PREREQUISITES OF PARTNERSHIP IN MALAYSIA: PRE-VIEWS AND POST-VIEWS

I. INTRODUCTION

Partnership as a mode of conducting business antedates the more modern joint ventures carried on through the limited liability companies. To too many businessmen who start business often of a small nature, choose partners of mutal confidence, believe in the freedom of contract and prefer to avoid all forms of state regulation or control, the partnership style of business is still the main attraction.

This article is intended to probe into the history of partnership law in the various states and straits settlements and to examine the appropriateness of the current definition of partnership as contained in section 3(1) of the Partnership Act, 1961 (revised 1974, Act 135) in retrospect and prospect. The nature of the problems relative to the definition which have come before the courts will also be reviewed. This necessarily involves comparison with the previous definitions of partnerships in the different Malay states, as well as in Sabah (then North Borneo) and Sarawak. The first traces of the statutory form of the common law of partnership in some of the Malay states are found in an enactment, to be noted below, towards the end of the nineteenth century.[1]

II. HISTORICAL SKETCH

In 1899, the Federated Malay States of Perak, Selangor, Negri Sembilan and Pahang passed the Contract Enactment (F.M.S. Cap. 52), based wholly upon the Indian Contract Act, 1872. Chapter XI of the Enactment (sections 239–266) dealt with the law relating to partnership. Section 266 excluded "extraordinary partnerships such as partnerships with limited liability, incorporated partnership, and joint stock companies." As the

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[1] The reference is to the Contract Enactment of 1899. It is interesting to note, however, that at the end of the Contract Enactment, 1899 the schedule attached thereto dealt with the "Enactment Repealed", applicable to Selangor only. It referred to Regulation XI of 1893 and stated "The words 'The Indian Contract Act, 1872 (Act IX of 1872), contained in the third Schedule there to." This suggests that the provisions of the Indian Act were earlier applicable to Selangor by Regulation XI of 1893.

preamble reads this Enactment was made "to define and amend certain parts of the law relating to Contracts."

In succession, the Contracts (Malay States) Ordinance, 1950 (No. 14 of 1950) of the Federation of Malaya repealed the Contract Enactment of 1899. However the Ordinance reproduced the Contract Enactment except the chapter on sale of goods. In turn, the Ordinance was revised in 1974 and was called the Contracts Act, 1950 (revised 1974, Act 136). While the Ordinance applied to Kuala Lumpur, Johore, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu in May 1950, it was extended to Malacca, Penang, Sabah and Sarawak on 1st July 1974. This Contracts Act, 1950 deleted the partnership law altogether by one stroke. Thus through the processes of history, one by one, the two limbs of sale of goods and partnership were extricated from the parent body of contract legislation.

A separate Act, called the Partnership (Amendment) Act, 1974 (Act A240) repealed Chapter X (sections 192 to 219, dealing with partnership) of the Contracts (Malay States) Ordinance, 1950. The Amendment Act also repealed the partnership Ordinance of Sarawak (Cap. 67). The Amendment Act was made to "consolidate the law relating to partnership." Thus as the preamble states that Act was passed "to amend the Partnership Ordinance, 1961, of Sabah, and to extend that Ordinance, as amended, to all parts of Malaysia."[2]

Malacca and Penang were earlier governed by the English law of partnership.[3] The Amendment Act extended the Partnership Ordinance 1961 of Sabah to these two straits settlements. Under section 4(2) of the Amendment Act, "the English law of partnership to the extent that it conflicts with the Ordinance shall cease to have effect in Malacca and Penang." Thus the Sabah Partnership Ordinance, 1961 was revised by the Parliament in 1974. It introduced uniformity in the law relating to

[2]The Partnership Act, 1961 (revised 1974, Act 135, Laws of Malaysia) reads: [Sabah – 29th April, 1961; Other States – 1st July 1974].

[3]See Roland Braddell, *The Law of The Straits Settlements, A Commentary* (Volume 1, 2nd edn. 1931). As pointed out by this learned author, the first charter, 1807 (March 25) "established a Court of Judicature in Penang" (Page 11), and according to him, "... the acquisitions of Malacca and Singapore ... led to the granting of the second Charter," (Page 19), enacted 1826, November 27). He is of the opinion that this Charter introduced into the "Colony the English law as it existed in November 26, 1826." (Page 26). As to the third Charter, 1855 (August 12), Roland Braddell raised the following question: "Did the Charter of 1855 introduce English Statute law passed from 1826 to that date? The answer is that it did not ..." (Pages 31–32) According to him (in volume 2 of his work on *The Law of Straits Settlements, A Commentary* 149 (Volume 2, 2nd edn. 1932) "The English Law of partnership is in force in the Colony by virtue of section 5 of Ordinance No. III (Civil Law)."

Partnership in Malaysia. Originally, it was passed in Sabah "to codify the law relating to partnership."

The Partnership Ordinance of Sabah may have been chosen as a unifying model because of several factors:

1. The partnership provisions in the nine Federated Malay States (rather the Federation of Malay States), though applicable to vast area and population of Malaysia, were originally derived from the Indian Contract Act, 1872, which in respect of partnership had become outdated and outmoded in course of time. Even in India, the partnership provisions had been abolished and replaced by a separate Act known as the Indian Partnership Act, 1932.[4] There was, therefore, little justification in perpetuating the provisions, when the Ordinance was under revision, when in the country of the origin itself they had been repealed.
2. The Sabah legislation was in close proximity with the English Partnership Act, 1890. The act had stood the test of time and had, by and large, satisfied the needs of the merchant class.[5] Furthermore the straits settlements had already been following the English law. So the application of the Sabah partnership law to these settlements was hardly new.
3. The Civil Law Act, 1956 (revised 1972, Act 67) which deals with the reception of English law, facilitated the adoption of the Sabah partner ship Ordinance which had followed the English model. Thus the Malaysian Parliament preferred the Sabah Ordinance for its closeness to English law, comprehensiveness, consistency, wider coverage, and for its harmony with the law in Malacca and Penang.

Since the partnership law in the nine federated Malay States needed revision, the uniformity was achieved with minimum efforts and almost in the normal way by adopting the Sabah legislation.

[4] According to the Report of the Special Committee on the Indian Partnership Act, 1932 "... many important matters relating to partnership were left unnoticed in Chapter XI. In addition to these omissions the development of trade in India has shown further matters on which legislation is required." Quoted from the A.I.R. Manual (Civil and Criminal) 269–70 (Vol. 15, 3rd edn. 1972).

[5] According to Lindley on The Law of Partnership at page 4 (13th edn. by Ernest H. Scamell 1971) "... the Act reduces a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed, although it is by no means a perfect measure, nor even so good as Parliament might have made it."

According to the Report of the Special Committee on the Indian Partnership Act, 1932 "The Partnership Act, 1890, has received some approval from legal commentators, and is generally recognised as a useful Code embodying most of the law applicable to modern partnership." Quoted from the A.I.R. Manual, *supra* note 4 at 270.

III. THE CIVIL LAW

The role of the civil law provisions which provided for the reception of English law in Singapore and Malaysia must be mentioned here. Their earliest history dates back to the year 1878. It was in that year that the Civil Law Ordinance (No. IV of 1878) was passed "to improve the Civil Law". Its section 6, which provided for the reception of the law of England in all commercial matters, including partnerships, into the Colony read thus:

> In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen, or had to be decided in England, unless in any case other provisions is or shall be made by any Statute now in force in this Colony or hereafter to be enacted.
>
> Provided that nothing herein stated shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to any land or other immovable property, or any estate, right or interest thereon.

Subsequently, the Civil Law Ordinance No. VIII of 1909, which repealed the Civil Law Ordinance, 1878 was made "to consolidate certain provisions of the Civil Law." Its section 6 reintroduced the law of England in all commercial matters into "the Colony" in similar terms.[6] Again, Ordinance No. III (Civil Law) 1909 which repealed the Civil Law Ordinance No. VIII of 1909 was passed "to consolidate certain provisions of the civil law", like its predecessor. It reenacted those provisions in section 5.[7]

[6] In all questions or issues which may hereafter arise or which may have to be decided in the Colony, with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by Statute.

Provided that nothing herein contained shall be taken to introduce into the Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any immoveable property, or any estate, right or interest therein.

[7] 5(1). In all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance average, life and fire

Thus a succession of Civil Law Ordinances though confined "to this Colony" or "in the Colony", always included , *inter alia* partnerships.[8] According to G.W. Bartholomew, the reasons for the non-reception of the English Law in the federated and unfederated Malay States was as follows: "The unfederated Malay States were also protectorates and therefore there was no common law reception of English law into these states, any more than there was into the Federated Malay states".[9]

It is pertinent to remember that the Federated Malay States did make a Civil Law Enactment No. 3, 1937. Its section 2(i) read:

> Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by statute, shall be in force in the Federated Malay States; provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary, . . .

Thus in the F.M.S. the English common law and the rules of equity played subsidiary rule, only as a gap-filling device. The enumeration of topics exhaustively in section 5 or 6 of the earlier Civil Law Ordinances applicable to the Colony, is missing. Since Partnership provisions already existed in the form of enacted law, it is doubtful, what aid could these provisions give to the partnership matters. Ordinance No. 49 of 1951, extended section 2 of the Civil Law Enactment, 1937 of the Federated Malay states to the States of Johore, Kedah, Kelantan, Perlis and Trengganu also. The Schedule to section 29 of the Civil Law Ordinance, 1956 (No. 5) of the Federation of Malaya repealed the whole of the Civil Law Enactment, F.M.S. No. 3 of 1937. This 1956 Ordinance deals with several matters. Its section 5(1) and (2) read thus:

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insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made By Statute.

(2) Nothing herein shall be taken to introduce into the Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any immoveable property, or any estate, right or interest therein.

See Vol. 3, *The Laws of The Straits Settlements* (1908–12) 48, at 53 (1920).

[8] For the current Civil Law provisions in Singapore, see Chapter 30, Civil Law Act of Singapore, volume I of the statutes of the Republic of Singapore, pages 535–555, revised edition 1970).

[9] G.W. Bartholomew, *The Commercial Law of Malaysia* 15 (1st edn. 1965).

5(1) In all questions or issues which arise or which have to be decided in any Malay State with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

(2) In all questions or issues which arise or which have to be decided in the Settlements with respect to the law concerning any of the matters referred to in the last preceding sub-section, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

The Ordinance was revised in 1972. It is cited as the Civil Law Act, 1956 (revised 1972, Act 67).[10] It applies to the whole of Malaysia "(West Malaysia – 7th April, 1956; East Malaysia – 1st April, 1972)."

The changes introduced in the revised section 5(1) are that in lieu of the words "in any Malay State", the words substituted are "in the States of West Malaysia other than Malacca and Penang." Again in section 5(2) in lieu of the words "in the Settlements", the words substituted are "in the States of Malacca, Penang, Sabah and Sarawak."

An important problem is the application of these provisions to partnership cases when the enacted law, i.e. the Partnership Act, 1961 (revised 1974) is silent, suffers from a *lacuna* or does not cover the situation at hand. Is the court, in such cases, bound to apply the English law?

Tan Mooi Liang v. Lim Soon Seng & Ors.[11] raised this vital question. In the words of Azmi, L.P.:

> The question we have to decide is whether a partner in the absence of any contract to the contrary dissolves a partnership by giving notice of intention to dissolve it. In other words, whether the English law on that point is applicable to Malaysia.[12]

[10] For extension of the Civil Law Ordinance, 1956 to Sabah and Sarawak, see The Civil Law Ordinance (Extension) Order, 1971.

As to the problems connected with Civil Law provisions, see Joseph Chia, *Reception of English Law Under Sections 3 and 5 of the Civil Law Act 1956 (REVISED 1972), [1974]* 1 J.M.C.L. 42; Ahmad Ibrahim, *The Civil Law Ordinance in Malaysia*, [1971] 2 M.L.J. lviii; L.C. Green, *Filling Lacunae In The Law*, [1963] 29 M.L.J. xxviii.

[11] [1974] 2 M.L.J. 60.

[12] *Id.* at 61.

The question was discussed in relation to section 206 of the (now repealed) Contracts (Malay States) Ordinance which provided:

> In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules: . . . .
>
> g. if, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members;
>
> h. unless the partnership has been entered into for a fixed term any partner may retire from it at anytime.

The facts were that the plaintiff appellant and the four defendants formed a partnership to deal in and distribute sundry goods in 1971. On February 7, 1973, the plaintiff was removed as a cashier. Next day he sent a notice to the defendants, "to *dissolve* the said partnership as from 15th February 1973."[13] The defendants averred that (when no duration of partnership was fixed), the plaintiff could not unilaterally terminate or dissolve the partnership and that the notice, "in effect amounted to a notice of intention to retire from the said partnership."[14] The trial judge dismissed the plaintiff's motion.

The plaintiff appealed that by virtue of section 5 of the Civil Law Ordinance of 1956 (now revised Act), the English law should have been applied. In other words, the notice dissolved the partnership. Azmi L.P. allowed the appeal and applied the English law accordingly. He supported his conclusion by reference to the decision of the Privy Council in *Terunnanse* v. *Terunnanse*,[15] a case from Ceylon. In other words, despite the statutory provisions on an enumerated topic the English law could be applied on the strength of the Civil Law Ordinance. However, both Suffian C.J. (Malaya) (as he then was) and Ong Hock Sim F.J. held that the words in section 5 that unless in any case "other provision is or shall be made by any written law" excluded the application of English law. Thus the Contracts (Malay States) Ordinance, 1950 (now revised Act) containing provisions on partnership (chapter X) is "other provisions". According to the majority opinion, therefore, the mere existence of a statute on partnership, however incomplete the rules may be, is sufficient to replace the Civil Law Ordinance back to the bookshelf.

In 1976, the Federal Court was again confronted with the same issue in *Royal Insurance Group* v. *David*[16] but did not consider it fit to decide it because "there was no ambiguity in the contract of agency taken as a

[13] *Ibid.* Emphasis added.

[14] *Ibid.*

[15] [1968] A.C. 1086.

[16] [1976] 1 M.L.J. 128, 129.

whole."[17] However the High Court had applied the English law because the Contracts Ordinance, 1950, applicable to the case, was regarded as silent. Mention may, however, be made of a much earlier case, *J.M. Wotherspoon & Co. Ltd. v. Henry Agency House,*[18] *which dealt with the del credre* agency under the Contracts (Malay States) Ordinance. There Suffian, J. (as he then was) said:

> As the Contracts (Malay States) Ordinance No. 14 of 1950 is silent on the subject, by virtue of section 5(1) of the Civil Law Ordinance No. 5 of 1956 the law applicable in England is applicable in the Federation.[19]

In view of the above, one is not sure whether the *Tan Mooi* case finally resolved the controversy or just started it! As a judicial precedent, the majority view in this case is binding on lower courts and represents the law unless it is departed from by the same court, overruled by the Privy Council or is nullified by legislation.

Nevertheless two explanations must be set out here: First, it appears that the (Malaysian) Civil Law Act, 1956 was inspired by section 3 of the Civil Law Ordinance, 1853 (Cap. 66 of the Legislative Enactments of Ceylon). This reads:

> In all questions or issues which may hereafter arise or which may have to be decided in this Island with respect to the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Island or hereafter to be enacted.

These provisions were quoted by their Lordships of the Judicial Committee of the Privy Council in *Bank of Chettinad, Ld. of Colombo* v. *Commissioners of Income Tax, Colombo,*[20] a case from Ceylon. In that case, the question related to the meaning of the phrase "business of banking", used in section 2 of the Income Tax Ordinance No. 2 of 1932 of Ceylon. Although guidance was available from section 330 of the Companies Ordinance 1938 as to the meaning of the above phrase, their Lordships mooted that if the section 330 which was enacted in 1938 (six

[17] *Id.* at 131.

[18] [1962] 28 M.L.J. 86.

[19] *Ibid.* This case is not mentioned in *Tan Mooi Liang* v. *Lim Soon Seng & Ors., supra* note 11.

[20] [1948] A.C. 378 at 383.

years after the Income Tax Ordinance which contained the above phrase) were to be "entirely disregarded",[21] what would be the legal position? Lord Morton of Henryton, who delivered the judgment of their Lordships, said:

> ... the definition in s. 330 in no way conflicts with the meaning attached to the word "banker" in England in 1932, and if s. 330 were to be entirely disregarded, it would be necessary to bear in mind the terms of s. 3 of the Civil Law Ordinance, 1853 (Cap. 66 of the Legislative Enactment of Ceylon).[22]

This would seem to support the majority view that the English law will not apply when a local statute on the subject is available. The controversy, however, as to the reception of English Law in matters relating to partnership is partly cooled down by the following provision in section 47(1) of the Partnership Act, 1961 (revised 1974) thus:

> The rules of equity and of common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.[23]

Under the Act, the *lacuna* can be filled only by the rules of equity and common law and not by the statutory English law.

IV. DEFINITIONS OF PARTNERSHIP

The law of partnership being statutory in the former Malay States, Sabah (then North Borneo) and Sarawak, it would be useful to note the various definitions of partnership and to make a comparison between them. The definition of partnership in the current Partnership Act, 1961 (revised 1974) may first be noted.

Partnership Act, 1961 (revised 1974)

3(1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

(2) The relation between members of any company or association which is –

(a) registered as a company under the Companies Act, 1965

[21] *Ibid.*

[22] *Ibid.*

[23] This reproduces section 46 (entitled "saving for rules of equity and common law") of the English Partnership Act, 1890 with minor changes. Instead of "applicable to", the Malaysian Act uses "applicable in". Again the latter Act adds a comma after the word force and before except, while there is none in the English Act. While extending the Sabah Partnership Ordinance, 1961 to other parts of Malaysia, it would have been better to drop the word "continue" from section 47(1) and to *substitute* it with "be" to complete the grammatical construction of the sentence.

or as a co-operative Society under any written law relating to co-operative societies; or

(b) formed or incorporated by or in pursuance of –

(i) any other law having effect in Malaysia or any part thereof; or

(ii) any letters patent, Royal Charter or Act of the Parliament of the United Kingdom, is not a partnership within the meaning of this Act.

Sabah Partnership Ordinance No. 1 of 1961

3(1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.[24]

Section 239 of the Contract Enactment, 1899

"Partnership" is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them.

Illustrations

(a) A and B buy 100 bales of cotton, which they agree to sell for their joint account; A and B are partners in respect of such cotton.

(b) A and B buy 100 bales of cotton, agreeing to share it between them. A and B are not partners.

(c) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold, and that they shall share in the resulting profit or loss. A and B are partners.

(d) A and B agree to work together as carpenters, but that A shall receive all profits and shall pay wages to B. A and B are not parterns.

(e) A and B are joint owners of a ship. This circumstance does not make them partners.

Section 192 of the Contracts (Malay States) Ordinance, 1950

It adopted section 239 in identical terms and was applicable to the nine Malay states of the Federation of Malaya.

Section 2 of the Sarawak Partnership Ordinance (Cap. 67), 1932

2. In this Ordinance –

"partners" means persons who have agreed to combine their property, labour or skill for the purpose of carrying on a business, or

[24] Sub-section (2) is similar to sub-section 2 of the Partnership Act, 1961 (revised 1974) as quoted in the text.

of effecting a transaction, with a view to sharing the profits and losses thereof.

Illustrations

(a) A and B buy 100 bales of cotton with the object of selling the same at a profit to be shared between them. A and B are partners in respect of such transaction.

(b) A and B buy 100 bales of cotton agreeing to share it between them. A and B are not partners.

(c) A agrees with B, a goldsmith, to buy and furnish gold to B to be worked up by the latter and sold, and that they shall share in the resulting profit or loss. A and B are partners.

(d) A and B agree to work together as carpenters, A paying B a wage for his services and being responsible for the losses and taking all the profits. A and B are not partners.

(e) A and B are joint owners of a ship. Unless the ship is used for profit, A and B are not partners.

A graphic comparative table containing the salient points of each of these definitions may be stated on the charts shown on pages 236 and 237.

The definition of partnership as given in the Contract Enactment, 1899 (or in the Contracts (Malay States) Ordinance, 1950, which is in *pari materia* therewith) is derived from the one given by Kent, so far as the elements of property, labour or skill are concerned: "Partnership is a contract of two or more competent persons to place their money, effects, labour and skill, or some or all of them, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions".[25] In *Pooley* v. *Driver*, Jessel, M.R., admitted that "each partner does contribute something, either in the shape of property or skill. But it is not a universal rule, and therefore the definition . . . is not quite correct".[26] Hence the later definitions of partnership in England in the Partnership Act, 1890[27] and in India in the Indian Partnership Act, 1932[28] avoid any reference to what the partners contribute when they carry on their business in common or when the business is carried on by some for the benefit of all.

[25] See Lindley, *Partnership* 15 (13th edn. 1971 by Ernest H. Scamell).

[26] (1877) 5 Ch. D. 458, 472.

[27] See section 1(1) of the English Partnership Act, 1890. The definition of partnership in section 3(1) of the Malaysian Partnership Act, 1961 (revised 1974) is in *pari materia* with the English counter-part. Of course, the Malaysian Act uses the term "business" instead of "a business."

[28] Section 4 of the Indian Partnership Act defines partnership thus: "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

PA *1.* *F.M.S. (in the Federation of Malay States from 23/5/1950 Until repeal)*	*S* *2.* *Sarawak*	*T* *3.* *Sabah*	*PRESENT* *4.* *Partnership Act, 1961 (revised 1974)*
1. Date of enforcement. The Contract Enactment was framed in 1899 and under its section 1 (i) it shall come into force on the date of the publication in the Gazette".	1. 1st January 1932	1. 29th April 1961	1. Sabah – 29th April, 1961 Others States – 1st July 1974
2. "Partnership" and "firm" are defined in section 239 which is an opening section in chapter XI of pertnership.	2. "Partners" are defined in the interpretation clause in section 2	2. Partnership is defined in section 3(a) in Part II, dealing with the "Nature of Partnership".	2. As in column 3
3. Five illustrations are attached to the definition.	3. Five illustrations are attached to the definition. Although these are based upon the illustrations given in section 239 of the Contract Enactment, 1899, they are amplified by the insertion of more facts.	3. No illustration is attached to the definition.	3. As in column 3.
4. Minimum or maximum number of persons who constitute partnership is not given, though the use of the word "persons" requires that the minimum number must be two.	4. As in column 1.	4. Under section 47(2), "nothing in this Ordinance shall be read to permit any association of more than twenty persons to be formed or to carry on any business in partnership contrary to section 328 of the Companies Ordinance.	4. Under section 47(2) "nothing in this Act shall be read to permit any association of more than twenty persons to be formed or to carry on any business in Partnership contrary to section 14(3)(b) of the Companies Act, 1965.

PA *1.* *F.M.S. (in the Federation of Malay States from 23/5/1950 Until repeal)*	*S* *2.* *Sarawak*	*T* *3.* *Sabah*	**PRESENT** *4.* *Partnership Act, 1961 (revised 1974)*
5. "Persons" constitute partnership which is a *relation* between them.	5. Persons become partners; partnership as a relation between partners is not defined.	5. Persons constitute partnership which is a relation between them.	5. As in column 3.
6. Partnership is a subsisting relation.	6. Not emphasised. However the relevant words are "have agreed".	6. As in column 1.	6. As in column 3.
7. Agreement is required.	7. As in column 1.	7. Not so stated, though necessarily implied from the various provisions of the Act.	7. As in column 3.
8. Partners must combine (contribute) their property, labour, or skill	8. As in column 1.	8. Not so stated.	8. As in column 3.
9. Existence of "some business" is essential.	9. "Carrying on a business, or of effecting a transaction" is essential.	9. "Carrying on business" is essential.	9. As in column 3.
10. Commonness of business is not emphasised.	10. Not emphasised. The words are not *their* business or *their* transaction but only a business or a transaction.	10. Commonness of business is emphasised.	10. As in column 3.
11. Agreement to share the profits is essential.	11. Agreement of partnership must be made "with a view to sharing the profits and losses thereof."	11. Business must be started "with a view of profit". The motive is profit and not loss, so agreement for distribution of losses is not essential.	11. As in column 3.

V. THE PARTNERSHIP AND THE JUDICIARY

The reaction of the Malaysian courts and of the old Singapore Courts to the various prerequisites of partnership remains to be seen. This will show how the courts solved the various problems which came before them on the subject and whether the factual situations were no new that they defied the pre-existing definitions of partnership. The facts have sometimes involved the larger question whether a person was a partner within the law of partnership. This wider problem was taken care of by other provisions which did not define partnership, but dealt with the nature of partnership or rather the tests for determining the existence of partnership. These latter problems will also be alluded to, but the discussion in the main will be confined to the former.

The definition of partnership as given in the Partnership Act, 1961, unfolds the following essentials of partnership:

a) Partnership is a *relation* between persons;
b) The *business* must be *carried on;*
c) It must be so in *common*;
d) It must be so with a *view of profit.*

The amplifications and judicial glosses on these essentials will now follow succintly.

a) *Relation*

The *kind* of relationship between the partners as referred to in the definition of partnership is necessarily a business relationship. But the main question is this: how does this relationship spring up? Obviously, through the theory of contract. Indeed, there are several sections in the Partnership Act, 1961, which lend support to this view either by using the words consent, agreement or the phrase, subject to agreement between the partners.[29] The definition, however, excludes the word agreement or any other similar expression. The omission may have been deliberate to avoid the fear that the agreement for partnership may not be understood as equivalent to partnership itself. But the fear could well have been avoided by using suitable words as has been done in the Indian experiment.[30]

[29] See sections 10, 21, 26, 27, 28, 29, 31, 32, 34, 35, 44, 45 and 46, of the Partnership Act, 1961 (revised 1974).

[30] See the definition of partnership as given in section 4 of the Indian Partnership Act, 1932, as quoted in the text. This definition, on the one hand, emphasises that partnership is the result of agreement between the parties. On the other hand, it stresses that the agreement itself does not create a partnership and that the *business* of the partnership must be carried on by all or any one of them acting for all.

The judicial dicta provide functional examples of the above element of consensualism.[31] The basis of the relationship among the partners being contractual, no material change may be effected in a firm without the consent of all the existing partners. In *Tham Kok Cheong & Anor.* v. *Low Pui Heng,*[32] the Federal Court unanimously held that three out of the four partners could not sell the partnership business to a company formed by them in the absence of the consent of the fourth partner, an old illiterate woman, a dormant partner, who happened to be the step-mother of the three defendants. The action of the three defendants, therefore, "could have no effect on the plaintiff's share in the partnership."[33]

One major problem emanating from the concept of contractual relationship is the question of the legal position of the minors to become partners and to be liable for the debts of the firm. The Partnership Act, 1961 (revised 1974) is silent on the point. And the reasons would seem to be historical and not accidental. It would therefore, be interesting to examine the position of the minor in the earlier partnership legislations in the different states.

The Contract Enactment, 1899 contained a chapter on partnership. The definition of partnership in section 239 used the expression "persons who have agreed to combine." The other provisions in this Enactment did not confer a full-fledged status on the minor to become partner but compromised his position by permitting the major partners to admit the minor to the benefits of partnership, subject to his certain liabilities and obligations as stated in sections 247 and 248 quoted below:

> 247. A person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

[31] In English Law, in *Smith* v. *Anderson,* (1880) 15 Ch. D. 247, at 273, James, L.J., emphasised the notion of contract by giving the following definition of partnership.

> An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another.

[32] [1966] 2 M.L.J. 52. See to similar effect *Tiang Tien Kwang & Orts.* v. *Kong Sung Seng & Ors.,* [1964] 30 M.L.J. 427 which emphasised the element of consent under the Sarawak Partnership Ordinance (Cap. 67). See *Ban Hin Sawmill Co. and four others* v. *Chio Kee Yung & Five others,* [1956] S.C.R. 73 at 81; *Voon Guan Choon* v *Voon Ah Shoon,* [1957] S.C.R. 157; *Lau Hock Chiong* v. *Sim Kheng Hong,* [1958] S.C.R. 7 (This last mentioned case deals with principles of contract also.)

[33] *Id.* at 53.

248. A person who has been admitted to the benefits of partnership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.[34]

[34]These provisions are in *pari materia* with the repealed partnership provisions of the Indian Contract Act, 1872. It would be interesting to compare them with those of section 30 of the Indian Partnership Act, 1932. These new Indian provisions are not only detailed but also lay down the disabilities and legal effects of admitting a minor to the benefits of partnership.

To quote section 30 of the Indian Partnersip Act, 1932:

Minors admitted to the benefits of partnership –

1. A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

2. Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

3. Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

4. Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48:

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

5. At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm:

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

6. Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

7. Where such person becomes a partner—

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor,

8. Where such person elects not to become a partner –

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,

Nachiappa Chettiar v. *Kamppau Chettiar*[35] (from Selangor) was decided under the above provisions (sections 239, 247 and 248). It dealt with the liability of the adult and minor members of the joint Hindu trading family. The plaintiff had claimed the amount of loan he had made to the joint Hindu trading family and made his prayer against the minor member also. His claim was lost against the minor, though it was decreed against the major partners.[36]

The same view was reiterated in *Abdul Majeed* v. *Official Administrator*[37] (from Selangor) where despite the fact that on the death of the father, his share in the partnership property "was transferred into the name of his minor son,"[38] the partnership was held to have been dissolved on the death of the father. The court did not pronounce that the continuance of the old business by the surviving partner resulted in a new partnership with the minor son (of the deceased partner) who was then only three years old.

Chan Yin Tee v. *William Jacks & Co. (Malaya) Ltd.*[39] decided by the Federal Court, carried the law a step further: the fact of registration of the

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(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

9. Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

[35] [1939] M.L.J. Rep. 168.

[36] In this context, Cussen, J., referred to the role of section 239 of the Contract Enactment and said:

> ... if they take an active part in the formation, conduct or management of the business, then there is supplied or added the contractual element of agreement, the free choice and will of the member himself, which brings him within the provision of the Contract Enactment defining the relationship of partnership
>
> ...
>
> ... either expressly or by conduct, he adds his agreement, his assent, and thereby completes the requirements of section 239 of the Contract Enactment, so placing himself in the position of a partner, with the personal liability attaching thereto. (*Id.* at 170).

As to the position of the minor, Cussen, J., referred to sections 247 and 248 (quoted above in the text).

As to the position in Singapore, see *Wong Peng Yuen* v. *Senanayke*, [1962] 28 M.L.J. 204 – a Singapore case – where two infants were "admitted as partners". (Page 207).

[37] [1939] 8 M.L.J. 205 (marginal page 267).

[38] *Id.* at 206.

[39] [1964] 30 M.L.J. 290 (F.C.) Mention may also be made here of *Sivagami Achi* v. *P.R.M. Ramanathan Chettiar & Anor*, [1959] 25 M.L.J. 221, 224, where it was said:

adult member and the minor member as partners under the then Registration of Business Ordinance, did not result in a partnership. The adult person was held to have represented to the seller of goods that the minor was his agent. This attracted sections 136 and 137 of the Contracts Act, 1950. Thereunder, a minor has a protective cloak in that though he can be an agent to make his principal liable to third parties, he himself is not liable at all. Referring to the partnership between the major and minor members and the liability of the former on the basis of agency, Thomson, L.P. said:

> Whether or not these people were in any partnership – it has been argued that Yong could not be a partner by reason of the decisions of the Privy Council in two cases that have been cited to us – irrespective of that, it is quite clear that Chan held out Yong as his agent who had authority to do things on his behalf and it seems to me that he is clearly liable for his agent's acts.[40]

The matter of the minor being a partner under the law was, therefore, not discussed. The appeal was dismissed.

The legal position of the minor to become a partner was the same in the Federation of Malaya.

Sarawak Partnership Ordinance (Cap. 67) used the expression "persons who have agreed" in the definition of partners in section 2 and made elaborate provisions regarding the position of the minor. These provisions may be quoted in *extenso* as follows:

> Section 5. A minor may be a partner in a firm but shall not be personally liable for any obligation of the firm;
> Provided that the share of such minor in the property of the firm shall be liable for the obligations of the firm;
>
> Section 6. A minor partner on attaining majority shall become liable for all obligations incurred by the partnership from and including the date of his attaining majority.
>
> Section 7. Every partner, subject in the case of a minor to the provisions of section 5, shall be liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm shall not thereby become liable to the creditors of such firm for anything done before he became a partner.

". . . the mere fact of her registration as a partner does not estop the co-partners from alleging and proving that she was a nominal partner. Registration is merely *prima facie* though strong evidence of partnership." (Page 224). Because of the fact that partnership is the result of contract between the parties, the death of a person does not as such make the legal representative as a partner in a firm.

[40] *Id.* at 291.

Section 8. Every partner, subject in the case of a minor to the provisions of section 5, shall be liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

The Sabah Ordinance of which the present Act is an extension was based on the English Partnership Act, 1890. It has hardly any provision on the subject. In English law, the position of a minor is well-established: a minor may enter into a contract of partnership and this contract is voidable at his option and subject to certain limitations of the law.[41]

If partnership arises out of contract, as it does, the Contracts Act, 1950 (revised 1974) and the Partnership Act, 1961 (revised 1974) produce contradictory results. Under section 11 of the Contracts Act, 1950, a minor is not competent to enter into a valid contract and on identical provisions in a case from India, their Lordships of the Privy Council held in *Mohori Bibee* v. *Dhurmodas Ghose*[42] that a minor's agreement is void *ab initio*. In other words, in *all* cases whatsoever, a minor is incapable of entering into a valid contract – a result contrary to the English law. This Privy Council case has been followed in Malaysia.[43] Thus while the Malaysian Contract law was wedded to Indian position and the Malaysian partnership law to English position, their offspring was surely hybrid.

The problem, however, may be resolved by adopting the following solution: The Contracts Act, 1950 is the general legislation relating to partnership contracts and the partnership Act, 1961 is the special legislation on the subject and in case of conflict, the latter must prevail. Section 47(1) of the partnership Act, 1961 lays down as follows:[44]

> The rules of equity and of common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

[41] See Lindley on the law of Partnership 53–54 (13th edn. by Ernest H. Scamell 1971).

[42] (1903) I.L.R. 39 Cal. 539; (1902-03) L.R. 301 A. 114.

[43] *Government of Malaysia* v. *Gurcharan Singh & Ors.*, (1971) 1 M.L.J. 211. See Contracts (Amendment) Act, 1976 (A 329) which overrules the case on some points. *Leha binti Jusoh* (administratrix) v. *Awang Johari bin Hasbim* [1978] 1 M.L.J. 202 (F.C.).

[44] One might recall here the similar provision made in section 101(2) of the Bills of Exchange Act, 1949 (revised 1978), Act 204), which is based on the English counterpart:

> Subject to the provisions of any written law for the time being in force, the rules of the common law of England, including the law merchant, shall, save in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes, and cheques.

In other words, the minor's position in relation to partnership must be governed by the well-established English common law. Comparison here may be made with the Indian historical processes. When the chapter on partnership was repealed from the Indian Contract Act and a separate Act about it was being enacted, the Special Committee took care to avoid any conflicting position. It was stressed that in India the minor could be admitted to the benefits of partnership since the year 1866. There was no justification to enact any exception to the rule of *Mohori Bibee* case so far as only the law of partnership was concerned.

b. & c.) *Business must be carried on in common*

This phrase refers to three different but highly significant factors in the formation of partnership. They include that the activity of the partnership must be "business" within the meaning of law, that the business must be carried on as in commercial transactions so that mere *agreement* to carry on a business does not constitute partnership and that it must be participated in by all the partners or all of them must be involved as principals and agents in the carrying on of the business. It is possible that these elements are mixed up in a single factual situation.

In *Soh Hood Beng* v. *Khoo Chye Neo*,[45] a case decided in the nineteenth century, the question as to the meaning of the phrase "for the purpose of carrying on any other business (other than banking) that has for its object the acquisition of gain" arose in the context of section 4 of the Companies Ordinance V of 1889. The facts were that in 1894, the defendant, a woman manager, formed a Chinese money loan association, wherein the plaintiff's wife took two shares out of fifty-seven at £5 each. The defendant made up all the affairs of this association and handed over the loan (thus collected from subscriptions) to the person whose tender was accepted. She maintained no regular office, no books of account and no list of members. The advantage to the members was to get a whole lump sum at one time. It was held that there was no business or gain from the association. The court said:

> It is true the agent or manager had to collect the subscriptions and hand them over to the person who obtained the loan, but that is not carrying on a business.[46]

The myth that there is a real distinction between an association for gain without business and an association for gain carrying on business was

[45] (1897) 4 S.S.L.R. 115.

[46] *Id.* at 121.

exploded by Jessel, M.R. in *Smith* v. *Anderson*[47] and was styled as a "supposed distinction".[48]

Business involves repetition or a series of acts and in the case of a particular partnership even a single commercial venture may involve many acts in the completion of the transaction. Thus a partnership created for a single commercial transaction can also carry on business in the sense of the term used in section 3 of the Partnership Act, 1961. A single human being though by himself he cannot form partnership may nevertheless carry on business as a proprietor by continuity or repetition of similar acts. If a man were to buy land and casually were to sell it for profit, it would not be business, but if he buys and sells land for profit, that would, no doubt, be called a business.[49] Here the casual nature of the transaction disappears and turns the acts into business. Under section 2 of the Partnership Act, 1961, the term "business" includes "every trade, occupation, or profession". This, however, does not explain the term fully.

In *Choo Wee Neo* v. *Kho Gow Neo and Tan Twa Kow*,[50] there was an agreement between two persons (including the defendant Tan Twa Kow), but under the deed, the latter had no share in the capital, although he "was entitled to three out of ten shares in the profits."[51] It was held that the business was carried on in common, so that the deed created partnership between the parties. Whether or not the business is carried on in common, the court will look not only to the partnership deed but also to their conduct in the running of the partnership affairs wherever the needs might arise. Thus in *Ratna Ammal & Anor* v. *Tan Chow Soo*,[52] the Federal Court held that although the written agreement used the word "syndicate" and there was a "complete omission"[53] of the word partnership in the deed of agreement, the relationship between the parties was that of partners and the business was carried on "in common with a view of profit", within the meaning of the expression in section 3(1) of the Partnership Act, 1961.

A business may still be carried on in *common*, although some of the partners are active partners, while others are sleeping or dormant part-

[47](1880) 15 Ch.D. 247.

[48]*Id.* at 258.

[49]In *Shaw* v. *Benson*, (1883) 11 Q.B.D. 563, Brett, M.R., emphasised the repetitious aspect of the term business. See illustration of moneylending at page 570.

[50](1888) 1 S.L.J. 26.

[51]*Id.* at 27.

[52][1964] 30 M.L.J. 399 (F.C.)

[53]*Id.* at 401.

ners.[54] The legal effect in both the cases is the same and the non- (actively) participating partners are bound by the actions of the other (active) partners provided that their actions were authorised or necessary in the carrying on of the business of the firm.[55]

Thus in one of the cases, *Osman bin Haji Mohamed Usop* v. *Chan Kang Swi*,[56] a firm was styled as "The Federal Trading Company". It consisted of three Chinese partners, who actually were managing partners and three Malay partners who did not participate in the management. It was held that the three managing partners were entitled to borrow money on a pronote from a creditor, so as to bind the (whole) firm and that the three non-managing partners were also partners of the firm and bound by the pro-note. The business was carried on in common for the benefit of all the partners and their relationship was the result of a contract among them all.[57]

d) *View of Profit*

Sharing of losses is not the hallmark of partnership. But the law requires that the partners must have been motivated and accordingly may have provided for profit. Under section 26(a), "subject to any agreement, express or implied, between the partners",

> all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

In none of the earlier Ordinances or the Enactment, except that of Sarawak, was there a mention of the element of loss, as seen earlier. Thus according to the Partnership Act, 1961, where a person receives a salary

[54] *Osman bin Haji Mohamed Usop* v. *Chan Kang Swi*, (1924) 4 F.M.S..L.R. 292; *Chettinad Bank Ltd.* v. *Chop Haw Lee, Chop Lee Chan*, (1931–32) F.M.S.L.R. 31; *Tham Kok Cheong & Anor* v. *Low Pui Heng*, *supra* note 32.

[55] *Ibid.* See also *Wan Weng* v. *Too Boon Chiar*, (1916) 1 F.M.S.L.R. 279, 287–88. In *Sithamparam Chetty, Alagappa Chetty, And Sitham Baram Chetty*, v. *Hop Hing & Ors.*, (1928) S.S.L.R. 52, the question arose whether the firm was bound by the action of the second defendant. This involved the question whether the second defendant was also a partner. The court concluded:

> . . . there is nothing in the evidence which is in consistent with the assumption that the second defendant was a partner. (Pages 55–56)

[56] *Supra* note 54.

[57] In this case, the pronote was executed by the three Chinese managing partners on behalf of the firm and guaranteed by one of the managing partners in his individual capacity. On a refusal by the firm to pay, the guarantor paid the amount and sought to recover the contribution from the remaining partners. The one reluctant partner, who had refused to pay was held liable on the basis of section 70 of the Contract Act.

and not a share of profit as the remuneration for his services, he does not thereby become a partner in the firm. A transitory provision for the receipt of salary or even for salary regularly but in lieu of profit would fall under a different category. The courts, therefore, must thoroughly examine the deed or oral agreement of partnership, coupled with the conduct of the parties as evidenced in their partnership matters.

Furthermore section 4 of the Partnership Act, 1961 specifies certain circumstances which do not *prima facie* constitute partnerships. References here must be made to clause (c) of section 4:

> the receipt by a person of a share of the profits of business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business . . .

In some cases, the courts were called upon to determine the nature of relationship between the parties, where one of the persons was entitled to a share of profits. Thus in *Gulazam v. Noorzaman and Sobath*,[58] there was a verbal agreement among the three parties to form a partnership to purchase, keep and sell cattle. The plaintiff's share in the capital was $200 and the profits were to be divided equally. The plaintiff had given $200. The business was held to be carried on in common with a view of profit and this constituted partnership between the parties. Again in *Murry v. David*,[59] a Singapore case, fundamental question was whether there was a partnership between the plaintiff and the defendant in the flotation of the three tin mining companies. From a mass of evidence, Murison, C.J., tried to infer the intention of the plaintiff about his forming a partnership with the defendant, a promoter of companies. It was accordingly held that in two out of the three ventures, there was no partnership between the parties. The following factors contributed to this conclusion:

a) That the plaintiff made a claim to partnership and an examination of the accounts for the first time in the instant case.
b) That there was "no arrangement with the defendant as to profits on his subscription to the defendant's ventures."[60]
c) That the plaintiff "did not know if there were other partners. He did not know where the property was."[61]
d) That there was no agreement as to sharing of losses. The plaintiff was "not asked any questions as to his views on his liability if the venture by any chance ended in a loss."[62]

[58] [1957] 23 M.L.J. 45.
[59] [1930] S.S.L.R. 229.
[60] *Id.* at 234.
[61] *Ibid.*
[62] *Ibid.*

e) That the correspondence between the plaintiff and the defendant shows that the former had advanced money to the latter only for the purchase of shares in the tin mining company.
f) That the word partner or partnership was never used.

With reference to the third venture, the learned Chief Justice found that the circumstances were different:

a) That there was "a contribution by the plaintiff to the defendant for the purpose of developing and selling a property to a company for the benefit of both Plaintiff and Defendant."[63]

This was interpreted by the court as an agreement to share the profits of a business carried on in common between them.

b) That the "discordant factors"[64] which were present in the other two ventures, were absent in the third venture.
c) That there was no allottment of shares.
d) That the plaintiff had made a claim for account.

Again in *Too Tong*, v. *Lim Eng Tiong & Anor.*,[65] the question was whether the defendant was a partner on the date when the promissory note was made on behalf of the firm in favour of the plaintiff. The court found, *inter alia* that the books of the firm contained two entries thus. "August 25, $2000- capital" "March 15, 1887, $400- capital."[66] This meant that the second defendant had advanced the money not by way of loan but as capital. In the words of O'Malley, C.J.:

> . . . there was an agreement between these two persons to join their capital and share profits and that they were substantially partners.[67]

In *K.A. Abdul Gaffoor* v. *R.E. Mohd. Kassim*,[68] the court was faced with Tamil expressions in a document using the terms *Kana-pattalabbanashtam* meaning "balance found"[69] and *Kuttalimargal* meaning "persons who are remunerated by a share in the profits".[70] The agreement between the plaintiff and the first defendant was a written one containing ten clauses. In view of the explicit nature of the clauses that the business solely belonged to the first defendant, who, also, had a

[63] *Id.* at 238.

[64] *Ibid.*

[65] [1891] 4 S.L.J. 46.

[66] *Id.* at 47.

[67] *Id.* at 48.

[68] (1931)32) F.M.S. Law Report 19. The case was decided under sections 239 (defining partnership) and 242 ("servant or agent remunerated by share of profits not a partner").

[69] *Id.* at 20.

[70] *Ibid.*

complete control thereupon, the fact that the plaintiff was a close relation of the first defendant, having married the latter's wife's sister and the circumstances of the case the court concluded that there was no partnership between the parties.[71] The fact that the person advancing money is a Muslim who agrees to share in the profits of the partnership business without a provision for or in lieu of interest militates in favour of his not being a partner in such circumstances.[72] Participation in the management of the partnership business combined with an agreement to share in the profits thereof in the normal way leads to the formation of partnership.[73]

VI. CONCLUSION

From the foregoing it appears:

a) that even at different times in different states the characteristics of partnership closely resembled each other. This made the task of unifying the various partnership laws into the Partnership Act, 1961 (revised 1974) quite easy;
b) that the current Partnership Act, 1961 does not specifically provide for the position of the minor and the application of English law would create disharmony with the legal consequences of a minor's agreement under section 11 of the Contracts Act, 1950; and
c) that apart from just a few complicated factual situations, the law of partnership has worked smoothly, sometimes with the aid drawn from the English decided cases.

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[71] See the various clauses of the deed.

[72] See *supra* note 68.

[73] See *Official Assignee* v. *Tan Cheng Guan*, (P.C.). See Roland Braddell, *The Law of The Straits Settlements, A Commentary* (Volume 2), appendix page 305, at page 306.

LEGAL PROBLEMS OF THE RURAL POOR IN MALAYSIA[1]

INTRODUCTION

This paper focusses attention on the increased participation by the State in the provision of a particular resource – legal services to the poor through the Legal Aid Bureau.[2] It is based on a study of three rural poor communities in Malaysia. Broadly, the study was designed to ascertain the use value of such Governmental agencies as the Legal Aid Bureau to the poor in seeking and securing the resolutions of legal problems they confronted. Ultimately the study helped evaluate the efficacy of the legal system by providing incisive insights into the accessibility of the legal system to poverty communities. More specifically, the primary purposes of the study were to:

1) determine the types of legal problems confronting the rural poor person;
2) identify the categories of problems he perceived as 'legal';
3) ascertain the typical problem solving methods and institutions he employed and their effectiveness;
4) identify categories of problems not perceived as being 'legal' which are amenable, nonetheless, to resolution through the legal process;
5) assess the perception of the poor of the possible effectiveness of legal intermediaries on their behalf in specific problems;
6) identify factors which heightened legal perception and problem-solving ability.[3]

[1]This is a revised version of a paper contributed to the Workshop on "Access, Distributive justice" held under the joint auspices of the International Legal Centre, New York and the Institute of S.E. Asian Studies, Singapore 31st July – 2nd August 1976 at Singapore.

[2]The Bureau was set up in 1970 under the Emergency (Essential Powers) Ordinance No. 39 of 1970, subsequently replaced by the Legal Aid Act, 1970. Initially, civil proceedings in respect of which aid could be given were confined to maintenance cases. Since then, the limited jurisdiction operations have been expanded steadily, and now include as well, workmen's compensation, accident, and money lender's cases and maintenance, custody, divorce and property proceedings in Muslim Courts. Legal advice is available in respect of proceedings for divorce and custody, tenancy and hire-purchase matters. Legal aid in criminal cases is limited to advancing pleas of mitigation on behalf of a convicted indigent.

It may be noted that no real research into the legal needs of the poor preceded the setting up of the Bureau.

[3]This study was modelled on a similar study in America by the staff of the Duke Law