In the Privy Council.

No. 31 of 1949.

ON APPEAL

FROM THE COURT OF THE JUDGE OF APPEAL IN THE STATE OF BRUNEI.

IN THE MATTER of an EX PARTE application for leave to issue and serve a Summons together with a Plaint upon the Defendants thereto outside the jurisdiction of the State of Brunei

— AND —

IN THE MATTER of a Suit (Civil Suit No. 1 of 1948) instituted in the Court of the Resident of the State of Brunei.

BETWEEN—

BERTRAM WILLES DAYRELL BROOKE and ANTHONY WALTER DAYRELL BROOKE (Plaintiffs) *(Appellants)*

— AND —

SIR CHARLES VYNER BROOKE, G.C.M.G., CHARLES JAMES VYNER CRAIG BROOKE, RALPH EVELYN STUART JOHNSON, and THE HONOURABLE ARTHUR GEORGE VILLIERS PEEL *Defendants.*

CASE FOR THE APPELLANTS.

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1. 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 dated the 4th November, 1948 and signed on the 7th December, 1948, which dismissed an appeal from an Order of the Court of the Resident in the State of Brunei dated the 21st July, 1948, refusing leave to issue a summons for service upon the above-named Defendants outside the jurisdiction of the State of Brunei.

Record, p. 23.
Record, p. 9.

2. The main point raised by the Appellants is whether the provisions of Section 66 of the Civil Procedure Code of the Federated Malay States (which, broadly speaking, reproduces the provisions of Order XI, Rule I, of the Rules of the Supreme Court in England regarding service outside the jurisdiction) override the provisions of Section 4 (i) and 5 of the Courts Enactment, 1908, of the State of Brunei (which the Appellants submit give the Court of the Resident in the State of Brunei compulsory jurisdiction over absent defendants in a case such as the present).

3. The above-named Plaintiffs (now the Appellants) instituted a Suit (Civil Suit No. 1 of 1948) in the Court of the Resident in the State of Brunei by presenting a plaint, which was admitted by the said Court on the 14th July, 1948, claiming:— 10

Record, p. 1.

(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:— 20

Record, p. 26.

(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 above-named Sir Charles Vyner Brooke, and after the death of the said Sir Charles Johnson Brooke, and 30 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 40 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.

4. The Defendants to the said suit are: the above-named Sir Charles Vyner Brooke, who is the third Rajah of Sarawak; the above-named Charles James Vyner Craig Brooke and the above-named Ralph Evelyn Stuart Johnson, who are contingent heirs to the Raj of Sarawak under the entails created by the aforesaid Will dated the 15th April, 1867; and the Honourable Arthur George Villiers Peel, who is a trustee under the said Will to see that the purposes thereof, in relation to the transmission of the sovereignty of Sarawak, are carried into effect.

5. All the Defendants to the said suit being resident in England, 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 said suit to each of the Defendants be issued for service out of the jurisdiction of the State of Brunei. Record, p. 8.

6. The question, whether the summons in the said suit ought to have been issued for service out of the jurisdiction as aforesaid, turns on the construction of the Courts Enactment, 1908, of the State of Brunei and the Civil Procedure Code of the Federated Malay States.

7. The relevant provisions of the Courts Enactment, 1908, of the State of Brunei, 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.

8. 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.

Record, p. 9. 9. By its Order dated the 21st July, 1948, the Court of the Resident in the State of Brunei refused the said application (referred

Record, p. 10. to in paragraph 5 hereof). The reasons for the decision of the Court were, briefly, that:

(a) the question of jurisdiction was not the matter at issue in the application;

(b) leave to issue a summons for service outside the jurisdiction could only be granted if the case were a proper one within the terms of the Civil Procedure Code of the Federated Malay States;

(c) it was in fact not a proper one, since the property affected was not now situate within the State of Brunei.

10. The Appellants appealed to the Court of the Judge of Appeal in the State of Brunei, from the said Order of the Court of the Resident dated the 21st day of July, 1948, and the appeal was argued on the following grounds:—

(A) that, in so far as the Civil Procedure Code of the Federated Malay States was applicable, it should have been applied by virtue of Section 19 of the Courts Enactment, 1908,

as amended by Section 7 of the Courts (Amendment) Enactment, 1941;

(B) that, in so far as the Civil Procedure Code of the Federated Malay States was applicable, it should have been construed, in its application to the State of Brunei, not as though Brunei were the Federated Malay States, but as though Brunei were one of the States which formed part of the Federated Malay States;

(C) that, in so far as Section 66 of the Civil Procedure Code of the Federated Malay States was applicable (if at all), its provisions were modified and amplified by Section 5 (ii) of the Courts Enactment, 1908, of the State of Brunei;

(D) that the Court of the Resident was wrong in law in holding that the question of jurisdiction was not the matter at issue in the application for leave for service out of the territorial jurisdiction, because, on the contrary, the essential object of such an application is the confirmation by the Court that jurisdiction exists in the particular case;

(E) that the Court of the Resident was wrong in law in holding that it had not been shown that this suit was a proper case for leave to be given for service outside the territorial jurisdiction.

11. The Court of the Judge of Appeal accepted the contention set out in ground (A) of the Appellants' appeal.

12. The Court of the Judge of Appeal did not accept the other contentions of the Appellants; and, by its Order, dated the 4th November, 1948, and signed on the 7th December, 1948, the Court of the Judge of Appeal dismissed the Appellants' appeal. The reasons for the dismissal of the appeal may be summarised as follows:— Record, p. 23. Record, p. 16.

(i) As regards grounds (C), (D) and (E) the learned Judge of Appeal referred to the so-called "assumed jurisdiction" of the English Courts, which is now governed by Order XI, Rule 1, and which gives the Courts a discretionary power to summon absent defendants. He said that it was necessary to consider whether the principles which underlie the exercise of jurisdiction by the Brunei Courts were essentially different; in other words whether by virtue of Section 5 of the Courts Enactment, 1908, of the State of Brunei, the jurisdiction of the Brunei Courts was a jurisdiction not territorially restricted as in England. He took the view that Section 5 must be read in conjunction with Section 19 of the same Enactment with the result that "the Court has authority in certain cases to try a case although the defendant is not present in the State, but the exercise of this authority is dependent on service outside the State in accordance with Section 66 of the Federated Malay States Civil Procedure Code" He further held that the subject

matter of the suit did not fall within either paragraphs (b) or (d) of Section 66 (i) of the Federated Malay States Civil Procedure Code, because the property affected was not now within the State of Brunei, and that therefore the case was not a proper one for service outside the State of Brunei.

(ii) As regards ground (B), the learned Judge of Appeal held that it failed because, so far as Brunei was concerned, the Colony of Sarawak was a foreign country for the purposes of private international law.

13. The suit instituted by the Appellants in the Court of the Resident in the State of Brunei concerns deeds executed in Brunei by His Highness the Sultan of Brunei relating to a grant (subject to the payment of tribute to His Highness the Sultan) of the sovereignty of a province of Brunei.

Record, p. 25.

14. Moreover the said suit is one which in any event falls, on general principles of international law and comity, to be determined by the law of the State of Brunei, for the following reasons:—

(a) Sarawak was a province of the State of Brunei, the sovereignty of which was granted by His Highness the Sultan of Brunei to the aforesaid Sir James Brooke, the first Rajah of Sarawak, on the 2nd August, 1846. The grant of sovereignty was subject to the payment of tribute to His Highness the Sultan of Brunei by each succeeding Rajah of Sarawak.

(b) the above-named Sir Charles Vyner Brooke, the third Rajah of Sarawak, purported by an Instrument of Cession dated the 21st May, 1946, to cede the sovereignty of Sarawak to the British Government. The Appellants—Bertram Willes Dayrell Brooke (the heir presumptive to the Raj of Sarawak) and his son Anthony Walter Dayrell Brooke—challenge the validity of this cession.

(c) The submission of the Appellants in the said suit is that

(i) the said Sir Charles Vyner Brooke, having regard to the terms of his tenure of the Raj of Sarawak, was not entitled to cede it to the British Government; and

(ii) the said Sir Charles Vyner Brooke, before the purported cession, transferred £200,000 from the State funds to his private account, that is to say, the said Sir Charles Vyner Brooke retained £200,000 and ceded the rest of the assets of the State to the British Government.

(d) If the Appellants obtain a judicial declaration to the effect that the said Sir Charles Vyner Brooke was not entitled to cede the sovereignty of Sarawak, they would have ground thereafter to petition His Majesty in Council, pursuant to Section 4 of the Judicial Committee Act, 1833, to annul or vary the Order in Council of the 26th June, 1946, by which (following

the aforesaid purported cession by Sir Charles Vyner Brooke) the British Government annexed Sarawak.

(e) If it be that the cession of the sovereignty of Sarawak and of the bulk of the State assets cannot now be questioned there remains the further submission of the Appellants that the said Sir Charles Vyner Brooke transferred £200,000 to his private account, and that it is consequently the duty of the Appellant, Bertram Willes Dayrell Brooke, to see that the said sum of £200,000 is recovered and applied for the good of the people of Sarawak.

(f) The said sum of £200,000 did not lawfully pass to the private account of the said Sir Charles Vyner Brooke, and he consequently holds it on the same tenure as the sovereignty of Sarawak; and, on his death and subject to the payment of tribute to His Highness the Sultan of Brunei, it would pass to the Appellant, Bertram Willes Dayrell Brooke, as the next heir, whose duty it would be to see that it was applied for the good of the people of Sarawak.

(g) As the merits of the case for the Appellants in the said suit depend on the construction of one or more deeds executed by His Highness the Sultan of Brunei in Brunei, and as the subject matter of the suit is territory which was then a province of the State of Brunei and which has since been held on tribute payable to His Highness the Sultan of Brunei, and as (notwithstanding the annexation by the British Government) there is property of the Raj (the said sum of £200,000) on which tribute may still be payable to His Highness the Sultan of Brunei (and which might, in its entirety, contingently revert to His Highness the Sultan of Brunei absolutely) the Courts of Brunei are the only tribunal before which the said suit can properly be brought; and the said suit is essentially one in which the subject of the proceedings falls, on general principles of international law or comity, to be determined by the law of the State of Brunei.

15. The decision of the Court of the Judge of Appeal in the State of Brunei, from which the present appeal is brought, was based on Section 66 of the Civil Procedure Code of the Federated Malay States, which (with such alterations as may be required to suit the circumstances of the State of Brunei) is applicable (if at all) in the State of Brunei by virtue of Section 19 of the Courts Enactment, 1908, of the State of Brunei, as amended by Section 7 of the Courts (Amendment) Enactment, 1941.

16. The learned Judge of Appeal relied on Section 66 (i) (b) of the Civil Procedure Code of the Federated Malay States which reproduces the words of Order XI, Rule 1 (b), of the Rules of the Supreme Court in England, and which provides that an action to construe a deed can be brought against a defendant out of the

jurisdiction, if the deed affects land within the jurisdiction; but, by virtue of Section 5 (ii) of the Courts Enactment, 1908, of the State of Brunei, such an action can be brought, not only if the deed affects land within the jurisdiction, but also if the deed was executed within the jurisdiction or if the subject of the proceedings falls, on general principles of international law or comity, to be determined by the law of the State of Brunei.

17. The contention of the Appellants is as follows:—

(a) In England, there must normally be a cause of action of which the Court can take cognizance and there must also be a defendant within the territorial jurisdiction. Both these conditions must be satisfied before an English Court can try a case. It is only because the Rules of Court permit service out of the jurisdiction, in certain specified circumstances, that the jurisdiction of the Court is extended, in such circumstances, to defendants out of the territorial jurisdiction.

(b) In Brunei, it is expressly provided by Sections 4 (i) and 5 of the Courts Enactment, 1908, that, in a long list of specified suits, the Court of the Resident shall try the case although the defendant is not present in the State of Brunei. There is not in Brunei, as in England, the double condition that there must be a cause of action within the competence of the Court and a defendant within its territorial jurisdiction; and there is therefore no need in Brunei, as there is in England, to rely on the provisions of Order XI, Rule 1, or some equivalent Rule of Court, to extend the jurisdiction of the Court before it becomes possible to try the case if the defendant is out of the State.

18. The State of Brunei has no Code of Procedure of its own; and when the Courts Enactment, 1908, was enacted, the concurrent adoption of a foreign Code of Procedure was made "with such alterations as may be required to suit the circumstances of the State". If, as the Court of the Judge of Appeal has in effect decided, the Legislature intended that the provisions of the adopted Civil Procedure Code should override the provisions of the Courts Enactment, 1908, then much of Sections 4 (i) and 5 of the Courts Enactment, 1908, become meaningless surplusage. This cannot have been the intention of the Legislature, because there is no reason why the usual rule should not be applied to this as to other statutes—namely that effect must be given, if possible, to all the words used, for the Legislature is deemed not to waste its words nor to say anything in vain.

19. Consequently Section 66 of the Civil Procedure Code of the Federated Malay States does not (in the Appellants' submission) apply to the State of Brunei in derogation of the jurisdiction conferred by Sections 4 (i) and 5 (ii) of the Courts Enactment, 1908, of

the State of Brunei (as the Court of the Judge of Appeal in the State of Brunei has, in effect, decided).

20. As regards the decision of the Court of the Judge of Appeal in the State of Brunei that, as far as the State of Brunei is concerned, the Colony of Sarawak is, for the purposes of private international law, a foreign country, the Appellants submit that this was not the point at issue. The contention of the Appellants in this connection is as follows:—

(a) In applying the law of the Federated Malay States to the State of Brunei (which is a unitary State) it should be applied as though Brunei were one of the members of the Federation, e.g., the State of Perak. Each State (which formed part of the Federated Malay States) has its own laws as well as those common to the whole Federation; each State has its own British Resident, responsible to the same High Commissioner as the British Residents in each of the other States in the Federation; each State has its own Courts, but there is a common Chief Justice. In the courts of the State of Perak, for instance, there can, under Section 66 of the Civil Procedure Code of the Federated Malay States, be service out of the jurisdiction (e.g., in England) in a case concerning immoveable property situated in the Federated Malay States, i.e., either in the State of Perak itself, or in one of the adjacent States (e.g., the State of Pahang) having the same Chief Justice and the same High Commissioner; although, as far as the State of Perak is concerned, the State of Pahang is a foreign country for the purposes of private international law.

(b) Applying this procedure to the State of Brunei, service should be permitted out of the jurisdiction of the Brunei Courts (e.g., in England) 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. In consequence of the integration of Brunei with Sarawak the execution of the Order in Council of the 31st May, 1949 (granting the Appellants special leave to appeal to the Privy Council) was entrusted to the Governor of Sarawak as High Commissioner for Brunei.

21. The Appellants submit that the Order of the Court of the Judge of Appeal in the State of Brunei, dated the 4th November, 1948, and signed on the 7th December, 1948, should be reversed, and that as Plaintiffs in Civil Suit No. 1 of 1948 in the Court of the Resident in the State of Brunei they should be granted an Order

Record, p. 23.

that summonses in the said suit be issued for service on each of the Defendants in England together with a copy of the Plaint therein; for the following among other

REASONS.

1. The jurisdiction of the Court of the Resident over the absent Defendants in the above-mentioned suit is compulsory by virtue of Sections 4 (i) and 5 (ii) of the Courts Enactment, 1908, of the State of Brunei, and is not a matter for discretion.

2. If Section 66 of the Civil Procedure Code of the Federated Malay States applies at all to Brunei, it does not override or derogate from the said Sections of the Courts Enactment, 1908, of the State of Brunei.

3. Even if the said Section 66 does override the said Sections of the Courts Enactment, 1908, the case is a proper one for leave to be given for service outside Brunei within the terms of Sub-section (i) (b) and (d) of the said Section 66.

DAVID MAXWELL FYFE.

THEODORE STEPHEN PAGE.

No. 31 of 1949.

In the Privy Council.

ON APPEAL

FROM BRUNEI.

BROOKE and Another

v.

BROOKE and Others.

CASE FOR THE APPELLANTS.

MESSRS. WILLIAM CHARLES CROCKER,
43, Gracechurch Street, E.C.3.

10534 WITHERBY & CO. LTD., 15, NICHOLAS LANE, LONDON, E.C.4.