

The article below is a further addition to my writings on hunting. Others are included within the Topic 'Hunting Act 2004'. The Topic can be found on this website at www.francisbennion.com/topic/huntingact2004.htm.

Is the Parliament Act 1949 invalid?

A convicted huntsman will have ground to pursue an appeal

Labour's 1949 Parliament Act looks sound but the validity of any law passed under its provisions is open to challenge, writes Francis Bennion

If Labour MPs, with a free vote and the whips off, use the 1949 Parliament Act to force a hunting ban on to the statute book, how effective will the legislation be?

Doubts have been expressed by the former Master of the Rolls Lord Donaldson of Lymington. He has introduced two Bills designed to settle the supposed doubts, both of which failed.

In the debate on his second Bill in January 2001, Lord Donaldson explained that the 1949 Act amended the original Parliament Act of 1911, which was designed to force Lloyd George's People's Budget through a recalcitrant House of Lords. Under the 1911 Act as originally passed, the Commons could submit a Bill for royal assent without Lords' concurrence if they had passed it unchanged in three successive sessions and two years had elapsed between the first Second Reading of the Bill and the third occasion on which it was passed by the Commons.

In 1949, the Labour government took the view that the 1911 Act timetable imposed too long a delay. So their 1949 Act substituted a requirement for a Bill to be passed by the Commons on two, instead of three, occasions, and for only one year, instead of two, to have elapsed. The 1949 amending Act was passed under the 1911 Act, the House of Lords disagreeing.

Lord Donaldson, citing academic support, says it was invalid to purport to amend the 1911 Act in this way. He argues that by the 1911 Act Parliament delegated its powers under certain conditions to the House of Commons alone, and that a delegate cannot by itself enlarge the powers that have been delegated to it (known as pulling oneself up by one's own bootstrings). Was he right?

For the Liberal Democrats, Lord Goodhart said in the debate on the second Donaldson Bill in 2001 that the assertion that the 1911 Act was a delegation of Parliament's sovereign legislative powers to the Commons was 'plainly a fiction' and 'simply fanciful'.

For the Government, the Attorney General (Lord Williams of Mostyn) agreed. He reminded the House that the point had been considered in the parliamentary debates on the 1911 Act, when the then Prime Minister, Mr Asquith, said that his Government did not wish to see the liberty of a future House of Commons 'in any way impaired or restricted' by an exception proscribing 'any amendments which experience may show to be necessary'.

The great constitutional lawyer A. V. Dicey was also against the Donaldson theory. He said in his book *Law of the Constitution* that the House of Lords 'cannot prevent the House of Commons from, in effect, passing under the Parliament Act [1911] any change of the constitution'. In other words the contention that the 1949 Act was ultra vires is misconceived because the act involves not delegation but a remodelling of the constitutional powers..

Lord Donaldson's main academic authority is the late Professor Sir William Wade, who said in his book *Administrative Law* that an Act of Parliament requires the assent of the Queen, the House of Commons and the House of Lords, and that this is the one and only form of sovereign legislation. He added-

'It is true that Acts may be passed without the assent of the House of Lords under the procedures provided by the Parliament Acts 1911 and 1949; but these confer delegated, not sovereign, powers, for legislation passed under them owes its validity to their superior authority, and this is the hallmark of delegated legislation. Sovereign legislation owes its validity to no superior authority: the courts accept it in its own right.'

In my view the true position is that the 1911 Act involves not delegation but a remodelling of the constitution. Under the British constitution as accepted by our courts Parliament has unlimited legislative sovereignty. This means it can remodel the constitution in any way it wants by Act of Parliament (for example it could abolish the House of Lords altogether). Under the 1911 Act it used this power to remodel the constitution by modifying the power of the House of Lords to delay a Bill passed by the Commons. After the passing of the 1911 Act the constitution stood in this modified form.

So it seems that it was effective to use the 1911 Act as the Labour Government of the time used it to pass the 1949 Act. But a challenge remains possible. If a huntsman is convicted under what looks like becoming the Hunting Act 2004 he will be able to appeal against his conviction on the ground that the Act is invalid. Then Lord Donaldson's contention will at last come to court to be decided.

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¹ Published in Times Law, 9 November 2004, pages 6-7.