

Privy Council Appeals Nos. 25 and 26 of 1968

Rediffusion (Hong Kong) Limited – – – – – *Appellants*
v.
The Attorney-General of Hong Kong and another – – *Respondents*
and
The Attorney-General of Hong Kong and another – – *Appellants*
v.
Rediffusion (Hong Kong) Limited – – – – – *Respondents*

(Consolidated Appeals)

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1970

Present at the Hearing :

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD PEARSON
LORD DIPLOCK

(Majority Judgment delivered by LORD DIPLOCK)

These are consolidated appeals from two separate orders of the Supreme Court of Hong Kong. The first order dismissed the defendants' summons to set aside the writ upon the ground that the court had no jurisdiction to grant any of the relief claimed by the writ. The second order was made upon the defendants' summons to strike out the writ upon the ground that it disclosed no reasonable cause of action and ordered the writ to be struck out accordingly. Although the practical result was that the defendants succeeded in killing the action they did not do so on the first ground of their choice, *viz.* lack of jurisdiction in the court to entertain the action, but only on the second ground, *viz.* failure by the plaintiffs to disclose any reasonable cause of action. The defendants have appealed against the order dismissing the jurisdiction summons; the plaintiffs have appealed against the order striking out their writ in the cause of action summons. Although both summonses invoked the summary procedure of the Supreme Court they raised questions of law of outstanding constitutional importance. With the consent of the parties they were referred for hearing by the Full Court, who listened to prolonged and comprehensive argument and delivered careful and fully reasoned reserved judgments upon both the question of jurisdiction and the question of cause of action.

It is not necessary to do more than to summarise briefly the facts which led up to the issue by the plaintiffs of their writ. They are a company which carries on in Hong Kong the business of "re-diffusion" *i.e.*, of relaying to subscribers by means of wires programmes similar to those transmitted in this country without the aid of wires by television broadcasts. The terrain and architecture of Hong Kong create difficulties in the reception of ordinary television broadcasts and hitherto there has been no commercial television station in the colony. The greater part of the programmes relayed by the plaintiffs are produced by them in their own studios, but they also relay to their subscribers programmes and recordings of programmes broadcast by radio and television stations outside the colony and received by the defendants by means of their own receiving station there. They hold an exclusive licence granted by the Government of Hong Kong to carry on re-diffusion of television programmes in the colony. The licence expires in 1973. It is subject to the condition that they shall not infringe any copyright in the works which they transmit.

In 1964 an Ordinance was passed providing for ordinary commercial television broadcasting in Hong Kong and for the licensing of television broadcasting stations in the colony. The plaintiffs made an unsuccessful application for a licence under the Ordinance. The licence was granted to a rival company. They will accordingly be restricted to their present re-diffusion service. The Government later proposed that the law of copyright should be altered to take account of the new situation which would arise when the new television station started broadcasting.

The powers of the Hong Kong legislature to make laws about copyright are limited. This subject matter is dealt with by an Act of the Imperial Parliament, the Copyright Act 1911, which is expressly extended to Hong Kong by section 25. By section 27 the Hong Kong legislature has limited powers to modify or add to the provisions of the Act in its application to the colony. Although the Copyright Act 1911 has been substantially repealed in its application to the United Kingdom and has been replaced by the Copyright Act 1956, it still remains in force in Hong Kong under transitional provisions contained in paragraph 41 of the Seventh Schedule. Section 31 of the Copyright Act 1956, however, enables an Order in Council to be made extending any of the provisions of the Act to Hong Kong and confers upon the legislature of Hong Kong when this has been done limited powers to modify or add to those provisions in their operation as part of the law of Hong Kong. The terms of this section will call for closer examination at a later stage in this judgment.

For the purposes of the present appeal the relevant difference between the Copyright Act 1911, as at present applicable in Hong Kong and the Copyright Act 1956, as applicable in the United Kingdom, is that the former grants copyright in literary, dramatic, musical and artistic works, but does not grant any separate copyright in television broadcasts or in programmes relayed by re-diffusion. Consequently, if the copyright law of Hong Kong were to remain unchanged the plaintiffs would be entitled to relay to their subscribers television programmes broadcast from a television station in Hong Kong without the necessity of obtaining any licence from the company operating it, although they would need the licence of the owner of the underlying copyright in any original literary, dramatic, musical or artistic work which was broadcast from that station. Conversely they would themselves have no separate copyright in the programmes relayed to their subscribers as distinct from any copyright they might possess in any original literary, dramatic, musical or artistic work produced and relayed by them.

The Copyright Act 1956, on the other hand, as applicable in the United Kingdom creates a separate copyright in programmes broadcast by television, although not in programmes relayed by re-diffusion. It makes

it a breach of the separate copyright in television broadcasts to re-broadcast such programmes by television; but relaying a television broadcast by re-diffusion does not constitute any breach of the separate copyright in it nor is the person relaying the television broadcast liable for any breach of the underlying copyright in any original literary, dramatic, musical or artistic work relayed. Consequently if the provisions of the Copyright Act 1956, dealing with television broadcasts and re-diffusion, were to be extended to Hong Kong by Order in Council under s. 31, in the form in which they apply in the United Kingdom, the plaintiffs would still be able to relay to their subscribers television programmes broadcast by a company operating a television station in Hong Kong without the necessity of obtaining a licence to do so from the operating company and would be relieved from the necessity of obtaining a licence from the owner of any underlying copyright in the work broadcast.

The plaintiffs thus had a vital commercial interest in any modifications which might be made in any provisions of the Copyright Act 1956, either in the Order in Council extending them to Hong Kong or in any Ordinance which the Hong Kong legislature might enact pursuant to the powers conferred upon it by section 31 of that Act. Their interest in this matter was appreciated by the Government of Hong Kong and starting in September 1967, there was a lengthy correspondence between that Government and the plaintiffs as to the terms of the proposed Order in Council and the proposed Hong Kong Ordinance. The correspondence was conducted on behalf of the Government of Hong Kong by the second defendant, the Deputy Colonial Secretary. In the course of this correspondence the plaintiffs were supplied with copies of a draft Order in Council, which it was proposed to invite the United Kingdom Government to make and a draft Ordinance in the form of a Bill which it was proposed should be introduced in the Legislative Council and enacted by the Governor of Hong Kong with the advice and consent of that Council.

The draft Bill contained modifications and additions to the Copyright Act 1956, which the plaintiffs considered would operate to their commercial disadvantage. In particular although it granted separate copyright to programmes relayed by re-diffusion it also made the relaying by re-diffusion of television broadcasts a breach of the separate copyright in the television broadcast. This would prevent the plaintiffs from relaying to their subscribers programmes broadcast from a television broadcasting station in Hong Kong unless they could obtain a licence to do so from the company operating the television broadcasting station.

The plaintiffs considered that these proposed modifications and additions to the provisions of the Copyright Act 1956 were not within the legislative powers of the Hong Kong legislature under section 31 (3) of that Act.

On 10th April 1968, they issued a writ against a number of named defendants, whom they sued in a representative capacity on behalf of themselves and all other members of the Legislative Council of Hong Kong and against the second defendant personally. The writ was subsequently amended by substituting the Attorney-General of Hong Kong as representative defendant on behalf of the Legislative Council and inserting in paragraph (1) of the indorsement a reference to section 27 of the United Kingdom Copyright Act 1911. The amended writ claimed relief in the following terms:

“ 1. A declaration that it would not be lawful for the Legislative Council of Hong Kong to pass an Ordinance provisionally entitled “ A Bill to modify the Copyright Act 1956, in its application to Hong Kong and to make further provision with respect to copyright law in Hong Kong ” such Ordinance being *ultra vires* the Legislative

Council of Hong Kong having regard to the terms of **Section 27 of the United Kingdom Copyright Act 1911 and of Section 31 (3) of the United Kingdom Copyright Act 1956** as extended (or proposed to be extended) to Hong Kong and repugnant to the provisions of **those Acts** as so extended (or proposed to be so extended).

2. An injunction to restrain the First Defendant and every other member of the Legislative Council of Hong Kong and the Second Defendant by themselves their respective servants or agents or otherwise howsoever from passing the said Ordinance and from presenting it to the Governor of Hong Kong for his assent.

3. Further or other relief.

4. Costs.”

Together with the writ, the plaintiffs served notice of motion for an interlocutory injunction in the terms of paragraph (2) of the writ.

The defendants entered a conditional appearance and on 1st May issued two summonses. The first (the jurisdiction summons) sought an order:

“(a) that the writ of summons herein be set aside upon the grounds that the said writ seeks reliefs outside the jurisdiction of this Honourable Court, namely reliefs designed to prevent members of the Legislative Council from proceeding with a lawful part of the legislative process of Hong Kong; and further and in the alternative

(b) that the writ of summons herein be set aside upon the grounds that the said writ seeks reliefs outside the jurisdiction of this Honourable Court, namely—

- (i) in that the said writ seeks a declaration as to hypothetical and future questions to which declaration the Plaintiffs have no right; and
- (ii) in that the said writ seeks an injunction the granting of which is prohibited under section 16 of the Crown Proceedings Ordinance.”

The second (the cause of action summons) sought an order:

“(a) that the writ of summons herein be struck out upon the grounds that the said writ discloses no reasonable cause of action in that the said writ seeks reliefs designed to prevent members of the Legislative Council from proceeding with a lawful part of the legislative process of Hong Kong; and further and in the alternative,

(b) that the first relief claimed in the indorsement on the writ of summons herein be struck out upon the grounds that the said first relief discloses no reasonable cause of action, in that the said first relief sought is a declaration as to hypothetical and future questions; and further and in the alternative,

(c) that the second relief claimed in the indorsement on the writ of summons herein be struck out upon the grounds that it discloses no reasonable cause of action in that the said second relief sought is an injunction the granting of which is prohibited under section 16 of the Crown Proceedings Ordinance.”

The existence of the two separate summonses and judgments makes it necessary to distinguish between absence of jurisdiction in the court and absence of cause of action in the plaintiff. It is helpful to start by defining some relevant terms for the purposes of this case.

“An action” is an application to a court by a plaintiff for the grant of specified relief against the defendant.

“A cause of action” is a state of facts the existence of which entitles the court to grant to the plaintiff the relief applied for in the action.

“Jurisdiction” is the right of the court to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for. Conversely, lack of jurisdiction is absence of any right in the court to enter upon such an inquiry at all.

A properly constituted court may lack jurisdiction on four grounds:

- (1) Because a condition precedent to its entering upon the inquiry has not been fulfilled, *e.g.* a requirement such as existed in some British Colonies that notice be given to the government before starting an action against it.
- (2) Because of the status of one of the parties to the action, *e.g.* an action brought against a foreign sovereign or ambassador who has not consented to the jurisdiction or an action brought by an alien enemy.
- (3) Because of the subject-matter of the dispute in respect of which the relief is sought, *e.g.* a dispute involving the title to foreign land.
- (4) Because of the nature of the relief sought, *e.g.* dissolution of marriage before the Matrimonial Causes Act 1857, or an injunction against the Crown.

Lack of jurisdiction may be due to a combination of two or more of these grounds, *e.g.* an injunction against the Crown is a combination of grounds (2) and (4). Where the reason of public policy for excluding the jurisdiction of the court is the protection of a particular class of persons a defendant who belongs to that class can, by waiving his immunity, confer jurisdiction on the court; but, with this exception, no agreement between the parties can give to the court jurisdiction which it would otherwise lack.

It is evident from this analysis that the presence of the word “lawful”, which appears in both summonses as descriptive of the part of the legislative process with which the defendants contend would be interfered with by the reliefs sought in the action, though appropriate in the cause of action summons is inappropriate in the jurisdiction summons. What the defendants are contending in the jurisdiction summons is that the court has no power to interfere with the conduct of members of the Legislative Council when taking part in the legislative process even though their conduct is unlawful; and consequently the court cannot embark upon the inquiry whether their conduct is lawful or not. It is conceded that in the jurisdiction summons the word “lawful” was inserted in error and although no formal amendment has been made the proceedings on this summons in the Full Court and before their Lordships’ Board have been conducted on the basis that the word “lawful” has been omitted.

One further preliminary matter calls for mention. The claims in the writ both for the declaration and the injunction refer to the Legislative Council’s passing an “Ordinance”. It is common ground that this is a misnomer. What the Legislative Council passes is a “Bill”. It becomes an “Ordinance” only if and when the Governor assents to it. Although again no formal amendment has been made the proceedings on both summonses have been conducted on the basis that the word “Bill” has been substituted for the word “Ordinance” wherever it appears in the writ.

The defendants’ argument upon the lack of jurisdiction summons relies upon a combination of grounds (2), (3) and (4) mentioned above.

It is contended that the court cannot enter into the inquiry as to whether any cause of action exists because

- (a) The defendants, other than Mr. Hamilton, are members of the colonial legislature, and of the deliberative constituent part of it.

- (b) The subject matter is the legislative process of a colonial legislature or alternatively the deliberative process of a constituent part of a colonial legislature.
- (c) The relief sought by way of declaration would interfere with the legislative process of a colonial legislature or alternatively with the deliberative process of a constituent part of that legislature.

The Jurisdiction Summons

Since lack of jurisdiction has the consequence that the court has no right to enter upon the inquiry as to whether there exists a state of facts which would entitle the court to grant to the plaintiffs the relief sought, the jurisdiction summons can succeed only if it is shown that, no matter what were the facts that the plaintiffs would be able to establish relating to the subject-matter of the dispute *viz.* the passing of a Bill in the Legislative Council of Hong Kong, the court would have no power to grant relief of the kind sought against the defendants.

Before proceeding to a more detailed consideration of the jurisdiction summons it is desirable to examine briefly the constitutional position of the legislature in Hong Kong.

The legislative power in Hong Kong is conferred upon the Governor by Clause VII of the Letters Patent in the following terms :

“The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.”

Clause VI provides that there shall be a Legislative Council consisting of the Governor and such other persons as the Crown may direct by Royal Instructions. All of them hold office during Her Majesty's pleasure.

Clause X provides that when a Bill passed by the Legislative Council is presented to the Governor he has a discretion, to be exercised subject to any Royal Instructions, whether to assent or not.

The Letters Patent also reserve power to the Crown to disallow laws made by the Governor by and with the advice of the Legislative Council, and the prerogative power of the Queen in Council to make laws for Hong Kong.

Finally, Clause XII of the Letters Patent provides :

“In the making of any laws the Governor and the Legislative Council shall conform to and observe all rules, regulations, and directions in that behalf contained in any Instructions under our Sign Manual and Signet.”

The Royal Instructions provide that the Legislative Council shall consist of the Governor and not more than twelve other persons holding office under the Crown in the Colony, styled “Official members” and not more than thirteen other persons appointed by the Governor styled “Unofficial Members”. The Governor is to preside as far as practicable and when he does so he has a second or casting vote. The Legislative Council is empowered to make rules and orders for its own proceedings not inconsistent with the Letters Patent or Royal Instructions, and it is expressly provided by Clause XXIV that

“It shall be competent for any Member of the Legislative Council to propose any question for debate therein; and such question, if seconded by any other Member, shall be debated and disposed of according to the standing rules and orders.”

There are a number of directions to the Governor as to the granting and withholding of assent to Bills and reserving them for the signification of the Queen's pleasure, and there is a provision in Clause XXVII which

prohibits the introduction by an Unofficial Member of what would be the equivalent of a Private Bill in the United Kingdom Parliament unless certain conditions as to prior publication are fulfilled.

Pursuant to the power conferred upon it in the Royal Instructions the Legislative Council has made Standing Orders for its procedure to which it is not necessary to advert except to note that they contain a provision that "when a bill has been read a third time it shall be deemed to have been passed", but they do not contain any provision about presenting Bills to the Governor for his assent—perhaps because the Governor himself is a member of the Legislative Council and its President.

The significant matters in this constitution for the purposes of the present appeals are:

First, the legislature of Hong Kong consists of the Governor and the Legislative Council. The latter alone is not the legislature, it is the deliberative part of it.

Secondly, it is not a representative legislature. None of the members of the Legislative Council is elected; all, including the Unofficial Members, are appointed by or on behalf of the Crown.

Thirdly, although the advice and consent of the Legislative Council, signified by its passing a Bill, is an essential part of the legislative process in Hong Kong, no Bill passed by the Legislative Council has any effect as part of the law of Hong Kong unless and until it is assented to by the Governor.

Fourthly, the Governor has a discretion, uncontrolled by the Legislative Council though subject to control by the Crown, to give or to withhold consent to a Bill: though he has no power to make any law for Hong Kong except in the terms of a Bill passed by the Legislative Council.

Fifthly, the Letters Patent do not, but the Royal Instructions do, contain some provisions which themselves control the procedure to be followed in the Legislative Council in passing Bills. Of this the prohibition of the introduction of a Private Bill by an Unofficial Member without prior publication is an example.

Sixthly, the legislature of Hong Kong is not a fully sovereign legislature, even apart from the reserved power of disallowance by the Crown. Although the law-making power is conferred on the legislature in the widest possible terms by Clause VII of the Letters Patent it is subject to the limitation that the legislature cannot make laws which have effect outside the territorial limits of the Colony and to the limitation imposed by the Colonial Laws Validity Act 1865 of the United Kingdom Parliament. The nature and effect of this latter limitation will require closer examination in connection with the cause of action summons. For the purposes of the jurisdiction summons it suffices to observe that it invalidates laws made by the Hong Kong legislature to the extent that they are repugnant to the provisions of any Act of the United Kingdom Parliament which extend to the Colony.

Finally, the common law of England has been introduced as the residual law of Hong Kong. So far as any matter is not dealt with by a written law of local application in the Colony it is governed by English common law.

For the purposes of the jurisdiction summons one must treat the declaration sought as if it stopped at the end of the title of the proposed Bill; and one must assume that if the action were allowed to proceed the plaintiffs would be able to establish that the conduct of the members of the Legislative Council in passing the Bill would be unlawful and would

affect adversely the legal rights of the plaintiffs. The remainder of the declaration merely sets out the grounds upon which the plaintiffs seek to rely as establishing that it would be unlawful for the Legislative Council to pass the Bill. These are relevant to the question whether the writ discloses any reasonable cause of action in the plaintiffs which would entitle the court to grant them the relief sought if the court has any power to grant that kind of relief at all. They are not relevant to the only question raised in the jurisdiction summons, *i.e.*, whether the relief *is* of a kind which the court has power to grant.

Thus the broad question on the jurisdiction summons is whether a court of justice in Hong Kong has any power to interfere either by persuasion (declaration) or compulsion (injunction) with the conduct of members of the Legislative Council in carrying out a part of the legislative process, or more specifically in carrying out the deliberative part of the legislative process, even though that conduct is unlawful.

This question cannot be answered by applying to Hong Kong the legal principles which govern the jurisdiction of English courts to interfere in the conduct of proceedings in the fully sovereign Parliament of the United Kingdom. It is well settled that the common law of England which is introduced into a colony does not include the whole of the *lex et consuetudo parliamenti*. Members of a legislative assembly in a colony do not enjoy all the privileges and the immunity from control by courts of justice which are enjoyed by members of the Parliament of the United Kingdom, but only such of those privileges and so much of that immunity as are essential to enable them to carry out their functions under the colonial constitution. (*Kielley v. Carson* 4 Moo P.C. 63, *Doyle v. Falconer* L.R. I.P.C. 328.)

The cases in which this principle was first established were concerned with the power of a colonial legislature to imprison for contempt. In *Doyle v. Falconer* the alleged contempt was not by an outsider but by a member of the legislative assembly committed in the course of its deliberative proceedings. In the later case of *Barton v. Taylor* (11 A.C. 197), the plaintiff who was a member of the Legislative Assembly of New South Wales and had been suspended from the service of the House by resolution of the Assembly, attempted to attend a subsequent meeting of the Assembly and was evicted upon the order of the Speaker. He brought an action against the Speaker for trespass to the person in evicting him from the Chamber. By his plea the Speaker relied upon the resolution of the Assembly as justifying the plaintiff's eviction. To this plea the plaintiff demurred. It was held by the Supreme Court of New South Wales that the Assembly had no power to suspend a member from attending its proceedings for an indefinite period. The Court's dismissal of the demurrer was upheld upon appeal by the Judicial Committee.

This case is of two-fold significance to the jurisdiction summons. First, neither the Supreme Court nor the Judicial Committee hesitated to entertain an action in which relief was sought for unlawful acts committed by members of a Legislative Assembly in the course of deliberative proceedings in the Chamber itself. Secondly, the court exercised jurisdiction to inquire into and to determine not only the lawfulness of a resolution of the Assembly but also the legal right of a person to take part in its legislative proceedings, a determination which directly affected the conduct of the legislative process itself. Although the argument that a court of justice had no jurisdiction "to inquire as to what is done within the walls of Parliament" had been advanced at the hearing in the Supreme Court it received no mention in the judgment. Both that court and the Judicial Committee treated it as axiomatic that the court had

jurisdiction to inquire into and to grant relief for unlawful conduct by members of a legislative assembly in the course of legislative proceedings in the Chamber.

In each of these cases the relief claimed was damages for unlawful acts already committed. None of them involved equitable relief such as a declaration or an injunction directed to preventing future unlawful acts. These are remedies which the court has a discretion to grant or to withhold notwithstanding that the plaintiff has established a threatened breach of his legal rights by the defendant. When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, *i.e.* to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

In *Trethowan v. Peden* the courts did intervene to prevent threatened unlawful conduct in the legislative process itself by granting the discretionary remedy of an injunction to restrain the President of the Legislative Council of New South Wales from presenting to the Governor for his assent a Bill which had been passed by the Legislative Council. The question of jurisdiction was argued on demurrer when the case was before the Supreme Court of New South Wales ((1930) 31 S.R. (N.S.W.) 183). The five members of that court were unanimous in holding that the court had jurisdiction to grant the injunction, though Long Innes J. dissented upon the question whether the facts alleged by the plaintiffs disclosed any threatened unlawful conduct by the defendants. Special leave to appeal to the High Court of Australia was granted upon terms which excluded that part of the demurrer which raised the question of jurisdiction. Accordingly this was not dealt with upon the appeals in the High Court of Australia (44 C.L.R. 394) or before the Judicial Committee ([1932] A.C. 526). But if it had been apparent that there was no jurisdiction presumably the High Court of Australia and the Judicial Committee would have felt bound to take the point *proprio motu* at the hearing of the appeals.

A similar jurisdiction was exercised by the Supreme Court of Victoria in *McDonald v. Cain* ((1953) V.L.R. 411) though in the result the action failed; the injunction was not granted and there was no appeal. In two more recent cases in the High Court of Australia, however, doubt has been expressed as to the correctness of the decision in *Trethowan v. Peden*. In *Hughes and Vale Proprietary Ltd. v. Gair* (90 C.L.R. 203) Sir Owen Dixon who had been a party to the decisions of the High Court in *Trethowan v. Peden* both on the applications for special leave to appeal and on the appeal itself, expressed his doubts as to whether the procedure whereby the question of jurisdiction had been excluded from the appeal was justified and said of an application for an interlocutory injunction restraining the presentation of a Bill for the Royal Assent "We do not think it should be granted on this occasion or later or in any case." The plaintiffs' proper remedy in his view lay in proceedings for a declaration of invalidity of the Statute after the Bill had been enacted and the legislative process was complete. To the same effect were his observations in *Clayton v. Heffron* (105 C.L.R. 214) where he said that where the validity of a law "depends upon any fact . . . which consists in a proceeding within Parliament the courts must take it under their cognizance . . . but even then one might suppose only after the law in question has been enacted. . . ."

This language in their Lordships' view is more appropriate to a statement of what should be the settled practice of the courts in Australia with regard to granting discretionary relief in respect of unlawful proceedings in legislative bodies than to a denial of any jurisdiction in the courts to inquire into the lawfulness of such proceedings. Sir Owen Dixon was dealing with conduct by members of the legislative body which, if unlawful, would result in the enactment of a law which would be void. In such a case the plaintiff would have an alternative remedy after the Bill had been passed and assented to, by seeking a declaration that the resulting statute was void. The existence of an alternative remedy is always a relevant consideration in the exercise of a discretion whether to grant or withhold relief at an earlier stage.

But in the case of a colonial legislature whose powers are derived from Letters Patent and Royal Instructions there may be some kinds of conduct in the course of the legislative process which, though prohibited by the constitutional documents from which the legislature derives its powers, do not have the effect of making the resulting enactment void.

Section 4 of the Colonial Laws Validity Act 1865 provides :

“4. No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.”

Thus the breach of prohibitions relating to proceedings in the legislature, contained in Royal Instructions, such as that contained in Clause XXVII of the Royal Instructions to the Governor of Hong Kong does not make the resulting law void. Prohibitions of this kind are inserted for the protection of Her Majesty's subjects in the colony, but unless the courts have jurisdiction to inquire into them and grant relief before the resulting law is enacted the subject intended to be protected would be deprived of any remedy.

The immunity from control by the courts, which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships' view leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers.

In their Lordships' view the Full Court of Hong Kong were right in holding that they had jurisdiction to enter upon the inquiry whether or not it would be unlawful for the Legislative Council of Hong Kong to pass the proposed Bill, and if they found that it would be unlawful, to decide in their discretion whether or not to grant the relief by way of declaration and injunction claimed.

Their Lordships can deal very briefly with the alternative ground upon which it was contended before them that the court had no jurisdiction to entertain the action, *viz.* that it seeks a declaration as to hypothetical and future questions. The evidence showed a clear intention on the part of the Government of Hong Kong, which, with the aid of the Governor's casting vote, commands a majority in the Legislative Council, to seek from the Secretary of State in the United Kingdom an Order in Council in the terms of the draft Order referred to in the writ and to enact an Ordinance in the terms of the draft Bill. Such a Bill, if enacted, would, as previously mentioned, seriously affect the plaintiffs' existing legal rights. All questions involved in *quia timet* proceedings are hypothetical and future. To exclude the jurisdiction of the court to inquire into them in order to decide whether to exercise its discretion to grant relief, the defendants would have to show that the questions were purely abstract questions the answers to which were incapable of affecting any existing or future legal rights of the plaintiffs. This they have not done.

Their Lordships would accordingly dismiss the appeal in the jurisdiction summons.

The Cause of Action Summons

Although a summons to set aside a writ for want of jurisdiction invokes the summary procedure of the court it is not subject to the general rule of practice that the summary procedure for striking out proceedings should be used only in plain and obvious cases. When faced with a contention that it has no jurisdiction to entertain the action at all, a court should satisfy itself at any rate *prima facie* that it has such jurisdiction before it enters upon any inquiry into the existence of the facts alleged to constitute the cause of action. It is for the court to decide in its own discretion whether the question of its jurisdiction to entertain a particular action can be conveniently decided *in limine* by proceedings to strike out the writ. In the instant case the Supreme Court of Hong Kong was faced with a pending application by the plaintiffs themselves for an interlocutory injunction: so it would in any event be imperative to decide the question of jurisdiction before entertaining the application for interlocutory relief. Neither party complains of their having done so.

But in the cause of action summons the plaintiffs have repeated before their Lordships the objection raised in the Supreme Court that the cause of action summons involves complex questions of law unsuitable to be dealt with at this early stage by the summary procedure of striking out the writ and that the action should have been allowed to go to trial or the question of law involved set down for hearing as a preliminary issue after the pleadings had been closed.

It is a well-established principle that the summary power under Order 18 rule 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases. This principle can be shown to be correct according to the evident intention of the rule for several reasons:

- (1) There is the reference to a "reasonable" cause of action or defence.
- (2) There is the context of "scandalous frivolous or vexatious" and "prejudice, embarrass or delay the fair trial of the action" and "otherwise an abuse of the process of the court."
- (3) The application is made at a very early stage of the action when the pleadings are not complete and no evidence has been adduced.
- (4) The application is (in England in the Queen's Bench Division) to a master and on appeal to the judge in chambers with no further appeal as of right. Normally the hearing of such an application does not involve consideration of elaborate arguments and is of

a short and summary character. But the court must have a discretion as to the length of the hearing. There have been cases in England where an application of this kind involved an important question and after elaborate arguments it became plain and obvious that the alleged cause of action was unsustainable so that an order to strike out should be made. *Rondel v. Worsley* [1969] 1 A.C. 191, *Wiseman v. Borneman* [1969] 3 W.L.R. 706, *Roy v. Prior* [1969] 3 W.L.R. 635, *Schmidt v. Home Office* [1969] 2 Ch. 149.

The cause of action summons was heard with the consent of the parties by the Full Court consisting of the same judges as had previously heard the jurisdiction summons. The constitutional law of Hong Kong and the cases which were relevant to the jurisdiction summons had been fully canvassed at the hearing of that summons and comprised nearly the whole of the law and cases relevant to the cause of action summons. In the light of the argument about them which they had already heard the judges of the Full Court were sufficiently familiar with the law involved to find "plain and obvious" a case which without the benefit of prior indoctrination might well have seemed complex.

Their Lordships see no reason to criticise the way in which the Full Court exercised their discretion to entertain the cause of action summons and to decide the question of law which it raised. They are satisfied that the matter has been fully argued before the Supreme Court and in these consolidated appeals and that no useful purpose would be served by deferring a decision as to whether the writ as at present framed discloses any reasonable cause of action.

No evidence is admissible on the cause of action summons. It was taken out before any statement of claim was delivered and the only documents that can be looked at are the writ, the documents referred to in the writ, *viz.* the draft proposed Bill and possibly the draft proposed Order in Council, and the relevant law of Hong Kong contained in the Letters Patent, Royal Instructions, local Ordinances and subordinate legislation and any Acts of the Imperial Parliament and subordinate legislation thereunder which extend to Hong Kong.

The only question in the cause of action summons is whether the writ discloses any reasonable grounds for contending that the conduct of Members of the Legislative Council in passing the Bill would be unlawful. In answering this question all facts alleged expressly or by implication in the writ must be assumed to be correct, *viz.* that the Members of the Legislative Council do intend to pass a Bill in the terms of the draft and do intend to present it to the Governor of Hong Kong for his assent.

It would have been open to the defendants to have contended at the hearing of the summons that the terms of the proposed Bill would not be repugnant to the Acts of the United Kingdom Parliament and the proposed Order in Council referred to in the writ. But they elected not to do so, no doubt for the reason that this question would involve complex questions of specialised law not appropriate to be dealt with by the summary procedure under Order 18 rule 19 of the Rules of the Supreme Court of Hong Kong. The Attorney-General accordingly conceded that, *for the purposes of the cause of action summons*, the Court may assume that the whole of the proposed Bill, if enacted as an Ordinance, would be repugnant to the provisions of the Acts of the United Kingdom Parliament and the proposed Order in Council referred to in the writ. This concession made solely for the purpose of testing whether it is plain and obvious that it is not "unlawful" for the Members of the Legislative Council to pass a Bill which is repugnant to an Act of the

Imperial Parliament extending to Hong Kong, does not of course stop the Government from contending in any other proceedings in this or any other action that the proposed Bill or any Ordinance enacted in the terms of the proposed Bill would not be so repugnant.

The only question raised in the cause of action summons can thus be re-stated as: "Is it 'unlawful' for Members of the Legislative Council of Hong Kong to pass a Bill which is repugnant to the provisions of an Act of the Imperial Parliament extending to Hong Kong and/or to present it to the Governor for his assent?"

This depends upon the effect of section 2 of the Colonial Laws Validity Act 1865, which reads as follows:

"2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

This section it is to be noted deals only with the construction and effect of Colonial Laws once they have been enacted. It is not concerned with the procedure followed in the law-making process before a proposed measure becomes a law. So far as that is dealt with at all in the Act it is by section 4 and, as respects representative legislatures, also by the latter part of section 5.

Section 2 provides as a matter of construction that a Colonial Law shall be read as subject to any Act of Parliament, Order or Regulation extending to the Colony, and secondly, as a matter of effect, that it shall be void and inoperative to the extent of its repugnancy to any such Act of Parliament, Order or Regulation but not otherwise.

A Bill passed by the Legislative Council of Hong Kong is not a Colonial Law nor does it become one when presented to the Governor for his assent. It becomes a law only when the Governor has assented to it and it does as a result of his assent. It is true that the passing of a Bill in the terms of the proposed law is a necessary step in the making of that law, since the Governor's power of assent is restricted to laws in the terms of Bills passed by the Legislative Council, but it is a step which does not necessarily result in the making of any law since the Governor has a discretion to refuse his assent.

It can be truly said about the conduct of the Legislative Council in passing a Bill which, if enacted by the Governor's assent, would be repugnant to an Act of Parliament, that such conduct cannot affect the legal rights of anyone. If the Governor does not assent, the Bill will never become a law at all; if he does the Ordinance will be void and inoperative and will not be the law of Hong Kong. The Legislative Council may be wasting their time in passing the Bill, but to do so is not in itself unlawful.

In a sense it may be said to be *ultra vires* the legislature of Hong Kong to make a law, *i.e.* to pass not merely a Bill but an Ordinance which is void and therefore ineffective. But conduct which is *ultra vires* in this sense is not of itself "unlawful". Conduct however much it lies outside the legal power of the actor does not give rise to any cause of action on the part of any person unless it infringes or threatens to infringe that person's legal rights. Such an infringement can only occur when steps are taken

to enforce the void Ordinance. It is committed not by the makers of the Ordinance but by those who take steps to enforce it after it has been made. But steps to enforce any Ordinance passed in the terms of the proposed Bill will not in any event be taken by members of the Legislative Council in their capacity as such, which is the only capacity in which they are sued. The question whether before a proposed Ordinance is enacted the plaintiffs might have some other remedy in a *quia timet* action brought against other defendants sued in a different capacity in respect of threatened steps to enforce the Ordinance if and when it is passed does not arise in the present appeal.

But even if it be correct to say that in the limited sense indicated above it would be *ultra vires* the legislature to pass an Ordinance repugnant to an Act of Parliament, it does not follow that it is also *ultra vires* the Legislative Council, as a constituent part of the legislature, to pass a Bill which at the time when it is debated in the Council is in terms which are repugnant to existing provisions of an Act of Parliament extending to Hong Kong. Repugnancy falls to be determined at the date of enactment, not before. By that date the relevant provisions of the Act of Parliament may have been amended in their application to Hong Kong—a possibility which the Hong Kong legislature may hope to influence but cannot control.

In their Lordships' view it cannot be said to be *ultra vires* in any proper sense of that expression for the Legislative Council to debate and pass a Bill, merely because its terms are repugnant to existing provisions of an Act of Parliament extending to Hong Kong. The Royal Instructions expressly confer upon every member the right to propose any question for debate in the Legislative Council and there can, in their Lordships' view, be no reason in public policy, why they should not debate and pass and present to the Governor for his assent a Bill which cannot have any effect as law in the Colony unless by the time it is actually assented to by the Governor the provisions of an Act of Parliament as they existed at the time of passing and presentation of the Bill have been amended. The likelihood or otherwise of such amendments being made may affect the utility of their debates; it cannot in their Lordships' view affect their legal right to engage in them.

It only remains to consider whether the provisions either of the Copyright Act 1911, which at present extend to Hong Kong or those of the Copyright Act 1956, which it is proposed shall be extended to the Colony, impose some greater limitation upon the powers and proceedings of the Legislative Council of Hong Kong than those resulting from the Colonial Laws Validity Act 1865.

Section 27 of the Copyright Act 1911 has the effect of amending the Colonial Laws Validity Act 1865 by empowering the Hong Kong legislature to make modifications or additions of a limited character to the provisions of the Copyright Act 1911 in its application to Hong Kong. Its wording calls for no comment. It extends the powers of the legislature; it does not curtail them.

Section 31 (3) of the Copyright Act 1956 gives a similar power of modification and addition to the Hong Kong legislature though in somewhat different phraseology. So far as relevant to this point that section reads as follows:

“ 31. (1) Her Majesty may by Order in Council direct that any of the provisions of this Act specified in the Order (including any enactments for the time being in force amending or substituted for those provisions) shall extend, subject to such exceptions and modifications (if any) as may be specified in the Order, to—

- (a) . . .
- (b) . . .
- (c) any colony;
- (d) . . .
- (e) . . .
- . . .

(3) The legislature of any country to which any provisions of this Act have been extended may modify or add to those provisions, in their operation as part of the law of that country, in such manner as that legislature may consider necessary to adapt the provisions to the circumstances of that country:

Provided that no such modifications or additions, except in so far as they relate to procedure and remedies, shall be made so as to apply to any work or other subject-matter in which copyright can subsist unless--

- (a) in the case of a literary, dramatic, musical or artistic work, the author of the work, or, in the case of a sound recording or a cinematograph film, the maker of the recording or film, was domiciled or resident in that country at the time when, or during the period while, the work, recording or film was made, or
- (b) in the case of a published edition of a literary, dramatic or musical work, the publisher of the edition was domiciled or resident in that country at the date of its first publication, or
- (c) in the case of a literary, dramatic, musical or artistic work, or of a sound recording or a cinematograph film or a published edition, it was first published in that country, or
- (d) in the case of a television broadcast or sound broadcast, it was made from a place in that country."

It is to be observed that the proviso contains a positive prohibition upon the making by the Hong Kong legislature of certain types of modifications and amendments: "no such modifications or additions . . . shall be made . . . unless". To this extent it may be said with greater force than in respect of colonial laws affected only by the Colonial Laws Validity Act 1865, that it is *ultra vires* the legislature to pass an Ordinance which purports to make prohibited modifications or additions. But the only consequence of making them is that prescribed by section 2 of the Colonial Laws Validity Act 1865. They are void and inoperative to the same extent as they would have been if no power of modification at all had been granted. In their Lordships' view this cannot affect the only question for decision on the cause of action summons, which is not whether the Governor could lawfully assent to an Ordinance which made modifications and additions of the prohibited kind, but whether pending the application of the Copyright Act 1956 to Hong Kong, the members of the Legislative Council can lawfully debate, pass and present to the Governor for his assent a Bill containing them.

For the reasons already given their Lordships are in agreement with the Supreme Court that they can, and that the appeal in the cause of action summons should also be dismissed. Accordingly they will humbly advise Her Majesty that both appeals be dismissed. There will be no order as to costs.

(Dissenting Judgment by LORD MORRIS OF BORTH-Y-GEST)

By s. 31 (1) of the United Kingdom Copyright Act 1956 Her Majesty is empowered by Order in Council to direct that such provisions of the Act as are mentioned in the Order are to apply to a colony. No such direction has yet been given in relation to Hong Kong but in the year 1967 Rediffusion (Hong Kong) Limited (the Company) were informed by the Colonial Secretariat in Hong Kong that it was proposed to extend the Copyright Act 1956 to Hong Kong. The extension (as permitted by s. 31 (1)) would be subject to certain exceptions and modifications as appeared necessary to make the Act applicable to Hong Kong.

If and when any provisions of the Act are extended to Hong Kong and if those provisions include s. 31 (3) the legislature of Hong Kong will then have the powers given by that sub-section. So far as relevant the sub-section is as follows:

“(3) The legislature of any country to which any provisions of this Act have been extended may modify or add to those provisions, in their operation as part of the law of that country, in such manner as that legislature may consider necessary to adapt the provisions to the circumstances of that country:

Provided that no such modifications or additions, except in so far as they relate to procedure and remedies, shall be made so as to apply to any work or other subject-matter in which copyright can subsist unless

. . .

. . .

(d) in the case of a television broadcast or sound broadcast, it was made from a place in that country.”

On 5th September 1967 the Colonial Secretariat in Hong Kong wrote to the Company and sent a draft copy of the proposed Order in Council which would extend the Act of 1956 to Hong Kong subject to certain exceptions and modifications. Section 31 (3) was not excluded. Indeed it was made clear that avail was to be made of the provisions of s. 31 (3) for with the letter a draft was sent of a proposed Bill which was to be passed in Hong Kong to modify and to add to the Act in its application to Hong Kong. The comments of the Company were invited. The contents of the proposed Bill were such that the Company considered that it would be seriously adversely affected. Considerable correspondence followed. The Company made it clear that the contents of the proposed Bill gave them great concern. Eventually by a letter dated 10th February 1968 the Colonial Secretariat informed the Company that the Governor in Council had ordered that, in relation to copyright, legislation should be introduced which would (a) confer copyright in a television broadcast as such (which would be done by an Order in Council extending the United Kingdom Copyright Act 1956 to Hong Kong) and (b) provide (by a local Ordinance) that the relaying of a television broadcast to the premises of a subscriber to a diffusion service would be an act restricted by copyright. The Company wrote saying that they found the contents of the letter profoundly disturbing in that the decisions which had been indicated carried with them a very serious threat to the future of the Company.

By a further letter dated 24th February 1968 the Colonial Secretary sent to the Company a copy of the new Draft Order in Council and a copy of the new draft Copyright Bill to be introduced in Hong Kong. These were in replacement of the earlier working copies of the drafts which had been sent on 5th September. The draft Copyright Bill was a Bill to “Modify the Copyright Act 1956, in its application to Hong Kong and to make further provision with respect to copyright law in Hong Kong.”

It was therefore made clear to the Company that it was in the first place proposed that by Order in Council there should be an extension to Hong Kong of certain provisions of the Act of 1956. The validity of such proposed action has been in no way doubted or challenged. It was further made clear to the Company that thereafter in reliance upon the provisions of s. 31 of the Act when extended to and made operative in Hong Kong, it was proposed to enact a Hong Kong Ordinance which made certain modifications. The Company took the view not merely that the proposed modifications seriously imperilled their commercial future but that as a matter of law the proposed modifications could not be made. They were as the Company contended of such a nature as brought them within the express prohibitive words of s. 31 (3) viz. "that no such modifications or additions . . . shall be made . . ."

It is unnecessary to record the respects in which, as the Company contend, the proposed modifications would be within the express statutory prohibition, because, for the purpose of the interlocutory proceedings it is conceded that the terms of the proposed Bill if enacted as an Ordinance would conflict with the substantive provisions of the 1956 Act which were to be extended to Hong Kong. It is therefore conceded (for the purpose of the interlocutory proceedings) that if the proposed Bill were enacted as an Ordinance there would be such repugnancy to the provisions of the Act of 1956 as applied to and extended to Hong Kong that the whole Ordinance would be void and inoperative.

Under these circumstances the Company was faced with the prospect that legislation the provisions of which would in the Company's view be highly damaging to the Company's interests was to be enacted in defiance of a statutory prohibition. The Company had two courses open to them. One was to reiterate their contentions but to take no action and to wait until there was an enacted Ordinance and then to take appropriate steps to have it declared by the Court that the whole Ordinance was void and inoperative. In the interval of time that it would take after the making of an Ordinance to get the decree of the Court there would be an enacted law which could be asserted by others to have the force of an enacted law producing the result that some of the activities of the Company would be very materially affected.

The other course open to the Company was to seek the ruling of the Court so that certainty in regard to the legal position should result. That was the course that they followed. Provided always that the jurisdiction of the Court could be invoked that would appear to have been the convenient and sensible course. It would be in everyone's interests to know with certainty what could be done and what could not. The Colonial Secretariat very properly stated what they intended to do. The precise terms of the proposed Bill were formulated. The terms were made known to the Company. A clear issue arose. It could only be resolved by the adjudication of the Court. The Colonial Secretariat on the one hand made it clear that the hope and intention was to secure the passing of a bill in the proposed terms so that it could be enacted by the Governor. The Company made it clear that they asserted that the proposed terms constituted modifications the making of which was expressly forbidden by the terms of s. 31 (3). So there was a clear direct and straightforward issue of law. Of course if the Colonial Secretariat, after the matter was before the Court, decided to withdraw the proposed Bill or to withdraw the parts of it that the Company asserted could not be enacted the issue of law would disappear. Unless or until any such development occurred there was a live dispute on a point of law. The situation was not in any way uncertain or obscure. The point at issue was neither academic nor hypothetical. Nor in my view did the provisions of s. 16 of the Crown Proceedings Ordinance deprive the Court of power

to give the reliefs claimed. The members of the Legislative Council were not the Crown and any order against the second defendant would not have the effect of giving relief against the Crown.

When the writ was issued on 10th April 1968 it must have been clear to all that the question raised for the adjudication of the Court was whether the enactment of a Bill in the terms communicated to the Company would be repugnant to the provisions of the Copyright Act 1956 as proposed to be extended to Hong Kong. That was the issue raised. It still remains undecided.

That it may be both convenient and desirable to obtain the ruling of a court on a point of law will not suffice if the court lacks jurisdiction to give the ruling which is sought. Those who were sued (the members of the Legislative Council and the Assistant Colonial Secretary) decided, after entering conditional appearance, to ask the Court to stop the proceedings *in limine*. By one summons (under O. 12. R. 8) they asked that the writ should be set aside because reliefs were sought which were "outside the jurisdiction" of the Court. The first ground was that the reliefs were "designed to prevent members of the Legislative Council from proceeding with a lawful part of the legislative process of Hong Kong". By another summons (under O. 18. R. 19) they also asked that the writ should be set aside and, asserting exactly the same grounds as set out in the other summons, they claimed that because of the nature of the reliefs claimed the writ disclosed no "reasonable cause of action". The summonses were separately considered. After argument lasting four days the Court in a careful and learned reserved judgment dismissed the first summons. That meant that they had jurisdiction to give the reliefs claimed. That did not involve that the Court was deciding that, at a trial, the Court, if satisfied as to the correctness of the Company's legal contentions, would inevitably give the relief claimed or would necessarily give it in the precise terms formulated on the writ. But the decision involved not merely that those sued were as persons amenable to the jurisdiction of the Court but further that it was within the power of the Court to give relief of the nature claimed even though as against the first defendants it related to their rights and duties as members of the Legislative Council of Hong Kong. Important and difficult questions called for decision.

After giving judgment in regard to the one summons the Court later heard argument upon the other. In the result after argument on three further days the Court decided that the writ should be set aside. The application had been to set it aside because it claimed the reliefs which the Court on the other summons had held that it had jurisdiction to give. The Court held that the writ disclosed no reasonable cause of action.

It is because with respect I am unable to agree in affirming the decision of the Court on this summons, *i.e.*, that under O. 18. R. 19 that I feel constrained to express my dissent.

It is to be remembered that no statement of claim had been delivered. On the application to strike out the writ by the summons under O. 18. R. 19 no evidence was admissible. Only the writ could be looked at together with the documents referred to in it. The law of Hong Kong would of course be known to the Court and no evidence in regard to it would be needed. There was no suggestion that the writ was an abuse of the process of the Court: nor that it was scandalous or frivolous or vexatious: nor that anything contained in it was calculated to prejudice, embarrass or delay the fair trial of the action. The actual terms of the writ included a claim for a declaration that it would not be lawful for the Legislative Council to pass the proposed Ordinance. It was I think common ground that instead of the word Ordinance the

word Bill should have been used. The Legislative Council passes a Bill. A Bill only becomes an Ordinance when the Governor by assenting to a Bill makes it a law. Nothing however turned upon so minor a verbal point. Another verbal point did however receive great prominence and finally seems to have been the basis of the argument to set aside and of the Court's decision. That was the word "lawful". The point was taken that the word "lawful" was used in the writ and it was contended that it would not be unlawful for the Legislative Council to pass a measure even though such measure was inevitably destined, if it later nominally became an Ordinance, to be declared to be void and inoperative.

I cannot help thinking that once it was decided that there was jurisdiction in the Court to give the reliefs claimed it was a pity that so much learning had to be diverted to a somewhat arid and technical discussion as to whether it would be "lawful" for the Legislative Council to pass the proposed Bill in view of the terms of s. 31 (3) and as to whether or not it would be "lawful" to pass a Bill which when called an Ordinance would quite definitely be void. Waiting in the wings was the real issue which at some time must be tried: the curtain raiser has so far been the whole performance.

It was however decided to strike out the writ as disclosing no reasonable cause of action. As I read the judgment the decision was based not upon a conclusion that there was no cause of action but rather upon the view that the case would not succeed. With respect I consider that the Court posed the wrong question when they defined it as being "whether the relief, which we have held lies within our jurisdiction, should be granted in the circumstances of the present case". Whether the relief "should" be granted would be the question to be decided at the trial. By then there would be pleadings. By then all relevant evidence would be available. If the Court at the trial in its discretion decided to make a declaration it would not be anchored to the exact wording or phrasing used in the writ.

There may be circumstances under which a person may have the right to go to a court for a declaration (whether or not he seeks other relief) without being able to or having to show that he has a cause of action apart from his claim for a declaration. His application will not be defeated because he applies merely for a declaratory judgment or order. His application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action. (*Guarantee Trust Company of New York v. Hannay & Company* [1915] 2 K.B. 536.) As Bankes L. J. said in that case there would be the limitation that the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. In reference to an English rule in terms corresponding to the existing O.15. R.16 in Hong Kong which reads:

"No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

Bankes L. J. said that subject to the limitation which he had expressed he could see "nothing to fetter the discretion of the Court in exercising jurisdiction under the rule to grant relief": he added "having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors I think the rule should receive as liberal a construction as possible".

Once therefore the Court decided that there would be nothing contrary to the accepted principles upon which the Court exercises its jurisdiction if it granted the reliefs which the Company sought I do not think that the writ ought to have been set aside as disclosing no reasonable cause of action. The reason why the Court made its order was that it did not consider that the relief "should" be granted. A full reading of the judgment shows however that the Court proceeded on the basis that the case was one where it was "plain and obvious" that the action could not succeed: that it was a case where even bearing in mind the possibility of amendment the Court considered that the action was from the start doomed to failure with the result that no possible injustice could result if the action was stopped *in limine*. Accepting that this was a legitimate line of approach it becomes necessary to see the reasons why the Court felt able to be so satisfied. Here the words "it would not be lawful" taken from the writ again emerge as the pivot of the reasoning. Shortly stated the reasoning was that there was no chance that the Company could succeed in showing that it would not be lawful for the Legislative Council to pass the proposed Bill: therefore their claim was inevitably doomed to fail. Accepting for the purpose of the summons that the terms of the proposed Bill are such that it could never become an Ordinance (for if it ever came to be called an Ordinance it would be void) it was held that in proceeding to pass such a Bill the Legislative Council would be merely engaged upon a process of wasting time but that it could not be said that what they would be doing "would not be lawful".

The conclusion of the Court was contained in the following passage:

"We hold that the relief requested in the first paragraph of the endorsement on this Writ cannot be granted because it is not, in our view, "unlawful" for the Legislative Council of Hong Kong to pass a Bill that contains provisions which, if and when the Bill is assented to and becomes an ordinance, will be in conflict with the provisions of the Copyright Act of 1911 and such provisions of the 1956 Act as may apply in Hong Kong. Whilst the provisions of the ordinance would, in such circumstances, be void and inoperative in Hong Kong, as a result of Section 2 of the Colonial Laws Validity Act, the actions of the Legislative Council in entertaining such a Bill and giving it a first, second and third reading would not, in themselves, be unlawful though they might well be a waste of time."

The position is unfortunate. The Company are told that they must wait until they are in actual peril and that the law cannot help them to avert what on the concession made must be regarded as an inevitable future peril. This case must depend upon its own facts. If in ordinary circumstances the introduction of a Bill before the Legislative Council was followed by an action seeking the ruling of the Court as to whether its provisions, if they became law, would be void the Court even if it was a case in which it felt able to exercise jurisdiction would be very likely to refuse, in the exercise of its discretion, to make a declaration on the ground that any argument as to validity would be premature and on the ground that so much was hypothetical. The present situation is very different. The Company has a Licence in Hong Kong and must operate according to law. The authorities very properly send to the Company the precise terms of the law that it is hoped to enact. The Company will be at once adversely affected if the law is enacted and is not void but contends that the law if enacted would be void. The authorities presumably contend otherwise.

The matter proceeded however on a concession that the proposed Bill if enacted would be wholly void. Taking the words "would not be lawful" from the writ it was nevertheless contended that the proceedings

must be stifled because it would be quite lawful to pass the Bill even though, if it became an Ordinance, the Ordinance would be void. The eventual decision was therefore that it was clear beyond all argument that the passing of such a Bill would not be unlawful.

I consider that this view does not take into account the language of s. 31 (3) and the effect of the concession made for the purpose of the summons. On that concession the Bill contains modifications or additions which are within express statutory prohibitive words viz. the words "no such modifications or additions . . . shall be made". I cannot think that at a trial on the basis of the concession any Court would view favourably or with tolerance a contention that in the Legislative Council there would merely be a process of idle time-wasting and that that would be so because it would not be the Legislative Council but the Governor by whom the modifications or additions would be "made". Legislation in Hong Kong is enacted by the Governor with the advice and consent of the Legislative Council. But in passing a Bill containing modifications or additions which it would be contrary to statute to make could the Legislative Council seriously argue that in giving their advice to the Governor to pass the Bill they were merely wasting time but could not be said to be doing anything unlawful? Though it is for the Governor to enact Ordinances the Legislative Council must both advise them and consent to them. Faced with a statutory prohibition against the making of a law could they be heard to say that they were not acting unlawfully because all that they were doing was not to make the law but to send it to the Governor so that he with their advice and by their consent should make it? They would be doing something which it did not lie within their powers to do. A plea that they were merely wasting time would I think be regarded as trifling with the Court.

There may be cases where a colonial law is found to be in some respect repugnant to the provisions of an Imperial Act of Parliament extending to the colony. In such cases the colonial law will, to the extent of the repugnancy but not otherwise, be void and inoperative. The making of the law would not however necessarily be unlawful. In the present case there is much more than a prospect of repugnancy leading to a declaration consequent upon the provisions of s. 2 of the Colonial Laws Validity Act. Here there is a positive statutory prohibition against the making of a law. The present is a case where a prohibition operates before the stage at which s. 2 comes into play. In my view it is because of that prohibition that the Court was entitled to rule that it was within its jurisdiction to exercise control over the Legislative Assembly and if thought fit to grant such reliefs as are in the present case claimed.

Otherwise the Court would not assert jurisdiction to limit in any way any of the activities of the Legislative Council which properly lie within its sphere. The Court would not assert jurisdiction to limit freedom of debate nor to curtail or to limit discussion even if it were acknowledged as being merely time consuming. Nor in my view would the Court assert jurisdiction to prevent the passing of a Bill which could lawfully be passed even if there were strong grounds for thinking that the Bill if passed would, because of some repugnancy, be held to be partly or wholly void. In the present case the statutory prohibition contained in s. 31 (3) warrants the Court in asserting and exercising jurisdiction. The Court decided that it had power to assert it and to grant reliefs such as those claimed. Were it not for the allegation that the statutory prohibition was being violated I would not have thought it right for the Court to accept jurisdiction and to dismiss the first summons. The Court would only assume jurisdiction to control the Legislative Council if they were exceeding their powers. In the present case and on the basis upon which the interlocutory proceedings have been conducted the Legislative Council

would not merely be doing something *ultra vires* but would be doing something that by statute they were expressly prohibited from doing. Hence on the first summons the question that arose was whether the Court could assume jurisdiction in order to decide whether, as the Company alleges, the Legislative Council are intending to do something both *ultra vires* and positively forbidden.

On the concession which, for the purpose of the interlocutory proceedings has been made, the Bill which is proposed consists entirely of provisions which by statute are forbidden. They must not be made. The law-making is forbidden. The functions of the Legislative Council are an essential part of the process of law-making. Can it be lawful for them to advise that a law should be made which by statutory prohibition must not be made? Can it be lawful for them to consent to a law that must not be made? If the whole matter has to turn upon the use of the words "would not be lawful" in the writ I would think that at least they mean—would be contrary to law. I consider that on the basis of the concession made it is unrealistic to say that if the Legislative Council advised and consented to the proposed Bill and presented it to the Governor for him to convert it into an Ordinance they would merely be wasting time but would not be acting contrary to law. I find it impossible to say that it is clear beyond argument that they would not be acting contrary to law. On the contrary I think that on the concession made it would not be an easy task for any one to have to try to argue that what they would be doing would be other than unlawful or contrary to law. I consider therefore that the Court ought to have allowed the action to proceed so that decision should have been reached in 1968 on the important issues which arose.

In the Privy Council

REDIFFUSION (HONG KONG)
LIMITED

v.

THE ATTORNEY-GENERAL OF
HONG KONG AND ANOTHER
AND

THE ATTORNEY-GENERAL OF
HONG KONG AND ANOTHER

v.

REDIFFUSION (HONG KONG)
LIMITED
(CONSOLIDATED APPEALS)
