South Wales)* (1912) 14 CLR 721, 725 per Griffith CJ.
113. *Palmer v R* (1998) 193 CLR 1, 24 [55] n 54 per McHugh J.
114. *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2] n 2 per Gleeson CJ and 377 [31] n 8 per McHugh J.
115. *HML v R* (2008) 235 CLR 334, 425 [275] per Heydon J.
116. *R v Randall* [2004] 1 WLR 56, 62 [20].
117. *Jairam v Trinidad and Tobago* [2005] UKPC 21, [11].
118. *Seaboyer v R* [1991] 2 SCR 577, 679 per L'Heureux-Dubé and Gonthier JJ. For other approval in various jurisdictions, see *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760, 785; *Bortolotti v Ontario (Minister for Housing)* (1977) 76 DLR (3d) 408, 416; *Jeppe v R* (1985) 61 ALR 383, 393; *Sydney Steel v Mannesmann Pipe* (1985) 69 NSR (2d) 389, [15]; *D v Hereford and Worcester CC* [1991] Fam 14, 22; *R v Raso* (1993) 68 A Crim R 495, 509; *R v Hazim* (1993) 69 A Crim R 371, 377; *AJ v Western Australia* (2007) 177 A Crim R 247, 251 [5]; *Azarian v Western Australia* (2007) 178 A Crim R 19, 29-30 [34].
119. *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2] n 2.
120. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 377.
121. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864–1882 (1996) 118 n 3.
122. Hansard HC, 5 August 1873, 1559.
123. *A Digest of the Law of Evidence* (1876), iii.
124. See *Bills – Public*, (1873) vol 2, 355, where it is stated that Bill 274 was not printed. An officer of the Parliamentary Archives has advised that no copy exists in its possession. It is quite possible that no copy exists, for Stephen was impetuous and careless with papers. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957) 51 incorrectly suggests that that bill is what he describes as 'the Code of Evidence, 69, 1872, Parl. Papers, Bills (1872) vol 1, p 685': but the bill so referred to was introduced while Stephen was still in India. Intrinsically interesting though it is, it does not appear to be traceable to Stephen. C J W Allen, *The Law of Evidence in Victorian England* (1997) 27, says that that bill was a private member's bill read for the first time on 28 February 1872, was dropped at the second reading and may have triggered Coleridge's request to Stephen to draft an evidence code bill.
125. *Terunnanse v Terunnanse* [1968] AC 1086, 1092.
126. *A Digest of the Law of Evidence* (1876), iii.
127. *A Digest of the Law of Evidence* (1876), v.
128. *A Digest of the Law of Evidence* (1876), vii-viii.
129. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895), 274.
130. H S Maine, 'Mr Fitzjames Stephen's Introduction to the Indian Evidence Act' (1873) 19 *Fortnightly Review* 51, 55.
131. Imperial Legislative Council (India), *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the purpose of Making Law s and Regulations, 1872,* vol XI (1873), 141. Sir George Campbell was one of the original judges of the Calcutta High Court.
132. A *Digest of the Law of Evidence* (1876) vii.
133. There are bibliographical problems with the *Digest*. The publishing history as recorded in the twelfth edition (revised) published in 1948, iv does not correspond either with the usage of judges and writers or with the way some earlier editions described themselves. Several High Court judges have said there was a fifth edition of the *Digest* in 1887 – Evatt J in *Cheers v Porter* (1931) 46 CLR 521, 538, McHugh J in *Palmer v R* (1998) 193 CLR 1, 24 [55] n 54 and Gleeson CJ in *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2] n 2 (see also McHugh J, 377 [31] n 8). Wigmore spoke of a 'third ed 1876' – Chadbourn rev, vol 7 [1986] 245 and a '3rd ed 1877' – [1981] 210 n 20. The Joint Courts Library has a 'Second Edition' published in 1876 which seems to be what the 1948 version refers to as a reprint with slight alterations.
134. Sir Harry Lushington Stephen and Captain R Townshend-Stephens (eds), *A Digest of the Law of Evidence in Courts Martial (under the Army and Air Force Acts)* (1934).
135. For example, there was a 'second edition' in 1879 (reprinted by Garland in 1978).
136. For example, a second American edition (from the sixth English edition) by George Chase in 1898 – at 469 pages an enormous expansion – reprinted by F B Rothman 1991; a fourth American edition by William Reynolds in 1905.
137. For example, a New South Wales edition by Henry Giles Shaw, barrister and police magistrate (1909). The work is still commonly cited: eg *Maher v Bayview Golf Club*, [2004] NSWSC 275, [27]. It was cited by the NSW Court of Criminal Appeal on a point no longer part of the law in *R v Connors* (1990) 48 A Crim R 260, 267.
138. J H Wigmore, *Evidence in Trials at Common Law* , Tillers rev, vol 1, [12] 689-690 (relevance); Chadbourn rev, vol 3A, 861 [986] n 16 (doctrine of 'privilege against disgracing answers'); Chadbourn rev, vol 6, 432 [1828] n 9 (unsworn evidence of children); Chadbourn rev, vol 7, 210 [1981] n 20 and 245 [1986] (reputation of witnesses). *The History of English Criminal Law* and other writings of Stephen were also quite frequently quoted or referred to in Wigmore.
139. See, for example, the citations in David P Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* (2009) § 4.3.1 text, nn 27-33 and 57-65.
140. *Cullen v Welsbach Light Co of Australasia Ltd* (1907) 4 CLR 990, 1013-1014.
141. *Tasmania Gold Mining Co Ltd v Cairns* (1908) 5 CLR 280, 282-283.
142. *Brown v R* (1913) 17 CLR 570, 582.
143. *South Australian Co v Richardson* (1915) 20 CLR 181, 196.
144. *Dent v Moore* (1919) 26 CLR 316, 326.
145. *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107, 123.
146. *Webb v Bloch* (1928) 41 CLR 331, 367.
147. *Cheney v Spooner* (1929) 41 CLR 532, 539.
148. *Cheers v Porter* (1931) 46 CLR 521, 532, 538, 542-543.
149. *Davis v Bunn* (1936) 56 CLR 246, 270.
150. *Martin v Osborne* (1936) 55 CLR 367, 383-384, 386, 397.
151. *Axon v Axon* (1937) 59 CLR 395, 412.
152. *Harriman v R* (1989) 167 CLR 590, 606-607.
153. *Azzopardi v R* (2001) 205 CLR 50, 102 [151] (also citing Stephen's *A History of the Criminal Law of Evidence*).
154. *Cornwell v R* (2007) 231 CLR 260, 275 [39] n 33: 276-277 [41]-[42] the positions taken up by Stephen's 1878 Bill and the Commission's 1879 Bill were discussed.
155. *Mountney v Smith* (1904) 1 CLR 146, 151.
156. *Cullen v Welsbach Light Co of Australasia Ltd* (1907) 4 CLR 990, 992.
157. *Brown v R* (1913) 17 CLR 570, 571 (NSW edition).
158. *Cheney v Spooner* (1929) 41 CLR 532, 535.
159. *Martin v Osborne* (1936) 55 CLR 367, 369.
160. *Ahern v R* (1988) 165 CLR 87, 91 (7th ed, 1905).
161. *Helton v Allen* (1940) 63 CLR 691, 693-694.

162. *Reynolds v G H Austin & Sons Ltd* [1951] 2 KB 135, 145;*Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445; *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561, 565. See also *Cummings v Vancouver* [1911] 1 WWR 31, 34; *R v Kakelo* [1923] 2 KB 793, 795; *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367, 382-383; *Dixon v McAllister* [1945] NI 48, 59; *MacLeod v R* [1968] 2 CCC 365, 368; *Procter & Gamble Co v Cooper's Crane Rental Ltd* (1972) 33 DLR (3d) 148, 151.
163. *Ulrich v R* [1978] 1 WWR 422, [5].
164. *R v Sileski* (1921) 32 BR 135; *R v Markadonis* [1935] 2 DLR 105, 106; *R v Matchette* (1946) 19 MPR 132, 137; *Commissioners for Customs and Excise v Harz and Power* [1967] 1 AC 760, 783, 788-792 (CCA) and 795, 801, 808, 814 (HL); *R v Sweezey* (1974) 27 CRNS 163, [32]; *R v Hayter* [2005] 1 WLR 605, 608.
165. *R v McCafferty* (1886) 25 NBR 396, [15].
166. *R v Black* (1922) 16 Cr App R 118, 120; *Falcon v Famous Players Film Co* [1926] 2 KB 474, 481.
167. *R v Hall* [1973] QB 496, 502.
168. *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1913] 2 KB 130, 137.
169. *R v Connors* (1893) 5 CCC 70, 70-71.
170. K*arpati v Spira*, unreported, Supreme Court of New South Wales, 6 June 1995.
171. *R v Bannerman* (1966) 55 WWR 257, [95].
172. *R v Barsalou* (1901) 4 CCC 347, 349; *R v Castellani* (1967) 59 WWR 385, [94]; *R v Ma* (1978) 44 CCC (2d) 511, 517.
173. *Marshall v Wettenhall Bros* [1914] VLR 266, 269; *R v Wagner* [1931] 2 WWR 650, [7]; *McQuaker v Goddard* [1940] 1 KB 687, 700; *Harrison v Flaxmill Road Foodland Pty Ltd* (1979) 22 SASR 385, 386-387; *Saul v Menon* [1980] 2 NSWLR 314, 325.
174. *Ex parte Bottomley* [1909] 2 KB 14, 21, 23; *R v Saunders* (1985) 15 A Crim R 115, 121-122.
175. *Haydon v Magistrates Court* [2001] SASC 65, [114].
176. *R v Bond* [1906] 2 KB 389, 402; *R v McLean* (1906) 11 CCC 283, 286; *Perkins v Jeffery* [1915] 2 KB 702, 708; *R v Belliveau* (1954) 36 MPR 154, 160; *R v Heidt* (1976) 14 SASR 574, 586.
177. *Preeper v R* (1888) 22 NSR 174, [11]; *Fa v Morris* (1987) 27 A Crim R 342, 352.
178. *Ord v Ord* [1923] 2 KB 432, 440; *Woodland v Woodland* [1928] P 169, 172-173; *Hollington v F Hew Thorn & Co Ltd* [1943] KB 587, 594; *Hull v Hull* [1960] P 118, 120; *Field v Field* [1964] JP 336, 348; *In the Marriage of Wakely* (1979) 35 FLR 138, 148.
179. *Corke v Corke* [1958] P 93, 98.
180. *R v Smith* (1909) 2 CrAppR 86,87; *R v Pitt* [1983] QB 25, 32; *R v Prefas and Pryce* (1986) 86 Cr App R 111, 114.
181. *R v Deacon* [1947] 1 WWR 545; *R v Prefas and Pryce* (1986) 86 Cr App R 111, 114; *R v Cairns* [2003] 1 WLR 796, 803 [37]-[39]; *Re Madden* [2004] EWCA Crim 754; [2004] PNLR 37.
182. *R v Lillyman* [1896] 2 QB 167, 176; *R v Reindeau* (1900) 4 CCC 69.
183. *Shenton v Tyler* [1939] Ch 620, 640.
184. *Polak v Polak* (1962) 38 DLR (2d) 333.
185. *Town of Walkerton v Erdman* (1894) 23 SCR 352.
186. *Sigroum Office Management v Milanis* (1985) 4 CPC (2d) 243.
187. *Fox v Sleeman* (1897) 17 PR (Ont) 492, 494; *Misener v Hotel Dieu Hospital* (1983) 42 OR (2d) 694, 696; *Reichmann v Toronto Life Publishing Co* (1988) 66 OR (2d) 65.
188. *Toohey v Metropolitan Police Commissioner* [1965] AC 595, 606.
189. *Ivett v Ivett* (1930) 29 Cox CC 172, 175; *Beattie v Beattie* [1945] 1 DLR 574, 582-583; *Re Bell* [1946] OR 854, 861; *Re Jones* [1955] 5 DLR 213, 219; *Middlemiss v Middlemiss* [1955] 4 DLR 801, 811; *Re Miller* (1978) 92 DLR (3d) 255, 257.
190. *Selvey v Director of Public Prosecutions* [1970] AC 304, 326.
191. *Zwicker v Young* [1929] 1 DLR 602, 604.
192. *Donaldson v State of Western Australia* [2007] WASCA 216, [65].
193. *R v Gunewardene* [1951] 2 KB 600, 608-609; *R v Hoban* [2000] QCA 384, [26]; *R v BDX* [2009] VSCA 28, [35]-[37].
194. *Hally v Starkey; Ex parte Hally* [1962] Qd R 474, 478 per Gibbs J; *Hooper v Gorman* [1976] 2 NSWLR 431, 440.
195. This is a proposition which Judge Cardozo extracted from Art 91(5) and (6) of the first ed (Art 98(5) and (6) of the twelfth ed) in *Utica v City National Bank and Gunn* 118 NE 607, 608 (1918), quoted by Lord Wilberforce in *Prenn v Simmonds* [1971] WLR 1381, 1384. See also *Appleby v Pursell* [1973] 2 NSWLR 879, 890.
196. *Korner v Witkowitzer* [1950] 2 KB 128, 163.
197. For example, *Massey v Allen* (1879) 13 Ch D 558, 560; *R v Riley* (1887) 18 QBD 481, 482; *Ballantyne v MacKinnon* [1896] 2 QB 455, 457; *Mercer v Denne* [1905] 2 Ch 538, 549; *R v Ball* [1911] AC 47, 54; *Tucker v Oldbury Urban District Council* [1912] 2 KB 317, 318; *R v Cohen* (1914) 10 Cr App R 91, 95; *R v Baskerville* [1916] 2 KB 658, 661; *Conquer v Boot* [1928] KB 336, 337; *Re Davy* [1935] P 1, 4; *Teper v R* [1952] AC 480, 485; *Corke v Corke* [1958] P 93, 94-95; *Murdoch v Taylor* [1965] AC 574, 579; *Myers v DPP* [1965] AC 1001, 1017; *Selvey v DPP* [1970] AC 304, 315; *R v Z* [2005] 2 AC 467,470.
198. Richard Harris, *Hints on Advocacy*, 16th ed, 1932, introduction by Judge Parry, vi.
199. *Director of Public Prosecutions v Selvey* [1970] AC 304, 326.
200. *Haddow v Glasgow City Council* (2005) SLT 1219, 1223.
201. *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107, 123.
202. *Ex parte Bottomley* [1909] 2 KB 14, 21.
203. *Re Overbury (decd)* [1955] Ch 122, 126.
204. *Martin v Osborne* (1936) 55 CLR 367, 383.
205. Sidney L Phipson, *The Law of Evidence*, 1st ed (1892) v.
206. Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 655.
207. *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Laws and Regulations. 1872,* vol XI, Office of the Superintendent of Government Printing, Calcutta (1873) 406-407.
208. 'A Critique of the Australian Law Reform Commission Draft Evidence Bill' (1992) 9 *Australian Bar Review* 185, 186.