RESERVATION OF TITLE AS SECURITY AND IN THE ADMINISTRATION OF PROPERTY

BY

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1. BACKGROUND

The use of reservation of title (reservation of proprietary rights, *reservatio dominii*) implies a reliance, through the incorporation of a proviso on the right of ownership, on the set of norms regulating rights of ownership and on the corresponding legal conception of right of ownership in cases where legislation has not provided any appropriate methods for satisfying the needs in question. The features of the right of ownership are well known in the legal system, and the legal conception of this right provides the possibility of utilizing it for special purposes. In Finland, the use of reservation of title has primarily been developed in practice to satisfy practical needs. It is used above all (a) as a means of security, but also (b) as a means of administration of property and (c) as a steering device.

(a) When reservation of title is used as a means of security, the seller's purpose is to secure his purchase-money claim for the goods and possibly also other claims on the buyer directly based on the purchase in case of default of payment. The object of the assignment serves as security. Generally, this object is a movable subject, but Finnish law does not rule out the valid use of reservation of title also when the object is real property or securities.[1]

Reservation of title is intended to guarantee the seller the right of repurchase and withdrawal (annulment), a right which would also be binding on the buyer's creditors. Such a right of repurchase and withdrawal binding on third parties constitutes an effective security should the buyer default in payment. It is a question of securing the seller's purchase-money claim.

(b) To an increasing extent, however, reservation of title has a significant role in commerce other than as security. Reservation of title is also used in the administration of property. It would appear that the legal conception of right of ownership (the set of norms on right of ownership) is increasingly being utilized for this purpose in the sense that one party, in the "capacity as owner"

[1] However, the use of reservation of title in Finland as a means of security in the conveyance of real estate is rather impractical, as during this interim situation the buyer is not able to register his ownership of the real estate (nor is he even able to start the process for so-called adjourned registration proceedings), and in this way he is prevented from mortgaging the real estate.

In regard to securities, reservation of title enters the question primarily when it is a question of the selling of shares in a housing corporation (a real estate corporation), when the housing in question is under construction. In such cases, there was no intention at any stage to grant the buyer possession of the shares until the construction is completed.

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and in regard to another participating interest, is able to exercise sufficient supervision over his own interests within a community of property organized in a certain way. In the individual case, such organized reliance on the legal conception of the right of ownership can be explained, for example, through the concept of *fiducia*,[2] or by applying the principles regulating authorization, or the norms of corporate law which apply to partnerships. In general, the legal phenomenon in question may be approached from the point of view of the construct of the intermediary, and the principles of intermediate agency can thus be applied.[3]

In Finland, reservation of title is used in the administration of property, for example in construction, by a so-called promoter-contractor.[4] In such a case the contractor founds a housing corporation which is to be the developer, and the contractor signs a contract with the housing corporation for the construction of the building which the housing corporation will be using. At as early a stage as possible, the contractor undertakes the marketing of shares in the housing corporation to those needing a flat. Not only does the promoter-contractor reserve title on the shares in the housing corporation as security for his purchase-money claim; the reservation of title also has another function which is very important to the contractor: during the construction phase, it keeps the administration of the corporation in the hands of the contractor, thus guaranteeing efficiency and expertise during this phase.

(c) In Finland, reservation of title is also used to a certain extent in order to direct a specified object to a certain assignee and keep it in his hands. Reservation of title for this purpose is useful, for example, in transactions between relatives in the assignment of objects which the family considers important, for example a farm or a family-owned company. Through the use of such arrangements, the parents as the assignors attempt to ensure that the object in question remains, for example, undivided and in the possession of one

[2] The conception of *fiducia* has been developed separately in Germanic and Anglo-American law. In the *German* language area, the concept of *Treuhand* has been developed, and legal practice in *Anglo-American* law has developed the concept of *trust*, which later on broke away from the basic points of departure of the *Roman* conception of *fiducia*.

Regarding *Treuhand*, see the general presentation in Coing, *Die Treuhand kraft privaten Rechtsgeschäft*, Munich 1973. A comprehensive description of *trusts* is given in Parker-Mellows, *The Modern Law of Trust*, London 1966.

[3] Regarding conceptions utilizing intermediaries in general in the formation of theory, see Grönfors, *Ställningsfullmakt och bulvanskap*, Stockholm 1961, and Nilsson-Stjernquist, *Föreningsfirmans funktion*, Stockholm 1950. In Finland, the different conceptions utilizing intermediaries have been examined above all by Zitting. See, for example, Zitting, "Kiinteistön osto omassa nimessä toisen lukuun", *Lakimies* 1956, pp. 549-85, and the same, *Saantosuoja irtaimisto-oikeudessa*, Vammala 1956, pp. 118-37.

[4] Regarding this subject, see Muukkonen, "Rakentamiseen liittyvät vakuudet", *Rakentamispäivä* 16.10.1965, Vammala 1965, pp. 17-34, and Zitting, "Omistuksenpidätystä koskevia näkökohtia", *Lakimies* 1978, pp. 728 ff.

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assignee (the heir). In this last-mentioned (c) case, reservation of title is used primarily to secure the interests of the assignee and not, as in the cases of (a) and (b), to secure the interests of the assignor.

The above brief outline is presumably sufficient for demonstrating how reservation of title is utilized to meet practical needs in legal life. A common feature of the various legal phenomena in which the parties have turned to reservation of title is the utilization of the legal conception and terminology of right of ownership, in accordance with the relevant set of legal norms. As a result of this reliance on the right of ownership, features which are generally connected with such a conception, for example good protection against third parties, a broad right to use the object, and so on, are utilized in connection with completely different legal phenomena than those normally taken into consideration in the predominant way of visualizing the features of this legal institution.

2. THE INTERIM SITUATION BROUGHT ABOUT BY RESERVATION OF TITLE

In studying in general the interim situation brought about in transfer of property, two different approaches can be distinguished: the system approach based on German constructive conceptual legal dogmatics, and the analytical approach in research based on Scandinavian realism.

The goal of the former approach is to construct broad classes of concepts and elements, in other words a macro-level conceptual system, to form a framework for the law in question. In the latter, in turn, the goal is not seen to be the formation of broad spheres of concepts, systems, but a more specific analysis of micro-level concepts by constructing exact sub-concepts instead of broad general concepts.

As a result of the *system approach in conceptual legal dogmatics*, the German system of property law is dominated by the duality between rights based on the law of property and rights based on the law of obligations. This duality has been incorporated into German law in the BGB.[5] This distinction appears in the relationship between the two contracting parties in that the validity of the agreement according to the law of obligations is kept distinct from its validity according to the law of property (in other words, from the effect it has on third parties). The right which is developing during the interim period does not *change* into a right according to the law of property until a relevant fact according to the law of property occurs—delivery/conveyance.[6]

[5] See Westermann, *Sachenrecht*, 5th ed. Karlsruhe 1969, pp. 3-6.

[6] Germanic legal writing speaks of an abstract agreement regarding the law of property—the so-called *principle of abstraction*. For a closer examination of this, see e.g. Baur, *Lehrbuch des*

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For the systematic reasons described above, a description of the legal position of the contracting parties during the interim period must distinguish between *full rights* and *imperfect rights*. Rights of the latter category have formed a *class of legal types of their own*. An essential feature of the system, in the description of the interim period, is the concept of *independent interim right*. One example of such a right that may be mentioned is the so-called expectancy or expectant right (*Anwartschaftsrecht*) that has been developed in German legal writing.[7]

A typical feature of the study of the interim situation in *analytical legal dogmatics* has been the examination of the legal positions of the contracting parties in the different interpersonal relationships, through the use of a realistic-analytical method. In Finland, Simo Zitting in his studies describes the interim situation connected with *normal* assignment of ownership by distinguishing between the different sides of the right of ownership (the factual and the legal disposing capacity) and by dealing with the right of ownership as a description of the different elements of the legal position of the owner (the owner's right of possession, his competence and his legal protection).[8]

The special basis for the interim situation arising from reservation of title has also traditionally been examined in Finland above all in regard to *change in ownership*. This means that the point of view has been the same as in connection with "normal change in ownership". However, in order to obtain a realistic point of departure in outlining the legal position of the contracting parties during the interim situation following a conditional assignment, it is necessary to *expand* the point of view beyond that of change in ownership so that the actual purpose of the condition is taken into consideration. The adoption of this point of view is of decisive significance in describing the content of the right that is formed through the condition used by the parties. As has already been observed in the foregoing, in actual life there is a tendency, through the use of a condition attached to assignment, to utilize the set of norms on right of ownership for different purposes, by establishing different kinds of rights or entitlements in order to achieve a certain goal. Through such an expansion of the point of view, the legal position of the contracting parties can be better

Sachenrechts, 7th ed. Munich 1973, pp. 40-44; Westermann, *op.cit.*, pp. 22-29; and Ernst Wolf, *Lehrbuch des Sachenrechts*, 2nd ed. Cologne, Bonn, Berlin, Munich 1979, pp. 220 and 408. See also Forssell, *Tredjemansskyddets gränser*, Lund 1976, pp. 54-56, 68-70, and especially 92-96.

[7] See Baur, *op.cit.*, pp. 582-98; Westermann, *op.cit.*, pp. 31-33; and Raiser, *Dingliche Anwartschaften*, Tübingen 1961, pp. 66-68. Regarding criticism of the prevailing position, see Wolf, *op.cit.*, pp. 294 ff.

[8] Zitting, *Omistajanvaihdoksesta silmällä pitäen erityisesti lainhuudatuksen vaikutuksia*, Vammala 1951, *passim;* the same, *Saantosuoja irtaimisto-oikeudessa*, Vammala 1956, p. 139, and *Sivullissuojasta varallisuusoikeudessa*, Vammala 1975, pp. 8 f.

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described in accordance with the realities of exchange. This point of view has a decisive impact on the formulation of more specific questions.

In using the purposes of reservation of title as a point of departure, the contents of the right (the legal position) established by reservation of title by the contracting parties for the *seller* must be analyzed *without connecting* it to *change in ownership*—not to the assignment of the rights of ownership nor to the assignment of the owner's right of possession (his right to use the object). On the other hand, the choice of the point of view does not prevent an analysis of the *buyer's* legal position from the standpoint of the change in ownership. All in all, it is more important to examine *separately* the respective legal positions of the seller and the buyer during the interim situation arising from the reservation of title, without necessarily connecting their development to the same acts.[9]

In Sweden, in fact, Henrik Hessler has expanded the point of view as outlined above and has thus observed that the development of the seller's right of withdrawal (the protection of his purchase-money claim) and of the buyer's restricted right of ownership (his protection in exchange) must be examined as independent questions in the sense that they are each based on their own set of legal norms. The terminology which he recommends for the description of the position of the seller and the buyer during the interim situation has subsequently become firmly established in Sweden. On the basis of reservation of title, the seller obtains a right of withdrawal that is protected in accordance with the law of property, and the buyer obtains a restricted right of ownership which is encumbered by the seller's right of withdrawal.[10]

3. THE LEGAL POSITION OF SELLER AND BUYER IN THE INTERIM SITUATION BROUGHT ABOUT BY RESERVATION OF TITLE

As has already been noted in the foregoing, a standard feature in earlier Finnish legal writing was an analysis of the legal positions of the seller and the buyer during the interim situation brought about by reservation of title *from the point of view of change of ownership*. Without exception, this signified that the interim situation was explained as involving a *suspensive condition* from the point of view of change in ownership when reservation of title was used as a means of security. Thus, the seller was considered to have retained the right of owner-

[9] See also Zitting, "Omistuksenpidätystä koskevia näkökohtia", *Lakimies* 1978, p. 732.

[10] Hessler, "Om äganderättsförbehåll och återtagandeförbehåll i 1966 års lag om vad som är fast egendom", *Festskrift til Carl Jacob Arnholm 1969*, Oslo 1969, pp. 459-73, and the same, *Allmän sakrätt*, Stockholm 1973, pp. 187-203.

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ship or, to use the terminology adopted by Zitting, he has retained the owner's right of possession (i.e. the primary right). The buyer, on the other hand, was only seen to have an expectancy or a secondary right (a right to alter legal relationships) and, in addition, he normally has possession of the object of credit. This last-mentioned feature was established separately through a specific agreement; in other words, the necessary fictitious construction was arranged if no separate legal grounds could clearly be presented.[11]

In the following description of the position of the contracting parties, consideration will be given to two matters. First, the purpose of the condition regarding assignment will be considered. Secondly, the framework composed of the elements of the concept of right of ownership that has been constructed with an eye to normal change in ownership will be considered. Since these aspects will be utilized at the same time, it has here been considered appropriate to describe, as a rule, the interim situation brought about by a condition used as a means of security as being based on a *resolutory condition* from the point of view of the central element of the right of ownership, the owner's right of possession (his right to use the object).

Thus, when the condition is used as a means of security, as a rule the *buyer* receives immediately after the conclusion of the agreement the central element of the right of ownership, the owner's right to possess the object. The factual possession and use of the object are based on the owner's right of possession. For this reason there is no need to construct separate, more or less fictitious legal grounds for the buyer's right to possess the object. When the owner's right of possession is passed on to the buyer, it follows that in principle the buyer also has the owner's forms of competence. However, on the basis of the condition taken into the agreement, the *use* of these forms of competence is encumbered by the seller's right during the period for which credit is extended. The extent to which the owner's forms of competence held by the buyer are *available* is a separate point of inquiry, when we accept as the basic premise that the seller's right must be appropriately secured as a matter of course.

In addition to the owner's right of possession, the buyer, through the payment of the purchase money or by carrying out other obligations which may be incorporated in the agreement, has the right (the power) to formulate his legal position so that the seller's right is terminated and his own legal position develops towards the full position of owner. Here this right of the buyer will be called a *right to alter legal relationships in the broad sense* (*competence in*

[11] Regarding earlier Finnish legal writing, see Caselius, *Sopimukseen perustuvat irroittamisoikeudet*, Helsinki 1934, pp. 376 ff.; af Hällström, *Verkan av ägareförbehåll på rättsförhållandet mellan säljaren och köparen*, Turku 1942, pp. 140 ff.; and Zitting, *Saantosuoja irtaimisto-oikeudessa*, Vammala 1956, pp. 138-47.

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altering rights).[12] In this, it is in general a question of changing one legal situation into another, even though the use of this right does not signify a change in the subject of the owner's right of possession (his primary right). Through the use of the buyer's competence to alter rights, he is *relieved* of being *bound* by the seller's right of withdrawal.[13] In examining the buyer's competence in altering rights from the point of view of the law of contract, one can speak about an *act fulfilling* the agreement. In accordance with the principle of *pacta sunt servanda*, the buyer is obliged to fulfil his obligations under the agreement. One essential part of these obligations is the payment of the purchase money or other sums due on the basis of the purchase.

An agreement on reservation of title establishes for the *seller-creditor* the right of withdrawal in case the buyer defaults in payment of the purchase money or in other payment obligations arising from that transaction. The seller's right of withdrawal is a *right to alter legal relationships in the proper sense of the word.* This right is an *independent* one in the sense that it is held by other than the subject of the owner's right of possession, and it is *secondary* in the sense that it is focused on the right of possession of the primary owner; in other words, the use of the right to alter legal relationships in this case is intended to bring about a change in subject in regard to the owner's right of possession. The seller's independent right to alter legal relationships has connections with the owner's competence, the owner's right to alter legal relationships. The buyer is bound to the seller's right to alter legal relationships (to his right of withdrawal) in an effective legal manner as the owner's right of possession may be legally ended. Here, it is a question of the utilization of the conception of the right of ownership in order to maintain the validity of this right during the interim situation.

From the point of view of the fulfilment of the seller's right of withdrawal, it is of primary importance in practical legal life that this right is valid not only in regard to the buyer, but also in regard to the buyer's creditors, especially to his creditors in execution and bankruptcy proceedings, and to his successors to specific rights and obligations. In order for the right of withdrawal to be binding on third parties, reliance is placed specifically on the right of ownership, which in our legal order is connected with strong validity in regard to third parties. On the basis of the Finnish legal order one may say that the right of ownership is a strong right to which, at least as a point of departure, one applies the rule of validity towards certain third parties in regard to the dynamic protection.

[12] For a more detailed discussion, see Tepora, *Omistuksenpidätyksestä*, Vammala 1984, pp. 102 ff.

[13] In referring to this binding nature, Hohfeld's analysis of so-called legal modalities has been taken as the point of departure. See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. Reprint, Westport 1978, pp. 5-18.

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The valid fulfilment of the seller's right of withdrawal in regard to third parties does not necessarily require in theory that the seller is deemed, through the retention of the right of ownership, to have retained the owner's right of possession (right of use) over the assigned object. The binding nature of the seller's right of withdrawal in regard to the buyer's creditors can be explained in a manner which satisfies theory by accepting the use of the conception of the right of ownership as a means of security, as a clause on transfer of property to this effect. Although the intention of the parties to the transfer is to deliver the object of the transaction into the permanent possession of the buyer-assignee, should the agreement incorporate a proviso intended as a means of security which results in the buyer not being able to obtain a fully developed legal position as owner for the duration of the extention of the credit, it is consistent and justified to assume that the seller obtains a right of withdrawal binding on third parties specifically through the conception of the right of ownership. The seller's right to alter legal relationships, the function of which can be compared to the owner's competence, is matched by the buyer's liability. The buyer is freed of his liability when he fulfils his payment obligation to the seller in accordance with the agreement. From the point of view of the buyer, it is a question of an acquisition encumbered by a resolutory condition.

The explanatory approach taken above in describing the legal position of the contracting parties can be applied to all conditions which are intended to imply a security—i.e. also in connection with resolutory conditions and conditions providing a right of withdrawal—if it is only through the condition that one has explicitly resorted to the conception of the right of ownership and thus, in fact, to the set of norms regulating the right of ownership. In the opinion of the present author, there are no realistic grounds for maintaining an extreme position according to which—and here one refers rather to the magic of the concept—the parties should use some derivative of the concept of "right of ownership" in order to render the transaction valid in regard to third parties.[14]

In the foregoing the position of the transacting parties during the duration of the credit, when the reservation of title has been used only as a means of security, has been examined. In what follows, the legal position of the contract-

[14] However, even today in Finnish legal practice the right of withdrawal and the right based on a cancellation clause are considered to be "essentially based on the law of obligations". See the decision of the Supreme Court, 1983 II 132.

Regarding the mysticism which more or less pervades the terminology on rights of ownership, see Schmidt, *Om ägareförbehåll och avbetalningsköp*, Helsinki 1938, pp. 109 and 162; Hessler, "Om äganderättsförbehåll och återtagandeförbehåll i 1966 års lag om vad som är fast egendom", *Festskrift til Carl Jacob Arnholm 1969*, Oslo 1969, pp. 464 and 470; and Zitting, "Omistuksenpidätystä koskevia näkökohtia", *Lakimies* 1978, p. 731.

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ing parties during the interim period arising when reservation of title has been used as a means of administration of property will be dealt with.

A condition implying reservation of title is normally used in the administration of property when, also following transfer, the intention is that the seller retains the owner's right of administration over the subject of the transfer. An attempt will be made to describe the resulting interim phenomena with the *theory of intermediaries*.

The essential point of such a conceptual system is that, through their agreement, and for example using the terminology of the right of ownership, the parties establish for one contracting party a legal position as *intermediary*, in which position that party acts on behalf of more than just the other contracting party, who is the *principal*. The beneficiary of the acts of the intermediary may be the intermediary himself, but it may also be a third party. In cases where the intermediary himself is the beneficiary, he thus acts on his own behalf; this means that the *intermediary is acting on behalf of both parties*. This characteristic of the intermediary differentiates this case from other types of intermediaries, for example a figurehead intermediary, a commission agent and an intermediate agent, all of which have received much attention in Nordic legal writing.

A principal-intermediary relationship is often established with an *act of transfer*. This, however, does not regulate the relationship between the intermediary, on the one hand, and the principal or a possible separate beneficiary, on the other. Instead, supplementary agreements specifying the purpose of the transaction are made for this purpose; these are intended to remain secret. However, the intermediary obtains an external position which almost without exception appears to involve wider authorization than what would perhaps be necessary to secure the purpose of the transaction.

An intermediary-principal relationship may also be based on a condition of reservation of title, used as a means of the administration of property. In this way, for example, one can explain the interim situations which arise in Finland in promoter-contractor construction. In this, reservation of title is used to give the intermediary the facade of "owner" although, it is true, this facade is thinner than before. According to the theory of intermediaries, the legal relationship between the promoter-contractor-seller and the buyer is explained as an intermediary construct established for the benefit of both. Thus, the seller is at the same time a *beneficiary*. On the basis of reservation of title the seller acts as an intermediary in part *on his own behalf* and in part *on behalf of the buyer*. The relationship between the seller and the buyer is regulated by the obligations contained in the contract of sale, which limit the competence of the seller (as the intermediary) to act. By resorting in the contract of sale to a formal right of ownership, the seller retains the necessary *competence as agent* in regard to third parties. The seller's position as agent can be compared

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primarily to that of a normal intermediate agent, who also acts in his own name but—in distinction from the case here—not on his own behalf, but on behalf of his principal.

Through the reservation of title contained in the contract of sale, the promoter-contractor-seller retains a position as agent ("owner") in which he is authorized in his own name to use the owner's right of administration in the housing corporation to the extent set out by the obligations in the contract of sale, for the duration of the construction of the housing. Because of this reliance on the conception of the right of ownership, the buyer cannot unilaterally revoke the seller's right of administration. The mere fact that the administration of property cannot thus be revoked does not necessarily lead to any changes in regard to provisions on the agent's general liability, nor in regard to the provisions on the protection of third parties.

The theory of the intermediary set out briefly in the foregoing offers one justified *approach* in characterizing the legal position of the seller and the buyer during the interim situation brought about by reservation of title. In the opinion of the present author the theory is one suitable and realistic approach especially in analysing the legal position of the intermediary in regard to various parties, without attempting any comprehensive explanations. In other words, when the intermediary is the "owner", one must study the effect of agreements (the party intent) between the intermediary and the principal on the legal position of the intermediary in regard to various parties. *The theory attempts to demonstrate that the sharp distinction between owner and non-owner can be abandoned because the interests of the parties concerned can be secured also in other ways.* It should be possible to abandon the evaluation based on the terminology of the right of ownership when one cannot demonstrate any peremptory reasons for ignoring the various interests or the principle of freedom of contract in determining the legal consequences.

In attempting to describe the interim situation, the construction of an all-encompassing comprehensive theory does not appear to be a useful approach, as this would involve difficult problems in mastering various legal questions on the basis of one and the same conceptual structure.[15] On the other hand, it is appropriate to dissect the phenomenon into various legal relationships, and then analyze the legal position of the various parties and their development in relation to various other parties. The theory of the intermediary can be utilized in such an approach.

The reservation of title in a contract of sale between a promoter-contractor-

[15] The difficulties referred to in the text may appear, for example, specifically when the *fiducia* (*Treuhand*/trust) conception is constructed as an encompassing conceptual construct through which one attempts to explain the most divergent phenomena.

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seller and a buyer regularly has a dual function. The reservation of title establishes for the seller the *right of withdrawal* (right of annulment) in the case of default in payment by the buyer. Basically, the right of withdrawal is also valid in regard to third parties. The second function of reservation of title is to secure for the seller *the owner's right of administration* in the housing corporation during the construction phase. It would appear that the power of administration in the housing corporation is exercised to secure directly the interests of the seller, but *de facto* its use also serves the interests of the buyers, through increasing the degree of flexibility and efficiency in construction. According to the theory of the intermediary, the promoter-contractor uses the power of administration in the corporation during the construction phase not only on his own behalf, but also on behalf of the shareholders, including future shareholders. This presumably corresponds quite well to the actual situation.[16]

To the extent that the promoter-contractor exercises his power of administration on behalf of the buyers, one may speak of *authority as agent:* from the point of view of a third party, the capacity to act as agent is based on the terminology of the right of ownership used in the contract of sale, and the scope of the competence is determined by the obligations in the contract of sale which determine the relationship between the seller and the buyer. This point of view opens up the possibility of examining the liability of the promoter-contractor-seller also in the light of the provisions on *agency*.[17]

The position of the promoter-contractor-seller as agent—this side of his position—can be compared primarily to the position of the normal intermediate agent. It is true that Finnish legislation does not contain any general written norms on intermediate agency, nor is there a Commission Act, but in court practice and in legal writing the conception of intermediate agency is a recognized institution. It would appear that, depending on the situation, certain provisions on direct agency (authorization), such as those in secs. 10(2), 11(1) and 20 of the Contracts Act, might be applicable through analogy to intermediate agency.[18]

On the other hand, the promoter-contractor uses his power of administration in the corporation during the construction phase also on his own behalf. He has excellent opportunities for this, as during the construction phase he

[16] This mode of explanation can be found in the more recent Finnish legal writing and in court practice. See Zitting, "Omistuksenpidätystä koskevia näkökohtia", *Lakimies* 1978, p. 728, footnote 2; Havansi, *Panttioikeus osakkeeseen. Ensimmäinen osa*, Vammala 1979, pp. 453-56; and Rudanko, *Vastuusta grynderirakentamisessa*, Hämeenlinna 1982, pp. 164-75.

[17] See Zitting, *ibid.*

[18] In Finland, it has been considered to be possible to apply by analogy the provisions of the Contracts Act mentioned in the text to commercial commissions.

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normally (possibly through intermediaries) has the power of administration vested in the full stock in the housing corporation. It is possible that contracts of sale, including reservation of title, have already been made for some shares, while for others such contracts have not yet been made. In regard to this the *liability* of the promoter-contractor can be examined also in the light of the provisions of *corporate law*.[19] In practice, however, these norms are generally not enough to secure sufficiently the justified interests of third parties.

In the above analysis the legal situation has been outlined solely from the point of view that the *purpose* of the *use* of reservation of title opens up. When, alongside of this, the situation is examined from the point of view of *the change in ownership* and one begins by adopting Zitting's concept of ownership, the interim situation can be described as resting on either a suspensive or resolutory condition in regard to the central element of the right of ownership, the owner's right of possession. Both explanatory models would appear to be possible as theoretical constructs. The selection between the models ultimately depends on their appropriateness.

There may be reason to stress that the adoption of the approach based on suspensive or resolutory conditions certainly does not change the contents of the right of the buyer and the seller; instead, the purpose is to use the approach to give a *theoretically* satisfactory *description*, based on the conception of the right of ownership, of the basis for the rights of the seller and the buyer in change in ownership. A theoretically satisfactory description which corresponds to practical realities provides those applying the law with a better possibility than before of solving the legal problems coming before them, within the framework of the legal order.

Thus it is justified to begin by saying that on the basis of reservation of title used as security or in the administration of property, (1) the seller is provided with the right to annul the contract, in order to secure his purchase-money claim in the event of the seller's default in payment, and (2) the seller retains the power of administration in the housing corporation during the construction stage. On the basis of the contract, the buyer, in turn, naturally has the right to shape his legal position towards full right of ownership by paying the purchase money.

Should one accept the above conclusions, which in regard to the seller's right of administration accord with the theory of the intermediary, it would be natural to recommend also in this case the approach based on a *resolutory condition* in order to describe the legal position of the buyer and the seller during

[19] In Finnish legal writing, for example Zitting has examined this as one possibility, in his analysis of the use of promissory notes secured by a pledge in promoter-contractor relationships. See Zitting, "Panttivelkakirjojen käytöstä Gründer-urakkasuhteessa", *Lakimies* 1961, pp. 413 ff.

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the interim period. Thus, from the point of view of the essential element of the right of ownership, the owner's right of possession, the description would be as follows. On the basis of the contract of sale the buyer already has the *owner's right of possession* (the primary right). In addition, he has the *competence to alter legal relationships* and to develop his present legal position towards full right of ownership by paying the balance of the purchase money (performance). According to this explanatory model, the seller's right mentioned under (1) above is an *independent secondary right to alter legal relationships*. Its use, when enforced, is intended to change the subject of the owner's right of possession, from the buyer back to the seller. This right is basically valid in regard to third parties, through the set of norms on the right of ownership. In regard to the right of the seller mentioned under (2) above, it is a question of the power of administration in the company, connected in corporate law to the ownership of shares.

All in all it would appear appropriate to explain the situation arising from reservation of title as one resting on a resolutory condition, both when the reservation of title proviso is used solely as a means of security, and when it is used not only as security but also in the administration of property. However, it is important to emphasize that the problems of conflict in dynamic protection from the point of view of both the seller and the buyer are solved *separately* without deriving this solution as such from the concept of the right of ownership. In other words, a suspensory or resolutory explanatory approach cannot be used in seeking solutions to these questions. The alternative solutions in problems related to protection in conflict are based on several different factors, for example on the nature of the object, the type of conflict and on whether the legal order views the conflicting claims as being of similar or different strengths.

4. THE STATIC PROTECTION OF BUYER AND SELLER AGAINST THIRD PARTIES IN GENERAL

The resolutory condition explanatory approach to the interim situation phenomena recommended above best corresponds to practical reality, and thus gives those applying the law a better opportunity than before to approach legal problems also on a theoretically justified level.

When the buyer under condition of reservation of title actually has the object of assignment in his possession during the term of credit, the legal order provides him with independent static protection against those violating his rights. In order to use his independent right of action before an authority, it is enough that the buyer demonstrates both his right to possess the object and his

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actual need for legal protection. The legitimacy as the proper party in this case is connected precisely with the right of possession—its inviolability against disturbance by third parties in general—and the subject is the buyer. Normally, the subject in connection with conflicted interests (in this case, therefore, the buyer) has legitimacy as the proper party. In this case, regardless of the *type* of legal justification for the right of possession, the buyer is a "proper party".

However, the question should be approached from a broader and more integrated point of view than the one presented above. The question of the use of an independent right of action in order to achieve static protection should not be connected to the transfer of the right of ownership no more than to the transfer of the owner's right of posssession from the seller to the buyer during the interim period. The position of the seller and buyer as the subject of legal action depends on several factors, for example the risk and its allocation between the contracting parties, the actual possession of the assigned object and its protection, as well as the buyer's interest in becoming the owner of the assigned object and the seller's interest in securing his right of withdrawal. These factors are not connected with the transfer in the owner's right of possession, and should instead be evaluated independently.

In practice the question of who has the position as party and who has the right of action in securing static protection against someone violating the rights of the parties during the interim situation is not an "either-or" question. One comes to such a situation when the question is connected directly to the transfer of the owner's right of possession (right of ownership). Instead, the point of departure should be that as long as the interim situation between the contracting parties continues both parties have their own interests to safeguard against third parties. The basis for this idea lies in the fact that a violation by a third party immediately directed at the assigned object is actually directed at the *contractual relationship* between the seller and the buyer, and affects the fulfilment of the agreement. A claim by one contractual party for legal protection against a third party basically involves the ensuring of the interests of the contractual party in regard to the fulfilment of the agreement.[20]

On the basis of the foregoing we can distinguish between two parallel interpersonal relationships which should be evaluated apart from one another. On the one hand, there is the relationship between the contractual parties and a third party, and on the other there is the relationship between the contractual parties themselves.[21] By distinguishing between these interpersonal rela-

[20] This point of view has been stressed by Ross, *Ejendomsret og ejendomsovergang med særligt henblick paa dansk retspraksis*, Copenhagen 1935, p. 52.
[21] Ross, *op.cit.*, p. 56.

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tionships we can realistically take into consideration the various interests in practice when evaluating the position and right of action of the parties in a concrete situation, without being guilty of the potential for error resulting from the constructive approach.

During the interim period brought by reservation of title when used as a means of security, normally both the seller and the buyer have the independent right of action in order to obtain static protection. At least the following factors speak in favour of granting the buyer an independent right of action in regard to a party violating his rights: (1) generally it is the buyer who is liable for the risk attached to the object, (2) the buyer is in actual possession of the object, and the protection of possession is attached to this, and (3) it is in the buyer's interest to develop his legal position towards full right of ownership over the assigned object.[22] On the other hand, the seller's interest in ensuring his purchase-money claim speaks in favour of granting him an independent right of action in regard to a party violating his rights.

5. THE DYNAMIC PROTECTION OF BUYER AND SELLER

As has already been noted in the foregoing, the basis for the determination of the dynamic protection of the seller and buyer in case of conflict should not be linked to the same point in time (to the same act). The access of the buyer to dynamic protection is connected with the question of the determination of the owner's full right of ownership. In regard to this protection against third parties, legal writing has adopted the concept *protection of exchange*.[23] This concept refers to the protection of an assignee in the position of primary actor against a secondary actor (a creditor/successor of the seller) in a descending third-party relationship. It is a question of ensuring a privileged position in accordance with the rule of *time priority*. From the point of view of a secondary actor, the access to protection against the primary actor depends on the fulfilment of the conditions for *extinction*. Access to protection of exchange signifies in fact the elimination of the secondary actor's possibility of extinction.

[22] Regarding this question, see also af Hällström, *op.cit.*, pp. 90 ff., and Caselius, *op.cit.*, p. 388.

[23] Zitting, *Arvopaperin luovutuksensaajan oikeussuojasta*, Porvoo 1957, pp. 10 ff. Regarding Danish legal writing, see e.g. Ussing, *Aftaler paa formuerettens omraade*, Copenhagen 1945, pp. 5 ff., and Fr. Vinding Kruse, *Ejendomsretten*, 3rd ed. Copenhagen 1951, pp. 175 ff. In regard to Norwegian law, see Arnholm, *Privatrett III. Almindelig obligasjonsrett*, 2nd ed. Oslo 1974, pp. 7 ff. See Hessler, *Allmän sakrätt*, Stockholm 1973, pp. 31 and 52. He uses the term "protection of exchange" to describe the protection that the assignee has in regard to the assignor's successors to specific rights and obligations.

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There is reason to emphasize that extinction refers to the alternative solution of conflict in regard to claims directed at the specified object. The granting of extinction thus requires, *inter alia*, that the object of the assignment of the secondary successor has been specified, and correspondingly that the extinction in regard to the creditor does not take place until the basis for the credit has been specified.

Basically, the protection of exchange for the buyer on reservation of title terms is determined on the basis of the *normal rules of conflict applying to the protection of exchange*. This entails, for example, that the law in force in Finland takes note both of the type of object that has been assigned and whether or not it is a question of the protection of the buyer against the seller's creditors in execution and bankruptcy, the seller's security and mortgage creditors, or the seller's creditors during the interim period.

The analysis of the determination of the access of the buyer to the protection of exchange cannot include the possibility that the seller has of using his right of withdrawal on the basis of reservation of title in a manner that is valid in regard to third parties. The seller's dynamic protection can appropriately be called the seller's *price protection*.[24] Here it is a question of the use of the seller's right of withdrawal (his right of annulment) so that it is valid in regard to the buyer's (the assignee's) creditors and successors. Basically, the question concerns the protection of the "proper owner", in other words whether or not he can recover the property when necessary in a manner valid in regard to third parties, in accordance with the purpose of the reservation of title in a situation where the buyer is in default of payment.

Reservation of title, when understood in the above manner as a means of security, is a tool in understanding that the seller's price protection is not of necessity constructively connected to the phenomenon of change in ownership when this is examined from the point of view of the requirements for access to protection of exchange. It is quite natural to think that the object may be transferred from the sphere of competence of a seller using reservation of title, so that it can no longer be seized on an execution for the seller's debt or so that it can no longer be part of his estate in bankruptcy, even though the same object, without the reservations regarding the seller's rights, could not yet be seized on an execution for the buyer's debt or be part of his estate in bankruptcy. This is an important observation which justifies us in examining the seller's price protection in regard to creditors and successors of the buyer apart from the buyer's protection of exchange in regard to the seller's creditors and successors.

[24] The first to adopt this term in Finland is Zitting, "Omistuksenpidätystä koskevia näkökohtia", *Lakimies* 1978, p. 732.

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From the point of view of the seller's access to price protection, it is of significance to begin by distinguishing between situations in which basically either the rule of *validity* or the rule of *nonvalidity* is applied to the seller's right of withdrawal (the reservation of title condition) in regard to the buyer's creditors/successors.

The application of the *basic rule of validity* in the Finnish law in force would undeniably enter the question in regard to *credit purchases with normal reservation of title*, a condition of which is that the buyer does not have the competence to transfer the object during the period of credit. This rule, however, is not without exception. In fact, an exception can be made in regard to a *bona fide* third party successor.[25] In these cases it is enough that one examines more closely the conditions under which the *bona fide* third party successor obtains protection against the seller's right of withdrawal (in other words, an exception is made to the rule of validity).[26]

On the other hand, when it is a question of *credit purchase for resale* which takes place with reservation of title, in other words when despite the reservation of title the buyer has the right to transfer the object already during the period of credit, it is natural to take as the main rule the *rule of nonvalidity* in regard to third parties.[27] The making of an exception to this would require a special ground of validity. In this, the problem remains of examining what conditions are required to generate validity (in other words, to make an exception to the rule of nonvalidity).[28]

[25] See e.g. Caselius, *op.cit.*, p. 389; Zitting, *Saantosuoja irtaimisto-oikeudessa*, Vammala 1956, pp. 145-47; *Saantosuojakomitean mietintö* (Committee report 1965:A 3), pp. 11 ff., and in regard to Finnish legal practice, e.g. the Supreme Court decisions 1926 II 121, 1928 II 128 and 1937 II 525. In regard to Swedish law, see e.g. Undén, *Svensk sakrätt I. Lös egendom*, 6th ed. Lund 1969, p. 107; Schmidt, *op.cit.*, p. 138; and *SOU* 1965:14, p. 33.

[26] In addition to *bona fide*, a normal requirement is the fulfilment of some objective external act, such as possession, registration or denunciation.

[27] See Olsson, "Vilken verkan har ägareförbehåll då godset säljes vidare?", *FJFT* 1960, p. 6, and Portin, "Rättsutvecklingen rörande ägareförbehåll", *FJFT* 1979, p. 392. Compare with af Hällström, *op.cit.*, pp. 48 f. Regarding Finnish legal practice, see the Supreme Court decisions 1968 II 53, 1971 II 65, 1971 II 102 and 1977 I 4; all these decisions were the result of a vote.

In regard to Swedish legal practice, mention may be made of a similar decision, 1960 NJA 221. As for Swedish legal writing, see Agell, "Ägareförbehållets giltighet mot borgenärer och senare förvärvare i nyare rättspraxis", *SvJT* 1965, pp. 245 ff., and Adlercreutz, "Ägarförbehållet som kreditsäkringsmedel", *Festskrift till Knut Rodhe*, Stockholm 1976, pp. 9 ff.

[28] In Finnish legal practice, the *qualified knowledge* of a third party is generally considered special grounds for validity. On the basis of such knowledge, it may be presumed that the third party accepted that the (weak) right was valid in this respect, or conclusions are reached on its basis regarding the content of the transaction.

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