The Adventures of Bentham in Van Diemen's Land: Sir Alfred Stephen and the *Insolvency Act*

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Introduction

In 1987 in a speech to the history section of the Australian and New Zealand Association for the Advancement of Science, the well respected historian D C H Currey[1] stated that one of the most important legal reformers 'within the reigns of George IV and William IV was Jeremy Bentham and the men he inspired...and the benefits they conferred to the British Isles.'

Bentham opined that laws should be useful to society, rather than merely reflect the status quo. Whilst he believed that men inevitably pursue pleasure and avoid pain, he also preached that the greatest happiness should belong to the greatest number.[2] Bentham was highly critical of the approach taken by Sir William Blackstone[3] in that he displayed an 'an-

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1 *The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales*, (Royal Historical Society, Volume xxiii, Part iv, 1987) 229-241, but see 229 initially.

2 For a list of works on Bentham, see W S Holdsworth, *A History of English Law,* AL Goodhart and H G Hanbury (eds), (vol 13,1952) 63-76.

3 Sir William Blackstone, *Commentaries on the Laws of England* (first published 1765-69, 12th ed, 1978). Bentham was totally disillusioned with the Blackstone approach to law as not providing clear rules needed in a modern society; see Michael Lobban, *The Common Law and English Jurisprudence, 1760-1850*, (1991), especially chapter 5. Chapter 5, entitled 'Bentham and the Complete Code of Laws', contains many references for future Bentham research. See also below, n 13 for further references. The chapter examines Bentham's ideas and contrasts these ideas with those of Blackstone and argues that Bentham's science of legislation was a natural progression from Blackstone.

tipathy to reform' and his work was only a systematic exposition of the law of England[4] that did not consider the social impact of the law.

Jeremy Bentham[5] made the concept of utilitarianism the basis of ethics that could be applied simply to all areas of life.[6] According to Bentham, the natural order of things meant that human beings were subject to either pleasure[7] or pain.[8] Consequently, Bentham argued that subjective words such as right or wrong have meaning only if examined in the context of the utilitarian principle[9] which meant that overall good requires that pleasure should be increased and pain diminished. The question then arises: is it for the good of the individual or society? Bentham answers that society is an amalgam of all individuals, and as such, represents an aggregate of the good of individuals, and if there is a conflict then the good of society must prevail.[10]

This is evidenced in his writings where he states:

> The greatest enemies of public peace are the selfish and the hostile passions: necessary as they are, as one to the very existence of each individual, the other to his security... Society is held together only by the sacrifice that men can be induced to make of the gratifications they demand: to obtain these sacrifices is the greatest difficulty, the greatest task of government.

He saw a need to modernise the law following the French Revolution. Gone were the days that technical epitomes upon law sufficed. As a young scholar, whilst listening to lectures by Blackstone,[11] his mind was

4 Possibly, Bentham was being unfairly critical, for Blackstone's sole aim was to provide a clear statement of the law to be used by a practitioner of his day, not to make any statement about law reform.

5 See generally the Bentham Project at http://www.ucl.ac.uk/Bentham-Project/journal/mde.htm and particularly Moira Dimova-Cookson, *'Bentham, Mills and Green on the Nature of the Good'*.

6 Elie Hatevy, *The Growth of Philosophic Radicalism* (1928) 74-75.

7 Pleasure includes things like getting an advantage, benefit or simply being happier.

8 Pain meant the opposite viz. harm, unhappiness, evil.

9 J Bentham, *An Introduction to the Principles of Morals and Legislation*, J H Burns and H L A Hart (eds), (1996) 11.

10 Ibid 12-21. See also *Rights Representation, and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution (The Collected Works of Jeremy Bentham)*, P Schofield, C Pease-Watkin and C Blamires (eds), (2002) 321.

11 Sir William Blackstone, above n 3; see also J H Burns, *Jeremy Bentham: an Iliad of Argument*, Bentham Project, above n 5. There are a number of critiques and commentaries upon the Benthamite approach to law. For example see, J H Burns, 'Bentham and Blackstone: A Lifetime's Dialectic' (1989) 1 *Utilitas* 22; on Bentham's critique of law and his recommendations see: R Harrison, *Bentham* (1983); L J Hume, *Bentham and Bureaucracy* (1981); D Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (1989); D G Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism*

already focusing on radical law reform. Law should be less technical and more accessible and to achieve happiness for society, legislators should make the law and law should be dynamic in that it should vary with time and place.[12]

Bentham's most valuable contribution to legal thinking was to convince others of the importance of the concept of 'utility' and to devise a method to apply it. As mentioned earlier, the sole object of law, as he saw it, was to increase pleasure and diminish pain, and the measure of its success was whether it 'made the greatest happiness for the greatest number'. He believed that the amount of pain and pleasure could, and should, be calculated scientifically, so that ultimately a perfect system of legislation could be reached and enacted. Whilst the concept of utility had been accepted before his time, Bentham took the idea a step further and claimed that it was the *sole* principle upon which law should be based.[13]

A recent commentator has opined that whilst Bentham introduced a new brand of legislation with different underpinnings to Blackstone, even so, this new science of legislation did face formidable obstacles at the time viz. politicians had to satisfy public opinion, legal bureaucrats had to draft such legislation, and the economy that existed at the time was not conducive to such radical reform,[14] for England at the time faced a chronic shortage of currency and was dependent on the external world market.

On the other side of the coin, what happened in England also affected the colonies.[15]

(1977); D Lyons, *In the Interests of the Governed*, (1973); G J Postema, *Bentham and the Common Law Tradition* (1986); Michael Lobban, 'Blackstone and the Science of Law' (1987) 30 *Historical Journal* 311; Allen Watson, 'The Structure of Blackstone's Commentaries' (1988) 97 *Yale Law Journal* 795; F Rosen, *Jeremy Bentham and Representative Democracy* (1983).

12 See generally Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in Wilfred Harrison (ed), (1948); see also C J W Allen, 'Bentham and the Abolition of Incompetency from Defect of Religious Principle' (1995) 16(2) *Legal History* 172, 172.

13 Bentham's legal and political ideas have been the subject of general scrutiny in a number of writings and for a fuller appreciation of his views; see as a starting point, the Bentham Project, the references mentioned in footnotes 3, 11 and others mentioned throughout this article.

14 See Lobban, above n 11, chapter 1, especially at 15-16; for a detailed analysis of this relationship between society, its framework and the law, see D Sugarman and G R Rubin, 'Towards a New History of Law and Material Society in England, 1750-1914' in G R Rubin and D Sugarman (eds), *Law, Economy and Society: Essays in the History of English Law, 1750-1914* (1984) 1-123.

15 Both the English and colonial situations are examined in this article.

The Reception of Bentham's Ideas in Australia

It can be categorically stated that Bentham's views on the custody of felons was never accepted in Australia,[16] for he was of the view that transportation was not an effective deterrent[17] for those who had been convicted of largely petty crimes,[18] let alone to begin one of Her Majesty's colonies by populating it with corrupt felons. In the end however, Bentham was proven to be correct, for transportation ended half a century after it began.

Furthermore, Bentham was inspirational. From the 1790s Bentham's apparent disciples included Henry Brougham, Samuel Romilly,[19] Lord John Campbell, Lord John Russell, James Macintosh and Michael Taylor who

16 Bentham wrote two monographs: one in 1791, on the construction of a panopticon prison to house convicts and a related monograph in 1802, setting out his arguments in favour of the panopticon as against transportation; see 'Panopticon Versus New South Wales' in J Bowering (ed), *The Works of Jeremy Bentham* (1948) vol 3; also see following footnote.

17 His idea was to have a prison in which prisoners were housed separately in cells arranged in circular tiers with a central watch tower; supervision would be cheap and prisoners would be under constant watch. Bentham called it 'The Panopticon'. He formed this idea before transportation to New South Wales began. Even after transportation began he was still of the firm belief that transportation to the New South Wales colony was not working and for support he relied on the accounts of Judge Advocate David Collins and argued a case against transportation in a monograph entitled, 'Panopticon Versus New South Wales'; also see L J Hume, 'Bentham's Panopticon: an Administrative History' (1973) 15 *Historical Studies* 703-21. He also wrote a further monograph entitled, 'Plea for the Constitution', which questioned the whole legal basis of and for the colony. A noted Economic Historian, R V Jackson is critical of the loose way Bentham used the despatches of the Judge Advocate to support his view that transportation did not work. He states that Bentham often took extracts out of context, largely to suit his own arguments. As an illustration, Bentham gives the example that despite a reward being offered for reporting the offender, the offender was not reported; referring to the incident to show 'that remedies for lawlessness were unavailing in New South Wales'. See R V Jackson, 'Theory and Evidence: Bentham, Collins, and the New South Wales Penal Settlement' (1993) 39 *Australian Journal of Politics and History* 318-329.

18 The sentences handed down by the criminal courts were severe for punishment was aimed at the prisoners body, viz. injure the body by whipping, maim it or ship it out of the country forever. See J B Hurst, *Convict Society and its Enemies* (1983) 9.

19 Samuel Romilly was Solicitor General in 1806 and Bentham said of him, '[t]here was not one reform Romilly brought forward that he had not first brought to me and conned over with me'; see John Bowring (ed), *The Works of Jeremy Bentham* vol 5, 370. There are two other works on Romilly to which one may refer, Patrick Medd, *Romilly, A Life of Sir Samuel Romilly, Lawyer and Reformer* (1968); and his own work, *Memoirs of the Life of Sir Samuel Romilly* (1840); See also, V Markham Lester, *Victorian Insolvency* (1995) 27-30; the book also gives an explanation on Utilitariarism and how the theory affected various reformers.

all worked to reform the law on utilitarian principles.[20] In England, Bentham's ideas formed the basis for a whole movement whose aims were to transform economic, religious and political institutions, as well as the law itself.

In the Australian colonies, his ideas were never to have such a wide-ranging direct effect. Rather Bentham did play a not insignificant part in the Australian colony through the body of law reformers who believed in his legal philosophy and theory.

These ideas were taken up by individuals on various occasions and applied to specific aspects of society. Alfred Stephen was such an individual, who had recently arrived from England as a young enthusiastic barrister to take up the position of Solicitor-General of Van Diemen's Land on 24 January, 1825; ten days later he became the Crown- Solicitor.[21]

On legal questions, Alfred Stephen was a Utilitarian. He believed that the law had a function in society: 'to promote the welfare of all classes [of society]... without on the other hand disregarding the wishes of any class.'[22] Stephen's vision was to increase the efficiency of legal institutions and the rationality of individual laws so that 'welfare' or happiness in society would be increased. His work in Van Diemen's Land demonstrates his devoted allegiance to these principles.

Whilst Stephen was not a greatly original or innovative legal thinker, he did have an ability to take the best of the reforms of other countries and modify and combine them to produce law that was often superior to the law from which he borrowed. The reshaping of insolvency laws is a good example.[23] His aim was to ensure that the laws of the colonies served so-

20 See P J Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (1992); D Leiberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (1989); M Lobban, *The Common Law and English Jurisprudence, 1760-1850* (1991); F Rosen, *Bentham, Byron, and Greece: Constitutionalism, Nationalism and Early Liberal Thought* (1992); and G J Postema; *Bentham and the Common Law Tradition* (1986). For a more detailed account see W Holdsworth, *A History of English Law*, A L Goodhart & H G Hanbury (eds), (1952) vol 3, 259-307. In the decade beginning the 1950s, academic debate began and is still alive, on Bentham's influence and role on legal reformation; see not only *The Bentham Project*, but also Stephen Conway, 'Bentham and the Nineteenth Century Revolution in Government' in Richard Bellamy (ed) *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (1990) 71-90.

21 *Australian Dictionary of Biography*, vol 6, 180.

22 Stephen to Lieutenant-Governor Arthur, 12 May 1837, *Stephen's Letter Book IV* (A673, Mitchell Library).

23 As will be seen later in this article, Stephen borrowed ideas from Scottish law, Indian law, Irish law, South African law and English law.

ciety. He saw no reason why laws adopted from other countries could not do this as effectively as laws which were original; an approach he seems to have adopted with insolvency.

The Economy: A Determinant of Insolvency

General

A picture of society would show that it consists of three indistinct sectors viz. economic, social and political. Each of these sectors has a life of its own, yet they are intertwined.

It may be said that economic life consists of the production and distribution of goods and services. The social fabric of society includes culture, religion, education and the very way citizens live and socialise together. Politics emerges as the arena in which the various interest groups in the economy negotiate the terms of their everyday life according to the rules and procedures represented by the political process. It sets the framework of law within which goods and services are produced.

This intertwining produces a dynamic in society in which the economic system imparts impulses to the social system, constituting a framework within which society operates, so any inefficiency can manifest itself in various forms.

Insolvency is just one such manifestation. It may be said that insolvency is a product of the economic state of a country. It therefore follows that it is best if the insolvency of any of a country's citizens is a state responsibility to ensure a fair and responsible system that assists both parties and to provide for impartial trusteeship and eventual disposal of assets.

The Situation in Pre- and Early Victorian England[24]

In pre-Victorian England, the state of the bankruptcy system was corrupt[25] and open to abuse; it applied only to traders,[26] with delays in the administration of a bankrupt's estate being commonplace.[27]

[24] For the purposes of this article we will only trace the development of insolvency during the period 1800-1840, which coincides with the growth of the Van Diemen's Land legislation. See also the discussion under heading: Insolvency Laws Prior to 1830: The Situation in England, below.

[25] For example: *Ex parte Story* (1817) 1 Buck's Reports 70, where a firm of shipwrights contracted to build a ship for a client who did not pay the contracted price and so the shipwrights issued a bankruptcy petition against the client. Nothing unusual, except that the solicitor, the barrister and the commissioner were partners in the firm of shipwrights! Lord Eldon refused the petition on the grounds of fraud and abuse of process.

It was within these elements that pressure developed for insolvency law reform. In Victorian England we find a general movement towards strong government control, and growth in the formalised legal control of reform. In the early 1800s the aim was to government-managed business, viz. government set up a system of control, and within these parameters, business operated.[28] England increasingly became the centre of commerce, so concern for the success or failure of business was important. Legislation developed to manage insolvent estates within the context of business, for the relationship between a debtor and a creditor was one that needed a system which could ensure that there was a firm solution, yet that such a solution did not unduly harm the business relationship.[29]

Law, by its nature, had an important part to play in bankruptcy for it involved imprisonment for debt and not only did it provide a livelihood for lawyers, but it also required the government to set up a system of administration to collect and distribute assets.

By the 18th century the bankruptcy system with its imprisonment for debt contained two separate and distinct roads for an insolvent debtor. If the debtor was a trader, he or she could discharge their debts and not be imprisoned; if a non-trader, then the debtor could be imprisoned. This was set out in a consolidated Act entitled: *An Act to Prevent the Committing of Frauds by Bankrupts 1732*.[30]

During the first quarter of the 19th century there was a general movement for legal reform of which bankruptcy was a part, resulting finally in a

26 A trader was 'a merchant or other person, using or exercising the trade of merchandise by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or by retail... or seeking his or her trade or living by buying or selling' see, (1571) 13 Eliz. 1, c 7 s 1.

27 Commissioners were paid poorly and so did not act enthusiastically or speedily. This matter was addressed by the 1818 Committee of Enquiry which recommended the appointment of provisional assignees so that assets could be speedily collected. See *Report of the Select Committee on the Bankrupt Laws*, Parl Papers (1817) 60-61.

28 V Markham Lester, *Victorian Insolvency* (1995), in Chapters 2-5 uses the term 'Officialism'.

29 The bankruptcy system has been described as a system which sustained confidence in a credit system which underpinned the English economy and was a national economic concern. See generally, Joanna Innes, 'The Kings Bench Prison in the Later Eighteenth Century: Law, Authority and Order in London Debtors' Prisons' in John Brewer and John Styles (eds) *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (1980).

30 3 Geo 2, c 30. Yet bankruptcies increased. It has been estimated that during 1700-1750 bankruptcies grew at 0.20% p.a. and in the last half century at an increased rate of 3.55% p.a. This shows an increasing rate of bankruptcy with no reason to suggest that it would have abated in the new century; see Julian Hoppitt, *Risk and Failure in English Business* (1987) 42, 49.

consolidated Act under the pilotage of Lord Brougham in 1831.[31] It may be said that the passage of this Act was a victory for business as it involved a radical alteration of the powers of the Chancery Court, which previously had jurisdiction over bankruptcy.

The Act introduced a system of full-time and part-time commissioners appointed to administer bankruptcy and a court of review consisting of four judges. Assignees appointed by the Lord Chancellor were empowered to handle the everyday management of the affairs of a bankrupt.[32] An amendment was made to the Act in 1834, providing for interest from a bankrupt's estate to be used to pay the wages of bankruptcy officials.[33]

Not long after the passage of the legislation, economic prosperity returned to England and as one would expect, there was a resultant drop in bankruptcies with little pressure on bankruptcy laws. It was not until 1839 coinciding with a downturn in business expectations, that a royal commission was set up to enquire and review the state of bankruptcy and insolvency laws.

The major recommendations were:

- The terms bankruptcy and insolvency were interchangeable.
- A simplification of the term 'trader' to mean any person engaged in trade or business requiring capital.[34]
- Debtors could file a bankruptcy petition if one or more creditors agreed. This is still the law today.
- Perpetrators of fraud should be subject to penalty.

Incorporating these recommendations, a new bankruptcy Act was passed in 1842.[35]

31 Entitled, *An Act To Establish a Court in Bankruptcy*, see Sessional Papers, 1831, cclxxxix, 435-50.

32 The assignee system was not well received by the business community who viewed that the person who had most knowledge of a bankrupt's affairs was the creditor. See Anon, 'New Bankruptcy Court' *The Times* 11 August 1831, 7.

33 Entitled, *An Act For Investing in Government Securities a Portion of the Cash Lying Unemployed in the Bank of England Belonging to Bankrupt's Estate*, 1834; see Parl Papers, 1834, i, 87-92.

34 *Report of the Commissioners For Inquiring Into Bankruptcy and Insolvency* (1840); see Parl Papers, 1840, xvi, 596.

35 Entitled, *An Act For the Amendment of the Law of Bankruptcy*, see Sessional Papers, 1842, ii, 67, 14 March 1842. For the purposes of this article it is not intended to go beyond this Act, suffice to say that this legislation set the basic principles for all future bankruptcy acts.

The Situation in Van Diemen's Land

In Hobart and Launceston, both being centres of commerce, we find the community particularly sensitive to insolvency and its repercussions, due to the retarded economic development of the colony in the late 1820s and throughout the 1830s.[36] In 1820, Lieutenant-Governor Sorrell stated, '...two-thirds [of the settlers] were in debt.'[37] Adding to this, he said, '[r]ecorded indebtedness of adult males in the colony amounted to 15 pounds per head as the result of great extravagance.'[38]

However, there was a recovery, but its promise was slowed by a depression that commenced in late 1823 and worsened over the next three years.[39] The troubles of the colony were well described by Arthur in 1826. He related that '[d]uring the year, the commerce of the colony suffered a considerable check...due to bad harvests...and the enormous rate of interest...'[40]

The year 1830 was marked by low prices and a lack of cash flow and credit, which continued into 1831 with money supply becoming particularly difficult and livestock almost worthless.[41] The years 1833 and 1834 were better due to land price increases as citizens now wanted to own their own land.[42] The year 1835 was depressed with bankruptcies increasing and a general downturn in business, manifesting itself in unrest, complaints and public meetings critical of the government.[43] The next year saw a mild recovery due to Victoria becoming increasingly settled and requiring food items and whale oil from the Colony. Even so, the *Colonial Times* reported that half the citizens were insolvent.[44]

Meanwhile, in 1836 back in the England the economy was booming and as one would expect with time lags, 1837 became a good year for Van Diemen's Land with a high demand for exports such as wool. Things remained stable until mid 1840s, due not in any small way to the replace-

36 See Appendix A which sets out trade cycles during the period.

37 Sorrell to Macarthur, 21 January 1820, *Macarthur Papers*, vol 68.

38 *Historical Records of Australia*, vol III (iii), 36.

39 Arthur to Bathurst, 9 June 1824, *Historical Records of Australia*, vol III (iv), 133.

40 Arthur to Bathurst, 24 March 1827, *Historical Records of Australia*, vol III (v), 699.

41 *Colonial Times*, 19 February 1830, 17 December 1830.

42 *Colonial Times*, 21 April 1835.

43 *Colonial Times*, 3 September 1835; and see also, H M Melville, *The History of Van Diemen's Land From the Year 1824 to 1835 During the Administration of Lieutenant Governor George Arthur*, George Mackaness (ed) (1965) 192, 194 (with introductory notes and commentary, Horwitz-Grahame).

44 *Colonial Times*, 16 February 1836.

ment of the then unpopular Lieutenant-Governor Arthur with Franklin.[45] This settled tempers, increased optimism and the banks expanded credit.[46] However, dreams can turn into nightmares and the small colony suddenly fell into severe depression by the last month of the decade. Banks stopped providing credit; internal trade came to a standstill; businesses failed and insolvencies increased.[47]

Rather than take a narrow insular look at the economy of Van Diemen's Land, we need to look at the colony as part of the global trading world at the time. Hartwell[48] argues that there is a linkage between trade cycles in England and New South Wales, but the downturns and upturns reached Van Diemen's Land later and were gentler, much in the same way as when a pebble is thrown into a pond, the further one is away from the centre, the ripples become less.

Rostow[49] points out that in England there were two periods of low intensity between 1825 and 1830, coinciding with the colony's peaks in 1829 and 1832. During the remainder of the decade Van Diemen's Land was influenced by expansion in New South Wales and South Australia. The English boom of 1834-1836 preceded a mild boom in the colony, and thankfully, the depression of 1837 was lessened by an export boom to the mainland.

45 Arthur's departure was the subject of much newspaper publicity; the view taken depended very much upon a newspaper's stance towards Arthur. As an example, a paper notoriously anti-Arthur, the *True Colonist*, 27 May 1836, reported 'he will long be remembered with detestation and horror by thousands of wretched victims of his System', and again on when his recall was officially announced, the *True Colonist* reported on 10 June 1836 '...[he] will be wafted away from these shores with the sighs, the groans, and the curses of many a broken-hearted parent, and many a destitute child.' Perhaps the most unbiased references reporting his achievements and departure can be found in a mainland newspaper: the *Colonial Times* reported rumours as to a likely successor which included Alfred Stephens and a relative of Mrs. Arthur. Perhaps the most unbiased references reporting his achievements and departure can be found in a mainland newspaper *The Australian*, which recorded his departure and achievements on 10, 29 July, and on 18 November 1836. An interesting account of the attitude of the Van Diemen's Land newspapers at the time can be found in M C I Levy, 'Governor George Arthur' *Georgian House*, (1953) chapter 21 (which is entitled 'Pens Dipped in Poison'). The situation was probably summed up fairly by an emancipist by the name of Jorgensen: 'The misfortune of this Colony is that we are not possessed of a truly independent press. Nothing can be inserted but what suits the passion of the writer.'; see M C I Levy, 'Governor George Arthur' *Georgian House* (1953) 355, ch 21.

46 *Colonial Times*, 10 January 1837; *Hobart Town Courier*, 3 March 1837.

47 *Colonial Times*, 20 February 1838; *Hobart Town Courier*, 23 February 1838.

48 R M Hartwell, *The Economic Development of Van Diemen's Land, 1820-1850* (1954) 191-192.

49 W W Rostow, *British Economy of the Nineteenth Century* (1948) 33.

In summary, it can be seen that between 1820 and 1840, economic growth in Van Diemen's Land was cyclical, very much following the economic happenings in England. However, the colony was not dependent on England and in many respects the recessive dips were not as severe due to the fact that the colony earned income from exports to New South Wales and the developing colonies of Victoria and South Australia.[50]

A Time to Reflect

As is typical with trade cycles in most countries, Van Diemen's Land had the ups and downs that one would expect. The business communities in the towns of Hobart and Launceston were particularly sensitive because of the retarded economic development of the colony during the decades of the 1820's and 1830's, for trade in Van Diemen's Land was determined by government needs for wheat and meat which in turn was dictated by the demands of the local economy.[51]

Between 1820 and 1824, an external market developed in New South Wales and overseas for the colony's foodstuffs. This coincided with a lowering of tariffs for wool in England[52] and with the development of a maritime industry in which sea-going vessels plied their trade worldwide. The result was that Hobart was now opened to international trade between England and all the other English colonies. This meant the abandonment of the old colonial system.[53]

The years 1823 to 1830 saw a depression which gradually deepened and dampened this growth. The cause can be found in a currency crisis due to the fact that the Colony lacked sterling currency. This affected the colony's ability to purchase treasury bills to settle English debts.[54] A further cause can be seen in the abandonment in 1823 by England to pay a fixed price for wheat and grain and to allow it to float. The year 1825 saw a depression in England which meant a sharp drop in the price of wool. This exacerbated the depression in the Australian colonies. Referring to the

50 See generally, R M Hartwell, above n 48; W G Rimmer, *The Economic Growth of Van Diemen's Land, 1802-1821*, 327-351.

51 See J T Bigge, *Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales* (1823).

52 *Hobart Town Gazette*, 15 February 1823.

53 See generally R L Schuyler, *The Fall of the Colonial System*, (1945); *Colonial Times*, 8 September 1826. An example of a typical cargo is given by R M Hartwell, above n 48, 194: '... cargo of the Andromeda in 1826 included wool, mimosa bark, mimosa extract, seal skins cattle hides, kangaroo skins, whalebone, elephant and black oil. To New South Wales went sheep, wheat and potatoes.'

54 See generally S J Butlin, 'The Dollar System in New South Wales and Tasmania, 1822-42' (1941) 1(4) *Historical Studies, Australia and New Zealand.*

price of wheat and wool, Lieutenant Arthur wrote, 'The consumption of the government is but trifling compared with the quantity which may be grown in the Island.'[55]

This continued into the decade of the 1830s, and by 1835 the price of land in common with general price rises almost led to chaos, as now treasury bills that were used to pay English debts were unavailable and increasingly meetings of merchants resolved to inform English creditors of their difficulties.[56] It was reported that half the colonists were insolvent.[57] This did not go unnoticed by Alfred Stephen, who besides having a broad interest in law reform and its administration, sought to reform substantive areas of law. One of these areas was insolvency, an area where he made a significant contribution.

The environment in Van Diemen's Land at this time made his task more difficult.[58] In the normal course of things a push for reform usually came from dissatisfaction with the law within the existing system. With insolvency law, the initial motivation came from public pressure. Powerful public opinion which initiated the reform of insolvency law was not alone sufficient to turn dissatisfaction into improved legislation, for insolvency law was hard for the public to comprehend and there was also a need for much serious and laborious work before the desire for change became a reality.

It was in overcoming these two obstacles that Stephen played a major part. It was Stephen who was a member of the Committee which drafted the Act in 1830, and it was Stephen who chaired all the later committees which were set up to critique insolvency in 1835 and 1838.[59]

55 Arthur to Bathurst, 10 August 1825, *Historical Records of Australia*, vol III (iv), 312-313.

56 *Hobart Town Courier*, 27 June 1834.

57 *Colonial Times*, 16 February 1836.

58 Commercial difficulties continued into 1836, but due to a boom in England in 1836, time lags meant 1837 and the following year were good ones for the colony with increased wool sales. Furthermore, the imminent recall to England of Arthur was greeted enthusiastically and optimistically by the colony. Even though interest rates were high, stock prices also increased and so there was a general warm feeling within the colony. See R M Hartwell, above n 48, 195-197.

59 These committees will be discussed later in this article.

Insolvency laws prior to 1830

The Situation in England[60]

If a single economic concept can be seen as instrumental in preparing England for change, it was the spirit of laissez-faire.[61] Whilst a free market fostered success as commonly as it fostered failure and economic risk-taking needed encouragement, failure also needed a buffer. Insolvency laws were keenly positioned to respond to the challenges of an open market. The early bankruptcy Acts of the 16th and 17th centuries protected traders from each other. The Act of 1662[62] is an example of how the law of bankruptcy beginning from the restriction to traders in 1570, was specifically tied to the theme of economic expansion and the protectionist stance taken by the English parliament towards those persons who provided the investment capital needed for economic expansion: commercial considerations received priority in the legislative process and so the law was there to provide speedy and effective remedies.[63]

In economic terms, well into the 18th century, England was a largely agricultural economy. As agriculture prospered or faltered, so did those whose trade depended upon it.[64] Credit was also important and became more important as the weather dominated agriculture and later, industrialisation with its growth and development of sophisticated and complex overseas markets. Credit gave flexibility to an economy which was characterised by imperfect flows of money, resources and information.[65] As

60 See also earlier discussion at pages 167-171.

61 Laissez-faire was a policy based on minimal government interference in the economic affairs of the state and relates to the administration of social policy and dates not only to the Industrial Revolution but to the dislocation of the central government caused by the Civil War and Interregnum; see Max Beloff, *Public Order and Popular Disturbances, 1660-1714* (1963), 2; R L Crouch, 'Laissez-faire in Nineteenth Century Britain: Myth or Reality?' (1967) *Manchester School of Economics and Social Studies* 214.

62 *An Act Declaratory Concerning Bankrupts 1662*, 13 & 14 Caroline 2, c.24.

63 Blackstone, above n 3, vol 2, 477. A perspective upon the connection between insolvency and commerce can be gleaned from commentary upon formation of the American Federal Constitution. At the Fifth Congress of the Government on 15 January 1799, James A. Bayard of Delaware speaking of the relationship between commerce and credit argued '(t)hat England...had been the most flourishing commercial country upon the face of the earth, owing to her civil policy, the essential part of which was the bankrupt system; and that no nation...has been able to extend its credit so far as Great Britain'. See James Monroe Olmstead, 'Bankruptcy a Commercial Regulation' (1902) 15 *Harvard Law Review* 829, 832.

64 Julian Hoppit, *Risk and Failure in English Business, 1700-1800* (1987) 108.

65 Ibid 162-163.

the use of credit became more commercially sophisticated, so bankruptcy law developed in response.

There were four consolidations of the bankruptcy laws that are important for our purposes:

1. The English parliament in its first consolidation in 1732 passed *An Act to Prevent the Committing of Frauds by Bankrupts*[66] which formed the basis for bankruptcy laws for the rest of the 18th century.
2. The more important consolidation occurred during the first quarter of the 19th century when there was a general movement to reform all aspects of England's legal system. This era was recognised as the age of reform.[67] A distinguished commentator calls it England's century of law when the culture of law began to permeate all layers of society.[68] This consolidation occurred in 1825[69] and introduced many administrative ideas that were to become entrenched in future bankruptcy legislation.[70] Now, an insolvent debtor could place themselves in bankruptcy by declaring their own bankruptcy.[71] The concept of a composition was also introduced.[72]
3. In 1831, a decisive year in that Lord Brougham[73] introduced a system of what came to be called 'official bankruptcy' which set up a separate court with official assignees who were to act on any bankruptcy in co-operation with the creditor's assignees.
4. The third consolidation occurred in 1849.[74] This consolidation also introduced the debtor's summons by which a creditor who did not comply with it committed an act of bankruptcy[75] and providing for court approved and private deeds of arrangements.[76]

66 5 Geo.11, c. 30.

67 E L Woodward, *The Age of Reform, 1813-1887* (1939).

68 David Lieberman, *Province of Law Determined: Legal Theory in Eighteenth Century Britain* (1989) 1.

69 6 Geo. 1V, c. 16.

70 Holdsworth, *English Law*, vol xiii, 377.

71 In today's terminology a declaration of insolvency.

72 This concept came from the Scottish *Sequestration Act*. Similarly, Alfred Stephen in his legislation in Van Diemen's Land studied and adopted parts of the very same Act.

73 See above at pages 169-170 where there is a discussion of the Act in the context of the social and economic state existing in 1831.

74 12 & 13 Vic., c.106.

75 Dennis Rose, *Lewis, A N, Australian Bankruptcy* (10th ed, 1994) 17.

76 Ibid. In 1861, bankruptcy was combined with insolvency and applied to all persons: 24 & 25 Vic., c. 134.

> Until 1861[77] in England anybody unable to pay their debts fell into two clear categories: they were either traders or non-traders. Traders came within the umbrella of the *Bankruptcy Act*.[78] This legislation was protective of traders in that they were immune from arrest and imprisonment and any property acquired after bankruptcy belonged to the trader.

Contrast this with the position of non-traders who could petition for discharge from insolvency after being imprisoned for at least three months.[79] Upon release, any property acquired was used to pay outstanding debts.[80] The rationale for this was that traders suffered financial distress because of changed circumstances in trade, whereas non-traders suffered from not being able to control their financial lives.[81]

The Situation in the Colony

Until 1830, the insolvency law of New South Wales and Van Diemen's Land was determined by the *New South Wales Act 1828* and the *Australian Courts Act 1828*.[82] This gave creditors the power to arrest their judgment debtors on a writ for non-payment of their debts. These provisions also applied to the insolvency law of England. In England this had resulted in many abuses. For example, there was a reported instance of a person being imprisoned for 40 days by the judgment of the Court of Requests for a debt of one shilling and sixpence and being put to great expense to get his release.[83] Another example involved a person who was arrested to prevent them from giving evidence in a fraud case.[84]

There had been attempts to remedy this situation.[85] The aim of reforms had been to mitigate the harshness of imprisonment for debt, but unfortu-

77 In 1861, bankruptcy was combined with insolvency and applied to all persons: 24 & 25 Vic., c. 134; see also C H Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (1968) 350-351.

78 Entitled, *An Act to Amend the Laws Relating to Bankrupt 1825*, 6 Geo. IV, c.16. This Act was effectively a consolidation Act. IS THIS SUPPOSED TO BE IV

79 Entitled, *An Act for the Relief of Insolvent Debtors in England 1883*, 53 Geo. III, c.102.

80 See B Kercher, *The Transformation of Imprisonment for Debt in England, 1828-1838* (1984) 2 *Australian Journal of Law and Society* 60-109.

81 For a detailed account of the history and administrative machinery of bankruptcy/insolvency at the time see V Markham Lester, above n 28.

82 These were 4 Geo IV, c.96, 1823 and 1828.

83 See Hansard (2nd series) vol xx, 431; and vol xxii, 267.

84 W Holdsworth, above n 20, 265.

85 Holdsworth details the attempts by the House of Lords to pass reforming legislation; for example by Lord Moira in 1800, Earl Stanhope in 1814 and by the House of Commons in its debate in 1829, 30; See W S Holdsworth, above n 70, 263-5.

nately none of these attempts had been successful up to 1830, except for minor incremental changes. The 1828 *Charter of Justice* declared that local governments should make provisions for insolvency.[86] Accordingly, in 1830, legislation was introduced for this purpose in New South Wales and Van Diemen's Land.[87] Both of these Acts were essentially the same: they were based on suggestions made by Sir Frances Forbes, the Chief Justice of New South Wales. The main aims of the Acts was to prevent debtors from being gaoled without trial and to provide for the release of debtors who just simply were not in any financial position to repay their creditors. These debtors could be discharged after three months in custody.

In summary, both these Acts incorporated the English bankruptcy laws and applied to all debtors. Under the English law, 'traders'[88] came under the bankruptcy law and were exempt from arrest for imprisonment, but non-traders came under the umbrella of the insolvency laws. So it can be seen that in 1830, the insolvency laws in the Australian colonies were much more liberal and humane than those applying to Englishmen.[89]

Re Wells[90] illustrates the situation that existed prior to 1830, where if a person was gaoled for bankruptcy, and the bankruptcy was caused by a downturn in the economy, the only solution available under the existing law was gaol. This case heralded a cry for reform to encourage debtors to have their circumstances independently examined, and an equitable solution found, rather than having the poor unfortunate debtor rotting in prison forever, particularly if the creditor was unyielding and stubborn.

Petrow and Kercher[91] give examples of insolvent Van Diemonians who became financially embarrassed and had to rely on the court to deal with them in accordance with English legislation because the colony did not have its own law in place. As fortune would have it, the local courts interpreted the legislation in the light of local economic conditions and the circumstances of the insolvent, leading to more humane results.

86 C H Currey, *Sir Francis Forbes* (1968), 350; see also J M Bennett, *History of the Supreme Court of New South Wales* (1974).

87 II Geo. IV, No.7 and II Geo. IV, No.4 respectively.

88 As defined in 6 Geo. IV, c.16.

89 See J. Gava, 'The Revolution in Bankruptcy Law in Colonial New South Wales' in M P Ellinghaus, A J Bradbrook and A J Duggan, *The Emergence of Australian Law* (1989) 210-231.

90 Decisions of the nineteenth century Tasmanian Superior Courts can be found at: <http://www.law.mq.edu.au/sctas/html/1829cases/InreWells1829.htm>.

91 See above n 90, where further examples in the same vein as *Re Wells* can be found.

A Landmark Act: The 1830 *Insolvency Act*

General

Between 1830 and 1839 uniformity between the law of New South Wales and Van Diemen's Land ceased, and differing economic conditions in the two colonies led to different responses.

In 1832, with an upswing in prosperity in New South Wales, a harsh insolvency law was enacted, allowing a debtor to be put into gaol by his creditors if he was unable to pay them. Thus a debtor could remain in gaol indefinitely.[92]

In Van Diemen's Land, the tendency was for more liberal legislation. With Stephen directing the reforms, the smaller colony was to lead both New South Wales and England in introducing a law which was both humane and efficient.[93]

Rationale: Humanitarian or Economic Values?

When the 1830 Act was introduced in Van Diemen's Land it aroused controversy. The committee which recommended the changes had been motivated by the general humanitarian spirit which was evident in both the New South Wales reforms and the attempts to reform the English law. However, the economic conditions which led to the demand for reform in New South Wales were not evident in Van Diemen's Land. In New South Wales a serious depression had resulted in an enormous number of insolvencies.[94] In Van Diemen's Land the economic situation was far less severe.[95]

The most controversial section of the Van Diemen's Land Bill was that which allowed an insolvent debtor to be released if a majority of his

92 This Act was re-enacted in 1834 as *An Act For the Relief of Debtors in Execution For Debts Which They Are Unable to Pay 1834*, 2 William IV, No.11; and in 1836 further re-enacted as an Act to revive and continue for a limited time and entitled *An Act for the relief of Debtors in Execution For Debts Which They are Unable to Pay*, 6 William IV, No.18; and finally in 1838 the very same Act was further enacted under the same title, as 2 Victoria, No. 14; see Thomas Callaghan, *Acts and Ordinances of the Governor and Council of New South Wales* (1892).

93 This law was ultimately followed in New South Wales in 1840, *An Act to Revive and continue for a limited time, an Act passed in the second year of the Reign of Her present Majesty, for the relief of Debtors in execution for Debts which they are unable to pay and to make certain amendments therein*, 4 Victoria, No. 24.

94 1880 actions in the Supreme Court alone; see C H Currey, above n 86, 349.

95 See Appendix A.

creditors (both in number and in value) desired it.[96] In commenting on this section, the *Tasmanian* was outraged:

> This clause is at direct variance with the whole principle of the law of insolvency...it brings the whole system of the English Bankrupt Law *without any of those restrictions which first caused its introduction*... into operation.[97]

The *Colonial Times* took a broad scurrilous swipe at the government stating that, 'the Governor and his minions... [were]... corrupt tyrants... fast driving the Colony to bankruptcy and revolt.'[98]

It was a simple economic matter which motivated this criticism. One of the main problems of the period 1830-1831 was extremely low prices due to the minute amount of money circulating in the Colony.[99] The only solution was to greatly increase credit, which, it was claimed, would be retarded by any insolvency legislation which was too easy on debtors. As the *Colonial Times* put it:

> The clause before us is altogether in favour of the *insolvent*... at the expense of the creditor... it is calculated to give a shock to that credit which in all countries, but in a new one particularly is so essential to the public prosperity... so very much of the existence of that general credit (without which the necessary operation of this and all Colonies could not go on) depending upon the decreased facilities afforded by law to debtors to get rid of their debts particularly if they can be permitted to enjoy the fruits of their so doing with impunity.[100]

Thus the public was torn between the need for credit to help the colony's economic development and the need for softer legislation that was in keeping with the current philosophy of law in England, and the social development of the colony.

The conflict between these two principles did not, however, come to a head. This was mainly due to the fact that between 1830 and 1835 the economic situation improved.[101] However, when things did worsen economically, as they periodically did during these years, the conflict was once again revived. For example, in 1832 economic conditions favoured

96 The other sections aroused controversy either on technical or constitutional grounds.

97 *Tasmanian*, 2 April 1830. This newspaper was anti-establishment and remained so until 1835; the editor, R L Murray, became a supporter of Arthur when the Lieutenant-Governor purportedly took a sympathetic approach when Murray was charged with forgery.

98 *Colonial Times*, 14 April 1830.

99 R M Hartwell, above n 48, 2.

100 *Tasmanian*, 2 April 1830.

101 R M Hartwell, above n 48, 206. This is of course, relatively speaking. Hartwell points out that there was still a general disaffection during these years.

debtors and the *Colonial Times* lamented 'the scenes of ruin and distress are a certain consequence of the present imperfect state of the law with respect to debtor and creditor'.[102]

The temporary, though serious, recession at the beginning of 1833 again resulted in a flood of complaints to the Governor about the inhumanity of the insolvency law. Even though a debtor could be discharged under the 1830 law, the feeling was that when many people were in gaol, the laws were still too harsh. For example, in January 1833, there were 34 debtors in the Hobart gaol, a fact which the *Tasmanian* (once an opponent of humanitarian reform) regarded as gross injustice:

> This fact alone is surely sufficient to arouse the attention of the government towards removing from this colony the reproach of being the only place under the British Flag where a debtor may remain incarcerated just so long as it suits the pleasure of the creditor.[103]

The newspaper pursued the matter in successive weeks,[104] giving its own suggestions on how to reform the Act, especially in relation to 'honest debtors'. They also appealed to the Governor asking him to ameliorate the inhumanity of the law. The paper wrote, '... [the insolvent] is infinitely worse off than if he had committed absolute crime... we early invite the attention of the governor to the subject, common humanity pleads on its behalf.'[105]

Throughout most of 1833, the economy was in a state of marginal recovery and so the *Insolvency Act* did not become an issue. Towards the end of that year, however, there was another burst of indignation when news of a proposed amendment to the English *Bankruptcy Act* reached the Colony. The *Tasmanian* wrote, 'it [the insolvency law] is a huge stain on the fair face of British Jurisprudence. Its abrogation will be joyfully hailed by every person... it is the greatest evil at present existing.'[106]

A more conservative newspaper, the *Courier* also attacked the inadequacies of the Act. The paper wrote, '[s]uch a law openly violates the principles of justice by allowing the party concerned to be judge in his own case.'[107]

[102] 4 April 1832.

[103] *Tasmanian*, 4 January 1833; the editor was apparently unaware of the New South Wales Law, or deliberately chose to ignore it.

[104] *Tasmanian*, 11 January 1833, especially 18 January 1833.

[105] *Tasmanian*, 25 January 1833.

[106] *Tasmanian*, 27 September 1833

[107] *Hobart Town Courier*, 11 October 1833.

This dissatisfaction persuaded Lieutenant-Governor Arthur to consider a reform of the Act and he wrote to Stephen, who had just taken up the new position of Attorney-General, to prepare an act for the relief of insolvent debtors.[108]

The matter did not proceed any further at this stage because Stephen was inundated with work and did not feel he could give the draft sufficient time and thought. As Stephen put it in reference to his legislative work:

> This branch is probably in importance and in difficulty also greater than the rest... if the duty consisted in drawing the acts alone or inventing them (for this is also part of the duty) or advising or reporting on them then the labour would be... severe enough. But this is only a small part of the labour.[109]

However, he did suggest that Arthur's request for an Act only to relieve debtors was completely inadequate and that the whole Act had to be reformed. He wrote, '[t]he subject requires more deliberation than can now be bestowed upon it. I would suggest for these purposes there be a completely separate act hereafter.'[110]

Throughout 1834, there was little mention of the Act. Nevertheless, the general public feeling remained, as in 1833, in favour of reducing the burden on debtors. In late 1834 an Act entitled *Relief of Persons Under Imprisonment For Debt or For Penalties*[111] was drafted by Stephen and passed; its purpose being to give debtors a weekly allowance while in gaol. This new local Act amended the earlier New South Wales Act which also applied in Van Diemen's Land and had two main effects viz. it regulated the method by which allowances were paid to prisoners, and it allowed debtors who had insufficient property for their maintenance to petition the court to be discharged. According to Stephen, the motivation behind this Act was 'solely one of benevolence and humanity'.[112]

The spirit of this, as well as the adage that 'marriage was for better or worse' was well illustrated in the case of *Peters v Nicholls*.[113] In this case a married couple were destitute and imprisoned for a debt that the wife had purportedly incurred prior to her marriage. It was reported that

[108] Stephen acknowledged this letter on 3 December 1833. See Stephen to Arthur, 3 December 1833, *Letter Book I* (A669, Mitchell Library).

[109] Stephen to Colonial Secretary, 7 December 1832, *Letter Book I* (A669, Mitchell Library), 314.

[110] Ibid.

[111] 5 Will IV, No. 7, also known colloquially as the Debtors Groat Act. A groat was an English silver coin worth about four pence.

[112] Stephen to Colonial Secretary, 20 August 1834, *Letter Book II* (A670, Mitchell Library).

[113] <http://www.lawmq.edu.au/sctas/html/1831cases/PetersvNicholls,1831.htm>.

Stephen, 'most humanely moved the Court gratuitously for the discharge of the poor woman, who at an advanced period of life had been thus imprisoned, and for the usual prison allowance to Mr. Nicholls.' The judge ordered that Mrs. Nicholls be discharged.

A Committee of Enquiry

In 1835, insolvency law became a matter of major public concern in Van Diemen's Land. That same year there was a general economic depression, the worst year economically since 1830. By April 1835, the number of bankruptcies was growing rapidly and causing alarm in both Hobart and Launceston and, by September of that year, one-third of the shops in Hobart remained untenanted.[114] As a result, a committee was set up in early 1835 to examine the insolvency law. Stephen was appointed chairman. In this capacity, he sent letters to the leading merchants and also to members of the legal profession asking for recommendations.[115]

When the committee had completed its enquiry, although there remained areas of disagreement,[116] it still was able to present a number of recommendations and proposals, which Stephen communicated to the Colonial Secretary, and which were subsequently published in the local newspaper.[117]

These proposals[118] were drawn together by Stephen and formed the basis of a draft Bill which in form, and to some extent content, was based on the bankruptcy law of the Cape Colony. He also incorporated his knowledge of such laws that existed in other branches of the British Empire. He had a thorough knowledge of the Indian law, the Scotch law was not

[114] R M Hartwell, above n 48, 208.

[115] Stephen states, 'thirty seven witnesses some of the most intelligent and experienced merchants, landholders and professional and other gentlemen in the community) were examined touching the general principles and depths of both bills..." See 'Report of the Progress of the Sub-Committee of the Legislative Council on the Insolvent Debtors and Imprisonment for Debt Bill' *Votes and Proceedings of the NSW Legislative Council* (1839) vol 1; see also, Stephen to Colonial Secretary, 16 February 1835, *Letter Book III* (A671, Mitchell Library).

[116] Ibid.

[117] *Tasmanian*, 3 April 1835.

[118] See Report of the Progress of the Sub-Committee of the Legislative Council on the Insolvent Debtors and Imprisonment for Debt Bill, above n 115, 2, 4, 10, 11 and preamble by Stephen to *The Insolvent Debts and Imprisonment For Debts Bill 1830*, which also appears in the Report. All pages referred to contain statements by Stephen as to his knowledge of bankruptcy and insolvent laws in other jurisdictions. He also points out that the Scotch insolvency and bankrupt laws were also examined and considered in the colony's law.

beyond his comprehension, and he was fully acquainted with the proposed amendments to the English law.

The main object of the English Law was to abolish arrest upon 'Mesne Process'.[119] As well, Stephen later said, 'we altered it [the draft Act] in many particulars as we went on following chiefly the Scotch Insolvent and Bankruptcy Laws.'[120]

The New Act: A Discussion

It can be said that the new draft Act was a combination of the best and latest developments from abroad, though, as Stephen pointed out, in view of the disagreements within the Committee, its novelty and modernity did not necessarily mean its success.[121]

The most important single provision of the new draft Act was the abolition of imprisonment for debt except in cases of fraud. The Committee had been unanimous on this and had obviously been influenced by the unusually large number of gaoled debtors, a result of the economic depression of that year. Secondly, the Committee also felt that like the old 1830 New South Wales law, any proposed law should be a bankruptcy as well as insolvency law. Thus the proposed Act provided for insolvencies at the instance of the debtor himself and by the creditor. Thirdly, it was agreed that the dishonouring of a bill of exchange or promissory note for a specified period should be dealt with in a summary fashion. This, Stephen felt, as did the rest of the Committee, 'is a matter of great importance above all for the mercantile portion of the community'.[122] This section was modelled on the Scotch Act and on the proposed amendments to the English Act. Its object was to provide a cheap quick remedy which would ensure that business persons kept their confidence. The fourth pro-

[119] This term means any writ issued in the course of a suit between the original process and execution. The abovementioned proposals were the work of the Common Law Commissioners and were introduced to the British Parliament by Sir John Campbell in 1835. Campbell felt that the power given by this law, allowing one individual to take away another's liberty was 'one not belonging to the ancient common law of this country.' See *Parliamentary Debates* (1835) vol. 3, 558. It met with considerable opposition in Britain from the merchants' representatives in Parliament. Nevertheless, the Bill finally became law in 1838, (1 & 2 Vic. c. 110) but in a considerably watered down form; See E Cook, *A Treatise Upon the Practice of the Court for the Relief of Insolvent Debtors* (1839) Introduction.

[120] 'Report of Sub-Committee of Legislative Council on the Insolvent Bill', above n 115, where Stephen was giving evidence upon his experience in the drafting of the insolvency law in Van Diemen's Land.

[121] Stephen to Colonial Secretary, 2 February 1835, *Letter Book III* (A671, Mitchell Library).

[122] Ibid.

posal was drawn up for the same purpose. Since imprisonment for debt would, in essence, be abolished, the Committee felt that there was a need to safeguard creditors. Thus, it proposed that creditors could apply to the courts to obtain a hold over a debtors' property until the debt was paid.

The object of the Act was twofold. From a debtor's point of view, it attempted to remove the unjustifiable harshness of the old law, whilst on the other hand, it tried to ensure that creditors were safeguarded. It was for this latter reason that the proposed Act did not totally abolish imprisonment for debt. Stephen argued that debtors should go to prison if they committed a fraud or if they had gone on contracting debts after knowledge of their insolvency.[123] He hoped the new law would encourage debtors to relieve themselves of their difficulties immediately as well as prevent them from keeping up false appearances, which might possibly ruin others.[124] In relation to the former objective, Stephen raised the controversial point of the conditions for discharging debtors. A majority of the Committee felt that, if a large portion of a debtor's creditors (three quarters was suggested) would certify to his having become insolvent through misfortune, then he should be released. Stephen felt that this was one of the most important areas of the whole Act. He wrote, 'I hope it will not be decided without ample reflection on the possible consequences of that decision... to the community. We must see how far the proposed entire exception may open a door to fraud and dishonesty.'[125]

Stephen pointed out that there were two sides to be considered in this area: he questioned whether a law should relieve debtors of a duty which, if they were men of integrity, they would wish to fulfil; and he asked whether it was right that a man should work the rest of his life for others since this could lead to indolence and consequently a loss for the whole community. This question was later resolved by the Council in favour of the proposal.

There were a number of proposals of a procedural and administrative nature, which, though less important, were essential to the proper functioning of the proposed law. Stephen suggested the appointment of commissioners at the major towns, especially Launceston, to administer the proposed Act, with powers of arrest over debtors.[126] Unlike the Eng-

[123] I am grateful to Professor Bruce Kercher for pointing out to me that this happened in England nearly a generation later.

[124] Stephen to Colonial Secretary, above n 121.

[125] Ibid 100.

[126] Ibid 98. Under the new legislation, Writs of Attorney and Writs of Execution could be executed by commissioners appointed at the major towns viz. Hobart and Launceston. The duties of commissioners were to be enacted in a new piece of legislation, the

lish system, Stephen proposed that in relation to estates the courts should not be applied to unless there was evidence of fraudulent practices, or in cases of appeal:

> Under the draft as prepared by me every precaution is taken to prevent error... for which certain proceedings must be advertised and certain others must be reported to the Court. But no actual confirmation by the Court is necessary. If no appeal be entered the proceedings will stand confirmed as of course.[127]

To prevent trivial and improper applications, Stephen suggested that the court must always have the power to award costs. Provisions in relation to absent creditors were also introduced so that no man should lose due to his ignorance of the situation alone.[128]

The Media: Shaping a Community's Perception

The proposed Act was debated by the Legislative Council in March 1835, and made a favourable impression on most commentators.

The *Cornwall Chronicle* in an editorial stated, '[i]t affords us satisfaction to observe a notice given of an intended Act to amend the existing law of Debtor and Creditor...'[129] The editor pointed out that the Act would stop debtors, in particular traders, from deliberately not paying their creditors, for such a person '...we would award him the cup of earthly suffering to its very brim. Not class him as a poor debtor, but as a vile swindler.'[130] Two months later the same newspaper was even more expansive when it stated that '[t]he press, throughout the Colony, has bestowed just satisfaction on the amended law... and its operation will generally be beneficially felt.'

Another newspaper[131] concentrated its comments upon the effect of the law on traders:

> Its effect must be to render trade generally far more stable and wholesome to abolish entirely imprisonment for debt, except in cases of fraud. It embodies all the projected improvements ... proposed by Sir John Campbell, as well

Supreme Court Commissioners Act and were as follows: proof of debts, examination of insolvents, preside at meetings of creditors, power to issue writs for the arrest of absconding debtors. In England these duties were entrusted to justices of the peace.

127 Ibid 104.

128 Ibid 105, 106.

129 *Cornwall Chronicle*, 21 March 1835.

130 *Cornwell Chronicle*, 16 May 1835.

131 *Hobart Town Courier*, 6 February 1835. Similar sentiments were expressed in the *Launceston Advertiser*, 17 September 1835.

> as those recommended by a committee of the House of Commons for Scotland.

The editor of the *Launceston Advertiser*[132] after a careful scrutiny of the draft Act also gave it his blessing, writing that, '[w]e are happy in being able to give it our sincere opinion that a better conceived and better executed enactment could not possibly be brought before the Council.'[133]

The *Tasmanian* wrote, '[the proposed *Insolvency Act*] especially appears to have been drawn with much care. The Attorney-General is entitled to much praise for the attention he has bestowed on the most difficult subject.'[134]

After having gone through the Bill with 'great care' a week later, the same newspaper commented:

> We repeat it is an admirable production reflecting the greatest credit on the Attorney-General who must have devoted much time and attention before he could so well put together the best portions of the British Bankrupt, Insolvent and Debtor and Creditor Law.[135]

The editor of the *Tasmanian* however, did have some serious reservations, particularly in those areas where the committee itself had lacked unanimity. First, he felt that it was too lenient to allow three quarters of the creditors to discharge an insolvent. Second, the bailiff's right to search a debtor was severely criticised.

In fact, this issue resulted in a quite lengthy and virulent public debate which lasted until October 1835, and considerably delayed the passing of the draft Act into law. Towards the end of June, a petition drawn up by the Sheriff appeared in the local papers, complaining about certain duties he had to carry out under the proposed Act, especially the taking of all of a debtor's property under a writ of fieri facias.[136] The essence of the Sheriff's objection was that such taking of a person's property would require a

[132] This newspaper was in principle opposed to Arthur and what he stood for viz. not moving the Colony beyond its convict status.

[133] 2 April 1835.

[134] *Tasmanian*, 3 April 1835.

[135] *Tasmanian*, 10 April 1835.

[136] Fieri facias meaning 'that you cause to be done'. This is a writ directing the sheriff to levy the debtor's goods and chattels real for a sum contained in a judgement plus interest. For 'colonial' purpose (i.e. 'the colony of New South Wales') the Statute 54 Geo III, c 15, s 4 - known as the *New South Wales (Debts) Act 1813*, allows a judgment creditor to cause the debtor's lands to be sold under a writ of fieri facias 'in like manner as personal estates in the said colony are seized, extended, sold or disposed of for the satisfaction of debts'.

search, which was 'an intrusion into private life... working oppressively and dangerously.'[137]

The issue was taken up by the local papers, whose criticism was so severe and convincing that it began to turn public opinion against the proposed Act.[138] Stephen was extremely disappointed about the whole episode, and in particular the stance taken by the Sheriff. He viewed the Sheriff's criticism as utterly erroneous and that even if the Sheriff was right, it was entirely unnecessary to sacrifice the whole Act. Commenting on the petition, Stephen wrote, '[t]he publication of which has been so much calculated to create an unfounded prejudice against one of the most useful... probably the most useful act which we have yet had on the Council table.'[139]

The *Launceston Advertiser* agreed:

> Whilst the purpose of the petition from the Sheriff was to protest at the extension of his powers to seize property, it was under consideration by the Chamber and that a member had given notice of a very Radical and sensible motion 'for the abolition of arrest in execution for debt in all cases except those involving frauds or an intention to abscond from the Colony.[140]

The newspaper concluded that on an overall assessment of the legislation it was one that deserved support and 'it may be well to remind the public that there is lasting credit upon the Local Government under whose auspices it was made.'[141]

Stephen pointed out to the Colonial Secretary that the words he had used in defining the Sheriff's power were the same as those of Sir John Campbell who had recently introduced a new insolvency Bill[142] into the British

[137] Stephen to Colonial Secretary, 12 August 1835, *Letter Book III* (A671, Mitchell Library).

[138] As one paper put it when writing about the Sheriff's powers, '... reflections are indeed suggested to us as to the probability of those powers being abused, and to such an extent that the utility arising from the use will be more than counterbalanced by the abuse of them...' See *Launceston Advertiser*, 27 August 1835. The same editor a month later continuing in the same vein states: 'We profess ignorance as to the precise powers of a Sheriff...but we believe they are not very definite, and that in consequence Sheriffs are constantly incurring legal liabilities?' See *Launceston Advertiser*, 17 September 1835.

[139] Ibid.

[140] *Launceton Advertiser,* 27 August 1835.

[141] Ibid.

[142] Entitled, *An Act For the Amendment of the Law of Bankruptcy 1842*; see Sessional Papers (1842) ii, 167. The Royal Commission Enquiring Into Insolvency (1939) which preceded the passage of the Act, noted that the existing system of discovery of property was sufficient, but it did recommend that the punishment of wrongdoers needed strengthening. See Parliamentary Papers, 30th July 1840, 14.

parliament. Stephen also referred to the state of the existing law, demonstrating that the Sheriff already had extremely wide powers and that the new Bill in fact restricted the powers of search: for example, the Sheriff could no longer search the debtor's person.

The editor of the *Launceston Advertiser* also reflected on the contents of the Attorney-General's letter and could find no fault with the legislation[143] and concluded that it was a masterly piece of drafting and 'above all dictated in a spirit of candour and moderation which may well be referred to, in this part of the world, as a good example for belligerent politicians to imitate.'[144]

These Acts were not made public, however, until a couple of months later. In the meantime, public animosity towards the draft Act increased. By September, the criticism of this particular section of the proposed *Insolvent Act* had again raised the ubiquitous question of the overall authoritarianism of Arthur's administration. The *Tasmanian,* for example, at first limited its comments to the clause in the Act, which allowed all private papers of debtors to be investigated. It declared that 'the very people of Turkey and Persia would not endure such a proposition for a moment.'[145]

The newspaper soon turned its attention to the whole administration, referring to it as 'the Attorney-General's harsh system',[146] of which the *Insolvent Act* was merely another example. Although the paper did revert to questioning alleged inadequacies of the proposed Act itself[147] its main object was to reveal the inadequacies of the whole government. Lamenting that the proposed Act would probably pass the Legislative Council, the *Tasmanian* wrote:

> The great principle of the present system of legislation seems to be paid and penalties put into operation with the sole object of increasing power in order thereby to abridge the little shadow of liberty the people possess.[148]

The *Insolvency Act* became a cause celebre of the colonists, to the extent that by September, the substance of the proposed Act was completely forgotten and the proposed Act's opponents had set up a voice to oppose the government and to represent the colonists on any matter in which they

[143] Except for the comment upon the Sheriff's powers as footnoted earlier.

[144] *Launceston Advertiser*, 17 September 1835.

[145] *Tasmanian*, 14 August 1835.

[146] *Tasmanian*, 21 August 1835.

[147] *Tasmanian*, 28 August 1835.

[148] *Tasmanian*, 11 September 1835.

felt aggrieved. So the Association,[149] under the umbrella of its general aims, relished attacking the 'frightful' Act and any similar Act.[150] Stephen was the focus of the attacks of the Association and also of the newspapers sympathetic to it.

The *Tasmanian*, representative of the opposing forces claimed, '[h]e is exerting his powerful talents not only to withholding them [Imperial Laws] from the people but to the construction of laws which he someday will denounce.'[151]

Stephen: A Rational Response

At the beginning of October, Stephen submitted to the *Tasmanian* a vindication of his draft *Insolvency Act*. It is unclear why he waited so long, especially considering the virulence of the attacks on the Act and on himself; attacks which had been going on for over six weeks. In view of Stephen's great concern about the Sheriff's petition in August, it seems unlikely that he proffered the explanation merely at the 'suggestion of others', referred to at the beginning of his published statement.

Perhaps he simply hoped that the newspapers might drop the issue and that the public might therefore forget the early criticism of the Bill, which had since been obscured by the general issue of government authoritarianism. Whatever the reason for the delay, the statement itself, when it did appear, was a clear and persuasive document. Even the *Tasmanian* which had been most aggressive in attacking Stephen declared, '[i]t exhibits great ability... it is throughout calm temperate and argumentative... the public will we trust peruse it with much attention and impartiality.'[152] In his reply, Stephen ignored the personal attacks on him and concentrated on explaining the objective of the proposed Bill, 'in the anxious hope that

[149] The 'Political Association' was born in October 1834. Throughout 1835 and 1836 the Association organised meetings against the conservativeness of the administration, attacking Arthur constantly at meetings and in the media to discredit him. As Stephen put it in writing to Arthur: 'I can conceive few associations which might be... more unjust than this irresponsible junta having the command of money for such purposes being at the head of a large body of followers of the ignorant and unreflecting.' Stephen to Arthur, 19 November 1831, *Letter Book* (A669, Mitchell Library. For an account of the Association see J Fenton, *History of Tasmania* (1884) 136-7.

[150] *Tasmanian*, 18 September 1835. A 'similar' Act was the *Jury Act*, also drawn up by Stephen. This is the subject of another article by the author. See Alex Low, 'Sir Alfred Stephen and the Jury Question in Van Diemen's Land' (2002) 21 *University of Tasmanian Law Review* 78.

[151] Ibid.

[152] *Tasmanian*, 2 October 1835.

it may allay apprehensions and convert into friends some of those who are at present enemies.'[153]

Stephen concentrated on dispelling two main criticisms of his Act: that, unlike the proposed English Act, it did not actively abolish imprisonment, and that the Sheriff's powers were intolerably great. His main arguments in relation to the first criticism were that the proposed local Act was superior to and different from the English Act. He pointed out that:

> Great pains were taken to ascertain how far the English Act might advantageously be introduced and they were carefully compared with the Cape and also the East India Act. The result was this insolvent Act *composed of each*.[154]

As well as this, Stephen argued that the only section which might meet any opposition in the English Act was that which abolished imprisonment.[155]

On the question of the Sheriff's power, Stephen proposed the appointment of a provisional assignee. The provisional assignee was to be a court appointed person with powers that were terminated after the first meeting of creditors, whereupon permanent assignees would be appointed, with the proviso that the provisional assignee could become permanent.

Creditors meetings could be held at any time and the job of the assignee was to follow their instructions, with all the insolvents property, rights and interests to vest ipso jure, in the assignee for the time being. He gave examples of similar provisions in other insolvency Acts, such as in India[156] and gave evidence of their success.[157]

Put simply, Stephen did not see a role for the Sheriff in insolvency.[158] He introduced the concept of an administrative officer to deal with the insolvent. This person, where possible, would have relevant experience and or qualifications, such as accountancy or law and would be court appointed

[153] Ibid.

[154] Ibid. (Original emphasis).

[155] Ibid. Of 445 witnesses interviewed in England only 61 were in favour.

[156] See *Launceston Advertiser*, 28 April 1835.

[157] The report in the *Launceston Advertiser*, above n 156, was in fact almost identical to Alfred Stephen's letter to the Colonial Secretary. There is almost no editorial comment or critique; from this one can only assume that the newspaper had no violent objections to the proposal and was in passive agreement.

[158] This was now the responsibility of the commissioner appointed under the Act. The commissioner had wide powers under which he could delegate, say to the Sheriff to do certain things under s. XV; but the Sheriff or any other person delegated responsibility by the commissioner, was protected and indemnified in discharging their duties under s. C II.

as provisional assignee[159] in each case, and he foreshadowed this would stop instances of patronage or corruption as instanced earlier,[160] and would facilitate the management of property. Courts would be there only by way of appeal in cases of fraud and corruption.

Stephen pointed out that there was nothing new in such a provision in relation to the common law. Indeed, the Common Law Commissioners and Lord Brougham, the English law reformer, also advocated proposals similar to the one he had inserted in the local Act.[161]

It is difficult to gauge the effect on the community of Stephen's published explanation. There is no clear evidence to suggest that the proposed Act was generally accepted. It did not become law until March 1836, but the fact that it was ignored after October by the newspapers seems to indicate that it was no longer a contentious issue in the Colony.

The Economy as a Determinant of Public Opinion

How wrong one can be! In December 1835, the economic situation once again began to worsen and, by the beginning of 1836 there was a general stagnation of all types of commerce.[162] By February, the situation was even worse and according to the *Colonial Times* 'more than one half of the colonists are insolvent.'[163] It was reported that many of the wealthy were preparing to leave Van Diemen's Land and a series of public meetings[164] were mooted to discuss the economic situation:

> Nay there are now good grounds for believing that a great many discreet and sensible persons are on the point of leaving 'for the continent' – persons who have earned money in the country are going to export their bullion with themselves... if we mistake not, we see symptoms of another series of Public Meetings which will have the effect of engrossing the public attention as to leave no room for finance for the next six months to come.[165]

Once again, the *Insolvency Act* came under public scrutiny. The opinion of the *Times*, an anti-government newspaper, was typically ambivalent. The *Times* felt that the Act was far superior to anything that had gone before: 'Till the Insolvent Act, men in embarrassed circumstances did not

[159] Page 5 & 6 of Report in the *Launceston Advertiser*, above nn 156-157.

[160] See above pp 185-187.

[161] 'Report of Sub-Committee of Legislative Council on the Insolvent Bill', above n 115.

[162] R M Hartwell, above n 48, 207-8 and see Appendix.

[163] *Colonial Times*, 16 February 1835.

[164] These never came to pass.

[165] *Launceston Advertiser*, 6 August 1835.

want to see their last shilling abstracted from them by the law... but bolted from the colony leaving their creditors in a worse state.'[166]

On the other hand, commenting on the 'three quarters'[167] provision, the *Times* expressed some reservations: 'We admit the law to be an experimental one... but at the present it appears to offer a stimulus to roguery by the facility with which a man can be whitewashed of all his debts.'[168]

This ambivalence was the predominant feeling upon the Act for more than two years. There was not much enthusiasm but the lack of economic downturns in 1836 and 1837 prevented this from becoming positive criticism. Stephen later claimed, when reporting to the New South Wales Select Committee on Insolvency in 1840, that the Act had 'considerable success' for over two years.[169]

By the beginning of 1838, the community viewed that Stephen's *Insolvent Act* had been to some extent a failure. Whilst he had admitted at the beginning of 1837 that he was not certain about the expediency of a general insolvency law for the Colony,[170] it was not until the economic distress of 1838 that there became widespread criticism of the Act. In fact many commentators felt that the economic crisis was a direct result of the insolvency law! The *Courier* wrote, '[i]t is urged, that [the Act] absolutely holds out an encouragement to fraudulent debtors rather than it answers the ends for which it was designed.'[171]

The *Hobart Town Gazette* also felt that the *Insolvency Act* was the primary cause of the distress, although it did point out that the lack of demand in Victoria and England were complementary causes.[172]

As the year progressed, the economic situation improved and by June the number of insolvencies quickly declined[173] and correspondingly, criticism of the Act was considerably muted. For example, the *Courier*, which had criticised the Act vehemently at the beginning of the year, completely reversed its position and claimed that it was 'admirably suited to the exi-

166 Ibid.

167 See above pp 182-183.

168 Ibid.

169 Stephen states: 'I have never heard a word of complaint against the law. The new law has been passed, however since my departure' see 'Report of Sub-Committee of Legislative Council on the Insolvent Bill', above n 115, 2, 5.

170 Rather than a separate Bankrupt and Insolvent Law. See *Circular*, 26 April 1837, *Letter Book V* (A673, Mitchell Library).

171 *Hobart Town Courier*, 23 February 1838.

172 R M Hartwell, above n 48, 210.

173 Ibid 211.

gencies of the Colony' and that the criticism had been entirely due to 'party feeling'.[174]

A Further Committee of Enquiry

Despite this change in mood in favour of Stephen's Act, a new Committee of the Legislative Council was set up to investigate the insolvency law.

Almost simultaneously in Van Diemen's Land, New South Wales and England, commissions of enquiry were set up independent of each other to review and examine the state of bankruptcy. The reasons for so doing seem to be the same in each country:[175]

1. The business community was a strong pressure group which the government of the day could ill-afford to ignore.
2. The economy in each was either in, or heading towards, a recession, which meant an increase in the percentage of bankruptcies as merchants, could not pay debts as they fell due.
3. In the colonies the price of wool, livestock and agricultural products was falling.[176]

Although Stephen had by then resigned from all public positions in readiness for his departure to New South Wales, he was made chairman of the Committee[177] and was the driving force behind its recommendations.[178]

The result of the committee's work was a temporary amendment to the Act (2 Vic. No. 29) but the real consequence was a general recommendation that the old Act (6 Will. IV, No. 10) should in essence be re-enacted with a number of amendments in relation to procedure.

[174] *Hobart Town Courier*, 23 September 1838.

[175] For a discussion of the economy in the context of the development of the English insolvency laws at the time, see I P H Duffy, *Bankruptcy and Insolvency in London During the Industrial Revolution* (1985) 100-103.

[176] The fall in the price of wool meant that English bills drawn against wool could not be honoured. See R M Hartwell, above n 48, 209; see also above pp 170-172, 174-176.

[177] At almost the same time in New South Wales on 12 June 1838, a sub-committee of the Legislative Council was set up to examine the Insolvent Debtors and the Imprisonment For Debt Bills. Evidence was given by prominent merchants and lawyers in the Colony and most did not favour the passage of the bills in their present form on the basis that punishing the very people who contributed most to the economy of the Colony was simply inequitable. Resulting from this, on 18 September 1839, the Chief Justice James Dowling recommended to the Governor that the Bills be withdrawn.

[178] *Tasmanian Statutes 1829–39*, Tables of Contents (Stephen's autographed copy). Stephen commented, 'Acts drawn by me... of which the whole was mine.' (Mitchell Library). See also 'Report of Sub-Committee of Legislative Council on the Insolvent Bill', above n 115, preamble 1, 2.

This recommendation was not acted upon until March 1839, the month in which Stephen was appointed to the New South Wales Supreme Court. Almost immediately after this appointment, the Legislative Council debated the proposed Act and passed it. Stephen himself noted the connection between these events. He wrote, 'I had been in March preceding appointed a Judge of New South Wales. The consolidation of my acts instantly followed.'[179]

The New Act: Old Wine in New Bottles

The resultant Act, *An Act to provide for the More Effectual Distribution of Insolvent Estate 1839* (3 Vic No. 1), was substantially the same as Stephen's earlier proposal which had caused so much debate. The long preamble to the new Act demonstrated that its aims were, in essence, the same as the 1835 Act, viz:

> And whereas it is highly desirable that effectual provisions should be made for the protection of the unfortunate debtor against the vindictiveness of an angry and disappointed creditor and it is equally desirable that ample means of punishment for the punishment of the dishonest debtor should be given.[180]

The Act also provided a remedy for those debtors already gaoled: if they surrendered all their property, they were released.[181] The main improvements in the new Act were those sections designed to speed up the passage of distributing insolvent estates: the Lieutenant-Governor was given the sole right to appoint commissioners who had the right to hear all matters under the Act[182] and who also had the right to make rules which had force equal to the original Act.[183] These commissioners replaced judges under the 1835 Act. Appeals could be made to the Supreme Court.[184]

The combined operation of the *Debtors Groats Act 1835* and the abovementioned 1839 Act, meant Van Diemen's Land finally had a law of insolvency which was humane, effective and efficient by 19th century standards.[185] The law safeguarded the creditor, was not too harsh on *bona fide* debtors, and could be administered cheaply, quickly and efficiently.

[179] Ibid.
[180] Ibid.
[181] Section LXXXIV.
[182] Section III.
[183] Section VI.
[184] Section CVI.
[185] Which still included the power to imprison those who committed fraud and debt.

Once again, Alfred Stephen had been the driving force behind the Acts. He ignored personal attacks on himself and succeeded in separating insolvency law from the wider issue of government authoritarianism when the government critics were attempting to discredit the law by stressing its connection with the administration.[186]

Stephen was rightly very proud of the insolvency laws. When he was a witness before the New South Wales Select Committee on Insolvency, he pointed out to the Committee the success of his Acts and that of the 300 insolvencies in Van Diemen's Land since 1835, only six had been compulsory, i.e. at the instance of creditors.[187] The 1839 revision of his Act[188] was in fact so successful that the law remained in force until 1870, when, inspired by reforms in England and New South Wales, a new bankruptcy law was introduced.[189]

Conclusion

During his stay in Van Diemen's Land Stephen's objective was to reform the legal framework so that it produced the greatest possible happiness in the community. He was motivated by the principle of utility as described by Jeremy Bentham, although he never openly acknowledged Bentham's influence. To achieve this objective, Stephen saw that the law had to be satisfactory in content and in procedure, and it had to be administered rationally and efficiently. He was also to learn over his six years as Attorney-General that it had to be supported by the public.

The passage of Stephen's insolvency law is just one example of Bentham's influence, and it was Stephen alone, who drafted and introduced the insolvency law into the Legislative Council.[190] Stephen was in a unique position to guide the legal and thus the social development of the

[186] Particularly by the Political Association; see above pp 195-196.

[187] 'Report of Sub-Committee of Legislative Council on the Insolvent Bill', above n 115.

[188] Except for minor revisions upon administration of the law due to increased commercial activity in Hobart and Launceston. For example, following a report of a Select Committee of the Legislative Council in 1861, the financial duties of the Official Assignee were spelt out in greater detail, requiring annual reporting to the Council; and a further judge was appointed to the Launceston District. See Report of the Select Committee appointed on 22 August 1861 (Report No. 96) in *Legislative Council Papers* (1861).

[189] H M Hull, *Alphabetical Index to the Acts of Council and Parliament of Tasmania 1825 to 1859* (1859).

[190] See 'Memirs pur Servir' uncat. Mss 211/1 (Mitchell Library): Stephen's annotated version of the Acts passed in Van Diemen's Land 1829-1840. '*Police Act, Postage Act, Dogs Licence Act, Jury Extention Act, Whale Fisheries Regulation Act, Boundary Fences Act, Quarter Sessions Act, Insolvency Act, Stage Coaches Act, Court of Requests Act, Supreme Court Practice Act.*

colony, and to ensure that it was based on utilitarian principles. In general he was able to do this because he was the principal law officer and a member of the Legislative Council; and for a long time held the Lieutenant-Governor's respect and affection.[191]

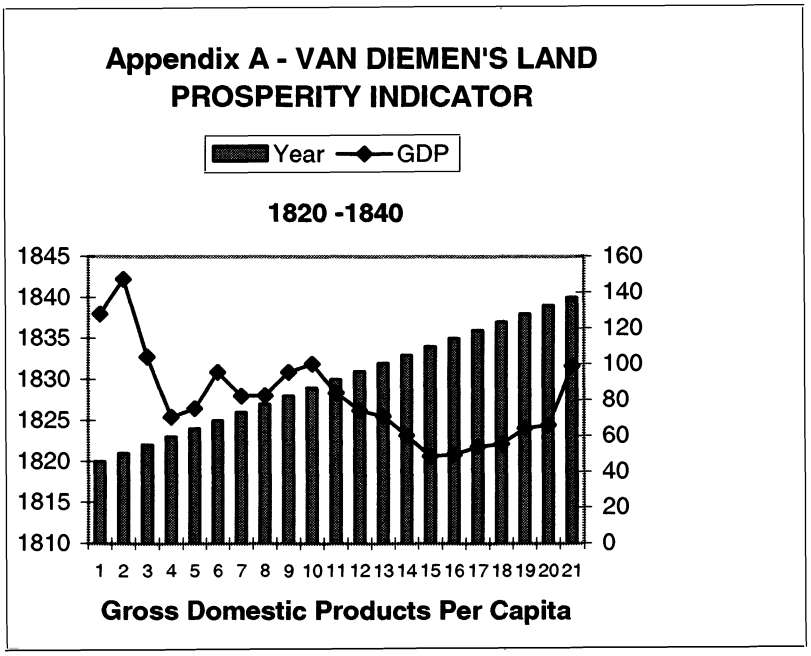
The forces which usually oppose law reforms were largely absent in Van Diemen's Land. There was no conservative establishment with a stake in maintaining the *status quo* because the *status quo* had been a response to an earlier set of social values – that of a prison – and these were increasingly inapplicable to the Colony. In fact, the only real opposition to Stephen's *Insolvency Act* were due to the dips in the economy of Van Diemen's Land over which he had no control.

Stephen's reforms were united by one idea viz. would they add to the welfare of the community. He tried to implement this central principle through a number of different types of legislation. He introduced laws which gave the colonists social rights which they did not previously possess. This was made necessary either because the law officers before Stephen had failed to introduce laws which were needed, or because laws which had been introduced had become inapplicable because of changed conditions.

The motivation for introducing laws in this category was not always the same. Some were introduced by Stephen in response to public demand whilst others were introduced because he felt the necessity for them even though there was no public dissatisfaction in the Colony. The laws reflected public demand and/or the product of Stephen's personal desires to improve the system's efficiency. The insolvency law was an important example of legislation introduced as a result of public opinion.

The Act fulfilled the Bethamite criterion for the validity of a law. By guaranteeing credit and alleviating the burdens of debtors it promoted social harmony and helped guarantee a legal framework in which the economic development of the colony could proceed more smoothly.

[191] He fell out with Arthur in late 1835 when it was alleged that Alfred's brother George cheated when playing cards with Henry, Arthur's nephew and he intervened on his brother's behalf. See Geoffrey Sorrel and Russel Ward (eds), *Dictionary of Australia Biography*, vol 6, 181.



Van Diemen's Land during this period experienced:

Depression:	Mixed Prosperity:
1826-1827	1820-1823
1834-1835	1828-1833
1841-1845	1836-1837
Moderate Depression:	Boom:
1824-1825	1839-1840
1838	

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R M Hartwell, *The Economic Development of Van Diemen's Land 1820-1850*, (1954), 190-192.