

SECTION 7A AND SIR JOHN PEDEN: A CONSTITUTIONAL COLLISION BETWEEN LAW AND POLITICS

Justice Elisabeth Peden*

In the early 20th century, the Lang Government sought to abolish the Legislative Council. There was a constitutional collision between law and politics. In light of Lang's threats, s 7A of the NSW Constitution was drafted by Sir John Peden: a double entrenched "manner and form" requirement stipulating that the Council was not to be abolished except on a referendum. At the time, Sir John was a barrister, Dean of the University of Sydney Law School, and President of the Legislative Council. Litigation in the 1930s in the Supreme Court of NSW, the High Court of Australia, and the Privy Council ultimately determined that s 7A was effective, ensuring the ongoing existence of the Legislative Council unless and until the people of NSW determine otherwise.

- 1 This Conference is one of the events which the Council has organised to celebrate its bicentenary and to reflect on this State's history of parliamentary democracy,¹ and I am grateful to the Usher of the Black Rod for inviting me to speak. We would not be here today, however, had history taken a different course in the early 20th century, when the Labor Party sought to abolish the Council.²

* Judge of the Supreme Court of New South Wales, Equity Division. This paper was presented on 9 December 2024 at the NSW Legislative Council's Bicentenary Conference ("Through the Hourglass: Parliamentary Democracy Yesterday, Today & Tomorrow") as part of a session titled "Evolution, Abolition, Entrenchment: Cementing the Place of the Legislative Council". The slides accompanying the presentation, which contain excerpts from various historical documents (including documents from the Peden family papers which are held at the State Library of NSW) are annexed to this paper.

¹ 'The Bicentenary of the Legislative Council', *Parliament of New South Wales* (Web Page) <<https://www.parliament.nsw.gov.au/about/Pages/Bicentenary-of-the-Legislative-Council.aspx>>.

² This paper builds upon various accounts of the Lang Government's attempts to abolish the Legislative Council: see David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003* (Federation Press, 2006) 242–3, 248, 278–96; Lynn Lovelock and John Evans, *New*

- 2 Abolishing the Council had been part of the Labor Party's platform since 1898, and from 1911, all Labor appointees to the Council were required to pledge that they would on all occasions "ensure the carrying out of the principles embodied in the Labor platform, including the abolition of the Legislative Council".³ Labor's hostility to the Legislative Council was in part driven by the view that the Upper House, comprised of nominated representatives rather than elected ones, was "more patrician than democratic in character, [its] membership reflecting the interests of wealth and privilege".⁴
- 3 A formidable figure who championed for the abolition of the Council was Jack Lang. In June 1925, he became Premier of NSW and in January 1926, he introduced the *Constitution (Amendment) Bill 1926* to abolish the Legislative Council.⁵ This was met with resistance, so much so that members of the Council took the unusual step of dispatching a memorial to Secretary of State for Dominions requesting "that His Majesty be advised not to assent to a Bill for the abolition of the Legislative Council for New South Wales until its abolition has been approved by the people".⁶ The controversy that might have otherwise precipitated was ultimately averted, as the Bill was narrowly defeated in the Council. Enough Labor members had been absent or voted against the Bill; the price for their defection was expulsion from the Party.⁷

South Wales Legislative Council Practice, ed Stephen Frappell and Davis Blunt (Federation Press, 2nd ed, 2021) 38–41; Jeffrey Goldsworthy, 'Trethowan's Case' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 98, 98–105 ('Trethowan's Case'); Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 141–9 ('Parliamentary Sovereignty'); Ian Loveland, 'Assessing the Legitimacy of Referendums as a Vehicle of the Legislative Councils in Queensland and New South Wales' (2023) 34(2) *King's Law Journal* 388, 399–409.

³ Bede Nairn, 'The NSW Labor Party, the Legislative Council and Catholics, 1891-1926' (1986) 71 *Journal of the Royal Australian Historical Society* 233, 236.

⁴ Clune and Griffith (n 2) 242–3.

⁵ Ibid 282–3; Lovelock and Evans (n 2) 38–9.

⁶ *Memorial to the Secretary of State for the Dominions from the Members of the Legislative Council of New South Wales Whose Signatures are Attached Hereto relating to the Present Constitutional Crisis* (Memorial, 3 February 1926) 12.

⁷ Lovelock and Evans (n 2) 38–9; Clune and Griffith (n 2) 284.

- 4 In late 1927, Lang lost the election and Sir Thomas Bavin's conservative government rose to power.⁸ Sir Thomas was "determined that there should be no repetition of what we saw in the last Parliament, when there was an effort to destroy the Legislative Council and to make a fundamental alteration in the Constitution of the State without consulting the people".⁹
- 5 One of Sir Thomas' close friends was Sir John Peden, who would go on to have an important role in thwarting Lang's later renewed attempts to abolish the Legislative Council. Sir John studied law at the University of Sydney, graduating in 1898 with First Class Honours and the University Medal, before being called to the Bar and reading with Richard Sly, who was later Justice Sly of the Supreme Court of NSW. He developed a considerable practice in equity and probate and in 1902, became a part time lecturer at the Law School.¹⁰
- 6 Not long after, in 1910, Sir John was appointed as Challis Professor of Law and Dean of the University of Sydney Law School.¹¹ He taught a wide range of subjects: real and personal property, constitutional law, public international law, jurisprudence, political science, and private international law.¹² Students called Sir John "Jacko",¹³ and he was held in high regard by them, his colleagues, and those in the legal profession, as recorded in the *Jubilee Book of the Law School of the University of Sydney: 1880-1940*.
- 7 In 1918, Sir John was appointed to the Legislative Council. In the years that followed, he was offered the role of Vice-Chancellor of Sydney University and could have had an appointment to the Bench, but did not take these roles;¹⁴ instead, Sir John remained committed to the Legislative Council and in 1929,

⁸ Lovelock and Evans (n 2) 39; Clune and Griffith (n 2) 287.

⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 March 1929, 3621 (Thomas Bavin).

¹⁰ John M Ward, 'Sir John Beverley Peden (1871-1946)', *Australian Dictionary of Biography* (Web Page) <<https://adb.anu.edu.au/biography/peden-sir-john-beverley-8008>>.

¹¹ *Ibid*.

¹² Judy Mackinolty, 'Learned Practitioners' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Southwood Press, 1991) 57, 71.

¹³ *Ibid* 76.

¹⁴ *Ibid*.

became its President.¹⁵ His appointment to that role was met with much acclaim, receiving many congratulatory messages from all quarters of the legal profession and beyond, which have been preserved in the Peden family papers.

- 8 Anticipating that his conservative government would be defeated in the next election and that the incoming Labor Government would yet again attempt to abolish the Legislative Council, Sir Thomas appears to have asked Sir John for assistance in devising a solution to prevent Lang from succeeding.¹⁶
- 9 His request for help was not because Sir Thomas was an intellectual lightweight: he graduated with First Class Honours and the University Medal in Law a year earlier than Sir John, taught at the Law School, had considerable experience and reputation at the Bar, and was eventually appointed to the Supreme Court of NSW after his political career.¹⁷ Nevertheless, Sir John proved to be the right person to ask for assistance. He was a teacher of constitutional law who, in the words of Justice Evatt of the High Court, had an “encyclopaedic knowledge of Australian constitutional history”.¹⁸ He regarded A V Dicey’s seminal text, *The Law of the Constitution*, “with particular reverence”, and in fact, it was his study of Dicey that led him to an idea that if implemented properly, could thwart Lang’s impending efforts to abolish the Legislative Council.
- 10 Sir John’s idea is reflected in s 7A of the NSW Constitution, which in its originally enacted form, provided that:

(1) The Legislative Council shall not be abolished, nor subject to the provisions of subsection six of this section, shall its constitution or powers be altered except in the manner provided in this section.

¹⁵ Ibid 58.

¹⁶ Ian Loveland, “‘Embarrassing and Even Ridiculous’: The Short-Lived Rise and Fall of Chief Justice Pope Cooper’s Two Act Entrenchment Thesis in Early 20th Century Queensland” (2023) 42(1) *University of Queensland Law Journal* 29, 63.

¹⁷ John McCarthy, ‘Sir Thomas Rainsford (Tom) Bavin (1874-1941), *Australian Dictionary of Biography* (Web Page) <<https://adb.anu.edu.au/biography/bavin-sir-thomas-rainsford-tom-86>>; Goldsworthy, ‘Trethowan’s Case’ (n 2) 101; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 144.

¹⁸ Justice H V Evatt, ‘Professor Peden as a Teacher of Constitutional Law’, in Sir Thomas Bavin (ed), *Jubilee Book of the Law School of the University of Sydney* 34, 35–6.

(2) A Bill for any purpose within subsection one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. ...

(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section ...

11 Sub-section (1) stipulated that the Legislative Council was not to be abolished except on a referendum. However, sub-s (6) was the crucial provision which made s 7A “a cunningly devised bill”.¹⁹ Absent sub-s (6), Parliament could have enacted ordinary legislation which expressly or impliedly repealed s 7A such that no referendum would be required to abolish the Legislative Council. What sub-s (6) did was that it provided for double entrenchment “by extending the manner and form requirement of a referendum to “any Bill for any repeal or amendment’ of s 7A”.²⁰ The consequence was that if Parliament sought to repeal the requirement in sub-s (1) to hold a referendum for the abolition of the Legislative Council, that amending law would itself need to be enacted in compliance with the manner and form requirement of a referendum in order to be validly enacted. Such compliance was required by s 5 of the *Colonial Laws Validity Act* 1865 (Imp), which was a form of higher law.²¹

12 In drafting s 7A, Sir John had the assistance of two experienced practitioners:²² Attorney-General Francis Boyce KC, later a Judge of the NSW Supreme Court, and Ernest Mitchell KC, a one-time Law School colleague of Sir John's who later represented the plaintiffs in *Trethowan v Peden*,²³ an important decision, to which I will return. Nonetheless, Sir John still retained an active role in the formulation of the section. That is evident from the draft versions of s 7A, which can be found in the Peden family papers, with handwritten edits, which are reflected in the final enacted version of the text. Further, on 16 May 1928, Sir

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 1928, 597 (William Brennan).

²⁰ Anne Twomey, *Constitution of New South Wales* (Federation Press, 2004) 300–1.

²¹ Goldsworthy, ‘Trethowan's Case’ (n 2) 101; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 144; W L Morison, ‘The Future Scope of Australian Common Law’ (1991) 13(3) *Sydney Law Review* 335, 339–40.

²² Goldsworthy, ‘Trethowan's Case’ (n 2) 143–4; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 100–1; Ken Turner, *House of Review? The New South Wales Legislative Council, 1934–68* (Sydney University Press, 1969) 14.

²³ (1930) 31 SR (NSW) 183 (*Trethowan v Peden* NSWSC).

John also moved an amendment to the Bill, suggesting that its long title was expressed too widely. He said:

This is not a bill to say that the Constitution and powers of this Council shall not be altered in any respect except on a referendum, but a bill to say straight out that the Council shall not be abolished, and to say that certain provisions with respect to the constitution or powers of the Council shall not be altered except on a referendum.²⁴

13 Sir John's active role in shaping s 7A is unsurprising, given how according to the clerk of the Law School, he was "far more at home drafting a Bill or a clause than other types of composition". Indeed, Sir John "appears not to have published any scholarly work nor to have engaged in research apart from seeking helpful answers to immediate problems".²⁵

14 In formulating s 7A, Sir John is also said to have drawn upon "suggestions by another noted Tory – Sir Arthur Berriedale Keith",²⁶ who in his 1916 work titled *Imperial Unity and the Dominions*, wrote:

Any rule whatever which has been laid down by any legislative authority with regard to the mode of modifying the constitution is a fetter on the freedom of the Dominion Parliament which it cannot break save in the way appointed by the Act imposing the fetter. If a Dominion Parliament enact to-morrow that any Act which it passes must be passed by a two-thirds majority to take effect as an alteration of the constitution, then this condition becomes one which, so long as the Act in question stands, cannot be undone by the Parliament save in the prescribed manner, that is to say if the Act has been careful to make it clear that this provision itself is to be protected in this way ... The limit thus put on the powers of the Dominion Parliaments is at first sight rather curious, but it follows inevitably from the express provision in the *Colonial Laws Validity Act* 1865.²⁷

15 The influence of Sir Arthur Keith's work on s 7A is evident from an explanatory note that appears to have accompanied the Bill, which states:

²⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 16 May 1928, 663 (John Peden).

²⁵ Mackinolty (n 12) 77–8.

²⁶ Geoffrey Sawyer, 'Constitutional Issues' in Alan Davies and Geoffrey Serle, *Policies for Progress: Essays in Australian Politics* (FW Cheshire, 1954) 13, 17.

²⁷ Arthur Berriedale Keith, *Imperial Unity and the Dominions* (Clarendon Press, 1916) 389–90, quoted in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 424 (Starke J) ('AG v Trethowan HCA').

[Section 7A imposes] legal restrictions, and not merely political restrictions, on the power of the State Parliament.

The legal basis of [s 7A] is the Colonial Laws Validity Act, 1865, s. 5. That section makes it clear that the State Parliament can make laws respecting its “constitution, powers and procedure,” but it also makes it clear that it can only do so, provided that such laws are passed in such manner and form as may from time to time be required by Act of Parliament (i.e. any Act of the British Parliament), letters patent, Order in Council, or “colonial law” for the time being in force in New South Wales.

The effect of this proviso is discussed in the judgment of Isaacs and Rich, JJ., in *McCawley v. The King* (26 C.L.R. 9, at pp. 54, 57), where it is pointed out that “if no special provision as to the manner and form of passing a particular class of law exists, then the ordinary method may be followed; but if as to given class of law a specific method is prescribed, it must be followed.”²⁸

- 16 Despite the articulated legal basis for s 7A, many were not convinced by the argument that it was legally effective. Indeed, it is said that such a view “was scoffed at by men of legal learning”.²⁹ One particularly strong critic was William McKell, who decried s 7A as “an absolute absurdity ... For this Parliament to purport to bind future Parliaments in this way is simply futile and, to that extent, the Bill is not worth the paper it is written on”.³⁰ Another critic was Sir Thomas Henley, who quoted from a passage by Dicey on legislative supremacy and accused “Professor Peden and other constitutionalists” for “shutting their eyes to these great authorities”.³¹ Even Attorney-General Boyce KC, who assisted in drafting s 7A, seems to have been confused about the provision’s effect, quoting Lord Bacon and Dicey for the view that Parliament cannot bind itself when introducing the *Constitution (Legislative Council) Amendment Bill* which contained proposed s 7A.³²

- 17 In spite of these criticisms, s 7A was enacted, although for various reasons, it did not come into force until 1 October 1930, which was just before the general

²⁸ Explanatory Memorandum, *Constitution (Legislative Council) Amendment Bill 1929*.

²⁹ C H Currey, ‘The Legislative Council of New South Wales, 1843-1943’ (1943) 29 *Journal and Proceedings of the Royal Australian Historical Society* 337, 417.

³⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 1929, 3704 (William McKell).

³¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 1929, 3709 (Sir Thomas Henley).

³² Goldsworthy, ‘Trethowan’s Case’ (n 2) 102; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 145.

election on 25 October 1930.³³ In the intervening period between the Bill being passed by both Houses of Parliament and it coming into force, Sir John delivered an address to the NSW Constitutional Association in April 1930 which touched on s 7A. It was reported in the *Sydney Morning Herald* that, in effect, he recognised that its enforceability had not been tested in a court:

The question had been raised whether [s 7A] would make the position satisfactory, if it were in force. [Sir John] thought the answer was that it would not. There were considerations which made that answer the only one that was safe. In the first place, there was the point whether the Act could be repealed by the ordinary process of legislation. That was a point of law which remained to be decided, and some eminent lawyers believed that the Courts would decide that the Act could be repealed in the ordinary way.³⁴

- 18 In 1930, the Labor Party won the general election and Lang resumed office as Premier, seeking to “swamp” the Council with Labor appointments and to carry out his “popular mandate” from the electors to abolish the Council. Unlike previously, Lang could properly claim that he had such a mandate: “his policy speech had plainly spelled out this objective”. So much was acknowledged by the Governor at the time, Sir Philip Game.³⁵
- 19 Soon after, Lang and Governor Game engaged in correspondence regarding the large number of proposed new appointments to the Council. In a letter dated 5 November 1931, the Governor who was aware of Lang’s abolition plans indicated that he had spoken with Sir Philip Street, then Chief Justice of the Supreme Court and Sir John. He noted that it had been pointed out to him that “under paragraph 6 of clause 2 (7A) of Act 28 of 1929 any Bill for the repeal or amendment of that section must go to a referendum”.³⁶ He then said:

If this is valid it appears to constitute a legal bar to the repeal of Act 28 of 1929 without a referendum, and without repealing this Act it does not appear possible to abolish the Legislative Council without a referendum.

³³ Clune and Griffith (n 2) 289.

³⁴ ‘Sir John Peden’s Address: Reasons for Reform’, *Sydney Morning Herald* (Sydney, 1 April 1930) 10.

³⁵ Goldsworthy, ‘Trethowan’s Case’ (n 2) 102; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 145–6.

³⁶ Letter from Sir Philip Game to John Lang, 5 November 1930 <https://www.parliament.nsw.gov.au/historictabledpapers/files/177219/NSW%20Parliamentary%20Papers%201930-1931-1932_1_0024.pdf>.

I am sure you will agree that I should have the opinion of your law officers as to the validity or otherwise of paragraph 6; and I shall be very grateful if you will obtain it for me.³⁷

- 20 In reply, Lang stated that he had consulted his law officers, enclosing their opinion that “there is no legal bar against the policy embraced by the people of abolishing the Second Chamber”.³⁸ That opinion by the Crown Solicitor, John Tillett, stated that a referendum was not legally required as parliamentary sovereignty precluded a legislature from binding itself in the future.³⁹
- 21 Lang consequently proceeded with his attempt to abolish the Legislative Council by seeking to enact the *Constitution (Amendment) Bill 1930* to repeal s 7A, and subsequently, the *Constitution Further Amendment (Legislative Council Abolition) Bill 1930*, which would render the seats of all members of the Council vacant and abolish those offices.
- 22 These Bills were the subject of heated debate, just like the Bill which introduced s 7A in the NSW Constitution. In one exchange, AC Willis, “a radical industrialist and committed Christian ... who had resigned his position both as General Secretary of the Miner’s Federation and as President of the Labor Party to act as Lang’s Representative of the Government in the Council”,⁴⁰ alleged that s 7A was “tying the hands of Parliament” and “making members of Parliament a lot of dummies instead of being the representatives of the people”. But “[t]hey are not dummies”, another member quipped, to which Willis replied, “Some are, but not all. Some are content to be to be, but not all”.⁴¹
- 23 At this time, Sir John remained President of the Legislative Council, which was significant because the Standing Orders of the Council rendered the President responsible for presenting to the Governor for royal assent a Bill initiated in the

³⁷ Ibid.

³⁸ Letter from John Lang to Sir Philip Game, 7 November 1930 <https://www.parliament.nsw.gov.au/historictabledpapers/files/177219/NSW%20Parliamentary%20Papers%201930-1931-1932_1_0024.pdf>.

³⁹ Goldsworthy, ‘Trethowan’s Case’ (n 2) 103; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 146.

⁴⁰ Clune and Griffith (n 2) 279.

⁴¹ New South Wales, *Parliamentary Debates*, Legislative Council, 3 December 1930, 98 (Albert Willis).

Council after it had been finally passed by both Houses.⁴² It was consequently feared by the Lang Government that if the Bills were to pass, Sir John might refuse to present them to the Governor for royal assent, as captured by a 5 December 1930 article titled “Peden Against the People” in the *Labor Daily*, which includes:

Out of the labyrinth of Tory tactics, whereby the enemies of Democracy hope to save the Legislative Council and thwart forever the will of the people, emerges the knightly figure of Sir John Beverley LLB., K.C., — inter alia President of the Council.

“Let us pass these Abolition Bills and Sir John will decline to present them to the Governor for the Royal Assent—until by referendum the people affirm them,” was the whisper that passed along the ranks of the Tories in the Council on Wednesday night.

A referendum would cost the people of N.S. Wales in the vicinity of £80,000 or £90,000 — a heavy and needless expense ...⁴³

- 24 It was also reported that the Lang Government’s ministers had been “discussing the possibility of dismissing Sir John Peden from the position of President of the Legislative Council in the event of his refusal to send the bills in for the Royal Assent”. It was said that this “could be done by an Executive Council minute” so long as the Governor agreed to “attach his signature to the document”. Alternatively, the Lang Government contemplated commencing proceedings following the passage of the Bills in order to seek a writ of mandamus compelling Sir John to present the Bills for royal assent.⁴⁴
- 25 Sir John did not participate in the debate for either of the Bills. But it appears that on his advice, and that of Francis Boyce KC who had helped draft s 7A, on 10 December 1930, the Council allowed both of the Bills to pass without

⁴² Goldsworthy, ‘Trethowan’s Case’ (n 2) 104; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 147.

⁴³ ‘Peden Against the People’, *Labor Daily* (Sydney, 5 December 1930) 8.

⁴⁴ ‘Will President Insist on Referendum? Sir John Peden May Be Dismissed’, *Daily Advertiser*, 8 December 1930, 2 (‘Will President Insist on Referendum?’). See also Goldsworthy, ‘Trethowan’s Case’ (n 2) 104; Goldsworthy, ‘Parliamentary Sovereignty’ (n 2) 147.

division. That was because the intention was to seek an injunction restraining the presentation of the *Constitution (Amendment) Bill* for royal assent.⁴⁵

- 26 It was, however, a race against time, as on the same day that the Bills had passed, Lang asked the Governor to forthwith send a memorandum by cable to the British Government seeking a direction that the Governor assent to the Bills immediately. The Governor sent that cable, supplementing the memorandum with his view that he could see no reason why he ought not accept his Ministers' advice. That cable also attached legal advice which the Governor had been supplied with, which characterised s 7A as:

[A]n unprecedented attempt to convert a flexible and an uncontrolled Constitution into a rigid and controlled one, not by the will of the Imperial Parliament, but by the mere operation of an ordinary local law passed according to the views of a casual and accidental majority in one Parliament.⁴⁶

- 27 Meanwhile, urgent proceedings were commenced by various members of the Legislative Council in the Supreme Court. Ironically, but as expected, Sir John as President of the Council was named as a defendant, with the statement of claim seeking injunctive relief on the basis that:

In contravention of Section 7A of the Constitution Act 1902 the said Defendant The Honourable Sir John Beverley Peden K.C.M.G., M.L.C, is threatening to present [the *Constitution (Amendment) Bill 1930*] to the Governor for His Majesty's assent although such Bill has not been approved by the electors in accordance with Section 7A of the Constitution Act 1902.⁴⁷

- 28 Sir John's refusal to disclose his intentions as to whether he would present the Bills to the Governor made that pleading tenable. In particular, when on 9 December 1930, Arthur Trethowan, one of the plaintiffs in the proceeding, asked Sir John whether he intended to present the two Bills to the Governor for royal assent, Sir John replied, "I decline to answer".⁴⁸ And when asked on 10 December 1930 by the plaintiffs' solicitor, Alfred Hemsley, as to whether he

⁴⁵ W K Charlton, *Notes of the Clerk Assistant of the NSW Legislative Council* (Notes, March 1934) 15; Lovelock and Evans (n 2) 41.

⁴⁶ Goldsworthy, 'Trethowan's Case' (n 2) 103; Goldsworthy, 'Parliamentary Sovereignty' (n 2) 147.

⁴⁷ Arthur Trethowan, Statement of Claim in *Trethowan v Peden*, 9865/1930, 10 December 1930, [11].

⁴⁸ Thomas Playfair, Affidavit in *Trethowan v Peden*, 9865/1930, 10 December 1930, [10].

would give an undertaking that he would not present the Bills for royal assent until they had been “approved by the electors”, Sir John again responded, “I decline to answer”.⁴⁹

- 29 On 11 December 1930, the matter came ex parte before Long Innes J. His Honour granted an interim injunction directed to Sir John and the other defendants until 15 December 1930, restraining them from presenting the *Constitution (Amendment) Bill* to the Governor for royal assent. His Honour also granted leave to the plaintiffs to serve a short notice of motion on the defendants to continue the injunction, which would be determined by the Full Court.⁵⁰
- 30 The following day, Sir John appears to have written to the Crown Solicitor’s Office asking if they could represent him. However, in reply, the Crown Solicitor, John Tillett, stated he was “unable to act for you in any way in connection with the suit, *AKT Trethowan and Another v. Yourself and Others*”.⁵¹ It appears that answer was given because the Crown Solicitor was acting for Lang and his Ministers, whose interests were not aligned with those of Sir John. And indeed, it was said that “[t]he idea that he would enter a defence to establish that he was entitled qua President of the Council to take a step which the Act he had conceived evidently prohibited him from taking lay somewhere between the bizarre and the surreal”.⁵²
- 31 Consequently, when on 15 December 1930, the matter returned before the Full Court, Sir John did not participate in the proceedings. It was the first time in 25 years that a five-member bench was convened, comprised of Street CJ, Ferguson, James, Owen and Long Innes JJ. The hearing lasted four days. On 23 December 1930, their Honours handed down judgment, finding by majority (Long Innes J dissenting), that s 7A of the NSW Constitution had been validly enacted pursuant to s 5 of the *Colonial Laws Validity Act 1865* (Imp) and that it

⁴⁹ Alfred Hemsley, Affidavit in *Trethowan v Peden*, 9865/1930, 10 December 1930, [2].

⁵⁰ Order of Long-Innes J in *Trethowan v Peden* (Supreme Court of NSW, 9865/1930, 11 December 1930).

⁵¹ Letter from John Tillett to Sir John Peden, 12 December 1930.

⁵² Loveland (n 2) 403.

could only be repealed by observing the manner and form requirement of a referendum.⁵³ Their Honours consequently ordered that the defendants be restrained from presenting the *Constitution (Amendment) Bill* to the Governor for royal assent without first having it approved by the electors in accordance with the procedure in s 7A.⁵⁴

- 32 However, the saga did not end there. On 6 January 1931, the Lang Government sought leave to appeal to the High Court. Leave was granted, but by a narrow majority, the appeal was dismissed. Rich, Starke and Dixon JJ formed the majority, whilst Gavan Duffy CJ and McTiernan J dissented.⁵⁵ McTiernan J's dissent was perhaps unsurprising: he served as Attorney-General in Lang's first Government and had "played a leading role in Lang's attempt to abolish the NSW Legislative Council—to the extent of travelling to London to persuade the Secretary of State for the Colonies, LS Amery, that Governor Dudley de Chair must accept his ministers' advice on the matter".⁵⁶ Evatt J, who was counsel for Lang and his Ministers in the proceedings before the Supreme Court, was a member of the High Court at the time of the appeal, but did not sit.⁵⁷
- 33 A further and final appeal was brought to the Privy Council, and on 31 May 1932, Lords Sankey, Blaneburgh, Hanworth, Atkin and Russell of Killowen dismissed it.⁵⁸ And so, Sir John's view as to the efficacy of s 7A, a provision which he had primarily drafted, was finally vindicated. It is said that thereafter his idea was "regarded as so important that the [law] faculty administrative officer used to take visitors to the spot in the library where Sir John was said to have got it".⁵⁹

⁵³ *Trethowan v Peden* NSWSC (n 23).

⁵⁴ Order of Street CJ, Ferguson, James and Owen in *Trethowan v Peden* (Supreme Court of NSW, 9865/1930, 23 December 1930).

⁵⁵ *AG v Trethowan* HCA (n 27).

⁵⁶ Michael Kirby, 'McTiernan, Edward Aloysius' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 466.

⁵⁷ Clune and Griffith (n 2) 295–6.

⁵⁸ *Attorney-General (NSW) v Trethowan* (1932) 47 CLR 97.

⁵⁹ Morison (n 21) 338.

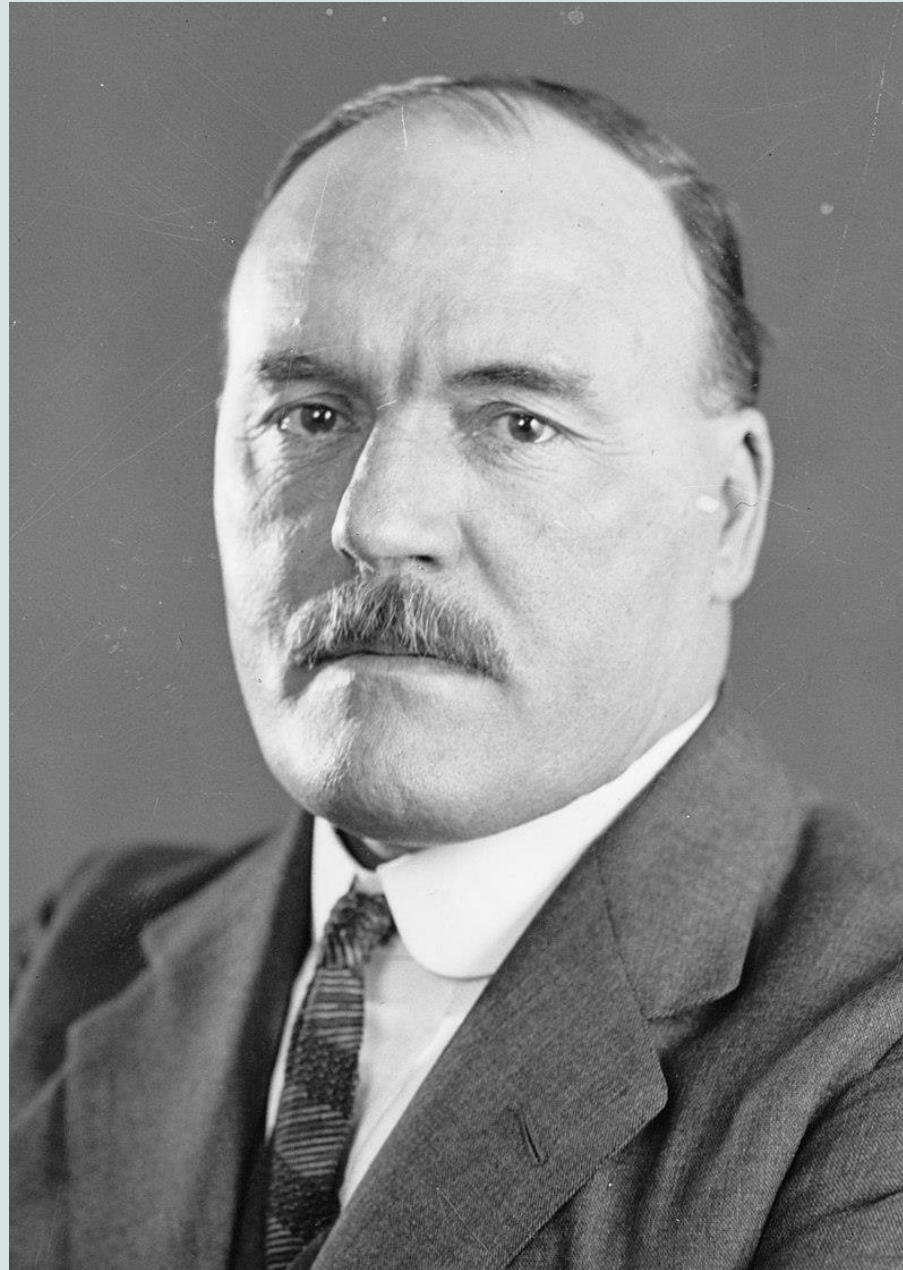
- 34 Meanwhile, Lang did not fare so well: he was removed from office by the Governor exercising his reserve powers.⁶⁰ However, that is another story.
- 35 The Legislative Council later underwent a series of reforms, moving from an appointed council to being an indirectly elected council in 1933 and a directly elected council in 1978.⁶¹ Sir John continued to serve President of the Council until April 1946, a month before he passed away. He was a member of the Council for nearly 30 years, including 17 years as President.⁶²
- 36 Today, the Legislative Council forms a vital part of the Westminster system of responsible government in this State. It acts as a House of Review, providing oversight of the government through legislative scrutiny and by questioning Ministers and other officials so as to hold them responsible to the electorate.⁶³ However, the existence of a bicameral legislature in NSW has not always been perceived as desirable, the Council having faced but ultimately survived multiple attempts at abolition in the early 20th century and beyond.
- 37 On a personal note, when I was invited to give this talk, I confessed that I knew little about s 7A beyond what I had studied at law school a number of decades earlier. In looking into the history, I have enjoyed coming to know my great grandfather, whom I never met, through the various documents. I have also been humbled and delighted to learn that unwittingly I have followed somewhat along his academic and professional path. However, the closest I have come to sitting in Parliament is during wonderful conferences such as this. Again, I am grateful for the invitation to celebrate the Council's history, and trust you will enjoy the rest of the conference.

⁶⁰ See eg Anne Twomey, 'The Dismissal of the Lang Government' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 129. See also Constitutional Clarion, 'The Dismissal of the NSW Lang Government' (YouTube, 5 October 2024) <<https://www.youtube.com/watch?v=1h0kXNZsESc>>.

⁶¹ Lovelock and Evans (n 2) 32–58.

⁶² 'Sir John Beverley Peden, K.C.M.G., K.C., B.A., LLB. (1871-1946)', *Parliament of New South Wales* (Web Page) <<https://www.parliament.nsw.gov.au/members/Pages/member-details.aspx?pk=1228>>.

⁶³ Lovelock and Evans (n 2) 22–5, 57–8.



1. Jack Lang



C O P Y



Secretary of State for Dominions,
L O N D O N

Memorial being forwarded through Governor from members of Legislative Council asking that if Bill for abolition of Council be passed the royal assent be withheld until approval of people obtained. Urge that no steps be taken either in way of instructing Governor as to further appointments to Council to secure passage of Bill or in any other way altering status quo, until memorial received and considered. Strongest public opinion aroused. Any action to assist passage of Bill without electors of State being consulted would cause grave dissatisfaction.

J.H. GARRUTHERS

for Signatories.

M E M O R I A L

TO

THE SECRETARY OF STATE FOR THE DOMINIONS
FROM

THE MEMBERS OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES
WHOSE SIGNATURES ARE ATTACHED HERETO

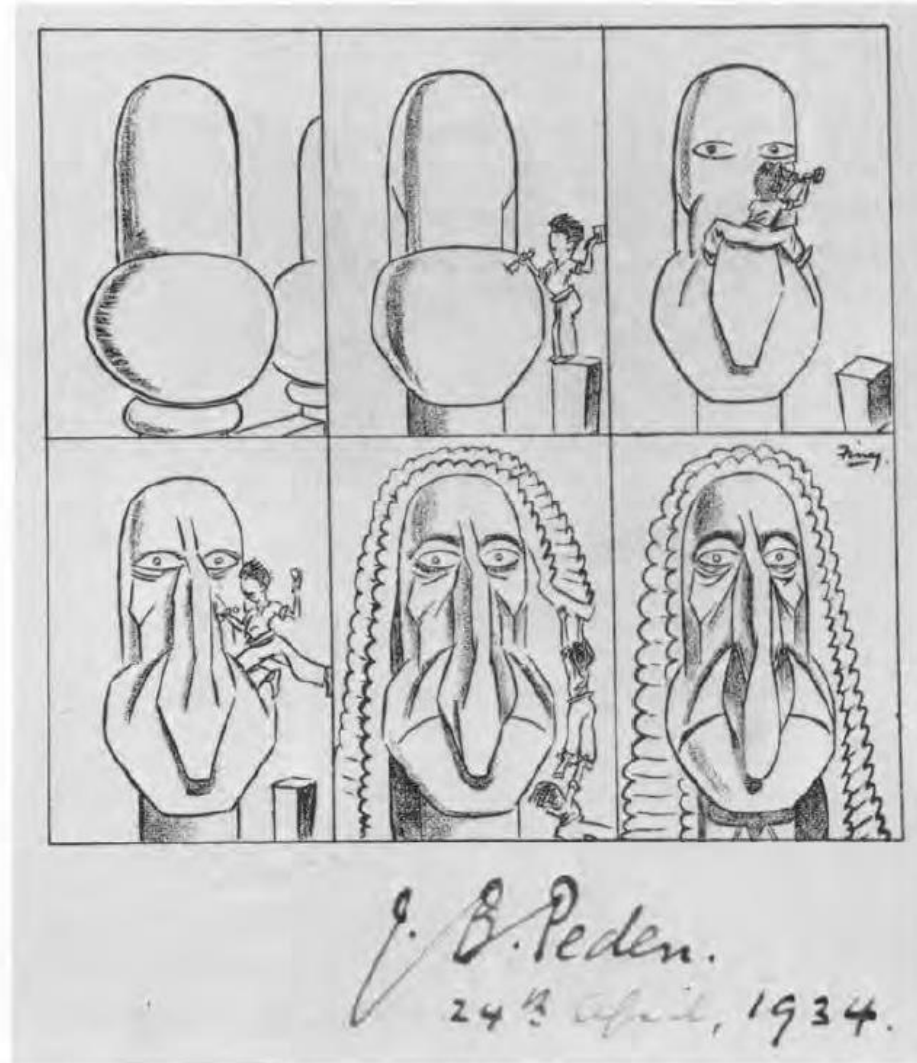
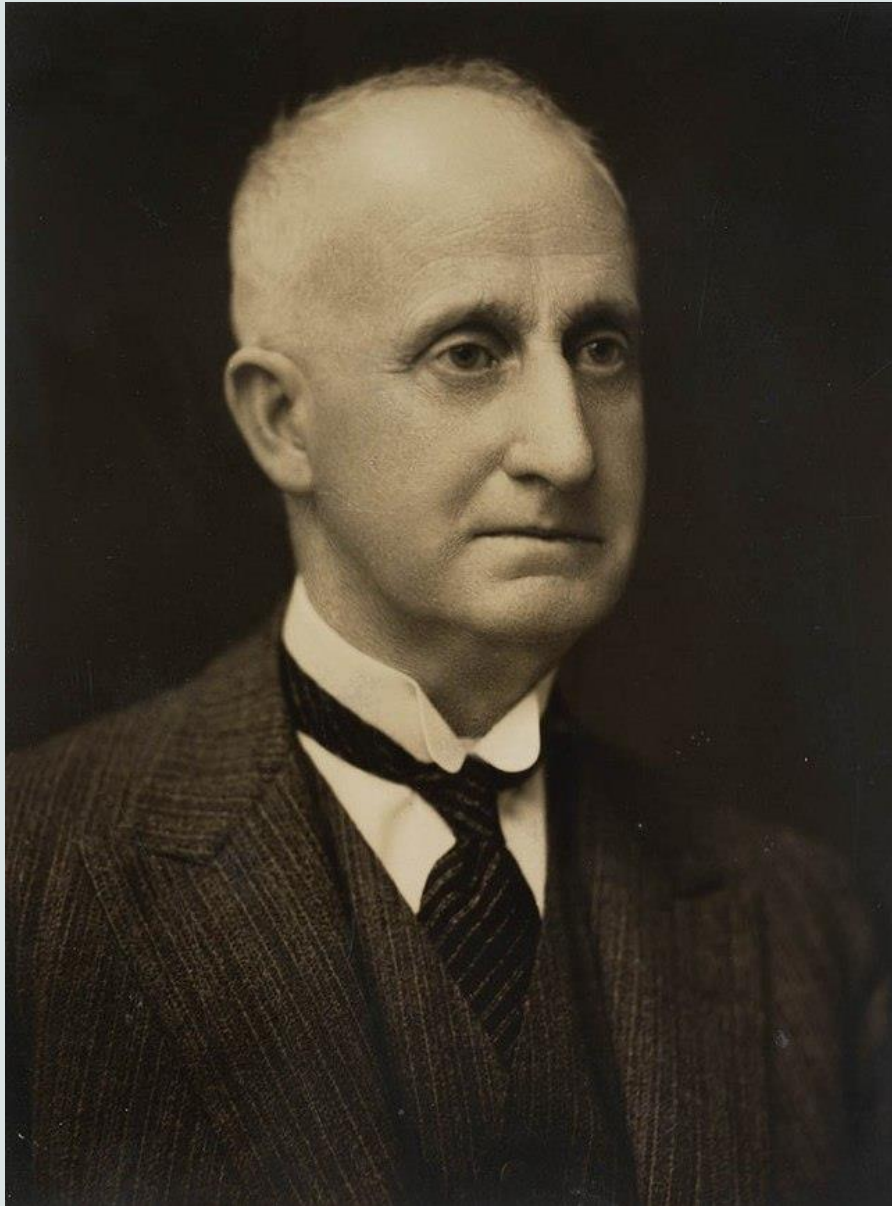
RELATING TO

THE PRESENT CONSTITUTIONAL CRISIS.

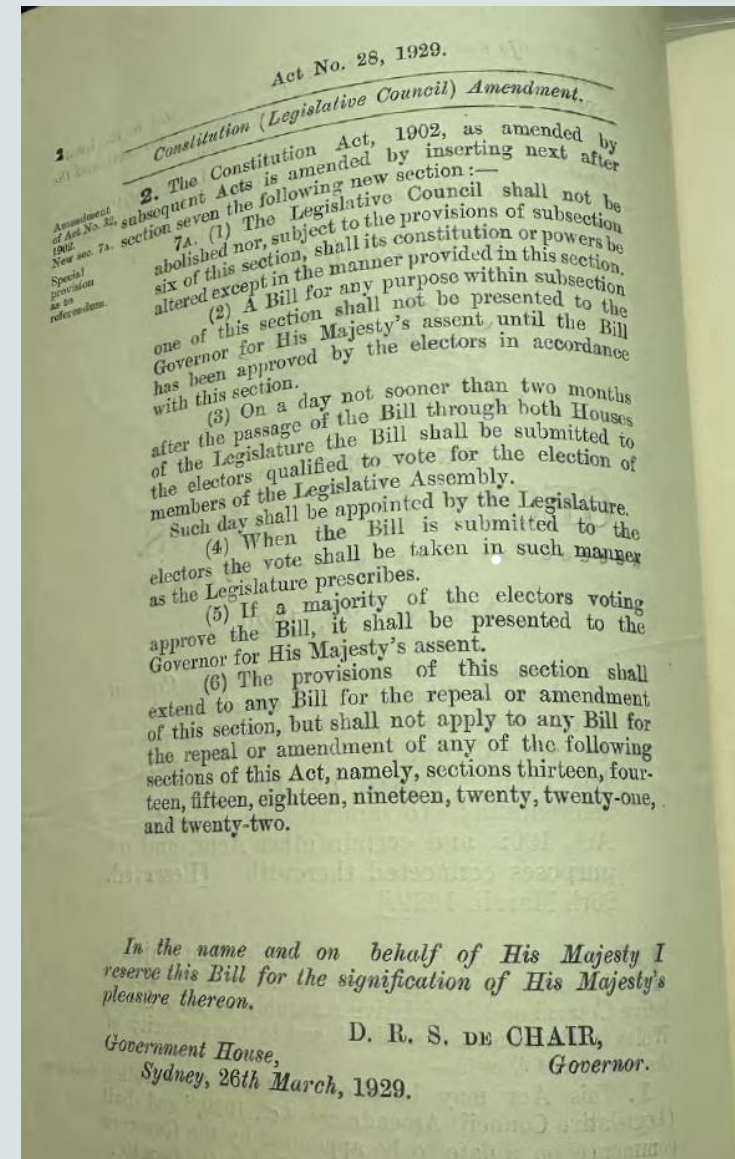
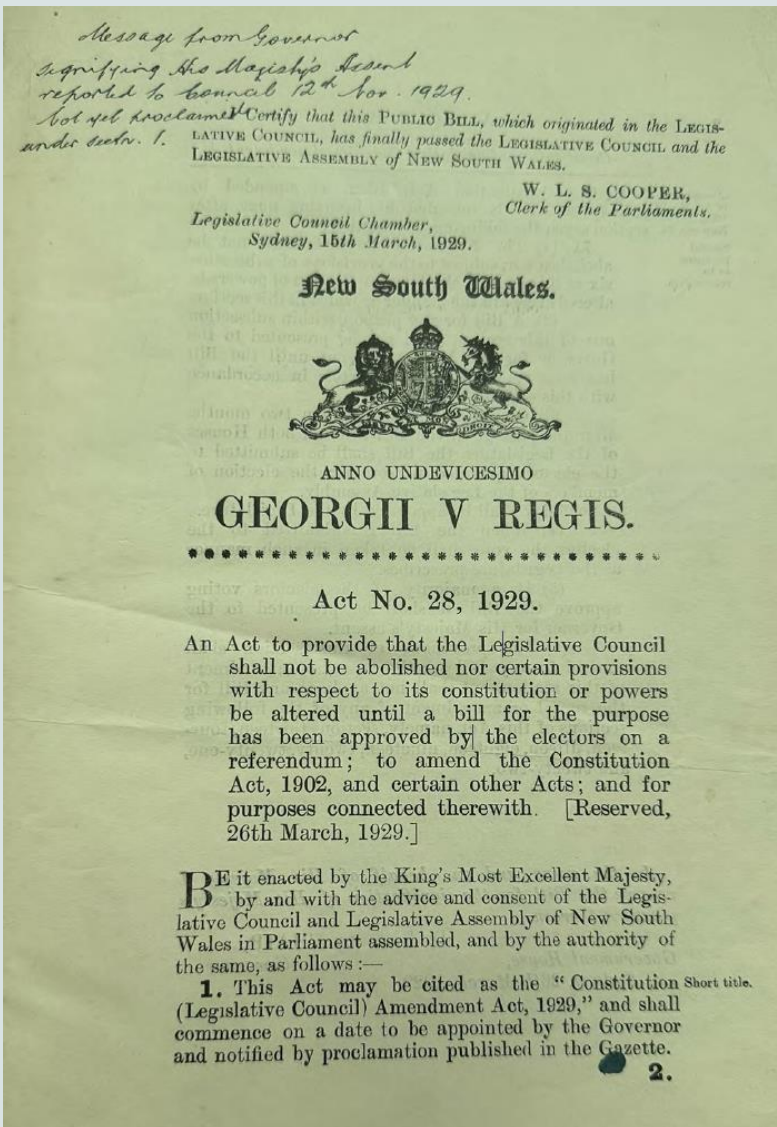
1. This memorial is submitted in view of the fact that, without the approval of the people, the Government of New South Wales has announced its intention of pressing through the Legislature, either in the forthcoming special session or in some later session, a Bill for the abolition of the Legislative Council of New South Wales.

The object of the memorial is to ask His Majesty's Secretary of State for the Dominions that, in the event of a Bill for that purpose being passed during the present Parliament, His Majesty should be advised to withhold the Royal Assent until the question whether the Legislative Council should be abolished has been submitted to the electors of New South Wales.





'Jacko', as seen by cartoonist George Finney — a stone monolith of severe mien.



Confidential

1928
A BILL

To provide that a bill concerning the Legislative Council shall not be presented to His Majesty for the signification of His Pleasure thereon except after the approval thereof by the vote of a majority of the electors at a referendum thereon; to amend the Constitution Act, 1902, and certain other Acts; and for purposes connected therewith.

Be it enacted, ...

Short title. 1. This Act may be cited as the "Constitution (Legislative Council) Amendment Act, 1928."

Amendment of Act No. 32, 1902, s. 7. 2. The Constitution Act, 1902, as amended by subsequent Acts is amended as follows:-

(a) by inserting at the end of section seven the following new paragraphs:-

Provided further that no such bill shall be presented to the Governor for transmission to His Majesty for the signification of his pleasure thereon unless and until the bill has received the approval of a majority of the electors qualified to vote at elections of members of the Legislative Assembly voting at a referendum at which the vote shall be taken in such manner as the Legislature prescribes.

Such referendum shall be held not less than three and not more than six months after the passage of the bill through both Houses of Parliament and at such referendum no other matter shall be referred to the electors.

Provided that any bill passed by the Legislature concerning the Legislative Council shall be presented to the Governor for transmission to His Majesty for the signification of his pleasure thereon only after the approval of a majority of the electors qualified to vote at elections of members of the Legislative Assembly voting at a referendum at which the vote shall be taken in such manner as the Legislature prescribes.

1.

1928
A BILL

To provide that a bill for the abolition of the Legislative Council or for the alteration of its constitution or powers shall be submitted to and receive the approval of a majority of the electors at a referendum thereon; to amend the Constitution Act, 1902, and certain other Acts; and for purposes connected therewith.

Be it enacted,

Short title. 1. (1) This Act may be cited as the "Constitution (Legislative Council) Amendment Act, 1928."

(2) This Act shall commence on a date to be fixed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No. 32, 1902. 2. The Constitution Act, 1902, as amended by subsequent Acts is amended by inserting at the end of section seven the following new section:-

New Sec. 7A.
Special provision as to referendum.

7A. (1) The Legislative Council shall not be abolished or its constitutional powers altered except in the manner provided in this section.

(2) A Bill for any purpose within subsection one of this section ~~must be passed by an absolute majority of each House of the Legislature and shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.~~

(3) Not less than two nor more than six months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly.

(4) When the Bill is submitted to the electors the vote shall be taken in such manner as ^{the Legislature} ~~Parliament~~ prescribes.

(5)

7

CONSTITUTION (LEGISLATIVE COUNCIL) AMENDMENT BILL

+++-----

The Bill inserts a new section, s. 7A, in the Constitution Act, 1902. This new section contains three important provisions, which are, in effect, as follows:-

(1) The Legislative Council is not to be abolished except on a referendum (s. 7A (1)).

(2) The constitution and powers of the Legislative Council are not to be altered except on a referendum (s. 7A (1)) - though this provision is subject to certain specified exceptions, which are set out s.7A (6)).

(3) The provisions of s. 7A are not to be altered except on a referendum (s.7 A (6)).

These provisions are legal restrictions, and not merely political restrictions, on the power of the State Parliament.

The legal basis of these restrictions is the Colonial Laws Validity Act, 1865, s. 5. That section makes it clear that the State Parliament can make laws respecting its "constitution, powers and procedure," but it also makes it clear that it can only do so, provided that such laws are passed in such manner and form as may from time to time be required by Act of Parliament (i.e. any Act of the British Parliament), letters patent, Order in Council, or "colonial law" for the time being in force in New South Wales.

(3) The provisions of s. 7A are not to be altered except on a referendum (s.7 A (6)).

These provisions are legal restrictions, and not merely political restrictions, on the power of the State Parliament.

The legal basis of these restrictions is the Colonial Laws Validity Act, 1865, s. 5. That section makes it clear that the State Parliament can make laws respecting its "constitution, powers and procedure," but it also makes it clear that it can only do so, provided that such laws are passed in such manner and form as may from time to time be required by Act of Parliament (i.e. any Act of the British Parliament), letters patent, Order in Council, or "colonial law" for the time being in force in New South Wales.

The effect of this proviso is discussed in the judgment of Isaacs and Rich, JJ., in *McCawley v. The King* (26 C.L.R. 9, at pp. 54, 57), where it is pointed out that "if no special provision as to the manner and form of passing a particular class of law exists, then the ordinary method may be followed; but if as to given class of law a specific method is prescribed, it must be followed."

UPPER HOUSE.

SIR JOHN PEDEN'S ADDRESS.

REASONS FOR REFORM.

Sir John Peden, President of the Legislative Council, in an address to members of the New South Wales Constitutional Association yesterday, said that if the people decided on an elective Chamber they could get rid of the problem of swamping, and make the House sufficiently independent to be of real service and a real safeguard.

The first and most important question, he said, was whether it was desirable to have a Legislative Council. It had to be remembered that quite apart from the work which a second Chamber could do as a House of revision, it might be so constituted as to be an adequate and satisfactory safeguard against hasty legislation, and against constitutional and other fundamental alterations being made in the system of government without the people being consulted—for example, as to the independence of the Judges, and as to the electoral system and its administration by an independent Electoral Commissioner. If the people of New South Wales desired to have the safeguard of a second Chamber they had to consider whether the present nominee system provided an adequate and satisfactory safeguard.

Under the existing Constitution members were appointed to the Legislative Council on the advice of Ministers. There was no express provision in the Constitution Act that the Governor was entitled to reject advice, but until recently it was taken for granted that the appointment of members to the Legislative Council was one of the matters on which the Governor had a discretion, to be exercised, of course, on constitutional lines. It was assumed, for instance, that if the Ministry had not a mandate from the electors for proposed legislation, or for the abolition of the Council, the Governor should refuse to swamp the Council. It seemed plain that the principle was sound. Otherwise the bicameral system established by the Constitution could be rendered valueless, or could

be ended, whenever a Ministry chose. During the last Parliament the principle was definitely challenged, and an attempt was made to abolish the Council without consulting the people. Whether a similar attempt would or would not be successful depended on the view that might be taken by the Governor for the time being, of his constitutional position, and on the question whether the Secretary of State for the Dominions would recall the Governor at the request of Ministers, if the Governor refused to accept their advice. In those circumstances it could not be said that the present nominee system provided an adequate or satisfactory safeguard.

There was another matter bearing on the question which should be mentioned, said Professor Peden. That was the bill which passed early last year to prevent the Council from being abolished or its Constitution or more important powers being altered except on a referendum. That legislation was to come into force on a day to be proclaimed. The question had been raised whether it would make the position satisfactory, if it were in force. He thought that the answer was that it would not. There were considerations which made that answer the only one that was safe. In the first place, there was the point whether the Act could be repealed by the ordinary process of legislation. That was a point of law which remained to be decided, and some eminent lawyers believed that the Courts would decide that the Act could be repealed in the ordinary way. In the next place, even if the Act could not be repealed in the ordinary way, that fact merely prevented the abolition of the Council by ordinary legislation, and did not necessarily prevent the swamping of the Council for the purpose of carrying measures which had never been before the electors, though the existence of the Act might strengthen the position of a Governor who was advised to swamp in circumstances which did not justify swamping.

Obviously if the people desired a second Chamber, it was not wise to base it on uncertainties either as to disputed points of law, or as to disputed constitutional understandings, whether as to abolition or as to swamping. Personally, he did not want to see the Constitution of the State resting on what the Government or the Secretary of State might say or do. The commonsense thing was to make their own Constitution.



1930-31.

—
LEGISLATIVE ASSEMBLY.
NEW SOUTH WALES.

LEGISLATIVE COUNCIL.

(CORRESPONDENCE BETWEEN HIS EXCELLENCY THE GOVERNOR AND THE PREMIER (MR. LANG)
RELATING TO PROPOSED ADDITIONAL APPOINTMENTS TO THE LEGISLATIVE COUNCIL.)

Ordered by the Legislative Assembly to be printed, 26 March, 1931.

His Excellency the Governor to the Premier.

Government House, Sydney, 5th November.

Dear Mr. Lang,

Since our talk this morning I have seen both Sir Philip Street and Sir John Peden.

A new point has arisen of which I was not aware when we discussed the matter. It has been pointed out to me that under paragraph 6 of clause 2 (7A) of Act 28 of 1929 any Bill for the repeal or amendment of that section must go to a referendum.

If this is valid it appears to constitute a legal bar to the repeal of Act 28 of 1929 without a referendum, and without repealing this Act it does not appear possible to abolish the Legislative Council without a referendum.

I am sure you will agree that I should have the opinion of your law officers as to the validity or otherwise of paragraph 6, and I shall be very grateful if you will obtain it for me.

Yours sincerely,

PHILIP GAME.

The Premier to His Excellency the Governor.

Premier's Department, Sydney, 7th November, 1930.

Dear Sir Philip,

I have consulted the law officers regarding the matter raised in your letter of 5th November, and am enclosing their opinion.

It is clear that the legal officers are of opinion that there is no legal bar against the policy embraced by the people of abolishing the Second Chamber.

In the opinion of the Government it is imperative that sufficient members should be appointed to the Upper House to ensure the observance of this clear mandate of the people, and I shall be glad to have your consent to make the necessary appointments.

Yours faithfully,

JOHN T. LANG,

Premier.

His Excellency Air Vice-Marshal Sir Philip Game, G.B.E., K.C.B., C.B.,
Governor of New South Wales.

Legislative Council.

No. , 1930.

A BILL

To repeal the Constitution (Legislative Council) Amendment Act, 1929, and the Constitution Further Amendment (Referendum) Act, 1930; and to amend the Constitution Act, 1902, as amended by subsequent Acts, and for purposes connected therewith.

[MR. WILLIS;—2 December, 1930.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Constitution (Amendment) Act, 1930." Short title.

2. The Constitution (Legislative Council) Amendment Act, 1929, and section 7A of the Constitution Act, 1902, as amended by subsequent Acts, and the Constitution Further Amendment (Referendum) Act, 1930, are repealed. Repeal of Act No. 28, 1929, Act No. 32, 1902, s. 7A, and Act No. 2, 1930

Legislative Council.

No. , 1930.

A BILL

To abolish the Legislative Council; to amend the Constitution Act, 1902, and certain other Acts; and for purposes connected therewith.

[MR. WILLIS;—2 December, 1930.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Constitution Further Amendment (Legislative Council Abolition) Act, 1930," and shall be read with the Constitution Act, 1902, as amended by subsequent Acts. Short title.

35943 c 1—

2.



PEDEN AGAINST THE PEOPLE ?

MAY HOLD UP COUNCIL BILLS

LABYRINTH OF TORY TACTICS TO RETAIN UPPER HOUSE

THWARTING DEMOCRACY

OUT of the labyrinth of Tory tactics, whereby the enemies of Democracy hope to save the Legislative Council and thwart forever the will of the people, emerges the knightly figure of Sir John Beverley Peden, LL.B., K.C.—inter-alia President of the Council.

"Let us pass these Abolition Bills and Sir John will decline to present them to the Governor for the Royal Assent—until by referendum the people affirm them," was the whisper that passed along the ranks of the Tories in the Council on Wednesday night.

A referendum would cost the people of N.S. Wales in the vicinity of £80,000 or £90,000—a heavy and needless expense.

Moreover, it would mean still further delay in putting in hand the constructive programme of the Labor Government—a delay possibly of from eight to nine months.

A referendum on abolition must necessarily be in favor—if the figures of the recent State election is any criterion.

The election issues were fought on the abolition of the Council just so much as they were fought on anything else.

The abolition of the Council question occupied the forefront of Mr. Lang's policy speech.

chosen by the enemies of Labor (it might be the 1/ wages tax), there must be conflict.

In that event, Mr. Lang would be able to insist upon additional appointments to the Upper House. But how many would the Governor approve?

The Government's path is strewn with the poisoned arrows of Capitalism.

But the first fight it appears is to be a legal encounter—that of Peden v The People.



LEGISLATIVE COUNCIL

Will President Insist on Referendum?

SIR JOHN PEDEN MAY BE DISMISSED

Talk of a Writ by the Government

SYDNEY, Sunday.

There is still considerable speculation in political circles as to the steps likely to be taken if Sir John Peden (President of the Legislative Council) refuses to present the Upper House Abolition Bill to the Governor until a referendum is held.

No credit is given to the report that immediately the bill passes both Houses the Premier (Mr. Lang) will lock the doors on the Legislative Council. The bill will not become law until it has been signed by the King, and over two months must elapse before that can be done, as the bill must lie on the table of the House of Commons for 30 days.

The intention of the State Ministry is to have the Upper House Referendum Repeal Bill and the Abolition Bill passed through all stages in both Houses by Wednesday; but in political circles it is believed that the measures cannot become operative for six months, even if eventually they receive the Royal assent.

Ministers feel that legal action is certain to take place on the initiative either of the Government or the anti-abolitionists. It is feared in Labor circles that Sir John Peden will take the view that he cannot constitutionally send on the bills for Royal assent unless they are first submitted to a referendum of the electors.

MUST SIGN

Ministers have discussed this possibility, and they now contend that it is mandatory upon the President to attach his signature to the bills and forward them on for the Royal assent. The Legislative Council standing order, they state, lays it down that "the President shall attach his signature" to any bill passed by both Houses, and shall forward it on for assent. This

standing order, Ministers state, was not amended by the Bavin Ministry.

Should Sir John Peden refuse to send the bills on for assent, it is stated in Labor political circles, the Government may approach the Courts and ask for a writ of mandamus to compel him to do so.

APPEAL TO COURTS

On the other hand, if the President does forward the bill on to the Governor, a section of the anti-abolitionists in the State Parliament threatens to appeal to the courts, and seek an order to restrain the State Ministry from proceeding with the abolition scheme until a referendum has been taken.

Ministers, it is stated, are now discussing the possibility of dismissing Sir John Peden from the position of President of the Legislative Council in the event of his refusal to send the bills in for the Royal assent.

Labor supporters argue that this could be done by an Executive Council minute providing, of course, that the State Governor (Sir Philip Game) would attach his signature to the document.

IN THE SUPREME COURT }
OF NEW SOUTH WALES }
IN EQUITY }

No. 9865 of 1930.

Between- THE HONOURABLE ARTHUR KING TRE-
THOWAN M.L.C. and THE HONOURABLE
THOMAS ALFRED JOHN PLAYFAIR D.S.O.
M.L.C. (on behalf of themselves and
all other the Members of the Legis-
lative Council of New South Wales
who are not Defendants herein) 10

Amended the 11th
day of December 1930
pursuant to Rule 175.

Allen Allen & Hemsley
Solicitors for the Plaintiffs.

(The amendment being the insertion
of the word "Ninth" before the
word "day" in paragraph 7).

Plaintiffs

-and-

THE HONOURABLE SIR JOHN BEVERLEY
PEDEN K.C.M.G., M.L.C. (President
of the said Legislative Council)
HIS MAJESTY'S ATTORNEY-GENERAL in
and for the State of New South
Wales, THE HONOURABLE JOHN THOMAS
LANG M.L.A., THE HONOURABLE JOHN
MARCUS BADDLEY M.L.A., THE HON-
OURABLE ANDREW AUGUSTUS LYSAGHT
M.L.A., CAPTAIN THE HONOURABLE
WILLIAM FRASER DUNN M.L.A., THE
HONOURABLE MARK GOSLING M.L.A.,
THE HONOURABLE WILLIAM DAVIES
M.L.A., THE HONOURABLE JOHN MORAN
TULLY M.L.A., THE HONOURABLE
JOSEPH LAMARCO B.A., LL.B., M.L.A.,
THE HONOURABLE MARK ANTHONY
DAVIDSON M.L.A., THE HONOURABLE
JAMES MCGILVER M.L.A., THE HONOU-
RABLE WILLIAM JOHN MCNEILL M.L.A.,
THE HONOURABLE WILLIAM THOMAS ELY
M.L.A., THE HONOURABLE ALBERT
CHARLES WILLIS M.L.C. and THE
HONOURABLE JAMES MATTHEW CONCANNON
M.L.C.

Defendants.

STATEMENT OF CLAIM.

1. The Plaintiffs are Members of the Legislative Council 40
of New South Wales.
2. The Plaintiffs as such Members of the said Legisla-
tive Council are entitled to all the rights and privil-
eges of such Members and to sit and vote in the said Coun-
cil and to have access and the use of Parliamentary prem-
ises including the use of the Parliamentary Library and to

11. In contravention of Section 7A of the Constitution Act
1902 the said Defendant The Honourable Sir John Beverley
said
Peden K.C.M.G., M.L.C., is threatening to present the Bill
referred to in paragraphs 6 and 7 hereof to the Governor
for His Majesty's assent although such Bill has not been
approved by the electors in accordance with Section 7A of 10
the Constitution Act 1902.

12. A Bill in the words and figures following initiated in
the said Legislative Council was passed by the said Legis-
lative Council on the Ninth day of December One thousand
nine hundred and thirty.

A B I L L

"To abolish the Legislative Council; to amend the Consti-
tution Act, 1902, and certain other Acts; and for pur-
poses connected therewith.

Be it enacted by the King's Most Excellent Majesty by and 20
with the advice and consent of the Legislative Council and
Legislative Assembly of New South Wales in Parliament as-
sembled and by the authority of the same as follows:-

1. This Act may be cited as the "Constitution Further
Amendment (Legislative Council Abolition) Act 1930" and
shall be read with the Constitution Act 1902 as amended
by subsequent Acts.

2. (1) The Legislative Council of New South Wales is
abolished.

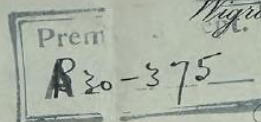


ALLEN ALLEN & HEMSLEY
Solicitors & Notaries.

REGINALD CHARLES ALLEN
ARTHUR WIGRAM ALLEN
ALFRED MACARTNEY HEMSLEY
HERBERT ALLEN
HAROLD MINTON TAYLOR
ARTHUR DENIS WIGRAM ALLEN
GEORGE WIGRAM DUNDAS ALLEN
NORMAN LETHBRIDGE COWPER

TELEPHONE NOS. { B 6267.
B 6268.

TELEGRAPHIC & CABLE ADDRESS "ALLENS SYDNEY."
ADDRESS ALL MAIL TO BOX 50 C.C. G.P.O.



Wigram House,
19 Castlereagh Street,
Sydney 11th December 1930.

WHEN REPLYING
PLEASE QUOTE

To/
The Honourable Sir John Beverley Peden, K.C.M.G.
President of the Legislative Council.

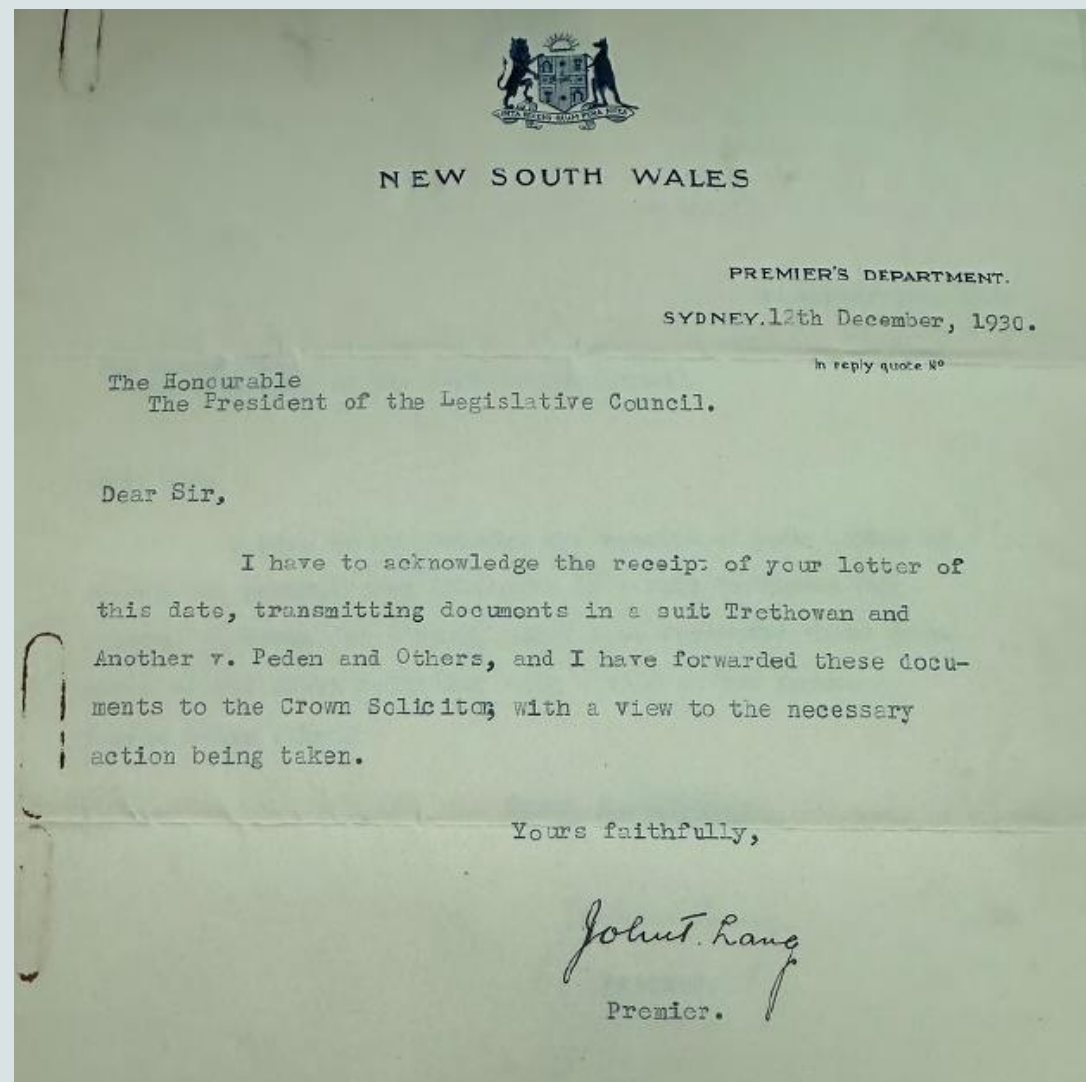
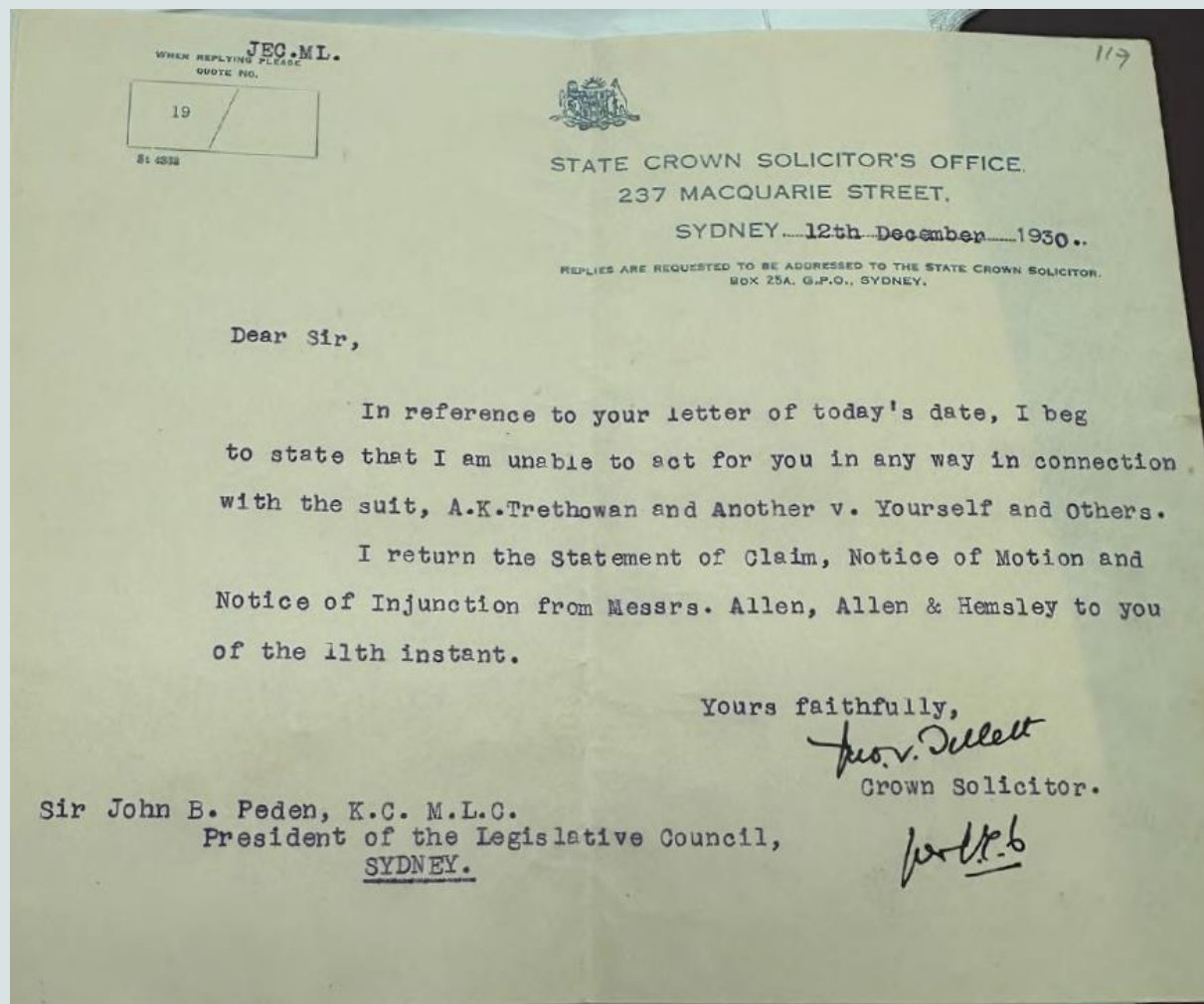
Dear Sir,

A. K. TRETHOWAN & ANOR v. YOURSELF AND OTHERS.

Please take notice that this afternoon His Honour Mr. Justice Long Innes granted an injunction against you and all the other Defendants in the above matter until Monday next the 15th instant presenting to the Governor for His Majesty's assent the Constitution (Amendment) ~~Bill~~ 1930 and the Constitution Further Amendment (Legislative Council Abolition) Bill 1930.

Yours faithfully,

Allen Allen & Hemsley



15. Letters from the Crown Solicitor and Jack Lang to Sir John Peden – 12 December 1930



IN THE SUPREME COURT)
OF NEW SOUTH WALES)

Trethowan & anor

v.

Peden & ors.

Coram: Streat, C.J.,
Ferguson, J.
James, J.
Owen, J.
Long Innes, J.

Monday, 15th December, 1930.

the said Defendant The Honourable Sir John Beverley Peden K.C.M.G., M.L.C., not appearing THIS COURT DID ORDER that the Defendant the Honourable Sir John Beverley Peden K.C.M.G. M.L.C., be restrained until Monday the fifteenth day of 20 December instant from presenting to His Excellency the Governor for his Majesty's assent the Bill mentioned in paragraphs 6 and 7 of the Statement of Claim herein until the same had been approved by the electors in accordance with Section 7A of the Constitution Act of 1902 AND THIS COURT DID FURTHER ORDER that the Defendants other than the Honourable Sir John Beverley Peden K.C.M.G., M.L.C., their servants and agents be restrained until Monday the fifteenth day of December instant from presenting or endeavouring or causing or procuring to be presented to His 30

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9865 of 1930.
IN EQUITY)

Between- THE HONOURABLE ARTHUR KING TRETHOWAN M.L.C. and THE HONOURABLE THOMAS ALFRED JOHN PLAYFAIR D.S.O., M.L.C., (on behalf of themselves and all other the Members of the Legislative Council of New South Wales who are not Defendants herein)

10

Plaintiffs,

-and-

THE HONOURABLE SIR JOHN BEVERLEY PEDEN K.C.M.G., M.L.C. (President of the said Legislative Council) HIS MAJESTY'S ATTORNEY GENERAL in and for the State of New South Wales THE HONOURABLE JOHN THOMAS LANG M.L.A., THE HONOURABLE JOHN MARCUS BADDELEY M.L.A., THE HONOURABLE ANDREW AUGUSTUS LYSAGHT M.L.A., CAPTAIN 20 THE HONOURABLE WILLIAM FRASER DUNN M.L.A., THE HONOURABLE MARK GOSLING M.L.A., THE HONOURABLE WILLIAM DAVIES M.L.A., THE HONOURABLE JOHN MORAN TULLY M.L.A., THE HONOURABLE JOSEPH LAMARO B.A., LL.B., M.L.A., THE HONOURABLE MARK ANTHONY DAVIDSON M.L.A. THE HONOURABLE JAMES MCGIRR M.L.A. THE HONOURABLE WILLIAM JOHN MCKELL M.L.A., THE HONOURABLE 30 WILLIAM THOMAS ELY M.L.A., THE HONOURABLE ALBERT CHARLES WILLIS M.L.C. and THE HONOURABLE JAMES MATTHEW CONCANNON M.L.C.

Defendants.

Tuesday the Twenty-third day of December One thousand nine hundred and thirty.

On Appeal from the Supreme Court of
New South Wales in its Equitable Jur-
isdiction.

BETWEEN— HIS MAJESTY'S ATTORNEY GENERAL in and
 for the State of New South Wales THE
 HONOURABLE JOHN THOMAS LANG M.L.A., THE
 HONOURABLE JOHN MARCUS BADDELEY M.L.A.,
 THE HONOURABLE ANDREW AUGUSTUS LYSAGHT 10
 M.L.A. CAPTAIN THE HONOURABLE WILLIAM
 FRASER DUNN M.L.A., THE HONOURABLE MARK
 GOSLING M.L.A., THE HONOURABLE WILLIAM
 DAVIES M.L.A., THE HONOURABLE JOHN MORAN
 TULLY M.L.A., THE HONOURABLE JOSEPH
 LAMARO B.A., LL.B., M.L.A., THE HONOUR-
 ABLE MARK ANTHONY DAVIDSON M.L.A. THE
 HONOURABLE JAMES MCGILL M.L.A. THE
 HONOURABLE WILLIAM JOHN MCKELL M.L.A.
 THE HONOURABLE WILLIAM THOMAS ELY M.L.A. 20
 THE HONOURABLE ALBERT CHARLES WILLIS
 M.L.C. and THE HONOURABLE JAMES MATTHEW
 CONCANNON M.L.C.

(Defendants)

Appellants
 -and-

THE HONOURABLE ARTHUR KING TRETHOWAN
 M.L.C. and THE HONOURABLE THOMAS ALFRED
 JOHN PLAYFAIR D.S.O. M.L.C. (on behalf 30
 of themselves and all other the Members
 of the Legislative Council of New South
 Wales not defendants)

(Plaintiffs)
 and THE HONOURABLE SIR JOHN BYRNELEY
 PEDER K.C.M.G. M.L.C. President of the
 said Legislative Council
 (Defendant)

Respondents.

NOTICE OF APPEAL.

TAKE NOTICE that pursuant to Special Leave granted to 40
 the abovenamed Appellants by the High Court of Australia
 of the said Court of the ninth day of January instant the

[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL FOR THE STATE OF }
 NEW SOUTH WALES AND OTHERS } APPELLANTS ;
 DEFENDANTS,

AND

TRETHOWAN AND OTHERS RESPONDENTS.
 PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

H. C. of A. *Constitutional Law (N.S.W.)—Legislative Council of New South Wales—Act requiring*
 1931. *any Bill to abolish Legislative Council or to repeal such Act to be submitted to a*
 Melbourne, *referendum—Bills to abolish Legislative Council and to repeal such Act passed by*
 Jan. 20, 21; *both Houses—Bills not submitted to referendum—Action to restrain presentation of*
 Mar. 16. *such Bills to Governor for royal assent until submitted to a referendum—Injunction*
to restrain presentation—Power of Parliament of New South Wales to fetter
legislation respecting abolition of Legislative Council and repeal or amendment of
provisions of Constitution of New South Wales—"Manner and form" of repeal
or amendment prescribed—The Constitution Statute (N.S.W.) (18 & 19 Vict. c.
54), sec. 4—Colonial Laws Validity Act 1865 (28 & 29 Vict. c. 63), sec. 5—Con-
stitution Act 1902 (N.S.W.) (No. 32 of 1902), sec. 7A—Constitution (Legislative
Council) Amendment Act 1929 (N.S.W.) (No. 28 of 1929), sec. 2—Constitution
Further Amendment (Referendum) Act 1930 (No. 2 of 1930).

Sec. 7A of the *Constitution Act 1902-1929 (N.S.W.)* provided :—"7A. (1)
 The Legislative Council shall not be abolished nor, subject to the provisions of
 sub-section six of this section, shall its constitution or powers be altered except
 in the manner provided in this section. (2) A Bill for any purpose within
 sub-section one of this section shall not be presented to the Governor or for His
 Majesty's assent until the Bill has been approved by the electors in accordance
 with this section. . . . (6) The provisions of this section shall extend to
 any Bill for the repeal or amendment of this section."



[PRIVY COUNCIL]

ATTORNEY-GENERAL FOR NEW SOUTH WALES AND OTHERS . . . } APPELLANTS;
DEFENDANTS,

AND

TRETHOWAN AND OTHERS . . . RESPONDENTS;
PLAINTIFFS,

AND

ATTORNEY-GENERAL FOR ENGLAND } INTERVENERS.
AND ANOTHER . . . }

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Constitutional Law (N.S.W.)—Legislative Council of New South Wales—Act requiring any Bill to abolish Legislative Council or to repeal such Act to be submitted to a referendum—Bills to abolish Legislative Council and to repeal such Act passed by both Houses—Bills not submitted to referendum—Action to restrain presentation of such Bills to Governor for royal assent until submitted to a referendum—Constitution Statute of New South Wales (18 & 19 Vict. c. 54), sec. 4—Colonial Laws Validity Act 1865 (28 & 29 Vict. c. 63), sec. 5—Constitution Act 1902 (N.S.W.) (No. 32 of 1902), sec. 7A—Constitution (Legislative Council) Amendment Act 1929 (N.S.W.) (No. 28 of 1929), sec. 2—Constitution Further Amendment (Referendum) Act 1930 (No. 2 of 1930).

PRIVY
COUNCIL.
1932.*
May 31.

Sec. 7A of the *Constitution Act 1902-1929* (N.S.W.) provided :—“(1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for

* Present—The Lord Chancellor, Lord Blanesburgh, Lord Hanworth, Lord Atkin and Lord Russell of Killowen.





19. The Legislative Council and a portrait of Sir John Peden

