B e f o r e : THE LORD CHIEF JUSTICE OF ENGLAND AND WALES, LORD PHILLIPS OF WORTH MATRAVERS, MR and LORD JUSTICE MAY : This is a Judgment of the Court to which each member has contributed.

1. **Introduction** : This is an appeal from a decision of the Administrative Court given in judgments delivered by Maurice Kay LJ and Collins J on 28 January 2005. This is no ordinary public law case. At issue is the validity of two Acts of Parliament, the Parliament Act 1949 *('the 1949 Act')* and the Hunting Act 2004 *('the Hunting Act').* It is the validity of the 1949 Act that is critical, for the Hunting Act was enacted pursuant to provisions of the 1949 Act.

2. The 1949 Act was purportedly enacted pursuant to the provisions of the Parliament Act 1911 *('the 1911 Act').* The 1911 Act laid down circumstances in which an Act of Parliament could be enacted without the assent of the House of Lords. The 1949 Act was so enacted under the circumstances specified, but purported to amend those circumstances. The critical issue is whether the 1911 Act permitted this.

3. In the Administrative Court this case was treated as an ordinary case turning on a point of statutory interpretation. It is not such a case. English courts do not normally have jurisdiction to consider the validity of an English statute. So far as the validity of a statute is concerned, the following observation of Lord Campbell in ***Edinburgh and Dalkeith Railway Co. v Wauchope*** (1842) 8 Cl & F 710 at 725 has always been accepted as correct:
"…all that a Court of Justice can do is look to the Parliament Roll; if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament, during its progress in its various stages through Parliament."

4. The issue to which the appeal relates is therefore one of considerable constitutional significance. However, while the success of this appeal is entirely dependant upon the complaints which are made as to the lawfulness of the provisions of the 1949 Act, as is well known, the Hunting Act (which is intended to make the hunting of wild animals, and especially foxes, by dogs unlawful) contains provisions that are highly controversial and bitterly opposed by substantial sections of the public.

5. The preamble to the 1949 Act states:
"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 ("the 1911 Act") by the authority of the same, as follows: -"

6. The preamble to the Hunting Act provides:
"BE IT ENACTED by The Queen'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 the authority of the same, as follows:-"

7. It will be noted that in both cases, reference is made to the Parliament Act, 1911. The validity of that Act is not disputed. It was, however, legislation which, at the time that it was passed was also highly controversial and, according to what we were told in the course of argument, was legislation which was preceded by a general election at the insistence of King Edward VII, who died before it was enacted, and was succeeded by King George V.

8. That the 1911 Act should be controversial was hardly surprising since the 1911 Act dramatically reduced the power of the House of Lords. Its effect, which is not in dispute, was to give the House of Commons the dominant role in Parliament. Prior to the 1911 Act, the House of Lords had an unlimited power to prevent a Bill becoming law by refusing to consent to its enactment. But after it came into force, it substantially restricted the ability of the House of Lords to delay the enactment of legislation. It achieved this by providing that, after a period of 2 years had elapsed in the circumstances described in the 1911 Act, a Bill could become an Act of Parliament without it being passed in the House of Lords. The 1911 Act can be regarded as having established a new constitutional settlement.

9. The 1949 Act amended the 1911 Act by reducing that period of 2 years to 1 year. However, the provisions of the 1911 Act were relied upon to enact the 1949 Act. On behalf of the Appellants, Sir Sydney Kentridge QC contends that this was not permissible as a matter of law. He submits that the 1911 Act could only be lawfully amended with the consent of the House of Lords. Accordingly, as the

Hunting Act was enacted relying upon the 1911 Act as amended by the unlawful 1949 Act, the Hunting Act is also unlawful.

10. Lord Goldsmith QC, HM's Attorney General who appeared before us disputes that this is the position. He contends that the amendments made to the 1911 Act by the 1949 Act were perfectly lawful. So, it follows, is the Hunting Act. In advancing his case, he is supported by Mr David Pannick QC who appeared on behalf of the League against Cruel Sports, ("the League") who were given permission to make submissions in support of the Attorney General's case.

11. It is unusual, and in modern times probably unprecedented, for the Courts to have to rule on the validity of legislation that has received the Royal Assent. (But as to earlier periods in our history see the ***Prince's Case*** 8 Co Rep 1A). However, the Attorney General did not dispute that the Courts could properly adjudicate on this issue and in the court below, Maurice Kay LJ remarked (paragraph 14) *'the Attorney General wisely takes no point on justiciability'*. Despite these exchanges we were concerned to satisfy ourselves that the issue before us was justiciable. We asked the Attorney General how this was. It was a question to which he gave us no convincing answer. He said that no point was taken on justiciability because it was recognised that it was desirable that the Courts should decide the issue. When we suggested that this might not be a valid basis for assuming jurisdiction, he asserted that there was no absolute rule that the Courts could not consider the validity of a statute. Here the Courts had jurisdiction because the issue was one of statutory interpretation and because the Appellants were contending that the 1949 Act was not a statute at all.

12. The reality is that the 1911 Act was a most unusual statute. By that statute the House of Lords, the House of Commons and the King used the machinery of legislation to make a fundamental constitutional change. Nearly 100 years after the event, the court has been invited to rule on the precise nature and extent of that change. We have decided that it was right for the Administrative Court to accept that invitation. The authority of the 1949 Act purported to be derived from the 1911 Act. The latter Act, by s.3, expressly envisaged the possibility that the validity of subsequent Acts enacted pursuant to its provisions might be subjected to judicial scrutiny. The effect of the 1911 Act was undoubtedly susceptible to judicial analysis. However, in considering that effect, the Administrative Court was acting as a constitutional court. There was no precise precedent for the jurisdiction that it was exercising.

13. The conclusion to which we have come is that Lord Goldsmith was correct to make the concession that he did. The determination of questions of interpretation and ascertaining the effect of legislation is part of the normal diet of the courts. While we will refer to what has happened in debates in Parliament concerning the issue before us, we will not be adjudicating upon the propriety of what occurred in Parliament. The circumstances in which it will be appropriate for the Courts to become involved in issues of this nature are limited, but in this case it is perfectly appropriate for the Courts to be involved. If the courts did not adjudicate on the issue, there would be great uncertainty as to the legal situation, which could have most unfortunate consequences after 19 February 2005, when the Hunting Act is meant to come into force. In exercising this role, the Administrative Court and this Court on appeal are seeking to assist Parliament and the public by clarifying the legal position when such clarification is obviously necessary

14. The Appellants are members of the Countryside Alliance, a body which opposed the banning of fox hunting, but they bring these proceedings in their personal capacity. Mr Jackson is the Chairman of the Countryside Alliance and a landowner whose land is within the area of a hunt, although he personally does not participate in hunting. Mr Martin is a hunt employee and professional huntsman whose livelihood and tied accommodation depend on the lawfulness of hunting. Mrs Hughes participates in hunting and she and her family have a business which is ancillary to hunting.

15. It is because the Hunting Act is due to come into force on 19 February 2005 that the resolution of this litigation is so urgent. So far, the proceedings have been dealt with with satisfactory expedition. The proceedings were commenced on 19 November 2004; the day after the Hunting Act received the Royal Assent. On 28 January 2005, Maurice Kay LJ and Collins J gave judgments of commendable clarity, dismissing the claim. We heard this appeal on 8 February 2005 and today give our judgment.

16. **The background to the Parliament Acts** : We agree with Sir Sydney Kentridge that it is necessary to consider the relevant statutory provisions against their background and for this purpose we adopt the succinct summary set out in Sir Sydney's skeleton argument. It is in these terms:
"It is well known that, following the Liberal election victory of 1906, the Lords on several occasions rejected the legislation proposed by the Liberal Government. This series of rejections culminated in 1909 when the Lords rejected Lloyd George's Budget by 350 votes to 75. A general election was called and the Liberal Government was re-elected in 1910. The House of Lords then accepted Lloyd George's Budget, but the incident spurred calls for reform of that House. In 1910, the newly formed Government introduced the Parliament Bill, which was designed to extinguish the House of Lords' power over Finance Bills and to limit its powers over other Bills. The Government announced that rejection of this measure by the Lords would lead to a further dissolution of Parliament. That step became necessary and a further general election took place in December 1910, again resulting in the re-election of the Liberal Government.
After the election, the Commons again passed a Parliament Bill. The Lords again attempted to amend it, but the Commons insisted on its Bill, which was eventually passed by the Lords in 1911, after the Prime Minister, Asquith, had publicly announced his intention to ask the King, George V, to create large numbers of new Liberal peers if necessary. The Bill so passed became the Parliament Act 1911.
The 1949 Act was passed using the provisions of the 1911 Act, that is to say, by the Commons alone in three successive sessions, two years having elapsed between the date of Second Reading in the first of those sessions and the date on which it passed the House of Commons in the third."

17. Although the new route provided by the 1911 and 1949 Acts for enacting legislation did involve a significant change in the balance of power between the two Houses of Parliament, as we will see later, the number of occasions on which the Commons resorted to the Acts in order to enact legislation were remarkably limited. Usually the Commons, as the democratically elected House, could achieve its objectives without resorting to the Acts. It is, however, undoubtedly the case that the fact that the alternative route was available to the Commons made the Lords more compliant to the will of the Commons.

18. **The relevant legislative provisions** : The starting point is the 1911 Act. However, in order to recognise the extent of the changes which the 1911 Act brought about, it is helpful to refer to Professor Dicey's classic statement as to what is usually understood by the Sovereignty of Parliament, which is a basic constituent of our constitutional arrangements. In an *Introduction to the Study of the Law of the Constitution*, Professor Dicey described the position 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."

19. The 1911 Act significantly qualified that statement by curtailing the role of the House of Lords. We have already seen the consequence reflected in the changed language of the preamble of the 1949 and Hunting Acts, which omit any reference to the House of Lords. The position can be contrasted with the preamble to the 1911 Act, which made the traditional reference to the Lords Spiritual and Temporal and the Commons. The preamble to the 1911 Act reads:
"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 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:
Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, …"

20. That Preamble makes it clear that the 1911 Act was only a stepping stone on the way to even more fundamental changes to the House of Lords. It was not to be abolished but to be recreated on a popular instead of hereditary basis. It is not suggested that the 1911 Act was to be the vehicle for these changes. It includes the more limited interim changes.

21. The first change made by the 1911 Act was in relation to Money Bills alone. S.1(1) of the 1911 Act provided:

"If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill."

22. Turning to s.2, that section contained the critical provisions on which much of the argument before us turned. S.2 provides:

"(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."

23. S.3 provides that the certificates of the Speaker as to the matters in ss.1 and 2 shall be conclusive for all purposes and shall not be questioned in any court of law. The arguments in the present case do not involve any such questioning. The different enacting language which appears in Acts of Parliament passed pursuant to the 1911 Act, is provided for in s.4. The preamble to the 1949 Act provides an example of this.

24. S.7 of the 1911 Act reduced the maximum duration of Parliament from seven years to five years, thus the reference in s.2(1) to extending that maximum beyond five years. It is to be noted that this provision was introduced by amendment and Mr Cassel said, when introducing the amendment:
"if we are to have Single Chamber Government thrust upon us, then at least let us withdraw from that Single Chamber the power of extending and perpetuating its own existence"

The Government was initially opposed to the amendment because it assumed the amendment was unnecessary but in the House of Lords the amendment was agreed. When the Bill returned to the Commons, the amendment was accepted by Mr Churchill, the then Home Secretary, who explained;

"We are, I think, bound to make every effort in our power to give reasonable reassurance where we can, without prejudice to any essential principles of the Bill, to persons to whom we are opposed." (Extracted from *Can the House of Lords be Abolished?* (1979) 95 LQR 54-55 Peter Mirfield)"

25. The 1949 Act purported to amend the 1911 Act by amending s.2. In s.2(1) and s.2(4) the words *"in three successive sessions", "for the third time", "in the third of those sessions", "for the third time", "in a third of those sessions", "in the third session"* and *"in the second or third session"* respectively, were amended so

that ,wherever it appeared, the word *"third"* became *"second"* and the word *"three"* became *"two"*. In addition, the requirement that "two years have elapsed" became "one year has elapsed".

26. It is not, however, necessary to refer further to the 1949 Act since the argument between the parties does not turn on the language used by the 1949 Act, but on the fact that it was passed relying on the restrictions on the role of the House of Lords contained in the 1911 Act. Put shortly, what Sir Sydney contends, on behalf of the Appellants, is that the only manner in which the procedural and temporal conditions of the 1911 Act could be amended was, by obtaining, both the consent of the Commons and the House of Lords to its amendment.

27. In relation to the legislation, we would draw attention to the following points:
    a) The 1911 and the 1949 Acts did not remove but restricted the involvement of the House of Lords in the Parliamentary process. The restriction did not affect Bills introduced in the Lords which still require the consent of both Houses to their enactment.
    b) Even in the case of a Bill introduced in the Commons, the House of Lords was left with a very significant role. The House of Lords can debate and revise a Bill although its amendments can ultimately be rejected by the Commons.
    c) Nevertheless, the 1911 Act significantly redefined the relationship between the two Houses by restricting the circumstances in which the consent of the House of Lords was required before a Bill became law.
    d) The 1949 Act did not remove any restriction contained in the 1911 Act. It only reduced the period that had to elapse before the consent of the Lords could be dispensed with. For example, it did not attempt to extend the maximum duration of Parliament beyond 5 years. The changes made by the 1949 Act were far less significant than the changes made to the constitutional position of the House of Lords by the 1911 Act.

28. **Contentions of the Appellants** : In support of their appeal, Sir Sydney advances 3 main submissions. He submitted (as set out in his skeleton arguments) that the Divisional Court erred in:
    "(i) describing legislation passed under the 1911 Act as 'more akin to primary legislation' and as having 'all the trappings of primary legislation' ('**Legislation passed under the 1911 Act is not primary, but delegated or subordinate legislation**');
    (ii) holding inapplicable to this case the established principle that, where an Act of Parliament confers on a body the power to legislate subject to stipulated conditions, it does not, in the absence of express words, authorise that body to vary the stipulated conditions or to enlarge its own powers ('**The principle applies that powers given by an enabling Act may not be enlarged or modified save by express words of authorisation**'); and
    (iii) holding that, on a proper construction of the 1911 Act read as a whole, s.2(1) of that Act should be read as enabling the Commons, without the consent of the Lords, to attenuate or remove completely the very conditions on which its law-making power was granted ('**On a proper construction, the 1911 Act does not authorise the Commons to remove or attenuate the conditions on which its law-making power was granted**')."

29. Those 3 grounds relate to the primary reasons relied on by the Administrative Court for dismissing the claimant's application. However, two further contentions were relied upon by the Attorney General in the court below and the Appellants also complain about the views of the Administrative Court as to these contentions. The complaints are:
    "(iv) expressing the views that (a) ministerial statements made during the passage of the Bill which became the 1911 Act were admissible in support of the Attorney General's construction and (b) such statements disclose that "the central issue in this case was in the minds of Parliamentarians in both Houses";
    (iv) expressing the view that legislation passed after the 1911 and 1949 Acts could be used as an aid to construction of the 1911 Act."

30. **Legislation passed under the 1911 Act is not primary, but delegated or subordinate legislation.** This ground of appeal goes to the heart of the distinction between the case advanced by the Appellants and that advanced by the Attorney General, supported by the League. The Attorney General contends that, as a matter of construction of the Acts, any Bill enacted in accordance with the provisions of the 1911 Act, or the 1911 Act as amended by the 1949 Act, has the same force and effect as any Bill enacted without reliance on those Acts. His contention is that the 1911 Act created a second procedure for enacting legislation and that that procedure was then amended by the 1949 Act. As long as the relevant procedure set out in the Acts is followed, then, on the Attorney General's argument, this results in legislation that is in every respect identical to legislation passed in the traditional way; that is with the consent of both the Commons and the Lords. The resulting legislation is not inferior legislation and so, critically, it could be used to amend the 1911 Act.

31. Sir Sydney vehemently disagrees. His contention is that legislation that is made following the procedure set out in the 1911 Act is legislation of a different nature. It is legislation which depends for its validity upon the 1911 Act. It is to be distinguished from legislation passed in the traditional way which is not dependent for its existence upon earlier legislation. He therefore describes the legislation made under the 1911 Act as delegated or subordinate legislation when compared with "primary" legislation made with the consent of both Houses of Parliament in the traditional way.

32. That there is the distinction, which Sir Sydney advances, is, in our view, undoubtedly correct. It is reflected in the fact that the Attorney General is right to accept the role of the Court which the Administrative Court exercised and which we are seeking to exercise on this appeal. It is because the 1911 Act has to be complied with (whether in its original or, if the amendment is valid, in its amended form) that the Courts' involvement is appropriate.

33. Although we are here concerned with Parliamentary powers, the role of the Court is the same as it is with any other power exercised under statutory authority: the statutory authority here being the 1911 Act. The Court can determine whether what is said to have happened *under* that Act in fact complied with that Act.

34. To an extent, the issue is one of definition as to what is meant by primary or subordinate legislation. Sir Sydney refers to *Craies* on legislation. (8th ed., 2004 at paragraph 1.21). Here it is stated:
"All legislation can be classified as primary or subordinate. Quite simply, legislation is subordinate if it owes its existence or authority to other legislation: if it does not, it is primary."

35. Drawing this distinction between primary and secondary legislation, it is perfectly possible properly to regard the 1949 Act, as being subordinate legislation if, contrary to the Appellants' submission, it is legislation at all.

36. The point is made even more clearly by Sir William Wade in *Constitutional Fundamentals* (pp 27 – 28) when he insisted, contrary to the views of Professor de Smith, that legislation passed under the 1911 Act should be regarded as delegated. Sir William said:
"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 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 Coke 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."

Sir Sydney submits that there can be no answer to this reasoning.

37. However, on this subject, we were referred to a letter written by Lord Donaldson of Lymington to the three leading counsel involved in this case. Out of fairness to Sir William, he drew attention to a letter

that Sir William had written to him. Unfortunately, Lord Donaldson has not retained the letter. However, his understanding of what Sir William wrote was that he was saying that, whilst adhering to his view that the 1949 Act was a species of subordinate legislation, he did not agree that from this it followed that the 1949 Act was ultra vires, always provided that it did not seek to extend the life of the Parliament.

38. The Attorney General has placed before us the views of other distinguished academics beside Sir William and he submits, correctly, that if this matter is to be resolved by counting heads, then there is more support for his view than that contended for by Sir Sydney. However, this is not a head counting exercise.

39. What is clear is that whatever description is appropriate to apply to the 1911 and 1949 Acts, it is the 1911 Act that is the source of authority for the creation of the 1949 Act. The argument of the Attorney General, that once legislation has been created by the 1911 Act it is no different from legislation created in the traditional way with the consent of both Houses, is one which we question. If it is correct, then that is the end of the Appellants' case since it means that as long as the basic requirements of the 1911 Act as amended were procedurally complied with, the contents of an Act made by this procedure could not be questioned. Indeed, in these circumstances the Certificate of the Speaker would probably be conclusive because it is his responsibility to ensure compliance with the procedure set out in the 1911 Act.

40. The main reason for our reservations as to this outcome is that it involves it being accepted that the 1911 Act could be used to extend the life of Parliament contrary to the express language of s.2(1) of the 1911 Act for such period as the Commons determines. All that would be required would be for Parliament, in the shape of the Commons, to pass legislation deleting the words "Bill containing any provision to extend the maximum duration of Parliament beyond five years" and then to pass further legislation extending the life of Parliament. This would be quite contrary to the express limitation on extending the duration of Parliament contained in s.2(1) and we are not prepared to accept that this is the position.

41. We appreciate that it is most unlikely that the Commons would ever contemplate seeking to use the 1911 Act, either in its amended or unamended form, to enact legislation to which the House of Lords had not consented, in order to extend the duration of Parliament or, for that matter, to abolish the House of Lords. However, if, contrary to our expectations, it did contemplate such action we would regard this as being contrary to the intention of Parliament when enacting the 1911 Act. So, here we disagree with the views to the contrary expressed by the Administrative Court.

42. The purpose of the 1911 Act was to establish a new constitutional settlement that limited the period during which the Lords could delay the enactment of legislation first introduced to the Commons but which preserved the role of the Lords in the legislative processes. In our view it would be in conflict with the 1911 Act for it to be used as an instrument for abolishing the House of Lords. This would be so whether or not there was initially an attempt to use the 1911 Act process to amend the 1911 Act to provide an express power to abolish the Lords. We would view such an endeavour in the same way as an attempt to delete the prohibition on extending the life of Parliament. The preamble of the 1911 Act is inconsistent with the Attorney General's contention. The preamble indicates that the 1911 Act was to be a transitional provision pending further reform. It provides no support for an intention that the 1911 Act should be used, directly or indirectly, to enable more fundamental constitutional changes to be achieved than had been achieved already.

43. Thus, it does not necessarily follow that because there is compliance with the requirements in the 1911 Act, the result is a valid Act of Parliament. Following the reasoning in the previous paragraph, if, without amending the 1911 Act further, the Commons attempted to extend the life of Parliament in excess of five years without the consent of the Lords the attempt would be ineffective and, if necessary, the Court's jurisdiction that we are now exercising could be invoked. The Attorney General in fact recognises this because, while he contends this could be done, he accepts it would be necessary for the 1911 Act to be amended first to remove the express exception to extending the life of Parliament.

44. This concession recognises that there are differences between the traditional powers of Parliament when legislating, and its powers when legislating under the 1911 Act. With the consent of the Lords and Commons, Parliament could extend the life of Parliament for say two years without having to amend the 1911 Act. Indeed, it did so during the Second World War. (We deliberately confine the extension for a limited period because there could be different arguments if Parliament attempted to extend its life indefinitely).

45. Once it is accepted that the use to which the 1911 Act could be put is limited, the question arises as to the extent of the limitation. It is when we reach this stage that it becomes important to recognise that what could be suggested here is the power to make fundamental constitutional changes. If Parliament was intending to create such a power, surely it is right to expect that the power would be unambiguously stated in the legislation. This is not the case with s. 2 of the 1911 Act. Whether or not legislation enacted in reliance on the 1911 Act is properly described as delegated, the 1949 Act can nevertheless be said to be seeking to do that which was disapproved of by Van den Heaver JA in the South African Court of Appeal in the *Minister of the Interior v Harris* (1952) 4 SA 769 at 790, that is, (adapting his words), to perform an act of levitation by lifting itself above its own powers by its own boot straps. The result of the use of the 1911 Act was in form to produce an Act of Parliament as is contended by the Attorney General and Mr Pannick but, as we have already pointed out, that Act will not be valid if it is outside the scope of the 1911 Act.

46. Thus we do not, however, regard this as being an all or nothing situation. We do not believe that it will necessarily follow if we conclude that the 1949 Act is lawful legislation, that the 1911 Act can be used or amended, so as to produce results that will constitute a different constitutional settlement. On the Third Reading of the 1949 Bill, the Secretary of State for Home Department (Mr Ede) stated:
"This Bill is a short and workmanlike measure to bring up to date an Act which, at the time of its passing, was fiercely resisted by the party now represented by right hon. and hon. Gentlemen opposite. They then proclaimed their definite intention, as soon as they got into office, to repeal it. Now they accept it as one of the pillars of the Constitution. Therefore, one does not have to argue anything other than the shortening of the time during which another place can delay the non-financial proposals which this House sends forward to them. We feel that the length of time allowed in this Bill of one year and two Sessions is adequate to ensure that proposals which may be the subject of controversy between the two Houses shall receive full and ample consideration before being carried into effect, even if another place should not be reconciled to them. (Parliamentary Debates 1947-48 Vol 445 at p 1018)."

This statement makes clear that the ambitions for the 1949 Bill were of a modest nature. It involved no more than a modification of the 1911 Act and we recognise that such a modification of the 1911 Act is a change of a different dimension from the dramatic changes that we have just been discussing.

47. Interestingly, apparently, according to Lord Donaldson's letter, that this was not a black and white situation was also the view of Sir William Wade. Unfortunately, we do not know Sir William's reasons for considering it possible for the 1949 Act to be valid while at the same time believing that it would not be possible to amend the 1911 Act as a precursor to extending the maximum duration of Parliament.

48. The fact that we do not know Sir William's reasons does not mean that we cannot produce a justification of our own. The justification would be the difference in scale that the changes to our constitutional arrangements involved in reducing a delaying power from two years to one, when compared with either enabling the life of Parliament to be extended beyond five years or abolishing the House of Lords. The latter changes are so fundamental, that they could only be enacted or expressly made possible by what is traditionally the Sovereign Parliament. That is to say by the triumvirate of the Monarch, the Lords and the Commons. As we will explain later in this area it is important to pay attention to the views expressed in Parliament itself. From the extracts from Hansard placed before us we detect no consensus for a view that the 1911 Act was intended to give the Commons directly or indirectly power to change fundamentally this country's constitutional arrangements.

49. **Can powers granted by an enabling Act only be enlarged or modified by express words of authorisation?** Here the principle is admirably expressed by Professor O Hood Philips as *"the general principle of logic and law that delegates (Queen and Commons) cannot enlarge the authority delegated to them."*

(Constitutional and Administrative Law, 8th Ed., 1987 at p 80) This approach was endorsed by Lord Donaldson when introducing the Parliament Acts (Amendment) Bill (HL Official Report, 19 January 2201 Col.139). Relying on this approach, Sir Sydney submits:

"The answer, as a matter of principle, is that, when Parliament confers power to legislate (even a wide or plenary power), the act of enlarging that power is, prima facie, repugnant to the enabling Act. Where the legislative power is granted subject to specified conditions, the act of modifying those conditions undermines the conditionality of the power. The foregoing analysis is supported by the colonial and Dominion cases, which were cited below both by the Appellants and by the Attorney General."

50. The Appellants also rely on decisions of the Privy Council dealing with the situation where legislative powers have been given by the *"Imperial Parliament"* to the local legislature. In this context, the Appellants and the Attorney General each relied on a number of authorities relating to the constitutional powers of legislatures of former dominions or colonies. The Appellants submit that these authorities establish a principle that a legislature established under a constitutional instrument subordinate to that of the Imperial Parliament at Westminster could not legislate to alter its own constitution without an express power to do so. The Sovereign and the House of Commons are to be seen for the purposes of the 1911 Act as a subordinate legislature to which this principle applies.

51. The Attorney General submits that there is no rule of construction that a power to legislate to alter a constitutional instrument has to be express. Of course there has to be a power, and such a power is, he submits, to be found in s.2(1) of the 1911 Act properly construed. He further submits that the rule of construction which emerges from the colonial and commonwealth cases is the exact opposite of that contended for by the Appellants. The rule is that courts should not read in any limitation to a legislative power other than what is expressly laid down in the instrument conferring that power.

52. Colonial legislatures were generally established either under an Act of the Imperial Parliament or by an Order in Council exercising the Royal Prerogative. The instrument establishing the legislature defined its legislative powers. These often included a *"power to make laws for the peace, welfare and good government of the Colony in all cases whatsoever"*, subject to certain restrictions as to the manner of doing so. These particular words appeared in clause 2 of the Order in Council of 6 June 1859 establishing the legislature of the Colony of Queensland – see ***McCawley v The King*** [1920] AC 691 at 706. Lord Birkenhead LC, delivering the judgment of the Privy Council in ***McCawley***, contrasted at page 704 controlled and uncontrolled constitutions, saying that:

"… a constitution [is not] debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever."

53. Lord Birkenhead gave an account at page 709 of the perceived difficulties which gave rise to the Colonial Laws Validity Act 1865. S.5 of this Act features in a number of cases to which we were referred. It provided:

"Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such Legislature, provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony."

54. In ***McCawley,*** the issue was whether a Queensland statute authorising the Governor in Council to appoint a judge of the Court of Industrial Arbitration to hold office for seven years, was in fatal conflict with a provision of the 1859 Order in Council and a section of the Constitution Act 1867. The Privy Council held that it was not, since the legislature of Queensland had power to enact the Queensland statute both under s.5 of the 1865 Act and under clause 22 of the Order in Council. Clause 22 contained an express power to amend that provided:

"The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the colony except …".

This in turn was held to be within the powers conferred by s.7 of the Imperial Act 18 & 19 Vict c 54.

55. ***The Bribery Commissioner v Ranasinghe*** [1965] AC 172 was an appeal from the Supreme Court of Ceylon. S.29 of the Ceylon (Constitution) Order in Council 1946 empowered the Ceylon Parliament to make laws for the peace, order and good government of the island. S.29(4) gave Parliament the power to *"amend or repeal any of the provisions of this Order"*; but provided that no Bill for amendment or repeal should be presented for the Royal Assent unless it was endorsed with a certificate of the Speaker, which was to be conclusive for all purposes that the Bill had been passed by a two-thirds majority of the members of the House of Representatives. The appellant was convicted of a bribery offence before a tribunal created by a provision of the Bribery Amendment Act 1958, which conflicted with a provision of the Constitution. The 1958 Act was not endorsed with the requisite Speaker's certificate and was not shown to have been passed by a two-thirds majority. The Privy Council held that the orders made against the appellant were null and void, since the persons composing the tribunal had been appointed under an invalid statute.

56. Lord Pearce gave the judgment of the Board. He identified at page 196B the point which was the real substance of the appeal, asking:
"When a sovereign Parliament has purported to enact a bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner?"

57. Lord Pearce considered, explained and distinguished ***McCawley's*** case, saying at page 197F that passages, which he quoted, from ***McCawley's*** case:
"… showed clearly that the Board in McCawley's case took the view, which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the board held the Constitution of Queensland to be. 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 these very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process."

And Lord Pearce said at page 200A:
"No question of sovereignty arises. A parliament does not cease to be sovereign whenever its component members fail to produce among them a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign power of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority."

58. In ***R v Burah*** [1878] 3 App Case 889, the issue before the Privy Council was whether Act No. XXII of 1869 of the Indian Legislature was inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104) or with the Charter of the High Court, or whether it was within the legislative power of the Governor-General in Council. The Privy Council held that the 1869 Indian statute did not contravene the Indian High Courts Act nor the letters patent issued under it. In so holding, Lord Selborne, giving the judgment of the Board, said at page 904:
"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament which has, and was intended to have, plenary powers of legislation, as large and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions."

59. ***Taylor v Attorney General of Queensland*** (1917) 23 CLR 457 is a decision of the High Court of Australia concerning the constitution of Queensland. The Queensland Parliamentary Bills Referendum Act of 1908 provided that, when a bill passed by the Legislative Assembly in two successive sessions had in the same two sessions been rejected by the Legislative Council, it might be submitted by referendum to the electors, and, if affirmed by them, should be presented to the Governor for His Majesty's assent. Upon receiving such assent, the Bill was to become an Act of Parliament in the same manner as if passed by both Houses of Parliament, and notwithstanding any law to the contrary. The High Court held that this was a valid and effective Act of Parliament by virtue of the power conferred upon the Legislature of Queensland by S.5 of the Colonial Laws Validity Act of 1865. It was further held that there was power to abolish the Legislative Council of Queensland by an Act passed by the Legislative Assembly and affirmed by the electors in accordance with the provisions of the 1908 Act.

60. Barton J noted, at page 469, that the Constitution Act of 1867 provided for all laws passed under it to be enacted *"by Her Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly in Parliament assembled"*, and that the constitution did not recognise the making of laws by any other authority. He then said:

"It is also true that in general the legislation of a body created by and acting under a written charter or constitution is valid only so far as it conforms to the authority conferred by that instrument of government, and that therefore attempted legislation, merely at variance with the charter or constitution, cannot be held an effective law on the ground that the authority conferred by that instrument includes a power to alter or repeal any part of it, if the legislation questioned has to be preceded by a good exercise of such power; that is, if the charter or constitution has not antecedently been so altered within the authority given by that document itself. … Normally, therefore, in the absence of such a provision as s.5 of the Imperial Act, I should have been prepared to hold that the [1908 Act], which, though it professed to be an amendment of the Constitution Act of 1867, was merely, in view of its provisions, an Act at variance with the constitution, not preceded by a valid extension of the constitutional power, was therefore itself, as it stood, invalid. But in the present case the Imperial provision seems to me to take away the application of the principle I have stated to legislation of the kind which it authorises."

The other four judges, Isaacs, Gavan Duffy, Rich and Powers JJ each held that the 1908 Act was validly enacted under power derived from s.5 of the 1865 Act.

61. In the present case, Maurice Kay LJ rejected Sir Sydney's submission that these and other authorities supported the proposition that, in the absence of an express power to amend the governing statute itself by the prescribed procedure, no such power exists. Maurice Kay LJ held that what s.2 of the 1911 Act permits is what it says it permits. One is driven back to the language of the section and of the Act. He held that s.2(1) is wide enough to embrace a Bill which amends s.2 itself. ***Ranasinghe*** concerned the Ceylon (Constitution) Order in Council 1946 which *contained* an express power, but it is not an authority *requiring* an express power. The whole line of authority was not strictly analogous. It deals with the relationship between the Westminster Parliament and the devolved legislatures of former colonies. In his 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. He did not doubt that s.2(1) of the 1911 Act is sufficient to permit amendment in the manner which was achieved by the 1949 Act. Collins J entirely agreed with Maurice Kay LJ's analysis of the dominion and colonial authorities.

62. As we have indicated, we regard this approach as being an over-simplification. It is also necessary to consider the nature of the amendment. The Attorney General supports Maurice Kay LJ's analysis. He submits, for instance, that ***Ransinghe,*** which he described as Sir Sydney's best case, was accepted by Sir Sydney as not establishing the principle for which Sir Sydney contends. For his part, Sir Sydney submits that the principle, although not established by the case, is assumed and correctly so. The Attorney General further submits that the passage from *R v Burah*, which we have quoted, is a clear injunction against reading in limitations which are not expressed; and that it flatly contradicts the submission that there is a general rule of law that a legislature cannot amend its own constitution without an *express* power to do so. Sir Sydney submits that the passage embraces the principle of delegated legislation that delegated powers are limited by and to the express powers so delegated.

63. Sir Sydney submits that, like the instruments regulating the legislative powers of the Ceylon and South African legislatures and those of the Australian states, the 1911 Act is a regulating instrument which imposes conditions of law making. But, unlike the former instruments, it contains no provision authorising amendment of those conditions. Accordingly, in the absence of such an authorising provision, any attempt to amend the conditions of law making, which it lays down, will be repugnant to the 1911 Act and invalid.

64. Sir Sydney submitted that there was no Commonwealth case in which a valid amendment to a constitution had been found to have occurred in the absence of express statutory words saying in terms that a legislative body had power to amend the constitution. The Attorney General submitted that this was not correct. He referred to ***Clayton v Heffron*** (1960) 105 CLR 214, a voluminous decision of the High Court of Australia. The case concerned the validity of a proposed Act introduced by the Legislative Assembly of the New South Wales legislature to amend the constitution of New South Wales by abolishing the Legislative Council of the legislature, if there was a vote in favour of that in a referendum. The proposed Act was to be passed under a procedure in s.5B of the New South Wales Constitution Act 1902–1956, whereby legislation could be enacted ultimately without the consent of the Legislative Council. S.5B had been introduced into the New South Wales Constitution by an enactment of the New South Wales legislature under s.5 of the Constitution Act. This provided:
"The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever."

The Act to abolish the Legislative Council was held to be valid.

65. The Attorney General submits that the judgments rest upon the construction of s.5 of the Constitution Act, not on s.5 of the Colonial Laws Validity Act 1865. He refers to the judgment of Menzies J at page 269 to 273. Thus the relevant constitutional instrument contained a general power to legislate, but no separate provision saying in distinct terms that the Legislature could legislate to amend the constitution itself. Sir Sydney submitted that, on the contrary, there was ultimately an express power to amend deriving from s.4 of the Constitution Statute (18 & 19 Vict c 54). He referred to the judgment of Dixon CJ, McTiernan, Taylor and Windeyer JJ at page 252 to the effect that the combined effect of s.4 of the Constitution Statute and s.1 of the Constitution Act was to confer upon the legislature of New South Wales a full constituent power. The authority thus conferred was that exercised in adopting s.5 of the Constitution Act 1902.

66. It is not, in our judgment, necessary to resolve this disagreement, since we accept the Attorney General's more general submission that, although in many instances the relevant legislation contained an express power to make amendments to the constitution, the authorities do not establish a principle that such constitutions may not be appropriately amended without such an express power.

67. So far as is material to the present appeal, we derive the following synthesis from the authorities to which we have referred. A sovereign legislature, uncontrolled by antecedent written constitutional instrument, may alter its own legislative powers and procedures by legislation duly enacted in accordance with its embedded procedures. The resulting amended constitution is controlled to the extent provided by the legislation. Thereafter, further constitutional alterations may be validly enacted under and by means of the altered powers and procedures. Such alterations may include alterations to the powers and procedures prescribed by the first legislation. This is, however, all subject to the proviso that the making of these subsequent alterations is within the power afforded by the first legislation properly understood, and provided that they are duly enacted in accordance with its procedures.

68. We agree with Maurice Kay LJ that the circumstances of the Commonwealth authorities are not strictly analogous to those of the present appeal, except to the extent that they uphold the validity of constitutional change by virtue of the very instrument from which the legislature enacting the change derives its own powers. But there is, in our judgment, no constitutional principle or principle of statutory construction which prevents a legislature from altering its own constitution by enacting alterations to the very instrument from which its powers derive by virtue of powers in that same instrument, if the powers, properly understood, extend that far. This is not performing an act of

bootstrap levitation, provided the power exercised is duly derived, directly or indirectly, from a sufficient original sovereign power and authority.

69. We would suggest that the critical question is that referred to by Lord Pearce in his opinion before the Judicial Committee in the ***Bribery Commissioner v Ranasinghe*** [1965] AC 172at 197-198, where he made it clear that a constitution can 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".* Whether this is so or not depends on the proper construction of the regulating legislation, here the 1911 Act. This is the subject of the Appellants' third ground to which we now turn.

70. **On a proper construction of the 1911 Act, does it authorise the Commons to remove or attenuate the conditions on which its law-making power are granted?** Sir Sydney, the Attorney General and Mr Pannick advanced contextual arguments based on the precise wording of s.2(1). Sir Sydney refers to the fact that s.2(1) begins with the word *"If"* and that it clearly has a proviso. He is right in submitting that this demonstrates the intention of Parliament in 1911 that a Public Bill would only become an *"Act of Parliament"* if the provisions of s.2(1) were complied with. As against this, it is argued that s.2(1) refers to *"any Public Bill"* and specifies the Bills which are to be excluded, namely a Money Bill or a Bill containing a provision to extend the maximum duration of Parliament beyond 5 years. It is pointed out that an amending Bill could easily have been excluded but it is not. It is submitted that as there are specific exclusions, there should be no implicit exclusion of amending Bills. We regard the submission of Sir Sydney that this involves flying *"in the face of the express wording of s.2(1)"* as overstating the position. Insofar as the 1911 Act can be amended by the 1949 Act, then the requirements of s.2(1) have been changed. It is then the different requirements of s.2 which have to be complied with.

71. We do not detect anything in the language of s.2(1) which would prevent the amendment which the 1949 Act seeks to make. Ultimately the question is whether the relatively modest changes made to the 1911 Act by the 1949 Act fall outside the scope of the 1911 Act.

72. **The significance of the Parliamentary context** : Unlike the court below, we do not approach this case on the basis that it turns simply on statutory interpretation and on established principles as to how statutes should be interpreted. We have been referred to parliamentary material that gives a clear indication of how the House of Lords and the House of Commons viewed the effect of the 1911 Act, both at the time that it was passed, and at the time of passing the 1949 Act. The manner in which both Houses have acted, with the assent of the Monarch, from 1911 up to the present day, demonstrates a consistent approach to the nature of the change made to the constitution by the 1911 Act. We have concluded that this, of itself, is a most material factor in deciding whether the Hunting Act is a valid Act of Parliament.

73. **The passing of the 1911 Act** : We now propose to consider the circumstances in which the 1911 Act was enacted, including parliamentary material recorded in Hansard. What is the justification for so doing? If this case turned simply on the true construction of the 1911 Act, we should have to consider the effect of ***Pepper v Hart*** [1993] AC 593, and we propose to start by considering the implications of that case, in the light of subsequent jurisprudence.

74. Prior to ***Pepper v Hart,*** the courts refused to consider statements made in Parliament in the course of the passage of a Bill in order to elucidate its meaning and effect. This rule was relaxed in *Pepper v Hart*, a particularly hard case which, it has been suggested, led to bad law. At issue was the effect of an ambiguous provision in the Finance Act 1976. That issue had been expressly raised in debate on the Bill and the Minister had given a specific assurance in answer. In these circumstances the majority of the House ruled that it was permissible to have regard to the statement made by the Minister, as recorded in Hansard, in order to interpret the provision. Lord Browne-Wilkinson, who gave the leading speech, said at p 640:

"…the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister

or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect and (c) the statements relied upon are clear."

75. Members of the House of Lords have since, both judicially and extra- judicially, expressed doubts as to whether the decision in *Pepper v Hart* was well advised – see the observations of Lord Hoffmann in ***Robinson v Secretary of State for Northern Ireland*** [2002] UKHL 32 (at paragraphs 39 to 40) and the Hart Lecture given by Lord Steyn (2001) 21 Oxford Journal of Legal Studies 59. Certainly the application of *Pepper v Hart* has been strictly constrained: see ***R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*** [2001] 2 AC 349. Sir Sydney submits that this last decision was directly in point, and precluded reference to Parliamentary material as an aid to interpreting the 1911 Act. In ***Spath Holme,*** Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hutton all agreed that it was not legitimate to have regard to a ministerial statement to elucidate not the meaning of a provision but the scope of a statutory power. Sir Sydney submitted that this was precisely the use that the Attorney General was seeking to make of the parliamentary material.

76. This appeal is concerned with much more than the scope of a statutory power. It is concerned with the extent of the restriction of the role of the House of Lords as one of the constituents of sovereign power affected by what was in reality a concordat and what was in form a statute. Each of the parties before us has urged that the effect of the 1911 Act is clear from its terms, yet each contends for a different result. We have accepted the Attorney General's submission that there was no express restriction on the subject matter of the statutes that could be passed under the 1911 Act other than those specified within brackets in s.2(1). We were, however, persuaded by Sir Sydney that it was at least strongly arguable that, the 1911 Act having conferred powers on the Commons subject to express restrictions, it was implicit, as a matter of basic principle, that those powers should not be used to sweep away the express restrictions.

77. The respective arguments in respect of the true interpretation of the 1911 Act, would, in the absence of further assistance, have left us in doubt as to what Parliament intended in respect of its scope. Having regard to the unusual nature of the 1911 Act, this is not a question to be resolved on the basis of the wording of the Act alone, without considering the circumstances in which it was passed and what was said in the course of debating its provisions. Furthermore, as we have said and for reasons that we shall explain, it is relevant when considering the effect of the 1911 Act to consider not merely parliamentary material in relation to its enactment, but the subsequent understanding of Parliament as to the nature of the constitutional change effected by the 1911 Act.

78. The 1911 Act resolved a constitutional crisis. The Conservative party had a majority in the House of Lords, which seemed likely to persist forever. They were using this majority to defeat measures of social reform proposed by the elected members of the Commons, where the Liberals were dominant. In 1909 the Lords even rejected the Finance Bill based on the budget, which Lloyd George had presented to the Commons. Faced with this impasse the Government twice went to the country, putting restriction of the powers of the House of Lords at the forefront of their manifesto. In 1910, King George V agreed, at the request of Mr Asquith the Prime Minister that he would, if necessary, create 400 new Liberal peers in order to relieve the Government's impotence. It was against the background of this threat that the Bill was debated that was to become the 1911 Act.

79. Consideration of Hansard discloses beyond doubt the understanding of both the Lords and the Commons as to the extent of the constitutional change to which they were agreeing, albeit, so far as the Lords were concerned, under duress. The relevant Parliamentary material is far more cogent than a mere ministerial statement, however emphatic. In the Commons, the Bill was debated in Committee before the whole House. Many amendments proposing express restrictions on the scope of s.2 were tabled. All were defeated, with the exception of the conditions ultimately contained within brackets in that section. On 24 April 1911, Sir Philip Magnus moved an amendment to insert after the words *"other than a money Bill*" the words *"or Bill for modifying this Act".*

80. Sir Philip explained the effect of his amendment as follows (Hansard col 1471):

"What I claim for my Amendment is that any change in this Bill shall also not become law without the consent of both Houses, and that having once passed this Bill it shall not be again altered unless the House of Lords give its consent. That is the essential feature of this Amendment – that the same condition shall hold good as regards the alteration or amendment or modification of this Bill as the Government recognise must hold good in order that the Bill may pass into law. In other words, the proposal is that the Constitution of this country cannot be again changed any more than it is being changed now without either the assent of both Houses of Parliament, or without an appeal to the country, so that the will of the people with regard to any alteration in this Bill may be made known."

81. Sir Philip went on to state that, without his amendment, it would be open to a Government to modify the provisions of the Bill, so that a shorter period might elapse between the passing of a Bill for the first time in the House of Commons and its receiving the Royal Assent. The Prime Minister, Mr Asquith, in explaining why the amendment was not acceptable to the Government said that its effect would be (col 1471):
"We could not amend the procedure in Clause 2 of the Bill, however much experience might show it to be necessary, without resorting to the old forms of the Constitution, enabling the House of Lords to block our proposals."

82. Mr Balfour, the Leader of the Opposition, responded **...**col 1476):
"When you are handing over all the powers to this Chamber over ordinary legislation we see the greatest objection to it, but we at all events know that no further invasion upon our Constitution can be made except under the provisions you are putting before us. Now it seems that that may be the fruitful parent of any number of further revolutions, each one of which fritters away what you call the safeguards. In these circumstances you are asking us to substitute the ancient foundations of the Constitution, foundations of moving sand, which any breath may sweep away.....Are we now, from henceforth going to hand over to a majority of the House, constituted as he tells us as a majority of this House so often is, not merely the ordinary legislation of the country, but the very shaping of the machinery by which legislation is to be carried into effect?"

83. Many other contributions to the debate were to like effect. We quote, by way of example, Mr Cave (col 1479):
"Surely a Parliamentary bargain is worth nothing unless it can be enforced, and the effect of this bargain now proposed is that each of these safeguards may be swept away two years from now. You cannot enforce the safeguards. What then are your safeguards worth?"

84. No one who took part in the debate on the amendment questioned the basis on which it was advanced, and at the end of the debate the Prime Minister acknowledged the importance of the decision on the amendment. In conclusion he said (col 494)
"… we think it right that we should not submit ourselves to what we should have to submit ourselves to if the Amendment were accepted, namely, the possibility of our not being able, whatever experience we may show, to amend in any particular this measure."

The amendment was defeated.

85. A similar debate took place in the House of Lords. On 29 June 1911 the Earl of Ancaster moved an amendment to omit the words *"other than a Money Bill"* and to replace them with *"not being either a Money Bill or a Bill extending or modifying the provisions of this Act"*. He explained (Hansard col 1184)
"The Amendment would have the effect of keeping out any amending Bill to lessen the suspensory period of two years".

He went on to comment (paragraph 1186) that, without the amendment:
"I do not see that it would involve any great difficulty on the part of the Government of the day to alter the period of two years into one."

86. For the Government, Viscount Morley of Blackburn accepted the importance of the amendment, but indicated that it would not be acceptable to the Government because it would prevent the Commons from amending the terms of the Parliament Act should this be expedient. His speech led the Earl of Ancaster to comment, when stating that he did not intend to press his amendment to a division:
"But the action of the Government and the admission of the noble Viscount, Lord Morley, have shown that it is possible for a Bill to be brought in reducing the two years' delay to one, and the period of three sessions to two, so that what we said at the last election about single-Chamber government is perfectly true."

Comments of other members of the House before the amendment was withdrawn indicated general acceptance that if the Bill was enacted as drafted, it would be open to the Government to use its provisions to reduce the limited powers that it gave to the House of Lords.

87. These two debates make it impossible to suggest that either House understood that the Parliament Act would be subject to the rigid restriction on the use of its powers, which Sir Sydney submits followed from its terms in the light of basic principle.

88. We have now dealt with the understanding of both Houses of Parliament as to the reach of the constitutional change effected by the 1911 Act. We turn to consider the understanding of the two Houses as to the effect of that Act between 1911 and the present day. Before doing so, however, we must explain why this is relevant.

89. Sir Sydney submits that the legislative history subsequent to the 1911 Act has no relevance. He accepts that many members of Parliament had assumed that the 1949 Act and the legislation passed under it were valid, but submits that the correctness of that assumption was a matter for the courts alone. He relies on the statement of Lord Sterndale MR in ***Cape Brandy Syndicate v Inland Revenue Commissioners*** [1921] 2 KB 403 at 414, approved by Viscount Simonds in ***Kirkness v John Hudson & Co Ltd*** [1955] AC 697 at 711, that *"subsequent legislation, if it proceeded on an erroneous construction of previous legislation, cannot alter the previous legislation".* The latter case demonstrated that, while subsequent legislation could resolve ambiguity in earlier legislation, it could only do so where the subject of the subsequent litigation was the same as the earlier Act.

90. We do not consider that these principles can be strictly applied in this case. What is in issue is a consensual constitutional change in the manner in which sovereign power is exercised. The nature of that change depends not simply on the words used in the legislation by which that change was brought about. It depends on general recognition of the nature of the change, as demonstrated particularly by those who brought about the change, but additionally by all affected by it. This is what Hart described as the 'rule of recognition' in Chapter 6 of his work on *The Concept of Law*. In short, it is vain to argue that, on its true construction, the 1911 Act provided for entrenched restrictions on the manner in which the powers granted by that Act should be exercised, if no one who was involved appreciated those restrictions at the time, and if all concerned have acted in disregard of such limitations in the lengthy period which has since elapsed.

91. The first use of the 1911 Act was to pass the Welsh Church Act 1914. The Parliament that passed this Act was the Parliament that enacted the 1911 Act itself. The effect of the Welsh Church Act was to disestablish the Welsh Church and to remove the Welsh bishops from the House of Lords. This was a significant constitutional change that, by virtue of the 1911 Act, the Commons were able to bring about without the assent of the House of Lords. Sir Sydney did not challenge the validity of this use of the 1911 Act, for it did not impact on the restrictions which he contended were entrenched by the 1911 Act. It nonetheless raises a question. If the 1911 Act could be used to effect a constitutional change in the composition of the House of Lords, how far could that Act be used to bring about constitutional change? The more far-reaching the legislative power granted by the 1911 Act, the more difficult to suggest that this power stopped short of amending the 1911 Act itself. The matter was not, however, put to the test until the 1949 Act was enacted. Prior to that, the only other Act passed pursuant to the 1911 Act was the Government of Ireland Act 1920 another important Act of constitutional reform which established a parliament for Ireland with legislative powers; so called 'Home Rule'.

92. Parliament's understanding of the effect of the 1911 Act was demonstrated by the use of its provisions to enact the 1949 Act. There was much debate in the Commons as to the nature of the constitutional changes proposed and whether it was right to make them, but it was generally accepted that the 1911 Act could be used to make those changes. The nearest to a challenge came in the following passage of the speech of a Conservative MP, Mr Quentin Hogg (Hansard 14 November 1949 col 1771):

"I must record my view that under the Parliament Act 1911 it was never contemplated that that particular procedure would be employed for the purposes of amending that Act. On the contrary, the preamble makes it quite plain that the Act was contemplated as a temporary Measure, and when the question of reform came before the House again what would be introduced, according to the framers of that Measure, would not be some amendment of that Act, but a totally new Second Chamber altogether. The purpose of using the Parliament Act procedure for the purpose of amending the Parliament Act is wholly outside the purposes of those who framed it, and is in itself a constitutional outrage."

Mr Hogg was not, however, suggesting that it was impossible to use the 1911 Act to pass the 1949 Act, merely that it was outrageous to do so. Mr Hogg was supported in his observations by another

member of his party, Captain Crookshank (col 1803). The position was the same in the House of Lords. The Bill was attacked on its merits and on the ground that there was no popular mandate for it. But it was throughout accepted that the Government was in a position to use the 1911 Act to pass the Bill despite the opposition of the Lords.

93. The Hunting Act is the fourth statute to be passed pursuant to the provisions of the 1911 Act, as amended by the 1949 Act. The other three are the War Crimes Act 1991, the European Parliamentary Elections Act 1999 and the Sexual Offences (Amendment) Act 2000.

94. In the first prosecution under the War Crimes Act 1991, ***R v Serafinowicz***, a submission was made on behalf of the defendant that both the 1949 Act and the War Crimes Act were invalid. No record remains of the submission or of Potts J's ruling, which rejected it, but we have been informed that both were brief. The first trial did not reach a conclusion, but a second defendant has been prosecuted under the War Crimes Act, was convicted and sentenced to life imprisonment, and remains in prison today. 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)). Each of these statutes was passed by both Houses and assented to by the Queen, so that all three constituents of sovereign power have recognised the validity of the War Crimes Act.

95. In June 1999, European Parliamentary elections were held under the European Parliamentary Elections Act and MEPs returned to the European Parliament on the strength of those elections. The validity of that Act was recognised by both Houses and the Queen when it was consolidated in the European Parliamentary Elections Act 2002.

96. Homosexual acts which were previously unlawful have no doubt been committed in reliance upon the Sexual Offences (Amendment) Act 2000 and prosecutions have also been successfully brought in respect of offences created by that Act.

97. These are cogent examples of the general recognition by Parliament, the Queen, the courts and the populace, that the 1949 Act was a proper exercise of sovereign legislative power and that the same is true of legislation enacted pursuant to the provisions of the 1949 Act. Sir William Wade, writing fifty years ago on *The Basis of Legal Sovereignty*, [1955] CLJ 172 at 196, commented:

"…the seat of sovereign power is not to be discovered by looking at Acts of Parliament but by looking at the courts and discovering to whom they give their obedience. In the case of peaceful revolutions, as has been pointed out, the issue is obscured by legal camouflage: Acts of Parliament purport to transfer sovereign power and since sovereign power passes at the same time by universal consent, the transfer is ascribed to the Acts. But it has already been seen that this is a defective explanation, for it leaves alive the controversy about the possibility of a repeal. That controversy can be resolved only in one way, by recognising that sovereignty is a political fact for which no purely legal authority can be constituted even though an Act of Parliament is passed for that very purpose. "

The restrictions on the exercise of the powers of the House of Lords that the 1949 Act purported to make have been so widely recognised and relied upon that they are today a political fact.

98. **Conclusion** : For the reasons we have given we have accepted that there was power to amend the 1911 Act to the extent of the amendment contained in the 1949 Act. We have not been prepared to go further than that. This is because, to an extent, we have been prepared to accept part of the argument that Sir Sydney advanced so eloquently. Once the 1911 Act had made the fundamental change of allowing the consent of the House of Lords to be dispensed with as long as the conditions in s.2(1) of the 1911 Act were complied with, the reduction of the period referred to in s.2(1) in its original form to those contained in the 1949 Act, was a relatively modest and straightforward amendment.

99. However, accepting a power of amendment of this nature exists is quite different to allowing the power of amendment to extend to making changes of a fundamentally different nature to the relationship between the House of Lords and the Commons from those which the 1911 Act had made. The 1949 Act left the relationship between the House of Lords and the House of Commons substantially the same as it was before the 1949 Act. It reduced the length of the period for which the House of Lords could delay legislation proposed by the Commons.

100. What, if any, further power of amending the 1911 Act that Act authorises should not be determined in advance of an attempt to make a more significant amendment than that contained in the 1949 Act. It

is, however, obvious that on our approach, the greater the scale of the constitutional change proposed by any amendment, the more likely it is that it will fall outside the powers contained in the 1911 Act. Our decision is limited to indicating that if what is involved is properly described as a modification of the 1911 Act it is legally effective.

We dismiss the appeal.

ORDER: Appeal dismissed; no order as to costs; leave to appeal refused.

(Order does not form part of approved judgment)

Sir Sydney Kentridge QC, Mr Richard Lissack QC, Mr Martin Chamberlain and Mr Marcus Hayward (instructed by Messrs Allen & Overy LLP) for the Appellant

Lord Goldsmith QC, Mr Philip Sales and Mr Clive Lewis (instructed by Treasury Solicitor) for the Respondent

Mr David Pannick QC and Mr Gordon Nardell (instructed by Messrs Collyer-Bristow) for the Interveners

