AN ATTEMPT TO ANALYSE THE OWNER'S LEGAL POSITION

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1. In recent Scandinavian jurisprudence the conception of ownership as a homogeneous entity, an indivisible substance from which various rights emanate, has been abandoned. Ownership is now understood to be a certain kind of legal position, based on positive law and consisting of legal facts and legal effects. An analysis of this position may be particularly helpful in explaining and solving the complicated situations which arise out of transfers of property.

In an earlier study[1] I have analysed the different elements of the owner's legal position in the light of the recent contributions of Scandinavian jurisprudence,[2] with a view to investigating the various forms of transfer of property. The content of ownership, in the general sense, consists of elements lying on different levels. The owner's right refers, on the one hand, to the use of an object, and, on the other hand, to his legal competence to transfer ownership, to pledge the object of his ownership, etc. Similarly, the owner's legal protection consists of "static" protection on the one hand, and of some essentially different elements of protection

[1] *Omistajanvaihdoksesta silmällä pitäen erityisesti lainhuudatuksen vaikutuksia* (Zusammenfassung: Über den Eigentümerwechsel unter besonderer Berücksichtigung von Wirkungen der Eintragung). Vammala 1951. §§ 1–14.

[2] This refers to the development that has taken place in the study of transfer of ownership, concerning the various forms of legal protection, the relations between persons involved, and the legal effects. The idea that a special kind of protection which appears in connection with transfer of ownership must be distinguished from ordinary protection against third persons has been put forward by Carl Ussing, in an undeveloped form (*T.f.R.* 1896, pp. 181 ff., particularly p. 186). The theory of relations introduced by Carl Torp has been of fundamental importance, particularly in the presentation of the above-mentioned special protection against third parties (*Forhandlingerne paa det tiende nordiske Juristmøde,* Copenhagen 1902, Annex VI). The next step in development is given in Fr. Vinding Kruse's important study (*T.f.R.* 1924, pp. 315 ff.). He assigns the decisive importance to the specification of the different legal effects, and not to the various relations. On this development Alf Ross based his theoretical analysis of the owner's legal position, with which the present analysis essentially agrees (*Virkelighed og Gyldighed i Retslæren*, Copenhagen 1934, Chaps. VIII–XII; *Towards a Realistic Jurisprudence,* Copenhagen 1946, Chaps. VII–X; *Ejendomsret og Ejendomsovergang med særlig Henblik paa dansk Retspraksis,* Copenhagen 1935).

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termed "dynamic" on the other hand. The static protection refers to sanctions against acts infringing the owner's actual or potential free use of an object. The owner will achieve this kind of protection by submitting to the authorities claims for injunctions, for restitution of alienated property, for compensation, etc. The dynamic protection appears in connection with different forms of transfer of property and concerns the validity of the owner's title in various collisions of rights, such as a collision with the rights of creditors.

The owner's right of use together with the static protection forms an entity which—in conformity with Ross—I shall call the owner's primary right. This term refers to an exclusive, (statically) protected freedom to use an object. It constitutes the central element of the owner's legal position, and its abstract parts are the right concerning the use and the static protection. Compared to this element, the owner's competence is secondary. It refers to the legal ability to bring about a change of subject of the owner's primary right. There must in addition be a certain amount of dynamic protection, which can thus be regarded as a third element. The decisive point here seems to be the protection of the purchaser against the vendor's creditors, since a purchaser who has achieved the primary right of an owner and the adherent competence but has not yet received the protection against these creditors cannot be called an owner for the purposes of the law.[3]

In the legal position of the owner we can, in this way, recognise three different types of elements on different levels. In order to examine the relationship between these elements, we must analyse their basic legal parts. This I shall now attempt to do. First I shall investigate the static side of the owner's legal position, i.e., the owner's primary right, thereafter the owner's competence and his dynamic protection.

In order to arrange the different elements of the owner's legal position and their mutual relations in a coherent system, we must work with purely legal conceptions. The purity of the method and the unity of the system are inseparable. All ingredients which, from a legal point of view, are alien would disturb the joining together of the different parts of the system. If, for example, the concept "thing" were connected with purely legal ideas, the result would be a mixed conception of which we have an example in the

[3] See Almén, *Om köp och byte av lös egendom*, 3rd ed. by Rudolf Eklund, Stockholm 1934, p. 553.

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conception of a real right as the jural power over a thing.[4] Economic, social, and other similar interests are likewise, from the legal point of view, alien ingredients. The interest which the law can protect is as such independent of the law itself.[5] Such interests can be the reason for issuing legal norms to be complied with, but they are not on the same level as the latter.

2. By legal propositions we understand linguistic expressions which may have either a symbolic function or a social effect.[6] This distinction must be stressed when trying to find out in what sense one may speak of legal imperatives, commands and prohibitions, through which the law tries to influence the behaviour of man. The imperative presents, on the one hand, a prototype model of behaviour, and on the other, a demand. By prescribing that a debtor must pay his debt, or that outsiders must not use an object belonging to someone else, the legislator gives a pattern of behaviour for those who are in the position of a debitor or an outsider, but, at the same time, adds to it an element of demand. This element fulfils a social causal function by having a suggestive effect on the persons in question, and thus on their mode of behaviour.

According to Olivecrona, legal imperatives differ from actual orders in that they do not presume a personal relation between the one who gives the order and the one who receives it. They are thus independent imperatives,[7] or to use the term adopted by Lahtinen, imperatives of long tension.[8] Whereas actual orders are addressed directly to certain persons, legal imperatives generally have an abstract form. They concern all who find themselves in the situation referred to by the pattern of behaviour.[9] The legal imperatives anticipate concrete definitions both as regards the pattern of behaviour and the person. Before the imperative can fulfil its social function, it is necessary in each case to ascertain

[4] See Felix Kaufmann, *Logik und Rechtswissenschaft*, Tübingen 1922, pp. 105 ff. and pp. 118 f.

[5] Thon, *Rechtsnorm und subjectives Recht*, Weimar 1878, pp. 219 f.; Th. Geiger, *Vorstudien zu einer Soziologie des Rechts*, Copenhagen 1947, p. 121. Cf. Lundstedt, *Obligationsbegreppet*, Vol. 1, Uppsala 1929, pp. 87 ff.; Ross, *Towards a Realistic Jurisprudence*, pp. 182 f.

[6] See Olivecrona, *Om lagen och staten*, Lund 1940, pp. 26 ff.; Ahlander, *Är juridiken en vetenskap?*, Uppsala 1950, pp. 101 ff. and pp. 126 ff.

[7] Olivecrona, *op. cit.*, pp. 30 ff. and *Lagens imperativ*, Lund 1942, pp. 5 f.

[8] *Zum Aufbau der rechtlichen Grundlagen*, Helsinki 1951, pp. 23 f. and p. 29.

[9] Olivecrona, *Om lagen och staten*, p. 39.

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who has to behave, and in what way. The concrete definition can be either positive or negative. Where obligations are concerned, a positive definition will be used, and where ownership is concerned a negative one.

The legal proposition often discloses the person whom a certain kind of behaviour will favour, e.g. a creditor, the owner, etc. However, it is not necessary to mention the person who is entitled, as is the case, for example, when you find the notice "No parking" on a private parking space. We may now inquire what significance the indication of the person entitled carries.

The naming of the person entitled may be of importance when specifying the pattern of behaviour. The payment of a certain sum to N is not identical with paying it to M, and the using of an object belonging to N differs in behaviour from the using of an object belonging to M. When trying to find out if this question has any other significance we must separate the primary legal norm from the secondary or sanctional norm. Seen from the angle of the former, the legal position of the person entitled is such that the required behaviour is in his favour. Whereas, seen from the angle of the latter, it is such that the person entitled can, if necessary, initiate a reaction. As an initiative of this kind generally belongs to the person in whose interest the demanded pattern of behaviour is followed, it seems that the person's "right" is founded on the primary norm. As all civil rights, in principle, may be pursued in court, it is generally sufficient to refer to the primary norm in order to show the authority of the person entitled with respect to the secondary norm. In conformity with this, it has been said that the right is contained in the material claim based upon the primary norm. However, according to Nawiasky this way of thinking is not pure from the legal point of view as it also observes social, economic, and other interests. The fact that a person may claim payment from another of the latter's debt, does not as yet, according to the same author, indicate anything about the legal nature of their relations, as the coercive sanction behind the legal obligation belongs to the nature of this obligation. On the other hand, this obligation is independent of whether the other party is entitled or not. If the person entitled is mentioned, it is, from his point of view, of decisive importance to have the competence to set the legal machinery functioning.[1]

It is usually claimed as typical of civil law that the right of one

[1] Nawiasky, *Allgemeine Rechtslehre,* Einsiedeln 1948, pp. 156 ff.

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corresponds to the duty of another. If we analyse this relation closely we shall notice that the term right is used in many different senses. According to the conception just presented it stands for power of initiative.[2] However, it has other meanings apart from this.

According to Bierling the term "right" is used in three different ways: (1) as the right to claim a certain action or inaction from another person *(Anspruch),* (2) as the right to act or not to act oneself *(Dürfen),* and (3) as the right to bring about a certain legal effect by one's own means *(Können).* The same writer identifies right in the first of these senses, i.e. in the sense of claim, with subjective right in the full sense of the word.[3] In this connection we shall pay attention to this alternative only; as the other alternatives will be dealt with later. If our starting point is that the command to a person to do or not to do a certain thing (this command being contained in the legislator's primary legal proposition) constitutes an obligation for this person, and a right to demand the behaviour in question for another person, we have a right in the meaning of a claim.[4] If we subject this material claim to a realistic examination, we will soon find that it is a mirage which disappears when it is approached. The indication of the person in whose favour the pattern of behaviour has been laid down in the primary proposition means that the person favoured has the right to expect this behaviour from another person. What else is the material claim of a creditor, in respect of the payment of the debitor, but a right to obtain payment? If the person entitled cannot initiate coercive means, he has, as Wilhelm Fuchs has remarked,[5] a mere right of expectation, i.e., a right to expect that the other person behaves in a certain way. However, in paying attention to the right of initiative we have touched the relation between right and duty viewed from the angle of the sanctional proposition.

The sanctional legal proposition does not in nature or effect

[2] See also Kelsen, *Reine Rechtslehre,* Wien 1934, pp. 48 f.; Lahtinen, *op. cit.,* pp. 191 ff.

[3] *Juristische Prinzipienlehre,* Vol. 1, Freiburg i.B. und Leipzig 1894, pp. 160 ff.

[4] See Del Vecchio, *Lehrbuch der Rechtsphilosophie,* Basel 1951, pp. 392 f.

[5] *Wege und Irrwege juristischen Denkens,* Berlin 1936, pp. 92 f. Lahtinen (*op. cit.,* pp. 189 ff. and pp. 199 ff.), who has empirically studied this relation, defines right as competence to bring about a judicial reaction. This competence belongs to the person favoured in some way by the behaviour of another. He therefore finds no room for the material claim (*Anspruch*) in the proper sense.

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differ in principle from the primary legal proposition, but it concerns the reaction of the legal machinery, and not the behaviour attitude of a private person as does the primary proposition.[6] The position of the person entitled is different when seen from the standpoint of the sanctional proposition. Above we noted that the right of initiative belongs to the person entitled. However, there are changes on the other side also, as the sanctional proposition does not demand a certain type of behaviour of a private person, but forces him instead to submit to certain sanctional measures. The right of initiative implies competence, ability *(Können)*[7] on the part of the person entitled which does not correspond to necessity *(Sollen)*, but to tolerance *(Dulden-Müssen)* on the other side.[8] This diversity remains clear if instead of "duty" we use "subjection to claim" (as meaning subjection to command or to prohibition) and "subjection to threat of sanction".

The above leads to the question of the real meaning of the saying that the owner's right to use an object corresponds to the outsider's duty not to use it, or—as is often said—not to disturb the owner in the use of his object. Here right means neither claim nor right of initiative. Where, then, is the owner's right to use the object? In searching for an answer to this question we shall start from the scheme of W. N. Hohfeld, the eight concepts of which enable us to present the parts of the legal position of an owner or similar assignee as jural correlatives and jural opposites.[9] The part of the scheme indicating correlations is as follows (symbols supplied by me):

a_1	a_2	a_3	a_4
right	privilege	power	immunity
b_1	b_2	b_3	b_4
duty	no-right	liability	disability

The relations a_1–b_1, a_2–b_2, a_3–b_3, and a_4–b_4 are jural correlatives. The relations a_1–b_2, a_2–b_1, a_3–b_4, and a_4–b_3 again are jural opposites. We notice that the sets of jural correlatives will change into jural opposites if on one side b_1 and b_2, and on the other b_3 and b_4 are interchanged. We also note that the sets a_1–b_1 and a_2–b_2

[6] See Lahtinen, *op. cit.*, pp. 119 and 124.
[7] Thon, *op. cit.*, pp. 218 and 228.
[8] Nawiasky, *op. cit.*, p. 166.
[9] *Fundamental Legal Concepts*, New Haven 1923, pp. 35 ff. Cf. Ross, *Om Ret og Retfærdighed*, Copenhagen 1953, § 34.

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are related to each other but not to the sets a_3–b_3 and a_4–b_4 which, however, stand internally in the same relation as the first-mentioned sets. We may, therefore, divide these sets into two groups. With the aid of the sets of the first group (a_1–b_1 and a_2–b_2) we can symbolize the static side of the owner's legal position. We shall next investigate these sets. The second group of sets (a_3–b_3 and a_4–b_4) will be dealt with later, in connection with the study of the dynamic elements of the owner's legal position.

In the above scheme "right" means the right (of A) to demand (of B) a certain action or a certain inaction, i.e., right equal to claim. The correlative of this is (B's) duty. The owner's privilege (liberty) implies the privilege (of A) to act or not to act. The correlative of this is the no-right (no-claim) (of B), and its opposite is duty. According to this, the owner has, on the one hand, the right to demand that outsiders shall not use his object, and on the other, the privilege or liberty to use it himself.[1]

Above we have examined the fundamental relation between the right of A and the duty of B, the relation a_1–b_1. According to the scheme, a_1 and b_1 are jural correlatives. The analysis of this relation, however, showed us that a_1 represents right of initiative, and that b_1 represents subjection to claim and to threat of sanction. In accordance with this the jural correlatives, right (claim) and duty, form two separate relations. First, "subjection to claim" corresponds to right of expectation; secondly, "subjection to threat of sanction" corresponds to right of initiative. With this as a starting point we shall now study the relation a_2–b_1.

The scheme indicates that this relation is one of jural opposites. A privilege to use an object is, according to Hohfeld, a negation of a duty not to use it.[2] One can also say that a_2 is permissive *(Dürfen)* and b_1 compulsive *(Sollen)*. However, we must consider that it may be permitted to do both (*a*) what is demanded and (*b*) what is not demanded. As compulsory actions are permitted there is no unlimited jural opposition between permissive and compulsive.[3] If, on the other hand, we consider as permissive only what is not demanded, or in other words what is not subject to claim, these concepts are jural opposites.

For this reason, it is not exact to use the concepts compulsive and permissive when presenting the jural opposites b_1 (duty) and a_2 (privilege). It is better to define b_1 as subjection to claim and to

[1] Hohfeld, *op. cit.*, pp. 38 f., cf. p. 60.
[2] Hohfeld, *op. cit.*, p. 39.
[3] W. Fuchs, *Logische Studien*, Vol. 1, Hannover 1920, pp. 4 f.

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threat of sanction, and a_2 as liberty, which here would mean freedom from subjection to claim and to threat of sanction. As far as the use of an object is concerned we can speak about liberty to use. It is often claimed that the correlative of the owner's right to use an object is every outsider's duty not to use it. However, the scheme introduced clearly indicates that this is incorrect. The owner's (A) privilege to use (a_2) is not based upon the fact that outsiders (B) have been forbidden to use (b_1), but upon the fact that the former (A) neither has been forbidden to use nor is subjected to threat of sanction. The liberty to use is founded upon the state of nature, or—using Binding's words—"*Loch im Zentrum eines Normenkreises*".

The fact that a person (A) has a certain kind of liberty to use an object, can be stated in a permissive legal proposition. However, the fact that a certain course of action is allowed to A does not in itself mean that outsiders are forbidden to follow such a course any more than the prohibition for outsiders by itself contains a permission for A.[4] A permissive proposition may, however, render proposition of a claim more exact.[5] When we examine the relation a_1–b_1 we shall find that the definition of the pattern of behaviour is made more exact, and if we study the relation a_2–b_1 we shall notice that this may also be true in regard to the persons concerned. If, for example, behaviour which is generally forbidden is permitted to a group of persons in a certain position, we have a case where the definition of the persons is made more exact.

Above we have tried to clarify what is meant by the often presented statement that duty corresponds with the owner's right and vice versa. In our study we have so far not touched on any legal phenomena belonging to the dynamic sphere. We have noticed that one may speak of the owner's right—in a static state—as meaning two things (a_1 and a_2). We have also examined the relation between these two meanings of right and the duty (b_1) of outsiders.

The owner's primary right, which we employ as meaning exclusive, protected liberty to use, contains the two following abstract elements: liberty to use and static protection. The former means liberty from subjection to claim and from subjection to threat of sanction (a_2). The latter means the owner's right to

[4] W. Fuchs, *op. cit.*, p. 4.

[5] See Del Vecchio, *op. cit.*, p. 397. According to Lahtinen the task of the permissive proposition is to express what kind of behaviour is not demanded (*op. cit.*, p. 33).

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start the reactive machinery (a_1). Static protection, in this sense, is based upon the secondary sanctional norm, and means protection through legal procedure. One can also speak of legal protection in regard to the primary norm, but only in the sense of norm protection. In point of fact a person is granted a certain kind of protection because the law forbids outsiders to use a certain object. However, this kind of protection does not correspond to any single element of the owner's legal position that could be called the owner's "right". When we consider the owner's possibilities of action in a static state we have to note, on the one hand, the liberty to use, and on the other, the right of initiative.

3. The owner's competence, which we shall now examine, means legal ability to transfer an object from one sphere of ownership to another or to change the legal situation in some other similar way. The owner's primary right concerns the use of an object, whereas the owner's competence enables him to produce a legal effect centred on the primary right. In some respects it is appropriate to compare the owner's competence to transfer, pledge, and bequeath property with the owner's "passive competence", i.e., the facts that, at the death of the owner, property is transferred by inheritance and that property, when needed, in cases of distraint or bankruptcy, can be used to satisfy personal creditors.[6] The competence to change the subject of the primary right may belong either to the owner or to some other person. When the competence to decide about a certain right belongs to someone other than the person in whom this right is vested, I use the term *secondary right*. Secondary rights may include rights to obtain the owner's primary right (e.g., right of redemption), to transfer it from the owner to another person (e.g., a pledgee's right to sell a pledge). They may even include a previous owner's right of restitution of his lost primary right (e.g., the right of rescission). The owner's competence and the secondary right of another person are similar in legal nature, as both denote ability to bring about a certain legal effect.

The relation between the owner's competence to transfer and his primary right is evident when we define competence as ability to dispose of the primary right. However, this definition is not sufficiently exact when we consider the integral parts of the

[6] See Fr. Vinding Kruse, *Ejendomsretten*, Vol. 1, 3rd ed., Copenhagen 1951, pp. 136 ff.

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primary right. From what has been said before, it seems clear that the legal position of the holder of the primary right contains both a liberty to use (a_2), and a right to exclude all other persons from this use (a_1). In order to explain the content of this "right", we have to consider the position of the person entitled both from the angle of the primary norm and from that of the secondary norm. When giving a detailed explanation of the relation between the owner's competence and his primary right we must, therefore, study the elements which form the complex of legal phenomena that is termed primary right.

The primary legal proposition of ownership prohibits the use of property belonging to others. A prohibition of this kind can be given, for example, in this form: "The behaviour of outsiders must not affect an object, which belongs to some person, in the ways $a + b + c + \ldots n$ without the permission of this person." The prohibition is given here in the abstract form commonly used in law. The application of this proposition to individual cases must be preceded by a concrete definition both with regard to the person and with regard to the behaviour. When a concrete element, e.g., that A is vested with the title of the object o, is added to the primary norm, the following form is suggested: The behaviour of the outsiders $B + C + D + \ldots N$ may not, without A's permission, be $a_o + b_o + c_o + \ldots n_o$. This indicates the persons concerned, and also the kind of behaviour prohibited. Apart from containing these essential parts of a legal norm proper, the primitive form of the primary norm of ownership specifies the person (A) whom the pattern of behaviour favours, and whose permission excludes the said behaviour from being contrary to the norm.

Both the primary and the secondary norms are ordinary legal norms which concern behaviour. However, the owner's legal position cannot be explained by these alone. Provisions of the law concerning the owner's competence to transfer or otherwise to dispose legally of his property are not norms of behaviour in the same sense as the above-mentioned legal norms proper. In spite of this it has been claimed that all law is based on legal norms, and that all legal norms are imperatives concerning behaviour. This is possible only if we explain that the norms which concern competence to accomplish a legal effect actually depend on legal norms proper. We shall now demonstrate how the relations between norms concerning competence and the legal norms proper can be explained.

When developing the pure imperative theory, Thon claimed

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that his main statement—*"dass alles Recht nur und allein in Imperativen der Rechtsgemeinschaft besteht"*—did not conflict with the fact that the legal system can give a private person the legal power which is *"ein Können rechtlicher Art"*, to dispose of a private right. However, the granting *(Gewährung)* of a power of this kind does not create an independent legal norm and therefore it cannot be placed on the same level as the imperatives of the legal system. The significance of such a grant is that it defines *"die Vorbedingungen für den Eintritt oder das Ende gewisser Imperative"*. The owner's act of conveyance, as well as legal acts belonging to the sphere of private law in general, are exercises of this legal power, and they are the conditions on which the appearance and disappearance of the imperatives depend. Other legal facts, e.g. the owner's death, bear the same significance. According to Thon all legal effects are based on the imperatives of the legal system, from which also the owner's legal position derives. However, these imperatives hang in the air until the question of whom they concern is answered. This answer we will find in the nature of the title of an owner.[7]

Nawiasky's basic idea is that the legal system is a compulsive arrangement on behalf of the state, which means that all law is state law and consists of legal norms concerning behaviour.[8] Apart from these obligating norms there are authorizing *(ermächtigende, befähigende)* norms which are of legal significance only in relation to the former. A dependent norm of this kind contains the presupposition of the legal norm proper, and this feature has led Nawiasky to call it "part-norm" *(Teilrechtsnorm)*. It contains a *Kann*-provision whereas the ordinary norm holds a *Soll*-provision. By a *Kann*-provision of this sort the legislator may, e.g., entitle the owner to transfer his right. The act of transference involves making the abstract legal norm concrete by individually defining the contents of the legal norm. However, in this case it is not alone a question of a technical act of application but of creating a legal norm, since according to Nawiasky all legal acts, from legislation to individual legal performances, are creative, and give rise to legal norms.[9]

In my description of the relationship between the owner's competence to transfer and the primary norm, I shall take the ideas of Thon and Nawiasky as a starting-point, and consequently con-

[7] Thon, *op. cit.*, pp. 338 f. and 345 ff.
[8] Nawiasky, *op. cit.*, pp. 8 ff., cf. p. 213.
[9] *Op. cit.*, pp. 45 ff., pp. 105 ff. and 120 ff.

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sider legal provisions which authorize alterations in the imperative system as not being legal norms in the proper sense of the word. The behaviour imperatives emerge or disappear only in the circumstances described in these provisions. They contain the presupposition of the legal norm proper, and in this way they fulfil their supporting function in relation to the latter norms. Consequently, this relation can be described as follows: The owner is qualified to give concrete form to abstract imperatives of the law and thus to bring about changes in the imperative system. In cases of occupation and dereliction it is likewise a question of the ability of a private person to change the imperative system. If a person (A) occupies an object (*o*), the outsiders B + C + D + . . . N are obliged to follow the behaviour pattern $a_o + b_o + c_o + \ldots n_o$. When A, basing his action on a legal provision, has disposed of the object in favour of B, the behaviour prohibition will accordingly concern the persons A + C + D + . . . N. However, if B derelicts the object, these persons will be freed from their obligation. During the above-mentioned series of events the abstract norm of the law remains unaltered, but its concrete contents have changed. These changes are expressions of the competence to create individual legal norms which is granted to private persons. In spite of the fact that private persons may participate in the making of norms, the imperatives which prohibit outsiders from affecting objects belonging to others are imperatives of the law.

If an outsider does not comply with the legal behaviour demand in its concrete form, the person entitled has the power to make the legal machinery react. This power is based on the behaviour demand contained in the secondary norm concerning the authorities. The secondary norm is directly attached to the primary norm. In consequence, the giving of concrete form to the primary norm also influences the secondary norm. Thus a reaction will follow if one of the outsiders B + C + D + . . . N, say B, behaves in spite of the prohibition in, for instance, the fashion a_o, and A uses his power of initiative. When the norm has been given concrete form, the outsiders B + C + D + . . . N will, from the point of view of the primary norm, be subjected to claim, and, from the point of view of the secondary norm, subjected to threat of sanction.

In explaining the relations between the owner's competence and the primary right, we must also pay attention to the owner's liberty to use, i.e., liberty from subjection to claim and from subjection to threat of sanction. As we have seen, the liberty to use implies a natural state (where we have not to presuppose legal

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norms), and is based on the fact that the owner has not been forbidden to behave in a certain way. This kind of liberty to use cannot be the immediate object of a legal disposition. The transfer of ownership from A to B will, however, alter the imperative system and result in A's being subjected to claim, and simultaneously losing his liberty to use the object. A disposition which directly concerns the primary norm will thus indirectly cause loss of the liberty to use. The fact that liberty to use cannot be the immediate object of a disposing act is evident in the case of dereliction. When A disowns the object the imperative system changes in so far as B+C+D+...N are freed from subjection to claim and from subjection to threat of sanction, which means that A cannot by legal means stop outsiders from affecting the object. However, A is free to use it until an outsider, say B, by occupation gets a legal title to the object. B's act then subjects A, as well as other outsiders, to claim, and puts an end to A's liberty to use.[1]

The legal nature of the owner's competence to transfer is legal ability *(rechtliches Können)* to accomplish legal effects.[2] It is a question of the same competence even when it belongs to a person other than the one in whom the right is vested. However, in that case it constitutes an independent legal position which we call secondary right.[3] If we set out with the idea that law consists of norms, it follows that legal effects will be founded on changes which have taken place in the system of norms. This competence to bring about such changes is legal ability.[4] Capacity to contract is also legal ability, but owing to its abstract nature it differs from the owner's competence, which presumes a concrete relation to a certain primary norm. When the legislator gives abstract imperatives, and when a private person, by using his competence, creates imperatives concerning individual objects, this same competence is involved.

The competence provisions are not independent, and do not contain a behaviour demand, as do the legal norms proper. The fact that an owner has the competence to transfer does not by itself mean that outsiders are subjected to claim. However, the use of

[1] See Hohfeld, *op. cit.*, p. 50 and p. 60 footnote 90.

[2] See Ross, *op. cit.*, p. 187; Nawiasky, *op. cit.*, p. 115, cf. pp. 106 f.; Burckhardt, *Methode und System des Rechts*, Zürich 1936, pp. 132, 155 ff. and 179 ff.

[3] See Tuhr, *Allgemeiner Teil des Bürgerlichen Rechts*, Vol. 1, Leipzig 1910, pp. 159 ff. The so-called "Gestaltungsrechte" belong to the group of secondary rights, and are, according to Zitelmann, "Rechte des rechtlichen Könnens" (*Internationales Privatrecht*, Vol. 2, Leipzig 1912, p. 32).

[4] Thon, *op. cit.*, pp. 345 ff.

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the competence will result in subjection to claim. Competence means ability to cause a change in the system of norms, and the use of it will subject outsiders to the demand of the law, which in general also means that they will be subjected to a reaction of a judicial body unless they behave at the instance of the law. From the viewpoint of the outsider the fact that someone possesses this kind of competence indicates dependence (liability).[5] A competent person can subject an outsider—without his assistance and even against his will—to the behaviour demand of the law, and regularly subject him simultaneously also to threat of sanction.

So far we have illustrated the static side of those correlations of the owner's legal position which are meant when we say that the owner's right corresponds to the outsider's duty. We may now approach the problem from the side of the owner's competence, and will notice that this statement means the correlation of ability (competence) and dependence. It is just as erroneous to call competence "right" as it is to express dependence by the word "duty". Dependence in this sense differs essentially from duty (subjection to claim) based on the primary norm. It would be more satisfactory to compare it with subjection to threat of sanction which is a correlation of the owner's power of initiative, and is based on the secondary norm. By using his power of initiative the owner can subject an outsider who has not met the behaviour demand to the reaction of the legal machinery. The power of initiative is ability to start the protective machinery of the law, and its nature is legal ability, as is also the owner's competence.[6] Subjection to threat of sanction again is dependence, in a certain sense.

4. Above we have examined the owner's ability (competence) and its relation to his primary right. In order to get a complete picture of this element of the owner's legal position we must further study

[5] Thon distinguishes between main and secondary rights—and compares the owner's right to transfer with the latter—explaining that main right, on the part of one or several others, corresponds to duty to act or not to act, and the secondary right to dependence *(Bindung)*. This distinction becomes apparent in the fact that violation of dependence is excluded (*op. cit.*, Vol. 1, pp. 169 f., cf. pp. 62 and 160). In Hohfeld's scheme the correlation of "power" is "liability" (*op. cit.* pp. 50 ff.).

Fuchs has evolved the following scheme, presenting the principal forms of legal relations in the following manner: *Recht = Dürfen, Pflicht = Sollen, Fähigkeit = Können, Last = Müssen (d. h. Unterworfensein, Dulden-Müssen)*. According to this, competence corresponds to *"Last, d. h. Passivfähigkeit"* on the passive side (*Wege und Irrwege des juristischen Denkens,* pp. 102 and 105, cf. p. 80).

[6] Nawiasky, *op. cit.*, p. 161.

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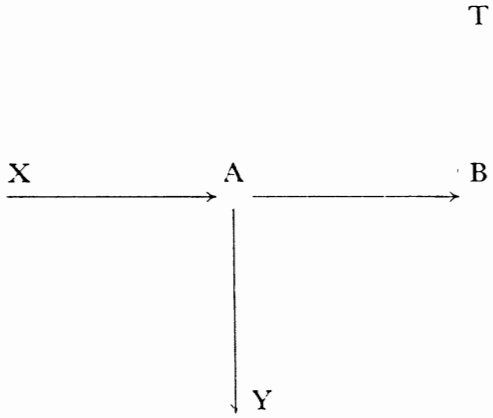
the relation between it and the dynamic protection. We shall base this study on the following sets in Hohfeld's scheme: Power–liability (a_3–b_3) and immunity–disability (a_4–b_4), which we disregarded in our examination of the static side of the owner's legal position.

The concept a_3, which in the scheme is described as "power", will here be used as meaning both the owner's competence in its various forms, and secondary right in the sense already used. The correlation of this, the concept b_3, which is described as "liability", means dependence in the sense we have given to this term.

With the aid of set a_3–b_3 we can illustrate the various forms of the owner's competence. Using the sets a_1–b_1 and a_2–b_2 we have above portrayed the central element in the owner's legal position, his primary right.

The third element of the owner's legal position, dynamic protection, still remains unexamined. Can this element be explained with the aid of set a_4–b_4? The first part of this set, a_4 (immunity), signifies freedom from dependence, which is the opposite of the concept b_3. The second part of the set, b_4 (disability), again means incompetence (respectively: not secondary right). Before we answer this question we have to examine cases in which dynamic protection appears. This examination will be simplified by the following diagram.



In a purchase between A and B, the legal position of the purchaser, B, can be examined in several different relations. We will distinguish two different kinds of legal protection. B may have the right to demand delivery from A (a personal right). When generic goods have been sold, he has this personal right only. If the sale concerns specific goods, B normally receives a right which is protected against all outsiders (T) (a real right). In the former case B is protected against a certain person, A, and in the latter case

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against all outsiders, T, as well. In both cases it is a question of ordinary, or static protection. As far as this form of protection is concerned we can maintain the old division into relative and absolute protection, on which the distinction between personal right and real right is based in the main.

This division of static protection does not, however, explain all occurring questions of legal protection. In claiming this we refer especially to the problems which are born of collisions of rights. Transfer of ownership gives rise to collisions *inter partes* (A–B) and collisions in certain side relations (X–B and Y–B).

If an act of transfer is faulty and therefore invalid towards the vendor A, but valid towards third parties, there will be a collision in the relation A–B. This collision can be solved immediately or after a certain period. An example of the latter case will be found in sec. 20 of the Finnish Act of February 28, 1930, on the recording of titles and the time for entering protests against titles of real property, according to which the vendor must enter his protest against a formally faulty conveyance of real property within one year from the time when the conveyance was registered and when the vendor's possession as owner ended. During this period the right of the vendor A collides with the right of the purchaser B. They both have a certain kind of "right". The purchaser B, who holds possession of the real property by virtue of his recorded title, enjoys the owner's static protection against outsiders (T). The vendor A, on his part, has the right to protest. By making use of this right, he may be able to have B's title declared void. This can also be expressed by saying that during this state of collision, B has the owner's primary right and A a secondary right, which is his right to protest. B is the owner in respect of outsiders (T), but his legal position is encumbered by A's secondary right to protest. A's secondary right corresponds to B's dependence (the relation a_3–b_3). If A does not enter a protest within the specified year, B will be freed from this dependence (the relation a_4–b_4), which means that B will enjoy dynamic protection against A. The relation A–B can be presented by the set a_3–b_3 during the state of collision, and by set b_4–a_4 when the collision has been settled in B's favour. In this case B's dynamic protection means liberation from dependence (a_4).

When the act of transfer is valid as far as general conditions are concerned, a deficiency in the vendor's competence may cause invalidity in respect of a tertius (X or Y) in a certain position. In the relation X–B the deficient competence of the vendor, A,

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is due to A's complete lack of title, or to A having a somehow invalid title, or to A, for other reasons, *not having obtained* power to dispose. In the relation Y–B this deficiency is due to A having disposed earlier of his competence in favour of Y, or his having *lost* it for other reasons.

As an example of the relation X–B we shall take a case where A has sold real property to B without having obtained a valid title from X, and is therefore not competent to dispose of it. B's title is encumbered by a gap in his competence which renders it invalid with respect to X. According to sec. 21, subsec. 1, of the above-mentioned act, the *bona fide* purchaser B can obtain (dynamic) protection against X when ten years have elapsed from the day on which the title was recorded and X lost his possession as owner. During this time B, who on the merit of his title has possession of the property, is protected against his contracting party (A) as well as against third parties (T). However, X has a secondary right to protest (a_3) which results in a certain kind of dependence on B's side (b_3). B will be freed from this dependence when X, at the end of the given term, loses his right to protest. In this case also the settling of the collision in B's favour means his liberation from dependence (a_4).

A collision between Y and B can be exemplified by a double transfer. If A first sells property to Y, and then the same property to B, there will be a fault of competence in B's title. In this case, as in collisions of rights to individually specified objects in general, the time priority rule will be applied. The primus, Y, is given preference to the secundus. On certain conditions exceptions to this rule can be made in favour of the secundus.[7] If the primus does not have his title recorded, the collision of rights, according to sec. 21, subsec. 2, of the above-mentioned act, may end in favour of the secundus provided that he (B) is *bona fide,* and one year elapses from the time of recording the secundus' title and his taking possession as owner. In this case, as in the earlier example, the purchaser B is in a position of dependence (b_3) during the collision. This dependence is caused by the primus' secondary right of rescission (a_3). By using this right he may nullify B's title. At the end of the prescribed term B will obtain dynamic protection, which means liberation from the dependence (a_4).

During the state of collision both parties have a certain kind of

[7] See Ross, *Ejendomsret og Ejendomsovergang*, pp. 73 f. and pp. 348 ff.

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"right".[8] The dynamic protection that appears in connection with collisions is conditioned by this relation between the parties involved. One may therefore speak of dynamic protection in connection with both the colliding rights. In the case of the double sale, for example, we may speak of dynamic protection not only for B but also for Y. The latter is a case of the purchaser's (Y) protection against the vendor's (A) successor (B). The purchaser's protection against the creditors of the vendor is comparable with this. Does the purchaser's (Y) protection in these two cases mean liberation from dependence, as did B's dynamic protection in the above cases?

If we examine the legal position of the primus, in the case of the double sale, in the light of the provisions of sec. 21, subsec. 2, of the above-mentioned act, we shall notice that during the state of collision the legal position of the primus is encumbered by the secundus' power to nullify it. The position of the secundus is such that the title of the primus, on the conditions stated in the above passage of the law referred to, will be null and void, and the secundus will be invested with the right. His legal position can be described as ability to bring about certain legal effects independently of the will of the opposite party. Though these legal effects are founded on the recording, the possession, and the passing of the certain period, and not on the second purchaser's volition, this ability may be described as a secondary right in the sense already used here. This right of the secundus (a_3) corresponds to the dependence of the primus (b_3). The primus will become independent, i.e., he will have dynamic protection against the secundus, if he records his title in time. In this way the primus' obtaining of dynamic protection can also be explained as liberation from dependence (a_4).

When looking at a purchaser's (Y) dynamic protection against the creditors of the vendor (A), we must separate mortgage, distraint, and bankruptcy. A purchaser of real property is, according to Finnish law, protected against creditors in the vendor's bankruptcy by the sales agreement, but against new mortgages and distraint only by requesting recording. Before the request has been made the purchaser's legal position is encumbered by

[8] Ross, who has done pioneer work by clearly distinguishing static and dynamic protection, assumes that dynamic protection appears in clashings of rights. However, simultaneously he states that we may speak of clashing of rights only after isolated consideration. (*Towards a Realistic Jurisprudence*, pp. 207 f.). When we consider a case in which the intermediate state lasts for a certain period, say ten years, we can in truth say that two "rights" collide for this time.

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the possibility of the creditors of the vendor obtaining a mortgage on the property, or distraining on it and having it realized. The purchaser will be freed from this kind of dependence only by having his title recorded in time. A purchaser of movables, again, is protected against distraint and bankruptcy by the sales agreement. However, in order to be protected against a *bona fide* pledge the purchaser must have possession. In other words, the purchaser is free from dependence (a_4), in the first case from the moment the agreement is made, and in the latter case from the time he obtains possession.

Transfer of ownership may cause many different kinds of collisions of rights. Above we have examined some of them. Our study seems to indicate that dynamic protection in connection with these collisions can be explained with the aid of the correlations a_3–b_3 and a_4–b_4. However, without an examination of each different type of collision this statement cannot be generalized so as to apply to all cases of this kind. An examination of all these would cover a part of the wide collision problem which reaches into various parts of the legal field, but it falls outside the theme of this analysis.

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