NOTES OF CASES

THE LOST MODERN GRANT — LOST AND GONE FOREVER

Datin Siti v. Murugasu *

It is now twenty-nine years since the leading case of *Yong Joo Lin* v. *Fung Poi Fung*[1] laid down the proposition that an easement of support could be acquired by way of prescription through the presumption of lost modern grant in the Malay States. The decision if given a more generous construction might also be regarded as authority for the proposition that the common law relating to acquisition of easements under the doctrine of lost modern grant[2] applied in the Malay States by way of a supplement to the Land Code 1926. This decision was met with approval as there would otherwise be missing from Malayan land law any provisions for easements.[3] Thus for this reason and for other more cogent reason that recent legislation and case law has consigned the decision of *Yong Joo Lin* to the limbo of legal history, it is not intended to discuss the merits and demerits of the legal reasonings of the case.

Assuming that the decision of *Yong Joo Lin* was accepted as good law in 1941, after the passing of the Civil Law Ordinance in 1956[4] the question as to the extent of the decision then becomes of importance. Did it bring in common law prescription by presumption of lost modern grant for the right of support only ? Or did it import the doctrine into the Malay States for all other categories of easements?[5] For depending on the answers to these questions is the key to answering the new question whether section 6 operated so as to prevent the common law doctrine of the lost modern grant from applying in Malaya with regard to categories of easements other than to the right of support. Although easements is an important branch of land law yet curiously these questions were never brought before any of the Malayan Courts.

Then in 1965 with the passing of the National Land Code the law of easements in Malaya became clearer in that there are provisions[6] in the Code for easements and their acquisition by registration. Further to set at rest any doubts as to the availability of methods of acquisition other than that of registration section 284 states

> (1) No right in the nature of an easement shall be capable of being acquired by prescription (that is to say, by any presumption of a grant from long and uninterrupted user).

* [1970] 2 M.L.J. 163.

1. [1941] M.L.J. 63.

2. This is the only method of prescription applicable in Malaya as proper common law prescription by user as from 1189 is clearly absurd in the context of local history. Prescription under the Prescription Act 1832 is also not available in Malaya for English statute law is not brought in under section 3 Civil Law Ordinance 1956, nor under its predecessor s. 3 Civil Law Enactment 1937.

8. See Braddell, R., *"Angus* v. *Dalton"* [1941] M.L.J. Rep. xiii.

4. Section 6 provides that "[n]othing n this Part shall be taken to introduce into the Federation... any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property."

5. See Braddell, R., *"Angus* v. *Dalton"* [1941] M.L.J. Rep. xiii.

6. Sections 282 - 291 National Land Code 1965.

(2) Except as mentioned in subsection (3) of section 286 [7] no such right shall be capable of being acquired by implied grant.

Thus it is clear that as from 1966 new easements can be acquired only by way of registration. It is also clear that rights in the nature of easements exercised for less than twenty years when the Code came into operation can no longer be acquired through the presumption of lost grant. But until the decision of *Datin Siti* v. *Murugasu* [8] it was not quite so clear whether the provisions of the National Land Code affected rights in the nature of easements which had been exercised for twenty years or more prior to the passing of the Code. In short did the Code affect accrued causes of action ?

The easement claimed in the case of *Datin Siti v. Murugasu*[8] was a right of way. The history of this alleged right began in 1929 when Tungku Syed Abdul Rahman the owner of the dominant tenement having built a house on it proceeded to use the servient tenement as a means of access to the main road. When the then owner of the servient tenement objected Tungku Syed Abdul Rahman bought over the land and had it registered in the name of his mother. He then constructed a road over it. In 1949 the servient tenement was purchased by a Haji Abdul. Shortly afterwards Tungku Syed Abdul Rahman died and his children who continued to live on the dominant tenement sought the permission of Haji Abdul for the use of the road across his land to get access to the main road. Permission was granted to them. Subsequently when in 1955 the plaintiff purchased the servient tenement her permission was sought for the use of the road. She agreed to this user. In 1963 she noticed that her road was being metalled; she then discovered that the defendant had become the owner of the dominant tenement. In 1964 the plaintiff instituted an action against the defendant alleging trespass on her land by the defendant. She also asked for a declaration that the defendant was not entitled to cross her land without her permission.

Before the case was heard the National Land Code 1965 was passed and the Land Code 1926 was repealed. Thus when the case came to be heard in 1970 the preliminary question was what law was applicable.

On this point the learned judge Syed Agil Barakbah held that despite the fact that the action had been instituted prior to 1966 nevertheless the law governing the case was the National Land Code and not the law in existence prior to the coming into operation of the Code. He based his decision on the language of section 4 which reads:

(1) Nothing in this Act shall affect the past operation of, or anything done under any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act:

Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided be subject to the provisions of this Act.[9]

The judge was of the opinion that this showed that the Legislature's intention was to make the Code apply to pending actions thereby rebutting the presumption that accrued causes of action, pending actions, were to be governed by the previous law.

The point next to be decided was whether the common law doctrine of prescription by way of presumption of a grant through long and uninterrupted user was applicable under, or in spite of, the National Land Code. The judge held that such common law was no longer applicable. The reasons seemed to be

(a) Section 6 of the Civil Law Ordinance [10]

(b) Section 3(1) of the Civil Law Ordinance and the ample provision for easements in the National Land Code.[11]

7. This refers to the implication of grants of ancillary rights.
8. [1970] 2 M.L.J. 153.
9. The legislation mentioned in subsection that follows does not include the Land Code 1926.
10. No. 5 of 1956.
11. Part 17 National Land Code 1965.

The learned judge in this context also distinguished *Yong Joo Lin's* [12] Case on the bases that (i) when the case was heard the prevailing land law, the Land Code 1926 had no provisions for easements, therefore there was at that time no local written law on the subject to prevent the application of English Common Law under section 3(1) of the Civil Law Enactment 1937;[13] (ii) there was no equivalent to the provision of section 6 of the Civil Law Ordinance 1956 now in force under the then Civil Law Enactment 1937; (iii) in any event the decision in *Yong Joo Lin* concerned the right of support whereas the right claimed in the instant case was a right of way.

Although these reasons were sufficient to decide the case nevertheless the learned judge went on to say that if he was wrong in stating that the common law of England was not applicable then even under that law no easement was acquired by the defendant as user of the road across the plaintiff's land was with her consent.

Taking the judge's decision on the preliminary point, i.e., that pending actions are governed by the National Land Code 1965 and not by the repealed Land Code 1926, the presumption at common law [14], and as stated in legislation [15] on interpretation of statutes, is against retrospectivity of statutes. But there seems to be a distinction between vested rights and existing rights.[16] On this Buckley L.J. in the case of *West* v. *Gwynne* [17] had this to say

> "Suppose that by contract between A and B there is in an event to arise a debt from B to A and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise... In such a case if the event has happened before the Act is passed so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective... But if at the date of the passing of the Act the event has not happened then the operation of the Act in forbidding the subsequent coming into existence of a debt is not retrospective operation but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B...."

Where existing as opposed to vested or accrued rights are concerned "there is no presumption that an Act of Parliament is not intended to interfere... [m]ost Acts of Parliament in fact do interfere with existing rights."[18]

Long and uninterrupted user of a right in the nature of an easement raises merely a presumption of a grant which was subsequently lost. It confers on the owner of the elleged dominant tenement a right to go to court for a decision in his favour. Under the doctrine of the lost modern grant as distinguished from proper common law prescription by user from time immemorial, title is acquired only on adjudication by a Court. Until then the title is but an inchoate one. Therefore such rights are not vested interests but are existing rights; this being so they would come within the scope of section 4.

However, it could be argued that the language used in section 4 [19]

(1) "Nothing in this Act shall affect the past operation of, or anything done under, any previous land law...

> Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided be subject to the provisions of this Act."

12. (1941) M.L.J. 63.
13. Section 3(1) Civil Law Enactment 1937 reads "Save in so far as other provision had been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance...."
14. *Hough* v. *Windus* (1884) 12 Ch.D. 224; *Lauri v. Renad* [1892J 3 Ch. 402.
15. Section 30 Interpretation Act 1967 (Malaysia); s. 13 Interpretation and General Clauses Ordinance 1948 (Fed. of Malaya).
16. *West* v. *Gwynne* [1911] 2 Ch. 1.
17. [1911] 2 Ch. 1 at p. 12.
18. Per Buckley L.J. in *West* v. *Gwynne* [1911] 2 Ch. 1 at p. 12.
19. National Land Code 1965.

is not sufficient to affect pending actions as distinguished from mere existing rights.[20] But it does appear that from the cases that whether a Statute affects pending actions depends on the particular statute itself and that "if the necessary intendment of the Act is to affect pending causes of action, then the Court will give effect to the intention of the legislature even though there is no express reference to pending actions."[21] In view of the clouded state of the law of easements in the States of Malaya prior to 1966 [22] it is in the best interest of the public that the National Land Code be given retrospective operation.

In any event, the presumption against retrospectivity of legislation does not apply to declaratory Acts[23] and the National Land Code 1965 at least that part of it which deals with easements is declaratory in nature.[24]

In deciding that the common law of England on acquisition of easements is not applicable in the States of Malaya Syed Agil Barakbah J. is to be commended. His unambiguous statements on this topic are most welcome as hitherto this was an area fraught with uncertainties.

The circumstances that permitted the application of English common law in the time of *Yong Joo Lin's* case are no longer prevailing. Where there was only half recognition of one species of easement [25] in the Land Code 1926 there are now two Chapters in the National Land Code setting out the requirements of easements and prescribing methods of acquisition.[26] Therefore whilst the English Common Law might have been justifiably imported under section 3 Civil Law Enactment, such is not so under section 3(1) Civil Law Ordinance 1956.[27] In the context of this section not only is there now local written law on easements generally but there is also a clear provision [28] expressly forbidding the application of the doctrine of prescription. Therefore whatever may be the position of the application of other aspects of the English law of easements e.g., the essentials of easements, there is no such doubt *vis-a-vis* the position of the doctrine of prescription. The defences against the importation of English law in this area become impregnable with the existence of section 6 Civil Law Ordinance 1956 which reads:

> Nothing in this Part shall be taken to introduce into the Federation... any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property.

Syed Agil Barakbah J. did restrict his statements of the law to rights of way.[29] But it is suggested that the propositions which hold good for acquisition of rights of way are equally valid in respect of acquisition of other categories of easements.

The consequences of (a) the retroactivity of the National Land Code *apropos* the acquisition of easements and (b) the inapplicability of the English common

20. *In re Joseph Suche & Co.* (1876) 1 Ch.D. 48, *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K.B. 310. *Henshall* v. *Porter* [1928] K.B. 193.

21. Per Evershed M.R. in *Hutchinson* v. *Jauncery* [1950] 1 K.B. 574 at p. 579.

22. *Ante.*

23. *A.G. v. Hertford 3* Ex 670; *A.G.* v. *Theobald* (1890) 24 Q.B.D. 567.

24. A declaratory Act may be defined as "an Act to remove doubts existing as to the common law or the meaning or effect of any statute", Crates *Statute Law* (1963) 6th Ed., p. 59.

25. Section 53 Land Code 1926 states that "a proprietor or occupier of country land may apply to the Collector for a right of way from his land over any other alienated country land to the nearest public road...."

26. Part 17 Chapters 1 and 2 National Land Code 1965.

27. "Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation of any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance."

28. Section 284(1). National Land Code 1965 "No right in the nature of an easement shall be capable of being acquired by prescription (that is to say by presumption of a grant from long and uninterrupted user)."

29. [1970] M.L.J. 153 at p. 156.

law doctrine of prescription can be stated briefly. Except for the right of support which was held to have been successfully acquired as an easement in the case of *Yong Joo Lin* other rights [30] in the nature of easements exercised for twenty years prior to 1966 come clearly within the ambit of existing rights[31] mentioned in section 4.[32] They are merely rights to ask the Court to declare that the rights exercised are easements. Since all existing rights are subject to the National Land Code 1965 and since English law is held to be inapplicable, unless they are registered according to section 286 [33] they cannot become easements. This result frees the law from dubious 18th century English fiction. It also is more consonant with the doctrine of indefeasibility of title under the National Land Code.

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