

Bertram Willes Dayrell Brooke and another - - - *Appellants*

v.

Sir Charles Vyner Brooke and others - - - *Respondents*

FROM

**THE COURT OF THE JUDGE OF APPEAL IN THE
STATE OF BRUNEI**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL DELIVERED THE 30TH MARCH, 1950**

Present at the Hearing :

LORD GREENE
LORD SIMONDS
LORD NORMAND
LORD REID
SIR JOHN BEAUMONT

[*Delivered by* LORD NORMAND]

This is an *ex parte* appeal by special leave from an Order of the Court of the Judge of Appeal in the State of Brunei which dismissed an appeal from an Order of the Court of the Resident in the State of Brunei refusing leave to issue a summons for service outside the State of Brunei.

The appellants and the plaintiffs in the suit are (1) the brother of the third Rajah of Sarawak and the next heir male, after the third Rajah, of the second Rajah and (2) the heir apparent of the first appellant. The defendants, all of whom reside in England, are the third Rajah, two contingent heirs to the Raj under entails created by the Will of the first Rajah, and the trustee under the said Will for the purposes thereof related to the transmission of the sovereignty of Sarawak.

The suit was instituted in the Court of the Resident in the State of Brunei by a plaint which was admitted by the Court on 14th July 1948. The plaint claimed:—

(i) a declaration that—on the true construction of the Deed executed by His Highness the Sultan of Brunei on the 2nd August, 1846, and of the Deed executed by His Highness the Sultan of Brunei on the 24th August, 1853, and of the provisions made pursuant to such Deeds in the Will executed by Sir James Brooke (the first Rajah of Sarawak) on the 15th April, 1867:—

(a) after the death of the said Sir James Brooke and on payment by his nephew, Sir Charles Johnson Brooke, to His Highness the Sultan of the sum of Four Thousand Dollars as tribute and on the said Sir Charles Johnson Brooke taking the Oath of Accession as the second Rajah of Sarawak, the sovereignty of Sarawak vested inalienably in the said Sir Charles Johnson Brooke for his life;

(b) the heir male of the said Sir Charles Johnson Brooke is the defendant Sir Charles Vyner Brooke, and after the death of the said Sir Charles Johnson Brooke, and on payment by the said Sir Charles Vyner Brooke to His Highness the Sultan of the aforesaid tribute of Four Thousand Dollars and on the said Sir Charles Vyner Brooke taking the Oath of Accession as the third Rajah of Sarawak, the sovereignty of Sarawak vested inalienably in the said Sir Charles Vyner Brooke for his life ;

(c) in default of an heir entitled to succeed to the Raj of Sarawak under the entails created by the aforesaid Will dated the 15th April, 1867, and willing to pay to His Highness the Sultan the aforesaid tribute of Four Thousand Dollars and to take the aforesaid Oath of Accession, the sovereignty of Sarawak and the State funds and other assets thereunto appertaining revert to His Highness the Sultan ;

(d) the plaintiff (now the appellant) Bertram Willes Dayrell Brooke is, after the said Sir Charles Vyner Brooke, the next heir male of the said Sir Charles Johnson Brooke ;

(e) the plaintiff (now the appellant) Anthony Walter Dayrell Brooke is the heir apparent of the said Bertram Willes Dayrell Brooke ;

(f) on the accession, after the death of the said Sir James Brooke, of each succeeding Rajah of Sarawak, there vested in him as aforesaid the sovereignty of the said Raj, and the State funds and other assets thereunto appertaining so vested in him as Rajah and not for his private account ;

(ii) an account by the said Sir Charles Vyner Brooke of all moneys (other than his normal personal emoluments as Rajah of Sarawak) transferred from the said State funds to his private account prior to the 21st May, 1946, and of the disposal thereof.

On 7th October 1948 the appellants applied by Summons in Chambers to the Court of the Resident in the State of Brunei for an order that the Summons in the suit to each of the Defendants be issued for service outside the jurisdiction. The application was refused on 21st July 1948 and an appeal against the order was dismissed by the Judge of Appeal on 4th November 1948. Special leave to appeal was granted on 31st May 1948 and thereafter one of the defendants, Charles James Vyner Craig Brooke, submitted to the jurisdiction of the Courts of Brunei.

The historical events which led to the institution of the suit and which are necessary for a proper understanding of the claims and of the purpose of the suit can be briefly narrated.

The State of Sarawak was before 1846 a province of the State of Brunei but on 2nd August 1846 the then Sultan of Brunei granted the province of Sarawak in sovereignty to James Brooke, afterwards Sir James Brooke, subject to a payment of 4,000 Spanish dollars by the successor on the grantee's death. This grant was confirmed by the Sultan's successor on 24th August 1853. Sir James Brooke, the first Rajah of Sarawak, by his Will bequeathed the sovereignty to his nephew Charles Johnson Brooke and the heirs male of his body lawfully issuing and in default of such issue to his nephew Stewart Johnson and the heirs male of his body lawfully issuing and in default of such issue unto Her Majesty the Queen of England and her heirs and assignees for ever. On Sir James Brooke's death Sir Charles Johnson Brooke succeeded, and on his death the defendant Sir Charles Vyner Brooke. He executed an Instrument of Cession dated 21st May 1946 by which he purported to cede the sovereignty of Sarawak to Great Britain and by Order in Council of 26th June 1946 Sarawak was annexed. Their Lordships were informed that if the appellants were to obtain a judicial declaration to the effect that Sir Charles Vyner Brooke was not entitled to cede the sovereignty of Sarawak, they might petition His Majesty in Council to annul or vary the Order in Council of 26th June 1946.

The question whether the Summons in the suit ought to have been issued for service out of the jurisdiction turns on the construction of the Courts Enactment 1908 (as amended) of the State of Brunei and the Civil Procedure Code of the Federated Malay States. The relevant provisions of the Courts Enactment 1908 as amended by later enactments are as follows:—

Section 4 (i) (as amended by the Courts Enactment, 1908, Amendment Enactment, 1920, and as further amended by the Courts (Amendment) Enactment, 1948). The Court of the Resident shall consist of (a) the Resident or (b) a Circuit Judge of one of the Circuit Courts of the Colony of Sarawak. It shall have and exercise such original and appellate jurisdiction in civil and criminal matters as is hereinafter provided.

Section 5 (i). The said Court shall, subject to the provisions of this and of all other Enactments for the time being in force, have jurisdiction in all suits, matters, and questions of a civil nature, excepting only that nothing herein contained shall be deemed to authorize any Court in the State to dissolve or annul a marriage lawfully solemnized between Christians in the United Kingdom of Great Britain and Ireland or in any British Colony, Protectorate, or Possession.

Section 5 (ii). In amplification and not in derogation of the generality of the foregoing powers, the said Court may try all suits by and against all persons and bodies corporate, in all cases where the persons who are defendants are persons in the State, or the corporate body which is defendant has an establishment or place of business in the State; and also in the following cases, although the defendant is not present or has not its establishment as aforesaid in the State, that is to say if the defendant has property in the State; or if the whole or any part of the subject matter of the suit is land or stock or other property situate within the State; or where any act, deed, will, or thing affecting such land, stock, or property was done, executed, or made within the State; and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such suit, or for the breach whereof damages or other relief are or is demanded in such suit, was made or entered into, or was to be performed or partly performed, within the State; and whenever there has been a breach within the State of any contract wherever made; and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the State; or if the cause of action arose in the State; or if the subject of the proceedings otherwise falls, on general principles of international law or comity, to be determined by the law of the State. In suits founded on contract, "cause of action" as used in this Section shall not necessarily mean the whole cause of action, but a cause of action shall be deemed to have arisen within the jurisdiction if the contract was made therein, though the breach may have occurred elsewhere, and also if the breach occurred within the jurisdiction, though the contract may have been made elsewhere.

Section 19 (as amended by Section 7 of the Courts (Amendment) Enactment, 1941). The procedure to be followed in civil actions and proceedings in the Court of the Resident and in Magistrates' Courts, and the procedure to be followed in prosecuting an appeal from any Magistrate's Court to the Court of the Resident, shall be that prescribed by the Civil Procedure Code of the Federated Malay States in force from time to time in the Federated Malay States with respect to Magistrates' Courts and the mode of appeal therefrom, with such alterations as may be required to suit the circumstances of the State.

The relevant provisions of the Civil Procedure Code of the Federated Malay States are as follows:—

Section 64. No summons for service on a defendant out of the Federated Malay States shall be issued by any Court without the leave of the Supreme Court or by a Judge thereof.

Section 65. Any party desiring that a summons be issued for service on a defendant out of the Federated Malay States shall deliver to the Registrar of the Supreme Court the summons and copy which he desires to issue, and the title of the intended suit shall be entered in the register of civil suits of the Court in which the said suit is to be instituted, and the next serial number shall provisionally be assigned to such summons. The application for leave to issue shall be by summons in Chambers, and, on production of the summons bearing a note or memorandum, signed by the Registrar, giving leave for the issue of a summons, the summons, completed in accordance with the terms of such order, shall be sealed and issued.

Section 66 (i). Service out of the Federated Malay States may be allowed by the Supreme Court or a Judge thereof whenever

(a) the whole subject matter of the suit is immoveable property situate within the Federated Malay States (with or without rents or profits); or

(b) any act, instrument, will, contract, obligation, or liability affecting immoveable property situate within the Federated Malay States is sought to be construed, rectified, set aside, or enforced in the suit; or

(c) any relief is sought against any person domiciled or ordinarily resident within the Federated Malay States; or

(d) the action is for the administration of the estate of any deceased person, who, at the time of his death, was domiciled, or ordinarily resided, or carried on business within the Federated Malay States, or for the execution (as to property situate within the Federated Malay States) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of the Federated Malay States; or

(e) the action is founded on the breach or alleged breach, within the Federated Malay States of any contract wherever made, which according to the terms thereof ought to be performed within the Federated Malay States even though such breach was preceded or accompanied by a breach out of the Federated Malay States which rendered impossible the performance of the part of the contract which ought to have been performed within the Federated Malay States; or

(f) the action is founded on a tort committed within the Federated Malay States; or

(g) any injunction is sought as to anything to be done within the Federated Malay States, or any nuisance within the Federated Malay States is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(h) any person out of the Federated Malay States is a necessary or proper party to a suit properly brought against some other person duly served within the Federated Malay States.

Section 66 (ii). Any order giving leave to effect such service shall, unless the mode of service be prescribed by this Code, direct in what mode service is to be effected, and the reasonable expenses of such service shall be allowed.

Section 67. Every application for leave to issue a summons for service on a defendant out of the Federated Malay States shall be supported by an affidavit or other evidence, stating that, in the belief

of the deponent, the appellant has a good cause of action, and shewing in what place or country such defendant is or probably may be found, the ordinary means of communication with such place or country, and the grounds on which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the Federated Malay States under this section. A copy of the plaint shall be filed with the application.

The appellant's Counsel submitted as his main contention that under s. 5 (ii) of the Courts Enactment 1908 (as amended), a plaintiff in a suit within the description of suits set out in the subsection was entitled *ex debito justitiæ* to an order for service out of the jurisdiction on non-resident defendants and that s. 19 incorporated only so much of the procedure of the Civil Procedure Code of the Federated Malay States as is contained in ss. 64 and 65 and 66 (ii). This submission treats as inapplicable to the Courts of Brunei the provisions of ss. 66 (i) and 67 of the Civil Procedure Code. The effect would therefore be that personal service would be in the State of Brunei "merely a *sine qua non* before effective action is allowed," and not as in England and in the Federated Malay Straits "the foundation of jurisdiction," (*Johnson v. Taylor* [1920] A.C. 144, Lord Dunedin at 154); and that the function of the Court to which application was made for service outside the jurisdiction would be purely ministerial.

Before examining this submission in its more general aspects their Lordships would observe that it fails *in limine*. There are in s. 5 (ii) of the Courts Enactment 1908 no words under which the declarations or the order for an account claimed in this suit can be brought. The claim for an account may be briefly dismissed. It is a claim that the Court of one sovereign state should order the sovereign of another sovereign state to render an account of moneys which have been collected as public revenue of the state over which he rules. The claim would have been incompetent in the Courts of Sarawak; it is not less incompetent in the Courts of Brunei and it may be dismissed from consideration. The claim for the declarations was said to fall within each of three clauses in s. 5 (ii). Of these the first was:—"Where any act, deed, will, or thing affecting such land, stock or property was done, executed, or made within the state": the second, "Whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such suit, or for the breach whereof damages or other relief are or is demanded in such suit, was made or entered into, or was to be performed or partly performed within the state": the third, "if the subject of the proceedings otherwise falls, on general principles of international law or comity, to be determined by the law of the state". The first clause founded on is inapplicable because "such land" refers back, and can only refer back, to "land within the state", that is the state of Brunei; and this suit is concerned not with land in the state of Brunei but with the sovereignty and the land of the state of Sarawak. The second clause does not apply because (*inter alia*) the suit is not concerned with a contract. Their Lordships cannot assent to the contention that the grant by the Sultan of Brunei to Sir James Brooke was a contract or should be deemed to be a contract. It was, on the contrary, a unilateral deed, and the Sultan's right to the payment of 4000 Spanish dollars was not a term of a contract but a condition of the grant. The third clause founded on, so far from supporting the appellants' claim, is adverse to it, for the principles of international law or comity would exclude from the jurisdiction of the Courts of Brunei any question relating to the sovereignty or the land of Sarawak.

Their Lordships, moreover, are of opinion that the entire argument for the appellants rests on a more general misconstruction of the Courts Enactment Act 1908 induced, it may be, by a misunderstanding of the sense in which the word "jurisdiction" is used in s. 4 (i) and s. 5 (i). It is an ambiguous term which may be used when the purpose is to define the kinds of action which a Court may competently entertain; or

which may be used when the purpose is to define the persons over whom the Court may competently exercise its powers of hearing, determining and enforcing its decrees in those actions which it can competently entertain. In the relevant provisions of the Courts Enactment 1908 the word is used in the first of these senses. Thus s. 4 (i) provides that the Court of the Resident "shall have and exercise such original and appellate jurisdiction in civil and criminal matters as is hereinafter provided". In s. 5 (i) it is provided that the Court "shall have jurisdiction in all suits, matters and questions of a civil nature", with an exception not material to the present purpose. In both subsections the words "shall have jurisdiction in" are equivalent to "shall be competent to entertain". S. 5 (ii) is "in amplification and not in derogation of the foregoing powers", and it provides that the Court *may* try the defined suits "when the persons who are defendants are persons in the state . . . and also in the following cases although the defendant is not present . . . in the state". The purpose is to define still further the classes of action which the Court *may* entertain, and to declare the Courts' competence to entertain suits of a limited class though the defendant is resident outside the jurisdiction. But the subsection does not give the Court power to hear and determine these suits and to enforce its orders unless the non-resident defendants are duly cited and subjected to the authority of the Courts of Brunei. That appears more clearly from s. 19 which must be read along with s. 5 (ii). By incorporating as "the procedure to be followed in civil actions and proceedings in the Court of the Resident and the Magistrate's Courts and the procedure to be followed in prosecuting an appeal from any Magistrate's Court to the Court of the Resident" the procedure prescribed by the Civil Procedure Code of the Federated Malay States, s. 19 incorporates rules for service outside the jurisdiction. Thus there is a complete code defining the Courts' jurisdiction in both its meanings, and it is necessary for a plaintiff, who desires to sue a non-resident, first to satisfy the conditions of s. 5 (ii) by showing that the suit is one of those classes of action which the Court may entertain when the defendant is a non-resident, and then to show that the conditions which s. 65 (i) prescribes as the conditions for the exercise of the discretion to grant leave to serve out of the jurisdiction are satisfied. The attempt to distinguish between ss. 64, 65 and 66 (ii) of the Civil Procedure Code and ss. 66 (i) and 67, is arbitrary, for all the cited sections of the Civil Procedure Code deal with the procedure to be followed where leave to serve out of the jurisdiction is necessary and s. 19 incorporates them all without distinction "with such alterations as may be required to suit the circumstances of the State of Brunei".

The alterations contemplated are only such adaptations as are necessary to give meaning to the sections of the Civil Procedure Code when it is applied to the circumstances of the Courts of Brunei. In s. 64, for example, the words "the Federated Malay States" must be read as equivalent to "the State of Brunei" and the words "Supreme Court" as equivalent to "the Court of the Resident". Similarly s. 66 (i) (a) must be adapted to read "service out of the jurisdiction of the State of Brunei may be allowed by the Court of the Resident whenever the whole subject of the suit is immoveable property situate in the State of Brunei", and the other paragraphs of s. 66 (i) must be adapted accordingly. The effect of this adaptation of s. 66 (i) is admittedly fatal to the appeal, and the appellants therefore submitted an alternative construction of the adaptation clause in s. 19 and an alternative method of applying the Civil Procedure Code of the Federated Malay States to the Courts of Brunei. They said that it should be applied as though Brunei and Sarawak were members of the Federation. Under s. 66 the Courts of one of the member states (e.g. Perak) can authorise service out of the jurisdiction (e.g. in England) in a suit concerning immoveable property situated either in that state or in another member state (e.g. Pahang); therefore, it was said, service should be permitted out of the jurisdiction of the Brunei Courts in a case concerning immoveable property situated either in Brunei itself or in the adjoining

territory of Sarawak, in as much as the Chief Justice of Sarawak is the Head of the Judiciary of Brunei, and the High Commissioner for Brunei is the Chief Executive Officer for Sarawak ; in other words, the judicial system of Brunei is integrated with the judicial system of Sarawak in the same way that, for instance, the judicial system of Perak is integrated with the judicial system of Pahang.

The adaptation clause of s. 19 of the Courts Enactment 1908 is incapable of bearing the tortuous and fanciful meaning assigned to it. The States of Brunei and Sarawak were independent sovereign states, and s. 19 did nothing to create between them a relation resembling a federal relation or to impose on them a conception of jurisdiction appropriate only to members of a federation.

The conclusion of their Lordships is that the appeal fails on two separate grounds:—(1) the suit is not within the descriptions of suits which the Courts of Brunei are authorised to entertain by s. 5 (ii) of the Courts Enactment 1908 (as amended) ; and (2) s. 19 of the Courts Enactment 1908 (as amended) incorporates and adapts as part of the procedure of civil suits in the Courts of Brunei ss. 64 to 67 inclusive of the Civil Procedure Code of the Federated Malay States, and on a sound construction of s. 19 (as amended) and of s. 66 (i) of the Civil Procedure Code the suit does not comply with the conditions under which the Courts of Brunei have a discretion to authorise service out of the jurisdiction. That was also the conclusion of the learned Judge of Appeal, to whose clear and satisfactory opinion their Lordships would acknowledge their indebtedness.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

In the Privy Council

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[DELIVERED BY LORD NORMAND]

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