LORD JUSTICE MAURICE KAY:

1. On 3 December 2002, the Hunting Bill was laid before the House of Commons. During that session of Parliament it was passed by the House of Commons, but it did not find favour in the House of Lords. A Bill in identical terms to that passed by the House of Commons was reintroduced in the House of Commons on 9 September 2004. Once again, it was passed by the House of Commons but met with resistance in the House of Lords. This time it received a third reading in the House of Lords, but only in a significantly amended form. On 18 November 2004, the House of Commons rejected the proposed amendments. The Speaker issued a certificate pursuant to section 2 of the Parliament Act 1911 as amended by the Parliament Act 1949, whereupon the Bill received the Royal Assent later the same day. The Hunting Act 2004 is due to come into force on 18 February 2005.

2. It is common knowledge that this legislation has been the source of great controversy, not only in Parliament but in the country. Its purpose is to criminalise the hunting of wild animals with dogs and the practice of hare-coursing. This case is not concerned with the wisdom or otherwise of the Act. Nor is it concerned with the question whether the effect of the Act will be to violate the human rights of members of the hunting community. We understand that there is a second case in the course of preparation which will address that issue. The sole issue in the present case is whether the Hunting Act was lawfully processed by Parliament. The contention of the claimants is that it was not because the procedure which resulted in the Royal Assent was that provided for by the Parliament Act 1949, and that Act was not validly passed by Parliament. The issue therefore is as to the validity of the Parliament Act 1949. I shall refer to the Parliament Act 1911 as *"the 1911 Act"*, the Parliament Act 1949 as *"the 1949 Act"* and the Hunting Act 2004 as *"the Hunting Act"*. To understand the case for the claimants it is first necessary to say something of the historical and constitutional context.

3. **The context** : The historical centrepiece of our constitution is the sovereignty of Parliament which was described by Dicey in these terms:

   "Parliament means, in the mouth of a lawyer .... the King, the House of Lords and the House of Commons; these three bodies acting together may be aptly described as the 'King in Parliament', and constitute Parliament.
   The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."
   (*Introduction to the Study of the Law of the Constitution*, 8th ed. pages 3-4)

   Happily, in the present case it will not be necessary to take into account the implication of our joining the European Economic Community in 1972 or the subsequent development of the Community and the establishment of the European Union.

4. The sovereignty of Parliament, in Dicey's sense, does not rest upon a single constitutional instrument. Whilst it was acknowledged in the Bill of Rights 1688 and in seminal jurisprudence such as **The Prince's Case** 8 Co Rep la, it is, in the words of the late Professor Sir William Wade,
   "the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation." (***The Basis of Legal Sovereignty***, [1955] CLJ 172, 188)

5. It is accordingly, in the analysis of Professor HLA Hart, *"the ultimate rule of recognition"* in our constitution, its validity not resting on some anterior legal rule but on accepted practice: (***The Concept of Law*** (1961)). This is all common ground and I resist the temptation to go further into its historical and intellectual foundations.

6. A hundred years or so ago, following the extension of the franchise, there was an obvious tension between the two Houses of Parliament — the elected Commons and the hereditary Lords. It intensified following the election of the Liberal Government in 1906. The House of Lords became an obstacle to the legislative programme of the elected Government. Matters came to a head when the House of Lords rejected Lloyd George's Budget in 1909. A general election was called and the Liberal Government was re-elected in 1910. Although the House of Lords then accepted the Budget, what had happened acted as a catalyst to legislative reform. In 1910, the newly re-elected Government introduced the Parliament Bill, the purpose of which was to emasculate the power of the House of Lords in relation to Money Bills and to limit its powers in relation to other Bills. The House of Lords refused to lie down and this led to a further dissolution of Parliament, another general election and

the re-election once again of the Liberal Government. It introduced the Parliament Bill 1911 which in due course was enacted as the 1911 Act, albeit only after the Prime Minster, Herbert Asquith, had indicated that, if necessary, he would invite King George V to create a large number of Liberal peers. I shall return to the detailed provisions of the 1911 Act later. At this stage it suffices to record that it enabled a Public Bill (other than a Money Bill or a Bill containing a provision to extend the maximum duration of Parliament beyond five years) to be passed as an Act of Parliament without the consent of the House of Lords, provided that it was passed by the House of Commons in three successive sessions, that it was rejected by the House of Lords in each of those sessions, and that two years had elapsed between the second reading of the Bill in the House of Commons in the first session and the date of its passage by the House of Commons in the third session. The procedure introduced by the 1911 Act was resorted to in order to enact the Welsh Church Act 1914, the Government of Ireland Act 1914 and, crucially for the present case, the 1949 Act.

7. The Labour Government which was elected in 1945 was committed to innovative legislation, including statutes to bring about the nationalisation of pivotal industries. It was fearful that the nationalisation legislation in particular would face fierce opposition in the House of Lords and it anticipated problems with the completion of its programme within the lifetime of a Parliament if it became necessary to resort to the 1911 Act to secure the passage of several Bills. Accordingly, it resolved to reduce the time requirements of the 1911 Act so as to refer to two sessions rather than three and the lapse of one year rather than two.

8. The Parliament Bill of 1947 was introduced on 31 October 1947. It was passed by the House of Commons but rejected by the House of Lords in each of the years 1947, 1948, and 1949. On 16 December 1949, it received the Royal Assent on the basis that there had been compliance with the provisions of the 1911 Act. The first three Acts to receive the Royal Assent in reliance upon the 1949 Act were the War Crimes Act 1991, the European Parliamentary Elections Act 1999 and the Sexual Offences Amendment Act 2000. The Hunting Act became the fourth Act to be promulgated in this way.

9. **The Claimants' Arguments** : In a nutshell, the case for the claimants is that the Hunting Act is not a lawful statute because its validity depends on the 1949 Act and that Act was not lawfully passed by Parliament. On this basis, the 1911 Act has not been amended and the Hunting Act was not passed in accordance with its unamended requirements because it was passed by the House of Commons in only two and not three sessions and within a relevant temporal span of one and not two years. The grounds of challenge mount the attack on the 1949 Act on three bases. **First**, it is said that, as a matter of construction, the 1911 Act cannot be used to achieve amendments to itself and that, accordingly, it was unlawful for the 1949 Act to reach the statute book without the approval of the House of Lords. **Secondly**, the claimants seek to characterise the procedure prescribed by the 1911 Act as one of delegated legislation, such that it was unlawful for the delegated body, namely the Sovereign and the House of Commons, to enlarge the scope of its own authority without the approval of the parent body, which includes the House of Lords. **Thirdly**, even if legislation passed under the 1911 Act is not delegated legislation in the strict sense, it nevertheless emanates from a subordinate legislature which, in the absence of an express power, cannot modify or amend the conditions upon which its power to legislate was granted. There is an inevitable overlap between these three grounds.

10. The three claimants are members of the Countryside Alliance but bring these proceedings in their personal capacities. Mr Jackson is the Chairman of the Countryside Alliance and a landowner whose land is within the area of a hunt, although he does not personally participate in hunting. Mr Martin is an employee of a hunt and is described as a professional huntsman whose livelihood and tied accommodation depend on the lawfulness of hunting. Mrs Hughes and her family have a business which is ancillary to hunting and she is herself a participant in hunting. The Attorney General, quite rightly in my view, takes no point about the standing of the claimants to bring these proceedings. Nor does he suggest that the court would lack the jurisdiction to grant the claimed relief if one or more of the claimants' arguments were to succeed. The claimed relief is a declaration that the 1949 Act is not an Act of Parliament and is consequently of no legal effect and that, accordingly, the Hunting Act is not an Act of Parliament and is of no legal effect. The sole defendant is the Attorney General. The

League against Cruel Sports has been permitted to participate in the proceedings as an interested party. I now turn to the three grounds of challenge.

11. **The first ground: construction of the 1911 Act** : Ironically, the 1911 Act was conceived as a temporary measure, pending the reform of the House of Lords. Part of the Preamble states:
".... whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation."

What a familiar ring that has. Section 1 of the Act contains a specific provision in relation to Money Bills enabling them to proceed to Royal Assent without the approval of the House of Lords within a short time frame. If such a Bill is sent to the House of Lords at least one month before the end of a Parliamentary session and is not then passed without amendment by the House of Lords within one month, it proceeds to the Royal Assent and becomes an Act of Parliament *"unless the House of Commons directs the contrary"*. The Hunting Bill was not a Money Bill.

12. The crucial provision for present purposes is section 2. In its 1911 form, it provided as follows:

"(1) If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons directs to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.

(2) When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the certificate of the Speaker of the House of Commons signed by him that the provisions of this section have been duly complied with.

(3) A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent any amendments which have been made by the House of Lords in the former Bill in the preceding session, and any amendments which are certified by the Speaker to have been made by the House of Lords in the third session and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section:
Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second or third session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords."

Section 3 provides that the certificate of the Speaker shall be conclusive for all purposes and shall not be questioned in any court of law. The claimants make it clear that they are not challenging the certificate of the Speaker –- a certificate to the effect that the Bill which became the Hunting Act complied with section 2 of the 1911 Act as amended by the 1949 Act. Their challenge is more fundamental. The Attorney General wisely takes no point on justiciability.

13. Section 4 provided for different enacting words to be used in relation to Acts of Parliament passed pursuant to the 1911 Act. The 1911 version of the new enacting words was:
"Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act 1911, and by the authority of the same, as follows."

14. Finally, section 7 of the 1911 Act reduced the maximum duration of a Parliament from seven years to five years. As I have set out, any future amendment of section 7 so as to extend the maximum duration beyond five years is expressly excluded from section 2.

15. As a matter of form, the relevant amendments to the 1911 Act introduced by the 1949 Act were to sections 2 and 4 of the 1911 Act. The references to *"three"* and *"third"* in section 2(1) were replaced by references to *"two"* and *"second"*. The references to *"third"* and *"second or third"* session in section 2(4) were replaced with references to *"second"*. In addition, section 4 of the 1911 Act was amended so that the relevant words of enactment became:
"Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by authority of the same, as follows."

16. On behalf of the claimants, Sir Sydney Kentridge QC submits that, properly construed, the 1911 Act, and especially section 2, did not confer on the Sovereign and the House of Commons an unlimited power to enact legislation without the approval of the House of Lords. In particular, it did not confer power to attenuate or remove the procedural and temporal conditions which it itself imposed. The construction argument was put in this way in the claimants' skeleton argument:
"First and obviously, the 1911 Act became law only through the assent of Monarch, Lords and Commons. Secondly, the Preamble to the 1911 Act makes it clear that 'Parliament' was to be understood, as it always had been, as consisting of the Queen and two Houses -- Lords and Commons. Similarly, the new enacting words introduced by section 4 of the 1911 Act make it clear that there was a distinction between 'Parliament' and the House of Commons. Astute as it is to this distinction, the 1911 Act cannot be regarded as having redefined 'Parliament'. Thirdly, as is again clear from the Preamble, the aim of the 1911 Act was to regulate the relationship between the two Houses of Parliament and to do so with the assent of both Houses. Furthermore, and importantly, any further reform of Parliament would be undertaken by Parliament itself, not by the Commons and Monarch alone under the procedure laid down by the 1911 Act. Fourthly, there are not words in the 1911 Act that indicate an intention to permit modifications of the carefully crafted conditions that it contains, save by Parliament as a whole, when it returned (as expressly envisaged) to the task of reforming the House of Lords."

17. Notwithstanding the attractive way in which these submissions are put, in my judgment they founder on the clear language of the 1911 Act. Section 2(1) expressly refers to *"any Public Bill"* (other than the specifically excluded Money Bill and a Bill to extend the maximum duration of Parliament). This has twofold significance. The word *"any"* is deliberately wide and the existence of express exclusions militates against the implication of additional excluded categories. In these circumstances, I accept the submission of the Attorney General that there is no scope for interpreting section 2 as containing an exclusion in relation to any Bill to amend the provisions of the 1911 Act. I also derive some assistance from a submission made by Mr David Pannick QC on behalf of the League Against Cruel Sports. He points to section 2(2) and the obligation placed on the Speaker to sign a certificate that *"the provisions of this section have been duly complied with"*. It would be an unduly onerous obligation if there were considered to be such provisions which are not manifest from the words of section 2(1).

18. Sir Sydney seeks to rely on the Preamble but I am unpersuaded that the Preamble assists the claimants' case. It is in these terms:
"Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:
And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis, but such substitution cannot be immediately brought into operation.
And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords."

The submission is that the reference to "Parliament" in the second recital means that the anticipated legislation to reform the House of Lords would have to be passed by Parliament in the fullest sense and not pursuant to the provisions of section 2 of the Act. This is said to illustrate the point that "any Public Bill" in section 2(1) is a more limited concept than may first appear. Moreover, the following words -– *"such provision as in this Act appears for restricting the existing powers of the House of Lords"* -– exclude a future amendment of the Act from being used for that purpose. I do not consider that the word *"Parliament"* in this context has the strict meaning that is suggested on behalf of the claimants. It is a word that is variously deployed in the Act. For example, in section 1(2), in the context of Money Bills, reference is made to *"money provided by Parliament"*. There must have been in contemplation money provided by Parliament in its attenuated form, as permitted by section 1(1). More importantly, by section 2(1) itself, a Bill thereby enacted becomes "an Act of Parliament".

19. The historical context is also relevant. As the Preamble makes clear, there was an intention to reform the House of Lords so as to put it on *"a popular instead of a hereditary basis"*. I do not believe that the Preamble can be read as a self-denying ordinance which put out of reach resort to section 2 in the event of the House of Lords itself subsequently rejecting such a reform –– a possibility which must have been considered. Nor do I read the reference to "provision as in this Act appears" as a fetter upon future legislation. Thus, even if the Preamble is a potential aid to construction of section 2(1) –– which I am prepared to assume, in spite of reservations stemming from **Attorney General v Prince of Hanover** [1957] AC 436 (where resort to a Preamble seems to have been predicated on unclear wording being clarified by the clear words of the Preamble) –– I do not consider that it helps to establish the construction for which the claimants contend. For all these reasons I am satisfied that, properly construed, the words "any Public Bill" are sufficient to embrace a Bill to amend the 1911 Act.

20. **The second ground of challenge: delegated legislation** : This ground of challenge is based on the proposition that an Act passed pursuant to the 1911 Act is a species of delegated legislation in the sense that, upon analysis, the 1911 Act was an instrument whereby a superior body (Sovereign, the House of Commons and the House of Lords) delegated to a lesser body (Sovereign and the House of Commons) the power to enact legislation but strictly on the conditions prescribed by the 1911 Act. In the claimants' skeleton argument the point is then expressed in this way:

"Legislation passed under the 1911 Act that purports to attenuate or remove the conditions imposed by that Act infringes the principle that a delegate may not enlarge the scope of his own authority."

This argument lies at the heart of the claimants' case. It has a very respectable academic pedigree. In his 1955 article in the Cambridge Law Journal the eminent and sadly now recently deceased public lawyer Professor Sir William Wade wrote:

"no difficulty arises over the Parliament Acts 1911 and 1949, if they are classed -- as it is submitted they should be classed -- as creating yet a further species of delegated legislation. The sovereign legislature has always been regarded as having three component parts, and an Act to which the Lords do not assent is not an Act of the sovereign Parliament at all. It requires ulterior legal authority, which of course is provided by the Parliament Acts, and the Act of 1911 contains plenty of indications that Acts passed under it without the consent of the Lords are delegated legislation: the threefold sovereign has delegated its power, subject to restrictions, to a new and non-sovereign body made up of two of its parts only. Difficulty only arises if the expression 'Act of Parliament' is used for sovereign and non-sovereign Acts indiscriminately."

The thesis was also supported by Professor O Hood Phillips (see his Constitutional and Administrative Law (8th edn), pp 79-80) and by Graham Zellick (see Is the Parliament Act Ultra Vires? [1969] NLJ 716). Lord Donaldson of Lymington expressed a similar view in a debate on his Parliament Act (Amendment) Bill in 2001 (HL Deb, 19 January 2001, cols 1308-1332, which Bill was never enacted).

21. On the other hand, the ball which Professor Wade set rolling half a century ago was not picked up by all or even most subsequent academic commentators. In their Constitutional and Administrative Law (8th edn, 1993), de Smith and Brazier characterized legislation passed pursuant to the 1911 Act not as delegated legislation but rather as Parliament *"redefining itself for particular purposes"* (p 93). Professor Wade was not impressed. Returning to the subject in 1980 in his Constitutional Fundamentals he wrote:

*"Professor de Smith maintained that by these Acts Parliament had redefined itself for particular purposes: the sovereign legislature of Queen, Lords and Commons had provided an optional alternative consisting of Queen and Commons only; and this new body could legislate in accordance with the Act for all purposes other than the prolongation of the life of Parliament. Such legislation, he said, was primary and not delegated; yet he accepted that if it purported to prolong the life of Parliament it would be a nullity. With this last point I fully agree, but I cannot square it with the notion that legislation enacted under the Parliament Acts is primary. The acid test of primary legislation, surely, is that it is accepted by the courts at its own face value, without needing support from any superior authority. But an Act passed by Queen and Commons only has no face value of its own. As Cooke put it in **The Prince's Case**, 'If an Act be penned, that the King with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament for three ought to assent to it scil. the King, the Lords and the Commons.' An Act of Queen and Commons alone is accepted by the courts only because it is authorised by the Parliament Act -- and indeed it is required to recite that it is passed 'in accordance with the Parliament Acts 1911 and 1949 and by authority of the same'. This is the hall-mark of subordinate legislation and I do not understand how it is possible to disagree with Professor Hood Phillips when he says that it is the correct classification."*

As against this, the Wade/Hood Phillips view is opposed by, amongst others, Professor Bradley, The Sovereignty of Parliament – Form or Substance?; in Jowell and Oliver (eds), The Changing Constitution (4th edn, 2000); E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law (11th edn, 1993, pp 27-28); Peter Mirfield, Can the House of Lords Lawfully Be Abolished? (1979) 95 LQR 36 -- at least in relation to the 1949 Act; and Winterton, Is the House of Lords Immortal? (1979) 95 LQR 386.

22. Sir Sydney adopts and relies upon Professor Sir William Wade in particular. He also claims support for this view in (1) section 21(1) of the Interpretation Act 1978 which defines delegated legislation as including "instruments made .... under [an] Act"; (2) Bennion, Statutory Interpretation (4th edn, 2002, p 197) which defines delegated legislation as "an instrument made by a person or body (the delegate) under legislative powers conferred by Act (the enabling Act)", and (3) Craies on Legislation 8th edition, p 9, which states:
"All legislation can be classified as either primary or subordinate. Quite simply, legislation is subordinate if it owes its existence and authority to other legislation: if it does not, it is primary."

23. If the 1949 Act is properly described as delegated legislation, I would have no difficulty in accepting the claimants' case. However, in my judgment the label of delegated legislation is inapposite. I accept the submission of the Attorney General that the 1911 Act is a special case which arose in a specific context which bore little or no resemblance to delegated legislation as that concept is generally understood. The purpose of the 1911 Act was to change the relationship between the House of Commons and the House of Lords in the process of enacting legislation (save in the expressly excluded areas). To that extent, the language of *"redefinition"* or *"remodelling"* (the latter being the word used by Francis Bennion in his helpful article ***Is the New Hunting Act Valid?*** Justice of the Peace, 27 November 2004, 928) is more appropriate than that of "delegation". Moreover, one only has to look at the product of the process for the position to become clear. What emerges when a Bill is enacted pursuant to section 2 of the 1911 Act is itself an Act of Parliament –- nothing less. Section 2(1) itself expressly provides that the Bill *"shall .... become an Act of Parliament on the Royal Assent being signified thereto"*. I consider it erroneous to characterise any Act of Parliament as *"delegated legislation"*. The error is to take and an established concept –- delegated legislation –- and to try to squeeze into it a phenomenon for which it is ill-suited and was never intended. Definitions of delegated legislation in the Interpretation Act or in the literature simply do not help. The phenomenon they are seeking to define is not an Act of Parliament. On the other hand, a Bill enacted pursuant to section 2 of the 1911 Act is expressly and precisely that.

24. In my judgment, the correct way to describe the 1911 Act is as a statute which redefined or remodelled the legislature in such a way that there were thenceforth two routes through which Acts of Parliament could be enacted -– the traditional way involving the Sovereign, the House of Commons and the House of Lords and the 1911 Act way emanating from the Sovereign and the House of Commons, provided that the conditions imposed by the 1911 Act are met. I accept that that proviso –- the existence of statutory conditions compliance with which can be investigated and secured by judicial process -– points to a difference between the 1911 Act and its progeny on the one hand and the general run of Acts of Parliament on the other hand. That difference has something in common with delegated legislation as we know it but the comparison ends there. Thus, Sir Sydney is constrained to concede that an Act passed pursuant to section 2, whilst it can be scrutinised judicially to ensure compliance with the statutory conditions, is not susceptible to challenge on **Wednesbury** grounds or for bad faith. There is a further aspect to all this which, perhaps surprisingly, received no attention in submissions but which gives some support to the conclusion I had reached without it. *"Primary legislation"* and *"subordinate legislation"* are concepts of critical importance in the Human Rights Act 1998. "Primary legislation" for the purposes of that Act is defined as including, amongst other things, *"any public general Act"* (section 21(1)). Such legislation cannot be quashed but is subject to the declaration of incompatibility procedure provided by section 4. I have no doubt that an Act of Parliament falls within those provisions, by whichever route it was enacted. That lends support to the proposition that if *"Act of Parliament"* calls for further taxonomy, an Act passed pursuant to the Parliament Acts is

more akin to primary legislation, even though, exceptionally, it is subject to judicial scrutiny to ensure compliance with the requirements of section 2.

25. It has been a pleasure to engage with a debate which has divided constitutional experts for half a century. However, I have come to the conclusion that Professor Wade's theory –- if I may so term it -– does not fit the matrix of the 1911 Act. I reject the delegated legislation argument. Indeed, I have the distinct impression that it was originally crafted more out of a concern with constitutional theory and desiderata than with rigorous statutory interpretation. As the Attorney General pointed out, it seems that by 2001, Professor Wade had become unsupportive of what was to become the claimants' case: see the speech of Lord Donaldson of Lymington in the debate on the Parliament Acts (Amendment) Bill, Hansard, 19 January 2001, col 1310, referring to a letter which he had received from Professor Wade.

26. **The Third ground: a subordinate legislature** : This ground of challenge rests not on any analogy with delegated legislation in a domestic context but on principles derived from authorities concerned with the relationship between the Westminster Parliament and colonial or Dominion legislatures. The submission on behalf of the claimants is that those authorities establish the principle that a subordinate legislature may not, in the absence of an express power, modify or amend the conditions under which its power to legislate was granted. It is suggested that the Sovereign and the House of Commons constitute a subordinate legislature for this purpose.

27. The principal authorities relied on are **The Queen v Burah** (1878) 3 App Cas 889; **McCawley v The King** [1920] AC 691; **Harris v Minister of the Interior** 1952 (2) SA 428; **Harris v Minister of Interior** 1952 (4) SA 769; and **Bribery Commissioner v Ranasinghe** [1965] AC 172. For present purposes I limit myself to the following citations. In **Burah**, Lord Selborne said (at p 904):

"If what has been done is legislation, within the general scope of the affirmative words which give the power, and it violates no express condition or restriction by which that power is limited... it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

In **Ranasinghe,** Lord Pearce said (at p 198):

"Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions."

Sir Sydney relies on these and other passages to support the proposition that, in the absence of an express power to amend the governing statute itself by the prescribed procedure, no such power exists. Applying this to the 1911 Act, he submits that because the Act, in particular section 2, does not expressly provide for its own amendment by the section 2 procedure, the procedure cannot be used for that purpose. In my judgment, that is not correct. What section 2 permits is what it says it permits. One is driven back to the language of the section and of the Act. It permits the procedure to be used in relation to *"any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years)"*, subject to the conditions that follow. For the reasons I gave when rejecting the first ground of challenge, I consider that the formulation used in section 2(1) is wide enough to embrace a Bill which amends section 2 itself. To that extent, to borrow the words of Lord Pearce, *"the regulating instrument"* (the 1911 Act) does *"so provide"*, in a way which embraces what became the 1949 Act. It does so subject to conditions, but they were respected. Sir Sydney submits that **Ranasinghe** in particular requires a power to amend to be express and clear. However, as the Attorney General points out, **Ranasinghe** is not an authority requiring an express power. It concerned the Ceylon (Constitution) Order in Council 1946 which contained an express power. Moreover, the whole line of authority relied upon by the claimants, dealing as it does with the relationship between the Westminster Parliament and the devolved legislatures of former colonies with (in Lord Birkenhead's phrase –- **McCawley,** p703) *"controlled constitutions"*, is not strictly analogous to the context of the Parliament Acts. In my judgment there is no established principle applicable to this case which denies a power of amendment of the earlier statute in the absence of the express conferral of one specifically dealing with amendment. What is important is the language of the earlier statute. I do not doubt that it is sufficient to permit amendment in the manner that was achieved by the 1949 Act.

28. **Some other issues** : The points that I have already addressed are sufficient to dispose of this application. However, submissions have ranged over other issues and it is appropriate to advert to some of them.

29. (1) **The Parliamentary debates in 1911.** Because I have reached the conclusion that the meaning of the 1911 Act is clear and unambiguous, it has not been necessary to resolve an issue as to whether it may be appropriate to resort to Hansard to assist in the process of interpretation in accordance with the principles set out in **Pepper v Hart** [1993] AC 593. It is submitted on behalf of the claimants that in any event those principles are inapplicable in the present case. Reliance is placed upon **R v Secretary of State for the Environment, ex parte Spath Holme Ltd** [2001] 2 WLR 15 , which is said to support the proposition that **Pepper v Hart** does not apply when the issue relates to the scope of a statutory power. In the circumstances, it is not necessary to decide this point, although I tend to the view that **Pepper v Hart** is not necessarily inapplicable where there is ambiguity in the statutory language in which the statutory power is expressed, as opposed to the situation in **Spath Holme** which was not one of ambiguous statutory language. There the issue related to what had been said in Parliament about the way in which it was intended to exercise an unambiguously expressed statutory power. Be that as it may, although I have not resorted to Hansard as an aid to interpretation, it is pertinent to observe that, as a matter of history, the reports of the debates on the Parliament Bill in 1911 make it clear that the question whether what was to become section 2 of the 1911 Act could itself be amended through the section 2 procedure was addressed at the time. On 24 April 1911 in the House of Commons Prime Minister Asquith responded to a proposal from Sir Philip Magnus that what was then clause 2(1) should be amended so as to provide an exclusion for *"a Bill for modifying this Act"*. The Prime Minister explained why the Government opposed such an amendment. He stated (Hansard, cols 1473-1474):

"I cannot think that it would be either logical or convenient that we should make a special exception in favour of the provisions of this particular Bill. The Government may have a parental pride in the Bill. As a Bill, I believe it is a very good Bill -- but I should be very sorry to see the liberty of a future House of Commons in any way impaired or restricted by the means of an exception proscribing any Amendments which experience may show to be necessary."

The amendment was defeated.

30. On 29 June 1911, in the House of Lords the Earl of Ancaster proposed an amendment which would have created the exclusion from clause 2 of a Bill *"extending or modifying the provisions of this Act"*. Viscount Morley of Blackburn (the Lord President of the Council) opposed the amendment on behalf of the Government. He said (Hansard column 1183):

"It is inexpedient and against the principle and policy of the Government to enlarge the chapter of exemptions."

The Earl of Ancaster did not press the proposed amendment. A little later another minister, Viscount Haldane (Secretary of State at the War Office) added on behalf of the Government (Hansard, column 1196):

"It is not desirable to lay down exceptions to a broad principle. We think that the procedure which this Bill embodies represents in the main what is the true relation between the two Houses of Parliament. It is the general principle and it is not desirable, therefore, to try and make exceptions to it which would only lead to a breach through which a good deal might flow."

Thus, history discloses that the central issue in this case was in the minds of Parliamentarians in both Houses in 1911.

31. (2) **Subsequent history** I have not found it necessary to use events and matters subsequent to the enactment of the 1911 Act as an aid to interpretation. The Attorney General submits that it is significant that the Sovereign, the House of Commons and the House of Lords clearly accepted that section 2 is available in relation to matters of major constitutional change. Sir Sydney does not now dispute this. Indeed, the same Parliament saw the enactment of the Welsh Church Act 1914 (which disestablished the Church in Wales and affected the composition of the House of Lords by excluding the Welsh bishops) and the Government of Ireland Act 1914 (which affected the composition of the House of Commons), both pursuant to section 2 of the 1911 Act. The Welsh Church (Temporalities) Act 1919, which was approved by both Houses of Parliament, plainly treated the Welsh Church Act

1914 as valid primary legislation with which it "shall be construed as one". It seems to me that, at the very least, all this is consistent with the analysis of the Act which I have found to be the correct one.

32. It is also instructive to consider the three Acts passed by reference to the 1949 Act prior to the Hunting Act. None has been successfully challenged (although there was an unsuccessful attempt to run at least some of the present arguments in the Central Criminal Court in **R v Serafinowicz,** the first prosecution under the War Crimes Act, but no transcript of the ruling of Potts J survives). However, there has been subsequent acknowledgement of these Acts by Parliament, in the sense of the Sovereign, the House of Commons and the House of Lords, in subsequent legislation. Thus, the War Crimes Act was amended by both the Criminal Justice and Public Order Act 1994 (Sch 4, Part II, para 72) and the Criminal Procedure and Investigations Act 1996 (s.44(5)(m)). The European Parliamentary Elections Act 1999 was repealed and consolidated in the European Parliamentary Elections Act 2002. The Sexual Offences (Amendment) Act 2000 was amended by the Sexual Offences Act 2003 (Sch 6, para 45). I repeat that I have not used these historical facts as aids to construction of the 1911 Act. I tend to the view that, if there had been ambiguity in that Act, it might have been possible to resort to them as aids although not determinative ones, notwithstanding the absence of specific authority to that effect.

33. (3) **Thoburn v Sunderland City Council** [2003] QB 151; [2002] EWHC 195 (Admin)
In the course of his submissions, Sir Sydney made extensive reference to the decision of the Divisional Court in **Thoburn**. In my judgment, it does not assist the claimants in the present case. It was concerned with the question of implied repeal of a constitutional Act (the European Communities Act 1972) by subsequent non-constitutional legislation and has nothing to say on the issue in the present case.

34. **Conclusion** : It follows from what I have said earlier in this judgment that I am not persuaded that the 1949 Act is invalid. As such invalidity is a prerequisite to this challenge to the Hunting Act, I conclude that the application for judicial review must fail. Constitutionally, I can well understand the argument that it would have been preferable if amendments to the 1911 Act had been excluded from the machinery of section 2. However, they were not. Apart from the two specifically excluded matters, resort to section 2 is constrained more by political self-restraint and accountability than by legal inhibition.

35. **MR JUSTICE COLLINS:** I agree with the conclusions reached by my Lord and the reasons that he has given for reaching them. However, having regard to the importance of the issue involved in this case, I have thought it right briefly to give my own reasons for reaching the same conclusion.

36. The claimants assert that the 1949 Act is invalid since it purported to amend the powers whereby the 1911 Act permitted Acts of Parliament to be passed into law notwithstanding that the House of Lords had not consented. That, submits Sir Sydney, the 1949 Act could not do because of its nature as a sort of delegated as opposed to primary legislation. While it was not open to challenge on the usual grounds upon which judicial review would lie nor did the maxim delegatus non potest delegare apply to it, it could not itself change the provisions contained in the 1911 Act which set out the conditions under which the procedure could operate.

37. Prior to 1911, the only way in which an Act of Parliament could be brought into being was if it was passed by both Houses and then put to the Sovereign. The expression *"Parliament"* in this context was taken to mean the Sovereign, the Lords and the Commons together. The 1911 Act enabled an Act of Parliament to come into being by a different route by dispensing in defined circumstances with the need for it to be passed by the House of Lords. Section 2(1) expressly provided that if the necessary conditions were met the Bill *"shall be presented to His Majesty and become an Act of Parliament"*. It is clear from the legislation to which we have been referred passed under the provisions of the Parliament Act that it was then treated as any other Act of Parliament and assumed to have precisely the same status.

38. The Attorney-General submits that the language of the 1911 Act read in the context of its obvious purpose as set out in the preamble shows that the Act of Parliament produced under its terms is indeed no different from any other Act. There is no question of delegation: it is merely another way by which an Act of Parliament can come into being. It follows that there can be no limitation on the scope

of any such Act save such as is expressly dealt with in the 1911 Act. The limitation is to be found in the words in parenthesis in section 2(1) *"other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years"*. There is, he submits, no justification for inferring any further limitation, since section 2(1) refers to "any Public Bill".

39. Thus the first and in my view the key question is whether an Act of Parliament which comes into being by means of the Parliament Act procedure is to be regarded as delegated or subordinate as opposed to primary legislation. A number of highly respected constitutional lawyers have expressed the opinion that it is to be regarded as a species of delegated legislation. Particular reliance has been placed on observations of Sir William Wade in Constitutional Fundamentals (1980) at pages 27-28, which have already been cited by my Lord. While it is of course true that an Act passed in the normal way and bearing the usual words of enactment is accepted by the Court at its own face value, that is because the Courts have declined to entertain any claims based upon procedural impropriety or fraud in relation to any provision in an Act. Thus in **Pickin v British Railways Board** [1974] AC 765 we find Lord Reid saying this at page 787G:

"The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its standing orders perform these functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an enquiry into the manner in which they performed their functions in dealing with the Bill which became the British Railways Act 1968."

At page 788A he continued:

"For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them. Any such investigations as the respondent seeks could easily lead to such a conflict and I would only support it if compelled to do so by clear authority. But it appears to me that the whole trend of authority for over a century is clearly against permitting any such investigation."

This inhibition is to a large extent based on the Bill of Rights and the consequent bar to the impeachment of proceedings in Parliament. That aspect is dealt with by section 3 of the 1911 Act so that the inability to question the Speaker's Certificate, which is an essential prerequisite to the validity of an Act passed under the Parliament Act procedure, puts that Act in the same position as ordinary Acts. The only material difference between the two methods lies in the matters which can be dealt with under the section 2 procedure. That is what led Sir William to regard such an Act as having the hallmark of subordinate legislation, namely that it could be regarded as a nullity if it, for example, sought to extend the life of Parliament beyond 5 years.

40. It is true that the courts cannot declare enacted law to be invalid: see per Lord Simon of Glaisdale in **Pickin v British Railways Board** at page 798F. That is because of the Sovereignty of Parliament. But Parliament itself can, if it wishes, put constraints on the extent of its own sovereignty. What it did in the 1911 Act was to provide for a new procedure whereby an Act of Parliament could be enacted and to limit to a small degree what an Act which came into existence by means of that procedure could deal with. That is not to say that the Act that results is to be regarded as delegated legislation, but merely that the sovereignty is, by decree of Parliament, subject to a limitation which must be followed. It is only if that limitation is on the face of the Act not complied with that a court can intervene; otherwise the Act is unimpeachable.

41. In my view, the terms of the 1911 Act show that it is not and was not intended to be limited in the way Sir Sydney submits. The preamble (which can properly be used to indicate its purposes and certainly in cases of ambiguity as an aid to its construction) makes it clear that the Act came into being because of the intention to substitute a popular for an hereditary upper house which could not *"be immediately brought into effect"* and that that would require *"provisions to be made by Parliament in a measure effecting such substitution for limiting or defining the powers of the new Second Chamber"*. Subject to Sir Sydney's submission based on the words "by Parliament", it seems to me to be inconceivable that in enacting the 1911 Act Parliament did not have regard to the very real possibility that the existing House of Lords would not willingly accept its own demise or measures to limit its powers and so the provisions of the Act might have to be used. If I correctly followed the submissions, Sir Sydney did not contend that constitutional changes, including the substitution of a second chamber based on a popular rather than hereditary basis, could not be effected by means of the 1911 Act procedure. His submission was

limited to the contention that it could not change the restriction on the powers of the House of Lords (or, presumably, the Second Chamber whatever it came to be called) set out in the Act. It is obvious that it would not necessarily be easy to know what did and what did not fall outside the scope of a future Act.

42. Sir Sydney relies on the words *"by Parliament"*, submitting that *"Parliament"* means the Queen, the Lords and the Commons. I do not think that in the context of the 1911 Act that is so. In section 1(2) the expression "money provided by Parliament" can mean money provided through what was a Money Bill and which had been passed without the consent of the House of Lords. Equally, in section 2(1), Parliament is clearly used in a narrower sense. Thus I see no reason to read the word in the preamble as indicating that any future provisions for limiting and defining the powers of the new second chamber must be by way of an Act passed in the normal way.

43. There is nothing in the wording of section 2(1) which suggests any such limitation. The word *"any"* is very wide and the words in parenthesis provide the specific limitations. It would have been easy enough to have added the limitation which Sir Sydney submits is in any event to be regarded as there. While I do not regard the matter as in any way determinative, it is noteworthy that unsuccessful attempts to insert such a limitation were made in both the Commons and the Lords.

44. Sir Sydney concentrated on the conditions in section 2(1). These meant that an Act which resulted could not properly be regarded as primary legislation since it depended for its existence on a pre-existing Act. If it could not be regarded as primary, it must be secondary or subsidiary. As such, it could not amend the powers by virtue of which it could exist. He was initially inclined to submit that it could not amend the 1911 Act at all. He recognises that the limitation in section 2(1) to extending the maximum duration of a Parliament made it difficult to submit that there would be no power to reduce the maximum by means of the Parliament Act procedure. So the narrower limitation of powers was relied on and this was said to be consistent with decisions of the Privy Council dealing with the extent of the powers of colonial or Dominion legislatures to amend provisions contained in Constitutions. The analogy lay, he submitted, in the inability to amend the Act of the Imperial (ie the United Kingdom) Parliament. My Lord has dealt with this part of the argument and I entirely agree with what he has said about it.

45. I am far from persuaded that the labelling primary or delegated is helpful. We have to consider the provisions of the Act to see what effect it has. There is no question but that an Act passed by the use of the section 2 procedure is an Act of Parliament and must be treated by the courts and given the same effect as any other Act. Thus it has all the trappings of primary legislation. The words of enactment show that it has come into existence by means of the Parliament Act and the Speaker's Certificate will prevent any investigation into whether the procedure had been properly carried out. In that regard also it is treated in the same way as any other Act. It is only if on its face it purports to extend the life of Parliament that it can be challenged, since the other limitations will be covered by a Speaker's Certificate. If there is no certificate, it is not a Money Bill -– see section 1(2) and (3). The 1911 Act extends to any public Bill without limitation beyond that expressly included. Thus as it seems to me the clear intention of Parliament in 1911 and the effect of the Act was to enable legislation to be enacted which in every respect save one (and that very limited and impossible to conceive occurring) was identical to an Act passed in the ordinary way. To regard that as delegated legislation and so limited in the manner suggested is in my view impossible. No doubt it is in a class of its own but I can see no justification for applying the limitations which might otherwise be appropriate to delegated legislation, particularly as Sir Sydney recognises that, if it is to be so regarded, it has its own special features.

46. In the circumstances it is not necessary to consider whether recourse could be had to Hansard since there is in my view no ambiguity. But for the reasons given by my Lord it is clear that if recourse is to be had, it supports the construction contended for by the Attorney General.

47. **MR SALES:** My Lord, I have an application to make, which is that the claimants pay the defendants' costs?

48. **LORD JUSTICE MAURICE KAY:** Sir Sydney?

49. **SIR SYDNEY KENTRIDGE:** My Lord, I have nothing to say about that. I have an application, my Lord. My application is for permission to appeal to the Court of Appeal. I do not know what my learned friend's attitude is about that?

50. **MR SALES:** Not to oppose, my Lord.

51. **LORD JUSTICE MAURICE KAY:** We anticipated your application. We have previously discussed it. We grant you permission. We grant it not on the basis of a real prospect of success, but on the basis of other compelling reasons, those compelling reasons being obvious in the circumstances. This is an issue that has been around in the literature for many years. It has been raised at first instance on one previous occasion. It would be wrong if the matter were to end simply at first instance. For that reason, and because of the public interest in the case, we grant you permission to appeal. We do so on conditions. The conditions are that the Appellants' Notice be filed by next Wednesday. That date is deliberately chosen for two temporal reasons. One is that the approved transcript, which will be expedited, will probably not be available until Tuesday (although you have the drafts from which we have been reading). The other is that we understand that the Court of Appeal can hear the case on 8 February -- that is ten days or so prior to the date upon which the Act is due to come into force.

52. **SIR SYDNEY KENTRIDGE:** My Lord, I understand it to be within your Lordships' power to fix the times for the skeleton arguments to be filed.

53. **LORD JUSTICE MAURICE KAY:** Yes.

54. **SIR SYDNEY KENTRIDGE:** My Lord, may I take it then that the appellants' skeleton argument may also be filed on that Wednesday, 2 February?

55. **LORD JUSTICE MAURICE KAY:** Yes. That does not present any problems, I assume?

56. **SIR SYDNEY KENTRIDGE:** Well, my Lord, if it does we will have to overcome them.

57. **LORD JUSTICE MAURICE KAY:** Yes.

58. **SIR SYDNEY KENTRIDGE:** My Lord, similarly I believe my learned friend will agree that the Attorney General's skeleton argument is filed by Friday 4 February.

59. **LORD JUSTICE MAURICE KAY:** Yes, certainly.

60. **MR SALES:** My Lord, I should just mention that Mr Chamberlain and myself had a debate about timetables for skeletons. We agreed between ourselves, and subject to the court, by 4pm Wednesday for the appellants' skeleton, and 4pm Friday for a response.

61. **LORD JUSTICE MAURICE KAY:** Yes. That time of 4pm can relate to the Appellants' Notice as well.

62. **MR SALES:** My Lord, yes. That seems sensible.

63. **LORD JUSTICE MAURICE KAY:** Mr Pannick, will you be gracing the Court of Appeal with your presence?

64. **MR PANNICK:** I will be there, my Lord. We will of course will also comply with that timetable.

65. **LORD JUSTICE MAURICE KAY:** Friday. Thank you very much. Sir Sydney, one thing occurred to me overnight. You will recall that I made a reference to the Human Rights Act in the judgment. I was conscious of the fact that that had not been the subject of submissions, and I did wonder whether we ought to invite submissions this morning. In the end we decided not to on the basis that the decision would have been the same without that reference and we anticipated that if you have points to make about it, you will be able to make them in another place in a few days time.

66. **SIR SYDNEY KENTRIDGE:** If your Lordship pleases.

67. **LORD JUSTICE MAURICE KAY:** Thank you. Could we thank all counsel and those who instruct them for the most helpful way in which this interesting case has been presented? Thank you very much indeed.

