

**ALL TAKING AND NO GIVING: THE CONCEPTUAL TREND IN
TRANSFERS OF OWNERSHIP**

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We transfer property all the time. Every time we buy a chocolate bar or give birthday presents we engage in the legal process of transferring property. But what does transferring property entail? Most theories of ownership look at transfer as an act typically perpetrated by the original owner. In this article, that assumption is attacked and it is suggested that the Law of Property in fact only ever allows for things to be taken rather than given. The conceptual implications of this mechanic are then explored and it is concluded that they support a conception of ownership that is essentially self-serving.

1. Introduction:

This essay identifies and explores an interesting feature of the transfer of ownership that is common to all legal mechanisms and social institutions. Namely that, whenever ownership is transferred, it is the transferee that has the power or right to transfer and not the transferor.

Before examining this however, I will briefly discuss the concept of ownership. This being done, I will consider several instances where ownership is transferred and illustrate that in every case it is the transferee that takes and not the transferor that gives. I will start with situations in which it is more or less clear that ownership is taken by the transferee. These are: restitution for an unjust enrichment, the rule in *Saunders v Vautier*, hire purchase agreements and through the use of a contractual ‘retention of title’ clause.¹ Moving on from these more simple examples, I will then look at the more conceptually difficult cases of gifting and ‘simple swap’ contracts. Having done this I will show why it is important to keep the nature of ownership in mind when analysing complex instances of transfer. Finally, I will make some observations about what this discussion of transfer could mean for our understanding of property more generally. Specifically, I will suggest that if the act of taking is conceptually significant, then property

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¹ [1841] EWHC Ch J82

should be seen as a basically self-regarding institution, rather than merely a vehicle for resource distribution or sharing.

At this stage it also pays to observe that this essay is concerned with ownership transfer abstracted from systems of registration. The registration of property complicates the issue of transfer, as it can sometimes be used, in addition to its normal regulatory role, as the very means of transferring property. An example of this is the case of shares, where property passes by the act of registration alone. I do not concern myself with such transfers here and restrict my discussion to the more familiar examples of the transfer of chattels and land, for the latter of which I take registration to ‘sit on top’ of the normal legal mechanisms of transfer.

2. Ownership:

Before embarking on the issue of transfer some consideration needs to be given to what ownership is. After all, we need to know what we are transferring before we can discuss the method of transfer.

Ownership is one particular type or collection of property rights that has a certain distinct substance.² So what distinguishes property rights from other legal rights? Robert Stevens, whilst suggesting that there is no exhaustive definition of property available, gives us four common characteristics of a property right.³ The first of these is:

“That the right is in relation to a subject matter that can be transferred independently of the right itself but in relation to which the right can persist after transfer.”⁴

So if you steal my car I no longer have it in my possession but I still hold the right to it, in this case the ownership of it. This tells us something important about ownership. It is a relation, in respect of some ‘thing’ or *res*, between an owner and a certain class of other. It can also be meaningfully described as a relation between the owner and the *res* itself. Whichever one

² The debate still rages in private law between whether property rights can be reduced to a number of *in personam* relations. See for example: P Eleftheriadis, *Legal Rights* (Oxford, Oxford University Press, 2008), 124-125, 138-142; J Penner, ‘The “Bundle of Rights” Picture of Property’ 43 *UCLA Law Review* 711 (1996) 711-820 For the purposes of this paper it is largely irrelevant, as whether one transfers a ‘bundle’ or ‘cluster’ or rights, or one right alone, ownership itself is still transferred.

³ R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007), 5-6

⁴ *Ibid.* 5

prefers, it is clear that the *res* is of central importance. Competing claims of ownership all settle on whether A or B has a better claim to the *res*. The common law does this through a mechanism referred to as ‘the relativity of title’.⁵ When you steal my car you gain a claim to the ownership of it good against the rest of the world but not against me, who preceded you in time and was wrongfully divested of possession by you. Your claim is relatively good against Bob’s, a third party to our little scenario who wants to say that the car is his, but relatively bad against mine.

In litigation we are seldom concerned with the definitive legal owner of a *res* and usually focus on establishing the stronger title claim. As such, the metaphor of relativity serves the common law well. However, this is not sufficient for an investigation into the theory of Property Law. The common law procedure of appealing to relative title claims clearly does allow for a person who has a claim superior to all others, an ‘owner’ in the true sense of the word, and should not confuse us into thinking that as a matter of law, ownership does not exist.

The second characteristic of property rights identified by Stevens is that, generally, such rights can be transferred. This is obviously of central importance to us, but since it is the main subject matter of this essay, we can move on for the time being.

Thirdly, Stevens tells us that property rights are ‘special rights not everyone else has’.⁶ For example, Professor Steven’s right to his Rolls Royce is a right that only he possesses because only one Rolls Royce is Professor Steven’s Rolls Royce. This seems to be important for us too. The uniqueness of the *res* in question clearly gives rise to a situation in which transfer of specific rights, rather than the creation of rights of equivalent value, is very important. Consider some comparative rights in other branches of law. An *in personam* right to restitutionary compensation as a result of an unjust enrichment targets an equivalent economic value to be detracted from the abstract wealth of the enrichee, not the specific property transferred.⁷ This is because what generally matters to the law of unjust enrichment is the reversal of that enrichment, not the transfer of a specific *res*.⁸ Similarly, in

⁵ B McFarlane, *The Structure of Property Law* (Hart Publishing, 2008), 146

⁶ R Stevens, *Torts and Rights*, 6

⁷ P Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2005), 5-9, 69-70

⁸ That is not to say the proprietary remedies are not available in a case of unjust enrichment. For an account I find particularly convincing, see K Turek ‘Proprietary (2012) J. JURIS 497

the case of unsecured creditors during insolvency proceedings, it is not a claim of ownership (whether in equity or law) that they are asserting, but merely the debt due to them.

Steven's fourth characteristic of property rights could be said to be somewhat more contentious. It is that property rights are good *erga omnes* (against the rest of the world), which is commonly conflated with the latin phrase *in rem*.⁹ Professor Stevens' right to his Rolls Royce is certainly *in rem*.

It is debateable whether for present purposes there is any useful conceptual distinction between *erga omnes* and *in rem*. Both types of right give rise to duties on the part of the rest of the world, both of which are capable of limitation in certain circumstances. My *in rem* right to stolen property is good against all save the original owner and my *erga omnes* right not to be punched in the face is good against everyone save the individual acting with lawful excuse. To point out that rights *in rem* are distinct from rights *erga omnes* because they make reference to a *res* rather than merely requirements of action or inaction does very little to form such a distinction. In the first place, rights *in rem* all deal with requirements of action and inaction and so are formally identical, even though they are substantively different because they do so in respect of a thing. In the second place it is tautologous when analysing ownership to distinguish *in rem* from *erga omnes* on the basis that the former deals with a *res*. By that logic any right *erga omnes* dealing with a *res* is also *in rem*. For present purposes therefore, these two concepts, whilst acknowledged to be dealing with different substantive groups of rights, shall be assumed logically equivalent.

The fact that ownership is a right *erga omnes* cannot be the distinguishing feature of ownership, because plenty of non-proprietary rights *erga omnes* exist. For example, I have a right *erga omnes* not to be punched on the nose for no good reason.

James Penner argues that rights *in rem* can be seen as normatively grounded in a general duty to not interfere with the property of others.¹⁰ Whether duty is logically prior to right or not, the notion that no one has the liberty to

Remedies for Unjust Enrichment: An Impossibility?, *Cambridge Student Law Review* (2009), 158-166

⁹ R Stevens, *Torts and Rights*, 5

¹⁰ J Penner, *The Idea of Property in Law*, 26

interfere with another's property is common sense.¹¹ Where this gets counterintuitive is the case of a chose in action, like a right in a bank account. If Professor Stevens sells his Rolls Royce and gets £50,000 paid into his bank account, by his own criterion he has swapped his right *in rem* against the car for a right *in personam* against the bank. That would mean he has no property any more. The layperson might find this a little hard to swallow. Penner argues that there might be an alternative means of looking at this situation. If we dispense with the idea that property rights have to be rights *in rem* and instead hold them to be rights that make one a beneficiary of a duty *in rem* to not interfere with the *res*, then Professor Stevens is still the owner of his bank credit. This is because he indirectly benefits from the general duty owed to the bank.¹²

There is of course a problem. If the bank goes insolvent Professor Stevens becomes an unsecured creditor. It is clear the law of insolvency doesn't regard this right as a property right. We are left with an odd situation in which we can either accept that Professor Stevens is not the owner of the money in his bank account, which might seem counterintuitive, or we have to stamp our feet at the law of insolvency until someone changes it.

In considering this puzzle and what it may mean for the concept of ownership, let us go back to our two examples of unjust enrichment and unsecured creditors. Just like these right holders, what a person with bank credit has is a certain amount of money owed to them. They do not already 'own' the money in question. Of course, this won't solve the layperson's disquiet. For if Professor Stevens were to sell his car for cash and then 'pay in' that cash to his bank, the common sense thought might be that he is merely moving his property from his wallet to his bank account. The fact that what he is actually doing is transferring his property to the bank with the consideration of receiving a promise to pay plus certain benefits seems a little steep, especially with the uniformly poor rate of interest in current accounts these days.

¹¹ Personally, I do not subscribe to Penner's inverse-Razian view that in this circumstance the duty grounds the right; however it is useful to consider this perspective as an *ethical*, as opposed to *moral*, proposition, simply because people tend to think that way. For my own view on the logical structure of rights and their place within the larger framework of legal concepts, see A Green 'A Philosophical Taxonomy of European Human Rights Law', *European Human Rights Law Review* (2012), Issue 1, 47-56

¹² J Penner, *The Idea of Property in Law*, 129-132

The important thing seems to be that owned objects are unique (and therefore valuable to their owners) because they cannot be replaced in themselves. Their loss is only capable of being dealt with through compensation. Debts themselves, whether simply unsecured, in the form of a chose in action or money due as a result of an unjust enrichment, cannot claim such uniqueness because credit or currency is by definition generic rather than unique. Once the metaphysical uniqueness of the *res* has been identified as the value which morally grounds the provision of an *in rem* right, it can be seen that Stevens is correct to argue that property rights must be *erga omnes*. This is not however because the *erga omnes* nature of the right has some deep conceptual importance but rather that this feature stems from another factor that possesses such importance: metaphysical uniqueness in the *res*.

That suffices as to the form of ownership, but what of ownerships' substance? This is important for the issue of transfer because the substance of a right will indicate how it should be treated.¹³ I take ownership, following Penner's definition, to be the legal state in which one has a right to exclusively determine the use or disposition of a *res*.¹⁴ Such a definition accords enough with common sense for us to accept it as the substance of ownership in a very general way. An important point to note is that several legal principles seem to sit very well with this notion. One good example is *nemo dat non quod habet* (no one can give what he does not have). If ownership exists to assert a owner's dominion over a *res* then it very obviously follows that no one else should be permitted to exercise dominion over that thing in his place. The substantive nature of straightforward ownership, as opposed to other and more complex forms of that right, is of central importance for the analysis that follows.¹⁵

3. Restitution, Trusts, Hire Purchase Agreements and Retention of Title Clauses:

Now we know what ownership is we can consider how it might be transferred. The first case I will consider is that of restitution for an unjust enrichment. If you give me thirty pounds under the misapprehension that you have a duty to do so then you have been unjustly enriched at my

¹³ See Section 5 below.

¹⁴ J Penner, *The Idea of Property in Law*, 68-75

¹⁵ For present purposes I take tenancy in common and joint ownership to be instances where the 'owner' is in fact two or more persons as a team and therefore fitting into the definition of ownership posited, albeit in a more complex way.

expense.¹⁶ In this situation you have a right against me that I reverse this enrichment. This allows you to claim ownership of an equivalent amount from my general resources. This classic example illustrates that restitution vests the ability to transfer in the transferee and not the transferor.

Let us turn now to the case of trusts. The rule in *Saunders v Vautier* operates so that when the beneficiaries of a trust are of legal age, equity allows them to claim the legal title of the trust property from the trustee, terminating the trust.¹⁷ Here we are indisputably dealing with taking by the transferee and not ‘giving’ by the transferor. Once more there is a power to take: the beneficiary can choose either to claim the trust property from the trustee or leave them with legal ownership.

Thirdly, let us consider the case of a contract with a retention of title clause. If we contract for the sale of a book and agree that ownership shall remain mine until two weeks after you have paid me the asking price, then I am duty bound to surrender the book after those conditions have been fulfilled. In such a situation you possess a right (not a power as in the two previous situations) to take the book from me. If I frustrate the exercise of that right it is your positive claim I am interfering with: I do not breach my duty by failing to take a positive step. Although this distinction may seem trite, it is reflected by the fact that if you sue for breach you will receive your expectation loss and be put in the position that you would have been were the contract correctly performed.¹⁸ In the case of specified goods, such as *my* copy of the book rather than *a* copy of the book, this guarantee of expectation is even clearer because instead of damages your right to the book is upheld.¹⁹ This once again shows that the taker of ownership is the one that positively affects transfer, rather than the party that is generally described as ‘handing it over’.

The inverse of this position is mortgage by legal charge, whereby a mortgagor retains ownership of the property until the debt is repaid.²⁰ In the event that the mortgagor defaults and a possession order is granted, ownership passes to the mortgagee as of right. Again however, it is clear

¹⁶ P Birks, *Unjust Enrichment* (Oxford University Press, 2005), 9

¹⁷ *Ibid.* nt. 1

¹⁸ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676

¹⁹ In simple terms this scenario covers transactions that do not fall under section 20A of the Sale of Goods Act 1979. See also: *Tarling v Baxter* (1827) 6 B. & C. 360; *Gilmour v Supple* (1858) 11 Moore P.C. 551, 556; *Seath v Moore* (1886) 11 App. Cas. 350, 370

²⁰ Section 85, Law of Property Act 1925

that the logical operator here is the transferee, who gained the right in this instance as consideration for the money lent.

Finally, let us turn to hire purchase agreements. These are superficially similar to contracts with retention of title clauses but are distinct in that possession is vested in the transferee before ownership passes to them. Once again we are dealing with a right to claim ownership from the transferor. Similarly, this arises when the conditions of the contract have been fulfilled. When I have paid all the instalments on my new wide screen television it becomes mine and I have a valid claim to ownership against the store. Yet again it is the transferee that pulls the property in, rather than the transferor that pushes it away.

4. Gifts and Simple Swaps:

It might seem odd that the above examples are far less paradigmatic than the two to be discussed now. However, as I will attempt to illustrate, it is logically much more difficult to explain transfer in these more simplistic cases than it is in the previous, more niche examples.

First let us consider gifting by way of the following example. I own a glass full of beer. I want to transfer the glass of beer to you. I put it down on the table next you and tell you that it is yours. You pick it up, say thanks and drink it. But at what point exactly does the glass of beer cease to become mine and become legally owned by you? It is clearly not before I put it down next to you. I am still in possession and have merely the intention to transfer. Similarly it is clearly not only when you have drunk it. If it was, then by picking it up and consuming it you have committed conversion. So it must be at some stage in between.

It might be the case that it becomes yours when I put it down in front of you and communicate to you that it has become so. But imagine this situation: I put it down in front of you and tell you that it is yours, but you can't hear me because you have long since become unconscious. Along comes Bob and, devious third party that he is, he picks up the drink and slurps it down. Who's right *in rem*, has Bob violated, mine or yours? English law requires acceptance of a gift for transfer to take place, so the right violated is mine.²¹ So how do we explain this in terms of juridical instances? One option is that I, as the owner of the beer, have a legal power to divest myself of ownership and vest it in you. This, 'simple view' as I shall call it, is

²¹ *Glaister-Carlisle v Glaister-Carlisle* [1968] Times 22nd February, CoA 450 (2012) J. JURIS 502

the general explanation that you will find in almost every property law textbook.

The simple view is nonetheless conceptually flawed. It completely ignores the power of the transferee to accept the gift. If I own the beer, in order for it to be transferred to you that ownership must be extinguished. Unless this is the case there will be an odd temporal overlap in which we both own the beer at the same time. If ownership means that the owner has exclusive dominion over the *res*, when I transfer ownership of the beer I cannot mean to create a joint or co-ownership simply in order to do so. An alternative explanation might be that I alienate my right in the beer first and *then* vest an identical right in you. This similarly cannot be true. To endow someone with a right that I do not possess is a direct violation of the *nemo dat* principle. How can I give you a property right that I do not possess myself? Neither explanation supports the simple view that the power to gift rests with the transferor.

Penner suggests that we can explain some instances of transfer through something called ‘directional abandonment’.²² The best way to understand this proposed mechanism is through the relativity of title. Under this theory, when I make a gift of my beer to you it is not the case that my ownership stops and yours begins but rather that our claims *in rem* get respectively weaker and stronger until your claim is greater than mine and then ownership is vested in you by operation of law. In the case of a simple gift, this happens very quickly. There is still a logical ‘gap’ here however because at some point our claims to ownership will be equally strong. Is it the case that we both own the beer at that point? Clearly not. By introducing the relativity of title we have in fact made the situation worse, because neither of us can claim ownership whilst another has as good a claim to it. So as long as we accept that the power to gift rests with the transferor we must accept that there is a logical gap where neither of us owns the beer.

Whilst Bob could be excluded from claiming the beer by our equally strong title claims, this is not an indication of ownership. This would be to confuse ownership with a strong title claim. Such an argument is analogous to claiming that if a licensee of land can exclude others save for the licensor, this fact makes him the owner of that land. Oddly, Penner seems to think that this is to some extent true. He suggests that in addition to the

²² J Penner, *The Idea of Property in Law*, 84-85

directional abandonment approach, property can be passed by way of licensing and vesting in the licensee a power to sub-license.²³

It is true that such a theory leaves no conceptual gap between right holders. However, whilst such a method might be said to transfer a right of some sort, it cannot be understood as a transfer of *ownership* in any meaningful sense. This is because the licensor can simply revoke the license whenever he wishes. Furthermore, as pointed out by Gaus, certain licensees cannot enforce exclusion upon a third party and have to rely on the licensor to do so for them.²⁴ Penner dismisses this objection on the basis that the licensee remains a beneficiary of a general duty of non-interference.²⁵ In support of his position Penner suggests that the question of who has the right to obtain a court order enforcing a duty is a matter of remedies and not relevant to the question of who holds a property right.²⁶ This conclusion seems too quick. If an ownership right is being claimed then it is a mistake to think that the question of ‘remedies’ is separate from the question of the nature of the primary right.²⁷ Upon the breach of an ownership right a secondary right comes into existence, requiring some form of compensation through a correlative duty.²⁸ Observing to whom this obligation arises is more than just a matter of remedies. It tells us something important about the nature of the primary right that has been breached. The fact that the licensee has to rely upon the licensor to redress his grievance indicates a special relationship between the licensor and the *res*. If the capacity to exclusively determine the use or disposition of the *res* post-license now rested with the licensee, what reason would there be for not allowing him to enforce? By Penner’s own criteria of what makes ownership valuable, the limitations of the licence model of transfer call it into question.

Penner offers a third explanation of transfer that is unique to the institution of gifting. He suggests that when one makes a gift one transfers on the basis that the giftee’s use or assignment of the property is treated as one’s own.

²³ J Penner, *The Idea of Property in Law*, 85

²⁴ G F Gaus, ‘Property, Rights and Freedom’ *Social Philosophy and Policy*, Vol 11 Issue 2 (1994), 209-240

²⁵ J Penner, *The Idea of Property in Law*, 86

²⁶ *Ibid.*

²⁷ I personally find Penner’s reduction of secondary rights arising from the breach of primary obligation to ‘remedies’ to simplify matters too much. The award of damages or restitution can be meaningfully referred to as a remedy. The creation, through operation of law, of secondary right and obligations seems to come at a logically prior stage.

²⁸ R Stevens, *Torts and Rights*, 287

Whilst this would undoubtedly jump the gap identified above, by causing an overlap of wills between the giftor and the giftee, there are substantive moral issues with this justification of gifting.

When one gives a gift one does not do so in order to exercise one's autonomous control over the *res* but to publicly recognise that one no longer enjoys anything like autonomous control over it. Penner's example of the parent gifting to the wayward child is intended to illustrate that it might be in one's interests to abandon autonomy to another. A parent might want to abdicate control so that their interest in their child properly developing as a person is realised. However, it still remains that when the parent gives £10,000 to their child, they do so in order to further their meta-interest of ensuring that their child develops 'properly' in some richer sense, even if they might 'shudder' to think of the risk they are taking.²⁹ However, they take that risk on the basis that doing so is compatible with their interest in their child's wellbeing. If they did not, then taking the risk would not be a rational choice. After all, no parent in their right mind would give a drug addicted child £10,000.

Penner's mistake comes from assuming compatibility between the immediate intention of giving a gift, that of surrendering to the autonomy of another, with the meta-intention of gaining the benefit of the act of giving. If the child develops a drug habit as a result of a gift of money intended to secure that child's positive development, then why should the gift not be revoked? If we are to accept this link between the immediate and meta-intentions of gifting, then there seems no reason why it should not be. That would make the parent's 'gift' look more like a conditional loan. Gifting only makes sense if its moral justification stems from the desire to revoke ownership to another and accept that one has no longer any interest in how that *res* is used. Any attempt at making a connection between the act of gifting and the meta-intention that caused the previous owner to gift merely confuses the issue, as proved by considering the parent/child example.

Since none of these theories of transfer can pass muster in the case of the gift, let us consider whether transfer by taking can provide a better explanation of how the law works. Due to the fact that gifts can be refused, it is clear that the giftee has a power rather than a right. However, unlike the previous examples there is no commonly articulated legal rule that stipulates

²⁹ J Penner, *The Idea of Property in Law*, 88-90

under what circumstances that power arises. My suggestion is that the power to take arises following the exercise of another power. This primary power is a power *in rem* of the transferor to create in the transferee a legal power *in rem* to transfer ownership. Once again, this suggests that ownership itself confers no power of transfer, only the power to create a power to transfer.

When I put the beer down on the table and say you can have it, I create a power in you to claim ownership of the beer. This means that we never reach a situation in which either we both own the beer or neither of us do. When I create the power in you to claim ownership of the beer, ownership is still vested in me. It continues to be so until you exercise your power, instantaneously claiming ownership for yourself by unilateral act whilst extinguishing mine at the same time. I never have to give up ownership because it is divested from me through your use of the secondary power. As such, there can be no gap of the sort that arose on the simple view, when I paradoxically might have been thought to give up ownership before vesting it in you or allowing it through directional abandonment.

Similarly, at no stage do we both own the beer at the same time because the effect of you exercising your power is to simultaneously divest me of my ownership and vest it in yourself. The advantage of this explanation is that this simultaneity is not the same as the illogical simultaneity that arose when I had to divest myself and vest in you. This is because in that situation I would have to be in a position of owning and not owning at the same time. Through the use of your secondary power you simply gain ownership at the same time that I lose it, which is not inconsistent at all. This is so because the power to transfer does not stem from the right being transferred. Instead the power is created by the previous owner as a separate juridical instance altogether.

Finally, should the devious Bob attempt to jump in at any point he will either be breaching his *in rem* duty to you or to me. He will be liable to me if he does so before you exercise your power *in rem*; once the beer is drunk the *res* is extinguished so your power goes with it but not his liability to me for conversion. After you exercise your power *in rem* however, ownership passes to you and Bob has violated your rights. There is no gap for Bob to exploit. In this mechanic of transfer then, we have found a vessel capable of safely transporting ownership.

If I create a power in you to divest me of ownership, I am liable to you until you refuse the use of that power and so extinguish it. As already stated, this accounts for the fact that gifts have to be accepted in order for ownership to pass. It also makes moral sense: as the holder of the primary power, my dominion is over the *res*, not you.

The case of the simple swap is conceptually very close to that of a gift and employs the same basic structure. Taking a modified version of the example used above to illustrate the retention of title clause, imagine that I contract with you to exchange my book for your ten pound note here and now. I exercise my primary power to give you the secondary power to take the book from me. You do the same thing in respect of the money. We then both exercise our secondary powers and ownership passes. This of course happens very fast, usually in the time it takes to pass the physical objects from one hand to another. However, the logical structure of this transfer, through the use of a power to take, prevents the conceptual conflicts of the simple view interfering with this everyday occurrence.

What emerges from the discussion in the last two sections is that in the transfer of ownership there are two basic logical structures that enable the transaction to occur. On the one hand, A can either have a right or a power to claim ownership from B through the coming to pass of some legally significant event, such as the fulfilment of contractual terms, coming of age or suffering an unjust enrichment. On the other hand, A can gain a power to claim ownership as a result of B's exercise of a primary power embedded in ownership itself: the power to permit A to take the *res* if they wish. In both cases however the operative party in the transfer is A, the transferee. It seems therefore that ownership can never be given but only taken.

There are more complex instances in which we can see the dual power model used in combination with the simple ability to take. One example of this is the now uncommon instance of mortgages by demise.³⁰ Here I abdicate ownership of my house to the mortgagee in consideration for a loan. I exercise my primary power and they their secondary power in respect of the house, and vice versa in the case of the loaned money. However, due to the existence of the mortgage agreement, when I have repaid the debt I gain a right to claim back ownership of the house ('redemption'). This example illustrates that although the basic structure of transfer is quite

³⁰ This is now unavailable in respect of registered land through section 23 of the Land Registration Act 2002.

simple and the operative ability is always that of the transferee, complex legal relationships can exist through a combination of different forms of transfer.

5. The Substance of Ownership and the Complexities of Taking:

There is a remaining issue in the shape of when, in more complex situations, the act of taking has actually happened and in what form it occurs. In these situations it becomes all important to bare the substance of the right in mind: are we dealing with straightforward ownership or something more complicated? Consider the following example. You and I go for a meal in a restaurant and order some food, which we then eat. At the end of the meal the waiter gives us the bill and we have to decide who should pay. Since we did not know who was to pay before eating the food, did either of us take ownership of it before eating it? If so, which of us?

If I am your host and clearly going to pay from the outset, the contract will be between me and the restaurant even if ownership passes directly to you when you accept the gesture.³¹ However, what happens when the issue of payment has not been decided and I run out, leaving you to pay the bill?

Practically, dine-and-dash incidents can be dealt with as misrepresentations: if we sit down, eat and then leave without paying we have misrepresented our intention to pay.³² In this case the contract is voidable and rescission can be sought. This get-out however, fails to answer the deeper conceptual issue of when ownership is transferred if the contract is actually valid.

The position in contract is that each of us would be individually liable to the restaurant for the food ordered, regardless of the arrangement between us. This stems from the fact that both of us are deemed to have separate contracts with the restaurant in respect of the entirety of the food.³³ That we are separately liable might suggest that we at no stage *jointly* own the food. It would be commonsensical to think that if we had entered into a contract as a team we would be jointly liable and this is not the case. This conclusion might be too hasty however. There is nothing conceptually preventing us from holding that joint ownership can arise as a result of two separate contracts between the joint tenants and a third party. Given that in this

³¹ *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468, 1473

³² *Ray v Sempers* [1974] A.C. 370

³³ *Lockett v Charles* [1938] 4 All ER 170

situation at least one of the contracts is going to be implied³⁴ and the remaining one will be poorly evidenced, what prevents us from concluding that both contracts made provision for ownership through joint tenancy? If this is the case, then both parties would be individually liable but hold the property together.

Joint tenancy would not explain why I can send my food back or consume it without doing you any wrong. A possible solution is that we own the food as tenants in common from the point at which it arrives. Although in doing so I am alienating or destroying my undivided share of the whole, I am not interfering with your use and enjoyment of your share and so am not interfering with your right. Such an example is distinct from us owning a car in common and me selling it without your permission. In the latter case you have a claim to either the money made by me or the car, as through the act of selling I have illegitimately infringed your stake.³⁵ You would however have no such right when, in the restaurant example, I consume the food, as that would be a legitimate use of my share of the meal. It is possible that this would also account for why you would be liable in contract were I to eat and run. Because tenants in common own *both* an undivided share and the whole property as a team, it is arguable that your duty to pay upon my refusal is grounded in your responsibilities as communal owner of the entirety. If this is the solution to the restaurant example then we might conclude that ownership is claimed as tenancy in common when the food arrives and accepted by both parties.

Contrast this with a different explanation. The requirement that you pay for my dine-and-dash could be an implied term of your contract and not something arising from the proprietary nature of your interest in my food. This seems to fit better with the contractual basis of the rule. However, this incurs the additional problem of the need to define that implied term. Are you liable in respect of those you go to the restaurant with or does it also cover people that join your table half way through the meal? What about annoying relatives that turn up by coincidence and you would rather not be eating with at all? It would be simple enough for this to be settled by general rule of contract limiting the class of persons for which you are responsible to those engaging with you in the social enterprise, or those with whom you arrived. The salient point for present purposes is to observe that, under this

³⁴ Ibid.

³⁵ *Baker v Barclays Bank Ltd* [1955] 1 WLR 822, 527
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explanation, ownership could pass to each diner at different times, depending on when the food was accepted.

What emerges from this discussion is that in order to work out when ownership passes from a transferor to a transferee, we need to know exactly what manner of ownership we are talking about. In this respect, the form of transfer can only tell us so much without a deeper understanding of the substance of ownership. Imagine that I have already dashed off and you are left with a half finished steak in front of you and a very irate waiter. Acknowledging that you have to pay, you decide that you might as well have the benefit of what remains of the steak. Whether the nature of the ownership is identified as straightforward ownership (under the implied term explanation) or tenancy in common, will affect how the transfer occurs and indeed whether it occurs at all. If it is the case that I had sole ownership of the steak and have just abandoned it, then you are taking unclaimed property. If on the other hand it was owned in common, then your pre-existing interest operates to 'suck in' my abandoned share. In both cases you as transferee are the legal catalyst but on the one hand you only gain ownership after your positive action in taking and on the other, your pre-existing right vests it in you before you reach out your fork. It is therefore clear that when explaining how and when ownership is taken, we need to be clear about both the form and substance of what is being claimed.

6. The Act of Taking and the Idea of Ownership:

This paper has sought to illustrate that ownership is something that is taken from the external world, be it from no one in particular or from another, with or without their consent. The act of taking and being able to declare 'this is mine' is something intuitively understood by us from a very early age. Most toddlers understand the idea of 'mine' a long time before they learn to respect things that are not theirs. Whether there is something psychologically important to the act of taking, and a concurrent explanation of the concept of ownership therein, is beyond the scope of this paper. What might be said here however is that this trend gives us reasonable grounds to ask whether the act of taking is of *philosophical* importance to the concept of ownership.

The ability to hold property has been recognised as an important element of personal liberty by statesmen throughout history and enshrined in documents such as Article 1 of the First Protocol to the European Convention on Human Rights. However, the link between the value of *having* property and *claiming* it is not immediately obvious. For Grotius, the

act of taking was the normative starting point for the concept of property and grounded the duty of exclusion. He argued that ‘whatever each had thus taken for his own needs another could not take from him except by an unjust act’.³⁶ This notion that rights to property are founded in their acquisition was common to many subsequent theorists such as Locke, who focused on developing theories of fair acquisition in order to justify the notion of exclusive possession.³⁷ This basis for property has however generally declined in popularity, with theorists such as Robert Nozick speaking of ‘justice in acquisition’ as an important *element* of property but not in itself *foundational*.³⁸

Nonetheless, the insight that *taking* is a conceptually universal element of ownership may have some philosophical value. It is clear that the act of taking something for yourself is a bold expression of your autonomy. By demarcating a material domain a person defines their personality, power and to a certain extent their interactions with others. Leaving the stricter confines of analytical philosophy behind, we might consider in this regard the Nietzschean idea of a Will to Power present in the essentially self-serving act of taking property from another and adding it to our own domain.

Underkuffler describes ownership as ‘that which gives the individual a bulwark of isolated independence from her fellows’.³⁹ For Hegel, the claiming of property was one means by which a being with a will could ‘translate his freedom into an external sphere’ and thereby define himself in his own (and others’) eyes.⁴⁰ This could explain the otherwise intuitively strange notion that we have some form of property in ourselves: if ownership is a supreme exercise of our will upon the external world, our personal inviolability mirrors that and might lead to us thinking about our bodies in proprietary terms.⁴¹

³⁶ H Grotius, *De Jure Belli ac Pace Libri Tres* (translated by F Kelsey, 1925), II.2.ii.1

³⁷ J Locke, *Two Treatises on Government and a Letter Concerning Toleration*, I Shapiro ed. (Yale University Press, 2003), 111-121

³⁸ R Nozick, *Anarchy, State and Utopia* (Basic Books Inc, 1974), 150-153; 157-158

³⁹ L Underkuffler, ‘On Property: An Essay’, 100 *Yale Law Journal* (1990) 127; 147

⁴⁰ G Hegel, *The Philosophy of Right* (translated with notes by T Knox) (Clarendon Press, 1942), paragraph 21

⁴¹ S Munzer, ‘Kant and Property Rights in Body Parts’, 6 *Canadian Journal of Law & Jurisprudence* (1993) 319

If ownership is linked to an exercise of our will in this way, then it is also possible that it relates to our desire to dominate the social, as well as the material, world. As explained by Roger Cottrell:

...property treats those attributes which make human beings grossly unequal as separate from them and conceptualised as ‘things’ that they own...[s]ubjects are equal (in legal doctrine and ideology) but the distribution of assets is not.⁴²

Viewed in this light, the rules surrounding acquisition, including the various situations in which taking becomes permissible (many of which have been discussed above), may be explicable as not only a means of controlling but also of satisfying what Nietzsche deems ‘our strongest drive, the tyrant in us’.⁴³

In the spirit of experimentalism, it pays to briefly consider what a Nietzschean interpretation of this discovery might reveal. Such a reading of the legal concept of property would of course have to be in the spirit of his work rather than through a direct application of his writing, as Nietzsche has comparatively little to say about the law.

In *The Gay Science*, Nietzsche describes law as a limitation on, rather than a facilitation of, the will of the tyrannical individualist.⁴⁴ It is however also possible to locate in his writing the idea that law exists to protect the noble from the *ressentiment* of the masses.⁴⁵ Under the latter model, the logical importance of the act of taking to ownership might be seen as evidence of the protection of the capacity to manifest one’s will in the world. In the *Genealogy of Morals* Nietzsche describes this acceptance of legal rules as limitations that ‘the will to life in its quest for power provisionally imposes on itself in order to serve its overall goal: the creation of *larger* units of power’.⁴⁶ On the back of this, a radical interpretation might characterise an

⁴² R Cottrell, ‘Power Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship’, *Journal of Law and Society*, Vol. 14, Issue 1, (Spring 1987), 77; 82

⁴³ F Nietzsche, *Beyond Good and Evil* (translated by R Hollingdale) (Penguin Books, 2003), 103

⁴⁴ F Nietzsche, *The Gay Science* (translated by W Kaufmann, 1974) aphorism 43

⁴⁵ F Nietzsche, *On the Genealogy of Morals* (translated by D Smith) (Oxford University Press, 1996), 25-28

⁴⁶ Nietzsche, *On the Genealogy of Morals*, 57

element of ownership as concerned with the domination of others through the wresting of things from them.⁴⁷

Even if we do not subscribe to such a radical view, it is undeniable that the importance of taking to the mechanics of transfer seems to lead away from, rather than support, justificatory theories of property rooted in sharing.⁴⁸ This intuitional ‘nudge’ becomes clearer when one combines the universality of taking with the substance of ownership as a right to exclusively control, containing the all important right to exclude.⁴⁹ Even the most tentative of conclusions following the above examination must recognise the shadow of self-regard that goes hand in hand with property at the most basic level.

Legal scholars not engaged in an avowedly postmodernist critique of institutions such as property tend to stay well clear of philosophers such as Nietzsche. There is good reason to do so. Not only is analytical philosophy more methodologically commensurable with the complex structure of private law but it also gives the impression of a more positive or optimistic approach. The invocation of thinkers like Nietzsche is seen to lend itself to a reduction of law to a system of arbitrary power.⁵⁰

This assumption is unfortunate however; as one does not have to ascribe to Nietzsche’s world view in order to benefit from his undeniable insight and understanding of people.⁵¹ In the present case, relating the conceptual trend of taking (and its observable connection with ownership) to a manifestation of a self-defining will, might tell us important things about property. We can still accept, for example, that there is an overriding moral interest in the just redistribution of property whilst acknowledging that ownership itself is conceptually self-regarding. In fact, it is plausibly *because* ownership is self-

⁴⁷ Some basis for this might be found in the words of Zarathustra: “The best belongs to my own and to me; and if it is not given us, then we take it: - the best food, the clearest sky, the strongest thoughts, the most beautiful women!” in F Nietzsche, *Thus Spoke Zarathustra* (translated by Graham Parkes) (Oxford University Press, 2005), 249

⁴⁸ See for example: J Penner, ‘Ownership, Co-Ownership, and the Justification of Property Rights’, T Endicott, J Getzler, and E Peel (eds.), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006), 166-188

⁴⁹ On this see: A Honoré, ‘Rights of Exclusion and Immunities against Divesting’, *Tulane Law Review* (1959-1960), Vol. 34, 453-468

⁵⁰ D Litowitz, ‘Nietzsche’s Theory of Law: A Critique of Natural Law Theory’, *Legal Studies Forum*, Vol. 18, Issue 4 (1994), 393

⁵¹ As Nietzsche himself reminds us ‘...there is a world of difference between the reason for something coming into existence in the first place and the ultimate use to which it is put’: Nietzsche, *On the Genealogy of Morals*, 57

regarding that distributive justice is so important. Similarly, it might be possible for us to identify through the notion of a tyrannical will, something of *aesthetic* value in the act of excluding the other, whilst still believing the best *moral* interpretation of property to be rooted in social inclusion. This is not the place to develop such a theory of property in a more general sense but our discussion so far serves to illustrate that by recognising the prevalence of taking in the logical structure of ownership we can begin to search for new philosophical perspectives on the Law of Property.

7. Conclusion:

My purpose in writing this article has not been so much to break new legal ground as it has been to show that even well trodden ground can have hidden depths. By examining instances in which ownership is transferred I have attempted to illustrate that it is the act of taking rather than the acts of giving or sharing that drive the process. In doing so, I hope to have created space for different philosophical perspectives on the phenomenon. In providing the barest bones of one deliberately controversial interpretation, I have attempted to illustrate the possible light that can be shed on our established institutions through more experimental conceptualisation.