The rationale of publicity in the law of corporeal movables and claims

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3 Possession and Corporeal Movables

It has been indicated above that possession is often considered to be a method of publicity for corporeal movables. Before the advent of registers, possession was the most important tool of publicity for corporeal things, whether movable or immovable. Nowadays, the effect of publicity of possession is generally confined to the field of corporeal movables. For publicity of immovable property, it is registration that plays the principal role. This chapter examines the rationale of possession as a form of publicity in the field of corporeal movables. The discussion includes a comparative study that involves English law, German law, and Dutch law. For an easier understanding of the study, we also refer to Roman law and the DCFR.

This chapter consists of five sections. The first section presents and clarifies the differences between the selected jurisdictions in the way each jurisdiction defines the concept of possession (see 3.1). It will be found that possession is a concept intended to serve multiple purposes, one of which is publicity. This implies that we cannot fully construe this concept by only focusing on the aspect of publicity. In fact, as we will see, publicity is not a significant concern for legislators in determining how to define the concept of possession. The second section discusses the publicity effect of possession in a general way (see 3.2). In this section, direct possession is argued to be an "abstract" method of publicity, and indirect possession has no publicity effect. By the term "abstract", we mean that direct possession can only indicate that the possessor has a right to the possessed object. To know the detailed content of this right, third parties need to resort to other means. The reason why direct possession is an abstract means of publicity is that it can be associated with a great variety of rights, such as ownership, the right of usufruct, pledge, and lease.

On the basis of this conclusion, the last three sections provide a further discussion about the publicity effect of possession in three different cases: illegal interference (see 3.3), subsequent acquisition (see 3.4), and insolvency (see 3.5). In these sections, we explore the importance of possession for the three types of third parties, namely strange interferers, subsequent acquirers, and unsecured creditors. There, we can find that possession is an important means of publicity for strange interferers, while it fails to convey sufficient proprietary information to subsequent acquirers and to general creditors. Therefore, it can be said that the principle of publicity is no longer tenable by virtue of possession. In general, property rights of corporeal movables are hidden, and the asymmetry of proprietary information is ubiquitous in the field of corporeal movables.

3.1 The Concept of Possession

Possession is a complicated concept.[1] It is used by laymen as well as by lawyers. The two groups of individuals often have different understandings of the concept. Laymen often use the concept to describe factual control by a person over a tangible thing. In their view, possession means a kind of factual control. However, the concept has its special meaning in law, especially in property law. For example, a driver employed by a company might be deemed by laymen as the "possessor" of this company's motor vehicle, but the driver is merely a "possession servant (*Besitzdiener* in German law or *houder* in Dutch law)" in property law.

The above discrepancy can be explained once we realize that law regulates social life in a technical way by virtue of legal concepts. In brief, legal concepts have a function of connecting legislative purposes with social life. When legislators intend certain purposes to be realized, they usually define and use legal concepts in a technical way and attach certain legal consequences to these concepts. In this sense, every legal concept is associated with certain purposes and has its own scope of application: it covers a range of similar facts and links these facts to certain legal consequences.

> *„Damit wird der Zweck und der große Nutzen einer derartigen Begriffsbildung deutlich. Das Gesetz hat diese Aufgabe, eine sehr große Vielzahl mannigfach unterschiedener, in sich höchst komplexer Lebensvorgänge in übersehbarer Weise aufzugliedern, sie durch leicht erkennbare Merkmale zu kennzeichnen und so zu ordnen, dass, soweit sie im Hinblick auf das, was ihre rechtliche Bedeutung ausmacht, ‚gleich' sind, gleiche Rechtsfolgen an sie anknüpft werden können. Um diese Aufgabe zu bewältigen, scheint es der nächstliegende Weg zu sein, Tatbestände aus abstrakten Begriffen zu bilden, unter die alle Lebensvorgange, die Merkmale des Begriffs aufweisen, mühelos subsumiert werden können."*[2]

As will be seen below, the concept of possession is used in different situations and defined to serve multiple purposes. Moreover, different legislators do not always have the same attitude towards these purposes, which further leads them to define the concept in different ways.

In this section, we first provide a brief introduction to the definition of possession in history, under Roman law, Germanic law, and Common law. This helps us to understand how the concept of possession is defined under modern law. As we will see later, the way in which possession is defined is

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1 Salmond 1947, p. 287.

2 Larenz 1991, p. 441. English translation: "*Therefore, the purpose and great value of such formation of concepts are clear. Law has the task to categorize a large number of completely different and highly complicated social facts, identifying them with easily recognizable features, so that identical legal consequences are linked to the facts that have an 'identical' meaning in law. In order to accomplish this task, the most convenient way seems to be using the abstract concept to describe elements and subsuming social facts under the concept, provided that these facts contain the elements of the concept.*"

significantly affected by its history (see 3.1.1.4). The following introduction focuses on *possessio* in Roman law, *Gewere* in Germanic law, and *seisin* in the history of common law.

As we will see, the concept of possession differs significantly between English law, German law and Dutch law. For easier understanding of the analysis of this concept, we introduce the relevant DCFR terminologies as a baseline. The DCFR is an achievement of a comparative study of more than 20 European jurisdictions, including the three jurisdictions selected in this research. It forms a blueprint of the European civil code. The DCFR terms concerning possession are an outcome of the coordination and integration of different concepts used by different jurisdictions. These terms include owner possessor, limited-right possessor, and possession agent. These DCFR terms will be selected as a reference for the conceptual discussion below.

After introducing the history of the concept of possession and the DCFR terms, a comparison of the three jurisdictions selected (English law, German law, and Dutch law) is offered. It will be concluded that different jurisdictions define the concept in different ways because they have different legislative purposes.

3.1.1 An Introduction to the History of the Concept of Possession

3.1.1.1 Roman Law

In Roman law, *possessio* was used to represent the factual situation where a person was in control of an object, forming a distinction from ownership (*dominium*).[3] The distinction is a remarkable feature of Roman law. Possession was regarded as factual control over things, while ownership the "*ultimate entitlement*" to things.[4] The distinction allowed a thief to have possession of the thing stolen "*no less than its owner in actual control*", despite the lack of a lawful basis.[5] It is noteworthy here that there were multiple connections between possession and ownership in Roman law.[6]

In the beginning, possession was only applicable to corporeal things (*res corporales*), and possession of rights was impossible.[7] Due to this requirement, property rights could not be an object of possession. The possessory interdict – the standard remedy of possession under Roman law – was not available for the holder of property rights of use. This type of holder

3 Du Plessis 2015, p. 176; Prichard 1961, p. 164.
4 Du Plessis 2015, p. 176.
5 Thomas 1976, p. 138.
6 In sum, there are three connections: (1) *usucapio*, where the possessor could acquire ownership after a sufficiently long period of possession; (2) *occupatio* and *traditio*, where ownership was acquired by occupation and delivery respectively; and (3) *vindicatio*, where the burden of proof was on the side of the person who had no possession in the case of a dispute of ownership. See Thomas 1976, p. 138.
7 Prichard 1961, p. 164; Du Plessis 2015, p. 177.

was not recognized as a possessor by Roman law. In the late Roman law, a special possessory interdict (*quem usum fructum*) was granted to some users (such as *emphyteuta* and *superficiarius*), and they were treated as having quasi-possession (*quasi-possessio*).[8] It is quasi-possession rather than possession because the object involved is property rights of use.

In addition to the object of possession, another issue concerns the composition of possession. According to Roman lawyer Paul, acquisition of possession required both factual control (*corpus*) and mental intention (*animus*).[9] In brief, the element of *corpus* referred to factual control of the object. In answering whether there was factual control, the nature of the object, the circumstance and common sense should be taken into account.[10] About the element of *corpus*, a more precise guideline is either impossible or useless because of various exceptions.[11] The possessor did not have to exercise factual control in person under Roman law, and the possessor could allow another person to control the object on the former's behalf.[12]

As to the content of the *animus,* fierce debates exist in theory. Some scholars, such as Von Savigny, held that *animus* referred to the intention of holding the thing as one's own (*animus domini*), while others, such as Von Jhering, contested this perception and argued that *animus* merely meant the consciousness of controlling an object (*animus possidendi*).[13] Here we seek to outline the image of *animus* under Roman law, not focusing on the theoretical debate.

According to the criterion of protection, there are different situations where possession is related: (1) persons who were in control as an owner or as if they were an owner, such as in the situation of rightful ownership, theft, and *usucapio*; these persons had *animus domini* and enjoyed possessory protection; (2) persons who were termed as derivative possessors, such as the pledgee in the case of *pignus* and the depositary (*sequester*) in the case of deposition (*depositum*); these persons had no *animus domini* but enjoyed possessory protection; and (3) persons who merely had detention (*detentio*) or natural possession (*possessio naturalis*), such as the borrower, hirer, and lessee; these persons had no *animus domini* and enjoyed no possessory protection.[14] Fourthly, the holder of proprietary rights of use had *quasi*-possession and was entitled to a special possessory interdict.[15]

In relation to the four situations above, six legal terms are used: possession (*possessio*), possession with the possessory interdict (*possessio ad interdicta*), civil possession (*possessio civilis*), possession with the prescriptive acquisition (*possessio ad usucapionem*), quasi-possession (*quasi-possessio*), and

8 Thomas 1976, p. 147; Prichard 1961, p. 169.
9 Digesta 41.2.3.1, cited from Du Plessis 2015, p. 177.
10 Du Plessis 2015, p. 177; Prichard 1961, p. 165; Buckland 1950, p. 199.
11 Du Plessis 2015, p. 178; Prichard 1961, p. 165.
12 Du Plessis 2015, p. 178; Prichard 1961, p. 172.
13 Du Plessis 2015, p. 178; Prichard 1961, p. 171-172.
14 Du Plessis 2015, p. 179.
15 Thomas 1976, p. 147; Du Plessis 2015, p. 180; Prichard 1961, p. 169.

detention or natural possession (*detentio* or *possessio naturalis*).[16] The relationship between these six terms is of great importance for understanding the concept of possession in Roman law. The following discussion clarifies this relationship.

Firstly, *possessio ad interdicta* refers to possession to which possessory interdict is granted for protecting the possessor and is often deemed as an equivalent term of *possessio*.[17] Roman law experts often choose possessory interdict as the criterion in ascertaining whether a person is a possessor under Roman law. In general, the following people were entitled to possessory interdict in Roman law: legal owners, thieves, pledgees, *depositum sequester*, and persons in *usucapio*.

Secondly, *possessio civilis* represents a form of possession that can give rise to acquisition of ownership through *usucapio.* Thus, it is also often called *possessio ad usucapionem*, at least in the post-classical period.[18] However, it should be noted that sometimes *possessio civilis* is used by some scholars as an equivalent term of *possessio*.[19] In Roman law, it embodied two basic elements: a justified cause for possession (*iusta causa possessionis*) and *animus domini*.[20] The cause could be sales, donation and the like.[21] It often existed where *res mancipi* were transferred under *traditio*.[22] In this way, the possessor could acquire ownership after the passage of a sufficiently long period. *Possessio civilis* was a type of *possessio* because possessory interdict was available.[23] However, not every *possessio* had the "ownership-elevating effect". Though some possessors enjoyed possessory protection, they lacked a justified cause or *animus domini*. For example, both pledgees and depositors had no *animus domini*, and they could not claim *usucaptio*;[24] thieves did not have a justified cause, thus they could not acquire ownership through *usscaptio*.[25] In a word, *possessio* (*possessio ad interdicta*) was a broader concept than *possessio civilis* (*possessio ad usucapionem*).[26]

Thirdly, *possessio naturalis* or *detentio* was a contrast to *possessio civilis*, which implied that the former could not lead to the consequence of acquiring ownership.[27] Moreover, p*ossessio naturalis* was not *possessio* (*possessio*

16 Van Zyl 1983, p. 173-174; Mousourakis 2012, p. 158-159; Thomas 1976, p. 147.
17 Mousourakis 2012, p. 158; Buckland 1950, p. 197.
18 Mousourakis 2012, p. 158; Buckland 1950, p. 197; Prichard 1961, p. 168.
19 Lee 1956, p. 179; Buckland 1950, p. 197.
20 Mousourakis 2012, p. 158; Van Zyl 1983, p. 173; Prichard 1961, p. 201-206.
21 It is noteworthy that thieves did not have *possessio civilis* in Roman law. This is because they had no justified cause for factual control and could not acquire ownership on the basis of *usucapio*. However, thieves had possession as the possessory interdict was available for them. See Mousourakis 2012, p. 135.
22 Mousourakis 2012, p. 158.
23 Mousourakis 2012, p. 158.
24 Prichard 1961, p. 201.
25 Mousourakis 2012, p. 135.
26 It is worthwhile reiterating that scholars occasionally use *possessio civilis* in a broader way and equate this concept with *possessio*. See Lee 1956, p. 179; Buckland 1950, p. 197.
27 Prichard 1961, p. 201.

ad interdicta), because the possessory interdict was not granted.[28] Fourthly, *quasi possessio* was not *possessio* because the object involved was incorporeal. As just pointed out, possession could not exist on an intangible object in Roman law. Property rights were an intangible right for which possession was impossible. However, a special possessory interdict was granted to some users, giving rise to *quasi-possessio*.[29] In general, the relationship can be presented using the diagram below:

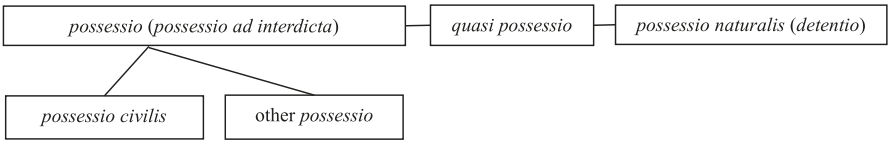

Figure 1

3.1.1.2 Ancient Germanic Law

In ancient Germanic law, possession was called *Gewere*, literally referring to "clothing (*Einkleidung*)". This concept is considered as the core of medieval property law. It indicated "*the endeavor to give a tangible embodiment to legal relations that actually exist in the human mind*".[30] Thus, it can be said that the idea of publicity was already entrenched in medieval property law. In relation to this concept, we should note that ancient Germanic law, unlike Roman law, did not distinguish between possession and ownership.[31]

The concept of *Gewere* was used with differences between movable property and immovable property. For example, possession of movable property required actual control, while possession of land could be direct (physical) and indirect (ideal).[32] In this aspect, Germanic law was different from Roman law, but resembled ancient common law. Roman law had a unitary concept of possession which could be applied to both movable and immovable property. Like Germanic law, ancient common law also recognized a distinction between direct possession and indirect possession of land, but denied the possibility of indirect possession of movable property.[33] Since this research does not concern immovable property, the subsequent discussion will focus on possession of movable property only.

As just mentioned, possession of movable property was only possible when there was actual control under Germanic law.[34] Unlike land, movable property could not be possessed in an indirect way. For example, an owner of a movable thing would lose his possessory position after granting a right

28 Mousourakis 2012, p. 159; Van Zyl 1983, p. 174.
29 Thomas 1976, p. 147.
30 Hübner 1918, p. 184.
31 Emerich 2017, 173.
32 Hübner 1918, p. 404.
33 Pollock and Maitland 1968, p. 38, 152.
34 Hübner 1918, p. 404.

of lease, and it was the lessee who had possession of the movable thing only. Even in the situation where a lawful possessor lost actual control of the movable thing against his will, he no longer had possession.[35] In the Germanic law of movable property, possession was necessarily "*bound up with the corporeal element*".[36] Multiple layers of possession could not be created on movable property because only one person was able to have actual control.

The notion of publicity and the way of defining *Gewere* were in line with two rules of Germanic law. The first rule is that transfer of movable property required the shift of actual control.[37] Property rights had to be manifested in the form of possession, and transfer of property rights had to be shown to outsiders via delivery. The second rule is known as "hand protects hand (*Hand wahre Hand*)", also a fundamental rule regulating the transfer of movable property in Germanic law.[38] According to this rule, where a conflict took place between the former possessor and the present possessor as a third party, the former possessor was not entitled to restore the thing in question from the latter.

> "*But whoever abandoned possession of a movable renounced the right which found visible expression in his seisin, without which its 'publicital' quality was ineffective; and therefore, also, the power to enforce his right against third persons.*"[39]

Under Germanic law, if an original possessor lost possession, whether voluntarily or not, he would only enjoy a claim against the person with whom he had a direct legal relationship. In other words, the original owner's claim did not bind third parties, thereby being personal in nature. For example, A leased a thing to B, and the latter sold it to C, or D stole it from B; in this situation, A could only proceed against B, because the relationship of lease only existed between them; A enjoyed no right against C or D.[40] Over time, this harsh rule was restricted in some situations, and legal protection for former possessors had some third-party effect.[41]

In the end, it is worthwhile mentioning that Germanic law recognized, in a general way, the possibility of "possession of rights (*Rechtsgewere*)", including claims and rights on immovable and movable property.[42] In the medieval period, there was a tendency to assimilate legal rights to things. For example, property rights to land was also a thing, an incorporeal thing,

35 Planitz 1936, p. 124.
36 Hübner 1918, p. 405.
37 Hübner 1918, p. 405.
38 It is often held that the modern rule of *bona fide* acquisition of corporeal movable things finds its historical root from this Germanic law rule. See Wieling 2006, p. 367.
39 Hübner 1918, p. 409.
40 Hübner 1918, p. 408-409.
41 Hübner 1918, p. 416-417.
42 Hübner 1918, p. 209.

under medieval law.[43] As a result, possession of rights was generally recognized, which formed a contrast to Roman law: the latter only permitted quasi-possession of rights in exceptional situations.[44]

3.1.1.3 Ancient Common Law

In understanding the concept of possession in ancient common law, it is inevitable to take into account *seisin*. This term was once used in the situation of land and that of movable property, but it was only used in the law of land later.[45] Literally, *seisin* means "*to seize*" and "*to sit*", implying the existence of factual control.[46] As has been mentioned, like Germanic law, ancient common law also recognized a distinction between possession of land and possession of movable property. For simplicity, attention will only be given to the ancient English law of movable property here.

Different from possession (*seisin*) of land, possession of movable property could not be hierarchic under ancient English law.[47] In the medieval age, indirect possession was not known in the law of movable property. Only the person who had actual control of movable property enjoyed possession of that property. Where a movable thing was illegally dispossessed, the former possessor would lose possession because he no longer had any actual control. If a movable thing was bailed by the bailor to the bailee on a legal basis such as lease and pledge, the former would lose possession.

> "*In the case of goods we can hardly have any similar phenomenon, and if, as we may be apt to do, we attribute possession to the bailee, we shall have to refuse it to the bailor*."[48]

As only the bailee had possession in the relationship of bailment, the bailor enjoyed no possessory protection in the history of common law.[49] If the movable thing bailed was unlawfully dispossessed from or sold by the bailee, the bailor was not entitled to sue the third party on the basis of larceny or trespass. The problem of such absence of legal protection for the bailor was partially addressed by the absolute liability borne by the bailee to the bailor.[50] In this sense, the bailor's legal position could be seen as personal.

> "*That the bailor has no action against any person other than his bailee, no action against one who takes the thing from his bailee, no action against one to whom the bailee has sold or bailed the thing*."[51]

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43 Hübner 1918, p. 161.
44 Hübner 1918, p. 209.
45 Pollock and Maitland 1968, p. 34.
46 Pollock and Maitland 1968, p. 34.
47 Pollock and Maitland 1968, p. 38, 152.
48 Pollock and Maitland 1968, p. 152.
49 Pollock and Maitland 1968, p. 156; Holdsworth 1935, p. 337.
50 Pollock and Maitland 1968, p. 170; Holdsworth 1935, p. 337.
51 Pollock and Maitland 1968, p. 172.

This limitation over the bailor's legal position reminds us of the Germanic law rule of "hand protects hand". According to this rule, the former possessor cannot proceed against third parties, regardless of the way they obtain possession. This has been shown above.

In medieval English law, giving up possession was necessary for the transfer of movable things.[52] In the 13th century, constructive delivery was not recognized, which means that the transferor had to give up actual control of the object involved.[53] This conclusion is in line with the fact that possession of movable property could not be indirect at that time.

In general, it is difficult to conceive of the possession of incorporeal things in ancient English law, due to the impossibility of actual control of them.[54] However, the conception of possession was extended to some incorporeal things in several situations for certain purposes, such as protecting or transferring incorporeal things.[55]

3.1.1.4 A Clue from the History

A clue can be found from the introduction of the history above. This clue is that the concept of possession mainly involves two questions: how to protect the possessor and how to dispose of corporeal movables. For example, Roman law took two functions into account to construct a concept of possession: the protection of possessors through the *interdicta* and the acquisition of ownership through *usucaptio*.

Firstly, possession is closely associated with protection issues: the possessory interdict was generally taken as the sole criterion of *possessio*. However, it is not difficult to find that Roman law was not fully consistent in this aspect. Some persons who had a limited right were recognized as a possessor, while others who had a right of the same nature did not have possession. For example, the lessee was not recognized as a possessor and enjoyed no possessory protection, the usufructuary was entitled to a special possessory interdict and recognized as a quasi-possessor, but the pledgee was a normal possessor who enjoyed possessory protection.

Secondly, it should be noted that ownership was involved in defining the concept of *possessio* in Roman law, in the sense that a particular term, namely *possessio civilis*, was created as a necessary condition for the acquisition of ownership through *usucaptio*. With *possessio civilis*, a special type of *possession*, the possessor could acquire ownership after the passage of a certain period of time. On the other hand, some persons, such as the pledgee, did not have *possessio civilis*, which implied that they could not obtain ownership through *usucaptio*.[56]

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52 Pollock and Maitland 1968, p. 181; Holdsworth 1935, p. 354.
53 Pollock and Maitland 1968, p. 181.
54 Holdsworth 1935, p. 96.
55 Pollock and Maitland 1968, p. 124-148.
56 Prichard 1961, p. 201

Though both ancient Germanic law and ancient English law were different from Roman law in the way the concept of possession was defined, they also focused on the issue of protection and that of transfer. For example, lessees (and pledgees) were a possessor of the object involved because they had actual control, which further implied that they enjoyed possessory protection against third parties; lessors (and pledgors) only had a personal claim against third parties. Another example is that transfer of movable things required a shift of the actual control under both Germanic law and English law in the medieval period.

3.1.2 Preliminary Comparative Study

3.1.2.1 The Chosen Terminologies for Comparison

For easier understanding of the conceptual and comparative analysis of the concept of possession in the three jurisdictions selected, we introduce three DCFR terms concerning possession here. These three terms are owner possessor, limited-right possessor, and possession agent, which are described in the following three model provisions respectively.

> Art. VIII.-1:206 DCFR: "*An 'owner-possessor' is a person who exercises direct or indirect physical control over the goods with the intention of doing so as, or as if, an owner*."

> Art. VIII.-1:207 (1) DCFR: "*A 'limited-right-possessor' is a person who exercises physical control over the goods either: (a) with the intention of doing so in that person's own interest, and under a specific legal relationship with the owner-possessor which gives the limited-right-possessor the right to possess the goods; or (b) with the intention of doing so to the order of the owner-possessor, and under a specific contractual relationship with the owner-possessor which gives the limited-right-possessor a right to retain the goods until any charges or costs have been paid by the owner-possessor*."

> Art. VIII.-1:208 (1) DCFR: "*A 'possession-agent' is a person: (a) who exercises direct physical control over the goods on behalf of an owner-possessor or limited-right-possessor without the intention and specific legal relationship required under Article VIII.-1:207 (Possession by limited-right-possessor) paragraph (1); and (b) to whom the owner-possessor or limited-right-possessor may give binding instructions as to the use of the goods in the interest of the owner-possessor or limited-right-possessor*."

From these three model provisions, we can make three conclusions. Firstly, possession is factual control (*corpus*) plus an intention (*animus*) and in some situations plus a particular legal relationship.[57] Secondly, factual control does not necessarily give rise to possession, because agents who lack

57 Ownership possession includes the intention of "*doing so as, or as if, an owner*", and limited-right possession requires an intention as well as an underlying relationship.

the intention required and the particular relationship are not possessors. Thirdly, possessors include owner possessors and limited-right possessors. These two types differ in the possessory intention and the specific relationship.[58]

In the following discussion, possession by the owner possessor in person or by a possession agent who is acting on behalf of the former is called *ownership possession*, and possession by the limited-right possessor himself or by a possession agent who is acting on behalf of the former is called *limited-right possession*. Here it is worthwhile mentioning that "limited rights (*beperkte rechten*)" are proprietary under Dutch law.[59] In this research, however, the concept of limited right is not confined to proprietary rights. Personal rights are also a type of limited right. Therefore, lessees who have factual control over the object leased are limited-right possessors. As factual control by agents does not constitute possession in the DCFR, it is just called *control by agents*. The subsequent sections compare the three jurisdictions within the conceptual framework provided by the DCFR.

3.1.2.2 English Law

In English property law, possession is a central concept, but subject to much dispute. The concept is used in diverse ways in different contexts, which makes an accurate definition impossible.[60] For simplicity, the subsequent introduction only seeks to highlight the relevant part of the whole picture. Before doing this, it is necessary to bear the following two points in mind.

Firstly, there are several similar terms often used in English law writings, but their precise content is not fixed. These terms include possession, exclusive possession, factual (physical) control, occupation, exclusive occupation, service occupation, custody, actual possession, constructive possession, *de facto* possession, and *de jure* possession. These concepts differ as well as overlap, one may be used with different meanings in different contexts.[61] To know what a concept means, "*careful attention must in every case be paid to the context*".[62] The complexity can be partly ascribed to the lack of legislative definition as a baseline. This creates a chance for English lawyers to use them in a non-unanimous way. Some writings seek to offer a general theory on the concept of possession, but they are proved to be not that successful.[63]

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58 In fact, the DCFR adopts a mixed approach which combines the subjective approach (argued by Von Savigny) and the objective approach (argued by Von Jhering). The former takes the possessory intention as the criterion, while the latter focuses on the cause of possession.

59 Snijders and Rank-Berenschot 2017, p. 41-42.

60 Bridge, Gullifer, McMeel and Worthington 2013, p. 55.

61 Hill 2001, p. 24.

62 Pollock and Wright 1888, p. 3.

63 Bridge, Gullifer, McMeel and Worthington 2013, p. 58-59.

Secondly, English property law is based on the dichotomy of land law and the law of movables, and these two branches often do not share the same legal concepts. In this respect, modern English law is not different from the medieval English law. Here, possession is a good example. In the field of corporeal movables, a bailee (e.g., a keeper or pledgee) can have possession, irrespective of the nature of the right he has.[64] However, possession of land is linked to the nature of a right with respect to land: possession can be acquired by a lessee who has a proprietary right, but a licensee who only has a personal right in principle cannot acquire possession.[65] As the theme of this research does not concern immovable property, we do not discuss possession of immovable property.

A General Introduction

In English law, possession is defined as intentional exclusive control of a thing.[66] It is comprised of two elements: factual control (*corpus*) and an intention to possess (*animus possidendi*).

> *"The legal concept of possession has two limbs: there must be factual control exercised over the chattel, coupled with an intention to exclude all others from such control (the animus possidendi)."*[67]

Two points should be mentioned about this definition. One is that possession has an attribute of exclusivity in English law, which implies that possession means a kind of exclusive control.[68] As a result, where a person is exercising control in a way that is subject to others' factual control, there is no possession. The other point is that only an intention to possess suffices, and the possessor does not have to exercise factual control as or as if an owner.[69] This is illustrated by the fact that the bailee has possession in English law.

In the end, possession applies only to tangible things, and incorporeal things (such as claims) cannot be possessed under English law.[70]

B Control by Agents: Custody

In English law, possessors do not have to exercise factual control in person. For example, an employer might require an employee to factually control his or her car. In this situation, it is the employer (rather than the employee) who is treated as the possessor, enjoying possessory interests and bearing liabilities associated with possession.

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64 Bridge, Gullifer, McMeel and Worthington 2013, p. 76.
65 Clarke and Kohler 2005, p. 271.
66 Clarke and Kohler 2005, p. 259.
67 Frisby and Jones 2009, p. 21.
68 Clarke and Kohler 2005, p. 271; Bridge 2015, p. 37.
69 Gray 2009, p. 161.
70 Bridge 2015, p. 15.

In general, possession can be maintained through a custodian who acts on behalf of possessors, which leads to a relationship of *custody*.[71] The custodian is not a possessor and enjoys no proprietary interests out of possession. If the custodian's intention changes to be dishonest against the legal possessor, offense of larceny will be committed.[72] Larceny requires dispossession from the owner. If the custodian were deemed as a possessor before he has dishonest intent, it would be difficult to explain the occurrence of larceny.[73] Therefore, the demand for the protection of possession explains why custodians do not have possession in law. Despite being denied recognition as a possessor, custodians are said to have "*factual (physical) control*" or "*custody*" of the movable thing in question.[74]

C Ownership Possession: Insignificance

In English law, possession is an important entitlement embodied within the right of ownership.[75] Therefore, it is not rare that owners have possession. There is no doubt that English law allows owners, precisely the persons having the supreme title, to have possession.[76] However, there is not an individual concept to describe the owners' possession, which is different from German law (*Eigenbesitz*) and Dutch law (*bezit*), as will be seen later. English law does not highlight the importance of having a separate term to describe the situation where the possessor has an intention to exercise factual control for himself (*animus domini*).

In English law, possession by owners may be constructive, which forms a contrast to actual possession. As an outcome of the possibility of constructive possession, a person, despite having no actual control, may still be a possessor.[77] For example, in a relationship of bailment where the bailor gives up possession of corporeal movables to the bailee, the former still enjoys constructive possession.[78] In addition to bailment, the holder of documents to goods (such as a bill of lading) also has constructive possession of the goods involved.[79] In addition, buyers are said to have constructive possession of the goods which are still in the hands of the seller.[80]

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71 Clarke and Kohler 2005, p. 265; Bridge, Gullifer, McMeel and Worthington 2013, p. 64.
72 Bridge, Gullifer, McMeel and Worthington 2013, p. 64.
73 Here it should be noted that larceny has been defunct in English law.
74 Frisby and Jones 2009, p. 22; Bridge, Gullifer, McMeel and Worthington 2013, p. 64.
75 Honoré 1987, p. 371.
76 Rostill 2016, p. 286-287.
77 "*The correct use of the term would seem to be coextensive with and limited to those cases where a person entitled to possess is (or was) allowed the same remedies as if he had really been in possession.*" See Pollock and Wright 1888, p. 14.
78 Bridge, Gullifer, McMeel and Worthington 2013, p. 59; Acquisition and Loss of Ownership of Goods 2011, p. 387.
79 Bridge, Gullifer, McMeel and Worthington 2013, p. 59, 65; Acquisition and Loss of Ownership of Goods 2011, p. 388.
80 Pearson 2003, p. 159.

D Limited-Right Possession: Bailment

As mentioned above, a possessor does not necessarily have an intention of ownership; only an intention to possess (*animus possidendi*) plus factual control is adequate.[81] As a result, hirers, pledgees and depositories also have possession of the object involved.[82] In general, possession held by other persons than the owner is a central element of bailment in English law.[83]

> "*It is fundamental that there is a delivery or transfer of possession interest from one party to another for bailment to arise.*"[84]

Bailment is a concept used to describe legal relationships where possession of corporeal movables is given up to another person for a limited period.[85] For example, where an owner gives up possession of his or her bicycle for the purpose of pledge or lease, there is a legal relationship of bailment between this owner and the pledgee or the lessee.

In the relationship of bailment, the bailee acquires possession on a "*limited or temporary*" basis.[86] By virtue of the possession acquired, a proprietary interest is conferred on the bailee, in the sense that the bailee has a claim against illegal interference.[87] The relationship of custody discussed above does not give rise to a bailment because the custodian does not have possession.

According to the DCFR terms, the bailee is a limited-right possessor. Under the DCFR, the limited-right possessor neither has a right of ownership nor acts as if he were an owner, and there is a proprietary, contractual or statutory relationship between the limited-right possessor and the owner possessor.[88] In general, these two requirements are satisfied in the case of bailment. Therefore, it can be said that the possession held by a bailee is limited-right possession. However, the term limited-right possession does not exist in English law. This reminds us that ownership possession, as opposed to limited-right possession, is not recognized by English law either. In addition, the bailor retains constructive possession after giving up actual possession to the bailee.

In general, the relationship between the concept of possession in the English law of movable property and in the DCFR can be shown in the following table.

81 Clarke and Kohler 2005, p. 266.
82 Acquisition and Loss of Ownership of Goods 2011, p. 388.
83 Bridge, Gullifer, McMeel and Worthington 2013, p. 70-71.
84 Bridge, Gullifer, McMeel and Worthington 2013, p. 76.
85 Palmer 2009, no. 1-001.
86 Bridge, Gullifer, McMeel and Worthington 2013, p. 77.
87 Bridge, Gullifer, McMeel and Worthington 2013, p. 91.
88 Acquisition and Loss of Ownership of Goods 2011, p. 388.

DCFR	Ownership Possession	Limited-Right Possession	Control by Agents
English Law	Possession under English Law		Custody

Figure 2

3.1.2.3 German Law

Unlike English law, German law has a single system of property law. The distinction between the law of movables and land law is alien to German lawyers. As a result, the concept of "possession (*Besitz*)" is applied to both immovable property and movable property without any significant differences. Moreover, German property law is codified as an independent book in the BGB, and this concept has been clearly defined by law. Thus, it is relatively easy to understand this concept.

A General Introduction

According to § 854 BGB, possession refers to "factual control (*tatsächlich Gewalt*)" over "things (*Sachen*)".[89] By understanding this term literally, it is not difficult to find that: (1) possession requires an element of *corpus* and only exists where there is factual control; and (2) possession is available only for tangible things, because the concept of *Sachen* in the BGB is expressly confined to be tangible.[90] To further understand the concept, the following aspects should also be noted.

Firstly, § 854 BGB does not explicitly require any element of intention (*animus*), but the prevailing opinion is that this requirement is indispensable.[91] Based on a systematic interpretation, it can be found that possessory intention is not necessarily *animus domini*, namely an intention to exercise factual control for oneself. However, this does not mean that *animus domini* is entirely irrelevant. § 872 BGB prescribes a distinction between "ownership-possession (*Eigenbesitz*)" and "limited-right possession (*Fremdbesitz*)" according to the possessor's intention.[92] Pursuant to this provision, lessees have limited-right possession because they do not possess the object leased for themselves, while thieves have ownership possession because they possess the object stolen for themselves. These two forms of possession give rise to different legal consequences. Further discussion about this will be provided below.

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89 § 854 (1) BGB: „*Der Besitz einer Sache wird durch die Erlangung der tatsächlichen Gewalt über die Sache erworben*." English translation: § 854 (1) BGB: "*Possession of a thing is acquired by obtaining factual control of this thing.*"

90 § 90 BGB: „*Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände*." English translation: § 90 BGB: "*Only corporeal objects are things as defined by law.*"

91 Wolf and Wellenhofer 2011, p. 39; McGuire 2008, p. 42.

92 § 872 BGB: „*Wer eine Sache als ihm gehörend besitzt, ist Eigenbesitzer*." English translation: § 872 BGB: "*A person who possesses a thing as belonging to him is an owner possessor.*"

Secondly, possession can exist independently from rights. Possession denotes factual control, and the acquisition of possession does not require any legal right, whether proprietary or personal, as a legal basis. For example, a thief is a possessor, though he has no rightful ownership to the stolen thing.[93]

Thirdly, there is in the BGB an exception to the requirement of tangibility of the object. According to § 1029 BGB, the right of "easement (*Dienstbarkeit*)" can be subject to possession, which is known as "possession of right (*Rechtsbesitz*)".[94] It is noteworthy that this is the only exception in German law.[95] Possession of easement is recognized for the purpose of protection: by allowing the easement to be possessed, the protection for possessors can be extended to the holder of easement. Due to this exception, the conclusion that only tangible things can be possessed is not entirely correct.[96]

B Control by Agents: Besitzdienerschaft

In German law, factual control is not necessarily exercised by the possessor in person. According to § 855, a "possession agent (*Besitzdiener*)" may control the object for the possessor under the instruction from the later, giving rise to an "agency of possession (*Besitzdienerschaft*)".[97] In German law, an employee who acts for his employer is a possession agent.[98] The employee has no possession because he is considered as only a "long arm" of the employer: he is subordinate to the possessor' instructions, as a consequence of the underlying relationship of employment.[99] Moreover, the employee neither has any possessory intention nor enjoys possessory interests. Thus, he does not have to bear liabilities caused by the thing involved. In general, it is the employer who enjoys possessory interests and bears corresponding liabilities. This is in line with the notion that interests and liabilities should

93 Wieling 2006, p. 41; McGuire 2008, p. 43.

94 § 1029 BGB: „*Wird der Besitzer eines Grundstücks in der Ausübung einer für den Eigentümer im Grundbuch eingetragenen Grunddienstbarkeit gestört, so finden die für den Besitzschutz geltenden Vorschriften entsprechende Anwendung, soweit die Dienstbarkeit innerhalb eines Jahres vor der Störung, sei es auch nur einmal, ausgeübt worden ist.*" English translation: § 1029 BGB: "*Where the possessor of a plot of land is disturbed in the use of an easement registered in the land register for the owner, the provisions applying to the protection of possession are applied with the necessary modifications if the easement was used within one year before the interference, even if only once.*"

95 Wieling 2006, p. 81.

96 Baur and Stürner 2009, p. 69.

97 § 855 BGB: „*Übt jemand die tatsächliche Gewalt über eine Sache für einen anderen in dessen Haushalt oder Erwerbsgeschäft oder in einem ähnlichen Verhältnis aus, vermöge dessen er den sich auf die Sache beziehenden Weisungen des anderen Folge zu leisten hat, so ist nur der andere Besitzer.*" English translation: § 855 BGB: "*If a person exercises factual control over a thing for another in the other's household or in the other's trade or business or in a similar relationship, by virtue of which he has to follow instructions from the other that relate to the thing, only the other shall be the possessor.*"

98 Baur and Stürner 2009, p. 82.

99 McGuire 2008, p. 49.

be allocated to the same person. In general, *Besitzdiener* in German law corresponds to possession agent in the DCFR. Both German law and the DCFR refuse to grant a possessory position to the person who merely exercises factual control on behalf of another person and is subordinate to the latter's instructions.

C Ownership Possession: Eigenbesitz

The owner possessor is called *Eigenbesitzer* by the BGB. According to § 872 BGB, it is used to describe a person who possesses a thing with the intention of belonging. In other words, *animus domini* is an essential component of "ownership possession (*Eigenbesitz*)". It should be borne in mind that whether the owner possessor has lawful ownership is of no relevance. Here what matters is whether the possessor behaves as an owner.[100] Therefore, a thief is an owner possessor in German law, despite his lack of lawful ownership. The most important legal consequence of ownership possession is that only owner possessors can obtain ownership through prescriptive acquisition.[101] Therefore, it can be found that *Eigenbesitz* in German law amounts to ownership possession in the DCFR. Both require that this kind of possessor must act as, or as if, an owner.

D Limited-Right Possession: Fremdbesitz

As just indicated, *animus domini* is not necessary for obtaining possession in German law. Even though a person does not have any intention to control the object for himself, he might still have possession, namely *Fremdbesitz*.[102] Fremdbesitz can arise in the situation where the possessor has no intention to control the object as an owner but has a proprietary limited right, an obligational right or other rights.[103] In general, *Fremdbesitz* amounts to limited-right possession in the DCFR. The main difference between ownership possession and limited-right possession lies in the content of the possessory intention: the limited-right possessor has to acknowledge the legal position of the owner possessor. Briefly speaking, what matters for ascertaining the possessory intention is the factual circumstances. For example, where a person obtains factual control on the basis of a proprietary limited right or an obligational right, this person is only a limited-right possessor.[104] Moreover, where a limited-right possessor changes to hold the object for himself, this

100 Wolf and Wellenhofer 2011, p. 47; McGuire 2008, p. 50.
101 Baur and Stürner 2009, p. 88.
102 Wieling 2006, p. 50; McGuire 2008, p. 50.
103 Baur and Stürner 2009, p. 89.
104 Baur and Stürner 2009, p. 89. In light of the objective theory, the type of the right to possession plays a decisive role in distinguishing ownership possession and limited-right possession. The objective theory is held by a minority of scholars. The prevailing view is the subjective theory according to which the possessor's intention is decisive. Staudinger/Gutzeit 2012, p. 250; MüKoBGB/Joost 2017, § 872, Rn. 3.

possessor does not obtain ownership possession. The change of the intention must be visible to outsiders.[105]

> *„Eigenbesitzer ist […] wer, eine Sache als ihm gehörend besitzt. Fremdbesitzer ist demnach, wer die Sache nicht mit der Willensrichtung des Eigentümers, sondern mit der des Inhabers eines beschränkten dinglichen, obligatorischen oder sonstigen Rechts besitzt.*"[106]

Limited-right possession should be carefully distinguished from factual control by agents. Unlike possession agents who are subordinate to the principal's instructions, limited-right possessors have an independent intention to possess in law. In other words, a limited-right possessor does not have to conform to the instructions of the person from whom he acquires possession. He only needs to control the object according to the underlying relationship, which might be a right of pledge, lease, or deposition. In a word, limited-right possessors can independently enjoy possession within the boundaries stipulated by the underlying relationship, while a possession agent has no possession.

It is necessary to point out that the person from whom a limited-right possessor acquires possession, remains in possession under German law. The possession retained is known as "indirect possession (*mittelbare Besitz*)", as opposed to "direct possession (*unmittelbare Besitz*)".[107] Therefore, where there is a relationship of lease, both the lessor and the lessee have a possessory position: the former has indirect ownership possession, and the latter has direct limited-right possession, provided that the object is not subleased.[108]

In general, the relationship between the German *Besitz* and the DCFR possession can be shown by the following table. It can be found that there is a high level of consistency between the DCFR and the BGB.

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105 MüKoBGB/Joost 2017, § 872, Rn. 11; Staudinger/Gutzeit 2012, p. 253. For example, where a borrower wants to retain the book borrowed, he or she does not become an ownership possessor of the book. However, if he writes down his name on the book, he obtains ownership possession. See Westermann 2011, p. 107.

106 Baur and Stürner 2009, p. 89. English translation: "*The owner possessor possesses the thing as it belongs to him. In contrast, the limited-right possessor, who has no intention of ownership, possesses the thing with an intention of being the holder of a proprietary limited right, an obligational right, or another right.*"

107 § 868 BGB: „*Besitzt jemand eine Sache als Nießbraucher, Pfandgläubiger, Pächter, Mieter, Verwahrer oder in einem ähnlichen Verhältnis, vermöge dessen er einem anderen gegenüber auf Zeit zum Besitz berechtigt oder verpflichtet ist, so ist auch der andere Besitzer (mittelbarer Besitz).*" English translation: § 868 BGB: "*If a person possesses a thing as a usufructuary, a pledgee, a farmer lessee, a lessee, a depositary or in a similar relationship by virtue of which he is, in relation to another, entitled to possession or obliged to have possession for a period of time, the other person shall also be a possessor (indirect possession).*"

108 Wolf and Wellenhofer 2011, p. 47.

DCFR	Ownership Possession	Limited-Right Possession	Control by Agents
German Law	*Eigenbesitz*	*Fremdbesitz*	*Besitzdienerschaft*

Figure 3

3.1.2.4 Dutch Law

Like German law, Dutch property law is also codified and unifies the law of movables and the law of immovable property in one system. As a result, the concept of possession under Dutch law is also less complicated than under English law.

A General Introduction

In Dutch private law, "possession (*bezit*)" is "detention (*houderschap*)" exercised for oneself.[109] This implies that possession includes two ingredients: detention and an intention of "for oneself".[110] The first element is the *corpus* of possession, and the second element is the *animus* of possession.

Detention is not expressly defined by law. However, in light of the prevailing opinion, it means "factual control (*feitelijke macht*)" over things.[111] In determining whether detention exists, direct factual control is not necessary, and what matters is the common opinion and external facts.[112] The second element is an intention to control the object for oneself (*animus domini*). It implies that only the person who holds the object as an owner has possession. The element is a decisive factor in differentiating possession from detention. Pursuant to art. 3:108 BW, whether a person is exercising factual control for himself is determined by the application of relevant rules and the assessment of external facts according to the common opinion.[113] The common opinion plays a decisive role in ascertaining whether *animus domini* exists. As a result, the requirement of *animus* does not refer to a purely subjective intention, but an objectified intention in Dutch law.[114] In addition, it is noteworthy that detention is presumed to be possession unless there is contrary evidence.[115]

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109 Art. 3:107 (1) BW: "*Bezit is het houden van een goed voor zichzelf.*" English translation: Art. 3:107 (1) BW: "*Possession is the detention of property for oneself.*"

110 Rank-Berenschot 2012, p. 13-14. It is noteworthy that the verb *houden* is not merely used in the situation of detention, while *houder* and *houderschap* are only used in the situation of detention. See Snijders and Rank-Berenschot 2017, p. 97.

111 Salomons 2008 (2), p. 31.

112 Rank-Berenschot 2012, p. 13.

113 Art. 3:108 BW: "*Of iemand een goed houdt en of hij dit voor zichzelf of voor een ander doet, wordt naar verkeersopvatting beoordeeld, met inachtneming van de navolgende regels en overigens op grond van uiterlijke feiten.*" English translation: Art. 3:108 BW: "*Whether somebody holds property and whether he does so for himself or for another, is determined according to common opinion, taking into account the following rules and, otherwise, the facts as they appear.*"

114 Snijders and Rank-Berenschot 2017, p. 99.

115 Art. 3:109 BW: "*Wie een goed houdt, wordt vermoed dit voor zichzelf te houden.*" English translation: Art. 3:109 BW: "*A person is presumed to hold property for him- or herself.*"

In general, both tangible things and patrimonial rights can be the object of possession. Art. 3:107 (1) BW prescribes that "*goed*" can be possessed, and "*goed*" is further defined as an upper concept covering tangible things and patrimonial rights by art. 3:1 BW.[116] This duality of the object of possession leads to an important outcome: a person may have dual positions.

> "*De huurder van een huis of van een auto is houder van die zaak en tegelijkertijd bezitter van (en ook rechthebbende op) het huurrecht. De vruchtgebruiker van een huis of van een auto is houder van die zaak en tegelijkertijd bezitter van (en ook rechthebbende op) het goederenrechtelijke recht van vruchtgebruik.*"[117]

In Dutch property law, there is a distinction between possession and property rights.[118] As a result, thieves have possession of the thing stolen.[119]

B Ownership Possession: Bezit

As discussed in the preceding section, possession (*bezit*) in Dutch law is confined to factual control for oneself, and the possessor must have *animus domini*. Therefore, the concept of *bezit* in Dutch law amounts to ownership possession in the DCFR, at least in terms of the content of the *animus*.

> "*It does not require an inner animus donimi (inner pretension of belonging). In general, however, the requirement may be set of an external pretension that appears to be animus domini (the outwardly apparent pretension of belonging).*"[120]

C Limited-Right Possession and Control by Agents: Houderschap

In Dutch law, both possession agents and persons only having a limited right lack *animus domini*. As a result, they only have detention of the thing involved. For example, both lessees and employees are a detentor, because they do not exercise factual control for themselves, but for the lessor and the employer respectively. However, as just mentioned, lessees have possession of the right of lease, since every patrimonial right can be possessed.

In general, the relationship between the *bezit-houderschap* distinction in Dutch law and the concept of possession in the DCFR can be shown in the following table.

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116 Art. 3:1 BW: "*Goederen zijn alle zaken en alle vermogensrechten*." English translation: Art. 3:1 BW: "*Property is comprised of all things and of all proprietary rights and interests.*"

117 Snijders and Rank-Berenschot 2017, p. 97-98. English translation: "*The lessee of a house or a car is a detentor of the thing and at the same time a possessor of (and also the proprietor) of the right of lease. The usufructuary of a house or a car is a detentor of the thing and at the same time a possessor of (and also the proprietor) of the property right of usufruct.*"

118 De Jong 2012, p. 187.

119 Snijders 2014, p. 26.

120 Snijders 2014, p. 26.

DCFR	Ownership Possession	Limited-Right Possession	Control by Agents
Dutch Law	*Bezit*	*Houderschap*	

Figure 4

3.1.3 Further Comparative Study of *Animus*

From the above introduction, it can be found that there are similarities as well as differences in the concept of possession between the three jurisdictions. A major similarity is that possession takes factual control as a constitutive element. The main difference lies in the content of *animus*.[121] This part seeks to provide a further comparative study of the content of *animus* and to find possible reasons for this difference.

3.1.3.1 Differences in Animus

In general, possession includes two elements: *corpus* and *animus*. The element of *corpus* denotes factual control over things, and the element of *animus* refers to the intention of possession.[122] Compared with *corpus*, the content of *animus* is more diverse and complicated in the three jurisdictions. As the chart below shows, each of the three jurisdictions has its specialties in defining the element of *animus*.

DCFR	Possession		Control by Agents
	Ownership Possession	Limited-Right Possession	
English Law	Possession under English Law		Custody
German Law	*Besitz*		*Besitzdienerschaft*
	Eigenbesitz	*Fremdbesitz*	
Dutch Law	*Bezit*	*Houderschap*	

Figure 5

Taking the DCFR as a baseline, we find that *Besitz* in German law is significantly similar to possession in the DCFR: *Eigenbesitz* corresponds to ownership possession, and *Fremdbesitz* corresponds to limited-right possession. Moreover, *Besitzdienerschaft* is not covered by the concept of *Besitz*. Between Dutch law and the DCFR, it can be found that *bezit* in Dutch law amounts to ownership possession in the DCFR, and *houderschap* covers limited-right possession and control by agents in the DCFR. In the English

121 Of course, the difference in the object of possession is also obvious. For example, only tangible things can be possessed in English law, tangibles and the right of easement can be possessed in German law, while Dutch law generally recognizes possession of both tangibles things and intangible rights.

122 Acquisition and Loss of Ownership of Goods 2011, p. 319.

law of movables, custody amounts to control by agents in the DCFR, and possession resembles the DCFR possession in the sense that *animus domini* is not required. However, English law does not have an individual concept of ownership possession which is different from the DCFR (ownership possession), German law (*Eigenbesitz*), and Dutch law (*bezit*).

In sum, there are three basic divergences between the three jurisdictions: (1) whether ownership possession is separately prescribed; (2) whether there is an individual concept of limited-right possession; and (3) whether control by agents has an independent position. The subsequent three sections discuss these divergences in sequence.

3.1.3.2 Necessity of a Concept of Ownership Possession

A English Law

English law does not have an individual concept of ownership possession. In general, this can be ascribed to the principle of the relativity of title. Under this principle, ownership is not an important concept for judgements, and what matters is the relative strength of two conflicting claims.

> *"These rival titles will each be recognized by law, but they will be of different relative strengths […]. In order to win, one of them only has to show that he has a better title than the other party to the dispute, not that he has an absolute title."*[123]

The principle is deeply rooted in the common law tradition. Common law is a system mainly based on judicial precedents. It is cases that serve as the fundamental source of law. Common law concentrates more on how to solve specific disputes fairly, rather than how to construct a coherent system of concepts, rules and principles. It enshrines empirical knowledge rather than abstract rationality. Usually, what judges are concerned about is which side (the claimant or the defendant) has superiority and should prevail, rather than who the owner is. The principle of relativity of title fits well with the culture of legal empiricism.

Due to the principle of relativity of title, English property law does not take ownership as a fundamental concept. Instead, possession is more important than ownership and plays a central role in the law of movables as well as land law.[124] Most disputes about a certain thing, whether movable or immovable, are resolved according to the rules of possession. Under the principle of relativity of title, ownership is at most deemed as the *best* right to possession.[125]

123 Clarke and Kohler 2005, p. 383.
124 Bridge, Gullifer, McMeel and Worthington 2013, p. 55.
125 Frisby and Jones 2009, p. 21; Bridge, Gullifer, McMeel and Worthington 2013, p. 53.

> "*Although the right to possession is merely one of the rights that make up the concept of 'ownership', and so in this sense is subordinate to it, in everyday practice possession is far more important than 'ownership'.*"[126]

As ownership has limited significance, and possession is the basis of the whole system of property law, there are no sufficient reasons to have an independent concept of ownership possession. As will be shown below, the right of ownership plays a central role in German law and Dutch law, which makes a concept of ownership possession necessary.

B German Law and Dutch Law

In this aspect, German law and Dutch law are different from English law: both have a concept of ownership possession. The two jurisdictions are significantly influenced by Roman law. Roman law took ownership (*dominium*) as a central concept, and ownership was unitary, perpetual, independent and comprehensive. In this ownership-dominating context, possession was construed as a concept subordinate to ownership. For example, Roman law created the concept of *possessio civilis* that could be elevated to ownership through *usucaptio*;[127] Von Savigny claimed that the Roman law *possessio* embodied the element of *animus domini*, namely an intention of belonging;[128] Von Jhering contended that the purpose of protecting possession was to protect ownership.[129]

> "*English law gives a possessory remedy to any possessor who is not merely a servant […]. The Roman law […] protects the possession of the owner, of the bona fide and mala fide possessor, but not one who holds under a contract as depositary, borrower, mandatory, hirer and so forth.*"[130]

This Roman law tradition profoundly affects the modern civil law system. Nowadays, ownership still plays a central role in the civil law system. Despite being eroded to some extent, the unitary feature, perpetuity, principality and comprehensiveness of ownership are generally accepted. In addition, the general doctrines of property law are often clarified by analyzing the right of ownership, the best example of property rights.

> „*Wichtigstes Recht an Sachen ist das Eigentum. Am Beispiel des Eigentums lassen sich am besten für dies Rechte an Sachen charakteristisches Merkmal aufzeigen.*"[131]

126 Frisby and Jones 2009, p. 21.
127 Mousourakis 2012, p. 158.
128 Bond 1890, p. 271.
129 Bond 1890, p. 261.
130 Lee 1956, p. 179.
131 Wolf and Wellenhofer 2011, p. 2. English translation: "*The most important right with respect to things is ownership. The example of ownership shows in the best way the characteristics of property rights.*"

The centrality of ownership partially explains why both German law and Dutch law create an individual term (*Eigenbesitz* and *bezit* respectively) for factual control held by those as or as if an owner.[132] As ownership stands at the center of property law, other institutions (in particular the institution of possession) are inevitably affected by this property right. In general, acquisition (especially prescriptive acquisition), transfer and extinguishment of ownership have a close link with possession, protection of ownership also partly relies on protecting possession, and the right to possess is treated as an important entitlement embodied within ownership. In these situations, ownership possession is an essential concept. If the concept of ownership possession were abolished, the entire system of ownership would malfunction. Moreover, the *animus domini* embodied within ownership possession is necessary for explaining the acquisition, transfer, and protection of ownership.[133]

C Summary

All in all, the reason why English law does not have a concept of ownership possession is that possession *per se* is a more important concept than ownership. Possession is deemed as a root of ownership, and ownership is, at most, treated as the best right to possession. In practice, most disputes are resolved according to the rules of possession, which can be boiled down to the principle of relativity of title. This principle means that the party who has a better right to possession prevails. In contrast, both German law and Dutch law have a Roman law tradition, and ownership is the most important right in property law. Just as English lawyers Buckland and McNair say, "*our Courts deal with rights to possess where the Roman Courts dealt with ownership*".[134] The centrality of ownership makes possession become a concept subordinate to ownership, rather than the opposite. For the system of ownership, an individual concept of ownership possession is essential.

3.1.3.3 Necessity of a Concept of Limited-Right Possession

The chart above (Figure 5) also shows that the three jurisdictions differ in limited-right possession. In German law, *Fremdbesitz* corresponds to limited-right possession, while Dutch law classifies limited-right possession, together with control by agents, under the concept of *houderschap*. In English law, factual control held by a bailee (such as the pledgee) is possession, but an equivalent term to limited-right possession is not used. These differences between the three jurisdictions can be partially accounted for by the legislative policy adopted: what is the fundamental function served by the concept of possession?

132 Van Schaick 2014, p. 5.
133 Emerich 2017, p. 177.
134 Buckland and McNair 1952, p. 68.

A Dutch Law and German Law

In Dutch law, prescriptive acquisition is the fundamental concern in determining how to define the concept of possession. As a result, *bezit* is directly confined to ownership possession, which has been pointed out in the parliamentary explanation of the BW.

> "*In de regeling van het ontwerp daarentegen staat, ten dele in aansluiting met het geldende recht, als gevolg van het bezit de verkrijging voor verjaring en de bescherming van hem, die op weg is door verjaring het goed te verkrijgen, voorop. Mitsdien wordt degene, die een goed voor een ander houdt, niet als bezitter aangemerkt […].*"[135]

> "*Bij de regeling van het bezit in titel 3.5 hebben de ontwerpers primair de verkrijgende verjaring en, in het verlengde daarvan, de bescherming van hem die bezig is door verjaring te verkrijgen, voor ogen gehad.*"[136]

As prescriptive acquisition requires the possessor to have a pretention of belonging (*animus domini*), it is necessary to distinguish possession from detention. Otherwise, it would become difficult to explain how a person having no pretention of belonging can acquire ownership in the way of acquisitive prescription. To put it differently, a detentor cannot claim prescriptive acquisition.[137] A similar policy reason can be found in French law in which possession is also distinguished from detention.[138]

> "*The distinction between possession and detention plays an important role for acquisition of property rights, as the detentor cannot acquire ownership of the object by way of acquisitive prescription.*"[139]

From the perspective of legal history, the distinction between possession and detention is partly because of the influence of Roman law.[140] As has been pointed out above, *possessio civilis* was distinguished from *possessio naturalis* (*detentio*) in Roman law (see 3.1.1.1). The biggest difference between them is that the former could give rise to the prescriptive acquisition of ownership, while the latter could not.

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135 Parlementaire Geschiedenis (3) 1981, p. 424-425. English translation: "*However, the rule in the draft is partially in accordance with the applicable law: prescriptive acquisition and protection of the person who intends to acquire the object through prescription, as a consequence of possession, stand in the fore. Therefore, the one who holds a thing for another person is not treated as a possessor [...].*"

136 Rank-Berenschot 2012, p. 12. English translation: "*With regard to possession in Chapter 3.5, the drafters paid primary attention to prescriptive acquisition and secondly to the protection of the person who aims for acquisition through prescription.*"

137 Vantomme 2018, p. 23-24.

138 Stoljar 1984, p. 1027; Staudinger/Gutzeit 2012, p. 75.

139 Hinteregger 2012, p. 100.

140 Parlementaire Geschiedenis (3) 1981, p. 423.

However, this narrow definition of possession implies that possessory protection is not available for detentors. For example, the protection under art. 3:125 (1) and (2) BW can only be claimed by possessors.[141] As a result, a problem arises: how to protect the legal position of detentors. To address this problem, art. 3:125 (3) BW expressly prescribes that detention is under the protection of the law of torts.[142] This tort law protection can be seen as a complementary scheme.

In contrast to *bezit* in Dutch law, possession (*Besitz*) in German law is defined with a major concern about the issue of protection. As a result, the distinction between possession and detention is not recognized by German law.[143] For German legislators, persons like the lessee should also be provided with possessory protection, even though they exercise factual control in the absence of an intention to be an owner.[144]

> "*In het Duitse en in het Zwitserse Wetboek staat als gevolg van het bezit op de voorgrond: de bescherming tegen eigenrichting. Mitsdien wordt daar zowel aan hem die een goed voor een ander houdt, als aan degene voor wie deze houdt, het bezit toegekend.*"[145]

> „*Als problematisch sah man es insbesondere an, dass diese Konzeption nur begrenzt mit der vorgesehenen Ausweitung des Anwendungsbereichs des possessorischen Besitzschutzes harmonierte, der nun auch solche Formen der tatsächlichen Sachherrschaft umfassen sollte, die nach diesem Konzept als bloße Detention einzustufen gewesen waren.*"[146]

According to these two excerpts, the main reason why a broader possessory intention (*animus possidendi*) is recognized is to extend possessory protection to the holder of limited rights. This approach enlarges the scope of application of possessory protection, which allows hirers, lessees, pledgees and the

141 Snijders and Rank-Berenschot 2017, p. 121.

142 Art. 3:125 (3) BW: "*Het in dit artikel bepaalde laat voor de bezitter, ook nadat het in het eerste lid bedoelde jaar is verstreken, en voor de houder onverlet de mogelijkheid een vordering op grond van onrechtmatige daad in te stellen, indien daartoe gronden zijn.*" English translation: Art. 3:125 (3) BW: "*Nothing in this article shall deprive the possessor, even after expiry of the year referred to in paragraph 1, or the detentor, of the possibility, should there be grounds, to institute an action on the basis of the law of torts.*"

143 Stoljar 1984, p. 1027; Hinteregger 2012, p. 104.

144 It is worthwhile noting that the first draft of the BGB provided a distinction between *possessio* and *detentio*. However, this was replaced by the distinction between ownership possession and limited-right possession in the second draft. See Wilhelm 2010, p. 212.

145 Parlementaire Geschiedenis (3) 1981, p. 424. English translation: "*In the German Civil Code and the Swish Civil Code, the consequence of possession, namely the protection against interference, has a prominent position. Therefore, those who hold things for another person as well as for themselves are granted with possession.*"

146 Müller 2010, p. 39-40. English translation: "*It was seen as particularly problematic that the narrow concept can fit into the policy of expanding the scope of application of possessory protection. The protection should also apply to those kinds of factual control that are, according to this concept, merely categorized as detention.*"

like to claim possessory protection. If the concept of *Besitz* were confined to be factual control with an *animus domini*, then the scope of possessory protection would be restricted.

It is noteworthy that the broad concept of *Besitz* also has a historical reason. In defining this concept, both Roman law and ancient Germanic law were taken into account by the drafters of the BGB.[147] As introduced above, possession (*possessio*) in Roman law roughly amounts to ownership possession, and lessees were not a possessor, enjoying no possessory protection (see 3.1.1.1). On the contrary, Germanic law allows lessees to have possession (*Gewere*).[148] To reconcile this divergence between Roman law and Germanic law, the BGB confers indirect ownership possession on lessors, and direct limited-right possession on lessees.[149]

However, the German approach gives rise to a problem: how to coordinate the relationship between possession and ownership? As pointed out above, ownership plays a central role in German property law, and there is demand for a form of possession that is specifically correlated with ownership. In order to solve this problem, the distinction between ownership possession (*Eigenbesitz*) and limited-right possession (*Fremdbesitz*) is recognized. The former must embody *animus domini*, namely an intention of belonging. It is considered an important factor for acquiring, transferring and abandoning ownership.

> "*This distinction plays an important role with regard to provisions, such as the presumption of ownership (Art. 1006) or the preconditions of acquisitive prescription (Art. 937) which now only applies to Eigenbesitz.*"[150]

From the preceding discussion, we find that Dutch law and German law define the concept of possession in different ways. However, both focus on the issue of acquisition of ownership and the issue of protection. In the end, no significant differences exist in the legal consequences between the two jurisdictions.

B English Law

In general, *animus domini* is not necessary for acquiring possession in English law, and the distinction between possession and detention is alien to English lawyers. In this respect, English law is akin to German law, but different from Dutch law. However, unlike German law, English law does not have any term equivalent to limited-right possession (*Fremdbesitz*). The following discussion clarifies why English law is special as such.

147 Wilhelm 2010, p. 211.
148 Wilhelm 2010, p. 211-212.
149 Füller 2006, p. 274.
150 Hinteregger 2012, p. 104.

Firstly, English law does not follow Roman law doctrines. Rather, it is rooted in the history of common law. Unlike German law and Dutch law, English law is not heavily influenced by Roman law. As has been shown above (see 3.1.1.1), Roman law differentiates between *possessio*, *possessio civilis* and *detentio* (*possession naturalis*). Scholars of civil law had conducted significant research with respect to these terms in history. The achievement obtained deeply affected later legislation, especially the codification that took place in the 19th century. Neither similar historical studies nor legislative debates take place meaningfully in English law.

Secondly, the principle of relativity of title also explains why limited-right possession does not have an independent position in English law. As pointed out above, English law does not enshrine the concept of ownership, which is at most considered as the *best* right to possession. Under this principle, what matters is the relativity of the strength of competing claims with respect to possession. The legal doctrine not only makes ownership possession dispensable, but also renders limited-right possession unnecessary. The concept of ownership possession and that of limited-right possession exist correlatively, and the lack of the former leads the latter to be redundant.

For example, prescriptive acquisition in civil law is generally equivalent to adverse possession in English law. For the claim of adverse possession, whether adverse possessors have *animus domini* is of no relevance. An adverse possessor can acquire a title to the land involved after the passage of a certain period of time. In light of the principle of relativity of title, the reason why this adverse possessor is protected against the former proprietor is that he has a better title.[151] English law shows no strong interest in the question whether the adverse possessor acquires a title called ownership.

C Summary

In sum, the three jurisdictions have their own characteristics in defining the concept of possession. The English law of possession has its own legal history (ancient English law) and is subject to a special legal principle (relativity of title). Thus, the concept is defined in a distinctive way. In general, Dutch law and German law share the same legal history (Roman law) and focus on two issues (acquisition of ownership and protection of possessors) in defining the concept of possession.[152] However, differences exist between the two jurisdictions.

Dutch law takes prescriptive acquisition as the fundamental function of possession, and *animus domini* is required as an essential element of possession (*bezit*), but this narrow definition restricts the scope of application of possessory protection. To address this problem, Dutch law confers on detentors tort law protection. In contrast, German law treats protection of

151 Vantomme 2018, p. 28-29.

152 In addition, ancient Germanic law (the concept of *Gewere*) also has an influence on the definition of *Besitz* in drafting the BGB, which has been pointed out above.

possessors as the central function of possession, and a large number of persons having no *animus domini* are also treated as a possessor under German law. However, this broad definition gives rise to difficulty in explaining the acquisition of ownership. To address this problem, German law prescribes a distinction between ownership possession and limited-right possession.

> "*At this point, one can conclude that between the two options presented by Caterina, that is, to rely upon a narrow category of possessors and give to all of them the benefits of possession (opening some possessory remedies to non-possessors), or, conversely, to define a wider category of possessors but restricting particular benefits to particular kinds of possession.*"[153]

The two jurisdictions choose two different ways to define the concept of possession, but the ultimate legal consequences do not differ substantially.

3.1.3.4 Necessity of a Concept of Factual Control by Agents

In many situations, factual control is not exercised by possessors in person. Instead, it may be a possession agent (such as an employee) who holds the object for the benefit of the possessor (such as an employer). Under the social context of the division of labor, many things are factually controlled by possession agents, which causes a divergence between the right of ownership and factual control. The preceding introduction has shown that possession agents are not recognized as possessor in the three jurisdictions. English law uses the concept of custody, German law uses the term *Besitzdienerschaft*, and Dutch law includes factual control by agents within the concept of *houderschap*. However, a difference also exists between the three jurisdictions. This difference is that Dutch law does not draw a line between possession agents and those who have a limited right (such as the lessee). The following discussion seeks to clarify the similarity as well as the difference.

A Why Are Possession Agents Not a Possessor?

Firstly, possession agents are said to have no possessory intention. In general, possession through an agent requires two elements: a relationship of subordination and the obedience to the possessor's instructions.[154] The first element means that there must be an underlying relationship between the possessor and the possession agent, which requires the latter to hold the thing involved for the former. The underlying relationship can be contractual or statutory.[155] A typical example is employment. The second element means that the possession agent should obey instructions from the

153 Rodriguez 2013, p. 38.
154 Baur and Stürner 2009, p. 81-82; Wilhelm 2010, p. 223.
155 Baur and Stürner 2009, p. 82.

possessor. For example, employers have a right to instruct their employees in managing their property. This power to instruct acts as a decisive criterion in judging who has possession.[156] In this sense, we can say that possession agents are only a "long arm" of the possessor.

Secondly, possession agents do not enjoy benefits or bear liabilities out of possession because they are subordinate to the possessor for whose benefits factual control is exercised. For example, possession agents are not entitled to acquire ownership by factually controlling an ownerless thing (*res nullius*), to gain ownership after the passage of the prescriptive period, or to give up ownership by abandoning possession.[157] Moreover, possession agents cannot be sued as a defendant, when the principal obtains possession in the way of illegal dispossession.[158] These legal consequences are reasonable: they are in line with the principle that benefits and liabilities should be allocated to the same person. In addition, according to the content of the underlying relationship, possession agents usually have no intention to obtain benefits or bear liabilities associated with possession. All in all, for the purpose of properly determining legal consequences out of possession, possession agents should not be recognized as a possessor in law.[159]

B Why Are Possession Agents Not Distinguished?

As pointed out, both limited-right possessors and possession agents are covered by the concept of "detentor (*houder*)" in Dutch law. In this aspect, Dutch law is different from English law and German law. In the latter two jurisdictions, a line is carefully drawn between factual control by agents and that by the holder of limited right. In general, the Dutch law approach seems to be a result of the following two reasons.

The first reason is that Dutch law focuses on prescriptive acquisition in determining how to define the concept of "possession (*bezit*)".[160] As a result, any factual control that cannot generate this legal consequence is strictly excluded from the concept of possession and thus fall under detention. The second reason is that non-possessory factual control has a great variety of variants, and categorizing them is neither easy nor worthwhile. Instead, a practical approach is to regulate this kind of factual control by reference to the underlying relationship between the parties involved.[161] In other words, factual control by the holder of a limited right (such as the lessee) does not seem substantially different from factual control by an agent (such as an employee). The legal consequences of both forms of factual control have to be determined by referring to the underlying relationship.

156 Baur and Stürner 2009, p. 81.
157 Baur and Stürner 2009, p. 83.
158 Wilhelm 2010, p. 223.
159 Füller 2006, p. 281.
160 Rank-Berenschot 2012, p. 12.
161 Van Schaick 2014, p. 47.

3.1.4 Conclusion

The preceding three parts have shown the complexities and divergences surrounding the concept of possession. In general, three factors should be considered to explain these complexities and divergences: historical influence, legal culture, and legislative policy.

Firstly, possession is a concept used to deal with different types of questions, which, in turn, makes this concept difficult to define. It has a connection with, *inter alia*, prescriptive acquisition of ownership, transfer of property rights, protection of possessors, and distribution of liabilities and interests between relevant parties. In general, prescriptive acquisition of ownership requires a narrower definition of possession, while a broader definition is needed for the purpose of protecting owners, pledgees, lessees and the like. For proper allocation of liabilities and interests to relevant parties, factual control by agents for the benefit of another person should be denied as possession. The legislative policy adopted by legislators with respect to these issues largely determines how possession is defined.

As pointed out at the beginning of this chapter, legal concepts are functional and technical, and the meaning of a legal concept is largely determined by legislative purposes.

> *„Die Auswahl der bei der Bildung eines abstrakten Begriffs in seine Definition aufzunehmenden Merkmale wird wesentlich durch den Zweck mitbestimmt, den die betreffende Wissenschaft mit ihrer Begriffsbildung verfolgt. Daher kommt es, dass sich der juristische Begriff, der eine bestimme Klasse von Gegenständen bezeichnet, nicht immer mit dem entsprechenden Begriff einer anderen Wissenschaft oder gar mit dem, was der Sprachgebrauch des Lebens darunter versteht, in vollem Umfange deckt.“*[162]

The concept of possession performs multiple functions and is used in a wide range of situations. Therefore, it cannot be fully understood unless we know the functions it is supposed to perform.

> *“Hetgeen in een wet met ‘bezit’ wordt bedoeld, wordt geheel bepaald door de gevolgen, welke die wet aan het bezit verbindt en de nadere vereisten, welke die wet voor het intreden van die gevolgen stelt.”*[163]

Dutch law takes prescriptive acquisition as the primary function. Thus, the possessory intention is confined to *animus domini*, and the possessor needs to act as, or pretend to be, an owner. German law takes protection as the

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162 Larenz 1991, p. 440. English translation: *“In defining an abstract concept, the selection of elements is significantly determined by the objective pursued by the academy in defining this concept. Therefore, a legal concept, which can describe a certain category of facts, is not always construed in the same way as the concept correspondingly used in another discipline or daily conversation.”*

163 Meijers 1954, p. 230. English translation: *“What ‘possession’ means in law is totally determined by the consequences attached by law to possession as well as the extra requirements pinned down by law for the occurrence of these consequences.”*

primary function. Thus, *animus domini* is not necessary, but it is essential for ownership possession which can lead to prescriptive acquisition. To properly distribute liabilities and interests between relevant parties, both German law and English law refuse to grant possession to possession agents who exercise factual control for the benefit of another person.

Secondly, historical influence is also important. Both German law and Dutch law are, to a lesser or greater degree, influenced by Roman law. As indicated above, the function of acquiring ownership and the function of protection are important for understanding the concept of *possessio* in Roman law (see 3.1.1.1). However, this Roman law concept is not entirely coherent, which triggers fierce debates in theory as well as in legislation, especially the debate concerning the question whether the distinction between possession and detention should be accepted. Compared with German law and Dutch law, English law is less influenced by Roman law; English law has its own history. This partially accounts for why the concept of possession in English law has its own specialties.

Finally, differences in legal culture are also relevant. In general, German law and Dutch law belong to the civil law system. In this system, ownership is a fundamental concept for property law. Thus, there is the need for a concept of ownership possession (*Eigenbesitz* in the BGB and *bezit* in the BW), on account of the tight connection between possession and ownership. In contrast, English law enshrines the principle of relativity of title, a principle that can be seen as a result of legal empiricism. Under this principle, ownership is at most considered as the best title to possession. This explains why a concept of ownership possession does not exist in English law.

3.2 Possession and Publicity

Possession is often treated as a method of publicity for corporeal movables. In this section, we examine how and in what sense possession can convey proprietary information to third parties. We argue that possession is able to convey proprietary information, but only in the sense that it can inform third parties that the possessor has a *right* to the object possessed. The details of the right can only be known through other means. In addition, this section also pays particular attention to indirect possession: can indirect possession be qualified as a method of publicity for corporeal movables? The answer is no.

3.2.1 Possession and the Proprietary Information Conveyed

In this part, we discuss the question whether and in what sense possession can convey proprietary information to third parties. It will be argued that: (1) possession can serve as an outward mark for different kinds of rights; and (2) for this reason, possession merely provides proprietary informa-

tion in an abstract and thus ambiguous way. With respect to the publicity effect of possession, there are two extreme approaches in theory. One is the ownership approach which holds that possession is an outward appearance of ownership. The other is the non-publicity approach which claims that possession does not have any effect of publicity. These two approaches are examined below.

3.2.1.1 The Field of Application of Possession

A Objects of Possession

A1: Corporeal Movables

In general, possession is of great importance in the law of corporeal movables. At present, there is not any general system of registration for corporeal movables, and possession is treated as the main method of publicity.[164] For corporeal movables, possession is a more suitable method than registration because: (1) corporeal movables usually have low value, while the costs of constructing and maintaining a system of registration are high; (2) corporeal movables are often in frequent circulation, and a requirement of registration would impact on the fluidity of the transaction of corporeal movables; and (3) corporeal movables are often fungible and difficult to be uniquely identified, which makes a registration system nearly impossible.[165] Compared with registration, possession is a much cheaper method of publicity (see 3.2.1.2.A). As a result, possession is considered a "natural" means of publicity for corporeal movables.

In the law of corporeal movables, the fate of property rights is closely related to possession. In general, acquisition, transfer and destruction of property rights are affected, to different degrees, by obtaining, transferring and abandoning possession respectively.[166] This is often explained from the perspective of the publicity effect of possession (see 3.4.1). Moreover, protection of property rights is also related to possession. In many situations, protecting possession implies that the holder of property rights is protected. Moreover, the protection of possession might be explained from the angle of publicity: possession should be respected and protected because possessors have shown their right to third parties via possession (see 3.3.2).[167]

Here it should be noted that securities concerning goods or payment (such as the bill of lading or the bill of exchange) are also a kind of corporeal movable. They can be factually controlled and possessed by the person entitled to the goods or payment.[168] On the other hand, securities are more

164 Snijders and Rank-Berenschot 2017, p. 63; Wolf and Wellenhofer 2011, p. 76.
165 Clarke and Kohler 2005, p. 388.
166 Snijders and Rank-Berenschot 2017, p. 105-106.
167 Baur and Stürner 2009, p. 64.
168 Not all securities have a tangible form. Uncertificated securities are paperless and electronic (see 4.2.1). For this type of securities, possession is not possible.

than a corporeal thing. Securities embody a right, and the disposal of this right is often based on the disposal of securities. Moreover, third parties can obtain proprietary information concerning the right embodied from securities. Due to these two reasons, securities have a function of publicity, which is discussed in Chapter 4 (see 4.2).

A2: Immovable Property

Historically, possession was also a means of publicity for immovable property, but was gradually replaced with registration. The process of this replacement started in the 12th century.[169] At present, most countries have constructed a system of registration for immovable property. More remarkably, even some special movables, such as aircraft and vessels, are publicized by a register.[170] Thanks to registration, proprietary information concerning these things can be recorded and conveyed in a clear, detailed and reliable way.[171] However, since this research concerns only the publicity of corporeal movables and claims, the registration of immovable property and those special movables is outside the scope of this research.

A3: Rights

In some jurisdictions, the object of possession includes not only tangible things, but also rights which are intangible. For example, "possession of easements (*Rechtsbesitz an Dienstbarkeiten*)" is recognized by German law, but only as an exception to the rule that the object of possession is tangible (see 3.1.2.3);[172] Dutch law recognizes possession of patrimonial rights in a general way, which has been pointed out above (see 3.1.2.4).[173]

In this research, we hold that possession of rights has nothing to do with publicity. Rights are intangible. Possession of a right cannot make this right visible to outsiders.[174] In Dutch law, possession of rights just means the enjoyment and exercise of rights. Thus, possession of rights does not have a unitary definition: it depends on the content of the right possessed.[175] Possession of a right of easement is different from possession of a claim of payment, because these rights significantly differ in terms of the content. Therefore, though possession of rights is generally recognized by the BW, Dutch lawyers acknowledge that this kind of possession fails to create a visible outward appearance for the specific right possessed.[176] This is particularly true in the situation of claims.

169 Xie 2011, p. 48.
170 Baird and Jackson 1984, p. 309-310.
171 Hinteregger and Van Vliet 2012, p. 844-902.
172 Wieling 2006, p. 81.
173 Snijders and Rank-Berenschot 2017, p. 97.
174 Emerich 2017, p. 180.
175 Biemans 2007, p. 88; Van Schaick 2014, p. 8.
176 De Jong, Krans and Wissink 2018, p. 289-290.

> "*Vooral het feitelijke element van de machtsuitoefening waarmee bezit gepaard gaat, lijkt moeilijk te verenigen met het ontastbare karakter van vorderingsrechten.*"[177]

Possession of rights is recognized for other legislative purposes than publicity. As has been shown above, Roman law recognized possession of rights by providing special protection to certain property rights of use, which gave rise to quasi-possession (see 3.1.1.1).[178] Possession of easements is recognized by modern German law for a similar reason: extending possessory protection to the right of easement.[179] Different from Roman law and German law, Dutch law recognizes possession of rights due to a concern about prescriptive acquisition. Possession of a right is a condition for prescriptive acquisition of this right. Thus, every right susceptible to prescriptive acquisition should be able to be possessed.[180] For example, prescriptive acquisition of claims is generally possible under Dutch law, and this type of acquisition is based on possession; thus, claims can be possessed.[181] Therefore, taking prescriptive acquisition as the principal function (*Hauptfunktion*) determines that the object of *bezit* is not confined to corporeal things.[182]

B Underlying Rights of Possession

In general, possession of corporeal movables can be acquired on different grounds. In most situations, the possessor has a right that underlies the acquisition of possession. This right might be ownership or a right out of pledge, lease, storage, or borrowing. Moreover, the possessor may also obtain possession illegally, such as theft. In this very situation, no underlying right is associated with possession. Here we provide a general view of the underlying right of possession.

B1: Ownership

It is needless to stress that possession can be associated with the right of ownership. As the most comprehensive property right, ownership embodies the entitlement to possess. In general, where an owner loses possession, he is entitled to recover the object unless the present possessor has a legal ground to keep factual control.

> "*The right to possess, viz, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the superstructure of ownership rests.*"[183]

177 Wibier 2007, p. 261. English translation: "*In particular, it seems difficult to reconcile the element of exercising of control associated with possession, on the one hand, and the invisible feature of claims, on the other hand.*"
178 Thomas 1976, p. 147.
179 Westermann 2011, p. 175; Rüfner 2014, p. 173.
180 Parlementaire Geschiedenis (3) 1981, p. 425.
181 Biemans 2007, p. 88.
182 Drobnig 1993, p. 181.
183 Honoré 1987, p. 371.

More importantly, property law is inclined to promote the convergence of possession and ownership, attempting to have ownership and possession held by the same person.[184] To some degree, this inclination can be shown by the following examples: the rule of first possession, the *traditio* rule which requires delivery as a requirement of the transfer of corporeal movables, the rule of *bona fide* acquisition of corporeal movables, the rule of prescriptive acquisition, and the rule of giving up ownership through abandoning possession. The inclination provides a basis for the viewpoint that possession is a method of publicity for ownership of corporeal movables. This viewpoint will be examined later (see 3.2.1.3).

B2: Pledge

Possession can be associated with possessory pledge. In general, the law allows individuals to create a right of pledge through delivery of the collateral to the pledgee to a third party. Possessory pledge is known as *pledge* in English law,[185] *Pfandrecht* in German law (§ 1205 (1) BGB), and *openbaar pandrecht* or *vuistpand* in Dutch law (art. 3:236 (1) BW). In general, there are two different ways to explain the relevance of delivery with the creation of pledge: the positive approach and the negative approach.[186] The former holds that delivery is a method to publicize the right of pledge to third parties. The latter holds that delivery helps address the problem of false appearance of wealth (or ostensible ownership) by preventing pledgors from appearing to have an unencumbered right of ownership.

> "*Deze eis vloeit voort uit het beginsel van publiciteit. Uit de wijziging van de machtsuitoefening blijkt van het bestaan van het pandrecht tegenover derden.*"[187]

> "*The debtor's dispossession fulfills two major functions: it makes it more difficult for the debtor to dispose of the pledged goods to a third person; and the debtor can no longer create the misleading impression in the minds of his other creditors of owning the pledged goods which might be available for the satisfaction of their claims.*"[188]

It should be noted here that there is a difference between these two approaches. Under the positive approach, possession is treated as a method of publicity for pledge, and delivery is expected to make the pledge transparent to third parties. However, the negative approach implies that possession can indicate the existence of ownership, and retaining possession by pledgors may lead other parties to believe that the collateral is not encumbered with any security interest. Therefore, this approach does not differ

184 Asser/Bartels & Van Mierlo 2013, nr. 114.
185 Goode 2013, p. 32.
186 Füller 2006, p. 296-298.
187 Asser/Van Mierlo 2016, nr. 146. English translation: "*This requirement results from the principle of publicity. Pledge can be shown to third parties through the change of the power of control.*"
188 Drobnig 2011, p. 1027.

from the view that possession is an outward appearance of (unencumbered) ownership. This view will be discussed later (see 3.2.1.3).

B3: Intermediary Rights

Apart from ownership and pledge, possession can also be held by a person who has an intermediary right which straddles property law and the law of obligations. A typical case is sales under a clause of reservation of ownership. In this case, possession of the movable in question is given up to the purchaser, but the seller retains the right of ownership usually for a security purpose. In brief, the purchaser acquires a right which can elevate into full ownership upon the fulfillment of the condition agreed, usually the payment of the purchase price.

In German law, this right is known as the "right of expectation (*Anwartschaftsrecht*)", which is partially proprietary.[189] In Dutch law, the buyer obtains a right called "conditional ownership (*voorwaardelijk eigendomsrecht*)".[190] As to the nature of conditional ownership, different opinions exist.[191] It is generally held that the right has a proprietary feature, and the buyer under the clause of reservation of ownership has a proprietary legal position.[192] In English law, what a buyer under the clause of reservation can obtain is more than a personal right, partially because of the acquisition of possession.[193]

Reservation of ownership is a transfer under a suspensive condition. Ownership can also be transferred under a resolutive condition, such as in the situation of transfer of ownership for security purposes. Upon fulfillment of the condition, ownership will be restored to the hands of the transferor. Before the condition is satisfied, the transferor no longer has ownership, but retains possession of the thing involved. In general, as in the case of reservation of ownership, the possession retained by the transferor is also associated with an intermediary right.[194]

B4: Personal Rights

In addition to property rights and intermediary rights, personal rights are also able to serve as a legal basis for the acquisition of possession. A typical example is the right of lease (*hire* in English law, *Miete* in German law, and *huur* in Dutch law). By virtue of this right, the lessee is entitled to acquire possession of the object. The lessee cannot use the object without obtaining possession. It is worthwhile noting that upon obtaining possession by the lessee, the right of lease is no longer a purely personal right under German

189 Baur and Stürner 2009, p. 30; Mincke 1997, p. 209.
190 *Rabobank/Reuser*, HR 3 juni 2016, NJ 2016/290.
191 Nieuwesteeg 2015, p. 168.
192 Schuijling 2017, p. 18.
193 Bridge 2014, p. 123; Pennington 1978, p. 286.
194 Sagaert and Gruyaert 2017, p. 434; Wieling 2007, p. 256.

law and Dutch law.[195] Instead, it begins to have a proprietary feature. In English law, hire of corporeal movables is a kind of bailment, which straddles property law and contract law.[196] As a possessor of the object, the bailee has an intermediary right.

In addition to the right of lease, other personal rights can also serve as a basis on which possession is acquired and maintained. For example, a person may acquire possession on the basis of the relationship of *depositum* (storage in English law, *Verwahrung* in German law, and *bewaarneming* in Dutch law) and *commodatum* (borrowing in English law, *Sachdarlehen* in German law, and *bruikleening* in Dutch law). In these two situations, the depositary and the borrower obtain possession of the thing involved on a contractual basis.

B5: Statutory Legal Relationships

The underlying right of possession is not necessarily a consequence of agreement. Possession can also be obtained as a result of the operation of law. In other words, the underlying right might be statutory. Here one example is lien (*Zurückbehaltung* in German law and *retentie* in Dutch law).[197] A repairman can retain the bicycle he repairs to secure his right to payment of fees. Another example is the finding of lost things. In this situation, the finder acquires possession of the lost thing and bears a duty of care to the owner. Generally speaking, the finder's possession is based on a legal relationship concerning the management, preservation and return of the lost thing.[198]

Moreover, where a contract giving rise to the acquisition of possession is invalid or terminated, the creditor's right to possess out of this contract will come to an end. The creditor has an obligation to return the thing involved to the debtor. Before doing this, however, the creditor remains in possession and has a duty to take care of the thing. This duty is part of the post-contractual relationship, a legal relationship that is often statutory.

B6: Illegal Possession

The way in which possession is obtained appears more diverse, when illegal possession (such as in the situation of robbery and theft) is taken into consideration. Compared with immovable property, corporeal movables are easier to be illegally dispossessed from their owner. In reality, posses-

195 Wolf and Wellenhofer 2011, p. 78; Snijders and Rank-Berenschot 2017, p. 58-59.

196 Bridge, Gullifer, McMeel and Worthington 2013, p. 72.

197 Three things should be noted here. The first is that lien is a complicated term under English law. Lien can be either statutory or contractual. It is impossible to find a legal term equivalent to the English concept of lien in German law and Dutch law. The second is that *Zurückbehaltung* is generally regulated by § 273 BGB, and the possessor's right to *Zurückbehaltung* is specifically regulated by § 1000 BGB. The third is that *retentie* can be either statutory or contractual in Dutch law. However, art. 3:290-295 BW is not applicable to contractual *retentie*.

198 Baur and Stürner 2009, p. 735.

sion of corporeal movables might be obtained through an illegal means. For example, a thief who has factual control of a bicycle stolen is also a possessor, despite his bad faith and lack of a lawful right.[199] The existence of illegal possession is related to the correctness of possession as a method of publicity. Like registration, possession does not always convey correct proprietary information. Nevertheless, this does not disqualify possession from being a method of publicity (see 3.2.1.2.C).

In sum, the preceding discussion shows that possession is connected with a great diversity of underlying legal relationships: (1) it can be acquired in lawful ways as well as in illegal ways; (2) it is not necessarily associated with the right of ownership; (3) it may take both property rights and personal rights as its legal basis; and (4) the underlying relationship of possession can be consensual as well as statutory.

3.2.1.2 Possession as an Abstract Method of Publicity

As possession can be obtained on the basis of different rights and even in an illegal way, two questions arise: (1) what proprietary information can be conveyed by possession to third parties; and (2) whether possession is an eligible method of publicity for corporeal movables. These two questions are discussed in this part.

A Possession and the Information Conveyed

A1: Abstractness

The diversity of underlying rights determines that possession is an abstract method of publicity for corporeal movables. By the term "abstract", we mean that the proprietary information conveyed by possession is merely that the possessor has a right to the thing possessed. To know the specific content of this right, we have to rely on other means, such as inquiring with the possessor or inspecting relevant certificates. Therefore, as a means of publicity, possession has a weakness: it cannot disclose the details of the underlying right enjoyed by the possessor.[200] From possession *per se*, one cannot identify the legal basis on which the possessor obtains possession. In this sense, the information conveyed by possession is ambiguous.[201] However, this does not mean that possession is a useless method of publicity. It does provide outsiders an indication that the possessor has a right to the thing possessed.

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199 Wieling 2006, p. 41; Snijders 2014, p. 26.

200 Miceli 1997, p. 127-128.

201 In the viewpoint of some scholars, such as Carol Rose, Raymond Saleilles, and Frédéric Danos, possession has a function of communication. Possession manifests *a right* to third parties or is an outward appearance of this right. However, they often do not specify what the right manifested by possession is. See Emerich 2018, p. 60-61.

> "*Possession, just like a deed of title recorded in a public registry, is, provided it is 'open and notorious', as the cases on adverse possession say, a way of notifying the world of the existence of a claim.*"[202]

> "*Yes, one person can hand over possession to another. But it is very difficult to know from a third-party perspective whether all the rights are being handed over, whether possession is given temporarily, or whether the possessor is giving mere permission to enter (a license). The problems here are so great that possession cannot serve to identify multiple unqualified in rem rights in the same thing.*"[203]

As has been shown, possession is not necessarily associated with a property right. In practice, the holder of some personal rights is also able to obtain possession. Thus, the information conveyed by possession is not necessarily proprietary information. However, this should not be seen as a reason to refuse to treat possession as a method of publicity in property law. Indeed, the underlying right of possession might be personal, but the right becomes partially proprietary due to possession. For example, the possessory protection granted to the creditor makes this right more than personal (see 3.3.2.4). It can be said that possession lies on the borderline between property law and the law of obligations. In each case, possession with an underlying personal right will make this right partially proprietary.[204] This has been demonstrated by the concept of bailment in English law.[205]

Obviously, the information conveyed by possession is neither as specific nor as clear as that conveyed by registration. By inspecting registers, especially the register for immovable property, searchers can have detailed knowledge concerning the legal relationships of the thing involved. The register usually records the identity of the owner, the existence of property rights of security, the existence of property rights of use, and so forth. This information is much clearer because it is stored and communicated in the form of words. If registration is taken as the bottom standard of publicity, then there will be no doubt that possession does not qualify as a method of publicity. In fact, this is the main argument of the non-publicity approach, which is examined later (see 3.2.1.4). Here it is necessary to mention in advance that this bottom standard is arbitrary.

A2: Cheapness

The feature of abstractness is a downside of possession. On the other hand, it is also an advantage. Possession conveys only simple information to third parties. This allows it to be a much cheaper means of publicity than registration. As pointed out by Smith, the low intensity of information communicated by possession implies that the process of this communication is

202 Posner 2000, p. 561.
203 Smith 2015, p. 86.
204 Snijders and Rank-Berenschot 2017, p. 59; Wolf and Wellenhofer 2011, p. 78; Füller 2006, p. 37-41.
205 Bridge, Gullifer, McMeel and Worthington 2013, p. 72.

cheap.[206] In general, this advantage is reflected in, among other things, three aspects: (1) outsiders can process the information provided by possession rapidly; (2) as a method of publicity, possession is more than a formality; and (3) the shift of possession, namely delivery, can be completed easily.

Firstly, the abstract indication communicated by possession can be rapidly obtained and processed. In general, an outsider can react to possession automatically and immediately, which is rooted in a living custom. This custom is that people take it for granted that the possessor has a right to the thing possessed, and this right should be respected.[207] For example, after seeing a person riding a bicycle, our immediate reaction is that the rider is an owner, at least a person who is entitled. According to recent studies in psychology, this reaction to possession has a biological origin.[208] Instinctively, people presume that the person in factual control of a thing enjoys a right to this thing. This immediate instinctual reaction to possession is described as "*possession heuristic*".[209]

> "*Since the law of property is essentially the law of belongings, its first task is to determine to whom things belong. There are all sorts of complicated inquiries that could be undertaken to figure out and justify an incredible range of answers to this question. Alternatively, there is a simple inquiry that provides a simple answer: a thing belongs to its possessor.*"[210]

As the information conveyed by possession can be acquired and processed automatically and instinctively, only a few costs will be incurred. In contrast, when one wants to gain information from a register, he has to search this register which often stores a large amount of data. Moreover, the searcher has to spend time processing the data.

Secondly, possession is more than a means of publicity, a formality. It often merges with use: the user of a thing is usually a possessor of this thing. In legal history, it is often held that enjoyment or use implies possession.[211] This is easy to understand. Use of a thing requires factual control of this thing. Therefore, possession is not purely a burden. Instead, it is often a precondition for making use of a thing. In many situations (such as lease), parties do not deem shifting of possession as a burdensome formality, because acquisition of factual control is necessary for enjoyment or use. In this aspect, possession forms a contrast to registration. The latter is a pure formality, creating inconvenience to transacting parties. Of course, this does not mean that the formality of registration does not bring any benefit to the parties.

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206 Smith 2003, p. 1117.
207 Merrill 2015, p. 16.
208 Stake 2004, p. 1763.
209 Krier and Serkin 2015, p. 149.
210 Krier and Serkin 2015, p. 150.
211 Hübner 1918, p. 186; Pollock and Maitland 1968, p. 34.

Thirdly, transfer of possession, namely delivery, requires only handing over the thing involved, which can be completed easily and cheaply. This allows possession to be a means of publicity suitable for corporeal movables, a kind of property which is often in frequent circulation. If delivery were expensive, the circulation of corporeal movables would not be smooth. In this aspect, registration is different: it is expensive to construct a system of registration, and updating this system is also burdensome.[212] This explains why registration is mainly a method of publicity for immovable property and some special movables having high value and a low frequency of transactions.[213]

B Possession and the Possessor's Disclosure

It should be pointed out that the information conveyed by possession should be carefully distinguished from the information provided by the possessor. For example, in the sale of a bicycle, the seller may promise to the purchaser that he has full ownership. This promise embodies a piece of proprietary information. However, it comes from the seller himself rather than from possession. As pointed out above, an important difference between these two sources of information is in the degree of objectivity (see 2.2.3). The seller has an incentive to cheat, and the information provided by the seller is subjective. The fact might be that the bicycle was stolen by the seller. In contrast, the information out of possession is more objective. The purchaser obtains the information from possession on the basis of the observation of the seller's factual control, which is independent of the seller's subjective will. However, we have to acknowledge that possession does not show that the seller has legal ownership, because it is an abstract and ambiguous means of publicity.

The distinction above also exists in the situation where registration is involved. For example, in the course of purchasing a house, the potential buyer will not only make an inquiry with the seller about the legal condition of this house, but also search the corresponding register to check the authenticity of the seller's disclosure and to ensure that the seller has not omitted anything important. The information from the register and that from the seller himself should be distinguished. In general, the principal purpose of registration is to address the problem that the seller might cheat the buyer and disguise or omit relevant information.

C The Issue of Illegal Possession

This part focuses on the situation of illegal possession, namely possession with no lawful underlying right. The existence of illegal possession triggers a question concerning the qualification of possession as a means of publicity. If the possessor may obtain possession in an illegal way, can possession qualify as a method of publicity for corporeal movables?

212 Rose 1985, p. 84.
213 Clarke and Kohler 2005, p. 388.

Before discussing this question, it is necessary to first distinguish the right *based on* possession from the right *indicated by* possession.[214] This distinction is important because publicity is supposed to show rights to outsiders. Publicity itself does not create rights. For example, in creating a right of hypothec, the entry of this right in the register is only to provide an access to third parties, allowing them to know about the existence of this property right. Indeed, registration might be constitutive for creating the right of hypothec in some jurisdictions. However, this neither means that the property right is a result of registration alone, nor that registration has any other ultimate purposes than showing the right to third parties in private law. In fact, the purpose of treating registration as a constitutive requirement is just to ensure that the property right is visible to third parties upon the creation of that right.

Different from registration, possession has a dual relationship with rights. Firstly, possession can give rise to rights and duties in law, irrespective of whether the way of acquisition is lawful. For example, thieves are entitled to enforce and protect their possession of the thing against other persons, except for those who have a better right (such as the legal owner). This is a legal consequence of possession. In this sense, possession itself creates rights. Secondly, possession is also a method of publicity. It can show the underlying right to outsiders, though in an abstract way. This determines that possession, like registration, is also a tool of communicating information. In the situation of theft, thieves have no legal right that needs to be publicized to third parties because possession is obtained in the absence of any right. Truly, the thief-possessor enjoys some rights on the basis of possession. However, these rights are not what possession, as a method of publicity, is expected to show to third parties. The thief-possessor only has an outward appearance, which makes him or her appear to be the holder of a right. In this situation, possession fails to publicize the true legal state and conveys an incorrect indication. It indicates that the illegal possessor has a right, which the possessor in fact does not have, to the thing possessed.

Nevertheless, this does not mean that possession does not qualify as a method of publicity. In fact, not only possession but also registration might be proven to be mistaken. It happens that information from a register proves to be false. However, this never forms a sufficient reason for denying registration as a method of publicity. Errors in the register can be rectified by those who are entitled to do so. Likewise, law allows lawful proprietors to recover the thing involved from illegal possessors, which can also be seen as a scheme of rectification.[215] This scheme ensures that possession can be

214 In the viewpoint of Bell, there is a differentiation between "*de jure* rights" and "*de facto* possessory rights" in the situation of unlawful possession. A thief-possessor enjoys *de facto* possessory rights on the basis of his possession, but the real owner has *de jure* rights. See Bell 2015, p. 328. In this research, *de facto* possessory rights are rights based on possession and *de jure* rights are rights that are expected to be made visible by possession.

215 Van Schaick 2014, p. 43.

held by legal possessors. Moreover, illegal possession does not exist ubiquitously in reality. Most corporeal movables are factually controlled by those who do have a legal right, such as the owner, lessee, pledgee, and borrower. This general association of possession with a legal right guarantees that possession is an eligible method of publicity for corporeal movables.

> "外观之表象和实质之内容通常八九不离十，社会之现状大抵亦复如此。占有乃是权利存在之外观，占有存在时，通常均有实质或真实之权利为基础。"[216]

In a nutshell, just like other methods of publicity, possession also provides incorrect information in some situations.

3.2.1.3 The Ownership Approach: Does Possession Indicate Ownership?

Traditionally, possession is treated as an outward appearance of ownership in the law of corporeal movables. This ownership approach finds its basis in several legal rules, among which *bona fide* acquisition and the presumption of ownership are the most important. In this part, we argue that the ownership approach is not as plausible as it appears.

A Main Problems of the Ownership Approach

In general, the ownership approach is no longer commonly accepted at present. It fails to take into account the simple fact that possession can be associated with different underlying rights (see 3.2.1.1). The diversity of the underlying rights determines that possession is not necessarily an outward mark of ownership.[217] Instead, it is merely an abstract and thus ambiguous method of publicity. It might be true that ownership and possession were usually held by the same person in the past when transactions were neither frequent nor complex. In modern society, however, possession diverges from ownership in many situations, such as lease, pledge, reservation of ownership, security transfer of ownership, financial lease, and sale and leaseback.[218] Under this context, it is no longer plausible to say that possession is an outward mark of ownership.

B Bona Fide *Acquisition*

Bona fide acquisition of corporeal movables is often used to demonstrate the ownership approach.[219] According to this approach, a transferee in good faith is entitled to acquire ownership from the unauthorized transferor,

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216 Xie 2011, p. 1174. English translation: "*Generally speaking, it is a social fact that the outward appearance is often consistent with the internal substance. Possession provides an indication of the existence of a right. Where there is possession, there is a real or substantive right as its legal basis.*"

217 Staudinger/Gutzeit 2012, p. 74.

218 Xie 2011, p. 273.

219 *Bona fide* acquisition of corporeal movables will be further discussed later on the basis of a comparative study (see 3.4.3). Therefore, the discussion here is brief.

because the latter's possession indicates the existence of ownership. Possession is an outward appearance of ownership. The transferee's reliance on this appearance deserves protection.[220]

> "*For decades, law students have been taught that the acquirer of a movable deserves protection because he should be able to rely upon the actual possession of the transferor: this actual possession legitimizes the transferor as the owner […] or possession of the transferor 'creates an image of ownership'.*"[221]

> "*Het bezit legitimeert den bezitter als eigenaar; wie door zijn bezit eigenaar schijnt te zijn, wordt voor eigenaar gehouden, en ieder die daarop voortbouwt is veilig.*"[222]

Moreover, proponents of this approach often compare possession of corporeal movables with registration of immovable property. In their viewpoint, *bona fide* acquisition of corporeal movables and that of immovable property share the same ground, namely the reliability of publicity.[223] Some proponents add that there is a difference in the degree of reliability between these two methods of publicity.

> „*Die Legitimation des Veräußerers liegt hier im Besitz; deshalb sind ja alle Übertragungsformen, mit Ausnahme der in § 931 geregelten, an den Besitz des Veräußerers gebunden. Aber eine sichere Garantie für das Eigentum gibt der Besitz nicht, und deshalb können hier eher als beim Grundeigentum, bei dem das Grundbuch eine weitgehende Sicherheit für seiner Richtigkeit gewährt, praktische Falle vorkommen, in denen ein Erwerb vom Nichteigentümer stattfinden.*"[224]

On a closer look, however, the ownership approach is not plausible. Generally speaking, this approach does not correctly interpret the importance of possession in justifying *bona fide* acquisition of corporeal movables, overstating the accuracy and clarity of possession. Moreover, it fails to consider other relevant rationales behind *bona fide* acquisition.

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220 Mattei 2000, p. 108.

221 Salomons 2008 (1), p. 11.

222 Asser/Scholten, Zakenrecht, 1905, p. 65, cited from Salomons 2000, p. 905. English translation: "*Possession legitimizes the possessor as an owner; the person who appears to be an owner due to his possession is assumed as the owner, and everyone who relies on that is secure.*"

223 Wilhelm 2010, p. 19.

224 Schwab and Prütting 2020, Rn. 423. English translation: "*The legitimation of transferors lies in possession; therefore, all forms of transfer are, subject to the exception under § 931, related to the transferor's possession. However, possession cannot provide a safe guarantee for ownership. Thus, the acquisition from the unauthorized here is more difficult than that in the situation of land ownership, where the land register provides extensive security for its correctness.*"

Firstly, possession is merely an abstract method of publicity, as has been argued above. It does not inform third parties that the possessor is an owner. This is the main reason why the ownership approach is seen as "*unrealistic*".[225]

> *„Anders ist die Lage im Mobiliarsachenrecht; hier ist es eine Erfahrungstatsache, dass Eigentum und unmittelbare Besitz häufig auseinanderfallen.*"[226]

Secondly, the ownership approach fails to consider that indirect possession has no publicity effect, which will be argued later (see 3.2.2). The unauthorized transferor is not necessarily in direct possession of the object. Rather, the transferor might be an indirect possessor only. As indirect possession has no publicity effect, *bona fide* acquisition cannot be explained from the angle of publicity, let alone under the ownership approach.[227]

Thirdly, *bona fide* acquisition is not based on possession alone. It also involves other requirements that cannot be explained from the perspective of publicity. In brief, *bona fide* acquisition also concerns, among other things, whether the acquirer is in good faith, whether the transfer is gratuitous, and whether the object involved is a stolen or lost thing. These aspects are closely related to legal policy: (1) *bona fide* acquisition is not applicable to gratuitous transfer because this acquisition is to promote the fluidity of transactions; (2) the original owner loses ownership to the third party in good faith because the former contributes to the disparity between ownership and possession, which may require that lost or stolen things are not susceptible to *bona fide* acquisition; and (3) a transferee who already knows the defect of the transferor's power of disposal cannot acquire ownership because *bona fide* acquisition is to protect the reliance of third parties in good faith.

> "*It is argued quite often that there is a practical or economic need of protecting commerce, as it would be too burdensome, costly and insecure if each acquirer was forced to undertake detailed investigations as to the asset's origin. Not having a good faith acquisition rule would create considerable legal uncertainty, even in numerous cases where the transferor was, in fact, entitled to transfer ownership. Thus, good faith acquisition would also serve the aim of promoting legal certainty.*"[228]

In a nutshell, two conclusions can be made here. The first one is that possession is only a necessary but insufficient condition for *bona fide* acquisition, and this acquisition cannot be explained from the angle of the publicity of possession alone. The second one is that ownership cannot be inferred from possession because possession is only an abstract means of publicity.

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225 Acquisition and Loss of Ownership 2011, p. 898.

226 Baur and Stürner 2009, p. 662. English translation: "*In the property law of movables, the situation is different; here it is an empirical fact that ownership and direct possession often diverge from each other.*"

227 Füller 2006, p. 324.

228 DCFR 2009, p. 4827.

C Presumption of Ownership

Another example which appears consistent with the ownership approach is the rule of the presumption of ownership: possessors are presumed to be the owner of the object possessed. This rule is generally accepted in the civil law system, such as art. 3:119 (1) BW and § 1006 (1) BGB. In light of the ownership approach, if a possessor is presumed to be an owner, then possession should be treated as an outward mark of ownership.

> *„Eine zweite Folge der Publizitätsfunktion des Besitzes ergibt sich aus § 1006. Aus dem Umstand, dass der Besitz üblicherweise das Bestehen von Rechten an der Sache dokumentiert, sieht das Gesetz die Konsequenz, indem es zugunsten des Besitzers die Vermutung ausstellt, dass er Eigentümer der Sache sei.“*[229]

> *“Op zijn beurt wordt de bezitter krachtens art. 3:119 vermoed de eigenaar te zijn […]. Bij dit vermoeden sluit art. 3:86 lid 1 als het waar aan. De derde die te goede trouw afgaat op de legitimatie van eigenaar die is verbonden aan het in de macht hebben van de zaak door de vervreemder, krijgt bescherming indienen blijkt dat de laatstgenoemd niet beschikkingsbevoegd was.”*[230]

Moreover, proponents of the ownership approach often compare possession with registration in this respect. This presumption for corporeal movables is akin to the presumption of correctness of registration for immovable property.

> *„Die Eintragung im Grundbuch hat für die Begründung, Übertragung und Aufhebung von Grundstücks-rechten eine ähnliche Wirkung wie die Besitzübertragung bei entsprechenden bewegliche Sachen betreffenden Rechtsvorgängen. Daraus erklärt sich die dem § l006 verwandte Vermutung des § 891.“*[231]

The largest problem of the ownership approach is that it fails to distinguish the presumption from publicity. The rule of presumption (such as § 1006 (1) BGB and art. 3:119 (1) BW) concerns how to distribute a burden of proof. According to this rule, the person who holds possession enjoys an advantage in proceedings: the party who has no possession needs to prove that

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229 Wolf and Wellenhofer 2011, p. 41. English translation: “*The second consequence of the publicity function of possession results from § 1006. Under this circumstance, possession often shows the existence of a right to the object; thus, law prescribes, for the benefit of the possessor, a presumption that the possessor is the owner of the object.*”

230 Reehuis 2015, p. 82. English translation: “*In turn, the owner is, according to art. 119, presumed to be an owner […]. This presumption is related to paragraph 1 art. 3:86, as if it is true. A third party, who is in good faith with respect to the owner’s legitimation which is related to the transferor’s factual control of the thing, receives protection when the latter has no authority to dispose.*”

231 Baur and Stürner 2009, p. 107. English translation: “*For creation, transfer and extinguishment of land rights, the entry into land registers has a similar effect as the transfer of possession for the transfer of rights on movables. This explains the presumption under § 891, which is akin to § l006.*”

the possessor is not the real owner. The rule does not apply until the facts concerning a dispute are unascertainable.[232] Therefore, the main function of this presumption is procedural and has nothing to do with the publicity effect of possession.

> "*In my view, such rules serve solely the procedural purpose of evidence for the protection of the entitled party. Since in practice the asset will remain most of the time in the physical possession of the entitled party, that party deserves the benefit of procedural advantage should anyone contest its right.*"[233]

> „*So gesteht die herrschende Meinung einmütig zu, dass eine Rechtszustandsvermutung aus § 1006 das Beweisbelasten überfordere: Dieser musste in diesem Fall generell den fehlenden Eigentumserwerb des Besitzers nachweisen […]. Hinter der These von der Erwerbsvermutung vergibt sich daher eine grundsätzliche Skepsis an Einigung des Besitzes als Publizitätsträger.*"[234]

Moreover, if there is sufficient evidence contrary to the presumption, then the presumption will be overturned. In practice, most limited-right possessors and illegal possessors can be proven as having no ownership. This means that the presumption is incorrect in most situations. Therefore, if possession is taken as a method of publicity for ownership of corporeal movables, then it will be doomed to being incorrect in most situations.[235] In other words, once being treated as an outward mark of ownership, possession will be generally unreliable. Thirdly, even if we acknowledge that the presumption is based on the publicity effect of possession, the ownership approach is still problematic. This is because this presumption can be applied by analogy in other situations. A possessor might be presumed to be the holder of another right than ownership.

> „*Nach § 1006 Abs. 1 S. 1 wird zugunsten des Besitzers einer beweglichen Sache vermutet, dass er seit Beginn seines Besitzes Eigentümer der Sache sei. In § 1065 wird dir Vermutung auf den Nießbrauch, in § 1227 auf das Pfandrecht ausgedehnt […]. Daraus folgt: die Vermutung streitet nur für denjenigen, der die Sache als Eigenbesitzer oder als Nießbrauchs- bzw. als Pfandbesitzer besitzt.*"[236]

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232 Rosenberg, Schwab and Gottwald 2010, p. 644.

233 Hamwijk 2012, p. 309.

234 Füller 2006, p. 291. English translation: "*The predominating view is that the presumption of the state of rights reverses the burden of proof: he has to prove that the acquisition of ownership by the possessor is flaw [...]. Under the thesis of the presumption of acquisition, a fundamental doubt exists to the equation of possession as a means of publicity.*"

235 Füller 2006, p. 324.

236 Baur and Stürner 2009, p. 105. English translation: "*Pursuant to the first sentence of paragraph 1 § 1006, the possessor of a movable thing is beneficially presumed to be the owner of the thing since the beginning of possession. The presumption is extended to the usufruct in § 1065 and pledge in § 1227 […]. Therefore, the presumption only benefits those who possess a thing as an ownership possessor or as a usufruct- or pledge-possessor.*"

> "*Ook bezitters van vorderingen op naam, waardepapieren, quoteringsrechten, intellectuele-eigendomsrechten en ander vermogensrechten, worden tot op het tegenbewijs vermoed rechthebbende van dat recht te zijn.*"[237]

The Taiwanese Civil Code includes a rule of presumption, which only stipulates that possessors are presumed to have a right that embodies possession as a component.[238] Therefore, possessors are not necessarily presumed to be an owner.

> "例如，占有人于占有物上行使所有权时，即推定其有所有权，于占有物形式租赁权时，即推定其有租赁权。惟不以占有为内容之权利，则不再推定之范围内。"[239]

Fourthly, the presumption of ownership is applied only to ownership possession, namely *Eigenbesitz* in German law and *bezit* in Dutch law.[240] As a result, the application of this presumption involves a subjective requirement: the possessor must have an intention of belonging (*animus domini*). This requirement also requires us to distinguish the presumption of ownership from publicity. The former involves a subjective element, which is at odds with the feature of objectivity of publicity (see 2.2.3.2).

> „*Der Eigenbesitz entwertet gleichwohl die Publizitätswirkung des Besitzes, da nicht mehr rein sei es auch noch so verschwommen erkennbares Faktum die Vermutungsbasis darstellt, sondern ein unsichtbarer Wille des Besitzers.*"[241]

In a nutshell, the presumption of ownership concerns how to allocate the burden of proof. It should not be confused with the publicity of possession. Moreover, the application of this presumption involves a subjective requirement. Even if the presumption is seen as related to the publicity of possession, we need to note that this presumption is applied by analogy to other rights than ownership.

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237 Van Schaick 2014, p. 84. English translation: "*The possessor of claims to a named debtor, securities, quotation rights, intellectual property rights and other patrimonial rights will also be deemed to be the holder of these rights, unless there is contrary evidence.*"

238 《台湾民法典》第943条："占有人于占有物上行使之权利，推定其适法有此权利"。English translation: Art. 943 Taiwanese Civil Code: "*Where a right exercised by the possessor in relation to the possessed thing, it is presumed that the possessor has this right.*"

239 Xie 2011, p. 1075. English translation: "*For example, when the possessor exercises ownership in relation to the possessed object, he is presumed to be an owner; when the possessor exercises a right of lease, he is presumed to be a lessee. The possessor should not be presumed to have a right which does not have possession as a component*."

240 Baur and Stürner 2009, p. 105; Sdu Commentaar/Jacobs & Ter Horst 2019, art. 119.

241 Füller 2006, p. 291. English translation: "*Ownership possession also depreciates the publicity effect of possession, because the basis of presumption is no longer neither a pure nor a clear visible fact, but the possessor's invisible will.*"

3.2.1.4 The Non-Publicity Approach: Possession Indicates Nothing?

Contrary to the ownership approach, the non-publicity approach is pessimistic to the publicity of possession for corporeal movables. According to the non-publicity approach, possession is too ambiguous to provide any useful information to third parties.

> "*Since physical possession can signify many legal relationships with respect to an asset, it in fact tells the viewer nothing […]. It does not render possession a viable means to provide information in respect of the question i) who holds an interest, ii) what kind of interest, iii) in what asset and iv) in what capacity.*"[242]

From this excerpt, we can find that the main reason why this approach denies possession as a method of publicity lies in the diversity of underlying rights of possession. As possession can be obtained and kept on the basis of a great diversity of rights, it tells third parties nothing.

Usually, proponents of the non-publicity approach compare possession with registration. Possession is not as clear as registration. Thus, it should not be treated as a method of publicity. Implicitly, this approach considers registration as the bottom criterion of publicity.

> „*Nach dem Grunddenken des Publizitätsprinzips kann der Besitz nur als Publizitätsträger deinen, wenn er dazu geeignet ist, unsichtbar Rechtsverhältnisse wahrnehmbar zu gestalten. Der Vergleich mit dem Grundbuch zeigt, dass der Besitz, verstanden als tatsächliches Faktum, keine derart eindeutigen Rückschlüsse auf die Rechtslage ermöglicht.*"[243]

In general, the problem of the non-publicity approach can be summarized as follows: (1) it arbitrarily takes registration as the bottom criterion for the method of publicity; (2) it neglects the fact that there are different types of registration conveying information of different degrees of clarity; and (3) it fails to note that possession does provide some information.

Firstly, there are no adequate reasons to treat registration as the bottom criterion of publicity. Indeed, possession does not convey information as clearly as registration (especially the land register). From possession, one cannot know the details of the right enjoyed by possessors. As an abstract means of publicity, it only indicates that the possessor has a right to the thing possessed. In contrast, registers allow searchers to know details of the proprietary relationship with respect to the thing registered. More impor-

242 Hamwijk 2012, p. 310-311.

243 Füller 2006, p. 247-248. English translation: "*According to the rationale of publicity, possession can only function as a means of publicity when it can make invisible legal relationships transparent. The comparison between possession and registration indicates that the former, which is understood as a fact, does not lead to any clear conclusion on the condition of rights.*"

tantly, all information from registers is communicated in the form of words, which means that registration usually causes no misunderstandings.

However, this difference between possession and registration is not a sufficient reason to deny possession as a method of publicity. The opinion that all methods of publicity in property law must be as clear as registration is arbitrary. With respect to the difference, we can take another view: there are different methods of publicity in property law, and these methods convey information with different degrees of clarity. Possession qualifies as a method of publicity for corporeal movables, despite the fact that it is not clear as registration. There is a continuum of methods of publicity in the law of property: one side of this continuum is registration, and the other side can be possession.

Secondly, there are different types of registration, and the information conveyed by them varies in the degree of clarity. In general, the information provided by the land register seems to be the clearest. However, other registers are less clear than the register for land. For example, Article 9 UCC and the Cape Town Convention on International Interests in Mobile Equipment creates a system of registration, and this system provides only a simple notice (or warning) about the existence of property rights to third parties.[244] Compared with the registration of land, this notice embodies only a small amount of information.

> "*The Article 9 filing system should be distinguished from registries familiar to virtually all legal systems such as those covering real property. Those are, in many cases, the source of real rights […]. In those registries, original substantive documents […] are placed in full on the record.*"[245]

The system of registration is supposed to provide the "*minimalist*" information or "*a minimum amount of information*", so that the fluidity of transactions will not be hampered.[246] Inevitably, it is ambiguous to some extent. Here, we will take the register of Article 9 UCC, a system for security interests in movables, as an example. In this system, a financing statement needs to be filed. However, this statement cannot make security interests fully clear to third parties. To know about the security interest, searchers have to make further inquiries with relevant parties, such as the security provider.[247] At least, the statement is ambiguous in two aspects: (1) it suffices that the movable collateral involved is ascertainable by a description with sufficient

244 Article 9 UCC creates a system of registration for security interests of movables. The function of this system, briefly speaking, is to warn that the secured creditor may have a security interest with respect to certain collaterals owned by the debtor. The Cape Town Convention on International Interests in Mobile Equipment constructs a similar system. This system records "*the international interest*" established on certain "*mobile equipment*".

245 Sigman 2004, p. 78.

246 Van Erp 2004, p. 97; Sigman 2004, p. 76.

247 Uniform Commercial Code Committee 2008, p. 518.

accuracy, which implies that the searcher cannot ascertain which specific assets are involved by only inspecting the system;[248] and (2) the amount of the secured obligation is not required to be fixed by the statement, which means that the searcher cannot know how many encumbrances will be finalized in the end.[249]

Thirdly, the non-publicity approach straightforwardly asserts that possession communicates nothing because possession is ambiguous.[250] This amounts to equating "ambiguity" with "nothing", which seems inappropriate. Possession can be associated with different rights, but this does not mean that it conveys nothing useful for third parties. At least, third parties can from possession know that the possessor has a right to the object possessed.

3.2.2 Publicity Effect of Indirect Possession

After arguing possession as an abstract means of publicity, we now turn to a special form of possession: indirect possession (*constructive possession* in English law, *mittelbare Besitz* in German law, and *middellijk bezit* in Dutch law). In this part, we discuss the question of whether indirect possession is qualified as a method of publicity for corporeal movables. In general, the crucial difference between direct possession and indirect possession is whether the possessor has actual or physical control over the thing. In this part, we argue that indirect possession is invisible due to the absence of physical control by the indirect possessor, which makes it unable to be a means of publicity. In general, the concept of indirect possession is recognized for other reasons than publicity.

3.2.2.1 The Essence of Indirect Possession

A The Composition of Indirect Possession

Indirect possession exists where a person (such as the lessor) gives up his actual control to another person (such as the lessee). In this situation, the former remains in possession through the latter who acts as an intermediary. According to the German legal theory, the relationship of indirect possession includes three components: an intermediary who has actual control, an intermediary relationship, and a right of recovery by the indirect possessor.[251]

Firstly, indirect possession takes the existence of direct possession as a condition. As its name indicates, "indirect" possession is held in an indirect way. There must be an intermediary person, the direct possessor, who exercises actual control on behalf of the indirect possessor. For example, a

248 Hamwijk 2014, p. 198.
249 Von Wilmowsky 1996, p. 160-161.
250 Hamwijk 2012, p. 310.
251 Baur and Stürner 2009, p. 75-76.

lessor retains his possessory legal position after giving up actual control to the lessee. Therefore, indirect possession is possession without physical domination over the thing.[252]

Secondly, indirect possessors should have an underlying relationship with direct possessors. This relationship is known as the intermediary relationship of possession (*Besitzmittlungsverhältnis* in German law).[253] It can take various forms. On the basis of the intermediary relationship, direct possessors acquire and preserve actual control of the object, and indirect possessors give up actual control.[254] For example, lease can be seen as an intermediary relationship on the basis of which the lessee and the lessor have direct possession and indirect possession respectively. The intermediary relationship serves as a channel between indirect possessors and direct possessors. Thus, it is considered as the most important component of indirect possession.[255]

Thirdly, indirect possessors should have a right to recover the object from direct possessors when the intermediary relationship comes to an end.[256] This right of recovery implies that indirect possession exists only for a limited period, and the direct possessor cannot keep actual control forever.[257] The right of recovery is often considered as the central element of the intermediary relationship.[258] However, the right can exist without being affected by the invalidity of this relationship.[259]

From the introduction above, we can find that indirect possession is no more than a relationship between the indirect possessor and the direct possessor.[260] This relationship concerns actual control: the indirect possessor gives up actual control to the direct possessor and will reobtain it after a certain period. However, the relationship itself is not actual control. The core of indirect possession is that the indirect possessor has a right of recovery, a right to reobtain actual control from the direct possessor.

> *„Das Besitzmittlungsverhältnis ist ein Rechtsverhältnis, so dass im Ergebnis dies drauf hinausläuft, aus einem rechtlichen Verhältnis auf die Sachherrschaft und damit auf eine Tatsache zu schließen. Den Kern des Publizitätsprinzips stellt ein solches Vorgehen geradezu auf den Kopf. Ebenso wenig überzeugt auch der oft gegebene Hinweise, dass der mittelbare Besitzer ja nur eine zeitlich begrenzte Sachherrschaft habe: Sie äußere sich deswegen, da der mittelbare Besitzer eine Herausgabeanspruch gegenüber dem Besitz-*

252 Westermann 2011, p. 128.
253 Brehm and Berger 2014, p. 47.
254 Baur and Stürner 2009, p. 75; Van Schaick 2014, p. 10.
255 Brehm and Berger 2014, p. 47.
256 Where possession is differentiated from detention, the right of recovery is treated as the crucial criterion for this differentiation. See Vantomme 2018, p. 19-20.
257 Baur and Stürner 2009, p. 76.
258 Brehm and Berger 2014, p. 47.
259 Brehm and Berger 2014, p. 47.
260 MüKoBGB/Joost 2017, § 868, Rn. 5.

> *mittler habe. Jedoch widerlegt sich dieses Argument selbst. Wenn der mittelbare Besitzer eine tatsächliche Sachherrschaft haben soll, stellt sich die Frage, warum er dann noch eines Herausgabeanspruches bedarf.*"[261]

In English law, indirect possession (constructive possession) is often treated as a right to possess. This implies that the essence of indirect possession is no more than a right or a legal relationship.

> "*Right to possess, when separated from possession, is often called 'constructive possession'. The correct use of the term would seem to be coextensive with and limited to those cases where a person entitled to possess is (or was) allowed the same remedies as if he had really been in possession.*"[262]

> "*Falling short of actual possession, a person may have constructive possession of property if he has the right to take actual possession.*"[263]

The preceding argument is also illustrated by the bailor's legal position in English law. Bailors are often said to have constructive possession. However, as we will show later, they are not allowed to sue on the basis of trespass, a kind of illegal interference with possession *per se* (see 3.3.3.1). In English law, bailors have a right known as reversionary interest, namely an interest of obtaining actual possession when the bailee's actual possession comes to an end.[264] The reversionary interest is a future interest. If this interest is infringed, bailors are be entitled to claim protection under tort law.[265] This also implies that indirect possession amounts to a right of recovery.

B The Change of Indirect Possession

In general, acquisition, transfer, and destruction of indirect possession are largely dependent on the intermediary relationship between the direct possessor and the indirect possessor. Firstly, the existence of an intermediary relationship is necessary for acquiring indirect possession.[266] As just pointed out, this relationship forms the most important element of indirect possession. One cannot become an indirect possessor when there is no intermediary relationship with the holder of actual control.

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261 Füller 2006, p. 284. English translation: "*The intermediary relationship of possession is a legal relationship; thus, it amounts to a legal relationship with respect to factual control, namely with respect to a fact. The core of the principle of publicity makes this approach chaotic. Likewise, the often-cited view that the indirect possessor has temporal and limited factual control is not convincing: this view says so because the indirect possessor enjoys a claim of recovery against the intermediary of possession. It stultifies itself. If the indirect possessor has factual control, then the question will arise of why the indirect possessor still needs a right of recovery.*"

262 Pollock and Wright 1888, p. 28.

263 Gardiner 2008, p. 181.

264 Clarke and Kohler 2005, p. 298.

265 Palmer 2009, no. 2-004,4-066.

266 Brehm and Berger 2014, p. 47-48.

Secondly, the transfer of indirect possession is based on the assignment of the right of recovery or a change of the intermediary relationship.[267] The transfer of indirect possession is known as non-factual delivery. It is non-factual because it does not involve any shift of actual control, and what matters fundamentally is the parties' consent.[268] As pointed out by Rank-Berenschot in the following excerpt, *traditio per constitutum possessorium* is contractualized because mere agreement suffices for this way of transferring indirect possession.

> "*De erkenning van de mogelijkheid tot bezitsoverdracht door enkele tweezijdige verklaring brengt mee dat het corporele element steeds minder betekenis krijgt. Men kan in dit verband spreken van 'contractualisering' van de bezitsverschaffing.*"[269]

Thirdly, indirect possessors lose indirect possession when the intermediary relationship comes to an end.[270] In general, this relationship can extinguish in two situations. One situation is that the direct possessor loses direct possession, whether voluntarily or involuntarily.[271] For example, the lessee, as a direct possessor of the thing leased, disposes of and gives up factual control of the thing to a third party. The second situation is that the right of recovery ceases to exist.[272] For example, the lessor transfers ownership of the thing involved to the lessee.

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267 In general, the way how indirect possession is transferred is different between German law, Dutch law and English law. Here, we take the situation where the direct possessor is a third party as an example. Under German law, just assignment of the claim of recovery against the direct possessor suffices for the transfer of indirect possession. Neither notifying the direct possessor nor obtaining approval of the direct possessor is necessary. The direct possessor does not have to be involved. There is no doubt that this simplifies the course of delivery (*traditio longa manu*). See Brehm and Berger 2014, p. 51-52; MüKoBGB/Oechsler 2017, § 931, Rn. 1. According to Dutch law, indirect possession is transferred via "mutual declaration (*tweezijdige verklaring*)" by the transferor and the transferee. However, just a mutual declaration is insufficient. The direct possessor, i.e. the "detentor (*houder*)" in Dutch law, has to be informed of the transfer or acknowledge that the object will be held for the transferee. In the viewpoint of some Dutch scholars, where the direct possessor is not aware of the transfer, it is difficult to say that the transferee obtains any factual control of the object. Due to this extra requirement, the course of delivery might be burdensome, especially when the transfer involves a large number of corporeal movables that are under the factual control by different third parties. See Rank-Berenschot 2012, p. 67. However, upon transfer of indirect possession, the claim of recovery is assigned, and the intermediary relationship is changed. Under English law, indirect possession is obtained through attornment. For the acquisition of indirect possession, it is necessary that the direct possessor expressly attorns to the transferee. Neither assigning the claim of recovery nor providing a notification to the direct possessor suffices. See Bridge 2015, p. 75-76.

268 Reehuis 2004, p. 49; Westermann 2011, p. 140.

269 Rank-Berenschot 2012, p. 61. English translation: "*The recognition of the possibility of transferring possession only through a two-sided declaration means that the corporeal element has less significance. In this situation, we can say 'contractualization' of the provision of possession.*"

270 Brehm and Berger 2014, p. 49.

271 Baur and Stürner 2009, p. 80.

272 Baur and Stürner 2009, p. 80.

3.2.2.2 *Indirect Possession Has No Publicity Effect*

After discussing the essence of indirect possession, we will demonstrate that indirect possession cannot convey any information to third parties due to the lack of actual control.

A Indirect Possession: A Hidden Relationship

Indirect possession is a legal relationship with respect to actual control. Actual control is visible, but this relationship *per se* is hidden to third parties. The purpose of publicity is to make invisible property rights transparent to third parties. Registration realizes this purpose by conveying information in the form of words. Possession realizes this purpose through actual control, which can give rise to physical proximity between the possessor and the thing possessed. This physical proximity can be observed by third parties.

Indirect possession does not let third parties observe its existence. Different from direct possession, indirect possession lacks actual control and thus is hidden to third parties.[273] As a result, no information is provided by indirect possession. This is the reason why indirect possession is often called "mental possession".[274]

> *„Diese abgeschwächte Beziehung zur Sache hat man dadurch zu charakterisieren versucht, dass man den mittelbaren Besitz als ‚vergeistigte' Sachherrschaft im Gegensatz zur tatsächlichen Sachherrschaft des unmittelbaren Besitzes gekennzeichnet hat."*[275]

In fact, indirect possession is hidden, and whether it really exists is always a problem for third parties. In order to know whether one has indirect possession, we have to conduct an investigation. To a large extent, this investigation is no more than an inquiry concerning the underlying right enjoyed by the indirect possessor. Is the indirect possessor, for example, a lessor or pledgor who has ownership? Therefore, indirect possession is an object of publicity, rather than a means of publicity. If the main purpose of publicity is to make invisible legal relationships transparent, then indirect possession is one of these legal relationships. Indirect possession *per se* is a legal relationship that needs to be publicized to third parties.

B An Illustration: Traditio per Constitutum Possessorium

Typically, the disqualification of indirect possession as a method of publicity can be illustrated by *traditio per constitutum possessorium*, a form of fictional delivery (*traditio ficta*). This delivery occurs where the transferor remains

273 Quantz 2005, p. 41-42; Chang 2015, p. 120.

274 Westermann 2011, p. 128.

275 Wolf and Wellenhofer 2011, p. 82. English translation: "*The weakened relationship with the thing leads us to characterize indirect possession as 'mental' control, which forms a contrast to the actual control of direct possession.*"

in actual control of the thing involved but agrees to hold this thing for the transferee. As a result of this delivery, the transferee becomes an indirect possessor, and the transferor retains direct possession.

In German law, *traditio per constitutum possessorium* is known as *Besitzkonstitut*. It gives rise to an intermediary relationship, and the indirect possessor obtains a right of recovery. As pointed out by some German lawyers, *Besitzkonstitut* is a change of the possessory intention only: the "ownership possessor (*Eigenbesitzer*)" becomes a "limited-right possessor (*Fremdbesitzer*)".[276] In Dutch law which distinguishes possession and detention, *traditio per constitutum possessorium* is also no more than a change of the parties' intention: the "possessor (*bezitter*)" becomes a "detentor (*houder*)".[277] This change is termed the "statement of detention (*houderschapsverklaring*)".[278] In English law, *traditio per constitutum possessorium* is known as attornment by transferors to transferees.[279] It only allows the latter to obtain constructive possession. The attornment consists of any overt or positive acknowledgment by the direct possessor and can arise in the absence of any change of actual control.[280] It has no effect of publicity. For example, where a pledge is created by attornment by the pledgor, this pledge is hidden and has no "*outward sign*".[281]

As *traditio per constitutum possessorium* is merely a change of the possessory intention, the entire process is hidden to third parties. For example, where a bicycle is sold and leased back, the seller does not lose the actual control, nor does the purchaser acquire actual control. In this situation, what changes is only the legal identity of both parties: the original owner becomes a lessee, and the purchaser becomes an owner. For third parties, the process of this sale and leaseback is in secrecy. Therefore, *traditio per constitutum possessorium* fails to perform any function of publicity.

> "*Aangezien een levering constituto possessorio zich slechts tussen partijen afspeelt, blijft de vervreemder in staat tegenover anderen te doen alsof niets is veranderd. Aldus is het voor derden niet kenbaar dat en controleerbaar of het bezit is overgegaan. Was de vervreemder bezitter, dan kan hij zich tegenover anderen nog steeds als bezitter gedragen.*"[282]

276 Füller 2006, p. 319; Schwab and Prütting 2020, Rn. 379.
277 Rank-Berenschot 2012, p. 62.
278 Reehuis 2004, p. 48.
279 Bridge 2015, p. 76.
280 Palm 1991, p. 1368.
281 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.27-5.28.
282 Reehuis 2004, p. 48. English translation: "*On account of the fact that traditio per constitutum possessorium only exists between the parties, the transferor remains in the state against others, as if nothing occurs. Therefore, whether possession shifts is invisible to third parties. If the transferor is a possessor, he can still behave as a possessor in relation to others.*"

3.2.2.3 *Functions of Indirect Possession*

Indirect possession has no publicity effect, but this does not mean that this legal concept is useless or should be abandoned. This is because indirect possession has other functions.

Firstly, indirect possession provides a conceptual basis for conferring possessory protection on a particular group of persons, namely indirect possessors. This function can be explained in the following way: (1) the law protects possessors from illegal interference; and (2) to provide such protection for lessors, pledgors, depositors and the like, it is necessary to recognize them as an indirect possessor. By virtue of indirect possession, indirect possessors are entitled to act, like a direct possessor, against illegal interference. This consideration of protection is an important reason why indirect possession is recognized by German law.

> *„Wie die historische Analyse zeigt, diente der Begriff des mittelbaren Besitzes dazu, dem Vermieter und vergleichbaren Personen einen Besitzschutz einzuräumen und somit die Vorschrift des § 869 zu rechtfertigen. Als einfachster Weg erschien dem Gesetzgeber, die als schutzbedürftig erkannten Personen auch als Besitzer zu bezeichnen. Der mittelbare Besitzer dient als rechtliches Versatzstück dazu, einem Besitzer ohne Sachherrschaft Besitzschutzrechte einzuräumen.“*[283]

The function of protection becomes more important where the indirect possessor has no legal ownership and can only claim protection on the basis of indirect possession.[284] For example, a thief leases the stolen things to another person and becomes an illegal indirect possessor.

Secondly, indirect possession is an important concept for prescriptive acquisition. Briefly speaking, prescriptive acquisition means that a possessor who continuously controls a thing for himself for a sufficiently long period is entitled to acquire ownership of this thing. When the possessor gives up actual control to another person, the question arises whether such prescriptive acquisition is still possible. In general, the law provides a positive answer on the basis of the concept of indirect possession.

For example, when a thief leases a bicycle he had stolen to another person, the thief can still claim prescriptive acquisition of this bicycle. Despite the loss of actual control, his possession is considered to be continuous, with a change from direct possession to indirect possession only. In this sense, indirect possession is conceptually useful for explaining this continuity of possession. In the absence of this concept, it becomes difficult to explain

283 Füller 2006, p. 285. English translation: “*As the historical analysis shows, the concept of indirect possession is to protect lessees and the like, which justifies art. 869. It seems that the simplest way for the legislator is categorizing those who deserve protection as a possessor. The term indirect possessor acts as a legal means to provide possessory protection to those who have no actual control.*”

284 Van Schaick 2014, p. 76.

why the thief still enjoys the right to acquire ownership after he gives up actual control to the lessee.

The preceding consideration is salient in Dutch law. As has been indicated above, Dutch law defines the concept of "possession (*bezit*)" by first focusing on prescriptive acquisition (see 3.1.3.3). According to art. 3:107 (2) BW, when the possessor allows another person to control the object without giving up the pretention of belonging, the former might simply become an indirect possessor.[285] As a result, the possessor's right to prescriptive acquisition is not affected.[286]

Thirdly, the concept of indirect possession helps to explain fictional delivery in theory.[287] In general, delivery requires a transfer of possession. Typically, it involves the handover of actual control, forming the actual delivery. However, delivery does not involve this handover in many situations, which leads to fictional delivery, including *traditio brevi manu*, *traditio longa manu*, and *traditio per constitutum possessorium*. In general, these three forms of fictional delivery involve transfer or provision of indirect possession.[288] Without the concept of indirect possession, the question will arise how to explain that non-factual or fictional delivery is also delivery.

3.2.3 Conclusion

In modern society, possession still qualifies as a method of publicity for corporeal movables. As possession can be obtained and preserved on the basis of a great variety of rights, it is an abstract and thus ambiguous method of publicity. Possession only indicates that the possessor has a *right* to the thing possessed. The details of this right cannot be shown by possession. To know the details, we need to make use of other means, such as making inquiries with the possessor. As an abstract means of publicity, possession is not an outward mark of ownership.

That the possessor has actual control is necessary for the function of publicity. Actual control can give rise to physical proximity between the possessor and the thing possessed, which is visible to third parties. This implies that indirect possession, as a hidden legal relationship between the direct possessor and the indirect possessor, cannot provide any indication to third parties. Moreover, whether indirect possession really exists is always

285 Snijders and Rank-Berenschot 2017, p. 98.

286 However, it seems that the concept of indirect possession is dispensable where the distinction between possession and detention (*detentio*) is recognized. For example, in the case of leasing a bicycle stolen, the lessor is the possessor, and the lessee has detention. On the basis of this distinction, acquisitive prescription by the lessor can be explained without any conceptual difficulty. French law distinguishes possession from detention, but the differentiation between direct possession and indirect possession is not recognized. See Stoljar 1984, p. 1027.

287 Brehm and Berger 2014, p. 51-52.

288 Staudinger/Gutzeit 2012, p. 222.

a question for third parties. The concept of indirect possession is recognized due to considerations of possessory protection, prescriptive acquisition, and fictional delivery. In creating this concept, publicity is not taken into account by legislators.

3.3 Possession and Third-Party Effect: Strange Interferers

Now we will examine the importance possession, as a means of publicity, has for third parties. As has been pointed out in Chapter 2, third parties bear a liability to respect property rights. In general, third parties are of three types: strange interferers, subsequent acquirers, and general creditors. The following three sections discuss the relevance of possession to the effect against these three types of third party. The main aim of this discussion is to reveal whether and in what sense possession lays a foundation for the effect of property right against third parties. In this section, we focus on possession and strange interferers. Possession and the other two types of third party are discussed later.

In this section, we first provide an introduction to the legal protection of possession. After that, an explanation of this protection is provided from the perspective of publicity. It will be argued that possessors deserve protection because they have shown their right to third parties though actual control over the thing possessed. At the end of this section, we also explain why legal protection is also available for those whose rights are infringed but do not have direct possession as an outward appearance.

3.3.1 The Concept of Possessory Protection

In this research, possessory protection means legal protection enjoyed by possessors. It is distinguished from the protection of underlying rights. The purpose of possessory protection is to maintain the state of possession *per se*: it is not relevant whether the possessor has a legal underlying right, or whether the right is personal or proprietary in nature. For example, thieves are entitled to possessory protection despite their lack of legal ownership of the thing stolen; lessees can also claim possessory protection despite the fact that their right to use is originally personal.

In general, the term possessory protection covers four different remedies enjoyed by possessors. The first is the right to use self-help. With this right, the possessor is entitled to a quick self-remedy when judicial measures cannot be reasonably expected. The self-help measure taken by the possessor should be immediate and proportionate.[289] The second is the right to recover, which means that the possessor can repossess the object

289 DCFR 2009, p. 4340.

when it has been illegally dispossessed by another person. It only happens in the situation where the possessor entirely loses possession.[290] The third remedy is to address other kinds of interference than illegal dispossession. It allows the possessor to require the interferer to remove imminent interference or suspend existing interference.[291] The final remedy is the right to claim damages or pecuniary compensation. This remedy is only possible when the possessor suffers loss due to illegal interference.

In terms of the way of protecting possession, there are two different systems: one is the civil law system, and the other is the common law system. The former has a dualist regime of protection, while the latter a single regime. Under the civil law system, possession is protected by property law as well as by the law of obligations (mainly on the basis of torts and unjust enrichment). This gives rise to a distinction between real protection and personal protection: the first means protection under property law, and the second refers to protection under the law of obligations.[292] In general, personal protection is subject to more restrictions than real protection, especially in the aspect of the burden of proof.[293] This distinction is alien to common law lawyers. In common law, possession is unitarily protected by tort law.[294] In this research, the term possessory protection covers all legal remedies that can be claimed to protect possession. The nature (personal or real) and the legal basis (property law or the law of obligations) of these remedies are deemed as irrelevant to our discussion. Therefore, details concerning the possessory protection itself are not provided here.

To avoid misunderstandings, it is necessary to mention in the end that possessory protection also includes the legal protection granted to those who only have a limited right, such as the lessee. As has been shown above, there is a distinction between "possession (*bezit*)" and "detention (*houderschap*)" in Dutch law (see 3.1.2.4). The following discussion includes the legal protection available for the detentor, as we will see later (see 3.3.2.4).

3.3.2 Possession, Protection and Publicity

After introducing the concept of possessory protection, we now turn to the relationship between this protection and the publicity of possession. In this part, we attempt to justify possessory protection from the angle of publicity.

290 DCFR 2009, p. 4346.
291 DCFR 2009, p. 4347.
292 Westermann 2011, p. 151; Reehuis and Heisterkamp 2019, p. 383.
293 Van Schaick 2014, p. 72. For example, personal protection is, in principle, available when the illegal interferer has fault, while real protection is not subject to this requirement. Therefore, if the possessor cannot prove that the interferer has fault, the possessor cannot claim remedies on the basis of the law of obligations.
294 Hinteregger 2012, p. 161.

Before starting our discussion, it is necessary to mention that scholars also justify possessory possession from other perspectives.[295]

3.3.2.1 Possessory Protection and Publicity Effect

A Normal Case: Protection of Underlying Rights

Possession has a function of publicity and a function of protection. These two functions are often considered as separate issues.[296] In fact, they are closely related: the function of publicity justifies the function of protection.[297] Every right should be respected, and possession indicates to outsiders that the possessor has a right to the thing possessed (see 3.2.1.2). Therefore, possession should be respected by outsiders. Possession indicates the existence of a right, thus every person is expected to not interfere with this right.[298] Protecting possession is an outcome of the necessity of protecting the right that is made visible by possession.

> *„Bei näherer Betrachtung entspringen diese Funktionen freilich einer einheitlichen Wurzel. Diese ist die Erkenntnis, dass der Besitz in aller Regel Ausdruck bestimmter Rechte oder Interessen ist; daher werden mit ihm die, hinter ihm liegenden Interessen geschützt.“*[299]

In fact, the connection between publicity of possession and protection of possession can be traced to the notion of *Gewere* in ancient Germanic law. As has been shown above, *Gewere* literally refers to the “clothing” of rights (see 3.1.1.2).[300] According to this notion, a person could show his or her

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295 As summarized by German scholar Müller, there are different approaches: (1) protecting possession is to protect the personality of the possessor (*Besitzschutz als Persönlichkeitsschutz*); (2) protecting possession is to protect the continuity of the relationship of economic life (*Kontinuitätstheorie*); (3) protecting possession is to protect the public peace (*Besitzschutz als Friedensschutz*); (4) protecting possession is to protect the right of ownership (*Besitzschutz als Eigentumsschutz*); (5) protecting possession allows the owner to enjoy protection without having to prove his or her right of ownership (*Beweislastverteilung*); and (6) protecting possession has the function of protecting personal rights associated with possession, thereby making these rights partially proprietary (*Verdinglichung*). In addition to these six approaches, protection of possession is also analyzed from an economic perspective. For example, some scholars argue that protecting possession is to protect the right to use (*wertbasierter Ansatz*), and others contend that it is a result of the fact that possession is a means of publicity (*informationsbasierte Ansatz*). See Müller 2010, p. 225-244. Among these approaches, the last one, namely the information-based approach, is a justification from the perspective of publicity.

296 Wolf and Wellenhofer 2011, p. 76; Salomons 2008 (2), p. 36-40.

297 Emerich 2014, p. 30.

298 Müller 2010, p. 240-241.

299 Baur and Stürner 2009, p. 64. English translation: “*On closer inspection, however, these functions share the same root. Possession is recognized as an expression of a certain right or interest in ordinary situations; therefore, the interest behind possession is also protected.*”

300 Hübner 1918, p. 186.

right through factual control and economic use of the thing involved, and the right should be respected because it has been shown by *Gewere* to the public.

> "*The actual circumstances of possession were regarded as 'prima facie' evidence of a legal right. It was therefore forbidden to disturb such possession by force, i.e. otherwise than by way of judicial action.*"[301]

Through actual control, possessors can show to outsiders that they have a right to the thing possessed. Those who receive this signal should respect possession. Truly, the details of this right are not shown by possession, an abstract means of publicity. However, these details are not relevant. For outsiders, just knowing that the possessor has a certain right to the thing possessed suffices (see 2.2.2.2.A). Any illegal interferer cannot be exempted from liabilities by claiming that he or she does not know which right is enjoyed by the possessor.[302]

Law might not only distinguish possession from rights, but also provide a distinction between the protection of possession and the protection of the underlying right. For example, the right of ownership has its own rules of protection.[303] However, this never means that the former protection has nothing to do with the latter protection. Instead, this distinction facilitates the protection of underlying rights. To claim possessory protection, the possessor does not have to prove that he or she has any legal right to keep possession, which alleviates the possessor's burden of proof.[304] In general, what the possessor needs to demonstrate is that he or she has possession previously, and possession is interfered with in the absence of his or her approval. In the situation where the right of ownership is interfered with, the owner may choose to claim possessory protection to avoid the burden of proving his or her right of ownership.[305]

B Exceptional Case: Protection of Convergence

The preceding argument from the perspective of publicity appears problematic in the situation of illegal possession. For example, why is a thief-possessor also protected from illegal interference by others? According to the publicity argument, the thief has no legal right to acquire and maintain factual control of the thing stolen, thus he or she should not be protected.

301 Hübner 1918, p. 193.
302 Hansmann and Kraakman 2002, p. 411; Smith and Merrill 2007, p. 1853-1854.
303 This is quite clear in Dutch law and German law. In particular, the owner is entitled to *rei vindicatio*, a remedy that allows the owner to repossess the object (art. 5:2 BW and § 985 BGB). See Reehuis and Heisterkamp 2019, p. 428-429; Brehm and Berger 2014, p. 120.
304 Müller 2010, p. 235-236; Emerich 2018, p. 77.
305 Müller 2010, p. 235-236; Van Oven 1905, p. 10.

However, this conclusion contradicts the fact that possessory protection is generally available. In law, a general rule is that possession is protected irrespective of whether the possessor has a lawful underlying right.[306] Interference with possession is actionable *per se*.

In fact, the protection granted to illegal possessors can also be justified from the perspective of publicity. Every possessor is presumed to have a right to maintain his or her possession. This presumption is generally in line with the reality: the possessor has a legal right to the thing possessed in most situations. Inevitably, illegal possessors benefit from the presumption. Just as German lawyer Von Jhering pointed out, granting possessory protection to thieves was a price of the presumption.[307] If a person obtains actual control, an outward appearance of rights, then he or she will be protected by law, irrespective of whether this acquisition is illegal. To third parties, the illegal possessor has conveyed an indication that he has a right to the thing possessed.

Though this indication is incorrect, not every person is entitled to sue the illegal possessor. Law only allows those who have a justifiable basis (such as the owner) to recover possession from the illegal possessor. In general, these persons know about the divergence of possession from underlying rights. Vesting a right of recovery in them can eliminate this divergence. As has been pointed out above, possession is a method of publicity that might be incorrect, and the legal protection of possession can be seen as a regime of rectification (see 3.2.1.2.C). This protection guarantees that possession will be held by those who really have a legal right to the thing involved.

In the situation of theft, even if the possessor's identity has been known by a third party, this third party cannot dispossess the thief, unless he or she has a legal right to do so. For example, a robber cannot defend his criminal act by claiming that the person he robbed is a thief. In principle, possession can only shift when there is a lawful basis, such as the transfer of ownership or the creation of a right of pledge. Possession remains unaffected in the absence of a lawful contrary cause. This is of great importance for maintaining the general convergence of underlying rights and possession, an outward mark. As has been shown, this general convergence is a precondition for the qualification of possession as a means of publicity (see 3.2.1.2). If people, in the absence of any lawful basis, were allowed to dispossess illegal possessors, then illegal dispossession would be encouraged. In the long run, the order of possession would be threatened, and the general convergence of possession and underlying rights would be hampered.[308]

306 Hinteregger 2012, p. 99; Clerk and Lindsell 2014, p. 1251.

307 Von Jhering, Über den Grund des Besitzschutzes, p. 55, cited from Müller 2010, p. 234.

308 In justifying the protection of possession, an important approach is that possession, including possession held by a person who has no lawful right to the thing possessed, is protected to maintain the public peace or the social order of possession. See Van Oven 1905, p. 37; Emerich 2018, p. 77. In general, the order of possession provides a social basis for the convergence between possession and underlying rights.

3.3.2.2 Possession as a System of Navigation

The preceding discussion concerns how the publicity effect of possession justifies possessory protection in a normal case and in an exceptional case. In this part, we view possession as a method of publicity under a broader context. Humans live in a world full of things owned, used and enjoyed by others. Everyone has a statutory duty to respect others' rights. In relation to this duty, a problem arises of how a person can avert infringing others' rights. To put it differently, how can a person know the boundary between his and others' sphere of free activities?

In general, possession can address this problem. Possession can give rise to physical proximity between the possessor and the thing possessed. From this physical proximity, outsiders can know that the possessor has a right to the thing and then adjust their acts. In this sense, the indication provided by possession helps outsiders avoid becoming illegal interferers.

> "*The concept of possession is a vital tool that allows people to navigate through the everyday world without interfering in the interest of others. Each person continually observes the things around him and can tell at a glance based on physical cues whether they are possessed or not.*"[309]

The information-communicating process is mutual: when a person informs others of his right to a thing through his actual control of this thing, this person also acquires similar indications from the actual control by others. Through this mutual process, every person is able to live in harmony with others. In reality, possession takes various specific forms, such as fencing a plot of land, storing commodities in a warehouse, locking a bicycle, or holding a book. The common feature of these forms is that they can be easily observed by outsiders.

As has been pointed out, possession is an abstract method of publicity (see 3.2.1.2). The information conveyed by possession is inadequate for subsequent acquirers (see 3.2.1.3) and general creditors (see 3.2.1.4). However, possession is a sufficient method of publicity for strange interferers, and the abstract indication provided by possession "happens" to be adequate for this type of third party to avoid interfering with others' property. Once a person knows that someone is in possession of a thing, he or she is required to respect the latter's possession of this thing, unless there is a lawful contrary reason. In general, the specific legal identity of the possessor is unimportant for strange interferers, because they do not enjoy or plan to obtain a specific proprietary interest in the thing.

309 Merrill 2015, p. 32.

3.3.2.3 *Possessory Protection, Publicity Effect, and Proprietary Effect*

The preceding two parts have explained possessory protection from the perspective of publicity and shown that possession can act as a system of navigation for humans. In this part, we argue that in the aspect of protection, the boundary between property rights and personal rights is made obscure by possession.

Property rights and personal rights are different in the aspect of the effect on third parties. This difference is shown by the way of protection. In general, property rights can be enforced against strange interferers, while personal rights cannot.[310] For creditors, the principal remedy is requiring the defaulting debtor to bear certain liabilities. Tort law protection is, in general, unavailable to personal rights (see 2.1.3.2).[311] This is in line with the fact that personal rights are a legal relationship *inter partes*.

It has been shown that possession is not necessarily associated with property rights (see 3.2.1.1). Various personal rights and intermediary rights can also be a legal basis of acquiring and maintaining possession. Where a person acquires possession on the basis of a personal right, this person is entitled to claim possessory protection against illegal interference with his or her possession. That is to say the personal right is enforced against strange interferers. In this sense, possession bestows a proprietary effect on the personal right, making the right partially proprietary.[312] Therefore, possession can make the boundary between property rights and personal rights obscure in terms of legal protection.

In general, this consequence can also be explained from the perspective of the publicity of possession. As has just been shown, possession can give outsiders an indication that the possessor has a right; thus, possession should be respected by outsiders. If a personal right embodies an element of possession, then this personal right will be made visible to outsiders. From the perspective of publicity, there is no reason to disallow the creditor claiming possessory protection against when his or her possession is illegally interfered with. After all, the personal right is made transparent by possession, and outsiders can easily know the existence of this right.

In civil law, possession is not treated as an important factor in pinning down the boundary between property rights and personal rights. In general, whether a right is associated with possession seems to be of little relevance to the nature of this right. This can be partially ascribed to the principle of *numerus clausus* and the distinction between possession and property rights.[313] The type of property rights is determined by property

310 Canaris 1978, p. 373.

311 Reehuis 2015, p. 358; Rank-Berenschot 1992, p. 133; Wolf and Neuner 2012, p. 227.

312 Müller 2010, p. 237.

313 The distinction between possession and property rights can be traced to Roman law: property rights have nothing in common with possession (*nihil commune habet proprietas cum possession*). See Wieling 2006, p. 126.

law by providing a closed list. Moreover, whether a right is proprietary is independent of possession, and property rights, especially the right of ownership, and possession represent legal domination and factual domination respectively.[314] In the closed list, some property rights embody the element of possession (e.g., *superficie*), while some property rights do not (e.g., easement). In addition, not all rights embodying possession are included in the closed list. As a result, a number of personal rights can also give rise to acquisition of possession. Lease is a typical example. In constructing the system of property rights, the failure to pay sufficient attention to possession gives rise to two results: one is that non-possessory property rights do not involve factual domination over things, and the other is that the existence of possessory personal rights obscures the boundary between property rights and personal rights, at least in terms of protection.[315]

In contrast, the distinction between property rights and possession does not play a fundamental role in common law.[316] Possession is not completely distinguished from property rights. Instead, possession is a source of proprietary effect.[317] For example, bailment, a legal relationship which takes possession as an essential element, straddles contract law and property law.[318] Another example is that lease of immovable property is, due to the lessee's possession, a typical property right in common law.[319] It is said that common law, like civil law, also has a closed list of property rights.[320] However, possession has great importance in creating the closed list by common law, while civil law treats property rights and possession as two separate issues.[321] As indicated by the common law maxim "*possession is nine tenths of the law*", possession plays a fundamental role in the common law of property.

3.3.2.4 Lease as an Illustration

Now we use lease as an example to show how personal rights are made partially proprietary by possession. To avoid misunderstandings, some conceptual divergences between the three jurisdictions (English law, Dutch law, and German law) are presented first. In English law, there is a dichotomy between the law of movables and land law. Lease can be used in both movable property and immovable property, and lease of movable property is

314 Wolf and Wellenhofer 2011, p. 39; Brehm and Berger 2014, p. 35. However, possession is never only a fact. It can give rise to certain legal consequences. As a result, possession is also considered as a right. See Snijders and Rank-Berenschot 2017, p. 110-111; Asser/Bartels & Van Mierlo 2013, nr. 104.

315 Füller 2006, p. 37-41.

316 Tay 1964, p. 480-481.

317 Bridge, Gullifer, McMeel and Worthington 2013, p. 60.

318 Bridge, Gullifer, McMeel and Worthington 2013, p. 72.

319 Cheshire and Burn 2011, p. 185.

320 Swadling 2013, p. 181-182; Merrill and Smith 2000, p. 3.

321 Müller 2010, p. 237.

also known as "hire" in English law.[322] Both German law and Dutch law use the same term (*Miete* and *huur* respectively) to describe the lease of movable property and the lease of immovable property. Moreover, both jurisdictions treat lease as a personal right and regulate it under the law of obligations.[323] As this chapter concerns only the publicity of corporeal movables, the following discussion will confine itself to the lease of corporeal movables.

A English Law

In English law, hire of corporeal movables is a type of bailment for which possession is essential. The bailor has to give up possession to the hirer (bailee). As a type of bailment, hire straddles property law and contract law and has a proprietary as well as a contractual dimension.[324] There is no doubt that the hirer enjoys possessory protection under tort law. Moreover, in principle, law only allows the hirer to sue interferers who illegally intervene in the peaceful enjoyment of possession, and the bailor is only entitled to do so when the interest of reversion is damaged.[325]

Due to the hirer being permitted to claim tort law protection, it is generally held that the relationship of hire is proprietary.

> "*Whilst some doubt has been expressed about the proprietary character of a lease or hire of goods, the better view is that all bailees with a right of possession have a right of a proprietary character, which carries with it the right to sue third parties who wrongfully interfere with the goods.*"[326]

English lawyers have doubts with respect to the proprietary qualification of the hirer's right, but these doubts mainly exist in the situation where the corporeal movable hired is disposed of to third parties or the bailor falls into insolvency.[327] In other words, the doubts concern whether and to what extent the hirer's legal position has binding force over subsequent acquirers and general creditors. It is never problematic that the hirer enjoys possessory protection against strange interferers.

B German Law

In German law, possession can take property rights and personal rights as its legal basis.[328] As a result, possession is not necessarily associated with the property right, and the holder of a personal right may also have pos-

322 Clarke and Kohler 2005, p. 609.
323 *Miete* is in Section 2 of Chapter 8 in the second book in the BGB, and *huur* is regulated in Chapter 4 and 5 in the seventh book in the BW.
324 Bridge, Gullifer, McMeel and Worthington 2013, p. 116-124.
325 Bridge, Gullifer, McMeel and Worthington 2013, p. 120.
326 Bridge, Gullifer, McMeel and Worthington 2013, p. 91.
327 Bridge, Gullifer, McMeel and Worthington 2013, p. 117.
328 Baur and Stürner 2009, p. 89; Akkermans 2008, p. 239.

session. The association of personal rights with possession is thoroughly discussed by German lawyers. According to the prevailing view, a personal right will be reinforced by possession to become partially proprietary.[329]

> *„In der Tat genießt das durch Besitzüberlassung verstärkte obligatorische Recht zum Besitz in vielem einen quasidinglichen Schutz.*"[330]

This view is based on the fact that the creditor, who is in possession of the thing involved, is entitled to claim possessory protection against illegal interference. In other words, the creditor has an independent legal position to sue illegal interferers. Here the contractual privity is eroded: the creditor does not have to rely on his counterparty.[331] German lawyers call the effect of possessory protection "function of preservation (*Erhaltungsfunktion*)".[332] Among the personal rights associated with possession, a typical one is the right of lease.

Lease is a specific contract prescribed in the book of obligations in the BGB (§ 535 BGB). It is commonly held that the right of lease, though owning some proprietary attributes, is a personal right, namely a contractual relationship between the lessee and the lessor. The content of lease is largely decided by the agreement made by the two parties (§ 535 (1) BGB). However, after acquiring possession, lessees are entitled to claim possessory protection when the thing leased is interfered with by an outsider.

> *„Der Mieter […] kann nach Besitzeinräumung die Beachtung seines Besitzes gemäß §§ 861, 862 von jedermann, auch vom Vermieter, verlangen.*"[333]

In general, all remedies of possession are available to lessees. Therefore, the lessee can according to § 861 BGB recover the thing leased from those who conduct illegal dispossession, and § 862 BGB allows the lessee to suspend existing interference and to remove imminent interference. In addition, the lessee, when as a direct and limited-right possessor, is also entitled to use self-help according to § 859 BGB. The remedies provided by these three provisions are real protection, which should be distinguished from personal protection on the basis of the law of obligations. As a possessor, the lessee is also allowed to protect his right to use under tort law and the law of unjust enrichment.[334]

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329 Wolf and Wellenhofer 2011, p. 78.

330 Baur and Stürner 2009, p. 66. English translation: "*In fact, the obligational right to possession is reinforced due to the transfer of possession and enjoys quasi-proprietary protection.*"

331 Müller 2010, p. 237.

332 Baur and Stürner 2009, p. 65; Wolf and Wellenhofer 2011, p. 76.

333 Wolf and Wellenhofer 2011, p. 78. English translation: "*The lessee [...] can according to § 861 and § 862 request recovery of possession from everyone, including the lessor.*"

334 Baur and Stürner 2009, p. 100-103.

C Dutch Law

Lease (*huur*) is a relationship of personal right regulated in Book 7 of the BW. The right of lease is configured as a result of the contract of lease, a contract that is subject to the principle of privity.[335] As to the content of the relationship, what counts is the contract. Before exploring whether and in what way possessory protection is available for the lessee, two points need to be mentioned first.

One point is that Dutch law distinguishes "possession (*bezit*)", which is equivalent to ownership possession, from "detention (*houderschap*)". As a result, the lessee is only a detentor of the thing leased: the lessee is subject to the contract of lease and controls the thing for the lessor.[336] On the other hand, the lessee is also a possessor of the right of lease *per se*, because both patrimonial rights and tangible things can be the object of possession in Dutch law.[337] The other point is that Dutch law, like many other civil law jurisdictions, has a dualist system of protection. Protection of possession can be real as well as personal: the possessor is entitled to take actions on the basis of both property law and the law of obligations.[338]

Due to the lack of "possession (*bezit*)", lessees cannot invoke art. 3:125 (1) and (2) BW.[339] These two paragraphs provide legal protection only to possessors, while lessees are merely a detentor of the thing leased.[340] However, it does not mean that the lessee enjoys no legal protection in Dutch law. Art. 3:125 (3) BW expressly provides that the detentor is entitled to claim protection under tort law. Permitting this tort law protection makes the right of lease partially proprietary, in the sense that the right also has some strength of exclusivity.

335 Akkermans 2008, p. 300.

336 Salomons 2008 (2), p. 32.

337 Snijders and Rank-Berenschot 2017, p. 97-98.

338 Art. 3:125 (3) BW: "*Het in dit artikel bepaalde laat voor de bezitter, ook nadat het in het eerste lid bedoelde jaar is verstreken, en voor de houder onverlet de mogelijkheid een vordering op grond van onrechtmatige daad in te stellen, indien daartoe gronden zijn.*" English translation: Art. 3:125 (3) BW: "*Nothing in this article shall deprive the possessor, even after expiry of the year referred to in paragraph 1, or the detentor, of the possibility, should there be grounds, to institute an action on the basis of the law of torts.*"

339 Snijders and Rank-Berenschot 2017, p. 121.

340 This restrictive approach is criticized. See Van Schaick 2014, p. 81. Here, it should be noted that the lessee has two legal positions in Dutch law: the detentor of the thing leased and the possessor of the right of lease. The dual positions are a result of the possibility of possession of rights. It is unclear whether the lessee can, in the name of a possessor of the right of lease, invoke art. 3:125 (1) and (2) BW. It seems that particular attention is not paid to this question by Dutch lawyers. It is worthwhile mentioning here that "*possession of an incorporeal right can only be protected by the possessory remedies where it is coupled with physical control over a corporeal thing*" in Austrian law. See Rüfner 2014, p. 173. Under South African law, possessory protection is available to the lessee's possession of the right to use. See Kleyn 2014, p. 195.

> "*Een zekere exclusiviteit kan men niet aan het huur- en pachtrecht ontzeggen en wel in die zin dat huurder en pachter kunnen ageren tegen derden die hen zodanig storen dat zij uit dien hoofde aansprakelijk zijn uit onrechtmatige daad.*"[341]

Therefore, the lessee enjoys legal protection against third parties under Dutch law. However, unlike German law, Dutch law does not entitle the lessee to claim real protection, and only remedies on the basis of tort law are possible.

D Conclusion

In a word, the possibility of possessory protection for the personal right of lease makes this right partially proprietary in the three jurisdictions, giving rise to a phenomenon of "propertization (*Verdinglichung* in German law or *verzakelijking* in Dutch law)".[342] In general, this phenomenon is not without ground. It can be justified by the publicity effect of possession. Once the lessee obtains possession, the personal right to use will be made visible to outsiders, beginning to have an outward appearance.

3.3.3 Protection in the Absence of Actual Possession

It has been argued in the preceding discussion that one ground of possessory possession is that (direct) possession can convey an indication to third parties. As a result, a right associated with possession should not be interfered with, regardless of whether this right is initially proprietary or personal. However, this argument does not mean that protection will be denied where direct possession is absent. In law, property rights are also protected, even though they are not associated with direct possession. For example, an owner has a right of recovery against illegal dispossessors by virtue of his or her ownership, and an indirect possessor enjoys possessory protection despite the fact that indirect possession has no effect of publicity (see 3.2.2). These two examples appear to be at odds with our preceding argument. However, this is not true when we note that the perception that direct possession should, due to its publicity effect, be respected does not mean that a right dissociated from direct possession deserves no protection.

3.3.3.1 Protection of Indirect Possession

The concept of indirect possession is recognized by English law (constructive possession), German law (*mittelbare Besitz*), and Dutch law (*middellijk bezit*). In general, these three jurisdictions differ in the aspect of protecting

341 Snijders and Rank-Berenschot 2017, p. 59. English translation: "*It cannot be denied that certain exclusivity is enjoyed by the tenant and the farming tenant, in the sense that the tenant and the farming tenant may act against third parties who are liable for their illegal acts.*"

342 Gray 2009, p. 163; Baur and Stürner 2009, p. 66; Snijders and Rank-Berenschot 2017, p. 59.

indirect possession, especially between English law and the other two civil law jurisdictions.

In German law, protective measures which can be taken by direct possessors are also available for indirect possessors. Thus, the indirect possessor has a right of recovery, a right to suspend and remove disturbance, and even a right to use self-help.[343] Dutch law protects indirect possessors and direct possessors in the same way: art. 3:125 (1) BW is identically applied to direct possession and indirect possession. As a result, the possessor, whether direct or indirect, is entitled to restore possession and to remove and suspend disturbance.[344]

Different from both German law and Dutch law, English law restricts constructive possessors taking actions in the situation of illegal interference with possession. For example, in the case of bailment only the bailee, who holds actual possession, has a right to sue on the basis of trespass.[345] In English law, the bailor's constructive possession is not a form of possession that is intended to be protected from trespass. However, exceptions exist: bailors can sue when they have an immediate right to possession out of the revocable bailment or when their reversionary interest is harmed.[346] For constructive possessors (bailors), possessory protection is in principle not available.[347] In general, what the bailor enjoys is no more than a reversionary interest, a right to reobtain actual possession in the future. This interest is protected by tort law as far as it is damaged, such as when the thing involved is destroyed by or sold to others.[348] The restrictive approach adopted by English law implies that constructive possession is, in essence, a right of recovery, which has been shown above (see 3.2.2.1).

Indirect possession cannot perform the function of publicity or give any indication to third parties (see 3.2.2). Due to the lack of publicity effect, it appears that indirect possessors should not be entitled to possessory protection, unless their right of recovery is damaged or threatened. This conclusion is in line with English law. As just shown, English law generally disallows indirect possessors to claim possessory protection. However, the conclusion contradicts both German law and Dutch law. In these two jurisdictions, possessory protection is generally available to indirect possessors. The following discussion presents that the main reason for this difference lies in legislative policy.

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343 Wolf and Wellenhofer 2011, p. 51. However, as to whether indirect possessors have a right to use force against illegal interferers, different opinions exist. See Wilhelm 2010, p. 241-242.

344 Here, it is worthwhile noting that Dutch law prohibits possessors from using force to defend possession against illegal interference. Possessors are supposed to initiate a judicial proceeding. See Van Schaick 2014, p. 71.

345 Bridge, Gullifer, McMeel and Worthington 2013, p. 120.

346 Winfield and Jolowicz 2010, p. 823; Palmer 2009, no. 4-065-4-075.

347 Bridge 2015, p. 84-86.

348 Palmer 2009, no. 4-068.

In general, indirect possession can be explained from the perspective of possessory protection in German law. As has been shown above, possession is defined broadly for the purpose of providing possessory protection to such persons as the lessee (see 3.1.3.3).[349] Due to this concern, German legislators draw a distinction between direct possessors (such as the lessee) and indirect possessors (such as the lessor).[350] In Roman law, there was a tradition that owners had *possessio* and enjoyed possessory protection, regardless of whether they exercise actual control in person. German law follows this tradition. Truly, the owner can sue the interferer by virtue of the right of ownership. However, this does not make possessory protection on the basis of the owner's legal position as an indirect possessor useless. Possessory protection is advantageous to the owner in terms of the burden of proof, which has been pointed out above (see 3.3.2.1). In addition, it is worthwhile noting that not every indirect possessor has a legal right. For example, a thief leases the stolen bicycle, thus becoming an indirect possessor. In this very situation, legal protection on the basis of an underlying right is impossible for the thief, and only possessory protection is available.[351]

In English law, one reason why indirect possessors cannot claim possessory protection is doctrinal: in essence, indirect possessors have no possession.[352] In terms of protection, indirect possession is no more than a reversionary interest. Another more important reason is that English law has a deep concern about double liability which is prejudicial to defendants.[353] The denial of possessory protection to indirect possessors can avoid the following situation: the same interferer is sued twice by the direct possessor and the indirect possessor. The concern about double liability helps us to understand s. 8 (1) Torts (Interference with Goods) Act 1977.[354] According to this paragraph, the defendant is entitled to refute the plaintiff's claim by proving that a third party has a better right than the plaintiff.[355] However, the denial of possessory protection does not trigger a large problem to indirect possessors for two reasons. Firstly, the direct possessor (bailee) bears a strict liability to the indirect possessor (bailor), which can encourage the former to take positive measures against illegal interference from third parties.[356] Secondly, the reversionary interest enjoyed by the

349 Füller 2006, p. 285.
350 Staudinger/Gutzeit 2012, p. 217-218.
351 Van Schaick 2014, p. 76.
352 Palmer 2009, no. 4-008; Clerk and Lindsell 2014, p. 1349.
353 Bridge 2015, p. 103-104.
354 S. 8 (1) Torts (Interference with Goods) Act: "*The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called jus tertii) to the contrary is abolished*."
355 Bridge, Gullifer, McMeel and Worthington 2013, p. 140.
356 Bridge 2015, p. 103.

indirect possessor is protected under tort law.[357] Thus, the legal position of indirect possessors has been well protected, despite the lack of possessory protection.

Therefore, the difference of English law from German law and Dutch law is principally a consequence of legislative policy. Both German law and Dutch law are concerned more about the protection of possessors against illegal interference. Both direct possessors and indirect possessors are entitled to take protective measures. As a result, the indirect possessor does not have to rely on the direct possessor: the former has an independent legal position to sue for unlawful interference. In contrast, English law is concerned more about the problem of double liability which is unjust to unlawful interferers. To address this problem, only direct possessors are allowed to claim protection. The indirect possessor cannot sue unless the reversionary interest is damaged.

3.3.3.2 Protection of Non-Possessory Property Rights

In reality, some property rights are not associated with direct possession or indirect possession, thus becoming non-possessory. Nevertheless, this does not mean that these non-possessory property rights are not protected by law. In other words, even though possession is absent, property rights *per se* are still protected.

For example, an easement usually does not vest possession in the owner of the dominant land, but law entitles this owner to sue when this property right is interfered with; the creditor who has a right of mortgage (hypothec) is not in possession of the collateral, but legal protection is available for this proprietor. Property law not only protects possession and possessory rights, but also non-possessory rights. In fact, with respect to one specific thing, there are often multiple legal relationships, among which only one can be made visible to third parties by possession. For example, A is an owner of a bicycle, he leases this bicycle to B and pledges it to his creditor C. In this situation, only B has direct possession, and his right of lease is made visible. Both A and C have no actual control, which means that the right of ownership and the right of pledge are not made visible to third parties.

Non-possessory property rights should be respected. In general, every property right constitutes a part of the proprietor's patrimony and represents an interest enjoyed by the proprietor. Therefore, every property right should be protected, irrespective of whether it embodies the element of possession. Possession deserves protection because it indicates the existence of a right. However, this does not mean that a property right in the absence of possession should be disrespected. In fact, possession should be respected because it usually has a certain underlying right, and it is the necessity of protecting this right that justifies the protection of possession (see 3.3.2.1).

357 Bridge 2015, p. 103; Clerk and Lindsell 2014, p. 1349.

If we acknowledge this, then the absence of possession should never be deemed as a sufficient reason for denying protecting property rights.

3.3.3.3 A Possible Explanation

The preceding discussion has shown that: (1) possession should be respected, because it makes the underlying right visible, and the necessity of protecting this right provides a basis for the protection of possession; and (2) indirect possession and non-possessory property rights are also protected from illegal interference, despite the fact that they are invisible to third parties. Therefore, possession should be protected because of the effect of publicity, but this does not mean that only property rights made visible by possession can be enforced against illegal interferers. These two conclusions appear contradictory. In this part, we provide an explanation by viewing the effect of publicity of (direct) possession under a more general context.

Indeed, indirect possession and non-possessory property rights are not visible to strange interferers. However, this does not mean that strange interferers face a problem of information asymmetry. This is because where indirect possession and a non-possessory right are involved, correlative direct possession has communicated an indication to strange interferers. In other words, if there is an actual possessor who physically controls the thing involved, then strange interferers are able to know from this physical control that a certain right exists and to gain sufficient information to adjust their acts. If they fail to adjust their acts, then it seems unproblematic to allow the indirect possessor or the holder of the non-possessory right to sue. Therefore, the grant of protection to indirect possessors and the holder of non-possessory property rights does not make strange interferers fall into a worse situation.[358]

In the preceding case concerning the bicycle, owner A gives up actual possession to lessee B, and both ownership and pledge are invisible. However, the hidden ownership and pledge do not cause any problem of information to strange interferers, because strange interferers have obtained an indication from the actual control by lessee B. The bicycle has already been possessed by B, and strange interferers are able to navigate their acts according to the B's actual control. As has been argued above, possession can convey an abstract indication, and the possessor's specific legal identity is not important for strange interferers (see 3.3.2.1). Therefore, it suffices for strange interferers that the lessee exercises actual control over the bicycle.

358 Here it should be noted that this does not involve the problem of double liability, which concerns English lawyers deeply. It only means that the protection does not create an extra burden in terms of the collection of proprietary information by strange interferers.

3.3.4 Conclusion

From the preceding discussion, it can be seen that possession has a function of protection and a function of publicity. These two functions are closely related. Specifically speaking, possession should be protected because it is an outward symbol of underlying rights that need to be respected. The underlying right justifies the protection of possession. Three points merit special emphasis about this conclusion.

Firstly, possession indicates that the possessor has a certain right to the thing possessed, and thus third parties should respect possession. This indication is communicated through the physical proximity between the thing and the possessor. Instinctively, third parties can immediately react to this physical proximity and adjust their behaviors to avoid conducting illegal interference. Otherwise, they will incur liabilities. In everyday life, people rely on possession to navigate their behaviors. In this sense, possession can be seen as a system of navigation that can provide information to third parties cheaply and efficiently.

Secondly, possession does not always have an underlying right. For example, thieves have possession of the thing stolen. From the perspective of publicity, the possessory protection granted to illegal possessors can facilitate the general convergence of underlying rights and the outward mark (possession). Excluding illegal possessors from possessory protection in a general way is tantamount to encouraging unlawful interference, which will, in the long run, threaten the order of possession and hamper the general convergence of underlying rights and possession. Of course, those who have a lawful ground are entitled to recover the thing involved from illegal possessors. Illegal possession causes a divergence between possession and the underlying right. The claim of recovery can rectify such divergence.

Thirdly, the two preceding points only concern why (direct) possession should be protected. They do not touch upon the issue of the protection of indirect possession and non-possessory property rights. In reality, not all property rights are made visible through direct possession. Some property rights are only associated with indirect possession, and some do not include any possession. Though these rights are hidden to third parties, they still should be protected from illegal interference. In general, there is an "indirect" connection between this protection and publicity of possession: these invisible property rights (such as the lessor's right of ownership) are often associated with actual possession held by another person (such as the lessee's actual possession), and third parties are always able to navigate their behaviors according to this actual possession.

3.4 Possession and Third-Party Effect: Subsequent Acquirers

After demonstrating the importance of possession for strange interferers, we now turn to the relationship between possession and another type of

third party, namely subsequent acquirers. As argued above, possession is an abstract method of publicity (see 3.2.1.2). This determines that possession is not an adequate method of publicity for subsequent acquirers who demand detailed proprietary information. In this section, we first present that possession cannot satisfy the demand for proprietary information by subsequent acquirers (see 3.4.1). After that, we discuss the role played by possession, as a means of publicity, in two specific situations: transfer of ownership (see 3.4.2) and *bona fide* acquisition (see 3.4.3). This discussion includes a comparative study of the three jurisdictions: English law, German law, and Dutch law.

3.4.1 Possession and Subsequent Acquirers

Unlike the strange interferer, subsequent acquirers have or intend to have a property right with respect to a specific thing. Subsequent acquirers include the transferee who intends to acquire ownership, the usufructuary who aims to have a proprietary right of use, and the secured creditor who seeks to have a prior right of enforcement. Subsequent acquirers are "subsequent" in the sense that they are a latecomer: before the acquisition, other parties already have a property right with respect to the thing involved. As a result of the rule of *prior tempore*, subsequent acquirers have a legal position inferior to those who have an "older" property right.

Because of this inferior legal position, subsequent acquirers require proprietary information concerning the existing property rights. Compared with strange interferers for whom an abstract indication suffices, subsequent acquirers need more detailed proprietary information. Before obtaining a property right with respect to a certain thing, subsequent acquirers will usually investigate the property rights that already exist on this thing. By this investigation, they want to avoid running into a conflict with other proprietors. In general, the investigation involves, among other things, the date of the creation of these property rights, the content of these rights, and whether and how these rights will affect the property right they intend to acquire.

In many sources, possession is considered as a means of publicity that can satisfy the demand for proprietary information by subsequent acquirers.[359] In fact, however, possession is almost of no use to subsequent acquirers. As emphasized many times, possession is only an abstract method of publicity. It can only give third parties an indication that the possessor has a right to the thing possessed. The details of this right cannot be shown by possession. In this sense, possession is ambiguous. This ambiguity implies that possession is far from being a method of publicity sufficient for subsequent acquirers. Subsequent acquirers need to know the details of the existing property rights with respect to the thing involved. The problem of

359 Clarke and Kohler 2005, p. 389-390; Wolf and Wellenhofer 2011, p. 76; Snijders and Rank-Berenschot 2017, p. 63.

information asymmetry for subsequent acquirers cannot be addressed by possession.

In general, the failure of possession to address the problem of information asymmetry is related to two facts: (1) the publicity effect of possession has been made dispensable to a large extent in the law of corporeal movables, and property rights can be acquired without involving (direct) possession in many situations; and (2) the publicity effect of possession is never decisive for the acquisition of property rights, and many other factors have to be taken into consideration. In other words, publicity is neither always necessary nor sufficient for acquiring property rights of corporeal movables. Here we briefly explain these two facts.

The first fact is that (direct) possession is not necessarily involved in the creation and transfer of property rights in many situations. In other words, property rights might be acquired invisibly. For example, the time when ownership of goods passes to the transferee is decided by transacting parties under the consensual system. Transfer or provision of possession is not necessary. Under the translative system, delivery is essential for the transfer of ownership. However, this delivery does not necessarily require the shift of direct possession. It can take other forms, such as *traditio brevi manu*, *traditio per constitutum possessorium*, and *traditio longa manu*. These three forms of delivery allow the thing involved to remain physically where it is. As a result, the transfer occurs invisibly, and for this reason, they are termed as "invisible delivery" in this research.[360] Correspondingly, delivery involving the change of physical control of the object is called "visible delivery" in this research.[361]

Moreover, transacting parties are also entitled to decide the date on which ownership passes under the translative system. The relationship between possession and the transfer of ownership is further discussed below (see 3.4.2). In the situation where corporeal movables are used as collateral, possession is not necessarily involved. For example, a non-possessory security device, such as mortgage and non-possessory pledge, might be created on corporeal movables (see 3.5.3.1). On the basis of this non-possessory security device, the security provider can continue having actual control of the collateral. As a result, possession fails to make the security device visible.

In general, the law allows the actual control of corporeal movables to remain unaffected by the disposal of corporeal movables. The reason is that transacting parties have an individual right to decide the person who will enjoy direct possession. Truly, (direct) possession is a method of publicity,

360 Generally speaking, the term invisible delivery is equivalent to the concept of constructive delivery, as opposed to actual delivery, in English law, as will be seen in 3.4.2.1.C. Moreover, invisible delivery is also called "fictional delivery (*traditio ficta*)" in some writings (see 3.4.2.4.A).

361 In general, visible delivery is known as actual delivery in English law (see 3.4.2.1.C) and "true delivery (*traditio vera*)" in some writings.

and visible delivery can show the disposal of corporeal movables in an abstract way. However, possession is also essential for making use of things in many situations. It embodies the interest of use. Sometimes, possession is defined by referring to using an object or excluding others from the enjoyment or use of this object.[362] Usually, possessing a thing is necessary for making use of or enjoying this thing. Transacting parties should be entitled to decide the person who can use the thing involved by obtaining and preserving actual control of the thing. For example, a seller can transfer ownership of a bicycle he has and retain possession of this bicycle by leasing it back. In this situation, the transfer is completely invisible to third parties.

The second fact is that (direct) possession alone does not suffice for the creation and transfer of property rights of corporeal movables. Possession is an abstract and thus ambiguous method of publicity. In the situation where possession is expected to give rise to certain proprietary consequences, such as *bona fide* acquisition, law always requires the fulfillment of other conditions. For example, possession cannot indicate the existence of ownership, thus third parties are required to be prudent when transacting with the possessor. Third parties should not believe that the possessor has legal ownership just because the latter is in actual control of the thing involved. Instead, they should be sufficiently attentive to ascertaining the possessor's true legal identity and conduct some investigations. If they fail to do so, their purpose of acquisition might be frustrated. Whether third parties are sufficiently prudent is often a question in the situation of *bona fide* acquisition. About the relationship between possession and *bona fide* acquisition, further discussion will be provided below (see 3.4.3).

3.4.2 Transfer of Ownership of Corporeal Movables

This part focuses on the role of possession and its publicity effect under the context of the transfer of corporeal movables. We will first introduce the role of possession under English law, German law and Dutch law and then provide a comparative and conclusive analysis. In this part, it will be concluded that: (1) for each jurisdiction, the starting point is that parties are entitled to decide the time when ownership passes as well as the person who will hold direct possession; and (2) invisible delivery has no effect of publicity, and visible delivery has the publicity effect only in an abstract sense.

3.4.2.1 English Law

In this part, we provide an introduction to the role possession plays in the transfer of corporeal movables in English law. This introduction concerns

362 Emerich 2018, p. 51. In ancient Germanic law and common law, the concept of possession was often defined on the basis of use or enjoyment. A possessor was a person who enjoyed or made use of the thing. See Gray 2009, p. 151; Hübner 1918, p. 186.

two requirements for a valid transfer: one is that the parties have a valid consent of the transfer, and the other is that the thing involved has to be specified. For the sake of simplicity, the following discussion concentrates only on the transfer of corporeal movables in the situation of the sales.

A A Consensual System

According to s. 17 (1) Sale of Goods Act (SGA), ownership of corporeal movables passes at the time decided by parties, provided that the thing involved is specific.[363] If individuals do not decide any specific moment, then the default rule is that ownership passes to the transferee when the contract takes effect. This default rule is set forth in s. 18 (1) SGA.

> S. 18 (1) SGA: "*Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.*"

In this sense, the SGA creates a consensual system, and delivery is not a prerequisite for the transfer of ownership.[364]

Where ownership passes to the transferee in the absence of delivery, there is a divergence between ownership and possession. This divergence will undermine the strength of the ownership acquired by the purchaser. Pursuant to s. 24 SGA, a third party in good faith is entitled to acquire ownership from "*the seller in possession*", provided that all relevant requirements are met. In this sense, we can say that the ownership acquired by the purchaser is relative in the absence of delivery. S. 24 SGA is a rule of *bona fide* acquisition that is further discussed below (see 3.4.3).

In understanding the SGA, it is necessary to note that the term "*agreement to sell*" is distinguished from "*sale*". S. 2 (4) SGA provides that "*Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale*". S. 2 (5) SGA stipulates that "*Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell*". According to these two paragraphs, a difference between the two terms lies in whether ownership is acquired by the buyer.[365] This difference further implies that the "*agreement to sell*" and the "*sale*" are treated differently in the following aspects: the protection against illegal interference, the power of further disposal to third parties, the right of separation in the situation of insolvency, and the allocation of fruits and risks.[366] Therefore, it

363 S. 17 (1) SGA: "*Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*"

364 Van Vliet 2000, p. 91.

365 Bridge, Gullifer, McMeel and Worthington 2013, p. 42.

366 Bridge, Gullifer, McMeel and Worthington 2013, p. 43-44.

can be said that the SGA draws a distinction between, in the jargon of German legal theory, the proprietary contract and the obligational contract.[367]

B The Requirement of Specificity

As just mentioned, a condition for the transfer of ownership in the absence of delivery is that the subject matter should be specific and ascertained.[368] According to s. 61 SGA, a good is specific when it can be "*identified and agreed on at the time a contract of sale is made*". The requirement of specificity is defined by s. 16 SGA. According to this provision, ownership of unspecific goods cannot pass until the goods have been ascertained.[369] This requirement is easy to understand. Ownership is a property right and can be enforced against general third parties. Thus, this right must exist on a specific object. Otherwise, third parties would be exposed to an excessive risk of uncertainty.[370]

However, English law recognizes an exception to the requirement of specificity: the "*sale of goods forming part of a bulk*" or "*quasi-specific goods*".[371] Typically, this exception arises in the following situation and the like: five tons of oil are sold out of ten tons of oil stored in a specific tank, but the oil sold is not yet appropriated. This situation was once regulated by s. 16 SGA. As a result, the buyer cannot acquire ownership of five tons of oil because the subject matter is not specified. If the buyer has paid the price in advance, then the buyer will fall into a disadvantageous position if the seller becomes insolvent. To address this problem, the Law Commission and the Scottish Law Commission conducted a reform and introduced the rule of bulk ownership: Sale of Goods Forming Part of a Bulk. This rule is embodied in s. 20A and 20B of the SGA.[372] The central consequence of this rule is that the buyer can temporarily acquire a share of the whole bulk

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367 In German legal theory, proprietary contract refers to the contract that can give rise to proprietary legal consequences, while obligational contract can only give rise to a legal relationship of personal rights. These two contracts are distinguished from each other. For acquisition of property rights, a proprietary contract is essential. The obligational contract only provides an obligational basis for the proprietary contract. See Wolf and Wellenhofer 2011, p. 68-71.

368 S. 16 SGA: "*Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.*"

369 Where there is a contract for the sale of unascertained goods, no ownership is transferred to the buyer until the goods are ascertained.

370 Clarke and Kohler 2005, p. 156.

371 Bridge, Gullifer, McMeel and Worthington 2013, p. 273; Van Vliet 2000, p. 93.

372 S. 20A SGA: "(1) *This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met—(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and (b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.* (2) *Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree—(a) property in an undivided share in the bulk is transferred to the buyer, and (b) the buyer becomes an owner in common of the bulk.*"

in proportion to the price paid. In other words, the buyer becomes a joint owner of the specific bulk.[373]

The rule of bulk ownership tempers the harshness of the requirement of specificity. In practice, this rule is very meaningful if the seller goes bankrupt, or if the bulk involved is distrained by a creditor of the seller. With joint ownership, the buyer can release the share from the bankruptcy or the seizure.[374] As indicated by the final report issued by the Law Commission and the Scottish Law Commission, the principal purpose of the reform is to protect the buyer, who has paid the purchase price in advance, from the risk of the seller's insolvency.[375]

To acquire a specified share of the entire bulk, two requirements must be met: a specific quantity and a specific bulk. The bulk should be sufficiently specific. Otherwise, the share cannot be determined even though the quantity agreed is specific.[376] By the same token, the specifically-agreed quantity will become nonsense if the whole bulk cannot be ascertained.[377] In a nutshell, the rule requires that both the quantity sold and the bulk involved should be specific. Due to these two requirements, we can say that the rule of bulk ownership does not completely dispense with the principle of specificity.

The rule of bulk ownership gives rise to joint ownership. However, this joint ownership is interim and different from ordinary co-ownership. Upon the delivery or the appropriation of the corporeal movables sold out of the bulk, the joint ownership will come to an end, and ownership of the thing delivered passes to the buyer.[378] About this appropriation, s. 20B SGA prescribes the "*deemed consent*" of all joint owners. This means that, in the absence of consent of joint owners, the seller has the right of delivery and a right to perform the contractual duty of transferring ownership.[379] When the seller delivers a thing out of the bulk to a buyer, the latter will acquire ownership of this thing. In the situation of overselling where multiple buyers are a co-owner, the seller's delivery to one buyer may cause a

373 Bridge, Gullifer, McMeel and Worthington 2013, p. 302.

374 Clarke and Kohler 2005, p. 485.

375 The Law Commission 1993, p. 2.

376 S. 61 (1) F1 SGA: "*'bulk' means a mass or collection of goods of the same kind which—(a) is contained in a defined space or area; and (b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity.*"

377 According to s. 20A (2) SGA, another requirement is that "*the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.*" This requirement is a result of the balance between conflicting interests, thus it is irrelevant to the definition *per se*.

378 See s. 20A (4) SGA; Bridge, Gullifer, McMeel and Worthington 2013, p. 302.

379 S. 20B (1) SGA: "*A person who has become an owner in common of a bulk by virtue of section 20A above shall be deemed to have consented to—(a) any delivery of goods out of the bulk to any other owner in common of the bulk, being goods which are due to him under his contract; (b) any dealing with or removal, delivery or disposal of goods in the bulk by any other person who is an owner in common of the bulk in so far as the goods fall within that co-owner's undivided share in the bulk at the time of the dealing, removal, delivery or disposal.*"

shrinkage of the other buyers' share.[380] Nevertheless, these other buyers are not entitled to complain about the shrinkage.[381] Therefore, the buyer who gains possession earlier will have a superior position, and the buyer does not have to bear any liability to the other buyers whose shares shrink. This "*first delivery first ownership*" rule is also applicable in the situation of the seller's insolvency.[382]

C Actual Delivery and Constructive Delivery

Under the English consensual system, corporeal movables can be transferred independently from delivery. However, this does not mean that delivery is not important. As will be seen later, the formality of delivery largely determines whether the ownership acquired is effective against third parties in good faith (see 3.4.3.1). For this reason, we now introduce the concept of delivery in English law.

The SGA defines delivery as "*voluntary transfer of possession from one person to another*" in s. 61 (1). In general, delivery can be actual as well as constructive, depending on whether actual control is handed over.[383] Roughly speaking, actual delivery is equivalent to visible delivery, and constructive delivery to invisible delivery. By actual delivery, the acquirer can obtain actual possession, while constructive delivery does not involve any change of actual control and the subject matter remains where it is.[384] Actual delivery involves handing over actual control. This is a bilateral process between the transferor who surrenders actual control and the transferee who receives actual control.[385] It is worthwhile noting that handing over the key to the premise where the corporeal movables involved are stored is actual delivery in English law.[386] However, different opinions exist.[387]

Constructive delivery can occur in different situations, and a common aspect of these situations is that the transferee does not obtain actual control. In general, constructive delivery includes attornment, delivery to a third party, and symbolic delivery. Attornment can take place in three situations: (1) the transferor attorns to the transferee and retains actual control (*traditio per constitutum possessorium*); (2) a third party holding actual control of the object attorns to the transferee (*traditio longa manu*); and (3) the transferee who has obtained possession begins to hold the object for his

380 Overselling means that the seller disposes of more goods than the total amount of the bulk. In this situation, the last buyer can also acquire joint ownership according to s. 24 (the seller in possession). As a result, the other buyers' share will shrink proportionally.
381 Bridge, Gullifer, McMeel and Worthington 2013, p. 306.
382 The Law Commission 1993, p. 33-36.
383 Benjamin 2014, p. 424.
384 Frisby and Jones 2009, p. 26.
385 Frisby and Jones 2009, p. 26.
386 Frisby and Jones 2009, p. 26-27; Bridge 2015, p. 75.
387 In the viewpoint of some scholars, handing over the key is a kind of "symbolic or constructive delivery", just like the delivery of bills of lading. See Benjamin 2014, p. 427.

or her own account (*traditio brevi manu*).[388] In the first case, the transferor is said to remain in possession "*in the capacity of bailee*".[389] In fact, possession does not shift, and only a relationship of bailment comes into existence. As pointed out by some scholars, "*possession and delivery go their separate ways*" in this case.[390]

Under the second attornment, a third party who attorns to the transferor before the transfer changes to attorn to the transferee after the transfer. This third party is known as bailee in English law. The second attornment can take place in the situation where delivery orders, warrants, wharfingers' certificates, warehousemen's certificates or the like are involved.[391] To accomplish this attornment, it is necessary to obtain an acknowledgment from the third party. This means that, for example, if a warehouseman refuses to hold the object for the transferee, then attornment will not be completed. In the absence of communicating the fact of transfer to and having an acknowledgment from the warehouseman, modification of the warehouse certificate alone does not suffice.[392] Even if the warehouseman has promised, in advance, to attorn to the person who holds the certificate, constructive delivery does not complete either.[393] A bill of lading is a special document that can directly give rise to constructive delivery upon negotiation of the bill of lading, even when the carrier does not express any acknowledgment. It forms a contrast to delivery warrants: the latter requires warehousemen's specific attornment, regardless of whether they contain the warehousemen's undertaking in advance.[394] Because of this difference between the bill of lading and the other documents concerning goods, the former is a document of title to goods in common law and sometimes treated as a document which can trigger symbolic delivery.[395]

Constructive delivery may also take place when the object is delivered to a third party who holds it for the benefit of the transferee.[396] For example, where a seller directly delivers a bicycle to the buyer's borrower, constructive delivery arises. The borrower possesses this bicycle for the buyer. However, if the third party is an employee or a servant of the transferee, then actual delivery will take place. Possession cannot be acquired by employees or servants under English law.[397]

On the basis of the introduction above, the concept of delivery in English law can be shown in the following diagram (Figure 6).

388 Bridge, Gullifer, McMeel and Worthington 2013, p.122.
389 Bridge 2015, p. 75; Benjamin 2014, p. 427.
390 Bridge 2015, p. 75.
391 Benjamin 2014, p. 429.
392 Bridge, Gullifer, McMeel and Worthington 2013, p. 133.
393 Bridge 2015, p. 77.
394 Bridge 2015, p. 77-78; Benjamin 2014, p. 429.
395 Benjamin 2014, p. 427. The bill of lading is the only document of title to goods in the common law sense, as we will show later (see 4.2.2.1).
396 Bridge 2015, p. 75-76.
397 Bridge 2015, p. 76.

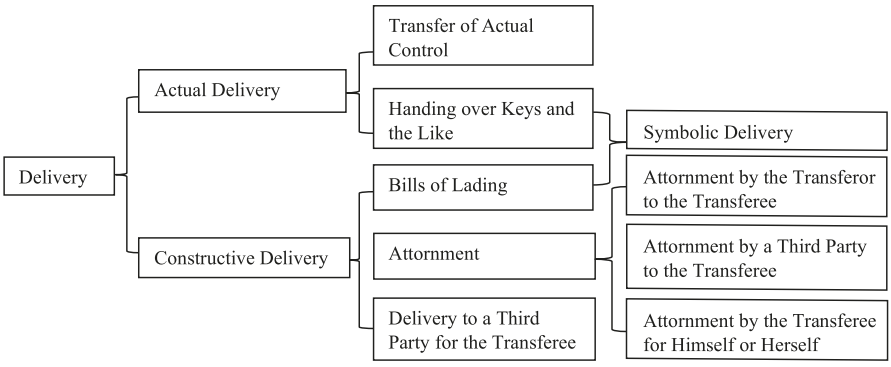

Figure 6

3.4.2.2 German Law

A A Traditio *System*

German law constructs a *traditio* system for the transfer of ownership of corporeal movables. Under this system, "delivery (*Übergabe*)" is a condition for valid transfer of ownership and thus has constitutive effect. Pursuant to § 929 BGB, a complete transfer includes two elements: consent and delivery.[398] It should be noted that the consent refers to "proprietary agreement (*dingliche Einigung*)", as opposed to "obligational agreement (*schuldrechtliche Einigung*)".[399] Under the principle of separation, transfer of ownership of corporeal movables is an outcome of the proprietary agreement, and an obligational agreement only allows the creditor to require the debtor to transfer the object. Consent is a basis for the transfer, and delivery performs the function of showing the consent to third parties.[400] Therefore, delivery has a function to make the proprietary agreement visible.[401]

Originally, delivery refers to the shift of actual control.[402] One purpose of the requirement of delivery is to guarantee "*the conformity of possession and ownership*" and to deter unauthorized dispositions.[403]

398 § 929 BGB: „*Zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, dass der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, dass das Eigentum übergehen soll […].*" English translation: § 929 BGB: "*For the transfer of ownership of a movable thing, it is necessary that the owner delivers this thing to the acquirer, and both agree on the transfer of ownership […].*"

399 Brehm and Berger 2014, p. 11-12.

400 Wolf and Wellenhofer 2011, p. 76.

401 Wieling 2006, p. 41.

402 Wolf and Wellenhofer 2011, p. 79; McGuire 2008, p. 96.

403 McGuire 2008, p. 97.

> *„Die Funktion dieser Übergabe sah der Gesetzgeber darin, Besitz und Recht deckungsgleich zu halten: ‚Wie im Immobiliarrecht das Eintragungsprinzip der Richtigerhaltung des Grundbuchs dient, so dient im Mobiliarrecht das Traditionsprinzip ähnlichen Zweck, indem es ein Auseinanderfallen von Besitz und Recht verhütet […]'.“*[404]

It is noteworthy that the element of consent under § 929 BGB has a special meaning. German law insists on the "principle of distinction (*Trennungsprinzip*)", which differentiates between the obligational legal act (including obligational contracts) and the proprietary legal act (including proprietary contracts).[405] The consent in this provision refers to a proprietary agreement.[406] In most situations, this proprietary agreement is implicit.[407] Where there is not any express proprietary agreement, an interpretation on the basis of the circumstances involved is necessary.[408] In general, when the obligational contract has taken effect, delivery usually implies that there is a proprietary agreement concerning the transfer of ownership.[409] The proprietary agreement must be made with respect to a specific object, which is required by the principle of specificity.

> *„Die Bestimmtheit muss im Zeitpunkt der Einigung gegeben sein […] und so beschaffen sein, dass jeder mit den Vereinbarungen vertraute Dritte als objektiver Betrachter dies übereignete Sache ohne Schwierigkeiten von anderen unterscheiden kann [...].“*[410]

The requirement of specificity finds its root in the nature of ownership. As a kind of property right, ownership can only exist on a specific thing. It is impossible to transfer the ownership of unidentified things. However, this requirement is never an obstacle to the valid creation of obligational contracts.

B Special Cases

The requirement of delivery is tempered by three special forms of invisible delivery in German law: *traditio brevi manu* (sentence 2 of § 929 BGB), *traditio per constitutum possessorium* (§ 930 BGB), and *traditio longa manu* (§ 931 BGB).[411] These three forms of invisible delivery constitute an exception to

404 Füller 2006, p. 299. English translation: "*Legislators think that delivery has a function to guarantee that rights and possession are obtained concurrently: 'In the law of immovable property, the principle of registration guarantees the correctness of the land register, and the traditio principle in the law of movable property serves for a similar purpose by preventing the divergence between possession and rights […]'.*"

405 Wolf and Wellenhofer 2011, p. 19.

406 Wolf and Wellenhofer 2011, p. 77.

407 Van Vliet 2000, p. 31.

408 Wolf and Wellenhofer 2011, p. 77; Van Vliet 2000, p. 31.

409 Baur and Stürner 2009, p. 639.

410 Wolf and Wellenhofer 2011, p. 78. English translation: "*The specificity must be realized at the time of the agreement [...] and should be such that every third party knowing the agreement can, as an objective observer, distinguish without difficulty the object from other objects […].*"

411 Baur and Stürner 2009, p. 651.

the requirement of delivery, once this requirement is interpreted strictly.[412] For comprehensiveness, this part also discusses another special case: "*Geheißerwerb* (acquisition at the behest)".

B1: Traditio Brevi Manu

Traditio brevi manu occurs where the transferee has already acquired possession of the object.[413] In this situation, ownership passes to the possessor (buyer) when the contract of transfer comes into effect.[414] Due to this delivery, the transferee turns from a "limited-right possessor (*Fremdbesitzer*)" to be an "ownership possessor (*Eigenbesitzer*)".[415] In this sense, this delivery is, in essence, a change of the possessory intention: from the limited-right purpose to the ownership purpose. At the same time, the transferor loses indirect possession, because the transferee no longer has an intention to control the object for the transferor.[416] However, it should be noted that *traditio brevi manu* does not necessarily involve a shift of indirect possession. The transferor may completely lose possession. For instance, an owner transfers his bicycle stolen by a thief to this thief. In this very situation, the owner does not have any possession to alienate.

In general, *traditio brevi manu* is often treated as an exception to the requirement of delivery in the German literature.[417] Law recognizes this delivery for the purpose of simplification: since the process of publicity precedes the alienation of ownership, there is neither need nor possibility to carry out visible delivery.[418] In essence, *traditio brevi manu* is a method to transfer ownership merely on the ground of the parties' consent, thereby falling under the consensual system.[419] It does not produce any effect of publicity, and third parties are not made aware of the transfer.

> *„Die verbreitete Gegenansicht deutet den Eigentumswechsel nach § 929 Satz 2 als reinen Konsensualakt, der für dritte nicht erkennbar sei.*"[420]

412 Baur and Stürner 2009, p. 637.
413 McGuire 2008, p. 100.
414 § 929 BGB: *„[…] Ist der Erwerber im Besitz der Sache, so genügt die Einigung über den Übergang des Eigentums.*" English translation: § 929 BGB:" *[…] If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffices.*"
415 Baur and Stürner 2009, p. 644; Füller 2006, p. 317.
416 Baur and Stürner 2009, p. 80.
417 Brehm and Berger 2014, p. 434.
418 Baur and Stürner 2009, p. 644.
419 Füller 2006, p. 302; McGuire 2008, p. 100.
420 Füller 2006, p. 317. English translation: "*The widespread opposite view holds that the transfer of ownership according to sentence 2 of § 929 is a purely consensual deed, which is not observable to third parties.*"

To add a word, this delivery rectifies, to some extent, the existing divergence between possession and ownership. This is because it is often associated with the outcome that the direct possessor acquires ownership. However, *traditio brevi manu* cannot indicate when ownership is transferred.[421]

B2: Traditio per Constitutum Possessorium

Traditio per constitutum possessorium takes place in the situation where the transferor remains in possession of the subject matter but agrees to hold it for the transferee.[422] This delivery is provided for in § 930 BGB.[423] It is the converse to *traditio brevi manu*. In practice, *traditio per constitutum possessorium* often occurs in the "security transfer (*Sicherungsübereignung*)".[424] It usually allows the seller to retain direct possession by only transferring indirect possession to the buyer.[425] Therefore, the concept of indirect possession is deemed as necessary for *traditio per constitutum possessorium*.[426] However, this delivery can also arise in the situation where the transferor only has indirect possession: it suffices that the transferor has indirect possession and agrees to hold the object for the transferee.[427] In this very situation, direct possession is held by a third party, the transferee acquires an upper indirect possession, and the transferor retains a lower indirect possession. This leads to multilayer indirect possession.[428]

However, indirect possession is in essence a legal relationship between the direct possessor and the indirect possessor. The shift of indirect possession does not make the transfer of ownership visible. Like *traditio brevi manu*, this delivery is also a change of the possessory intention: the transferor turns from an "ownership possessor (*Eigenbesitzer*)" to be a "limited-right possessor (*Fremdbesitzer*)".[429] Therefore, *traditio per constitutum possessorium* falls short of the principle of publicity and has no difference from the consensual system in the aspect of publicity.[430] Moreover, different from *traditio brevi manu*, this form of delivery usually causes a divergence of ownership from direct possession.

421 Quantz 2005, p. 54.
422 McGuire 2008, p. 101.
423 § 930 BGB: „*Ist der Eigentümer im Besitz der Sache, so kann die Übergabe dadurch ersetzt werden, dass zwischen ihm und dem Erwerber ein Rechtsverhältnis vereinbart wird, vermöge dessen der Erwerber den mittelbaren Besitz erlangt.*" English translation: § 930 BGB: "*If the owner is in possession of the thing, the delivery may be replaced by a legal relationship being agreed between the owner and the acquirer by which the acquirer obtains indirect possession.*"
424 Brehm and Berger 2014, p. 436.
425 McGuire 2008, p. 101.
426 Baur and Stürner 2009, p. 74.
427 Brehm and Berger 2014, p. 435.
428 Brehm and Berger 2014, p. 50.
429 Füller 2006, p. 319.
430 McGuire 2008, p. 104; Füller 2006, p. 319; Quantz 2005, p. 56.

B3: Traditio Longa Manu

In the case of *traditio longa manu*, visible delivery is substituted by an assignment of the transferor's claim of recovery.[431] This form of invisible delivery is recognized by § 931 BGB.[432] This often occurs in the situation where a third party is in actual possession of the object for the transferor, and the transferor only has indirect possession. To transfer ownership, indirect possession has to be given up to the buyer by assigning the claim of recovery.[433] If the transferor entirely loses possession, such as in the case of a stolen or lost bicycle, just assignment of the claim of recovery suffices.[434]

Like the two forms of invisible delivery discussed above, *traditio longa manu* also fails to make the process of transfer visible to third parties.

> *„Nicht nur in diesem eher exotischen Fall, sondern auch im Regelfall, bei dem ein Anspruch aus dem Besitzmittlungsverhältnis abgetreten wird, ist der Eigentumswechsel nicht erkennbar.*"[435]

This delivery involves a change of the direct possessor's possessory intention: from holding the object for the transferor to holding the object for the transferee. The transferor does not have direct possession as an outward mark. In essence, *traditio longa manu* amounts to the assignment of a right, namely the claim of recovery against the direct possessor. The assignment cannot make the transfer of corporeal movables visible.[436] In the process of transfer, it is the direct possessor who holds actual possession. In this sense, *traditio longa manu* has nothing different from the consensual system in the aspect of publicity.[437]

B4: Geheißerwerb

In brief, *Geheißerwerb* refers to "*acquisition at the behest*".[438] This usually occurs in the situation where the transferor does not have possession yet. For example, A lost his bicycle which is found by B, and A transfers this bicycle to C and requests B to deliver it to C, and B does so. In this situation, A has neither direct possession nor indirect possession, and C acquires

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431 McGuire 2008, p. 104.

432 § 931 BGB: „*Ist ein Dritter im Besitz der Sache, so kann die Übergabe dadurch ersetzt werden, dass der Eigentümer dem Erwerber den Anspruch auf Herausgabe der Sache abtritt.*" English translation: § 931 BGB: "*If a third party is in possession of the thing, delivery may be replaced by the owner assigning to the acquirer the claim to delivery of the thing.*"

433 Wolf and Wellenhofer 2011, p. 91.

434 McGuire 2008, p. 104.

435 Füller 2006, p. 322. English translation: "*Not only in rare cases, but also in ordinary cases, the change of ownership cannot be made visible by an assignment of the claim out of the intermediary relationship of possession.*"

436 Quantz 2005, p. 54.

437 Füller 2006, p. 321.

438 McGuire 2008, p. 111.

ownership and possession from A and B respectively.[439] *Geheißerwerb* can also arise in the situation known as the "chain transfer". For example, A sells a bicycle to B, and B immediately sells this bicycle to C and asks A to deliver it to C. In this situation, B never acquires possession, and C obtains ownership and possession from B and A respectively.[440]

In general, it is held that *Geheißerwerb* is regulated under § 929 BGB because it leads to the outcome that the transferee obtains actual possession, though not from the transferor.[441] However, *Geheißerwerb* has a feature: possession and ownership are not acquired from the same person. The transferee acquires ownership from the transferor, while possession is obtained from a third party. *Geheißerwerb* should not be confused with *traditio longa manu*. In the former situation, the transferor has no intermediary relationship with the possessor, a third party who abides by the transferor's instruction and gives up possession to the transferee designated.[442] With respect to *Geheißerwerb*, a question arises as to whether this acquisition satisfies the requirement of delivery. It is not, because there is no intermediary relationship between the transferor and the direct possessor (the possessory intermediary).[443] However, opponents claim that *Geheißerwerb* is able to show the intention of transferring ownership, thereby fulfilling the requirement of delivery.[444] This theoretical debate does not have much practical significance, however. The BGH has recognized *Geheißerwerb* as an adequate cause for the transfer of ownership for the sake of commercial convenience.[445]

3.4.2.3 Dutch Law

A A Traditio *System*

In Dutch law, "delivery (*levering*)" is necessary for the transfer of property.[446] According to the prevailing opinion, delivery is a legal act comprised of two elements: the "proprietary agreement (*goederenrechtlijke overeenkomst*)" and the "act of delivery (*leveringshandeling*)".[447] The latter manifests

439 Baur and Stürner 2009, p. 642.
440 Baur and Stürner 2009, p. 642-643; Brehm and Berger 2014, p. 429.
441 Brehm and Berger 2014, p. 428.
442 Brehm and Berger 2014, p. 428. In the case of the transfer of a lost bicycle, if the owner only transfers the claim of recovery to the transferee, then *traditio longa manu* takes place. However, if the owner asks the finder to give up the bicycle to the transferee, and the finder does so, then *Geheißerwerb* occurs.
443 Baur and Stürner 2009, p. 643.
444 Brehm and Berger 2014, p. 432.
445 Wolf and Wellenhofer 2011, p. 96-97.
446 Art. 3:84 (1) BW: "*Voor overdracht van een goed wordt vereist een levering krachtens geldige titel, verricht door hem die bevoegd is over het goed te beschikken.*" English translation: Art. 3:84 (1) BW: "*Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property.*"
447 Snijders and Rank-Berenschot 2017, p. 288; Salomons 2008 (2), p. 60.

the proprietary agreement.[448] Like German law, Dutch law recognizes a distinction between obligational contracts and proprietary contracts.[449] In general, the form of delivery varies from one kind of property to another kind of property.

> "*In de tweede plaats moet deze wilsovereenstemming blijken uit een leveringshandeling waarvoor de wet verschillende vormen voorschrijft al naar gelang de aard van het over te dragen goed (de leveringsformaliteit).*"[450]

For the transfer of corporeal movables, Dutch law has a requirement of delivery. In principle, ownership of a corporeal movable does not pass to the acquirer until delivery occurs. As pointed out by Dutch lawyers, there is an inclination of having possession (*bezit*) and ownership held in the hands of the same person in Dutch law.[451] Art. 3:90 BW stipulates that delivery of movable things requires "provision of possession (*bezitsverschaffing*)".[452] Here, it is worthwhile noting that "transfer of possession (*overdracht van bezit*)" should be distinguished from the provision of possession: the former only arises in the situation where the transferor has possession, while the latter can even take place when the transferor is only a "detentor (*houder*)" having no possession.[453] This distinction is an outcome of the differentiation between possession and detention in Dutch law.

Moreover, Dutch law accepts the principle of specificity, which means that ownership of unidentified corporeal movables cannot be transferred.[454] This requirement is satisfied through delivery. Thus, delivery has a function of individualization.[455] Because of the principle of specificity, the rule of bulk ownership, which has been accepted by English law (see 3.4.2.1.B), is difficult to reconcile with Dutch law.[456]

In most situations, provision of possession requires a shift of "actual control (*feitelijke macht*)" from the transferor to the transferee. This delivery is treated as *traditio* in the strict sense (*traditio vera*),[457] which has been

448 Suijling 1940, p. 278; Reehuis 2004, p. 1.
449 Van Vliet 2000, p. 141.
450 Asser/Bartels & Van Mierlo 2013, nr. 219. English translation: "*In the second place, the consensus of will should be shown by the act of delivery, and law prescribes different types of delivery according to the nature of the property (the formality of delivery).*"
451 Asser/Bartels & Van Mierlo 2013, nr. 114.
452 Art. 90 (1) BW: "*De levering vereist voor de overdracht van roerende zaken, niet-registergoederen, die in de macht van de vervreemder zijn, geschiedt door aan de verkrijger het bezit der zaak te verschaffen.*" English translation: Art. 90 (1) BW: "*Delivery required for the transfer of movable things which are non-registerable property and which are under the control of the alienator is made by giving possession of the thing to the acquirer.*"
453 Snijders and Rank-Berenschot 2017, p. 114.
454 Van Vliet 2000, p. 139.
455 Snijders and Rank-Berenschot 2017, p. 120.
456 Van Vliet 2010, p. 272.
457 Van Vliet 2010, p. 141.

prescribed by art. 3:114 BW.[458] It should be noted that this provision covers handing over the key to the house where the subject matter is stored.[459] In addition to the provision of actual control, there are three forms of invisible delivery: *traditio per constitutum possessorium*, *traditio brevi manu*, and *traditio longa manu*.[460] Pursuant to art. 3:115 BW, these three forms of invisible delivery are in essence a "mutual declaration (*tweezijdige verklaring*)" which does not involve any change of control.[461] As a result, what is decisive for delivery is not provision of actual control, but "provision of a right to actual control (*verschaffen van recht op heerschappij*)".[462]

B Special Cases

Before further introducing these forms of invisible delivery, it is necessary to mention that the distinction between "possession (*bezit*)" and "detention (*houderschap*)" is important for understanding delivery in Dutch law. In general, this distinction implies two things: (1) shift of actual control does not necessarily trigger the transfer of possession, and this shift might lead to acquisition of detention only; and (2) with respect to the question whether possession is acquired, the decisive factor is whether the transacting parties have an intention to transfer or provide possession.[463]

B1: Traditio per Constitutum Possessorium

Traditio per constitutum possessorium occurs where the transferor agrees to hold the subject matter for the transferee.[464] Under this delivery, actual control is still in the hands of the transferor, and what changes is merely the transferor's intention: changing from a possessor to be a detentor.[465] This is the reason why *traditio per constitutum possessorium* is often called the "declaration of detention (*houderschapsverklaring*)".[466]

Since the change of the transferor's intention is invisible to third parties, *traditio per constitutum possessorium* is unable to show the process of transfer to third parties.

458 Art. 3:114 BW: "*Een bezitter draagt zijn bezit over door de verkrijger in staat te stellen die macht uit te oefenen, die hij zelf over het goed kon uitoefenen.*" English translation: Art. 3:114 BW: "*A possessor transfers his possession by enabling the acquirer to exercise such control over the property as he himself was able to exercise over it.*"

459 Snijders and Rank-Berenschot 2017, p. 115.

460 Reehuis 2004, p. 47-53.

461 Art. 3:115 BW: "*Voor de overdracht van het bezit is een tweezijdige verklaring zonder feitelijke handeling voldoende […].*" English translation: Art. 3:115 BW: "*A bilateral declaration without further action is sufficient for the transfer of possession […].*"

462 Mijnssen and Schut 1991, p. 88.

463 Rank-Berenschot 2012, p. 55; Nieuwenhuis 1980, p. 30-32.

464 Art. 3:115 (a) BW: "*[…] wanneer de vervreemder de zaak bezit en hij haar krachtens een bij de levering gemaakt beding voortaan voor de verkrijger houdt […].*" English translation: Art. 3:115 (a) BW: "*[…] where the alienator possesses the thing and henceforth holds it for the acquirer by virtue of a stipulation made at the time of delivery […].*"

465 Rank-Berenschot 2012, p. 62.

466 Reehuis 2004, p. 48.

> "*Aangezien een levering constituto possessorio zich slechts tussen partijen afspeelt, blijft de vervreemder in staat tegenover anderen te doen alsof niets is veranderd. Aldus is het voor derden niet kenbaar dat en controleerbaar of het bezit is overgegaan. Was de vervreemder bezitter, dan kan hij zich tegenover anderen nog steeds als bezitter gedragen.*"[467]

As a result, transfer of ownership in the way of *traditio per constitutum possessorium* has no difference from the consensual system in the aspect of publicity.[468] This transfer might mislead creditors of the transferor.[469]

B2: Traditio Brevi Manu

Traditio brevi manu occurs where the transferee already controls the object.[470] As the transferee is in actual control of the object, there is neither need nor possibility of visible delivery. In essence, *traditio brevi manu* is a bilateral declaration between the transferor and the transferee. It causes a change of the former's intention: changing from a detentor to be a possessor.[471]

> "*Deze wijze van overdracht vormt het spiegelbeeld van de overdracht per constitutum possessorium. Wordt in dat geval de bezitter tot houder, bij traditio brevi manu geldt kort samengevat het omgekeerde: de houder wordt bezitter.*"[472]

Therefore, this delivery cannot make the process of transfer visible to third parties. Nevertheless, some Dutch scholars say that *traditio brevi manu* has a stronger publicity effect than *traditio per constitutum possessorium*.[473] This is because the consequence of *traditio brevi manu* is usually that ownership and possession are in the hands of the same person (namely the transferee), and ownership begins to have an outward mark.[474] However, the transferee does not necessarily acquire direct possession. The transferee may be an indirect detentor before the completion of *traditio brevi manu*, and it is a third party who is in actual control of the object.[475] In this very case, it is still

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467 Reehuis 2004, p. 48. English translation: "*On account of the fact that constitutum possessorium only occurs between the parties, there seem to be no changes to the state of transferor in relation to others. Therefore, whether possession shifts is invisible to third parties. If the transferor is a possessor, then he can still behave as a possessor in relation to others.*"

468 Pitlo and Bolweg 1972, p. 79.

469 Pitlo and Bolweg 1972, p. 79; Snijders and Rank-Berenschot 2017, p. 294.

470 Art. 3:115 (b) BW: "*[…] wanneer de verkrijger houder van de zaak voor de vervreemder was […].*" English translation: Art. 3:115 (b) BW: "*[…] where the acquirer was detentor of the thing for the alienator […].*"

471 Snijders and Rank-Berenschot 2017, p. 116; Mijnssen and Schut 1991, p. 96.

472 Rank-Berenschot 2012, p. 64. English translation: "*This method of transferring possession forms a reflection to constitutum possessorium. In the latter situation, the possessor becomes a detentor, while traditio brevi manu gives rise to an opposite consequence: the detentor becomes a possessor.*"

473 Reehuis 2004, p. 52.

474 Pitlo and Bolweg 1972, p. 78.

475 Rank-Berenschot 2012, p. 65.

difficult to say that *traditio brevi manu* has a stronger effect of publicity than *traditio per constitutum possessorium*.

B3: Traditio Longa Manu

Traditio longa manu is a form of delivery used when the object is in the actual control of a third party.[476] As the object is controlled by a third party, this invisible delivery is also no more than a mutual declaration. However, different from the other two forms of invisible delivery, *traditio longa manu* does not complete until the third party acknowledges the transfer or obtains a notification from the transacting parties, as prescribed by art. 3:115 (c) BW. In the absence of any notification or acknowledgment, it is difficult to say that the transferee obtains factual control of the thing involved.[477]

However, this does not change the fact that *traditio longa manu* only means the third party, who initially holds the object for the transferor, changes to hold the object for the transferee.[478] In this sense, this delivery is also only a change of the intention.

> "*Kort samengevat: de houder voor A (vervreemder) wordt houder voor B (verkrijger). Men denke aan een veem dat goederen voor de vervreemder en, na de overdracht, voor de verkrijger in bewaring heeft.*"[479]

In general, as an invisible change of the third party's intention, *traditio longa manu* cannot make the transfer visible. However, some scholars claim that this delivery has a stronger publicity effect than *traditio per constitutum possessorium*.[480] Different from visible delivery, the simplest and the most robust way to show the intention of transferring ownership, *traditio longa manu* realizes the effect of publicity through the actual control by a third party.

> "*Die legitimatie is uiteraard het eenvoudigste en het sterkst bij direct bezit, wanneer de rechthebbende de zaak feitelijk onder zich heft […]. In die gevallen is de verkrijger voor zijn legitimatie afhankelijk van de medewerking van […] de derde-houder.*"[481]

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476 Art. 3:115 (c) BW: "*[…] wanneer een derde voor de vervreemder de zaak hield, en haar na de overdracht voor de ontvanger houdt. In dit geval gaat het bezit niet over voordat de derde de overdracht heeft erkend, dan wel de vervreemder of de verkrijger de overdracht aan hem heeft medegedeeld.*" English translation: Art. 3:115 (c) BW: "*[…] where a third party held the thing for the alienator and holds it for the recipient after the transfer. In this event possession does not pass until the third party has acknowledged the transfer or has been notified of it by the alienator or acquirer.*"

477 Rank-Berenschot 2012, p. 67.

478 Pitlo and Bolweg 1972, p. 80-81; Mijnssen and Schut 1991, p. 102.

479 Rank-Berenschot 2012, p. 66. English translation: "*Briefly speaking, the detentor for A (transferor) becomes a detentor for B (acquirer). For example, a warehouseman who keeps the goods for the transferor begins to keep the goods for the acquirer after the transfer.*"

480 Reehuis 2004, p. 53.

481 Rank-Berenschot 2012, p. 57. English translation: "*The legitimation is for sure the simplest and strongest in the case of direct possession, where the entitled controls factually the thing [...]. In these cases, the acquirer's legitimation is dependent on the co-operation of [...] the detentor as a third party.*"

B4: Levering bij Akte

In addition to the three forms of invisible delivery, we also need to be cognizant of art. 3:95 BW.[482] This provision applies where the transferor has neither direct possession nor indirect possession. For example, the corporeal movable transferred by the owner is a lost thing or a thing stolen by others. As the owner has legal ownership, there is no reason to prohibit this person from disposing of the thing. According to art. 3:95 BW, the owner can deliver the thing through a "deed (*akte*)" which is known as "delivery by deed (*levering bij akte*)".[483] Because of the principle of specificity, the deed has to specify the object which is intended to be transferred.[484]

In essence, as an exception to the requirement of delivery, delivery by deed is either an agreement bilaterally made by the transacting parties or a declaration unilaterally made by the transferor.[485] In Dutch law, it is an independent method of transfer, being distinguished from *traditio longa manu*.[486] In this aspect, Dutch law and German law differ. In German law, *traditio longa manu* (§ 931 BGB) can apply to the situation where the transferor does not have any possession and only alienates the claim of recovery to the transferee.

3.4.2.4 Comparative and Conclusive Analysis

Based on the preceding introduction, it is easy to find that there is a general distinction between the consensual system (English law) and the translative system (German law and Dutch law). Under the consensual system, delivery is not necessary for the transfer of ownership. In contrast, the translative system includes a requirement of delivery, which means that ownership will not be alienated until delivery takes place. However, this distinction should not be overstated on account of the recognition of various forms of invisible delivery. In this part, we also discuss the question whether the principle of publicity is, on the basis of delivery, tenable for the transfer of corporeal movables.

A Significant Similarities

In general, both systems allow parties to transfer ownership without affecting actual possession. In English law, the fundamental rule is that parties can decide the moment when ownership of corporeal movables passes.[487]

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482 Art. 3:95 BW: "*Buiten de in de artikelen 89-94 geregelde gevallen en behoudens het in de artikelen 96 en 98 bepaalde, worden goederen geleverd door een daartoe bestemde akte*." English translation: Art. 3:95 BW: "*In cases other than those provided for in Articles 89-94 and without prejudice to Articles 96 and 98, property is delivered by an appropriate deed.*"

483 Asser/Bartels & Van Mierlo 2013, nr. 227; Brahn 1992, p. 26.

484 Reehuis 2004, p. 105.

485 Van Vliet 2000, p. 144; Reehuis 2004, p. 105.

486 Van Vliet 2000, p. 142-143.

487 S. 17 (1) SGA: "*Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*"

In German law and Dutch law, a similar consequence can be realized by invisible delivery, especially *traditio per constitutum possessorium* and *traditio brevi manu*. Under *traditio brevi manu*, visible delivery precedes the transfer of ownership. This delivery often occurs in the situation of reservation of ownership, where the transferee acquires actual possession in advance and gains ownership when the condition agreed is satisfied. By *traditio per constitutum possessorium*, the transfer of ownership can precede the shift of actual control. This form of invisible delivery often occurs in the situation of the security transfer of ownership. Because of these two forms of delivery, direct possession can be obtained by the transferee before or after the transfer of ownership. In sum, just as under the consensual system, it is also possible to determine the fate of possession and that of ownership separately under the *traditio* system.

As has been argued, indirect possession is merely a legal relationship between the indirect possessor and the direct possessor (see 3.2.2). Invisible delivery is no more than a bilateral declaration involving a change of the possessory intention (see 3.4.2.2.B and 3.4.2.3.B) and does not affect direct possession. In this aspect, invisible delivery and the consensual system do not differ substantially.[488] In fact, recognition of invisible delivery is only to maintain the *traditio* system in a formal sense, which has been shown above (see 3.2.2.3). Invisible delivery is also known as "fictional delivery (*traditio ficta*)" by some scholars.

> "*In the case of traditio ficta the transfer of ownership is brought about by mere agreement without any physical act being needed, a striking similarity between the consensual and tradition system*."[489]

In the line of this viewpoint, invisible delivery is a fiction (*ficta*).[490] Regardless of whether the viewpoint is correct, the recognition of invisible delivery is of great importance for commercial transactions under a *traditio* system.[491]

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488 In the preceding introduction, we have shown that Dutch law prescribes "delivery by deed (*levering bij akte*)" as an independent way of the transfer of ownership. This special delivery is not covered by *traditio longa manu* in Dutch law, because the transferor has neither direct possession nor indirect possession. In contrast, German law includes *levering bij akte* in *traditio longa manu* and regulates both forms of delivery in the same provision (§ 931 BGB). As a result, *traditio longa manu* perhaps involves no transfer of indirect possession in German law. This unitary treatment implies that the transfer of indirect possession is no more than the consent concerning the transfer of a claim of recovery.

489 Van Vliet 2010, p. 201.

490 In the viewpoint of some scholars, fictional delivery is a "substitute (*surrogaat*)" for delivery. It is not delivery but can substitute delivery. See Pitlo and Bolweg 1972, p. 78; Brehm and Berger 2014, p. 435.

491 Nieuwenhuis 1980, p. 31.

> "*The general opinion remains as before—that normal or proper traditio involves physical act but that, by a fiction, other acts can have the same effect, or the same effect can be realized without the intervention of any physical act at all.*"[492]

Even under German law and Dutch law which construct a *traditio* system, it is the parties' autonomy that constitutes the starting point. The requirement of delivery never precludes parties from determining the date on which ownership passes to the transferee. Therefore, the real difference between the *traditio* system and the consensual system lies in the default rule: whether delivery is necessary when parties are silent on the date of transfer of ownership. Delivery is not necessary under English law, while it is essential under both German law and Dutch law.[493]

B Publicity Effect of Delivery

In general, the principle of publicity is marginalized in the transfer of corporeal movables.[494] The transfer is not clearly shown to third parties. This fact can be explained from two aspects: one is that invisible delivery has no publicity effect, and the other is that visible delivery only has an abstract effect of publicity.

Invisible delivery cannot make the transfer of ownership visible for third parties. Usually, invisible delivery involves a shift of indirect possession, and direct possession remains in the hands of the transferor or a third party. Indirect possession is a hidden relationship between the direct possessor and the indirect possessor. This determines that invisible delivery has no effect of publicity.[495] Invisible delivery is treated as a "bilateral declaration (*tweezijdige verklaring*)" in Dutch law (art. 3:115 BW). In Roman law, both *traditio brevi manu* and *traditio per constitutum possessorium* imply that "bare will (*nuda voluntas*)" suffices for transferring ownership.[496] It only involves a change of the possessory intention, which is invisible to third parties. Publicity is to provide proprietary information to third parties, addressing the problem of information asymmetry. However, invisible delivery is a hidden process. Thus, it cannot convey any proprietary information to third parties. This is one reason why invisible delivery, in essence, has nothing different from the consensual system in the aspect of publicity.

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492 Gordon 1970, p. 179.

493 On the other hand, some scholars choose to understand the significant similarities from an opposite angle: construing the consensual system as a "hidden" *traditio* system. In their opinions, an agreement concerning transfer of ownership implies that possession is given up to the transferee. In other words, *traditio per constitutum possessorium* occurs on the basis of the implied consent of the two parties. See Sagaert 2014, p. 715.

494 Spath 2010, p. 334.

495 Van Vliet 2000, p. 201.

496 Mousourakis 2012, p. 133.

Different from invisible delivery, visible delivery has an effect of publicity. Direct possession can give rise to physical proximity between the possessor and the thing possessed. Visible delivery is able to alter this physical proximity. For example, if A sells a bicycle to B and directly hands over this bicycle to B, then B becomes the person who has physical proximity with the bicycle. Commonly, delivery is usually completed within a very short period of time and cannot be observed by outsiders. However, the outcome of delivery, namely B's actual control of the bicycle, is visible for outsiders. In this sense, we can say that visible delivery shows the transfer of ownership to third parties. In general, visible delivery ensures that ownership passes together with its outward mark.

However, the publicity effect of visible delivery is abstract and thus ambiguous. This is because direct possession is an abstract and thus ambiguous method of publicity: it only indicates that the possessor has a right to the object possessed (see 3.2.1). Possession is not necessarily associated with the right of ownership.[497] Visible delivery can take place in various situations, and transfer of ownership is merely one amongst these situations. For example, visible delivery might be made to create a right of pledge or to establish a relationship of lease. Therefore, we can only say that visible delivery indicates that the new actual possessor acquires a certain right to the object delivered. To know the details of this right, we have to investigate the underlying relationship, namely the reason why visible delivery occurs.

The recognition of invisible delivery implies that the rationale behind the requirement of delivery is not the effect of publicity.[498] If we hold that the purpose of delivery is to publicize the transfer of corporeal movables, how can we justify invisible delivery?[499] In theory, there is another approach justifying the requirement of delivery. According to this approach, the act of delivery implies that the transferor and transferee have a serious intention to transfer the object.[500] Delivery is a "manifestation of the will of transfer (*Ausdruck des Übereignungswillens*)".[501] With respect to this approach, two points should be noted. One point is that the manifestation only concerns whether the transacting parties do have a will of transfer, while publicity of this will to third parties is another issue.[502] The existence of a will of transfer does not mean that this will is made visible to third parties by possession. The other point is that whether invisible delivery, especially *traditio per constitutum possessorium*, is able to manifest the will of transfer is always a problem. As argued above, invisible delivery is no more than an agreement of transfer and falls short of the principle of publicity.

497 Staudinger/Gutzeit 2012, p. 74.
498 Staudinger/Wiegand 2017, p. 184.
499 Staudinger/Wiegand 2017, p. 184; MüKoBGB/Oechsler 2017, § 929, Rn. 3.
500 Staudinger/Wiegand 2017, p. 184; McFarlane 2008, p. 172.
501 MüKoBGB/Oechsler 2017, § 929, Rn. 3.
502 Füller 2006, p. 303.

3.4.3 *Bona Fide* Acquisition of Corporeal Movables

Traditionally, *bona fide* acquisition is treated as an example that is strongly connected with the publicity effect of possession. Compared with the transfer of ownership discussed above, *bona fide* acquisition more markedly illustrates this effect: the former concerns the acquisition of ownership from the transferor who has the authority to dispose, while the latter means that a third party acquires ownership from the transferor who has no authority of disposal. *Bona fide* acquisition implies that the third party's reliance on possession prevails over the legal position of the original owner. Before starting our discussion, it should be mentioned that *bona fide* acquisition is not confined to the acquisition of ownership of corporeal movables. Other property rights, such as the right of pledge, can also be acquired in this way. However, for the sake of simplicity, the following discussion concerns only *bona fide* acquisition of ownership. The subsequent three parts will introduce English law, German law, and Dutch law respectively. After that, there will be a comparative and concluding analysis. This analysis focuses on the role possession plays in *bona fide* acquisition of ownership.

3.4.3.1 English Law

In English law, the starting point of the system of transfer is the *nemo dat* rule: nobody can transfer more than he or she has.[503] However, there is a list of exceptions in English law. Unlike civil law which usually has a unified system of *bona fide* acquisition, English law has a patchy system consisting of different exceptions to the *nemo dat* rule.[504] These exceptions can be found in both statutory law and case law. Each has a special field of application. With respect to this patchy system, some scholars think that a "*recodification in a statute*" is desirable.[505]

In general, there are five exceptions to the *nemo dat* rule. In this part, we introduce these exceptions. It will be found that *bona fide* acquisition and apparent agency are occasionally mixed in English law. Apparent agency arises in the situation where the principal gives his or her agent an appearance of agency relationship and fails to deny the agent's appearance of authority.[506] Like *bona fide* acquisition, it is also a regime that can provide protection to third parties in good faith. In German law and Dutch law, apparent agency is known as *Anscheinsvollmacht* and *schijnvolmacht* respec-

503 Bridge, Gullifer, McMeel and Worthington 2013, p. 333.
504 Salomons 2011 (2), p. 1066.
505 Bridge, Gullifer, McMeel and Worthington 2013, p. 333.
506 Munday 2010, p. 88-89.

tively.[507] However, English lawyers distinguish apparent agency from *bona fide* acquisition in theory.[508]

A Apparent Authority

Apparent authority is derived from the case law and forms an exception to the *nemo dat* rule. It is used to describe the following situation: "*an owner has by some act indicated to a third party that another is acting with authority on his behalf, or has allowed another to appear as the true owner while dealing with a third party then he will be estopped from denying the title of the third party transferee*".[509] The rule of apparent authority has been absorbed in s. 21 (1) SGA.

> S. 21 (1) SGA: "*Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*"

In general, s. 21 (1) SGA can apply to two different situations: the apparent authority to be an agent and the apparent authority to be an owner.[510] In the first situation, the seller disposes of the object in the name of and on behalf of the principal, thereby acting as an agent. Therefore, this situation, in fact, concerns apparent agency.[511] In contrast, the seller in the second situation transfers the object in his or her own name, thereby acting as a transferor or an owner. Therefore, the second situation concerns apparent ownership and *bona fide* acquisition. [512] In this research, *bona fide* acquisition is a term confined to the situation of unauthorized disposals: the person who intends to conduct a disposal lacks the authority to dispose. In general, unauthorized disposal and unauthorized agency differ in two aspects. One concerns the name in which the object is disposed of, and the other concerns the person for whose benefit the object is disposed of. For example, where a transferor alienates the object in his own name and for his own benefit, but lacks the authority to transfer, there is an unauthorized disposal; if this transferor alienates the object in another person's name and for the latter's benefit, but lacks the authority to represent the latter, then there is an unauthorized agency. The SGA regulates these two different issues in one provision. Since this part only concerns *bona fide* acquisition, we will

507 Wolf and Neuner 2012, p. 628; Tai 2003, p. 290.

508 Apparent agency is a form of "apparent authority" to be an agent, and *bona fide* acquisition is known as "apparent ownership". In the latter situation, an owner allows another party to appear to have ownership to his property. See Munday 2010, p. 273-274.

509 *Eastern Distributors Ltd v. Goldring* [1957] 2 QB 600, cited from Frisby and Jones 2009, p. 120.

510 Bridge, Gullifer, McMeel and Worthington 2013, p. 354; Bridge 2014, p. 205; Goode 2010, p. 457.

511 Bridge 2014, p. 205.

512 Benjamin 2014, p. 361; Goode 2010, p. 457.

focus on the issue of unauthorized disposal, and unauthorized agency falls outside our discussion.

In the situation of unauthorized disposal, s. 21 (1) SGA is applied restrictively: only giving up possession to the buyer does not give rise to a valid apparent authority.[513] The legal owner must give the buyer an indication on the basis of which the seller can be reasonably treated as having ownership.[514] The form of this indication (such as words or conduct) is immaterial, but the indication must be clear and unequivocal.[515] In practice, apparent authority by an indication of conduct rarely takes place. The legal owner's disconnection with possession alone does not suffice.[516] In other words, the legal owner has to do something more than giving up possession, which can mislead the buyer into the belief that the seller has ownership of the object. The reason why just giving up possession to the seller is not sufficient is that "*possession is consistent with a range of transactions from bailment to outright sale*".[517]

Moreover, giving up possession to the seller is not necessary in some situations. Even though the seller does not have possession in the transaction, the buyer might also be able to acquire ownership of the object. This has been upheld by a landmark judgement. In this case, the buyer successfully acquired ownership due to his reliance on the legal owner's express statement that the seller had ownership.[518] In sum, the seller's possession is neither sufficient nor necessary for the application of the rule of apparent authority.[519]

B Voidable Title

Voidable title refers to the property right acquired on the basis of a voidable contract, a contract that can be rescinded by the transferor.[520] In English law, voidable title remains valid before rescission of the contract. Therefore, title does not return to the transferor in the meantime, and the transferee is entitled to transfer it. [521] When the second transfer takes place prior to the annulment of the first contract, the sub-transferee (as a third party) can acquire the title, provided that he or she acts in good faith with respect to the flaw in the first contract.[522] Transfer of a voidable title often happens in

513 Frisby and Jones 2009, p. 120.
514 Bridge, Gullifer, McMeel and Worthington 2013, p. 356.
515 Bridge, Gullifer, McMeel and Worthington 2013, p. 356-357.
516 Benjamin 2014, p. 362.
517 Bridge 2014, p. 207.
518 *Eastern Distributors Ltd v. Goldring* [1957] 2 QB 600.
519 Benjamin 2014, p. 361.
520 Title is a term having different meanings in property law. It can refer to the legal ground, such as contracts, on which property rights are acquired. On the other hand, this term is also used to mean the property right *per se*, such as voidable title and relativity of title. See Van Erp 2012, p. 47.
521 Bridge, Gullifer, McMeel and Worthington 2013, p. 351.
522 Frisby and Jones 2009, p. 121.

the case of chain contracts. The rule of voidable title has been recognized by the SGA to preclude avoidance of the first contract from affecting subsequent disposals.

> S. 23 SGA: "*When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.*"

Strictly speaking, the voidable title rule falls outside the sphere of *bona fide* acquisition. This is because the transferor in the second transfer has already acquired a legal title from the original owner, though subject to the latter's equitable right of recovery under equity law. The second transfer does not constitute typical unauthorized disposal: firstly, the transferor has a legal title; and secondly, the third party can obtain a voidable title, regardless of whether this party acts in good faith.[523]

For acquiring a fully valid title from the transferor who only has a voidable title, neither possession nor delivery is necessary. The transferor perhaps has no possession of the object in the second transaction. This is because the transferor might acquire a voidable title without obtaining any possession in the first voidable transaction under the consensual system. In principle, parties are entitled to determine the time when ownership passes in English law (see 3.4.2.1). For the same reason, the sub-transferee (as a third party) can acquire a fully valid title despite obtaining no possession.[524] However, the third party must be in good faith. Therefore, this acquisition is a result of the doctrine that equitable title, namely the title owned by the original seller, cannot bind *bona fide* third parties. It has nothing to do with the protection of the third parties' reliance on possession.

> "*It should be noted that s. 23 has no requirement of transfer of possession in relation to either transaction […]. This is because it is merely an example of the rule that a bona fide purchaser for value takes free of equitable interests, for which there is no requirement of entrustment or transfer of possession.*"[525]

C Mercantile Agency

Mercantile agent is a term used in the Factors Act (1889) (FA). It refers to the person who in the customary course of business has authority "*to sell goods, to consign goods for the purpose of sale, to buy goods or to raise money on the security of goods*".[526] The mercantile agent conducts activities for the

523 Bridge, Gullifer, McMeel and Worthington 2013, p. 353.
524 Bridge 2014, p. 198.
525 Bridge, Gullifer, McMeel and Worthington 2013, p. 354.
526 S. 1 (1) FA: "*The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.*" It is noteworthy that this definition excludes "*servants and employees, carriers, repairers and warehousemen*". See Bridge 2014, p. 217.

benefit of the principal and is subject to the instruction from the principal. In practice, the agent may violate the principal's instructions or exceed the authority. S. 2 (1) FA was enacted to protect the reliance of third parties in this situation.

> S. 2 (1) FA: "*Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the same time of the disposition notice that the person making the disposition has no authority to make the same.*"

This provision may not be invoked unless the following conditions are satisfied. The first condition is that the agent must be in possession of the corporeal movables or the documents of title. Secondly, the agent acquires possession with the consent of the principal, which suggests that stolen things are excluded.[527] Usually, this consent is presumed in the absence of contrary evidence.[528] Thirdly, the transaction happens in the ordinary course of business of a mercantile agent. This means that the disposal must be made "*within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act*."[529] Lastly, the transferee must act in good faith.

Mercantile agents may transact in their own name or in the name of their principal. Thus, it is irrelevant whether or not their counterparty (the transferee) realizes that they are an owner or an agent.[530] Like the rule of apparent authority, the rule of mercantile agency also includes two different situations: the unauthorized disposal (in the name of the transferor himself) and the unauthorized agency (in the name of the principal). In both situations, it is necessary that the agent is in possession of the object with the principal's consent. S. 2 (1) FA does not mention any requirement of delivery. Thus, it is irrelevant whether the transferee acquires possession of the object.[531] However, the absence of delivery might "color" the conditions mentioned above, in particular the "*ordinary course of business*" and "*good faith*".[532] In other words, delivery of the object is not necessary but is import.

From the preceding introduction, it can be deduced that the rationale behind the rule of mercantile agency is not just about the publicity of possession. Rather, it is an outcome of a comprehensive consideration of various factors.

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527 Bridge, Gullifer, McMeel and Worthington 2013, p. 361.
528 Benjamin 2014, p. 378.
529 *Oppenheimer v. Attenborough* [1908] 1 KB 221, cited from Bridge, Gullifer, McMeel and Worthington 2013, p. 362.
530 Benjamin 2014, p. 382.
531 Bridge 2014, p. 225.
532 Bridge 2014, p. 225.

> "*The goods must be entrusted to the mercantile agent in that capacity because the law does not penalise the owner merely because of appearances […]. Thus, the exception emanated from and extended the existing position of a mercantile agent acting with apparent authority: once the principal entrusted goods to a mercantile agent the law deemed him to have authority to sell or pledge goods in the ordinary course of business and attributed the dispositive act of the agent to the owner of the goods.*"[533]

D Seller in Possession

As shown above, English law allows ownership to be transferred in the absence of delivery. Therefore, ownership and possession might be held by the transferee and the transferor respectively, which gives rise to a situation known as the seller in possession. Possession retained creates a chance for the seller to dispose of the same corporeal movable to a third party. This might cause a clash between the lawful owner (the transferee) and this third party. This conflict is regulated by s. 24 SGA, a provision prescribing an exception to the *nemo dat* rule.

> S. 24 SGA: "*Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.*"

According to this provision, the third party in good faith can only acquire ownership when the following requirements are fulfilled. Firstly, s. 24 SGA applies only to the situation where the seller transfers ownership but retains possession. Possession retained by the seller can be actual as well as constructive.[534] The seller does not have to possess the object in person. It suffices that a bailee controls the object for the benefit of the seller. This has been upheld in case law and is generally approved in theory.[535] In practice, a large number of corporeal movables are managed by bailees, which makes it unrealistic to require the seller to possess the object in person.[536] Moreover, s. 1 (2) FA expressly stipulates that constructive possession is also possession.[537] However, some scholars hold that including constructive possession within s. 24 SGA is not totally consistent with the understanding of this provision by the Privy Council: The Privy Council asserts that the

533 Merrett 2008, p. 380.

534 Benjamin 2014, p. 389; Bridge 2014, p. 235.

535 *City Fur Manufacturing Co Ltd v. Fureenbond (Brokers) London Ltd* [1937] 1 All E. R. 937, cited from Benjamin 2014, p. 389.

536 Bridge 2014, p. 235.

537 S. 1 (2) FA: "*Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.*"

purpose of this provision is to protect the "*innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose*."[538]

Secondly, the object has been delivered to the transferee. In relation to this requirement, the traditional opinion is that there must be a change of direct possession, and constructive delivery is not sufficient.[539] In other words, there should be either "*actual delivery*" of the object or "*actual delivery*" of the documents of title.[540] The latter delivery can make the object deliverable to the transferee. However, this traditional opinion is challenged in a recent case involving double sale and leaseback.[541] In this case, the seller sold and leased back a machine from the purchaser, and the seller remained in possession of this machine, which was not disputable.[542] Afterwards, the seller disposed of the machine to a third party in the same way, namely selling it and then leasing it back. The court held that constructive delivery (i.e. attornment by the transferor to the transferee) was sufficient, and the second buyer could acquire ownership of the machine. According to this judgement, constructive delivery has the same legal effect as actual delivery.[543] This judgement has invoked a fierce debate among English lawyers.[544]

In a word, possession is closely related to the application of s. 24 SGA in two aspects: (1) the seller must be in (actual or constructive) possession of the object; and (2) the object has to be delivered (in an actual or constructive way). However, this does not mean that the rationale behind s. 24 SGA is just protecting the reliance of third parties on possession, nor does it mean that possession is an appearance of ownership. As introduced directly above, both the seller's possession and the way of delivery can be constructive, while constructive possession (indirect possession) and constructive delivery (invisible delivery) have no effect of publicity.

> "*Although section 24 is not based on agency or holding out and thus may not require entrusting of the goods to the seller in the same way, it is clear that the exceptions are based on the conduct of the first buyer rather than simply the expectations of the third party. The conduct of the first buyer on which section 24 is based, is his failure to take delivery of the goods. Because he has not completed his sale he is at risk if the seller makes a completed sale to a second buyer.*"[545]

538 *Pacific Motor Auctions Ltd v. Motor Credits Ltd* [1965] A. C. 867, cited from Bridge 2014, p. 235.
539 Benjamin 2014, p. 392.
540 Benjamin 2014, p. 391.
541 *Michael Gerson (Leasing) Ltd v. Wilkinson and State Securities Ltd*, 31 July 2000 [2001] Q. B. 514.
542 McKay 2000, p. 283.
543 McKay 2000, p. 283.
544 McKay 2000, p. 282; Benjamin 2014, p. 392; Bridge 2014, p. 240-241.
545 Merrett 2008, p. 387.

E Buyer in Possession

In English law, individuals have extensive autonomy in deciding the fate of ownership and possession. Thus, a seller may give up possession of the object but reserve the right of ownership. In this situation, there is a divergence between possession and ownership, which might trigger a conflict between the seller (the owner) and third parties. This conflict is regulated by s. 25 SGA (buyer in possession). If the buyer disposes of the object to a third party, then s. 25 (1) SGA can under certain conditions be applied in favor of this third party.

> S. 25 (1) SGA: "*Where a person having bought or agreed to buy good obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner*."

This provision has the same legislative purpose as s. 24 SGA (seller in possession): protecting the reliance of third parties in good faith and promoting the certainty of transactions. It can be easily observed that the two provisions regulate two similar divergences between possession and ownership: s. 24 SGA applies where ownership is transferred in the absence of delivery, while s. 25 SGA applies where possession is transferred in the absence of alienation of ownership. As these two provisions apply to similar situations, they have similar requirements.

First of all, the transferor, who is a buyer in the previous sale, must be in possession of the object. The transferor's possession is often actual but can be constructive. It suffices that a bailee controls the object for the transferor, and the transferee only acquires constructive possession through attornment.[546] The second requirement is delivery of the object. In relation to this requirement, a question is whether delivery can be constructive. The traditional opinion is that the delivery under s. 25 SGA must be actual.[547] However, recent judgements, including the judgement mentioned above concerning double sale and leaseback, have shown that constructive delivery is also adequate.[548] With respect to this judicial attitude towards constructive delivery, some scholars provide an explanation based on the

546 *Four Point Garage Ltd v. Carter* [1985] 3 All E. R. 12, cited from Benjamin 2014, p. 398.

547 *Gamer's Motor Centre (Newcastle) Pty Ltd v. Natwest Wholesale Australia Pty Ltd* [1987] 163 C.L.R. 236, cited from Benjamin 2014, p. 401-402; Bridge, Gullifer, McMeel and Worthington 2013, p. 365.

548 *Michael Gerson (Leasing) Ltd v. Wilkinson and State Securities Ltd*, 31 July 2000 [2001] Q. B. 514; *Forsythe International (UK) Ltd v. Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268, cited from Benjamin 2014, p. 402.

theory of risk: the owner who entrusts possession to another person should bear the risk of losing ownership to a third party acting in good faith.[549]

F Summary: A Mixed and Patchy System

In sum, there is not any general rule of *bona fide* acquisition in English law. English law has only a mixed and patchy system of exceptions to the *nemo dat* rule. It is mixed because more than one type of issues is regulated under the same provision, such as the rule of apparent authority and the rule of mercantile agency. Not only can these two rules apply to the situation of unauthorized disposal, but also to that of unauthorized agency. This mixture cannot be found in the other exceptional rules. For example, neither the seller in possession nor the buyer in possession is an agent because they dispose of the object in their own name. As to the rule of voidable title, it should be noted that transfer of a voidable title is not a typical unauthorized disposal. In some sense, it is an authorized disposal because the transferor has legal title (ownership), at least in statutory law. As has been mentioned, voidable title only means that the title is subject to an equitable right in equity law (see 3.4.3.1.B).

This system is also patchy because the five exceptional rules can be divided into three categories: apparent agency, *bona fide* acquisition, and authorized disposal. These five rules are applied in different situations and under different conditions. For example, mercantile agency only exists in the situation of commercial agency in the ordinary course of business, seller in possession and buyer in possession only exist where there is a previous transaction, and voidable title requires the existence of a voidable contract. In addition, these five rules also differ in whether and how possession is related. Possession and delivery are neither sufficient nor necessary for the rule of apparent authority and of voidable title. These two elements are partially relevant to the rule of mercantile agency: the agent has to be in possession with the consent of the principal. Possession and delivery have significant importance for the rule of the buyer in possession and that of the seller in possession: the transferor must have possession and then transfer it to the transferee.

3.4.3.2 German Law

Unlike English law, German law has a general system of *bona fide* acquisition of corporeal movables. This system is considered as an outcome of the tradeoff between "the certainty of transactions (*Verkehrssicherheit*)" and the preservation of ownership.[550] For *bona fide* acquisition of corporeal movables, "possession (*Besitz*)" is an important concept. It is usually held that *bona fide* acquisition is rooted in the rationale of possession as an outward

549 Benjamin 2014, p. 401.
550 Baur and Stürner 2009, p. 665; Wieling 2007, p. 117.

appearance of ownership.[551] The discussion below first introduces the conditions under which third parties can acquire ownership from the unauthorized transferor. A further examination of the relevance of possession to this acquisition then follows.

A General Requirements of Bona Fide *Acquisition*

Firstly, *bona fide* acquisition cannot be claimed by a third party to obtain stolen or missing things, as expressly stipulated by § 935 (1) BGB.[552] This restriction can be explained from the following perspective: only when the owner voluntarily entrusts possession to another person, can the former be expected to assess the latter's trustworthiness and to bear the associated risk out of *bona fide* acquisition.[553] In the situation of missing and stolen things, the owner loses possession in a way contrary to his or her will. The owner does not contribute to the unauthorized transferor's acquisition of ownership, the appearance of ownership.[554] Thus, the owner's interest in preserving these things needs to be protected in priority.[555] However, it is worthwhile noting that, pursuant to § 935 (2), this restriction does not apply when the missing or stolen thing is money or bearer securities, or when the third party acquires this thing through public auction.[556] The "*interest of society and fluency of legal transactions*" should prevail in these special situations.[557]

Secondly, there must be a legal ground for acquisition. The transferor and the third party must reach a valid agreement but for the lack of the authority to dispose.[558] This agreement has to be a trade transaction because the rules of *bona fide* acquisition are used to facilitate the fluency and security of transactions.[559] Where the third party lacks a legal ground, there is no need to protect the reliance of this person. Therefore, gratuitous acquisition

551 Weber 2012, p. 127; Wolf and Wellenhofer 2011, p. 97; Westermann 2011, p. 406.

552 § 935 (1) BGB: „*Der Erwerb des Eigentums auf Grund der §§ 932 bis 934 tritt nicht ein, wenn die Sache dem Eigentümer gestohlen worden, verloren gegangen oder sonst abhandengekommen war. Das Gleiche gilt, falls der Eigentümer nur mittelbarer Besitzer war, dann, wenn die Sache dem Besitzer abhandengekommen war.*" English translation: § 935 (1) BGB: "*The acquisition of ownership based on §§ 932 to 934 does not take place, if the thing has been stolen from the owner, became missing or otherwise lost. The same applies, where the owner was only indirect possessor, if the thing was lost by the possessor.*"

553 McGuire 2008, p. 133.

554 Weber 2012, p. 144; Westermann 2011, p. 411.

555 Baur and Stürner 2009, p. 679.

556 § 935 (2) BGB: „*Diese Vorschriften finden keine Anwendung auf Geld oder Inhaberpapiere sowie auf Sachen, die im Wege öffentlicher Versteigerung oder in einer Versteigerung nach § 979 Absatz 1a veräußert werden*." English translation: § 935 (2) BGB: "*These provisions do not apply to money or bearer instruments or to things that are alienated by way of public auction or in an auction pursuant to section 979 (1a).*"

557 McGuire 2008, p. 139.

558 McGuire 2008, p. 141; Baur and Stürner 2009, p. 677.

559 McGuire 2008, p. 140; Baur and Stürner 2009, p. 663.

is excluded: a donee is not entitled to acquire ownership from an unauthorized donor. This requirement is a result of the rules of unjust enrichment (§ 816 BGB).[560]

Thirdly, the transferor is in possession of the object. *Bona fide* acquisition is partially based on possession as an "appearance of rights (*Rechtsschein*)": this appearance misleads the third party to believe that the transferor has lawful ownership.[561] If there is not any outward appearance, then third parties will lose the possibility of acquisition. The transferor's possession can be direct as well as indirect. This is why German lawyers often think that, just like direct possession, indirect possession is also an eligible outward appearance.[562]

Fourthly, the object must be delivered to the third party. It is not disputable that delivery can take the form of visible delivery and *traditio brevi manu*.[563] In the situation of *traditio brevi manu*, the third party must obtain possession from the transferor himself in advance. This extra requirement is to guarantee that the transferor has possession as an outward appearance, and the third party has legitimate reliance on possession.[564] According to § 933 BGB, *traditio per constitutum possessorium* is not a qualified form of delivery here.[565] In other words, only reliance on the transferor's possession does not suffice, and the third party has to acquire complete possession from the transferor.[566] It is possible to acquire ownership from unauthor-

560 McGuire 2008, p. 137. § 816 (1) BGB: „*Trifft ein Nichtberechtigter über einen Gegenstand eine Verfügung, die dem Berechtigten gegenüber wirksam ist, so ist er dem Berechtigten zur Herausgabe des durch die Verfügung Erlangten verpflichtet. Erfolgt die Verfügung unentgeltlich, so trifft die gleiche Verpflichtung denjenigen, welcher auf Grund der Verfügung unmittelbar einen rechtlichen Vorteil erlangt.*" English translation: § 816 (1) BGB: "*If an unauthorized person disposes of an object and the decision is effective against the authorized person, then he is obliged to make restitution to the authorized person of what he gains by the disposal. If the disposition is gratuitous, then the same duty applies to a person who as a result of the disposition directly gains a legal advantage.*"

561 Baur and Stürner 2009, p. 662; Weber 2012, p. 127.

562 Baur and Stürner 2009, p. 670; Westermann 2011, p. 438.

563 § 932 (1) BGB: „*Durch eine nach § 929 erfolgte Veräußerung wird der Erwerber auch dann Eigentümer, wenn die Sache nicht dem Veräußerer gehört, es sei denn, dass er zu der Zeit, zu der er nach diesen Vorschriften das Eigentum erwerben würde, nicht in gutem Glauben ist. In dem Falle des § 929 Satz 2 gilt dies jedoch nur dann, wenn der Erwerber den Besitz von dem Veräußerer erlangt hatte.*" English translation: § 932 (1) BGB: "*As a result of a disposal carried out under section 929, the acquirer becomes the owner even if the thing does not belong to the alienator, unless the acquirer is not in good faith at the time when under these provisions he would acquire ownership. In the case of section 929 sentence 2, however, this applies only if the acquirer had obtained possession from the alienator.*"

564 McGuire 2008, p. 144.

565 § 933 BGB: „*Gehört eine nach § 930 veräußerte Sache nicht dem Veräußerer, so wird der Erwerber Eigentümer, wenn ihm die Sache von dem Veräußerer übergeben wird, es sei denn, dass er zu dieser Zeit nicht in gutem Glauben ist.*" English translation: § 933 BGB: "*Where a thing alienated under section 930 does not belong to the alienator, the acquirer becomes the owner if the thing is delivered to him by the alienator, unless he is not in good faith at this time.*"

566 Baur and Stürner 2009, p. 668.

ized transferors through *traditio longa manu*, provided that the transferor has indirect possession (sentence 1 of § 934 BGB).[567] Therefore, where the transferor completely loses possession and lacks the outward appearance, only an assignment of the claim of recovery is not adequate. In this situation, the third party cannot acquire ownership until he or she obtains possession of the object (sentence 2 of § 934 BGB).[568] In the opinion of some scholars, § 934 BGB implies that indirect possession is a qualified outward appearance of rights and can justify *bona fide* acquisition.[569]

Lastly, the third party must be in good faith: this person does not know that the transferor has no authority to dispose. The state of acting in good faith has to continue throughout the whole process of the transaction.[570] Pursuant to § 932 (2) BGB, if third parties do not know about the defect concerning the authority of disposal because of gross negligence, then they are not acting in good faith.[571] The requirement is an outcome of the purpose of *bona fide* acquisition: protecting the reliance of third parties. This reliance does not exist when third parties know or should have known about the lack of the authority to dispose.

B Possession and Bona Fide *Acquisition*

In general, the importance of possession for *bona fide* acquisition lies in two aspects under German law. The first is that the transferor must have possession as an outward appearance. The other is that the transferee acquires possession from the transferor, and the latter cannot retain any possession. We further clarify these two aspects below.

B1: Possession of the Transferor

The transferor must have possession at the time of delivery. The main justification of this requirement is that the transferor's possession is an outward appearance of ownership, which has been pointed out by the BGH.

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567 § 934 BGB: „*Gehört eine nach § 931 veräußerte Sache nicht dem Veräußerer, so wird der Erwerber, wenn der Veräußerer mittelbarer Besitzer der Sache ist, mit der Abtretung des Anspruchs […].*" English translation: § 934 BGB: "*Where a thing alienated under section 931 does not belong to the alienator, the acquirer becomes owner, if the alienator is the indirect possessor of the thing, on the assignment of the claim […].*"

568 § 934 BGB: „*[…] anderenfalls dann Eigentümer, wenn er den Besitz der Sache von dem Dritten erlangt, es sei denn, dass er zur Zeit der Abtretung oder des Besitzerwerbs nicht in gutem Glauben ist.*" English translation: § 934 BGB: "*[…] or otherwise when the acquirer obtains the possession of the thing from the third party, unless at the time of the assignment or the acquisition of possession he is not in good faith.*"

569 Baur and Stürner 2009, p. 670; Weber 2012, p. 132.

570 McGuire 2008, p. 149.

571 § 932 (2) BGB: „*Der Erwerber ist nicht in gutem Glauben, wenn ihm bekannt oder infolge grober Fahrlässigkeit unbekannt ist, dass die Sache nicht dem Veräußerer gehört.*" English translation: § 932 (2) BGB: "*The acquirer is not in good faith if he is aware, or as a result of gross negligence he is not aware, that the thing does not belong to the alienator.*"

> "*Voraussetzung für den gutgläubigen Erwerb des Eigentums an einer beweglichen Sache ist neben dem guten Gläubigen der auf dem Besitz beruhende Rechtsschein.*"[572]

The reliance of third parties will become groundless if the unauthorized transferor has no possession. This is said to be a reason why sentence 2 of § 934 BGB stipulates that when the transferor has no possession and only assigns a claim of recovery, the third party cannot acquire ownership until he or she obtains possession.[573]

> "*As the transferor lacks any kind of legitimizing appearance, neither transfer by means of assignment of the (non-existent) claim for recovery nor by mere agreement will suffice to protect the transferee.*"[574]

The transferor's possession can be indirect since *traditio longa manu* is an eligible form of delivery. Pursuant to sentence 1 of § 934 BGB, *bona fide* acquisition is possible when the unauthorized transferor provides the transferee with indirect possession by assigning a claim of recovery. As a result, when the object is directly held by a third party (a limited-right possessor), the transferor's indirect possession can also be treated as an eligible outward appearance.[575]

B2: Delivery to the Transferee

Delivery must be conducted: the transferor has to provide possession of the corporeal movable to the transferee in good faith. According to German lawyers, *bona fide* acquisition is not only rooted in possession as an outward appearance of ownership, but also in the transferor's "ability to provide possession (*Besitzverschaffungsmacht*)".[576]

However, nor every form of delivery is eligible.[577] As shown above, delivery can be actual and fictional (*traditio brevi manu* and *traditio longa manu*), but *traditio per constitutum possessorium* is excluded (§ 933 BGB). In relation to this exclusion, one explanation is that the law does not permit the transferor to retain any possession.[578] With the former three forms of delivery, the transferor completely gives up possession to the transferee. In contrast, *traditio per constitutum possessorium* allows the transferor to retain possession, usually direct possession of the object. Another explanation is

572 BGHZ 10, 81, cited from Baur and Stürner 2009, p. 662. English translation: "*In addition to good faith, another requirement of bona fide acquisition of ownership of a movable thing is the outward appearance of rights on the basis of possession.*"
573 MüKoBGB/Oechsler 2017, § 932, Rn. 6.
574 McGuire 2008, p. 148.
575 Baur and Stürner 2009, p. 670; Weber 2012, p. 132.
576 Staudinger/Wiegand 2017, p. 393.
577 Staudinger/Wiegand 2017, p. 393.
578 Staudinger/Wiegand 2017, p. 394; Baur and Stürner 2009, p. 668.

that *traditio per constitutum possessorium* is not different from the consensual system in the aspect of publicity, and § 933 BGB emphasizes the requirement of delivery in strict sense (§ 929 BGB) by excluding this form of delivery.[579] In the absence of visible delivery, the transferee should be suspect of the seriousness of the transferor's intention to dispose of the object.[580] In the 19th century, the transfer of ownership in the absence of abandoning direct possession was treated as a fraudulent transaction, which deserved special attention from the transferee.[581] Moreover, the exclusion of *traditio per constitutum possessorium* also implies that *bona fide* acquisition has to be visible.[582]

The exclusion gives rise to an inconsistency between § 933 BGB (the prohibition of *bona fide* acquisition by *traditio per constitutum possessorium*) and § 934 BGB (the possibility of *bona fide* acquisition by *traditio longa manu*). These two provisions grant different legal consequences to indirect possession, thereby causing a "contradiction of value (*Wertungswiderspruch*)".[583] According to § 933 BGB, a third party in good faith cannot acquire ownership when he obtains indirect possession but allows the transferor to retain direct possession. However, § 934 BGB permits third parties to acquire ownership, though they merely obtain indirect possession and allow a fourth person to hold direct possession.[584] The third parties obtain indirect possession in these two situations. The only difference lies in the person who directly holds the object: the transferor in the first situation (§ 933 BGB), while a fourth person in the second situation (§ 934 BGB).

This inconsistency creates a possibility for parties to elude the exclusion under § 933 BGB.[585] For example, the unauthorized transferor can first deposit the object in the place of a fourth party and then transfer this object to the third party. In a landmark judgement, the BGH held that the inconsistency should be accepted due to the express legislative intent.[586] In that case, the plaintiff sold a machine to H. KG under a clause of reservation of ownership, and then H. KG transferred this machine for a security purpose to C who sold it to the defendant. Even though C did not acquire ownership due to the statutory exclusion of *traditio per constitutum possessorium* (§ 933 BGB), the defendant could acquire ownership through *traditio longa manu* (§ 934 BGB).

579 MüKoBGB/Oechsler 2017, § 933, Rn. 2; Füller 2006, p. 335.
580 MüKoBGB/Oechsler 2017, § 933, Rn. 2.
581 Brehm and Berger 2014, p. 442.
582 Quantz 2005, p. 202.
583 Füller 2006, p. 336.
584 Baur and Stürner 2009, p. 671.
585 Füller 2006, p. 336.
586 Füller 2006, p. 336-337.

3.4.3.3 Dutch Law

Like German law, Dutch law also has a general system of *bona fide* acquisition of corporeal movables, which is governed by art. 3:86 BW.[587] The purpose of this provision is to promote business and trade and to balance interests between the acquirer and the original owner.[588] In this part, we first introduce the conditions of *bona fide* acquisition and then examine the relevance of "possession (*bezit*)" to this acquisition.

A General Requirements of Bona Fide *Acquisition*

Firstly, only corporeal movables (i.e. corporeal and unregistered things) are regulated by art. 3:86 BW. This is because possession can only be treated as an outward appearance of the authority to dispose of corporeal movables.[589] In general, stolen things are not susceptible to *bona fide* acquisition, but they can be acquired under certain restrictive conditions (art. 3:86 (3) BW).[590] However, *bona fide* acquisition can apply to stolen money and securities made payable to bearer or order. Lost things are regulated differently from stolen things: the rule of *bona fide* acquisition can apply to lost things.[591] The rationale behind the application of this rule to lost things is that owners are usually to blame, to some degree, for the loss of the thing.[592]

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587 Art. 3:86 (1) BW: "*Ondanks onbevoegdheid van de vervreemder is een overdracht overeenkomstig artikel 90, 91 of 93 van een roerende zaak, niet-registergoed, of een recht aan toonder of order geldig, indien de overdracht anders dan om niet geschiedt en de verkrijger te goeder trouw is.*" English translation: Art. 3:86 (1) BW: "*Although an alienator lacks the right to dispose of the property, a transfer pursuant to Article 90, 91 or 93 of a movable object, unregistered property, or a right to bearer or order is valid, if the transfer is not by gratuitous title and the acquirer acts in good faith.*"

588 Salomons 2008 (2), p. 108.

589 Snijders and Rank-Berenschot 2017, p. 315.

590 Art. 3:86 (3) BW: "*Niettemin kan de eigenaar van een roerende zaak, die het bezit daarvan door diefstal heeft verloren, deze gedurende drie jaren, te rekenen van de dag van de diefstal af, als zijn eigendom opeisen, tenzij: (a) de zaak door een natuurlijke persoon die niet in de uitoefening van een beroep of bedrijf handelde, is verkregen van een vervreemder die van het verhandelen aan het publiek van soortgelijke zaken anders dan als veilinghouder zijn bedrijf maakt in een daartoe bestemde bedrijfsruimte, zijnde een gebouwde onroerende zaak of een gedeelte daarvan met de bij het een en ander behorende grond, en in de normale uitoefening van dat bedrijf handelde; of (b) het geld dan wel toonder- of orderpapier betreft.*" English translation: Art. 3:86 (3) BW: "*Nevertheless, the owner of a movable object, who has lost its possession through theft, may recover it during a period of three years from the day of theft, unless: (a) the object was acquired by a natural person, not acting in the conduct of a profession or business, from an alienator whose business it is to deal with the public in similar objects, otherwise than as an auctioneer in business premises for such purpose, being an immovable structure or part thereof with the land belonging thereto, and provided that the alienator acted in the ordinary course of his business; or (b) in the case of money or paper payable to bearer or order.*"

591 Brahn 1992, p. 61-62.

592 Salomons 2008 (2), p. 110.

Secondly, only acquisition for value is permitted.[593] In other words, a donee is not allowed to obtain the corporeal movable donated to him in the way of *bona fide* acquisition. This requirement is a result of the following legislative purposes: (1) donees should be less protected than those who bear a liability to provide counter-performance; and (2) the purpose of art. 3:86 BW is to facilitate the security of commercial transactions.[594]

Thirdly, possession must be given up to the transferee in good faith. This requirement of delivery is not directly mentioned in art. 3:86 BW. It is a result of a reference to three other provisions, namely art. 3:90, 3:91 and 3:93 BW.[595] Pursuant to these three provisions, visible delivery, *traditio brevi manu* and *traditio longa manu* are eligible forms of delivery for *bona fide* acquisition. Both *traditio per constitutum possessorium* and "delivery by deed (*levering bij akte*)" are excluded.[596] The possible reasons for this exclusion are be presented below.

Lastly, the third party must act in good faith. Pursuant to art. 3:11 BW, the third party will not be in good faith if he or she knows or should have known about the fact of unauthorized disposal.[597] This implies that the law imposes a duty on the third party to inquire into the transferor's authority to dispose.[598] If the third party has a reason to doubt the transferor's authority of disposal, he or she will not act in good faith, regardless of whether an inquiry is possible.[599] The requirement of good faith is easy to understand: the purpose of art. 3:86 BW is to protect the reliance of third parties acting in good faith.

B Possession and Bona Fide *Acquisition*

B1: Possession of the Transferor

In theory, there are two approaches to justify the Dutch rule of *bona fide* acquisition: the "doctrine of legitimation (*legitimatieleer*)" and the "doctrine of ownership (*eigendomsleer*)".[600] Under the former approach, possession has an effect of legitimizing the transferor as an owner, and possession is a crucial element for *bona fide* acquisition.[601] Possession is treated as an outward appearance of ownership, which establishes a basis for the reliance of third parties in good faith.[602]

593 Snijders and Rank-Berenschot 2017, p. 317-318.
594 Salomons 2008 (2), p. 108.
595 Snijders and Rank-Berenschot 2017, p. 316-317.
596 Brahn 1992, p. 66-71.
597 Snijders and Rank-Berenschot 2017, p. 318.
598 Salomons 2008 (2), p. 112.
599 Snijders and Rank-Berenschot 2017, p. 318; Salomons 2008 (2), p. 112.
600 Snijders and Rank-Berenschot 2017, p. 313.
601 Salomons 2008 (2), p. 109.
602 Salomons 2000, p. 904.

> "*De ratio van beide bepalingen is dezelfde: bescherming van de derde te goeder trouw die verkregen heeft van een persoon met feitelijke macht, feitelijke macht die de schijn wekt van beschikkingsbevoegdheid en de vervreemder als zodanig legitimeert.*"[603]

According to the doctrine of ownership, possession acquired by a third party in good faith should be directly treated as ownership.[604] *Bona fide* possession amounts to ownership.[605] Between these two doctrines, there are some differences. For example, according to the doctrine of legitimation, the third party in good faith must have a valid legal basis, usually a valid contract, for acquisition, while the doctrine of ownership does not have such restriction.[606] In general, the doctrine of legitimation underlies art. 3:86 BW, which means that only obtaining possession in good faith does not suffice for *bona fide* acquisition of ownership.[607]

As to the question whether the transferor must have direct possession, an answer in the negative is provided by Dutch law.[608] Indirect possession can also be a basis for the reliance of third parties.[609] For example, *traditio longa manu* is an eligible form of delivery for *bona fide* acquisition, albeit that this form of invisible delivery only leads to the provision of indirect possession. Moreover, it is difficult for acquirers to ascertain whether the transferor has actual control under the context of electronic commerce.[610] Though direct possession is not necessary, the transferor must have indirect possession. This can be inferred from the fact that "delivery by deed" is excluded.[611] If the transferor does not have any possession, and the outward appearance does not exist, then there is no ground to entitle third parties to *bona fide* acquisition.[612]

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603 Snijders and Rank-Berenschot 2017, p. 313. English translation: "*The ratio of both provisions is identical: the protection of third parties in good faith who obtained from a person actual control, which serves as an outward appearance of the authority to dispose and legitimizes the alienator as such.*"

604 Snijders and Rank-Berenschot 2017, p. 313.

605 Pitlo and Bolweg 1972, p. 113.

606 Snijders and Rank-Berenschot 2017, p. 313; Pitlo and Bolweg 1972, p. 114.

607 In fact, the doctrine of legitimation has been accepted by the Hoge Raad by applying art. 2014 of the old Dutch Civil Code in the landmark case "*Damhof/Staat*" in 1951. In this case, the Hoge Raad clearly stated that the rule of *bona fide* acquisition is an exception of the requirement of eligible authority of disposal, and other requirements for successful transfer, such as a valid underlying contract, have to be satisfied. See Schut 1976, p. 42-44.

608 Salomons 2008 (2), p. 109-110.

609 Brahn 1985, p. 341; Reehuis and Heisterkamp 2019, p. 150.

610 Salomons 2000, p. 905.

611 Asser/Bartels & Van Mierlo 2013, nr. 364.

612 Brahn 1992, p. 70.

B2: Delivery to the Transferee

As just pointed out, delivery, i.e. provision of possession, is necessary for *bona fide* acquisition. This requirement of delivery implies that the rationale behind art. 3:86 BW is the doctrine of legitimation.[613] As indicated above, however, not every form of delivery is eligible.

Visible delivery or provision of direct possession is certainly eligible. In addition, *traditio brevi manu* and *traditio longa manu* are also an eligible form of delivery for *bona fide* acquisition. Under these two forms of invisible delivery, indirect possession passes to the transferee in good faith.[614] As a result of art. 3:111 and art. 3:90 (2) BW, *traditio per constitutum possessorium* is not qualified.[615]

According to the former provision, the "detentor (*houder*)" cannot change his or her intention of holding the object for the "possessor (*bezitter*)", unless the possessor allows or requires the detentor to do so, or the detentor has a good reason to do so.[616] In the situation of unauthorized disposal, *traditio per constitutum possessorium* triggers a change of the detentor's intention: from holding the object for the possessor to holding the object for the third party. Therefore, this invisible delivery cannot be validly made under art. 3:111 BW.[617]

> "*Een beschikkingsonbevoegde houder kan door middel van constitutum possessorium het bezit niet verschaffen. Op grond van artikel 3:111 BW kan een houder zich niet van houder voor de een buiten de wil van de ene om, tot houder van de ander maken (het interversieverbod).*"[618]

In addition, art. 3:90 (2) BW also creates a legal obstacle to *bona fide* acquisition. Pursuant to this provision, an acquirer under *traditio per constitutum possessorium* cannot enforce what he gains against an "older" property right. The relative effect is ascribed to the failure to make the transfer of ownership visible by *traditio per constitutum possessorium*.[619] In the situation of unauthorized disposal, the original ownership is such an older property right, and this right cannot be defeated by the third party in good faith.[620] However, this does not mean that the third party obtains nothing. Instead, the third party in good faith can acquire "relative ownership" in this situation.

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613 Snijders and Rank-Berenschot 2017, p. 316; Reehuis and Heisterkamp 2019, p. 150.
614 Brahn 1992, p. 86.
615 Snijders and Rank-Berenschot 2017, p. 316.
616 Snijders and Rank-Berenschot 2017, p. 103.
617 Brahn 1992, p. 67.
618 Sdu Commentaar/Van Peski 2019, art. 90, nr. C.3. English translation: "*The unauthorized detentor cannot provide possession through constitutum possessorium. On the ground of art. 3:111 BW, a detentor for one person cannot hold the object for another person, in the absence of the former's approval (the prohibition of intervention).*"
619 Parlementaire Geschiedenis (3) 1981, p. 384-385; Reehuis and Heisterkamp 2019, p. 218.
620 Salomons 2008 (2), p. 110.

> "*De eigendom echter, die de verkrijger aldus verwerft, is naar luidt van artikel 3:90 lid 2 een slechts relatief werkende, een eigendom die geldt jegens derden, niet echter jegens de ouder, de oorspronkelijke, gerechtigde die een ouder recht op het goed heeft dan dat hetwelk de derde uit handen van de beschikkingsonbevoegde bezitter heeft verkregen.*"[621]

In other words, ownership obtained by the third party is, in general, effective against third parties, but restricted by "older" property rights. For example, if the original owner transfers ownership to another person after *traditio per constitutum possessorium* takes place between the unauthorized transferor and the third party, then what this another person acquires is younger than what the third party acquires; as a result, the third party can acquire ownership securely.[622]

Apart from *traditio per constitutum possessorium*, "delivery by deed (*levering bij akte*)" is also excluded by Dutch law for *bona fide* acquisition of corporeal movables.[623] As has been shown above, this delivery is introduced to allow for the possibility of transfer of ownership where the transferor has neither direct possession nor indirect possession (see 3.4.2.3.B).[624] If the transferor has neither ownership nor possession, then there is no justification for the third party to acquire ownership at the sacrifice of the original owner's interest.[625] For example, where a finder loses the bicycle found by him, a third party cannot acquire ownership of this bicycle from the finder via "delivery by deed", regardless of whether this third party is in good faith.

3.4.3.4 Comparative and Conclusive Analysis

Traditionally, *bona fide* acquisition is justified under the approach of publicity. Possession is an outward appearance of ownership. Therefore, third parties in good faith can safely rely on this appearance and should be protected.[626] However, this possession-oriented theory is "*unrealistic*" nowadays,[627] and most scholars are not in favor of this theory.[628] Sometimes, the focus is laid on delivery. Under this delivery-oriented theory, the ability to provide possession can justify the reliance of third parties and *bona fide* acquisition of corporeal movables.[629] The two theories are introduced and examined below.

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621 Brahn 1992, p. 67. English translation: "*However, according to paragraph 2 art. 3:90, ownership obtained by the acquirer is a right of ownership that can be enforced against third parties, except the older, the original, owner who has an older right with respect to the object than what is obtained by the third party from the unauthorized possessor.*"

622 Snijders and Rank-Berenschot 2017, p. 317.

623 Brahn 1992, p. 70.

624 Brahn 1992, p. 70.

625 Brahn 1992, p. 71; Reehuis and Heisterkamp 2019, p. 150.

626 Karner 2006, p. 160.

627 Acquisition and Loss of Ownership 2011, p. 889.

628 Karner 2006, p. 173.

629 Karner 2006, p. 179-180.

A The Possession-Oriented Theory

According to the possession-oriented theory, possession is an outward mark of ownership and has the effect of legitimizing unauthorized transferors as an owner.[630] Therefore, third parties in good faith can rely on the transferor's possession, and such reliance is protected. This theory originates from the notion of *Gewere* in ancient Germanic law.[631] As has been shown above, possession was in Germanic law known as *Gewere*, which literally referred to the "clothing" of rights (see 3.1.1.2).

> *"If […] a legal system pursued to the same degree a policy of facilitating transactions […], it would maintain that a transferee acting in good faith could trust in the appearance of ownership created by possession of goods in the hands of the transferor."*[632]

> *"Het bezit legitimeert den bezitter als eigenaar; wie door zijn bezit eigenaar schijnt te zijn, wordt voor eigenaar gehouden, en ieder die daarop voortbouwt is veilig."*[633]

In general, this theory can explain the following fact: the unauthorized transferor must have possession of the object. If the unauthorized transferor has no possession, *bona fide* acquisition is impossible for the transferee. As has been shown above, "delivery by deed" is not an eligible form of delivery for *bona fide* acquisition under Dutch law, and assigning the claim of recovery by the transferor who has no indirect possession cannot give rise to *bona fide* acquisition in German law. In both situations, the unauthorized transferor lacks possession as an outward appearance. Therefore, according to the possession-oriented theory, the ground of the third party's reliance is absent.

However, the possession-oriented theory is problematic in explaining *bona fide* acquisition. As has been argued above, possession is an abstract and thus ambiguous means of publicity for corporeal movables (see 3.2.1), and indirect possession does not have any publicity effect (see 3.2.2). This means that the possession-oriented theory is problematic in explaining *bona fide* acquisition by viewing possession as an outward appearance of ownership. This is why this theory is no longer held by most scholars.[634]

In general, direct possession means that the possessor has actual control, which gives rise to visible physical proximity between the possessor and the object. This physical proximity informs third parties that the possessor has a right to the object. However, the details of this right cannot be shown by possession. Therefore, possession is an abstract and thus ambiguous means

630 Pollock and Wright 1888, p. 4; Baur and Stürner 2009, p. 662; Salomons 2008 (2), p. 109.
631 Karner 2006, p. 167-168; Von Gierke 1928, p. 59.
632 Bridge 2014, p. 196.
633 Asser/Scholten, Zakenrecht, 1905, p. 65, cited from Salomons 2000, p. 905. English translation: "*Possession legitimizes the possessor as an owner; the person who appears to be an owner due to his possession is assumed as the owner, and everyone who relies on that is secure.*"
634 Karner 2006, p. 173.

of publicity. Due to the ambiguity of possession, it is not convincing to treat possession as an outward mark of ownership (see 3.2.1.3).[635] Moreover, law either provides a consensual system or recognizes invisible delivery under a *traditio* system. As a result, direct possession and ownership often fall apart in modern transactions (see 3.4.2.4). This ubiquitous divergence between direct possession and ownership further makes the view of possession as an outward appearance of ownership groundless.[636] Moreover, even the possessor does have ownership, he or she might lose the authority to dispose because of judicial seizure or insolvency.[637]

In reality, individuals might have an inclination to deem that possessors are an owner, but this reaction to possession is emotional and unreliable.[638] Truly, the instinctive reaction can guide one person to avert illegally interfering with another's property (see 3.3.2.2). However, it does not provide a sufficient basis for *bona fide* acquisition of ownership from an unauthorized transferor. Before entering into a transaction with the potential transferor, the potential transferee needs to identify whether the former really has ownership. The fact that the transferor has possession only means that this person might be an owner. The transferee has to carry out investigations to identify whether the transferor is really the owner. If the transferee fails to do so, then the requirement of acting in good faith will not be fulfilled, which further implies that *bona fide* acquisition is impossible.

As has been shown above, indirect possession is also recognized as an outward appearance of ownership to justify *bona fide* acquisition of corporeal movables under the possession-oriented theory. In English law, *bona fide* acquisition is possible where the unauthorized transferor's possession is indirect. In German law and Dutch law, *traditio longa manu* is an eligible form of delivery, which implies that it suffices that the unauthorized transferor has indirect possession. Moreover, the publicity effect of indirect possession is also indicated by the following fact: *bona fide* acquisition is impossible where the unauthorized transferor is not an indirect possessor and only has a claim of recovery. Proponents of the possession-oriented theory often hold that indirect possession has publicity effect, though this effect is weaker than the publicity effect of direct possession.[639]

Here, we contend that it seems problematic to say that indirect possession can generate any effect of publicity. As has been argued, indirect possession is, in essence, a legal relationship that is invisible to third parties (see 3.2.2). It cannot be said that indirect possession can serve as an outward appearance of rights, let alone the right of ownership.[640] A successful claim

635 Baur and Stürner 2009, p. 665; Ernst 1993, p. 101.
636 Baur and Stürner 2009, p. 662; Kindl 1999, p. 315; Hager 1990, p. 240.
637 Hager 1990, p. 240.
638 Füller 2006, p. 323.
639 Van Vliet 2010, p. 284.
640 Ernst 1993, p. 104.

of *bona fide* acquisition is dependent on the enjoyment of indirect possession by the unauthorized transferor.[641] However, whether the transferor really has indirect possession is an unclear question to the transferee.[642] The transferee has to investigate this question. This investigation amounts to investigating the legal relationship between the direct possessor and the indirect possessor. Therefore, we can say that the relationship of indirect possession is an object of publicity, rather than a means of publicity.

Nevertheless, the present law recognizes that the holding of indirect possession by unauthorized transferors suffices. In our opinion, this recognition has nothing to do with the publicity effect that indirect possession lacks. Perhaps it is a result of the following practical consideration: if indirect possession were denied, then *bona fide* acquisition would become impossible for corporeal movables for which a document of title (such as the bill of lading) is created.[643]

> "*Goederen plegen immers veelvuldig te worden verhandeld terwijl zij in pakhuizen of elders zijn opgeslagen en te verwachten valt dat zij daar gedurende langere tijd opgeslagen zullen blijven. Het is in het belang van het handelsverkeer dat dergelijke goederen kunnen worden overgedragen op een wijze waarbij de bescherming van de verkrijger tegen een mogelijke beschikkingsonbevoegdheid tot haar recht kan komen zonder dat de zaken behoeven te worden verplaatst.*"[644]

In the end, the possession-oriented theory cannot explain why *traditio per constitutum possessorium* is excluded in *bona fide* acquisition by German law and Dutch law. If possession is an appearance of ownership and can be relied on by the transferee, then the transferee's reliance should also be protected in the situation where the transferor retains possession. As has been shown, direct possession can be transferred independently from ownership under present law due to the recognition of invisible delivery (see 3.4.2.4). In modern transactions, the transferor often retains direct possession when alienating ownership to the transferee. For example, sale and leaseback is an ordinary transaction in modern society. Where an unauthorized transferor sells a machine and then leases this machine back, there is no reason to say that the transferee's reliance, if he or she has it, disappears or weakens because of the retention of direct possession by the transferor. This kind of transaction is so commonplace that the transferee in good faith should

641 Wieling 2006, p. 390.
642 Füller 2006, p. 324; Hager 1990, p. 241.
643 Bridge 2014, p. 235.
644 Rank-Berenschot 2012, p. 84. English translation: "*After all, things tend to be transferred frequently, but they are stored in warehouses or elsewhere and are expected to remain there for a long period of time. For the benefit of commerce, these things can be transferred in such a way that the purpose of protecting the transferee against the lack of authority to dispose can be realized without having to relocate the things.*"

not be expected to be suspicious of the retention of direct possession.[645] Therefore, the prejudice against *traditio per constitutum possessorium* in the situation of *bona fide* acquisition is groundless, at least from the perspective of the transferee's reliance on possession.[646]

B The Delivery-Oriented Theory

As *bona fide* acquisition cannot be successfully explained by focusing on possession, some scholars turn to focusing on delivery or the provision of possession. According to this delivery-oriented theory, possession cannot be a basis of reliance, and what matters is that possession is provided to the transferee in good faith.[647] This ability implies that the transferor has the authority to dispose.

> „*Der Grund für das Vertrauen des Erwerbers in das Eigentum des Veräußerers liegt also darin, dass der Veräußerer den Besitz an der Sache an den Erwerber oder eine von diesem eingeschaltete Geheißperson transferieren kann. Aus der Besitzverschaffungsmacht des Veräußerers resultiert daher auch der den gutgläubigen Erwerb rechtfertigende Rechtsschein.*"[648]

This theory avoids the following difficulty: indirect possession is invisible and cannot be a basis of reliance, and *bona fide* acquisition is only possible when the transferee does obtain indirect possession.[649]

The delivery-orientated theory is based on the following fact: the unauthorized transferor has to provide possession to the transferee. As has been shown, delivery is necessary for *bona fide* acquisition in the three jurisdictions. In general, visible delivery, *traditio brevi manu* and *traditio longa manu* are eligible forms of delivery. If actual control of the object is acquired by the transferee, then the requirement of delivery can be satisfied. This occurs in the situation of visible delivery and that of *traditio brevi manu*. It also suffices that the transferor provides indirect possession to the transferee when the object is controlled by a third party (*traditio longa manu*). Under German law, if the transferor has no possession and only assigns a claim of recovery,

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645 In the 19th century, where the transferor retained direct possession, the transfer would be treated as a fictitious transaction, and legislators and judges would take a discriminatory attitude towards this transfer. See Brehm and Berger 2014, p. 442. However, this discrimination has become groundless at present. Retention of direct possession by the transferor is not only possible in law, but also really occurs in many situations.

646 This is a reason why the English judgement concerning double sale and leaseback holds that the third party in good faith could acquire ownership through *traditio per constitutum possessorium*. See McKay 2000, p. 283.

647 Karner 2006, p. 179-180.

648 MüKoBGB/Oechsler 2017, § 932, Rn. 6. English translation: "*The ground of the acquirer's reliance on the transferor's ownership is that the transferor can transfer possession of the thing to the transferee or a person designated by the transferee. The appearance of rights justifying bona fide acquisition also results from the transferor's ability to provide possession.*"

649 Karner 2006, p. 183.

bona fide acquisition is only possible when the transferee obtains possession (§ 934 BGB). This also illustrates that provision of possession, instead of possession, lays the basis of *bona fide* acquisition.[650]

However, the delivery-oriented theory fails to successfully explain *bona fide* acquisition for three reasons. The first reason is that the ability to provide possession cannot be seen as a basis of reliance of third parties in good faith, and *bona fide* acquisition cannot be justified by focusing on delivery. Providing possession by the transferor does not mean that he or she has ownership of the object.[651] There are various reasons why the transferor obtains and enjoys factual control of the object. For example, the transferor might be a lessee who obtains factual control of the object on the basis of a contract of lease. The transferee should not believe that the transferor is the owner just because possession is provided. Therefore, the delivery-oriented theory has the same problem as the possession-oriented theory in explaining *bona fide* acquisition.

The second reason is that property law does not stipulate a different meaning for delivery in *bona fide* acquisition from that in the acquisition from the authorized.[652] For the former acquisition, the requirement of delivery is prescribed by referring to the provisions regarding the latter acquisition. In German law, § 932 and § 934 BGB refer to § 929 and § 931 BGB respectively. In Dutch law, art. 3:86 BW refers to art. 3:90, art. 3:91 and art. 3:93 BW. The reference indicates that delivery does not play different roles in the situation of *bona fide* acquisition and that of the acquisition from the authorized. If the transferee does have any reliance, such reliance comes into existence before the provision of possession.[653] Otherwise, the transferee would not agree to make a contract of transfer with the transferor. Therefore, the delivery-oriented theory cannot explain how the reliance comes into existence before providing possession by the transferor.[654] Delivery is a result of the performance of this contract by the transferor.[655] The provision of possession just implies that the transferor fulfills his or her promise to deliver and transfer the object.[656] Therefore, viewing the provision of possession as a basis of reliance is not correct.

The third reason is that the delivery-oriented theory cannot explain the exclusion of *traditio per constitutum possessorium* by German law (§ 933 BGB) and Dutch law (art. 3:111 and art. 3:90 (2) BW). According to German lawyers, the unauthorized transferor has to provide complete possession to the transferee without retaining any possession.[657] However, why is retain-

650 Staudinger/Wiegand 2017, p. 394.
651 Hager 1990, p. 247.
652 Füller 2006, p. 326; Hager 1990, p. 246.
653 Hager 1990, p. 248; Ernst 1993, p. 112.
654 Rusch 2010, p. 220.
655 Füller 2006, p. 325.
656 Füller 2006, p. 324.
657 Baur and Stürner 2009, p. 668.

ing no possession necessary for *bona fide* acquisition? The delivery-oriented theory cannot provide a convincing answer to this question. In the situation of *traditio longa manu*, indirect possession is obtained by the transferee, and thus *bona fide* acquisition is possible. Indirect possession can also be provided to the transferee through *traditio per constitutum possessorium*, but *bona fide* acquisition is not available to the transferee. Like the possession-oriented theory, the delivery-oriented theory cannot explain this difference in the treatment of *traditio longa manu* and *traditio per constitutum possessorium* either.

C The Role of Legal Policy

C1: Legal Policy, Possession and Delivery

From the preceding introduction, it can be seen that possession and delivery are highly relevant to *bona fide* acquisition of corporeal movables. In English law, the mercantile agent, the seller in possession, and the buyer in possession must have possession (whether direct or indirect), and delivery (whether actual or fictional) is required in the latter two situations. In German law and Dutch law, the unauthorized transferor must have possession (whether direct or indirect). Moreover, this possession must be given up to the transferee through visible or invisible delivery, but *traditio per constitutum possessorium* is excluded. Because of this high relevance, there are two theories justifying *bona fide* acquisition from the perspective of publicity: the possession-oriented theory and the delivery-oriented theory. As has been shown, both theories are problematic. Here we examine the role played by legal policy in *bona fide* acquisition.

Bona fide acquisition is just an outcome of legal policy. This policy is that where a third party obtains possession in a certain way, this party is able to acquire ownership, even though the transferor has no ownership. Correspondingly, the original owner loses the right of ownership.

> *„Der gutgläubige Erwerb und der mit ihm verbundene Rechtsverlust des Eigentümers sind, wenn man so will, durch die rechtspolitische Entscheidung legitimiert, dass, wer bona fide eine Sache gegen Entgelt erwirbt, dieselbe auch dann soll behalten dürfen, wenn der Veräußerer nicht der Eigentümer war.*“[658]

Possession and delivery are two factors taken into consideration in answering the following question: are there sufficient grounds for the acquisition by the third party and for the loss of ownership of the original owner.[659]

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658 Ernst 1993, p. 114. English translation: “*The bona fide acquisition and the associated loss of the right of the owner are, if you will, justified by the legal-political decision that the person who acquires a thing for consideration in good faith can preserve this thing, even though the transferor was not the owner.*”

659 Ernst 1993, p. 114.

The main function of possession and delivery is to resolve the conflict between the interests of the original owner and the third party fairly. Therefore, possession and delivery are two factors that lay a basis for balancing the interests of the original owner and the third party. To illustrate this, we will discuss the exclusion of *traditio per constitutum possessorium* below.

As has been shown above, *traditio per constitutum possessorium* is excluded in *bona fide* acquisition in Dutch law and German law. From this exclusion, we can find that where the original owner and a third party situate in the "same" position, namely that neither has direct possession, legislators tend to favor the original owner. In other words, if the third party's position is no better than the actual owner's, the former's position will not be favored by sacrificing the latter's ownership. This preference of protecting the original owner has nothing to do with publicity of possession or reliance on possession. It is mainly an outcome of legal policy.[660]

Here, we take double sale and leaseback as an example: if a person sells and leases back a machine to two different buyers, which buyer should be protected? According to a recent judgement in English law, the second buyer can acquire ownership, albeit that the seller retains direct possession.[661] However, this judgement has encountered fierce criticism, which includes why the second buyer can enjoy more protection than the first buyer who in fact has the same position as the former.[662] The conduct of these two buyers is exactly the same.

In German law, the first buyer will prevail under § 933 BGB. In theory, this provision is explained by the view that neither the transferor nor the original owner can have any "residual (*Rest*)" of possession.[663] In the double sale and leaseback case, the first buyer, i.e. the true owner, has a claim of recovery against the transferor, at least on the basis of the agreement of lease.[664] Though the true owner is no longer an indirect possessor because of the lessee's change of the possessory intention, the true owner still has "little residual of factual control (*geringer Rest von tatsächlicher Gewalt*)".[665] It is this "residual of factual control" that makes the true owner able to prevail the third party (namely the second buyer in this case), despite the fact that the latter has obtained indirect possession.[666] However, why can the residual of factual control be a sufficient reason to exclude the third party's acquisition? This question is not answered. In our opinion, the legal policy of protecting the true owner in priority underlies § 933 BGB.

660 Ernst 1993, p. 119-120.
661 *Michael Gerson (Leasing) Ltd v. Wilkinson and State Securities Ltd*, 31 July 2000 [2001] Q. B. 514.
662 Merrett 2008, p. 392.
663 Staudinger/Wiegand 2017, p. 462-463; Baur and Stürner 2009, p. 668.
664 Hager 1990, p. 342-344.
665 Ernst 1993, p. 119.
666 Hager 1990, p. 344.

In Dutch law, the legal policy is implemented by art. 3:111 BW, a provision concerning the "prohibition of intervention (*interversieverbod*)".[667] Pursuant to this provision, a detentor is prohibited from holding the object for himself or a third party in the absence of the possessor's permission or a legal ground. In the situation of unauthorized disposal, *traditio per constitutum possessorium* involves a change of the intention of the detentor (the unauthorized transferor), which is prohibited by art. 3:111 BW. Therefore, the third party in good faith cannot validly acquire possession under this provision, which further makes *bona fide* acquisition impossible.[668] Therefore, Dutch law and German law use different rules to implement the same legal policy presented above.[669]

C2: Legal Policy and Other Requirements

The preceding introduction has shown that, in addition to these two requirements, some other conditions also have to be fulfilled. These conditions concern whether the transferee is in good faith, whether the transfer is gratuitous, whether the object is a stolen or lost thing, and other circumstances under which the transfer takes place. In general, these conditions cannot be explained from the perspective of publicity of possession. Instead, they are outcomes of legal policy.

Firstly, the rule of *bona fide* acquisition is recognized to promote the security of commercial transactions concerning corporeal movables.[670] Promoting the security of transactions is a legal policy that is in tension with the legal policy of protecting ownership.[671] Thus, this rule is not applied to gratuitous transfer, even though the donee has reliance on the donor's possession of the object.[672] In addition, exclusion of *bona fide* acquisition for a donee in good faith usually does not make him or her suffer any significant disadvantages.[673] Therefore, the original owner should be protected in priority. This implies that the legal policy of balancing the interests of the original owner and the third party in good faith also matters.

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667 Art. 3:111 BW: "*Wanneer men heeft aangevangen krachtens een rechtsverhouding voor een ander te houden, gaat men daarmede onder dezelfde titel voort, zolang niet blijkt dat hierin verandering is gebracht, hetzij ten gevolge van een handeling van hem voor wie men houdt, hetzij ten gevolge van een tegenspraak van diens recht*." English translation: Art. 3:111 BW: "*A person who commences detention for another pursuant to a juridical relationship shall continue to do so under the same title, so long as no change is apparent in his title, resulting either from an act by the person for whom he holds or from the latter's right having been contested*."

668 Brahn 1992, p. 67.

669 Here is should be noted that the first draft of the BGB accepted the distinction between possession and detention. On the basis of this distinction, the detentor cannot provide possession to a third party in the way of *traditio per constitutum possessorium*. However, the second draft gave up the distinction. As a result, § 933 BGB was made. See MüKo-BGB/Oechsler 2017, § 933, Rn. 1; Staudinger/Wiegand 2017, p. 462.

670 Staudinger/Wiegand 2017, p. 391; Acquisition and Loss of Ownership 2011, p. 890.

671 Karner 2006, p. 122.

672 Acquisition and Loss of Ownership 2011, p. 892.

673 Acquisition and Loss of Ownership 2011, p. 892.

Secondly, the original owner loses ownership because this person intentionally contributes to the disparity between ownership and possession.[674] The original owner often obtains benefits by giving up possession and thus needs to bear the associated risk arising out of *bona fide* acquisition by a third party acting in good faith. This is known as the "principle of ascription (*Veranlassungsprinzip* in German law and *toedoenbeginsel* in Dutch law)".[675] The principle explains why stolen things and lost things are not susceptible to *bona fide* acquisition in German law (see 3.4.3.2). However, with respect to lost things, there is an opposite legal policy: where the owner loses possession accidentally, the rule of *bona fide* acquisition is also applicable because the owner's negligence contributes to the loss of possession.[676] This consideration is accepted by Dutch law (see 3.4.3.3). To guarantee the safe circulation of money and securities, the rule of *bona fide* acquisition is applicable to these two types of corporeal movable. This implies that the legal policy of promoting the security of transactions prevails. Moreover, art. 3:86 (3) (a) BW provides special protection to consumers by entitling this type of third parties to *bona fide* acquisition of stolen things. In general, this is a result of the legal policy of "consumer protection (*consumentenbescherming*)".[677]

Thirdly, *bona fide* acquisition requires that the third party to be in good faith: this person neither knows nor should have known about the defect of the authority to dispose. Because of this requirement, the third party should be prudent and bears a duty to investigate in the transaction.[678] The requirement of good faith implies that the third party needs to respect the original owner when he knows or should have known about the defect. Undoubtedly, the requirement is not only important for balancing the interests of the original owner and that of the third party, but also for the smooth operation of transactions.[679] If courts take a strict attitude towards the satisfaction of this requirement, then the original owner will enjoy more protection, and the possibility of acquisition by the third party will become lower. Moreover, this further means that the third party needs to take more measures to investigate the transferor's authority of disposal and bear more costs.

In sum, the importance of legal policy implies that possession and delivery are not sufficient for *bona fide* acquisition, and the traditional approach of publicity cannot fully explain why third parties in good faith can prevail over the original owner. In general, *bona fide* acquisition is a rule based on a tradeoff between the protection of ownership and the security of transactions.[680] More requirements (restrictions) of this acquisition imply stronger protection for the original owner. If possession and delivery could

674 Karner 2006, p. 250; Snijders and Rank-Berenschot 2017, p. 320.
675 Snijders and Rank-Berenschot 2017, p. 320.
676 Salomons 2008 (2), p. 110.
677 Snijders and Rank-Berenschot 2017, p. 321.
678 Wolf and Wellenhofer 2011, p. 107; Snijders and Rank-Berenschot 2017, p. 318.
679 Karner 2006, p. 387-388; Acquisition and Loss of Ownership 2011, p. 895.
680 Bridge 2014, p. 196.

sufficiently give rise to *bona fide* acquisition, then the protection of original owners would become deficient.[681] Obviously, ownership also deserves protection: like the interest of third parties in acquiring property, the interest of original owners in preserving their property is also important. From the perspective of law and economics, if possession and delivery are sufficient, then owners would be discouraged from giving up possession to others, which would eventually inhibit the utilization of property to the largest extent.[682] Moreover, third parties would be discouraged from investigating whether the transferor really has lawful authority to dispose.[683]

3.4.4 Conclusion

In the preceding discussion, we have examined whether possession can be a sufficient means of publicity for subsequent acquirers in two situations: transfer of ownership of corporeal movables and *bona fide* acquisition of ownership of corporeal movables. In conclusion, possession cannot provide sufficient proprietary information to subsequent acquirers because direct possession is an abstract method of publicity, and indirect possession has no effect of publicity.

In the situation of transfer of ownership, the publicity effect of delivery cannot be overstated. Firstly, visible delivery only shows to third parties that the transferee acquires a certain right. From visible delivery, a third party cannot necessarily know that a right of ownership is transferred to the acquirer. We can only say that ownership is transferred in an abstractly visible way. Secondly, invisible delivery is invisible, thereby conveying no information to third parties. As a result, where invisible delivery is made, the transfer of ownership is completely invisible to third parties. In general, under the consensual system or the *traditio* system, individual parties are allowed to decide the time when ownership passes as well as the person who holds direct possession of the object. Law allows ownership to be transferred independently from direct possession, and there is a ubiquitous disparity between ownership and possession in reality.

In the situation of *bona fide* acquisition of ownership, the publicity effect of possession cannot be overstated either. Firstly, possession is never an outward appearance of ownership. This is because direct possession of the unauthorized transferor only indicates that this person has a right, which is not necessarily ownership. Another reason is that indirect possession has no effect of publicity. Indirect possession is invisible, and whether the unau-

681 In history, there were two extremes concerning this tradeoff: one is Roman law that, in principle, only protected original owners (*nemo dat quod non habet*), and the other is ancient Germanic law that provided very extensive protection to third parties (*Hand wahre Hand*). See Salomons 2008 (1), p. 143-144; Von Gierke 1928, p. 59.

682 Salomons 2011 (2), p. 1077-1078.

683 Salomons 2011 (2), p. 1077-1078.

thorized transferor really has indirect possession is unclear to third parties. Secondly, provision of possession cannot lay a sufficient basis for the third party's reliance either. In general, giving up possession of the object to the third party is an outcome of performing the obligation of delivery. Moreover, if the third party in good faith has any reliance, this reliance will come into existence before the provision of possession. Thirdly, various types of legal policy play an important role in justifying *bona fide* acquisition of corporeal movables. For example, the exclusion of *traditio per constitutum possessorium* is an outcome of the following legal policy: where the original owner and the transferee in good faith have the same position, the former prevails. In addition to possession and delivery, some other requirements also need to be fulfilled. For example, the third party has to act in good faith, the acquisition by the third party is not gratuitous, and the original owner does not contribute to the disparity between possession and ownership. In general, these requirements are a result of legal policy.

3.5 Possession and Third-Party Effect: General Creditors

In the preceding two sections, the publicity effect of possession for strange interferers and that for subsequent acquirers have been discussed. In this section, we turn to another type of third party, namely general creditors. The focus of our discussion is whether possession can provide any useful information to general creditors. In 3.5.1, we introduced general creditors and the proprietary information demanded by them. In the situation of the debtor's insolvency, general creditors can only distribute assets owned by the insolvent debtor but not encumbered with any security interests. Therefore, general creditors have an interest in knowing the answers to two questions: (1) which assets are owned by the insolvent debtor, and (2) which assets have been mortgaged or pledged.

Since the entire Chapter 3 addresses only the publicity effect of possession for corporeal movables, the following discussion is confined to possession of corporeal movables, a kind of assets owned by the debtor. Correspondingly, we adapt the questions which are discussed below: (1) can possession indicate how many corporeal movables are owned by the debtor; and (2) can possession indicate how much proprietary encumbrance has been created over the debtor's corporeal movables? These two questions are discussed in 3.5.2 and 3.5.3 respectively. In the end, a conclusion is provided.

3.5.1 General Creditors and the Desired Information

3.5.1.1 Two Types of Proprietary Information

In Chapter 2, we introduced the legal status of general creditors and the information they demand (see 2.2.2.2.C). Here, some of the most salient

points are reiterated. General creditors have unsecured personal rights. In general, these personal rights are guaranteed by the total unencumbered assets owned by the debtor. Unlike general creditors, secured creditors have a preferential right with respect to specific collateral. In practice, there are many reasons why a creditor might be willing to be an unsecured creditor. For example, this creditor believes that the debtor has the ability to pay, the costs of creating a proprietary security right might be too high, the creditor's bargaining power is not equal as the debtor's, and the creditor might choose other measures to counter the risk of underpayment.[684]

In Chapter 2, we have also shown that the overall financial health of the debtor is the most important for general creditors, and the unencumbered assets the debtor has are of very limited importance (see 2.2.2.2.C). In practice, general creditors are mainly concerned about the debtor's cashflow, earning ability, and development prospects.[685] The information concerning these factors is not proprietary information since these factors are unrelated to property rights. Therefore, they fall outside the scope of this research. In this section, we focus only on whether possession can provide information concerning the unencumbered assets owned by the debtor, despite this proprietary information having very limited value for general creditors. As has been shown in Chapter 2, the proprietary information concerning unencumbered assets involves two aspects: how many assets belong to the debtor (the information of ownership), and how much proprietary encumbrance is created over the debtor's assets (the information of proprietary encumbrance).

A The Information of Ownership

The total asset owned by a debtor usually consists of corporeal movables, immovable property and incorporeal property. Immovable property takes registration as the method of publicity. In general, a creditor is able to know the immovable property owned by the creditor from the land register. Here, a question is whether a creditor can know the corporeal movables owned by the debtor on the basis of possession. This question can be described in another way: does possession of more corporeal movables mean that the possessor owns more corporeal movables and is wealthier?

In many articles and discussions, an answer in the affirmative is argued. Possession is treated as an indication of ownership, and the divergence of possession from ownership causes a problem of "*ostensible ownership*" or "*false appearance of wealth*".[686] If a debtor who lacks ownership holds possession, then he will look like an owner and thus appear wealthier than he really is. To tackle this problem, a system of registration should be introduced to demonstrate the divergence.[687] Usually, this opinion can be found

684 Finch 1999, p. 638; Mann 1997, p. 658-663.
685 Von Wilmowsky 1996, p. 162.
686 Baird and Jackson 1983, p. 175; Gullifer 2016, p. 3.
687 Baird and Jackson 1983, p. 200.

in the discussion concerning the publicity of non-possessory security interests of movables (see 5.4). Moreover, some scholars recommend having a general system of registration for all property rights of corporeal movables, rather than security interests alone.

> "*We think that, as a general rule, the party wishing to take or retain a nonpossessory property interest should bear the burden of curing the ostensible ownership problem, regardless of the type of relationship that party has with the party in possession of the collateral.*"[688]

In general, we think that general creditors do not rely on possession to ascertain the assets owned by the debtor because possession is an abstract method of publicity. The divergence between possession and ownership does not trigger the problem of ostensible ownership. About these two arguments, a detailed discussion is provided below (see 3.5.2).

B The Information of Proprietary Encumbrance

Even if a general creditor has ascertained the assets owned by the debtor, this creditor still does not know how much performance he can expect if the debtor becomes bankrupt. This is because his unsecured claim is subordinate to property rights of security. The amount of proprietary encumbrance also affects the extent to which the unsecured obligation will be performed in the event of the debtor's bankruptcy. Therefore, the general creditor also has an interest in knowing how much proprietary encumbrance exists over the assets owned by the debtor. One question here is whether possession can convey the information concerning proprietary encumbrance to general creditors.

There are two relevant approaches to this question: the positive approach and the negative approach.[689] According to the positive approach, possession can show the existence of proprietary encumbrance over corporeal movables (such as possessory pledge): the creation of this encumbrance has been indicated through delivery of the corporeal movable collateral.[690] The negative approach justifies delivery of the collateral from a different angle: delivery can preclude the debtor from appearing falsely wealthy.[691] According to the negative approach, where a property right of security is created in the absence of delivery of the collateral, there will be the problem of ostensible ownership, and general creditors will be misled to believe that the collateral belongs to insolvency assets.

As argued later, these two approaches are not convincing. Again, the main reason is that possession is an abstract and thus ambiguous method of publicity. Delivery cannot indicate the existence of any proprietary encum-

688 Baird and Jackson 1983, p. 189.
689 Füller 2006, p. 296-298; Hamwijk 2012, p. 315.
690 Hamwijk 2012, p. 308.
691 Drobnig 2011, p. 1027.

brance, and possession does not make the possessor falsely wealthy. For example, delivery cannot inform general creditors that a possessory pledge has been created on the thing delivered. The positive approach ignores the simple fact that delivery can be made due to various legal grounds. Later we provide a detailed discussion of the positive approach (see 3.5.3). In light of the negative approach, delivery can avoid the problem of ostensible ownership. In essence, this approach treats possession as an outward appearance of unencumbered ownership. Thus, it is discussed in a separate part (see 3.5.2).

3.5.1.2 Reiteration of Two Caveats

For the sake of clarity, two caveats need to be reiterated before starting our further discussion. Firstly, the discussion focuses only on whether possession can provide proprietary information concerning unencumbered assets to general creditors. As has been emphasized above, this information has very limited importance for general creditors (see 2.2.2.2.C). In practice, what unsecured creditors are mainly concerned about is the debtor's overall financial health of the debtor.

Secondly, the following discussion is confined to corporeal movables. Therefore, the question discussed is whether possession can indicate the corporeal movables owned by the debtor and the proprietary encumbrance created over the debtor's corporeal movables. The debtor usually owns different types of assets, among which corporeal movables are only one type. Therefore, for a general creditor who wants to ascertain the total unencumbered assets owned by the debtor, giving attention to only corporeal movables is obviously insufficient.

3.5.2 Possession and the Information of Ownership of Corporeal Movables

3.5.2.1 Is Possession an Indicator of Ownership?

In this part, the central question discussed is whether possession can indicate how many corporeal movables are owned by the debtor. In general, the answer is in the negative for two reasons: (1) direct possession is an abstract and thus ambiguous method of publicity for corporeal movables (see 3.2.1); and (2) indirect possession has no effect of publicity (see 3.2.2). The second reason is easy to understand. Indirect possession held by the debtor is hidden to general creditors. Thus, indirect possession cannot convey any information to general creditors. The following discussion concerns the first reason.

As an abstract method of publicity, direct possession is not necessarily associated with the right of ownership. In modern society, direct possession and ownership diverge from each other extensively in the field of corporeal movables (see 3.4.2.4). A corporeal movable directly possessed by a debtor does not necessarily belong to this debtor. For example, the debtor might be

just a lessee. Indeed, possession of a thing indicates that the possessor has a certain right to this thing. However, this abstract and ambiguous indication is not sufficient for general creditors because what they are concerned about is whether the thing can be distributed if the debtor becomes bankrupt. In principle, for the thing to be able to be distributed among general creditors, a condition is that the bankrupt debtor is the owner. Therefore, direct possession conveys no useful information to general creditors, and general creditors cannot rely on direct possession to ascertain the assets owned by the debtor.

The failure of possession to be an indicator of the debtor's ownership can also be ascribed to another fact: a debtor might have ownership of a corporeal movable thing, despite this thing not being directly possessed by the debtor. As just mentioned, ownership and direct possession are often held by different persons in reality. It is common that an insolvent debtor (such as the lessor) enjoys ownership of a corporeal movable, while this movable is directly possessed by another person (such as the lessee). If direct possession is treated as an outward mark of ownership, then two incorrect results ensue: the amount of the bankrupt debtor's assets is underestimated, and the amount of the possessor's assets is overestimated. Therefore, the question whether a corporeal movable is susceptible to distribution among general creditors is never determined by direct possession.

3.5.2.2 Is Possession a Cause of Ostensible Ownership?

The preceding part presented the main reason why possession cannot show how many assets are owned by the debtor. In this part, we turn to the problem of ostensible ownership, a problem often seen as an outcome of the divergence between possession and ownership. However, we are of the opinion that this problem does not exist for general creditors. Here, more grounds will be provided to demonstrate that general creditors neither treat possession as an indicator of ownership nor are misled by possession.

A Introduction of the Problem

As mentioned above, it is often held that the separation between ownership and possession causes the problem of ostensible ownership: possession makes the possessor appear wealthier than he or she really is. In general, the problem of ostensible ownership can arise in two different situations. One situation is that the possessor, such as a lessor, does not have ownership. The other situation is that the possessor, such as a mortgagor, is an owner but has granted a limited property right to another person. In other words, the possessor only has encumbered ownership.

In the first situation, the possessor who has no ownership appears to be the owner of the thing possessed. To avoid this situation, possession must be held by the owner. This opinion can be found in an ancient English case, the *Twyne's Case*.[692] In that case, a farmer sold his sheep to another person

692 Baird 1983, p. 53.

but retained possession. Due to the retention of possession, this transaction was ruled as fraudulent and thus void. The transaction was carried out in the way of *traditio per constitutum possessorium*. In history, this form of invisible delivery was treated as a fraudulent activity.[693] In general, this discrimination against *traditio per constitutum possessorium* can be ascribed to the concern about the problem of ostensible ownership.

> "*Separation of ownership and possession has been viewed as a source of mischief toward third parties and, for that reason, as fraudulent.*"[694]

> "*One reason for a better right for the seller's creditors could be that they should be entitled to believe that everything in the possession of the seller belongs to him.*"[695]

In the English case above, the seller remained in possession of the sheep and continued appearing to be the owner, which was inconsistent with the fact that ownership had been alienated to the purchaser. For the seller's creditors, the seller appeared wealthier than he really is. With respect to *traditio per constitutum possessorium*, the concern about the problem of ostensible ownership can still be found in current law and theory.[696]

> "*Dit houdt verband met de publiciteitseis voor goederenrechtelijke rechten: de vervreemder c. p. wekt na de overdracht toch nog de indruk rechthebbende te zijn en wekt daarmee de valse schijn van kredietwaardigheid.*"[697]

The problem also exists in situations other than transfer of ownership. According to some scholars, every bailment, which is based on the separation of ownership and possession, can cause the problem of ostensible ownership.[698] For example, where a relationship of lease is created, the lessee acquires possession by virtue of a right of use, but possession makes the lessee appear to have ownership. To tackle this problem, a system of registration should be constructed to allow third parties to know whether the possessor really has ownership.[699]

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693 Brehm and Berger 2014, p. 442.
694 Baird and Jackson 1983, p. 180.
695 Hästad 2006, p. 40.
696 In Swedish law, where transfer is made in the way of *traditio per constitutum possessorium*, the transferee does not have a right to separate the object from the transferor's insolvency assets. If the transferor remains in possession, the transferee will have a position equal to other general creditors, except that the transferee is a customer or has registered the transfer. The rationale behind this rule is that *traditio per constitutum possessorium* triggers the problem of "*false wealthy*" and forms a sham transaction. See Lilja 2011, p. 59-62.
697 Snijders and Rank-Berenschot 2017, p. 116. English translation: "*It has a connection with the requirement of publicity of property rights: the transferor remains as a proprietor in the situation of constitutum possessorium, which gives rise to a false appearance of creditability.*"
698 Baird and Jackson 1983, p. 186.
699 Baird and Jackson 1983, p. 200.

In the second situation, the possessor, who has granted a limited property right, appears to enjoy unencumbered ownership. To avert this situation, possession needs to be given up by the owner. This opinion is often met in the course of justifying the requirement of delivery for possessory pledge and the construction of a registration system for non-possessory pledge: (1) delivery of the movable collateral by the pledgor avoids this person being falsely wealthy; and (2) where the pledgor retains possession of the movable collateral, registration of this non-possessory pledge can avoid general creditors being misled. In general, the rationale behind these concerns is that possession retained by the pledgor induces general creditors to overestimate the pledgor's creditability.[700]

> "*The debtor's dispossession fulfills two major functions: it makes it more difficult for the debtor to dispose of the pledged goods to a third person; the debtor can no longer create the misleading impression in the minds of his other creditors of owning the pledged goods which might be available for the satisfaction of their claims.*"[701]

This rationale once underlay art. 38 of the English Bankruptcy Act (1914), a provision which defines the scope of insolvency assets according to possession.[702] This provision was abolished in 1985.[703] At present, the problem of ostensible ownership still exists, but this problem should be addressed by registration, rather than delivery of the collateral. Putting aside the question of whether a system of registration is desirable, we discuss only the question of whether the problem really exists for general creditors.

B Non-Existence of the Problem

The problem of ostensible ownership does not exist in practice. The separation of ownership and possession does not make the possessor falsely wealthy to general creditors. As has been argued, the first and foremost reason is that possession does not indicate that the possessor has ownership (see 3.5.2.1).[704] Obviously, general creditors cannot evaluate the debtor's creditability according to the amount of the corporeal movables possessed by the debtor. Possession only indicates that the debtor has a certain right, which is not necessarily ownership.

Secondly, the amount of corporeal movables possessed by a debtor is largely contingent on the business content of this debtor. For example,

700 Hamwijk 2012, p. 302.
701 Drobnig 2011, p. 1027.
702 Pursuant to art. 38 (c) of the Bankruptcy Act (1914), the insolvency asset includes "*All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section*".
703 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.05.
704 Corral 2013, p. 414.

a warehousing enterprise is often in possession of a large amount of corporeal movables, which, however, neither means that this enterprise has ownership of these things, nor implies that it has good creditability. The reason is simple: the central business content of the enterprise is "possessing" and managing corporeal movables for others. At most, the amount of corporeal movables possessed indicates that the enterprise is running well. In contrast, an IT company might have good creditability, even though only a small amount of corporeal movables is possessed by this company. The reason is also simple: the major wealth of this company is incorporeal.

Thirdly, general creditors do not investigate the debtor's possession of corporeal movables because the cost of investigations is usually high. It is high for several reasons. Possession can take different forms and is exercised in different places. Possession can be indirect and hidden. Thus, general creditors cannot easily find out how many corporeal movables are in the debtor's indirect possession. The debtor often has more than one premises, which may be located in different cities, even foreign countries. Obviously, it is costly to go to each of the premises and ascertain the amount of corporeal movables. Another reason is that corporeal movables possessed by the debtor are always changing, which also makes the investigation difficult and expensive. For example, a manufacturing enterprise is always obtaining possession of materials and giving up possession of finished products. Moreover, the fluctuations in the object of possession also imply that the information collected is only useful for a short period.

Fourthly, delivery cannot avert the problem of ostensible ownership. Instead, it might be a cause of this problem. For example, once the pledgor delivers the movable collateral to the pledgee, the pledgee will appear to have ownership, which in fact he does not.[705] General creditors of the pledgee will be misled to believe that the pledgee enjoys ownership of the movable collateral.

> "*Strictly speaking, pledges of chattels, which were recognized at common law, created ostensible ownership problems as well, because the creditor holding pledged property would appear to own property that in fact belonged to another.*"[706]

As delivery cannot solve the problem of ostensible ownership, there is no reason to expect that general creditors will rely on possession.

Lastly, general creditors commonly know that a thing possessed by the debtor does not necessarily belong to the debtor. Even if this thing does belong to the debtor, general creditors know that the thing is very likely to be mortgaged or pledged. Possession and ownership often diverge from each other in many situations, such as the security transfer, reservation of ownership, and sale and leaseback. In practice, professional businesspeople know that, for example, goods are often sold under a clause of reservation

705 Hamwijk 2012, p. 313.
706 Baird 1983, p. 54.

of ownership, and equipment is often mortgaged to the bank or rented from a financial lessor.[707] Businesspeople's common knowledge also implies that possession will not make the possessor falsely wealthy.

> "*With the increasing use of ownership-based, non-possessory security interests (retention of title with various extensions, security transfer of ownership) the question arises of whether purchasers today can still believe that movables which they find in the possession of the seller are in fact owned by the latter. In 1980, the BGH decided that in those business sectors where practically all goods are sold under retention of title, purchasers can no longer trust that the goods which the seller possesses are in fact his property.*"[708]

For the reasons discussed above, possession cannot be considered as an indicator of ownership, and separation of possession from ownership does not cause the problem of ostensible ownership.

3.5.3 Possession and the Information of Proprietary Encumbrance over Corporeal Movables

As mentioned above, general creditors are not only affected by how many assets the debtor has in the event of the debtor's insolvency, but also by the amount of proprietary encumbrance over the assets. In this part, we turn to the latter aspect: whether possession can provide information about proprietary encumbrance over corporeal movables to general creditors.

It has been pointed out that there are two approaches in justifying the importance of delivery for general creditors: the positive approach and the negative approach (see 3.5.1.1). According to the positive approach, delivery can show possessory security interests to third parties. Under the negative approach, delivery is seen as a method to preclude the debtor from being falsely wealth and to avoid misleading third parties into the belief that the debtor has unencumbered ownership. The negative approach has just been discussed. In this part, we address only the positive approach.

This part begins with an introduction of both possessory security interests and non-possessory security interests in the three jurisdictions: English law, German law, and Dutch law. It can be found that these jurisdictions have a similar rule concerning possessory pledge, but differ in the non-possessory security interest. After that, a conclusive analysis is provided. There, we point out that the most commonly used security device in practice is non-possessory. Even if the possessory security interest is created with delivery, delivery cannot show this interest to third parties. As a result, possession cannot indicate the existence of proprietary encumbrance over corporeal movables to general creditors.

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707 Snijders and Rank-Berenschot 2017, p. 427.
708 Kieninger 2007, p. 653.

3.5.3.1 Introduction of Security Interests

A English Law

In English law, apart from liens which are usually statutory, there are three types of consensual security right on movable things: pledge, mortgage, and charge.[709] The following discussion focuses on the relationship between these security rights and possession.

A1: Pledge

Pledge is a traditional security right in English law. Pledge is a possessory security right. To establish a right of pledge on a movable thing, the pledgor has to deliver this thing to the pledgee.[710] Mere agreement of creation is not adequate.[711] The prominent case is that the pledgor gives up actual possession to the pledgee, which is known as visible delivery. Visible delivery also takes place in the situation where the means of control, such as the key to the house in which the collateral is stored, is given up to the pledgee.[712] Delivery can be constructive in English law.

If the pledgee is already in possession of the collateral, "*a change in the nature of possession*" suffices.[713] This constitutes *traditio brevi manu*. If the movable collateral is possessed by a third party, the pledge also comes into existence when the third party attorns to the pledgee.[714] This attornment is equivalent to *traditio longa manu*. It should be specially mentioned that pledge can also be created via attornment by the pledgor to the pledgee, namely *traditio per constitutum possessorium*.[715] In other words, the pledgor can retain actual possession by only acknowledging holding the movable collateral for the pledgee. However, it is held by some writers that pledge created in this way is hidden and should be recharacterized as a charge.[716]

The prevailing opinion about the possibility of equitable pledge, a contract of pledge in the absence of any actual or constructive delivery is that equitable pledge is conceptually impossible.[717] Pledge is necessarily possessory. Equity law does not recognize "equitable possession", which implies that equitable pledge is not possible.[718] Moreover, where a pledge is allegedly created by parties in the absence of delivery, it is highly likely that this pledge will be re-characterized as a charge.[719]

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709 Goode 2013, p. 32-35.
710 Goode 2013, p. 32.
711 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.23.
712 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.24.
713 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.88.
714 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.26.
715 *Dubin City Distillery v. Doherty*, [1914] A.C. 828, p. 852.
716 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.28.
717 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.60.
718 Bridge, Gullifer, McMeel and Worthington 2013, p. 157.
719 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.60.

A2: Mortgage

In English law, mortgage is an instrument of security on the basis of transfer of ownership, or precisely speaking, transfer of title.

> "*A mortgage is a non-possessory security whereby the mortgagor transfers ownership to the mortgagee subject to an obligation to retransfer ownership on satisfaction of the underlying obligation.*"[720]

Mortgage requires a transfer of ownership. The corporeal movable mortgaged is not required to be delivered to the mortgagee, whether in an invisible or visible way.[721] In this aspect, mortgage and pledge differ. If the mortgagor defaults, the mortgagee has a right, either expressly-agreed or readily-implied, to possess and sell the collateral.[722] After performing the secured obligation, any surplus of the proceeds out of the sale will be held by the mortgagee for the mortgagor, forming a constructive trust.[723] In this sense, mortgage has a function of security, but this function is not reflected in the legal form of this transaction.[724] Besides the remedy of sale, the mortgagee is also entitled to request an order of foreclosure from the court. If the request is approved, then the collateral will be absolutely vested in the mortgagee, and the mortgagor will lose the collateral. Moreover, a successful foreclosure means that the mortgagee has no duty to return the surplus.[725] Foreclosure is rarely requested and approved nowadays.[726]

The mortgagor has the right to redeem, a right to recover ownership of the collateral. This right can be legal (when there is an express agreement) as well as equitable (when there is no express agreement).[727] If the mortgagor fulfills the secured obligation, then the legal ground on which ownership is transferred, will come to an end. As a result, ownership of the collateral will return to the mortgagor immediately.

For the creation of a mortgage, it suffices that the mortgagee acquires ownership of the movable collateral. Under the consensual system of English law, delivery is not necessary (see 3.4.2.1). However, since mortgage brings a risk to third parties, including general creditors, registration is required to make this security interest transparent.[728] If the mortgage is provided by a company, it should be registered under the Companies Act.[729]

720 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.01.
721 Goode 2013, p. 35.
722 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.06.
723 Bridge, Gullifer, McMeel and Worthington 2013, p. 174.
724 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.01.
725 Bridge, Gullifer, McMeel and Worthington 2013, p. 174.
726 Beale, Bridge, Gullifer and Lomnicka 2018, no. 18.19.
727 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.02.
728 Sealy and Hooley 2009, p. 1139.
729 Sealy and Hooley 2009, p. 1139.

If the mortgage is given by an individual in written form, it should be registered as a bill of sale under the Bills of Sale Acts.[730] However, it should be noted that the registration as a bill of sale is not open to the public, which means that the mortgage is still hidden.[731] In general, registration is only a requirement for "perfecting" mortgage. The lack of registration does not affect the creation. Moreover, mortgage can take effect in equity law: where there is a valid contract of creation, there is an equitable mortgage.[732]

A3: Charge

Charge is another security right in English law. Charge is introduced by equity, thus it is in principle equitable.[733] It neither requires the chargor to give up possession, nor requires the chargor to transfer ownership to the chargee. Charge is a limited encumbrance over the collateral.[734] Therefore, charge is different from pledge as well as mortgages.

> "*A charge is a non-possessory security whereby the charged property is appropriated to the discharge of an obligation without the transfer of ownership.*"[735]

In terms of the execution, charge and mortgage also have some differences. For example, where there is a specific agreement, the chargee can claim certain judicial remedies, such as the order of sale and the appointment of a receiver. The mortgage is different: the mortgagee has a right of possession and can apply for foreclosure.[736] On the other hand, charge has a close relationship with mortgage. In many situations, these two terms are used interchangeably.[737]

B German Law

German law also recognizes possessory as well as non-possessory security interests. The subsequent discussion focuses on two types of security interest: one is the "pledge (*Pfandrecht*)" which is possessory, and the other is the "security transfer (*Sicherungsübereignung*)" which is non-possessory.

730 Sealy and Hooley 2009, p. 1139.
731 Beale 2016, p. 5.
732 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.07.
733 Clarke and Kohler 2005, p. 664.
734 Goode 2013, p. 36.
735 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.17.
736 Bridge, Gullifer, McMeel and Worthington 2013, p. 187.
737 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.54.

B1: Pledge

Pledge is a traditional security right, which has been prescribed by the BGB (§ 1204).[738] It requires dispossession and thus applies mainly to corporeal movables.[739] Pledge can also exist on certain incorporeal property, such as shares in limited liability companies, intellectual property and bank accounts.[740] In addition, "securities (*Wertpapieren*)" can also be an object of pledge since they can be possessed like a corporeal movable.[741] Upon default of the debtor, the pledgee has a right to sell the collateral and use the proceeds out of the sale to discharge the secured debt.[742] Moreover, pledge can be enforced against unsecured creditors in the situation of the pledgor's bankruptcy.[743]

For establishing the pledge, delivery is necessary as a means of publicity. Visible delivery suffices because it requires the pledgor to give up direct possession to the pledgee. As to invisible delivery, German legislators take a stricter attitude to the creation of pledge than to the transfer of ownership. Firstly, *traditio per constitutum possessorium* is prohibited, and the pledgor cannot retain direct possession of the movable collateral.[744] Secondly, *traditio longa manu* is not validly completed until notification is given to the third party who is in direct possession of the collateral.[745] It is worthwhile noting that such notification is not necessary for transferring ownership.

> § 1205 BGB: *„(1) Zur Bestellung des Pfandrechts ist erforderlich, dass der Eigentümer die Sache dem Gläubiger übergibt und beide darüber einig sind, dass dem Gläubiger das Pfandrecht zustehen soll. Ist der Gläubiger im Besitz der Sache, so genügt die Einigung über die Entstehung des Pfandrechts. (2) Die Übergabe einer im mittelbaren Besitz des Eigentümers befindlichen Sache kann dadurch ersetzt werden, dass der Eigentümer den mittelbaren Besitz auf den Pfandgläubiger überträgt und die Verpfändung dem Besitzer anzeigt.*"[746]

The requirement of delivery gives rise to significant inconvenience in practice, which partially accounts for the security transfer of ownership being commonly used.[747]

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738 In German law, pledge can be consensual as well as statutory. The statutory pledge is an outcome of the operation of law, while the consensual pledge is a result of the parties' agreement. This part concerns only the consensual pledge.

739 Akkermans 2008, p. 225.

740 Rakob 2007, p. 68.

741 See § 1292 and § 1293 BGB; Baur and Stürner 2009, p. 754.

742 Baur and Stürner 2009, p. 747.

743 Baur and Stürner 2009, p. 747.

744 Baur and Stürner 2009, p. 750.

745 Baur and Stürner 2009, p. 750.

746 English translation: § 1205 BGB: "*(1) To create a pledge, it is necessary for the owner to deliver the thing to the creditor and for both to agree that the creditor is to be entitled to the pledge. If the creditor is in possession of the thing, agreement on the creation of the pledge suffices. (2) The delivery of possession of a thing in the indirect possession of the owner may be replaced by the owner transferring indirect possession to the pledgee and notifying the possessor of the pledging.*"

747 Baur and Stürner 2009, p. 750.

B2: Security Transfer of Ownership

Because of the stringent requirement of delivery in creating the pledge, individual parties turn to an ownership-based security device: the security transfer of ownership.[748] This device is not expressly provided by law. It is a result of commercial necessity and judicial creation.[749] Under this device, the purpose of security is realized by transferring ownership of corporeal movables to the creditor in the way of *traditio per constitutum possessorium*.[750] As a result, the creditor acquires ownership to secure the claim, and the debtor can continue using the collateral by retaining direct possession. The security transfer of ownership tempers the requirement of delivery, thus averting the inconvenience caused by this requirement. In terms of enforcement, the creditor can, by analogy with the rules of pledge, sell the collateral if the debtor defaults.[751] However, the creditor bears a liability of liquidation to return the surplus to the debtor.

For the security transfer, an "intermediate relationship of possession (*Besitzmittlungsverhältnis*)" is necessary.[752] Under this relationship, the debtor agrees to possess the movable collateral for the creditor, namely the security owner. Any other requirement of publicity is not necessary. Therefore, the security transfer of ownership is a hidden security device.[753]

C Dutch Law

In Dutch law, "pledge (*pand*)" is a security device that can be established on corporeal movables. Pledge can be "possessory (*vuistpand*)" and "non-possessory (*vuistloos pand*)".[754] Security transfer of ownership has been prohibited since the new BW, and the non-possessory pledge is recognized as an equivalent.[755] The following discussion focuses on these two types of pledge.

C1: Possessory Pledge

To create a possessory pledge, the pledgee has to obtain factual control. However, the pledgee does not have to directly control the collateral in person, and it also suffices that the pledgee indirectly controls the collateral through a third party.[756] In the latter situation, the third party has to hold

748 In German law, this security device is applicable to both corporeal movables and incorporeal things, such as claims. The discussion here concerns only the former, and the security assignment of claims is discussed in 4.1.4.2. Immovable property cannot be transferred for the purpose of security.
749 Rakob 2007, p. 69.
750 Baur and Stürner 2009, p. 785.
751 Akkermans 2008, p. 190.
752 Baur and Stürner 2009, p. 789.
753 Brinkmann 2016, p. 340.
754 See art. 3:236 BW and art. 3:237 BW.
755 Veder 2007, p. 193.
756 Steneker 2012, p. 91.

the collateral for the pledgee rather than the pledgor.[757] Moreover, a notification should be given to the third party, so that this party will hold the collateral for the pledgee.[758] Pursuant to art. 3:236 BW, the pledgor cannot retain any factual control. If the pledgor does not give up factual control to the pledgee, the possessory pledge does not come into existence. Therefore, the pledge cannot be created in the way of *traditio per constitutum possessorium*.[759] If the pledgor regains factual control of the collateral, then the pledge will cease to exist.[760] It is noteworthy that "possession (*bezit*)" is always held by the pledgor due to the distinction between possession and "detention (*houderschap*)". As to the formality of the contract of creation, there is not any special requirement.[761]

Possessory pledge requires the pledgee to obtain factual control of the collateral, and *traditio per constitutum possessorium* is not recognized. This prevents the pledgor from continuing making use of the collateral. As a result, this security device is seldom used in practice.[762] The purpose of security is often realized through the non-possessory pledge.

C2: Non-Possessory Pledge

In contrast to the possessory pledge, non-possessory pledge does not require placing the collateral under the factual control by the pledgee or a third party. For this reason, the latter is also known as "silent pledge".[763] Non-possessory pledge is treated as an alternative to the security transfer of ownership, which has been prohibited by the new BW (art. 3:84 (3)). In general, non-possessory pledge can be established in two ways. One is notarizing the deed of creation, and the other is registering the deed in the tax authorities. However, this registration is not open to the public, and outsiders cannot search the system.[764] The main purpose of the registration is to prevent antedating, and this purpose can be realized by notarization as well.[765] In a word, the non-possessory pledge requires neither delivery nor public registration, thus this security device is completely hidden.

If the debtor fails to perform the secured debt or there is a good reason for the creditor to believe that the debtor will not perform the debt,

757 Steneker 2012, p. 91.
758 Snijders and Rank-Berenschot 2017, p. 462; Reehuis and Heisterkamp 2019, p. 628.
759 Snijders and Rank-Berenschot 2017, p. 462; Reehuis and Heisterkamp 2019, p. 628.
760 Veder 2007, p. 195.
761 Veder 2007, p. 193.
762 Steneker 2012, p. 92.
763 Akkermans 2008, p. 290.
764 Veder 2007, p. 196.
765 Van Erp 2003, p. 6.

the pledgee is entitled to take control of the movable collateral.[766] Consequently, the non-possessory pledge becomes a possessory pledge. As a form of proprietary right of security, the non-possessory pledgee has a superior legal position over general creditors in the situation of the debtor's bankruptcy.[767]

D Comparative Analysis

From the introduction above, it is evident that there are two lines to compare security interests in corporeal movables. One is whether the security interest is possessory, and the other is whether the non-possessory interest is ownership-based. In the three jurisdictions, the pledge in English law, the "pledge (*Pfandrecht*)" in German law and the "possessory pledge (*vuistpand*)" in Dutch law are a possessory security interest. The non-possessory security interest includes the mortgage and charge in English law, the "security transfer (*Sicherungseigenung*)" in German law, and the "non-possessory pledge (*vuistloos pand*)" in Dutch law. Among these non-possessory interests, the mortgage under English law and the security transfer of ownership under German law are ownership-based, while the charge and the non-possessory pledge are a limited proprietary encumbrance.

The security transfer of ownership and the English-law mortgage take the transfer of ownership as their legal form.[768] However, they perform an economic function of security. In English law, mortgage and charge are often used interchangeably in theory, judicial practice and legislation.[769] In German law, the security transfer of ownership is treated as a pledge-like device.[770] In the economic essence, what the acquirer (the creditor) gains is a proprietary interest of preference.

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766 Art. 3:237 (3) BW: "*Wanneer de pandgever of de schuldenaar in zijn verplichtingen jegens de pandhouder tekortschiet of hem goede grond geeft te vrezen dat in die verplichtingen zal worden tekortgeschoten, is deze bevoegd te vorderen dat de zaak of het toonderpapier in zijn macht of in die van een derde wordt gebracht. Rusten op het goed meer pandrechten, dan kan iedere pandhouder jegens wie de pandgever of de schuldenaar tekortschiet, deze bevoegdheid uitoefenen, met dien verstande dat een andere dan de hoogst gerangschikte slechts afgifte kan vorderen aan een tussen de gezamenlijke pandhouders overeengekomen of door de rechter aan te wijzen pandhouder of derde.*" English translation: Art. 3:237 (3) BW: "*Where the pledgor or the obligor fails to perform his obligations as regards the pledgee, or gives him good cause for concern that there will be such a failure, the pledgee is entitled to demand that the thing or the paper to bearer be brought under his control or that of a third person. Where there are several rights of pledge over the property, each pledgee as regards whom the pledgor or the obligor fails to perform his obligations, can exercise this right, in which case no pledgee, other than the most senior in rank, may demand surrender to a pledgee or to a third person, if so agreed by the pledgees jointly, or to a pledgee or third person to be appointed by the court.*"

767 Hamwijk 2014, p. 83.

768 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.01.

769 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.54.

770 Akkermans 2008, p. 190.

> *„Wirtschaftlich betrachtet ist aber der Sicherungsnehmer nur Pfandgläubiger, der Schuldner (=Sicherungsgeber) ist ‚Eigentümer' geblieben; Dies kommt auch rechtlich darin zum Ausdruck, dass die zur Sicherheit übereignete Sache nach Tilgung der gescherten Forderung an den Schuldner zurückfallen soll."*[771]

Security transfer of ownership was once recognized in judicial practice in the Netherlands. However, the new BW expressly prohibits this transfer under art. 3:84 (3) BW. The principal reason is that the purpose of the security transfer can be equivalently realized by the non-possessory pledge, and what the creditor should obtain is no more than a right of pledge.[772] This also illustrates that the security transfer of ownership is akin to the non-possessory pledge.

Different from the non-possessory security device, the possessory security device takes the same legal form: (possessory) pledge. In the three jurisdictions, the pledge is a limited property right, which does not involve any transfer of ownership. However, a difference exists between these jurisdictions. In both German law and Dutch law, *traditio per constitutum possessorium* cannot be used to create the possessory pledge: the pledgor is not allowed to retain actual control. In contrast, the possessory pledge can be created by *traditio per constitutum possessorium* in English law, albeit that the existence of mortgage and charge makes this unnecessary. As has been demonstrated above, pledge can also be created through attornment by the pledgor to the pledgee under English law (see 3.5.3.1.A).[773] In this way, the pledgor is able to retain factual control of the collateral, just like in the situation of creating a charge or mortgage. It is noteworthy that the possessory pledgee does not necessarily obtain direct possession of the movable collateral in the three jurisdictions. It might be a third party who is in actual control of the collateral. In this situation, the possessory pledge is created in the way of *traditio longa manu.* Moreover, the third party should be notified of the pledge.

3.5.3.2 Is Possession an Indicator of Proprietary Encumbrance?

On the basis of the discussion above, we find that possession cannot provide any information of proprietary encumbrance to general creditors for two reasons: (1) the ubiquitous existence of non-possessory security interests, and (2) possession is an abstract method of publicity.

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771 Baur and Stürner 2009, p. 787. English translation: "*However, in the economic sense, the security acquirer is only a pledgee, and the debtor (namely the security provider) remains as the 'owner'. This is also correct on account of the fact that the object transferred for security will return to the debtor upon performance of the secured obligation.*"

772 Akkermans 2008, p. 267.

773 *Dubin City Distillery v. Doherty*, [1914] A.C. 828, p. 852.

A The Ubiquitous Existence of Non-Possessory Security Interests

Even if we assume that possession can indicate the existence of proprietary encumbrance, the popularity of non-possessory security interests implies that general creditors cannot obtain information of proprietary encumbrance from possession. As most encumbered corporeal movables are still under the actual control by the debtors, how can a third party know about the proprietary encumbrance via possession?

It is worthwhile noting here that though the movable collateral is still possessed by the debtor when a non-possessory security right is created, the problem of ostensible ownership does not arise (see 3.5.2.2). Possession is not an outward mark of ownership, let alone that of unencumbered ownership. Moreover, prudent businesspeople know that there is a ubiquitous divergence between ownership and possession, and they will not be misled by the retention of possession by the debtor.

B The Abstract Publicity Effect of Possession

Traditionally, it is generally held that the possessory pledge should be made visible by delivery of the movable collateral to the pledgee. Moreover, *traditio per constitutum possessorium* cannot be used to create the pledge, because this invisible delivery does not have any effect of publicity.

> "*This is usually rationalized on the basis that possession is sufficient notice of the interest and so registration is not necessary.*"[774]

> "*Het object van het pandrecht moet in de macht van de pandhouder of die derde worden gebracht om te bewerkstelligen dat de pandgever niet over het object van het pandrecht kan beschikken. Deze eis vloeit voort uit het beginsel van publiciteit. Uit de wijziging van de machtsuitoefening blijkt van het bestaan van het pandrecht tegenover derden.*"[775]

> „*Eine Pfandrechtsbestellung durch Besitzkonstitut scheidet aus, weil die Pfandrechtsbestellung durch eine Änderung der Besitzverhältnisse für andere Gläubiger äußerlich erkennbar sein soll, woran es* § *930 in fehlt.*"[776]

In general, the opinion above is in line with the conventional view that possession is a means of publicity for corporeal movables. However, this opinion is not convincing. It is problematic to say that possession is able to make general creditors aware of the existence of a pledge on the movable collateral under the pledgee's control.

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774 Goode 2013, p. 82.

775 Asser/Van Mierlo 2016, nr. 146. English translation: "*The object of the pledge must be under the control by the pledgee or a third party to make sure that the pledgor is not able to dispose of the object of the pledge. This requirement results from the principle of publicity. The pledge can be shown to third parties through the change of the power of control.*"

776 Wolf and Wellenhofer 2011, p. 219. English translation: "*The creation of pledge though constitutum possessorium is excluded, because the creation of pledge must be made visible to other creditors by changing the relationship of possession, which does not take place under art. 930.*"

Firstly, direct possession is only an abstract means of publicity for corporeal movables. Due to the great diversity of the legal basis on which direct possession can be obtained, possession cannot clearly indicate the specific right enjoyed by the possessor.[777]

> "*After all, possession by the pledge-holder cannot alone indicate that a lien over the item exists. The pledge-holder could also be the owner, lessee or custodian of the item.*"[778]

For general creditors, it is completely impossible to infer the existence of pledge from the pledgee's direct possession. Direct possession only indicates that the possessor has a right to the thing possessed.

Secondly, indirect possession has no effect of publicity. As has been shown above, the possessory pledge can be created by allowing a third party to hold the collateral for the pledgee in the three jurisdictions. In this situation, the pledgee has indirect possession. As indirect possession is hidden to general creditors, it cannot provide any information.

> "*Where possession is transferred to the creditor by attornment rather than by an actual transfer of possession, it is hard to see that the creditor's possession constitutes very effective public notice.*"[779]

In sum, there is no reason to believe that possession is an eligible means of publicity for the possessory pledge of corporeal movables. Therefore, general creditors cannot know from possession the existence of possessory pledge.

3.5.4 Conclusion

This section focuses on the importance of possession for general creditors. The central question discussed is whether possession can indicate how many corporeal movables are owned by the debtor (the information of ownership) and how much proprietary encumbrance is created over the corporeal movables owned by the debtor (the information of proprietary encumbrance).

In the second part of this section (3.5.2), we argue that possession cannot provide the information of ownership of corporeal movables to general creditors. The reason is simple: direct possession is an abstract and thus ambiguous method of publicity, and indirect possession has no effect of publicity. Moreover, it is difficult, costly and inappropriate to ascertain the corporeal movables owned by the debtor through possession. In practice,

777 Hamwijk 2012, p. 307.
778 Lukas 2004, p. 99.
779 Goode 2013, p. 82.

creditors know that a corporeal movable possessed by the debtor might belong to another person, while a corporeal movable not possessed by the debtor might belong to the debtor. Therefore, the divergence between ownership and possession does not give rise to the problem of ostensible ownership.

In the second part of this section (3.5.3), we argue that possession cannot provide the information of proprietary encumbrance over corporeal movables to general creditors. The main reason is that most proprietary security interests are non-possessory in practice. Possession is completely useless for ascertaining the existence of non-possessory security interests. Even if a possessory security right is created, this proprietary encumbrance cannot be made transparent by possession obtained by the creditor. The reason is simple: direct possession is only an abstract and thus ambiguous method of publicity, and indirect possession has no effect of publicity.