THE NATURE OF PARTNERSHIP PROPERTY AND EQUITABLE INTERESTS

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> …and you, too, [*to* SUBTLE.] *164*
> Will give the cause, forsooth! You will insult,
> And claim a primacy in the divisions!
> You must be chief! As if you only had
> The powder to project with, and the work *168*
> Were not begun out of equality!
> The venture tripartite! All things in common!
> Without priority! 'Sdeath! you perpetual curs…

Ben Jonson, *The Alchemist*, Act 1, Scene 1.

I. Introduction

Ben Johnson's *The Alchemist* opens with a dispute over the profits of a joint venture. Three characters, Subtle (a conman), Jeremy (a servant), and Doll (a prostitute), form a scheme whereby they will equally split money obtained by passing off Subtle as an "alchemist" and charging for his services. In the first scene, Subtle and Jeremy argue, and Subtle threatens to run off with the money. In the above quotation, he is chided by Doll for seeking to take more than his fair share. The play focuses on who will get the money—which is ultimately taken by Jeremy and given to his master—a question used to explore the tension between different duties of loyalty and self-interest.

This article has a similar theme. It is concerned with the nature of the interest that partners have in the assets of an unincorporated partnership as a matter of private law—drawing on jurisprudence from England and cognate Commonwealth jurisdictions with similar Partnership Acts. This is a question of both practical and theoretical importance. Most UK private equity schemes and hedge funds are structured as unincorporated partnerships.[1] This is typically because partnerships are "tax transparent", they are not taxed at an entity level.[2] The volume of litigation concerning partnerships has increased in recent years, with a number of cases

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[1] Typically limited partnerships under the Limited Partnerships Act 1907, where a "limited partner" contributes capital, cannot interfere in the running of the firm, and has limited liability, or the private fund limited partnerships under the Legislative Reform (Private Fund Limited Partnerships) Order 2017 (SI 2017/514). The latter creates a modified form of limited partnership which (i) enables the limited partner to have some control over the business without forfeiting limited liability, and (ii) allows the partnership to form without the limited partner contributing capital.

[2] See L. Gullifer and J. Payne, *Corporate Finance Law*, 3rd edn (Oxford: Hart Publishing, 2020) at pp.810–813.

across the Commonwealth turning on the nature of a current or former partner's share in partnership assets—most notably the High Court of Australia's decision in *Commissioner of State Revenue v Rojoda*.[3] In particular, the characterisation of a partner's share can be crucial for determining the proper taxation of partnership profits and gains, resolving when a transfer of partnership property or shares attracts tax liability, and the proper treatment of a former partner's claims against the firm for priorities and limitation purposes.

Despite this, the nature of a partner's interest has received little scholarly attention. Such an omission is striking given that debates about the nature of equitable interests remain alive and well—but typically focus on the nature of an interest under a trust.[4] On the one hand, theories concerning equitable interests of other kinds might usefully be applied to partnerships, as a means of resolving those disputes which turn on the nature of a partner's share. On the other, any theory purporting to explain the nature of equitable property must be able to accommodate the law governing partnership property. In turn, understanding the nature of partnership property can help lawyers understand better the nature of related kinds of entitlement, in particular interests under trusts of different types, the rights of estate beneficiaries, shares in incorporated companies—and more broadly the nature of equitable co-ownership. Modern textbooks and cases take it for granted that partners are not simply equitable co-owners of partnership assets, and that the qualifications on their rights to the joint stock before dissolution mean that partners are better understood as equivalent to trust beneficiaries with interests in remainder only. The argument, though, is hard to square with central features of partners' rights and powers before dissolution—such as the right to profits and their treatment for tax purposes.

This article argues that the dominant view of partners as equivalent to remaindermen under trusts is incorrect—it is undermined by central features of partnership law and mischaracterises important aspects of trusts law too. Rather, partners should be understood as equitable co-owners of partnership property, and the partnership as resembling an express fixed trust under which the beneficiaries' interests are subject to the trustees' powers to trade trust assets and contract debts. Such a treatment best fits with the existing rules of partnership law and provides a principled basis for the resolution of difficult cases.

The argument will be made in three parts. First, the debate about the nature of a partner's share in partnership assets will be set out—including the controversy over the significance of the fact that partners are residual claimants. Three different conceptions of partnership property discussed in the case law and literature will be examined: the entity model under which partners have purely personal rights against the firm like corporate shareholders; the remainderman model where partners acquire fixed interests in partnership assets only after an accounting upon a general dissolution; and the equitable co-ownership model under which partners have fixed interests in partnership assets even before dissolution. Secondly, the merits of the different models will be discussed. It will be argued that the equitable co-ownership model is the most coherent, and that the rules governing partnership

[3] [2020] HCA 7; (2020) 268 C.L.R. 281.

[4] For an attempt to bridge the gap, see J. Nitikman, "It has been Over 150 Years since the first Partnership Act was Enacted. Do We Understand Yet the Nature of a Partnership Interest? The High Court of Australia Weighs in on the Debate" (2020) 39 Est. Tr. & Pensions J. 295.

property fit neatly within orthodox equitable principles. Finally, the implications of the equitable co-ownership model will be discussed in two controversial areas: tax and the treatment of a retired or deceased partner's claims.

II. Three Models of Partnership Property

The fundamentals of the law governing partnership property are set out in the Partnership Act 1890. Assets brought into the firm for its purposes "must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement".[5] Any land "which belongs to the partnership", wherever the legal title is vested, is to be held "in trust, so far as necessary, for the persons beneficially interested in the land under this section [i.e. the partners]".[6] Further, subject to any contrary arrangement, the Act provides that partners are to have a share of the partnership property[7] and of any profits made.[8] For our purposes the most important two provisions are those limiting partners' rights over partnership assets. First, by default, each partner has the right to have the partnership property applied to the firm's purposes and so no partner can unilaterally withdraw assets from the firm for their own benefit.[9] Secondly, upon dissolution of the firm, partners can only claim what remains of the assets after the business creditors have been paid.[10] In this sense, partners are residual claimants.

It is the residual nature of partners' claims that has generated debate about the nature of their interests in the firm's assets. Under what has become known as the "jingle rule", the creditors of a partnership, upon the insolvency of the partners, can claim the assets of the partnership in priority to the personal creditors of the partners. In this sense, partnership law "partitions" assets—by making them more available to the creditors of the business than the private creditors of the partners individually. As Hansmann, Kraakman, and Squire argue, historically, this was an important feature of partnership law.[11] Those considering dealing with partnerships could be sure that, whatever the personal debts of the partners, their individual creditors would not be able to compete with business creditors for the business assets. This reduced monitoring costs, in allowing creditors to deal with partnerships without making potentially costly inquiries into their personal finances as well as the health of the business. In this sense partnership law dedicates the partnership assets to partnership purposes, and so is a form of organisational law functionally akin to corporate law.

While the jingle rule and its economic significance have been commented upon, understanding the rule is much harder.[12] The point, emphasised in the New Private Law movement in the US, is that it is not possible to understand legal rules by examining their function alone without reference to their form.[13] The fact that

[5] Partnership Act 1890 (1890 Act) s.20(1).
[6] 1890 Act s.20(2).
[7] 1890 Act s.24(1).
[8] 1890 Act s.24(1).
[9] 1890 Act s.20(1).
[10] 1890 Act ss.39 and 44.
[11] H. Hansmann, R. Kraakman and R. Squire, "Law and the Rise of the Firm" (2006) 119 Harv. L. Rev. 1335.
[12] e.g. see Hansmann, Kraakman and Squire, "Law and the Rise of the Firm" (2006) 119 Harv. L.Rev. 1335; R. Bubb, "Choosing the Partnership: English Business Organization Law during the Industrial Revolution" (2015) 38 Seattle U.L. Rev. 337.
[13] e.g. see A. Gold and H. Smith, "Sizing up Private Law" (2020) 70 U.T.L.J. 389.

partners are residual claimants in an economic sense tells us little about the content of their rights as a matter of doctrinal law. The Partnership Act 1890 provides no clear doctrinal characterisation of partners' rights either—indeed it was drafted primarily to make the law more accessible,[14] and expressly preserved the pre-existing legal rules applicable to partnerships except where inconsistent with the Act.[15] What, then, does the residual nature of partners' claims to the joint stock tell us about how the law characterises their rights? Can these rights be rationalised in terms of orthodox property, contract, and equity? Or must they instead be understood as concessions by the legal system to the expectations of commercial parties that viewed partnerships as entities?

1. The entity model

The simplest way of explaining partners' rights involves conceptualising the firm as an entity. Partners could be seen as having purely personal rights against the "firm", rather than rights in the partnership assets. This would assimilate the legal characterisation of partnership shares and corporate shares. A corporation is a legal person—and its shares are personal rights against that legal person, not literal shares of the assets of the firm.[16]

This approach has had its advocates. Historically, English judges formulated rules that treated partnerships for some purposes as separate from their partners, including the rules that: partnership assets are to pay partnership debts in priority to the personal debts of the partner (the so-called "jingle rule"); and a succession of partnerships is treated as a single entity for the purpose of applying the rule in *Clayton's Case*, which determines which of several debts owed by a debtor to a firm is discharged by any payment they make.[17] Likewise, English courts were willing to treat new partners as assuming the debts of the old firm[18] and to construe guarantees of partnership debts as referring to the debts of the business rather than a particular partnership.[19] Such rules all involved treating firms for some purposes as an entity, and led some treatise writers to argue that judges had deliberately shaped partnership law to give effect to the commercial treatment of partnerships as entities.[20] Others, including Lindley, argued that English law should complete the development and recognise partnerships as having legal personality.[21] As Wells shows, this argument was particularly influential in the US, where it was adopted by Langdell and Ames.[22]

Arguments of this type have had a degree of a renaissance. After all, Hansmann, Kraakman and Squire argue that the characteristic feature of partnership law is

[14] F. Pollock, *A Digest of the Law of Partnership*, 5th edn (London: Stevens, 1890), at pp.vi-viii.

[15] 1890 Act s.46.

[16] *Borland's Trustee v Steel Brothers & Co* [1901] 1 Ch. 279.

[17] *Devaynes v Noble; Clayton's Case* (1816) 1 Mer. 529; 35 E.R. 767. A. Televantos, *Capitalism Before Corporations* (Oxford: Oxford University Press, 2020), at pp.157–162.

[18] See J. Bailey, "Dissolution of Partnerships under English and Scots Law" (University of Oxford, 2020), MPhil Thesis, at pp.2–32; Televantos, *Capitalism Before Corporations* (2020), at p.167.

[19] Bailey, "Dissolution of Partnerships under English and Scots Law" (2020), at pp.23–25.

[20] I. Cory, *A Practical Treatise on Accounts*, 2nd edn (London: W. Pickering. 1839), at pp.67–90.

[21] e.g. see N. Lindley et al, *The Partnership Act 1890, with Notes, Being a Supplement to a Treatise on the Law of Partnership* (London: Sweet & Maxwell, 1891); W. Lindley and T.J.C. Tomlin, *A Treatise on the Law of Partnership by the Right Honourable Lord Lindley*, 7th edn (London: Sweet & Maxwell, 1905), at p.4.

[22] H. Wells, "The Personification of the Partnership" (2021) 7 Vand. L. Rev. (forthcoming), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3836971*.

asset partitioning, and that it shares this essential function with corporate law—though, in each case, different degrees of asset partitioning are provided. The similarity has led some commentators to argue that the law does treat partnerships as having legal personality because of the jingle rule.[23] In *Re Bloxham*, the High Court of Ireland approved a passage from *Twomey on Partnership Law*,[24] stating that "like a share in a company, a share in a partnership confers no interest in the partnership assets".[25] Further, for some purposes in private international law, an English partnership will be treated like a corporation.[26] In 2003, the Law Commission suggested that partnerships should be recognised as having legal personality, a recommendation most consultees approved of.[27] McGregor[28] and Bailey[29] have more recently argued that the law should treat partnerships as legal persons with perpetual succession in much the same way as corporations—in particular to avoid the difficulties that arise upon general dissolution of a firm that, as a matter of law, had consisted of a succession of partnerships. The simplicity here could be seen as desirable—for instance the Privy Council in *Investec v Glenalla Properties* seemed to envy the simple American treatment of trusts as entities with rights and liabilities, compared to the more complicated English approach.[30] If the law did recognise partnerships as entities with separate personality, then shares in a partnership would be much like company shares.

Nevertheless, in England and other common law jurisdictions, partnerships are not separate legal persons—the Partnership Act 1890 provides that partnership is a "a relation which subsists between persons carrying on a business in common with a view of profit", the firm simply being the collective term for the partners.[31] While both corporate law and partnership law provide asset partitioning features, they do so through different legal forms. Corporate law provides asset partitioning through the creation of a separate legal person, whereas partnership instead achieves this effect through more basic private law doctrines, as discussed in the remainder of this article. It cannot be said that English law "in substance" recognises that partnerships have legal personality because of its asset partitioning features, any more than it can be said that English trusts have legal personality given their asset partitioning features.[32]

The deeper point is that allowing corporate entities to arise by operation of law is problematic, a point raised by the Chancery Bar Association in response to the Law Commission's proposals to give partnerships legal personality.[33] After all,

[23] J. MacLachlan, "Partnership Bankruptcy" (1960) 65 Com L.J. 253 at 255–256; R. Parry "Insolvent Partnerships" in J. Gant and P. Omar (eds), *Research Handbook on Corporate Restructuring* (Cheltenham: Edward Elgar Publishing, 2020), at pp.295–296 (jingle rule unjustifiable if partnerships have no legal personality). See also, Bailey, "Dissolution of Partnerships under English and Scots Law" (2020), at pp.33 and 68.

[24] M. Twomey, *Twomey on Partnership Law*, 1st edn (Dublin: Butterworths, 2000).

[25] *Re Bloxham* [2017] IEHC 664 at [37].

[26] See *Investec v Glenalla Properties* [2018] UKPC 7; [2019] A.C. 271 at [84]–[91].

[27] Law Commission and Scottish Law Commission, *Partnership Law* (TSO, 2003), Law Com. No.283; Scot. Law Com. No.192, Pt V.

[28] L. Macgregor, "Partnerships and Legal Personality: Cautionary Tales from Scotland" (2020) 20 J.C.L.S. 237.

[29] Bailey, 'Dissolution of Partnerships under English and Scots Law" (2020), at pp.76-78.

[30] [2019] A.C. 271 at [99]–[100].

[31] 1890 Act ss.1 and 4. For Commonwealth examples, see Partnership Act (Singapore, revised edn 1994) s.1; Partnership Act 1895 (Western Australia) s.7(1); Partnership Act 1990 (Ontario) s 2; Partnership Act 1932 (India) s.5.

[32] L. Smith, "Mistaking the Trust" (2011) 40 H.K.L.J. 747.

[33] I am grateful to Mr Mark Blackett-Ord for this observation, delivered at "Symposium on New Work in Property and Trusts", UCL, 26 April 2017.

any agreement to conduct a business with a view to profit creates a partnership, and so an entity with legal personality might be created without either partners or third parties being aware of what has happened.[34] While the problem could be avoided by requiring partnerships to register—just as limited partnerships seeking to benefit from limited liability have to[35]—such a solution would be imperfect at best, and come at a cost. First, it would be necessary in any event to have rules governing the treatment of unregistered partnerships that traded. Secondly, a historical strength of the common law has been its willingness to allow parties, privately and informally, to create arrangements with asset partitioning features. For instance, Maitland saw the trust as a "liberal substitute for a law about personified institutions", which allowed parties contractually to tailor entirely private property holding regimes without state intervention.[36] Partnership law can be understood in much the same way: it allows the informal creation of a joint stock business the rights and liabilities of which are partitioned from those of its owners and managers. In this sense, partnership is a distinct autonomy enhancing institution. It was not just a historically important means of facilitating trade before general incorporation,[37] but even today allows parties to create a wholly private business without state registration or privileges, and enormous freedom contractually to specify the terms of the arrangement. Any rule requiring all[38] partnerships to register would impoverish the law's menu of legal forms by replacing a distinct legal institution with another type of corporation.

Further, the Law Commission's recommendation that partnerships should have legal personality was rejected by the government following a consultation opened by the Department of Trade and Industry, which concluded that the costs of the proposed reforms would outweigh the benefits.[39] There were concerns that giving partnerships legal personality would cause English limited partnerships operating abroad to be taxed as corporations. This matters: much of what makes modern partnerships useful, and so used by hedge funds, is their tax transparency—the partnership is not taxed as an entity. Turning a partnership into an entity would create a recharacterisation risk, potentially undermining its most commercially useful feature. There are also concerns that the Land Registry and other agencies would need to make extensive inquiries as to partners claiming authority to deal with the firm's title to registered land; that there was no opt out for legal personality; and that there would be an adverse effect on established partnerships with carefully drafted partnership agreements.[40]

[34] 1890 Act s.1.

[35] Limited Partnerships Act 1907 s.5.

[36] F.W. Maitland, "The Unincorporate Body", reprinted in D. Runciman and M. Ryan (eds), *F.W. Maitland: State Trust and Corporation* (Cambridge: Cambridge University Press, 2003). See also F.W. Maitland, "Trust and Corporation" in the same compilation.

[37] Televantos, *Capitalism Before Corporations* (2020), Ch.1.

[38] Note that historically partnerships above a certain size had to register as corporations. The 20-member limit was repealed by the Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002 (SI 2002/3203).

[39] See Department of Trade and Industry, *Summary of Responses to the Consultation on Reform of Partnership Law: The Economic Impact* (TSO, 2006), *https://webarchive.nationalarchives.gov.uk/ukgwa/20070603185143mp_/http://www.dti.gov.uk/files/file32328.pdf*; Law Commission, Annual Report 2006–2007 (TSO, 2007), at paras 3.36–3.38. The only part of the 2003 report enacted into law was the Legislative Reform (Limited Partnerships) Order 2009 (SI 2009/1940).

[40] Department of Trade and Industry, *Summary of Responses to the Consultation on Reform of Partnership Law: The Economic Impact*, at paras 2.8–2.10.

2. The remainderman model

The next model of partnership property, the remainderman model, emerged principally in the 20th century and has become dominant. According to this model, during the life of the firm, a partner's only rights in respect of the assets are to have the other partners carry on the business according to the express and implied terms of the partnership agreement—sometimes described as a distinct kind of "equitable chose in action".[41] Before an accounting takes place upon a general dissolution, a partner's rights to the partnership assets are "indefinite and fluctuating",[42] a mere "interest in the realisation of [the] partnership's assets",[43] not truly amounting to a beneficial interest in,[44] or "share" of,[45] the assets. The inchoate nature of a partners' rights pre-dissolution, on this logic, explains the residual nature of a partner's claim to the assets of the firm—it is not until trade creditors are satisfied that it is possible to ascertain what each partner's rights relate to.

There are two variants of the remainderman model. According to the first, partners have future interests in the partnership assets—present rights to the future benefits of the assets, which only become fixed after a general dissolution.[46] In the language of trusts, they have vested equitable interests in the assets of the firm, but interests which are vested in interest, rather than in possession.[47] On the second view, partners have no existing interest in the assets during the life of the partnership, as it is not necessary to recognise partners as having equitable interests in the partnership assets themselves to protect their rights under the partnership agreement.[48] Instead, partners have only an expectation of acquiring an interest in the assets following a general dissolution—they have no vested equitable interests in the assets of the firm before that time. In this way, the rights of partners resemble those of the object of a discretionary trust or legatee of an unadministered estate who, respectively, only acquire vested interests in possession if a discretion is exercised in their favour, or sufficient assets remain after the liabilities of the estate are discharged.[49] On both variants, a partner's interest in the assets of the firm is

[41] e.g. the term is used in *Re Bainbridge Ex p. Fletcher* (1878) 8 Ch. D. 218 at 223; *Federal Commissioner of Taxation v Everett* [1980] HCA 6; (1980) 143 C.L.R. 440 at [8]; *United Builders Pty Ltd v Mutual Acceptance Ltd* [1980] HCA 43; (1980) 144 C.L.R. 673 at [16] (Mason J.); *Commissioner of State Taxation of the State of South Australia v Cyril Henschke Pty Ltd* [2010] HCA 43; (2010) 242 C.L.R. 508 at [45]; *Commissioner of State Revenue v Danvest* [2017] VSCA 382; (2017) 55 V.R. 190 at [164]–[165].

[42] *Marshall v Maclure* (1885) 10 App. Cas. 325 PC at 334; see also *Rodriguez v Speyer Bros* [1919] A.C. 59 HL at 68; *Sharp v Union Trustee Co* [1944] HCA 35; 69 C.L.R. 539 at 551.

[43] *Byford v Oliver* [2003] EWHC 295 (Ch); [2003] E.M.L.R. 20 at [19]. See also *Bakewell v Deputy Federal Commissioner of Taxation* [1937] HCA 11; (1937) 58 C.L.R. 743 at 770.

[44] *Rodriguez v Speyer Bros* [1919] A.C. 59 at 88 (per Lord Atkinson); *Commissioner of State Taxation of the State of South Australia v Cyril Henschkle Pty Ltd* (2010) 242 C.L.R. 508 at [25]; *Bieber v Teathers Ltd (In Liquidation)* [2012] EWHC 190 (Ch); [2012] 2 B.C.L.C. 585 at [76] (reversed on other grounds in *Bieber v Teathers Ltd (In Liquidation)* [2012] EWCA Civ 1466; [2013] 1 B.C.L.C. 248); *Commissioner of State Revenue v Danvest* (2017) 55 V.R. 190 at [83]; *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [33].

[45] *Popat v Shonchhatra* [1997] 1 W.L.R. 1367 at 1372; [1997] 3 All E.R. 800 at 804.

[46] e.g. see Roderick I'Anson Banks, *Lindley & Banks on Partnership*, 20th edn (London: Sweet & Maxwell, 2020), at para.19-08; *Connell v Bond Corp Pty Ltd* (1992) 8 WAR 352 at 373; also *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [32]–[35].

[47] J. Austin, *Lectures on Jurisprudence*, 1st edn (London: Murray, 1863), Vol.3, at pp.69 and 71. See also M.J. Cleaver, "'Absolutely Entitled Against the Trustee': Defeasibility, Saunders v Vautier, and Trustee Rights of Indemnity" (forthcoming).

[48] *Commissioner of Stamp Duties v Livingston* [1965] A.C. 694 at 712; [1964] 3 All E.R. 692 at 699 PC, cited in the context of partnership in *Commissioner of State Taxation of the State of South Australia v Cyril Henschkle Pty Ltd* (2010) 242 C.L.R. 508 at [25]; *Sze Tu v Lowe* [2014] NSWCA 462; (2015) 89 N.S.W.L.R. 317 at [120].

[49] *Commissioner of Stamp Duties v Livingston* [1965] A.C. 694.

categorically distinct from a vested interest in possession under a fixed trust—i.e., partners have no immediate fixed right to specific assets and their present enjoyment.[50] In *Rojoda*, the High Court of Australia emphasised that this distinction followed from the fact that land held by the partnerships has historically been treated as personal property under the doctrine of conversion—illustrating partnership shares are distinct from rights to the underlying assets.[51] The Singaporean Court of Appeal reasoned similarly in *Chian Heng Hsien v Chiam Heng Chow*.[52]

Although some discussion of partners' share in this way is obiter, the adoption of this conception of partnership shares has been relied upon to distinguish trusts from partnerships for the purposes of determining limitation periods;[53] whether stamp duty is payable on a transfer of shares in a partnership that holds real property;[54] and to determine whether a deed purporting to confirm partnership shares involved a "declaration of trust" within the meaning of taxation legislation.[55]

3. The equitable co-ownership model

According to the third and final model of partnership property, partners are co-owners of the partnership property in equity. On this view the rights of partners are not categorically distinct from those of beneficiaries of fixed trusts—partners have vested interests in the partnership assets. Further, such interests are vested "in possession": they involve a right to the present enjoyment of the assets, as (subject to contrary agreement) partners have a right to the income of the firm during its life, including income generated by the partnership property.[56] Although there was a historical debate about whether partners' co-ownership involved a tenancy in common or a kind of joint tenancy without survivorship, the debate was ultimately dismissed as academic, in that the rules governing each would have been identical.[57] The parameters of the debate, however, emphasised that partners were seen as co-owners in equity in the 18th and 19th centuries.[58] Claims that partners were joint tenants or tenants in common of the partnership property were sometimes made alongside claims that a partner's "share" was only what they could claim upon a general dissolution.[59] This involved no inconsistency—the term "share" simply related to what a partner could claim as their own to the exclusion

[50] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [33]; *Sze Tu v Lowe* (2015) 89 N.S.W.L.R. 317 at [123].

[51] *Rojoda* (2020) 268 C.L.R. 281 at [35] and [38].

[52] [2015] SGCA 27; (2015) 4 S.L.R. 180 at [124]–[131].

[53] *Sze Tu v Lowe* (2015) 89 N.S.W.L.R. 317.

[54] *Commissioner of State Revenue v Danvest* (2017) 55 V.R. 190.

[55] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281; Duties Act 2008 (WA) s.11(1).

[56] 1890 Act s.24(1).

[57] N. Lindley, *A Treatise on the Law of Partnership*, 1st edn (London: Maxwell, 1860), at p.560; F. Pollock, *A Digest on the Law of Partnership*, 3rd edn (London: Stevens, 1884), at art.27.

[58] W. Watson, *A Treatise of the Law of Partnership*, 2nd edn (London: Butterworth 1806), at pp.65–66 (partners are joint tenants without survivorship); N. Gow, *A Practical Treatise on the Law of Partnership*, 3rd edn (London: Hunter and Richards,1830), at pp.31–35 (partners are joint tenants at law without survivorship of personalty, and tenants in common in equity of any partnership realty); J. Story, *Commentaries on the Law of Partnership*, 4th edn (Boston: Little and Brown, 1855), at ss.88–100 (partners' co-ownership is sui generis); Lindley, *A Treatise on the Law of Partnership* (1860), at p.560 (partners as co-owners cannot exclude one another from partnership assets); F. Pollock, *A Digest of the Law of Partnership*, 1st edn (London: Stevens, 1877), at art.27 (partners are co-owners of partnership property). See also *West v Skipp* (1749) 1 Ves. Sen. 239 at 242; 27 E.R. 1006 at 1008; *Fox v Hanbury* (1776) 2 Cowp. 445; 98 E.R. 1179; *Crawshay v Collins* (1808) 15 Ves. Jr. 218; 33 E.R. 736.

[59] e.g. see *West v Skipp* (1749) 1 Ves. Sen. 239; N. Lindley, W.C. Gull, and W. Lindley, *A Treatise on the Law of Partnership*, 5th edn (London: Maxwell, 1888).

of their co-partners, and the allegation that this related only to a surplus on dissolution involved no assertion whatsoever about the content of their rights before that time. It was the partners' co-ownership of partnership assets which explained why, until 1890, the separate creditors of individual partners could levy judgment against partnership assets.[60]

On this model, wherever the partners vest the legal title to the firm's assets,[61] by default each partner has an equitable interest in the partnership property. Further, depending on the type of partnership,[62] by default each partner has agency powers to dispose of the firm's assets in the ordinary course of business.[63] Where a partner exercises the powers conferred by the partnership agreement, the equitable interests of their co-partners in the firms' assets are overreached, and instead they can claim any substitute as partnership property.[64] In this sense, a partnership resembles a fixed trust where the trustees hold business assets on trust for themselves, each is given a right to a distribution of the profits of the business, and each is expressly[65] given the power to act as agent for the collective, and so to trade the trust assets by acting alone.

III. Which Model is Correct?

Given the divergent approaches to the characterisation of the nature of a partner's share, which model should courts adopt going forward? The entity model can immediately be rejected, because partnerships do not have legal personality. We are therefore left with two possible options: the remainderman model and the equitable co-ownership model. This part argues that, although the remainderman model has become dominant, the equitable co-ownership model makes the most sense.

1. The logical fallacy of the remainderman model

As explained above, the key distinction between the equitable co-ownership and the remainderman model is that the latter sees a categorical distinction between the interests of partners in the assets of an ongoing firm and interests under a fixed trust. In essence, the remainderman model takes historical statements about what a partner can claim as their "share" upon a general dissolution and elevates that into a general theory of partnership property—according to which a partner's rights to the joint stock before dissolution are limited, much like those of a remainderman under a trust. Proponents of the remainderman model claim that it alone can explain three doctrinal features of partnership: the restrictions on partners' rights to take

[60] *Taylor v Fields* (1799) 4 Ves. Jun. 396; 31 E.R. 201 stated the principle, but the procedure changed. See Lindley, Gull and Lindley, *A Treatise on the Law of Partnership* (1888), at pp.356–363. Levying judgment in this way was prohibited by the 1890 Act s.23.

[61] Historically, personal property was by default jointly held by the partners at law, and the legal title to real property depended on the terms of the conveyance. See Story, *Commentaries on the Law of Partnership* (1855), at s.92.

[62] Such powers are by default part of partnerships (1890 Act ss.5 and 6) but can be excluded by express drafting. Limited partners also lack such powers (Limited Partnerships Act 1907 s.6).

[63] 1890 Act ss.5 and 6. See too *Sadler v Whiteman* [1910] 1 K.B. 868 at 889.

[64] The substitute would fall within the definition of partnership property (1890 Act ss.20 and 21). For an explanation of the mechanism in the context of trusts, see D. Fox, "Overreaching" in P. Birks and A. Pretto (eds), *Breach of Trust* (Oxford: Hart Publishing, 2002), at p.95.

[65] Default statutory powers under the Trustee Act 2000 do include the power to appoint trustees as agents of the trustees collectively but exclude trustee-beneficiaries from being delegated such powers (Trustee Act 2000 ss.11 and 12).

assets out of the firm during its continuance; the priority claim of partnership creditors to partnership assets upon dissolution; and the historical treatment of land held by a partnership as personalty. The argument is that these features are inconsistent with the equitable co-ownership model and so the remainderman model is the only plausible account of partnership property. It will be argued that the equitable co-ownership model is entirely consistent with each of these features, and so the argument that the remainderman model is logically necessary to explain partnership law is false.

i) Restrictions on partners' rights to take assets out of the firm

The remainderman model is not necessary to explain why individual partners have no unilateral power to take the firm's assets—nor is it even the simplest way of explaining this feature of their rights. Such a restriction is a normal incident of co-ownership, as Lindley recognised.[66] If A, B, and C are co-owners of a group of assets, either in equity or at law, it is not open for A to claim any given asset as A's own to the exclusion of B and C.[67] Common law systems have never recognised co-owners as having a unilateral power to compel division of co-owned property for the purpose of claiming a share as their own.[68] In the case of common law co-ownership of chattels, A's only power is to apply to court for division, and even this depends on A having a share of 50% or more of the chattels in question.[69] In the case of co-ownership of land, the most A can do is to seek that the court order the land to be partitioned.[70]

Partnerships are no different—A has no way of claiming any particular partnership asset as A's own, unless BC allow A to take assets from the firm, or A (for instance) has a power to borrow money from the firm, the exercise of which would overreach BC's interest in the money borrowed.[71] If A took partnership assets without such authority, A would incur liability for breach of custodial duty[72]—allowing BC to seek equitable compensation or follow or trace the misappropriated funds into the hands of third parties. As recognised by the High Court of Australia in *Canny Gabriel Castle Jackson Advertising v Volume Sales (Finance)*,[73] partners have equitable interests in the assets of the firm, and so only a purchaser of legal title to partnership assets for value without notice (or an equivalent defence, such as ostensible authority) can take partnership assets free of BC's claim.[74] The same principle explains why, where a partner defaults on their personal debts, their creditors cannot simply take assets out of the business, but only their share of the firm's assets.[75] Likewise, where a trust beneficiary

[66] Lindley, Gull and Lindley, *A Treatise on the Law of Partnership* (1888), at p.339.
[67] e.g. see *Beck v Henley* [2014] NSWCA 201; (2014) 11 A.S.T.L.R. 457.
[68] See D. Fox, "The Reception of Roman Law into the Anglo-American Common Law of Mixed Goods" (1 June 2016), Cambridge Legal Studies Research Paper No.23/2016, pp.13–19, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795098*.
[69] Law of Property Act 1925 s.188. See also P. Matthews, "Proprietary Claims at Common Law for Mixed and Improved Goods" [1981] C.L.P. 159; A. Waghorn, "Sorting out Mixtures of Property at Common Law" (2021) 84 M.L.R. 61, especially at 73–75.
[70] Trusts of Land and Appointment of Trustees Act 1996 ss.7 and 14.
[71] 1890 Act s.5.
[72] *Mackinlay v Arthur Young McClelland Mores & Co* [1990] 2 A.C. 239 at 249; [1990] 1 All E.R. 45 at 48.
[73] [1974] HCA 22; (1974) 131 C.L.R. 321.
[74] See too *Connell v Bond Corp* [1992] WASC 478; (1992) 8 W.A.R. 353.
[75] 1890 Act s.23.

defaults on their debts, their creditors can charge the beneficiary's interest, but cannot simply lift assets out of the trust fund if there are multiple beneficiaries.[76] In these ways, the limits on partners' rights reflect more broadly the limitations of rights of equitable co-owners.

ii) Residual claims upon dissolution

The fact that the claims of partners upon dissolution are postponed to those of the partnership creditors can likewise be explained without reference to the remainderman model. The point is easiest to grasp by comparison with the rules governing trust creditors.

Imagine a case where T holds the assets of a business on fixed trust for B, and the terms of the trust give T the power to borrow money on behalf of the business. If, when acting according to the terms of the trust, T borrows £500, then T will acquire what has historically been called a trustee's indemnity and lien over the trust assets. This variously provides that (i) T has the power to use trust assets to pay off the loan;[77] (ii) if T discharges the liability personally, T can claim reimbursement from the trust assets;[78] and (iii) in most common law jurisdictions,[79] T can sometimes claim an indemnity from B personally if the trust assets prove insufficient to meet the liability.[80] Further, unpaid creditors from whom money was borrowed on behalf of the trust with authority under its terms ("trust creditors"), can claim the trust assets by being subrogated to T's rights of indemnity and lien, and so are protected from T's insolvency.[81] Likewise, B could not collapse the trust under the principle in *Saunders v Vautier*, so long as T's liability for the £500 were outstanding, and T's indemnity were not otherwise provided for.[82] For that reason, in our example, even though B is the beneficiary of a fixed trust, B's claim is "residual".

Precisely the same reasoning explains the priority claim of partnership creditors to partnership assets. When partners incur liabilities in running the business, just like trustees, they acquire rights of indemnity and lien. In particular, partners can compel their co-partners to use partnership assets to discharge partnership debts.[83] In this sense, partners have rights of indemnity and equitable liens over the joint stock, which take priority over the beneficial interests of their co-partners. These liens explain the priority claim of partnership creditors to partnership assets. Much like trust creditors—including those of fixed trusts—upon insolvency, creditors of the partnership could be subrogated to the partners' own rights of indemnity and lien over the partnership assets.[84] This explains why partnership creditors can

[76] Charging Orders Act 1979 ss.1 and 2.

[77] *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; (2019) 268 C.L.R. 524 at [29]–[32].

[78] *Carter Holt Harvey* (2019) 268 C.L.R. 524 at [29]–[32].

[79] e.g. for an exception see Trustee Act 1925 (NSW) s.100A.

[80] *Hardoon v Belilios* [1901] A.C. 118; *Buchan v Ayre* [1915] 2 Ch. 474. See J. Campbell, "The Undesirability of the Rule in 'Hardoon v Belilios'" (2020) 34 T.L.I. 131.

[81] *Re Johnson* (1880) 15 Ch. D. 548; *Investec v Glenalla Properties* [2019] A.C. 271 at [59].

[82] *CPT Custodian v Commissioner of State Revenue* [2005] HCA 53; (2005) 224 C.L.R. 98 at [41]–[52].

[83] *West v Skipp* (1749) 1 Ves. Sen. 239; *Ex p Williams* (1805) 11 Ves. Jr. 3 at 4–5; 32 E.R. 988 at 988–989; *Kendall v Hamilton* (1879) 4 App. Cas. 504 at 517–518 HL; *Re Ritson* [1898] 1 Ch. 667; [1899] 1 Ch. 128 CA, codified in 1890 Act ss.24(2), 39 and 44.

[84] *Ex p Ruffin* (1801) 6 Ves. Jr. 119; 31 E.R. 970.

claim the assets of the partnership in priority to the personal creditors of each of the partners.

In sum, both partners and trust beneficiaries—including those of fixed trusts—are residual claimants for the same doctrinal reasons. How then can the residual nature of partners' claims compel the conclusion that partners are categorically distinct from beneficiaries of fixed trusts?[85] As Gageler J. noted in his dissent in *Rojoda*, an account taken upon dissolution might be necessary to determine, factually, what each partner could claim, were the firm dissolved at any given time, but that should have no bearing on the question of what interest partners have in the joint stock.[86]

Before moving on from looking at the residual nature of partners' claims, a potential objection to the analogy between trust and partnership creditors should be dealt with. It might be argued that the lien-subrogation mechanism cannot explain both trust and partnership creditors' claims, in that trust creditors are worse protected from unauthorised acts than partnership creditors. Where a trustee contracts a debt which is not authorised by the trust's terms, no right of indemnity nor lien in respect of the trust assets arises.[87] Further, even in cases where the trust debt is authorised, the trustee's right to an indemnity and lien can, in effect, be set off against claims by the beneficiaries for breach of trust.[88] In such a case a creditor is therefore "impaired"—the trustee has no lien over the trust assets for the creditor to be subrogated to, and therefore the creditor cannot claim the trust assets. If the priority of partnership and trusts creditors is similar, why do similar principles not apply to partnership creditors?

The answer is twofold. First, partners hold each other out as having authority to carry out the business of the firm, and so they have ostensible authority to bind their co-partners. For this reason, even where a partner contracts a debt without authority, if they appear to be acting within the firm's normal course of business, the debt will bind the partnership.[89] Further, each partner will acquire rights of lien and indemnity in respect of any such debt—rights to which the creditor can be subrogated in the event of the partners' insolvency. In other words, even unauthorised partnership debts, when contracted within the ostensible authority of the partners, give creditors claims to the partnership assets with priority over the partners' personal creditors. Conversely, the existence of a trustee-beneficiary relationship alone, without some additional holding out or agency relationship,[90] does not engage the doctrine of ostensible authority.[91] Secondly, in cases where a partner has committed an unrelated breach, it is uncontroversial that there is no impairment of partnership creditors' rights to access the partnership assets. In such a case the *other* partners have rights of indemnity and lien over all the partnership assets, and so partnership creditors can still claim the assets by subrogation.

[85] For an analogous discussion of the rights of legatees, see L. Smith, "Scottish Trusts in the Common Law" (2013) 17 Edin. L.R. 283 at 289–290.

[86] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [86]–[89].

[87] *Re Johnson* (1880) 15 Ch. D. 548 at 552; *Investec v Glenalla Properties* [2019] A.C. 271 at [59].

[88] *Investec* [2019] A.C. 271.

[89] 1890 Act s.5.

[90] e.g. as in *Rimmer v Webster* [1902] 2 Ch. 163.

[91] *Shropshire Union Railways and Canal Co v R.* (1875) L.R. 7 H.L. 496 at 507–509 (per Lord Cairns L.C.); *Burgis v Constantine* [1908] 2 K.B. 484 CA.

iii) Treatment of partnership property as personalty

The next argument made in support of the remainderman model relates to the rule that partnership shares were treated as personal property, even where the partnership held realty. This rule was a manifestation of the doctrine of conversion—the fact that partners have at least a contingent duty to sell the partnership land to satisfy the business liabilities explains why historically land held by the partnership was treated as personal property.[92] The rule has been abolished in England,[93] though it persists in some other Commonwealth jurisdictions.[94] As noted above, in *Rojoda* the High Court of Australia ruled that the fact that partnership shares were always treated as personalty, even when the partnership held land, showed that partners could not possibly have vested interests in possession directly in partnership assets. In other words, the application of the doctrine of conversion to partnerships was inconsistent with the equitable co-ownership model, but not with the remainderman model.

This reasoning conflates two different issues. Before the abolition of the doctrine of conversion in England and Wales,[95] courts recognised that a beneficiary under a trust for sale *could* have a vested interest in possession under a trust for sale, and so elect to take the land—as in *William & Glyn's Bank v Boland*.[96] The fact the trust was treated as one of personalty rather than realty, because of the trustee's duty to sell, did not prevent beneficiaries acquiring fixed interests in the land itself. For this reason, the doctrine of conversion never prevented partners from being equitable co-owners of the partnership property.

2. Partnership property as equitable interest

The difficulties lawyers have had understanding partnership property are symptomatic of a wider issue: how do we conceptualise equitable interests? After all, we cannot draw analogies between equitable interests of different types, without some way of identifying which aspects of any given equitable interest are definitional for any given purpose. It is suggested that these difficulties can be solved by reference to the difference between the "internal" and "external" aspects of equitable rights. By examining this distinction, we can better understand the relationship between the interests of partners, trust beneficiaries, and holders of other kinds of equitable interest. The following analysis will show that the rights of partners are not categorically distinct from those of beneficiaries of fixed trusts and suggests that the remainderman model confuses the "internal" and "external" aspects of partners' rights.

i) The internal and external aspects of equitable rights

In his classic exposition of the rights of a beneficiary of a trust, Maitland drew a distinction between then "external" and "internal" aspects of those rights. Maitland

[92] 1890 Act s.22; *Ripley Waterworth* (1802) 7 Ves. Jr. 425; 32 E.R. 172. See also F. Burdick, "Some Judicial Myths" (1909) 22 Harv. L. Rev. 393 at 397–402; Televantos, *Capitalism Before Corporations* (2020), at pp.20–22.
[93] Trusts of Land and Appointment of Trustees Act 1996 Sch.4.
[94] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [38]. See Partnership Act 1895 (WA) s.32.
[95] Trusts of Land and Appointment of Trustees Act 1996 s.3.
[96] [1981] A.C. 487; [1980] 2 All E.R. 408.

explained that "[t]he right of *cestui que trust* is the benefit of an obligation", on the basis that "a person who has undertaken a trust is bound to fulfil it".[97] This is the "internal character" of a beneficiary's rights—the trust beneficiary's right against the trustee to due administration of the trust assets. However, Maitland also recognised that the "external side of these rights" resembled "*jura in rem*", property rights, in that they could be asserted against the trustee's heirs, legatees, personal creditors, creditors, and disponees (other than bona fide purchasers of legal title for value without notice).[98] The point has been elaborated upon by Richard Nolan,[99] who argues that:

> "equitable proprietary interests under a trust are characterised by consistent exclusionary rights, enforceable against a wide category of people, coupled with highly variable positive rights, enforceable against a very limited number of persons".[100]

The term "consistent exclusionary rights" here refers to the "external" aspect of a beneficiary's rights, which allow the beneficiary to insist that trust property remain, or be returned to, the trust fund. By contrast, "highly variable positive rights" refer to the rights that the terms of the trust confer on beneficiaries against the trustees. Nolan argues that the contractarian freedom available to a settlor to dictate the terms of the trust is not at odds with the proprietary rights that beneficiaries have, and that the reason that beneficiaries can have trust assets returned to the fund, is to facilitate administration of the fund according to its terms.[101]

The rights of partners involve the same union of an obligational "internal" aspect and a proprietary "external" aspect.[102] This is the approach adopted in *Re Fuller's Contract*[103] and *Inland Revenue Commissioners v Grey*.[104] In the former, Luxmoore J. rejected an argument from counsel that partners had no beneficial interest in the assets of their firm, affirming that the partners were collectively owners of the same.[105] In *Grey*,[106] Hoffmann L.J. adopted an identical approach to partnership property:

> "As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share."[107]

[97] F.W. Maitland, *Equity* (Cambridge: Cambridge University Press, 1909), at p.116.
[98] Maitland, *Equity* (1909), at p.117.
[99] R. Nolan, "Equitable Property" (2006) 122 L.Q.R. 232.
[100] Nolan, "Equitable Property" (2006) 122 L.Q.R. 232 at 237.
[101] Nolan, "Equitable Property" (2006) 122 L.Q.R. 232 at 255. See also, L. Ho and R. Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 L.Q.R. 402.
[102] Banks, *Lindley & Banks on Partnership* (2020), at para.19-03; J. Nitikman, "Do we understand yet the nature of a partnership interest? The High Court of Australia weighs in on the debate" (2020) 26 T.&T. 672; P. Koh and S. Bull, "Agency and Partnership Law" (2015) 16 S.A.L. Ann. Rev. 87 at 97–98.
[103] [1933] Ch. 652.
[104] *Inland Revenue Commissioners v Grey* [1994] S.T.C. 360; [1994] 2 E.G.L.R. 185 (CA).. Law Commission and Scottish Law Commission, *Partnership Law*.
[105] *Re Fuller's Contract* [1933] Ch. 652 at 656.
[106] [1994] S.T.C. 360.
[107] *Grey* [1994] S.T.C. 360.

The reasoning here is as follows. Where A and B become partners, the terms of their agreement will govern the rights each has against the other, including the terms upon which they are to make use of the partnership assets. A and B have the normal freedom of contracting parties to determine these terms, which are the "internal" aspects of their rights. However, where B disposes of partnership assets beyond the terms of the partnership agreement, without authority, A can have the property[108] or its substitutes returned to the partnership estate, to be administered according to those terms. Likewise, A can prevent B's personal creditors levying judgment against the partnership assets themselves. These features are facets of the "external" aspect of their rights. The combination is a normal feature of equitable co-ownership.

Although in *Rojoda* the High Court of Australia rejected counsel's argument that the distinction between the internal and external aspects of a partner's right had any significance for determining the nature of their share,[109] the judgment on this point needs to be treated with caution. The court seems to have understood counsel as arguing that the "internal" aspect of a partner's rights were merely contractual rights overlayed upon the parties' equitable interests—rather than constitutive terms of the equitable interests themselves, equivalent to the terms of a trust setting out the trustees' duties and beneficiaries' rights.[110] In other words, the majority saw the argument as being that partnerships were equivalent to voluntary unincorporated associations in English law—the members of which hold an interest in the assets under a bare trust, subject to contracts between them as to the use of the assets, which nevertheless do not form part of the trust's terms.[111] However, as Lord Millett noted in *Hurst v Bryk*, the terms of a partnership have never been treated as a matter of common law contract.[112] In *Rojoda*, the court did not address the argument that the limits on partners' ability to claim the assets from the firm during its continuance *were* part and parcel of their equitable interests but formed its "internal" aspect only—whereas the characterisation of a right as one of equitable property or otherwise turns on its external aspect, its exigibility.

ii) Confusing the internal and external aspects

The value in distinguishing between the internal and external character of the rights of an equitable interest holder is that it can help guard against confusion where the two aspects are muddled. As Mitchell[113] and Hudson[114] argue, it is perfectly possible to have an equitable interest that looks proprietary in the sense of being exigible against third parties or assignable, without having a "beneficial interest" in the sense of present rights to the benefits of the assets to which the equitable interest relates. So, for

[108] Where the disponee has no defence to the claim. See text from fnn.71–75 above.

[109] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [43].

[110] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [43]. It is not clear that this is what counsel were in fact arguing, see *Respondents' Submissions in Commissioner of State Revenue v Rojoda Pty Ltd*, at paras 14–16, *https://cdn.hcourt.gov.au/assets/cases/07-Perth/p26-2019/StateRevenue-Rojada_Res.pdf*.

[111] *Re Bucks Constabulary Fund* [1979] 1 W.L.R. 936; [1979] 1 All E.R. 623. See also N. Stewart, N. Campbell and S. Baughen, *The Law of Unincorporated Associations* (Oxford: Oxford University Press, 2011), Ch.3.

[112] *Hurst v Bryk* [2002] 1 A.C. 185; [2000] 2 All E.R. 193.

[113] C. Mitchell "Commissioner of Stamp Duties (Queensland) v Livingston (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared" in B. Sloan (ed.), *Landmark Cases in Succession Law* (Oxford: Hart Publishing, 2019), at p.275.

[114] J. Hudson, "Equitable Ownership and Restitution of Misapplied Trust Property" (2017) 11 J. Eq. 245.

instance, an object of a trust power has no rights to any particular trust assets, but can nevertheless pursue a claim against third parties if the trustee makes an unauthorised disposition of the property.[115] Conversely, as Lord Walker emphasised in *Schmidt v Rosewood Trust Ltd*, a beneficiary's right to call for due administration of trust assets is essentially internal, and so does not depend on proof of any right which is proprietary in the sense of capable of being asserted against third parties.[116] In Maitland's terms, the "external" character of an equitable interest holder's rights tell us nothing about their "internal" character. A danger of describing an equitable interest as proprietary is that it could involve making a claim about present benefits (the internal aspect) or a claim about enforceability against third parties (the external aspect).

Cases involving the remainderman view have this confusion at their core. The argument is that the *internal* aspects of partners' rights—i.e., those they can assert against their co-partners during the firm's continuance—are limited to calling for due administration of the assets according to the terms of the partnership, and include no right to unilaterally withdraw assets from the firm. Equity therefore does not treat partners as having "property" rights, because (in the absence of some provision to the contrary in the partnership's terms) they cannot demand partnership assets from their co-partners until the firm is dissolved and the debts of the firm are paid.[117] This argument is hard to square with the fact that equitable interests are defined not by any particular internal aspects—such aspects are highly variable—but by their uniform external aspect, their exigibility against creditors and third party purchasers who cannot rely on the bona fide purchaser defence, but not against other categories of third parties (e.g. tortfeasors that interfere with the underlying assets).[118] Though the language is sometimes criticised,[119] it is this level of exigibility which means that equitable interests are usually described as proprietary. As explained above, the interests of partners are in this respect identical to those of equitable interest holders of other kinds, including beneficiaries of fixed trusts.

iii) The internal aspects of the rights of partners, trust beneficiaries, and estate beneficiaries

Drawing categorical distinctions between the internal rights of partners and beneficiaries of fixed trusts is therefore problematic. The internal aspects of the rights of partners and trust beneficiaries can be contractually stipulated for and, in any given case, depend on the drafting of the trust or partnership terms—and by default partners and trust beneficiaries have similar rights to an account of the administration of the assets,[120] and to insist that trustees/co-partners avoid

[115] e.g. *Lewis v Tamplin* [2018] EWHC 777 (Ch); [2018] W.T.L.R. 215 at [39].

[116] [2003] UKPC 26; [2003] 2 A.C. 709.

[117] *Commissioner of State Taxation of the State of South Australia v Cyril Henschkle Pty Ltd* (2010) 242 C.L.R. 508 at [25]; *Commissioner of Stamp Duties v Livingston* [1965] A.C. 694 at 712.

[118] Ho and Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 L.Q.R. 402 (trust beneficiaries); Mitchell, "Commissioner of Stamp Duties (Queensland) v Livingston (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared" in *Landmark Cases in Succession Law* (2019) (estate beneficiaries); 1890 Act s.20(1) (partners).

[119] e.g. see S. Douglas and B. McFarlane, "Defining Property Rights" in J. Penner and H. Smith (eds), *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013).

[120] 1890 Act s.28.

unauthorised conflicts of interests,[121] and hand over any unauthorised profits made from their office.[122] As explained above, a beneficiary of a fixed trust with multiple beneficiaries and/or where the trustee has an outstanding right of lien or indemnity has no more power to claim particular trust assets than a partner does from the joint stock.

It might of course be argued that it does make sense to see partnerships and trusts as analogous—but that the better analogy is to a discretionary trust. That argument is difficult to accept. While it is true that neither a potential object of a discretionary trust nor a partner in an ongoing partnership can unilaterally call for any given trust or partnership asset, the same is true of fixed trusts with multiple beneficiaries generally.[123] Further, unlike the rights of a beneficiary of a discretionary trust, a partner's rights to partnership property and profits do not depend on the exercise of discretion[124] and are transmissible.[125] In short, discretionary trusts have no distinguishing features that they share with partnerships, but not with at least some kinds of fixed trusts.

An alternative analogue, suggested by Kitto J. in *Livingston*,[126] is between the entitlements of a partner and a (residuary) legatee. Just as a partner cannot claim their share of the capital until the creditors have been paid and the firm dissolved, a legatee cannot claim testamentary assets until estate creditors have been paid and the estate administered. Each can assert their equitable interests against wrongful recipients of the relevant assets, as well as against the personal creditors of any executor/partner who might seek to claim them. Further, each can assign their interest. However, equity gives neither a "property right" in the "internal" sense of the entitlement to take any particular asset from the partnership or testamentary estate, at an earlier stage.[127] The internal and external aspects of their rights in this sense are closer.

At first glance, the reasoning might be seen as supporting the argument that a share of a partnership is categorically distinct from a present interest under a fixed trust. However, this overlooks an important part of Kitto J.'s reasoning. Kitto J. made clear that he thought that "similar reasoning applies … to an interest in a trust fund of inherently variable composition".[128] He then discussed *Favorke v Steinkopff*,[129] which concerned a fixed trust under which the trustees had power to vary investments, and a duty to pay an annuity to the beneficiaries—arguing the beneficiaries of such a trust were better understood simply as having the right "to have the fund properly administered" rather than a right in the underlying assets as they stood at any given time. This was despite the fact that the beneficiaries had vested interests in possession under a fixed trust. Kitto J. then emphasised that different reasoning would apply to a case involving a bare trust with a sole beneficiary. Although Kitto J.'s suggestion that the proper governing law for claims against trustees of overseas property should depend on the trust's terms does not

[121] 1890 Act s.30.
[122] 1890 Act s.29.
[123] Discussed above in Part III.1.i.
[124] 1890 Act s.24(1).
[125] 1890 Act s.31.
[126] *Livingston v Commissioner of Stamp Duties (Qld.)* [1960] HCA 94; (1960) 107 C.L.R. 411.
[127] Mitchell, "Commissioner of Stamp Duties (Queensland) v Livingston (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared" in *Landmark Cases in Succession Law* (2019), p.265.
[128] *Livingston v Commissioner of Stamp Duties (Qld.)* (1960) 107 C.L.R. 411 at [13].
[129] [1922] 1 Ch. 174.

represent modern English law,[130] the discussion usefully emphasises the difficulties with treating interests under a partnership as categorically different from interests under a fixed trust. It is the terms of a fixed trust which will determine how similar its internal aspect is to a typical partnership.

It is therefore suggested that the equitable co-ownership model is the one which makes the best sense. The analysis of equitable interests as involving internal and external aspects shows that the rights of partners can be accommodated comfortably within the principles governing fixed equitable interests.

IV. Implications

The explanatory force of the equitable co-ownership model of partnership is particularly strong in two areas where questions about the nature of a partner's share have been most controversial and important: tax and the treatment of a retired or deceased partner's claims. While the remainderman model has sometimes been relied upon in these areas, as above,[131] this section will show that the equitable co-ownership model is not only reconcilable with the decided cases in these areas, but better explains the law. In other words, existing precedent is no obstacle to later courts adopting the co-ownership model.

1. Tax

i) Tax transparency and English law

The equitable co-ownership model best explains why unincorporated partnerships are not taxed as entities as a matter of English law. Although, statute sets out the liability of partnerships to pay some kinds of taxation without reference to private law concepts,[132] the liability of partners to income tax, capital gains tax, and the availability of corporate group taxation relief where corporate partners hold shares in another company as partnership property, do turn on the private law characterisation of partnership shares. In determining tax liability in such cases, the courts and HMRC treat partners as co-owners of partnership assets.

First, a partnership itself does not pay corporation tax on its profits. As regards income tax, the general rule[133] is that "a firm is not to be regarded for income tax purposes as an entity separate and distinct from the partners".[134] Although businesses, including entities with legal personalities like LLPs and American LLCs, can be tax transparent in this way for a range of reasons[135]—and indeed institutions without corporate status as a matter of law like trusts[136] and voluntary

[130] *Akers v Samba Financial Group* [2017] UKSC 6; [2017] A.C. 424; S. Agnew and B. McFarlane, "The Nature of Trusts and the Conflict of Laws" (2021) 137 L.Q.R. 405.

[131] See text from fnn.52–55 above.

[132] e.g. Stamp duty under the Finance Act 2003 Sch.15; Value Added Tax Act 1994 s.45(1). See further Banks, *Lindley & Banks on Partnership* (2020), at paras 37-09 to 37-10.

[133] Note that partners' salaries are sometimes taxed like those of employees, see M. Baldwin, "Finance Act 2014 notes: section 74 and Schedule 17: partnerships" (2014) B.T.R. 416.

[134] Partnerships section under the Income Tax (Trading and Other Income) Act 2005 s.848 (where no corporate partners). The principle applies to partnerships with corporate partners too (Corporation Tax Act 2009 s.1258).

[135] *Anson v Revenue and Customs Commissioners* [2015] UKSC 44; [2015] 4 All E.R. 288. Lord Reed treated the point as turning on whether the shareholders were automatically allocated a share of the firm's profits or were subject to directors' discretions to declare a dividend (as with a typical English corporation).

[136] L. Smith, "Mistaking the Trust "(2011) 40 H.K.L.J. 747; S. Douglas, "Trusts as Persons in the Capital Taxes", presented at the Oxford Property Law Webinar on 24 June 2020 (forthcoming).

unincorporated associations[137] can be taxed as if they were separate legal persons—English courts have attributed the treatment of partnerships for income tax purposes to partners' equitable co-ownership of the joint stock.[138] In *Memec v Commissioners of the Inland Revenue*,[139] the question for the court was whether a German silent partnership was tax transparent in the same way as an English partnership. Robert Walker J. ruled that it was not: he saw the equitable proprietary rights of partners as central to explaining an English partnership's tax transparency. However, a silent partner under German law had only personal rights against the active partner—and so could not claim a direct interest in the income of the partnership.[140] The decision was upheld on appeal, where Peter Gibson L.J. reasoned that:

> "It is not difficult to see why an English partnership (including a limited partnership) is treated as transparent, the partners carrying on business (whether by themselves or by the other partners as their agents) in common and owning the business and having a beneficial interest in the partnership assets and profits."[141]

Likewise, in *Revenue and Customs Commissioners v Anson*,[142] Arden L.J. explained the tax transparency of partners on the basis that:

> "[a] partner in an English partnership has an equitable interest in the partnership assets and thus he will be able to show that he has a proprietary interest to the extent of his profit and share in the partnership".

She drew an analogy with a fixed trust.[143] The focus on partners as co-owners is perhaps unsurprising. As mentioned above, a significant reason for the Department of Trade and Industry refusing the Law Commission's recommendation to give English partnerships legal personality was a fear that this might cause English limited partnerships in the UK and abroad to be treated as taxable entities.[144]

The equitable co-ownership model also explains the treatment of partnerships for the purposes of capital gains tax—though the point is not often contested as many partnerships either consist of institutions like pension funds which are exempt from capital gains tax,[145] or else generate income through the provision of services and so do not have large capital assets. Though there are exceptions,[146] the general

[137] Stewart, Campbell and Baughen, *Law of Unincorporated Associations* (2011) at paras 11.2–11.32.

[138] *Memec v Commissioners of the Inland Revenue*, 71 T.C. 77; [1998] S.T.C. 754.

[139] *Memec*, 71 T.C. 77.

[140] *Memec*, 71 T.C. 77 at 98.

[141] *Memec*, 71 T.C. 77 at 113.

[142] [2013] EWCA Civ 63; [2013] S.T.C. 557.

[143] *Anson* [2013] S.T.C. 557 at [60]–[61]. The CA's decision was reversed on appeal (*Anson v Revenue and Customs Commissioners* [2015] 4 All E.R. 288), but the explanation of the tax transparency of English partnerships was not challenged.

[144] Department of Trade and Industry, *Summary of Responses to the Consultation on Reform of Partnership Law: The Economic Impact* (TSO, 2006).

[145] Taxation of Chargeable Gains Act (TGCA) 1992 s.271(1A), but subject to the Finance Act 2004 s.185F.

[146] The approach is not completely consistently followed by HMRC which, for example, seems to ignore partners' co-ownership of the firm's assets in determining the payability of capital gains tax when the assets are distributed upon final dissolution, Banks, *Lindley & Banks on Partnership* (2020), at paras 35-25 to 35-27. As discussed in *Lindley & Banks*, this is problematic but could be fixed by a more consistent recognition of partners' co-ownership. Further, HMRC's practice treats equivalent valuable consideration as having been given when partners rearrange their shares, and so although in theory this involves a transfer of interests in the underlying assets, it is not treated as triggering liability to pay capital gains tax, see at paras 35-11 to 35-27.

rule is that the law ignores the partnership and looks directly to the partners.[147] An implication of this is that partners can set off their liability to pay capital gains tax in respect of the partnership against their own unrelated losses. Further, when ascertaining the market value of a partner's share in partnership assets for capital gains tax purposes, according to HMRC guidance

> "it will be taken as a fraction of the value of the total partnership interest in the asset without any discount for the size of his share. If, for example, a partnership owned all the issued shares in a company, the value of the interest in that holding of a partner with a one-tenth share would be one-tenth of the value of the partnership's 100% holding".[148]

Likewise, where a partnership disposes of an asset to an outside party, "each of the partners will be treated as disposing of his fractional share of the assets".[149] In other words, partners are treated like co-owners of other kinds: the fact that they run a business together makes no difference.[150] It has been argued that HMRC's treatment of partners as co-owners for capital gains tax purposes "ignores" the true nature of partner's entitlements as claims to future assets upon dissolution,[151] or that the Taxation of Chargeable Gains Act 1992 s. 59 "overrides the general law".[152] However, it is difficult to see how the latter assertion could be true, in that the section simply says that the dealings of the partnership will be treated as the dealings of the partners, and makes no claim at all about the nature of their interest in the partnership property.[153] The provision in effect references the general law treatment of partners' shares which, as above, is best explained by the equitable co-ownership model.

The final, related, point concerns the treatment of partnerships when calculating the tax relief available to corporate groups.[154] Companies in the same group can surrender certain losses and other amounts to companies within their group;[155] can in some circumstances transfer assets within the group without incurring liability to pay chargeable gains tax[156] or stamp duty;[157] and a company with a large shareholding in another can sometimes claim capital gains tax relief when disposing of shares in that company.[158] Although what counts as a group differs for each type of relief, for company A and B to be in the same group, company A must directly or indirectly have a specified ownership interest in the shares of company B (or,

[147] TGCA 1992 s.59(1).

[148] HMRC Statement of Practice D12 A6-04, para.1.1.

[149] HMRC Statement of Practice D12 A6-04, para.2.1. For further examples of the way partners are treated as owning shares of the firm's assets for capital gains purposes see F.D. Foulkes and J. Cooklin, "Analysis—Holding shares through partnerships: some observations" (2018) 1415 Tax J. 7 at 8–9.

[150] The same approach is taken where shares or land are transferred by taxpayers to trustees, to hold on fixed trust in the same proportions as before the declaration. The beneficiaries are treated as having remained co-owners, and the transfer to the trustees does not trigger capital gains tax liability, *Booth v Ellard* [1980] 1 W.L.R. 1443; [1980] 3 All E.R. 569 CA; *Jenkins v Brown* [1989] 1 W.L.R. 1163; [1989] S.T.C. 577.

[151] Banks, *Lindley & Banks on Partnership* (2020), at para.35-02.

[152] Foulkes and Cooklin, "Analysis—Holding shares through partnerships: some observations" (2018) 1415 Tax J. 7.

[153] See D. Crossley and M. Baldwin, *Taxation of Investment and Trading Partnerships and LLPs* (London: Sweet and Maxwell, 2021), Ch.19, at para.5.8.

[154] I am very grateful to Mark Baldwin for this point. See generally Crossley and Baldwin, *Taxation of Investment and Trading Partnerships and LLPs* (2021), Ch.19.

[155] Corporation Tax Act 2010 Pt 5 Ch.4.

[156] TCGA 1992 s.171(1).

[157] Finance Act 1930 s.42.

[158] TCGA 1992 Sch.7AC para.8.

depending on the type of relief, both must be owned by a third company, C).[159] For this purpose too, HMRC treats unincorporated partnerships as transparent. For that reason, if company A has a sufficient share in a partnership, which owns all the shares in company B, A and B can be treated as part of the same group—on the basis that the partners "beneficially own" the partnership assets.[160] Again, the HMRC approach best fits with the equitable co-ownership model.

ii) Rojoda

The taxation statutes of different Commonwealth countries of course vary, but before moving on from tax it is worth briefly considering the approach taken to partnership property in Commonwealth taxation cases. We see, for instance, that the major Canadian cases on point resemble the English cases in treating partners as co-owners of the assets of their firm before dissolution.[161] Conversely, we have seen that Australian cases by and large have treated partners like remaindermen, most recently in *Rojoda*.[162]

In *Rojoda*,[163] a partnership was dissolved. By deeds executed in 2013, partnership assets were vested in Rojoda Ltd, a trustee. It was "confirm[ed]" that the assets were held on fixed trust for the former partners—in the same proportions as their former shares in the partnership—it was "acknowledged and agree[d]" that the "beneficial ownership … remain unchanged".[164] The High Court of Australia held that a transfer of partnership realty to an express trustee upon fixed trust did involve a legally significant "declaration of trust", which attracted liability to pay stamp duty.[165] The majority did describe a partner's share as an "equitable interest" rather than an "equitable chose in action" and did recognise that it had common features with a fixed trust.[166] However, it ruled that the rights of a beneficiary of a fixed trust were categorically different from the rights of partners who, upon dissolution, could only claim the partnership assets once creditors had been paid.[167] Partners did not have equitable interests in each and every asset of the firm prior to dissolution and the discharge of partnership debts.[168] The deeds executed in 2013 therefore sufficiently changed the rights and duties of the parties to amount to a "declaration of trust" for tax purposes.

[159] Generally, see Crossley and Baldwin, T*axation of Investment and Trading Partnerships and LLPs* (2021); Corporation Tax Act 2010 s.152 (loss relief group); TCGA 1992 s.170(3) (chargeable gains group) and Sch.7AC para.8 (substantial shareholding exemption); Finance Act 1930 s.42(2B), (3) (definition of associated body corporate for purpose of stamp duty relief).

[160] HMRC Manual CTM80152: "trading partnership…has no legal personality and cannot own assets, so the assets of the partnership are treated as beneficially owned by the partners" (loss relief groups); HMRC Manual CG45110: "member of a partnership is treated as beneficially owning shares" which are partnership property (chargeable gains groups); HMRC Manual CG53009: shares held through a partnership "are treated as being held based on the proportionate interest in the partnership" (substantial shareholding exemption); HMRC guidance, "Group relief for Stamp Duty Land Tax and Stamp Duty: partnerships" (11 December 2014), para.1.2, *https://www.gov.uk/government/publications/group-relief-for-stamp-duty-land-tax-and-stamp-duty-partnerships/group-relief-for-stamp-duty-land-tax-and-stamp-duty-partnerships.*

[161] *Boyd v Attorney General of British Columbia* (1917) CanLII 608 (SCC); (1917) 54 S.C.R.532; *Seven Mile Dam Contractors v British Columbia* (1980) CanLII 451 (BC CA).

[162] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281.

[163] *Rojoda* (2020) 268 C.L.R. 281.

[164] *Rojoda* (2020) 268 C.L.R. 281 at [11]–[12].

[165] Under the Duties Act 2008 (WA) s.11(1).

[166] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [32]–[33].

[167] *Rojoda* (2020) 268 C.L.R. 281 at [39] and [83].

[168] *Rojoda* (2020) 268 C.L.R. 281 at [33]–[35].

Can *Rojoda* be reconciled with the view of partners as equitable co-owners? Some Australian tax statutes define a "declaration of trust" attracting liability to pay tax differently to private law—for instance, the term might include gratuitous declarations over future property.[169] The issue is whether the declaration in question is one that varies the rights and duties of the parties or is simply confirmatory. In *Chief Commissioner of State Revenue v Benidorm*,[170] the New South Wales Court of Appeal ruled that a "declaration of trust" confirming the taxpayer's beneficial interest, was not a "declaration" for the purpose of the relevant legislation,[171] because it did no more than affirm his rights as an executor for the deceased prior beneficiary.

What both *Rojoda* and *Benidorm* leave open is the question of what degree of variation of equitable rights, if any, can be treated as a confirmation of those rights. In his dissenting judgment in *Rojoda*, Gageler J. argued that the 2013 deeds (other than vesting bare title in Rojoda) simply freed the partnership assets of the partners' liens, and this was not sufficiently significant to amount to a declaration. The discharge of partnership assets from partners' liens does not transform their underlying beneficial interests.

On the other hand, it could be argued that the deeds in *Rojoda* were correctly treated as a declaration of trust for tax purposes. This is not because the rights of partners and beneficiaries of fixed trusts are categorically different, but because the 2013 deeds meant that the former partnership assets were no longer subject to the powers of disposition included in the partnership agreement. Although English courts have rejected that kind of reasoning when determining whether transfers to a trustee involve incurring liability to capital gains tax,[172] it might nevertheless be argued that the 2013 deeds did involve a sufficient change to the partners' rights to amount to a declaration under the Duties Act 2008 (WA), s.11(1). In this way, the outcome in *Rojoda* might be reconciled with the equitable co-ownership view.

2. The nature of the rights of a retired or deceased partner

The treatment of partners' claims for limitation purposes has been a thorny issue historically and is one area where the relationship between partners' interests and interests under trusts has received scrutiny. Explaining what the law is in this area involves first discriminating between claims in respect of the claims of a continuing partner, and one who has left the firm.

As regards the former, the English position is relatively straightforward, though it differs from that taken in some other Commonwealth jurisdictions.[173] Under the Limitation Act 1980 s.21, which governs the "Time limit for actions in respect of trust property", the term "trustee" refers to any consensually created fiduciary relationship. A claim against a partner to recover partnership property or its proceeds on this logic would fall within s.21(1)(b) of the Limitation Act and be

[169] e.g. see Duties Act 2008 (WA) s.9; Duties Act 1997 (NSW) s.8(3). See also *Tooheys Ltd v Commissioner of Stamp Duties* [1960] SR (NSW) 539 at 545–546 (Walsh J.).
[170] [2020] NSWCA 285, upholding [2020] NSWSC 471 (Ward C.J.).
[171] Duties Act 1997 s.8(3) (NSW).
[172] See *Booth v Ellard* [1980] 1 W.L.R. 1443 CA; *Jenkins v Brown* [1989] 1 W.L.R. 1163 (ChD).
[173] e.g. see *Sze Tu v Lowe* (2015) 89 N.S.W.L.R. 317, discussing Limitation Act 1969 (NSW) s.47.

subject to no period of limitation[174] So long as the partnership is subsisting, no period of limitation will run.[175]

At first glance, the position where a partner has retired from the firm seems as straightforward—the Partnership Act 1890 s.43 provides that, by default, the amount due from any surviving or continuing partner to an outgoing partner (or their testamentary estate) in respect of their share is a debt accruing at the date of the dissolution or death—that is to say six years.[176] The provision though has caused difficulties in terms of its interpretation—splitting courts in whether they characterise retired partners' claims as personal or proprietary. Further, recent Singaporean cases have had to consider whether the provision applies upon a general dissolution on the one hand,[177] and on the other how it interacts with a former partner's rights to a share of the profits post-dissolution in cases where the partner has not been paid their share.[178]

To properly construe the provision we must first understand the decision in *Knox v Gye*,[179] which it codifies. Historically, a partner who retired from a firm retained their pre-existing interest in the partnership assets until their former co-owners and partners accounted to them. In effect, the continuing partners were trustees for the former partner, and so liable for a share of profits generated by the former partner's share of the partnership property on that basis.[180] This suggested that, as with claims against an express trustee, there was no limitation period for claims by a partner in respect of partnership assets. However, partnership deeds would often include provisions for the other partners to "buy-out" the share of a partner who retired, died, or became bankrupt[181]—converting the share of a partner upon their death or retirement into a personal claim only,[182] and so subject to a six year limitation period.[183] The debt would typically be calculated as a share of what would have been the net proceeds of the capital at the time of their retirement or death. Such clauses served to limit the effect of a partner's retirement or death on the business.

The law changed following the House of Lords' decision in *Knox v Gye*,[184] which concerned the claim by a deceased partner's estate against a continuing partner for a share of the partnership property and post-dissolution profits, brought more than six years after the death. The partnership agreement was never drawn up and contained no term providing that a partner's share upon their death or retirement would constitute a debt only. In the minority, Lord Hatherley L.C. ruled that the claim should be allowed, on the basis that the trusteeship of the continuing

[174] *Paragon Finance v Thakerar* [1999] 1 All E.R. 400.
[175] *Noyes v Crawley* (1878) 10 Ch. D. 31. See also Banks, *Lindley & Banks on Partnership* (2020), at para.23-32.
[176] Limitation Act 1980 s.5.
[177] *Chiam Heng Hsien v Chiam Heng Chow* (2015) 4 S.L.R. 180.
[178] *Lai Hoon Woon v Lai Fong Sin* [2016] SGHC 113.
[179] *(1871-72) L.R. 5 H.L. 656*.
[180] *Crawshay v Collins* (1808) 15 Ves. Jr. 218 (Lord Eldon L.C.); *Featherstonhaugh v Fenwick* (1810) 17 Ves. Jr. 298; 34 E.R. 115 (Lord Eldon L.C.); *Willett v Blanford* (1842) 1 Hare 253; 66 E.R. 1027 (Sir James Wigram V-C); *Simpson v Chapman* (1853) 4 De G.M. & G. 154; 43 E.R. 466 (Turner L.J.).
[181] e.g. see Watson, *A Treatise of the Law of Partnership* (1806), at pp.489–496 and 504–506 and I. Cory, *A Practical Treatise on Accounts*, 2nd edn (1839), at pp.158–159.
[182] *Ewing v Ewing* (1882) 8 App. Cas. 822 at 826, (1882) 10 R. (H.L.) 1 at 7; *Bakewell v Deputy Federal Commissioner of Taxation (S.A.)*
(1937) 58 C.L.R. 743 at 770.
[183] 21 Jac. I. c. 16, s.3.
[184] (1871-72) L.R. 5 H.L. 656.

partner was "trite law",[185] an "elementary principle of the law of partnership".[186] The majority, however, led by Lord Westbury, ruled that a six-year limitation period was applicable on the basis that a "surviving partner is not a trustee in that full and proper sense of the word".[187] In an age when partnership was the dominant commercial form, the concern seems to have been to treat all partnerships, in effect, as if they had included clauses providing that former partners' rights were personal only—so preventing claims of former partners threatening to lift assets out of the firm indefinitely.

The decision in *Knox* ultimately created a tension in the law of partnership. Although it was clear that a six-year limitation period applied to claims by former partners, as for a debt claim, courts continued to treat such partners as having an equitable property right in the assets of the firm sufficient to give rise to a claim for both any increase in the capital value of the assets post dissolution as well as post-dissolution profits.[188] The apparent contradiction, via Pollock's own textbook,[189] made its way into the Partnership Act 1890. Section 42(1) preserves the rule that an outgoing partner can claim profits made with their share of the assets post-dissolution or 5% interest—as if the partner retains an equitable interest in the assets of the firm.[190] Conversely, s.43 provides that the share of an outgoing partner is only a debt accruing at the date of dissolution or death. Since then, some courts have treated continuing partners as trustees,[191] or at least fiduciaries,[192] for retired or former partners: most recently the High Court of Australia in *Rojoda* ruled that "the [dissenting] view of Lord Hatherley prevailed",[193] but without addressing the conflict with statutory codification of the majority view.[194] Conversely, s.43 has, in dicta, also been used to suggest that a partner's claim is for all purposes personal rather than proprietary, and that he would be treated as an unsecured creditor if the firm later become insolvent.[195]

It is suggested that the problem here can be solved through the history of s.43 and its interaction with the equitable co-ownership model. The majority in *Knox* were only concerned to prevent stale claims indefinitely haunting businesses that constitute a succession of partnerships which had dissolved. Other than for limitation purposes, a former partner was treated as retaining equitable proprietary rights in the assets of the firm, hence the right to an account of a share of the joint stock and profits post-dissolution.[196] It is suggested that it therefore makes most sense to treats s.43 as relating to limitation periods only. This entirely accords with the analysis of the High Court of Australia in *Rojoda*.

[185] *Knox (1871-72) L.R. 5 H.L. 656* at 679.
[186] *Knox (1871-72) L.R. 5 H.L. 656* at 678.
[187] *Knox (1871-72) L.R. 5 H.L. 656* at 678.
[188] *Yates v Finn* (1880) 13 Ch. D. 839.
[189] F. Pollock, *A Digest of the Law of Partnership*, 3rd edn (London: Stevens, 1884), at pp.103–104.
[190] See too, *Barclays Bank Trust Co Ltd v Bluff* [1982] Ch. 172; [1981] 3 All E.R. 232.
[191] *Re Bourne* [1906] 1 Ch. 113 at 119 Ch; [1906] 2 Ch. 427 at 433 CA; *Burdett Coutts v Inland Revenue Commissioners* [1960] 1 W.L.R. 1027 at 1036; [1960] 3 All E.R. 153 at 159.
[192] *Stevenson v Aktiengesellschaft für Cartonnagen-Industrie* [1918] A.C. 239.
[193] *Commissioner of State Revenue v Rojoda* (2020) 268 C.L.R. 281 at [30]
[194] *Rojoda* (2020) 268 C.L.R. 281 at [28]–[31] discussing Partnership Act 1895 (WA) s.53, which is equivalent to the 1890 Act (UK) s.43.
[195] *Sobell v Boston* [1975] 1 W.L.R. 1587; [1975] 2 All E.R. 282; *Beckman v Inland Revenue Commissioners* [2002] S.T.C. (SCD) 59; *Deacon v Yaseen* [2020] EWHC 465 (Ch) at [56].
[196] See Banks, *Lindley & Banks on Partnership* (2020), at para.26-03.

In turn, such an approach helps us resolve uncertainties about the scope of s.43. It suggests that *Lindley & Banks* is correct in arguing that cases involving general dissolution are deliberately not within the wording of s.43 because there is no continuing business that needs protecting,[197] *contra* recent dicta of the Singaporean Court of Appeal.[198] It also suggests that the High Court of Singapore's decision in *Lai Hoon Woon v Lai Foong Sin*,[199] that a new limitation period does not accrue every time a post-dissolution profit is made, is right. On the opposite view,[200] the business might find itself indefinitely subject to the claims of former partners.

V. Conclusions

The nature of a partner's interest in partnership property has been much contested, and the significance of the issue is unlikely to diminish—especially in cases concerning taxation and former partners' claims. This article has rejected the dominant account of partners as akin to a remainderman under a trust, in having future or contingent interests in the assets of their firm only, in favour of a simpler one. Partners are co-owners of partnership property in equity, with present rights to the partnership assets and their benefits at any given time. These are overreached when any partner exercises agency powers to dispose of the assets of the firm in the ordinary course of business and attach to any substitutes received. They have rights of indemnity and lien in respect of partnership debts, to which creditors can be subrogated to take partnership assets in priority to the personal creditors of the partners. Describing partners' interests in the partnership property as future or contingent does not elucidate the nature of their rights. Likewise, partnerships do not have legal personality, and so partners' shares are not equivalent to shares in corporations. The equitable co-ownership model of partnership property best explains the incidents of partners' rights, the tax transparency of partnerships, and the law's treatment of the claims of former partners. It forms the best basis for the resolution of those disputes which turn on the nature of partners' shares.

This argument raises two wider issues which can only be touched upon here. The first relates to codification and its limits. The model of partnership advanced here is by and large equivalent to that accepted throughout the 19th century. The Partnership Act 1890, though it successfully preserved the pre-existing partnership rules, was less effective in preserving their doctrinal underpinnings. In particular, the Act seems to have prompted some textbook writers to omit any discussion of the nature of partnership property, and later courts would look at its provisions out of context. The case of partnership therefore suggests that, while the common law naturally preserves both rules and rationales, statutory codification preserves the former much more successfully than the latter.

The second point relates to the role of trusts law in modern legal thinking. Modern lawyers tend to think of the trust as the archetypal equitable property. Attempts to theorise equitable property have thus focused on trusts, and there has been a decline over the past 200 years in textbooks on "equity" in favour of those concerning "trusts". In the 19th century this was by no means the case: equity

[197] Banks, *Lindley & Banks on Partnership* (2020), at para.26-03.
[198] *Chiam Heng Hsien v Chiam Heng Chow* (2015) 4 S.L.R. 180 at [137]–[141].
[199] [2016] SGHC 113.
[200] Koh and Bull, "Agency and Partnership Law" (2016) 17 S.A.L. Ann. Rev. at 87.

lawyers of the time were as familiar with the law concerning testamentary estates and partnerships as they were with trusts. Many modern attempts to explain partnership property in relation to different types of trust obscured how comfortably partnership law fits within established equitable principles. The point is that partners' rights share features with other equitable interests but are distinct. We might query whether the dominance of the "trust" as a category in modern legal thought is justified, and whether recognising instead a group of rules governing "equitable property" or "equitable interests" might instead help us better understand the law and treat like cases alike.

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