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

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4 Notification, Documental Recordation, and Claims

Traditionally, notification and documental recordation are the two methods of publicity for claims. For example, if a seller assigns a claim for the payment of purchase price against a buyer to a third party, this seller usually notifies the buyer who will then pay the purchase price to the assignee. The notification is often said to perform a function of publicity.[1] If the purchase price has been paid by the buyer using a negotiable document (such as a check), then the seller can assign the claim embodied within this document by delivering and endorsing the document. The document is often treated as the method of publicity for the claim embodied, and transfer of the document can make disposal of the claim embodied effective against third parties.[2] In this chapter, we will discuss these two methods of publicity. In addition to these two traditional methods of publicity, the following discussion also devotes attention to "private registration", a formality of assignment and pledge of claims in Dutch law (art. 3:94 (3) and 3:239 (1) BW).

Chapter 4 is divided into three sections. The first two sections focus on notification to debtors (see 4.1) and documental recordation (see 4.2) respectively. In each section, English law, German law and Dutch law are selected for a comparative study. Moreover, Chapter 4 follows the framework of the discussion in Chapter 3: section 4.1 and 4.2 examine the importance of the two methods of publicity for the three types of third parties, namely strange interferers, subsequent acquirers, and general creditors. In these two sections, the focus of our discussion is whether the two methods of publicity convey sufficient information to subsequent acquirers.

4.1 Notification to Debtors

Nowadays, claims (or personal rights), especially monetary claims (receivables), form an important asset. Like corporeal movables, claims can also be transferred by the creditor, pledged for the purpose of security, and even taken as an object of proprietary usufruct. In these situations, a notification concerning the disposal is often given to the debtor. However, the legal effect of this notification varies from one jurisdiction to another. The notification might be a prerequisite of the disposal, a method which can make the disposal effective against third parties, or a factor which is only

1 DCFR 2009, p. 1076; Proprietary Security in Movable Assets 2014, p. 447.
2 DCFR 2009, p. 4553; Proprietary Security in Movable Assets 2014, p. 418.

relevant to the issue of the debtor's performance. In section 4.1, we examine the rationale of notification to debtors.

4.1.1 Notification and Personal Rights

4.1.1.1 The Dual Characteristics of Personal Rights

In general, personal rights have two aspects in law: personal rights as a means to acquire property and personal rights as a type of wealth.[3] The first aspect means that personal rights are a legal basis for the acquisition of things, which usually occurs between two particular parties. On the other hand, personal rights also constitute a type of property, which means that they can be disposed of like a thing.

> "*De Schuldvordering heeft een dubbel karakter, een persoonlijk en een zakelijk; enerzijds is zij ene persoonlijke betrekking tussen den schuldeiser en den schuldenaar, anderzijds is zij ene onlichamelijke zaak, een vermogensobject.*"[4]

A Publicity and Personal Rights as a Means of Acquisition

Personal rights are personal (*in personam*) in nature because they only denote that the creditor is entitled to a certain performance by the debtor. In essence, a personal right is a legal relationship between the creditor and the debtor. As shown in Chapter 2, personal rights and property rights mainly differ in the breadth of enforceability (see 2.1.3). In general, personal rights cannot bind third parties and are subject to the principle of *paritas creditorum* and the principle of privity. The former principle means that personal rights are treated equally in the event of the debtor's insolvency, and the latter principle means that personal rights only bind particular parties under contract law. As a result, this type of right does not cause any problem of information asymmetry to third parties. Third parties can transact with a creditor or a debtor without having to fear being bound by the latter's relationship of personal rights.[5]

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3 Radbruch 1929, p. 78.

4 Wiarda 1937, p. 84. English translation: "*The personal claim has a dual character, one personal and one proprietary; on the one hand it is a personal relationship between the creditor and the debtor, and on the other hand it is an incorporeal thing, a patrimonial object.*"

5 For example, where A sells a bicycle to B, but ownership of this bicycle does not shift to B due to a certain reason, such as the lack of delivery, then C, as a third party, can transact with A with respect to the bicycle. In principle, the relationship of the sale between A and B cannot affect C's acquisition of ownership. Moreover, because B's personal claim against A is only an internal relationship between the two parties, this claim is difficult to be interfered with. Only when C intentionally induces A to breach the first contract with a purpose of damaging B, is he liable for the tort to B. In this hypothetical case, the personal right arising out of the contract is a means to acquire ownership of the bicycle. The difficulty in damaging the personal right in law is closely related to the legal policy of free competition. If B's personal right could generally bind C, then the free circulation of the bicycle would be hampered. See Honoré 1960, p. 468.

As a means of acquisition, personal rights are, in principle, a legal relationship *inter partes*, yielding no effect on third parties. The principle of publicity is alien to personal rights. In the law of obligations, the starting point is that individuals can create an obligation free from any formality, let alone publicity.[6] In principle, the relationship of obligations concerns personal affairs of the creditor and the debtor involved. Thus, there is no reason to require this relationship to be shown to third parties.

In some special situations, for the purpose of secure acquisition, personal rights might be allowed to be registered, so that they are effective against certain parties. For example, the right to acquire immovable property may enter the land register, which is known as preemptive registration (*Vormerkung*).[7] After being registered, the transferee is able to acquire the immovable property without being affected by subsequent disposal by the transferor. In the situation of preemptive registration, the claim of acquisition is strengthened to be partially proprietary, and the claim serves an acquisition purpose.

B Publicity and Personal Rights as a Part of Wealth

Though personal rights are not proprietary in legal nature, they occupy a large proportion of our wealth in modern society.[8] Personal rights are not only a means of acquisition, but also an important part of wealth.

> *„Macht- und Zinsgenuss von Forderungsrecht ist jetzt das Ziel alles Wirtschaftens, das Forderungsrecht nicht mehr Mittel, zum Sachenrecht und zum Sachgenuss zu gelangen, sondern selber Ziel des Rechtslebens.“*[9]

Here bank accounts serve as a good example: individuals usually deposit their incomes in a bank account and use a bank card to pay for daily consumption. The depositing of fund can give rise to a personal right against the depositing bank. The payment involves debiting the payor's account and crediting the payee's account.[10] In general, the payment involves a combination of multiple acts made by the parties involved, such as the payor, the payee, and the bank(s) entrusted with these acts by the payor and the payee.[11]

> *“Aldus werd het mogelijk om de schuldvordering, die voor de schuldeiser een recht op een prestatie van zijn schuldenaar inhoudt, over te dragen aan een derde en ook te beschouwen als een op geld waardeerbaar, actief bestanddeel van het vermogen van de*

6 Hijma, Van Dam, Valk and Van Schendel 2016, p. 14.
7 See art. 7:3 BW and § 1094 BGB.
8 Pound 1999, p. 225.
9 Radbruch 1929, p. 79. English translation: *“The enjoyment of power and interests out of claims is nowadays the purpose of all economic activities, and claims are no longer a means to acquire property rights or enjoyment of property, but the purpose of the economic life.”*
10 Mijnssen 2017, p. 53.
11 Mijnssen 2017, p. 54.

> *schuldeiser. Het is in en door haar hoedanigheid van vermogensrecht en dus van vermogensbestanddeel, dat de schuldvordering tot voorwerp van het eigendomsrecht of een daarvan afgeleid goederenrechtelijk recht kan worden gemaakt.*"[12]

In legal history, the aspect of personal rights as a part of wealth was overlooked. The personal right was considered as a means of acquisition which could lead to a legal bond (*iuris vinculum*) between the creditor and the debtor in Roman law.[13] Assignment would make the personal right lose its identity and thus was prohibited.[14] However, some scholars, such as Windscheid and Delbrück, argued that the fact that personal rights were a relationship between particular persons should not be an obstacle to their qualification as a transferable asset.[15] French scholars and Dutch scholars thought that personal rights contained both a personal aspect and a proprietary aspect: the former means that personal rights are a legal relationship between two parties, and the latter means that personal rights are an incorporeal asset that can be transferred.[16] At present, personal rights are, in principle, transferable. The disposal of personal rights, especially receivables, has constituted an important part of commercial transactions, as indicated by securitization, factoring, and the pledge of receivables.[17] According to some scholars, this leads to a phenomenon of "objectification (*objectivering*)" and "propetization (*verzakelijking*)" of personal rights.

> "*In de geschetste voorbeelden en in het dagelijkse handelsverkeer in het algemeen worden schuldvorderingen niet louter geconcipieerd als een rechtsband die bestaat tussen minstens een schuldeiser en een schuldenaar, maar bovendien geobjectiveerd of gedepersonaliseerd als een object dat een op geld waardeerbaar bestanddeel van het vermogen van de schuldeiser uitmaakt. Schuldvorderingen worden als het ware 'verzakelijkt'.*"[18]

In a nutshell, personal rights are not only a means of acquisition, a legal relationship between the creditor and the debtor, but also a type of wealth susceptible to disposals.[19] This is a reason why the Dutch legislature includes personal rights within the concept of "property (*goed*)" and pro-

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12 Lebon 2010, p. 157. English translation: "*Therefore, it becomes possible to transfer to third parties a personal claim which includes the creditor's right with respect to the performance by the debtor, and to treat this right as a monetary asset of the creditor's patrimony. Due to its capacity as a patrimonial right and a patrimonial component, the claim can be an object of both ownership and a property right derived therefrom.*"

13 Wiarda 1937, p. 75.

14 Wiarda 1937, p. 75-76.

15 Wiarda 1937, p. 79-80.

16 Wiarda 1937, p. 82-83.

17 Verhagen 2002, p. 241.

18 Lebon 2010, p. 2. English translation: "*In general, in the examples outlined and the ordinary business transaction, personal rights are not only conceived as a legal relationship between the creditor and the debtor, but are objectified or depersonalized as an object that constitutes a valuable part of the creditor's patrimony. In this sense, personal rights are 'propertized'.*"

19 Eggens 1960, p. 198-199.

vides in patrimonial law for a general part which treats tangible property and intangible property equally in the BW.[20] Truly, there are different views on the status of personal rights in the law of property, but the debate is mainly theoretical.[21]

As a type of property, personal rights can be an object of different forms of disposal, such as transfer, pledge and creation of a property right of use. This means that there might be a conflict between two or more forms of disposal of the same personal right. For example, a creditor might transfer his personal right to two different persons, which causes a problem of double assignments; the creditor may pledge the right twice, which leads to a conflict between two pledgees; it is also likely that the creditor creates two rights of usufruct on the personal right. In general, every conflict that can arise in the disposal of corporeal movables might also take place in the disposal of personal rights. Therefore, once personal rights are included in transactions, a problem of information asymmetry arises to third parties. As mentioned above, notification to debtors is often seen as a method of publicity for the disposal of personal rights. However, this viewpoint is subject to heavy criticism.[22] In the following discussion, we focus on the question whether notification to debtors can qualify as a method of publicity.

C The Scope of the Following Discussion

As just shown above, a personal right is a legal relationship between a debtor and the creditor. Therefore, the consequence of the assignment of personal rights is that the assignee, i.e. the new creditor, is entitled to request the debtor to perform the debt. However, this does not mean that the debtor is necessarily obliged to provide performance, nor that the creditor can obtain performance. In principle, the debtor can claim the defenses he or she has against the original creditor also against the new creditor (art. 6:145 BW[23] and § 404 BGB[24]). The debtor of a claim should never be disadvantaged due to the disposal of this claim by the creditor.

For example, if a person acquires a personal right out of a contract against the debtor and then assigns this right, the debtor is, in principle, able to refuse to offer performance to the assignee by claiming, for example, that the contract is created on the basis of fraud or that the original creditor failed to provide counter performance appropriately.[25] As a result, the claim

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20 Meijers 1954, p. 159-160.

21 Lebon 2012, p. 367-375.

22 Rongen 2012, p. 497-499; Von Wilmowsky 1996, p. 392-393.

23 Art. 6:145 BW: "*Overgang van een vordering laat de verweermiddelen van de schuldenaar onverlet*." English translation: Art. 6:145 BW: "*Assignment of a claim does not affect the obligor's defences*."

24 § 404 BGB: „*Der Schuldner kann dem neuen Gläubiger die Einwendungen entgegensetzen, die zur Zeit der Abtretung der Forderung gegen den bisherigen Gläubiger begründet waren*." English translation: § 404 BGB: "*The debtor may raise against the new creditor the objections that he was entitled to raise against the previous creditor at the time of assignment*."

25 Nörr, Scheyhing and Pöggeler 1999, p. 41; Rongen 2002, p. 288-289.

acquired by the assignee might turn out to be "valueless". In general, this also applies, *mutatis mutandis*, to a pledge of a personal right.[26]

The question whether the debtor can claim defenses against the assignee or the pledgee is beyond the scope of the following discussion. In general, we focus only on the disposal of the claim *per se* and thus the proprietary aspect of the claim. The possibility of claiming defenses by the debtor is a problem of performance regulated by the law of obligations, thereby concerning the obligational aspect.[27]

4.1.1.2 The Rationale of Notification

A Notification and Two Functions

Notification to debtors refers to notifying the debtor involved of the disposal.[28] A valid notification has to fulfill several requirements which involve, for example, the person who provides the notification, the way in which the notification should be made, and the content the notification needs to indicate. These requirements might be regulated by different laws in different ways.[29] In the following discussion, we focus only on the function of notification.

In general, notification to debtors serves two functions. One function is that notification helps debtors to know the person to whom they need to perform the obligation.[30] The other function is that notification to debtors can make the assignment of claims transparent to third parties.[31] If the debtor is not notified of the assignment, then two consequences might arise: (1) the debtor is entitled to be discharged from performing the obligation to the assignor (the original creditor), as if the assignment never occurred; and (2) the assignee might end up in a disadvantageous position, if the same claim is assigned to a third party who notifies the debtor earlier. These two functions, known as the function of performance and the function of publicity in this research, were disputed in legal history.

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26 Verdaas 2008, p. 313.

27 Van Empel and Huizink 1991, p. 50-52.

28 In German legal theory, notification is a "quasi-legal act (*geschäftsähnliche Handlung*)", which means that it is neither a "legal act (*Rechtsgeschäft*)" nor a "factual act (*Realakt*)". See Medicus 2010, p. 89.

29 In the situation of assignment, notification to the debtor might be given by the assignor or assignee, which is often decided by the parties to the assignment. As to the formality of notification, law may require a written form, but oral notification or even constructive notification through acts might also be recognized. The notification is important for the debtor to ascertain the person to whom the debtor has to perform the debt. Thus, law usually requires the notification to be sufficiently precise and clear. In general, it needs to indicate the assignee, the claim assigned, the amount assigned, and the date of assignment. See Snijders and Rank-Berenschot 2017, p. 303; Medicus and Lorenz 2015, p. 375-376.

30 Parlementaire Geschiedenis (3) 1981, p. 392; Schlechtriem 2003, p. 304-305.

31 Parlementaire Geschiedenis (3) 1981, p. 392.

> "*Al in het klassieke en na-klassieke Romeinse recht was de precieze functie van de mededeling onduidelijk. Dient de mededeling slechts om aan de debiteur aan te geven aan wie hij moet betalen, of is zij een constitutief vereiste voor de overdracht van de vordering.*"[32]

As we will see later, the controversy still exists in present private law. The function of publicity is denied in some jurisdictions, such as German law, while it is a reason for the legal effect against third parties in French law.[33]

In the viewpoint of Dutch scholar Rongen, both functions concern publicity: the function of performance is "direct publicity with respect to the debtor (*directe publiciteit ten opzichte van de schuldenaar*)", and the function of publicity is "indirect publicity with respect to third parties (*indirecte publiciteit ten opzichte van derden*)".[34] The term "indirect" means that third parties can only obtain information indirectly, namely making inquiries with the debtor about the claim involved.

The first function only concerns how to identify the person to whom performance has to be carried out by the debtor. The debtor is entitled to perform the obligation to the assignor (the original creditor) when the debtor does not obtain any notification concerning the assignment. Therefore, the first function is a result of the demand for protecting the debtor in good faith. It has nothing to do with the assignment *per se*. The fact that the debtor in good faith is discharged from performing the obligation to the assignor does not mean that the assignment fails: the assignee, the actual creditor, can require the assignor to disgorge the performance on the ground of, for example, unjust enrichment.[35] For this reason, the first function is not included within the concept of publicity in this research. Even Rongen acknowledges that the "direct publicity with respect to the debtor" only has "obligational significance (*verbintenisrechtelijke betekenis*)".[36]

The second function implies the legal effect of notification on third parties. For determining the priority between competing interests with respect to the same claim, notification might play an important role. Therefore, the second function falls under the concept of publicity in this research and will be examined in this Chapter. According to Rongen's viewpoint, "indirect publicity with respect to third parties" has the following effects: determining whether and when the assignment arises; addressing the problem of "*false appearance of wealth*"; avoiding the risk of multiple assignments; protecting the subsequent acquisition against earlier disposal; setting up a

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32 Verhagen 1997, p. 165. English translation: "*In the classic and post-classic Roman law, the precise function of notification was not clear: it served to inform the debtor of the person to whom he has to perform or was a constitutive requirement for the assignment of the claim.*"

33 Lebon 2012, p. 388-392.

34 Rongen 2012, p. 484-489.

35 Schlechtriem 2003, p. 304; Reehuis and Heisterkamp 2019, p. 254-255.

36 Rongen 2012, p. 484.

barrier against the assignment of future claims.[37] In general, these aspects can be divided into two categories: the function of determining the date of assignment and the function of providing information.

B Notification and the Function of Publicity: Introduction

Firstly, it is often held that notification to the debtor is helpful for determining the priority of competing disposals of the same claim. The notification has a function of countering fraudulent assignments: once notification is stipulated as a prerequisite of assignment, then the problem of antedating can be addressed to some extent.

> *"To some extent and at least in some respects, notification can be understood as being functionally similar to publicity by registration, since a notification requirement can to some degree achieve common objectives such as the prevention of antedating."*[38]

The function of preventing antedating can be illustrated by a hypothetical case concerning double assignment (Figure 7): A is a creditor of B, and A first assigns his claim to C and then assigns the same claim to D.

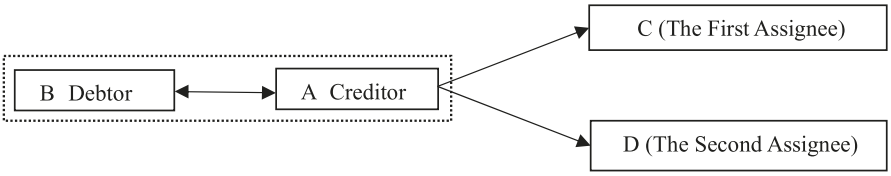

Figure 7

If notification is not a condition for valid assignment, and both assignments are unknown to B, then C will have a preferential position over D. This is because the assignment to C occurs earlier (the *nemo dat* rule). However, D might attempt to avert this disadvantage by conspiring with A and fraudulently antedating the second assignment. This activity can be prevented or inhibited by notification. If the law requires notification as a condition for valid assignment, which forces C and D to notify the debtor (B), then B, as a witness, can prove before the court the actual date of the two assignments.

In addition to the situation of double assignment, the function of determining the date of assignment is also useful for the assignor's creditors in the event of the assignor's bankruptcy.[39] This function was taken into consideration by Dutch legislators (art. 3:94 (1) BW).

37 Rongen 2012, p. 489.
38 Proprietary Security in Movable Assets 2014, p. 447.
39 Parlementaire Geschiedenis (3) 1981, p. 396.

> "*Bij zijn beslissing om dit stelsel in het gewijzigd ontwerp te handhaven heeft voor de ondergetekende de doorslag gegeven de grotere rechtszekerheid die het biedt ten aanzien van de vraag of een vordering al dan niet overgedragen is […]. Nagenoeg gelijke rechtszekerheid is op andere wijze niet te verkrijgen.*"[40]

Secondly, it is often said that notification to debtors also has a function of providing information to third parties. As has been shown above, the main purpose of publicity is to provide information to third parties, so that they do not have to only rely on their counterparties who have a motive to cheat (see 2.2.3). Notification is often treated as a way to realize this purpose.[41] For example, in order to know whether the assignor has disposed of the claim involved, potential assignees can ask the debtor about the claim.

> "*The second is that an intending assignee, before giving value, can ask the debtor whether the debtor has received any prior notice of assignment. If the first assignee has failed to give such a notice the second assignee should be entitled to assume that there is no earlier assignment, unless the second assignee has acquired knowledge of the earlier assignment in some other way or ought to have known of the earlier assignment, e.g. because it had been registered in a public register.*"[42]

> „*Dritte konnten von der Abtretung Kenntnis erlangen, indem sie sich an den Schuldner der abgetretenen Forderung wenden; es erscheine naheliegend dass sie sich an ihn wenden, um Auskünfte einzuholen.*"[43]

The two excerpts above show that assignees are expected to inquire with the debtor about the claim. If an assignee fails to do so, then he has to bear the risk of being subordinated to an earlier assignment. On the ground of this concern, some jurisdictions adopt a first-to-notify rule, which is also accepted by the DCFR.[44] Moreover, the DCFR drafters also think that notification is "*the closest equivalent to the acquiring of possession in good faith, which is a recognized method of obtaining priority in the case of corporeal movables*".[45]

In sum, notification to debtors is often treated as a method of publicity for the disposal of claims. Thus, there is always the notion that an advantageous position should be granted to assignees or pledgees who notify the debtor involved earlier.[46] In the following discussion, we argue that notification does not qualify as a method of publicity for claims.

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40 Parlementaire Geschiedenis (3) 1981, p. 396. English translation: "*By determining to maintain this system in the modified draft, greater legal certainty, as to whether or not a claim has been transferred, can be provided to the undersigned. Similar legal certainty cannot be given in other ways.*"

41 Snijders and Rank-Berenschot 2017, p. 302.

42 DCFR 2009, p. 1076.

43 Von Wilmowsky 1996, p. 392. English translation: "*Third parties can gain knowledge of the assignment by making an inquiry with the debtor of the claim assigned; it seems obvious that they should turn to the debtor for information.*"

44 DCFR 2009, p. 1075.

45 DCFR 2009, p. 1076.

46 *Dearle v. Hall* (1828) 3 Russ 1; Parlementaire Geschiedenis (3) 1981, p. 396.

C Notification and the Function of Publicity: Questioning

C1: Notification and the Prevention of Antedating

As just demonstrated, notification can alleviate or prevent the problem of fraudulent antedating. It can be used to determine the actual date of competing disposals.[47] However, this function is not the central aim of publicity, nor does it allow notification to be an eligible method of publicity.

The main reason why (public) registration qualifies as a method of publicity is that the register is open to the public. Registration provides information to third parties who can then predict their legal position, especially the possibility of acquiring the right and the ranking of the right acquired. Publicity is rooted in the notion of preventive justice: preventing the occurrence of conflicts *ex ante*, instead of solving conflicts *ex post*.

> *"Preventive justice is an essential element of the European legal systems. As part of it, government authorities support citizens in carrying out important legal acts. Especially in the area of title transaction German law provides a high standard of transaction security through the concept of preventive justice. This concept focuses on the means by which the state provides preventive protective mechanisms designed to avoid the need to resolve disputes ex post facto. The idea is to avoid the inefficiency and social cost of court proceedings to the greatest extent possible by means of measures to clarify and to rationalize high value transactions. In particular, public registers such as the Land Register and the Commercial Register are designed to provide a high level of certainty in real estate title and corporate capacity matters."*[48]

The distinctive feature of every method of publicity is that this method is open to third parties. Otherwise, conflicts cannot be prevented in advance. Certainly, once a property right is registered, the date of creation of this right will become fixed. In this sense, the prevention of antedating is merely a subordinate outcome of publicity.

Truly, notification is helpful for addressing the problem of antedating and facilitating the legal certainty of transactions. However, notification cannot make the assignment visible to third parties. As will be discussed later, though a creditor transfers his claim, and the debtor is informed of the transfer, third parties cannot easily know about the transfer. This means that the problem of information asymmetry to third parties still exits, and the purpose of preventing the occurrence of conflicts is not realized. In fact, the prevention of antedating by notification falls, to a large extent, within the *ex-post* approach: when two competing assignments have taken place, notification is helpful in ascertaining the actual date of each assignment.

Secondly, the effect of preventing antedating can also be achieved in other ways than notification. For example, notarization and private registration can determine the date of assignment, which lays a basis for the intro-

47 Rongen 2012, p. 486.
48 Limmer 2013, p. 329-330.

duction of the undisclosed or silent assignment in 2004 in the Netherlands (art. 3:94 (3) BW).[49] The problem of antedating can be addressed through these two ways: once the contract of assignment is made before a notary or deposited in the tax authorities, the date of assignment can be safely fixed.[50] Nevertheless, these two ways should not be treated as a method of publicity. The assignment, though notarized or privately registered, remains hidden to third parties.[51] The register administrated by the tax authorities is not accessible for third parties, and the problem of information asymmetry cannot be addressed by the registration. The purpose of preventing conflicts is not realized. According to some Dutch lawyers, notarization and private registration perform a "function of evidence (*bewijsfunctie*)" only: these two formalities demonstrate the time of assignment, thereby addressing the problem of antedating.[52]

Finally, whether notification is able to prevent antedating is still open to doubts. As mentioned above, notification addresses the problem of antedating indirectly: inquiring with the debtor involved. If antedating arises, then the debtor is expected to point out the fraudulent act. However, this way meets multiple challenges in practice. For example, the debtor may also participate in the fraudulent activity.[53] In most situations, it may be the subsequent assignees who induce the debtor to antedate their notification of the assignment. However, the debtor might also be an interested party in the disposal of claims, which means that the debtor perhaps cheats for his or her own benefit.[54] Therefore, notification cannot address the problem of antedating better than notarization or private registration does. Moreover, if the notification is made orally, then the debtor will have a chance to knowingly lie about the date of notification.

C2: Notification and the Provision of Information

In addition to the prevention of antedating, another argument for notification as a method of publicity is that third parties can obtain some information about the claim in question by inquiring with the debtor.[55] This function of publicity is considered by Dutch law and German law, which will be shown in the subsequent comparative study.[56] However, notification does not make claims, which are intangible *per se*, visible to third parties.

49 Rongen 2012, p. 481-482.
50 Rongen 2012, p. 486.
51 Struycken 2009, p. 140.
52 Struycken 2009, p. 140.
53 Rank 1992, p. 14.
54 For example, if assignment has a legal effect of interrupting the period of extinctive prescription, the debtor might claim that the assignment occurs later than the date asserted by the assignee.
55 Rongen 2012, p. 487.
56 Von Wilmowsky 1996, p. 392; Parlementaire Geschiedenis (3) 1981, p. 396.

> "*Publicity by notice to a contract obligator is of little efficacy as being transparent and obvious because other creditors cannot see the intangible, let alone see whether the notice has been given to the debtor of the issuer.*"[57]

At most, we can say that notification creates a possibility for third parties to obtain information from the debtor notified. No information is conveyed by the notification itself. In other words, information is communicated indirectly. Unlike notification, possession and registration directly convey information to third parties. The specialty of how information is communicated determines that notification to debtors does not qualify as a method of publicity.

Firstly, the law does not prescribe any obligation of disclosure to debtors.[58] In general, assignees and pledgees can have some benefits from notification, which encourages them to inform the debtor of the assignment or pledge. However, this does not mean that the debtor notified will honestly disclose the disposal that has already occurred to third parties, because the debtor is not required to do so by law. The absence of a legal duty of disclosure is understandable. The disclosure is not without costs, especially when the debtor has a large number of creditors, and the claim involved has been disposed of many times. If the debtor does not plan to cooperate and refuses to provide any information, it is unclear whether the inquirer can sue the debtor.

Secondly, even if the debtor is willing to cooperate, the information provided might be incomplete or incorrect.[59] The debtor might tell the inquirer what he or she knows, but some information may be missed. The claim might be assigned and pledged many times, and the debtor perhaps does not keep a full record of all the disposals. The debtor might only disclose some of the transactions to third parties, negligently omitting the other transactions. After all, the debtor has no duty of disclosure under law. A worse situation is that the debtor conspires with the creditor or other parties and intentionally misleads the inquirer by providing incorrect information.

> "*Zijn administratie kan onbetrouwbaar zijn, zodat hij niet meer op de hoogte is van de eerdere cessie. Hij kan zelfs op frauduleuze wijze samenspannen met de cedent. Dit laatste geldt ook bij mogelijke 'schijncessies', bedoeld om de crediteren van de cedent te benadelen.*"[60]

In these situations, the inquirer is unable to obtain complete or correct proprietary information concerning the claim.

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57 Wood 2019, no. 9-014.

58 Von Wilmowsky 1996, p. 392; Rongen 2012, p. 488; Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.10.

59 Von Wilmowsky 1996, p. 392-393; Rank 1992, p. 14; Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.10.

60 Verhagen 1997, p. 175. English translation: "*His administration can be unreliable so that he fails to be aware of the previous assignment. He can even fraudulently conspire with the assignor. He might also declare 'fake assignment', with an intention to compromise the creditability of the assignor.*"

Thirdly, due to the unreliability of the information provided by the debtor, *bona fide* acquisition is not generally recognized. In principle, property law does not provide legal protection to the inquirer's reliance on the debtor's disclosure.[61] In the above hypothetical case, A alienates a claim to C, and the debtor B is notified of the assignment; after that A assigns the same claim to D who inquires about this claim with B, but B does not disclose the first assignment, either negligently or intentionally.

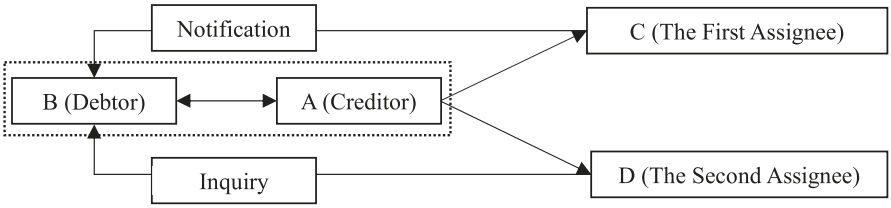

Figure 8

In this case, it is highly possible that D will rely on B's disclosure. Nevertheless, D is not entitled to acquire the claim. In principle, *bona fide* acquisition of claims is not recognized by law, and it is the *nemo dat* rule that regulates the disposal of claims. Notification is not an outward appearance which can trigger the legal protection of reliance of third parties.

> *„Anders als das Sachenrecht [...] kennt also das Zessionsrecht grundsätzlich keinen gutgläubigen Erwerb einer nichtexistenten oder gläubigerfremden Forderung [...]. Das erklärt sich daraus, dass es anders als bei Sachen, wo Grundbucheintrag bzw. Besitz der Sache einen Rechtsschein der Inhaberschaft eines nichtberechtigt Verfügenden erzeugen können, ein solcher Rechtsscheinträger bei Forderung nicht existiert.*"[62]

> "*Vanwege de gebrekkige publiciteit die de mededeling ten opzichte van derden aan de overdracht toekent, kan er mee worden ingestemd dat naar huidig recht de mededeling geen absoluut constitutief vereiste is voor de geldige levering van een vordering op naam. Ook verdient het geen aanbeveling de mededeling een functie te laten vervullen in het kader van een nieuw ontwerpen derden beschermingsbepaling voor het geval van een meervoudige beschikking over een vordering op naam.*"[63]

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61 Von Wilmowsky 1996, p. 392.

62 Medicus and Lorenz 2015, p. 365. English translation: "*Different from property law, the law of assignments does not generally recognize bona fide acquisition of non-existent claims or claims belonging to others […]. This is explained by the fact that, contrary to the situation where an entry in the land register or possession of the property can create a legitimate appearance of ownership of unauthorized disponers, a similar legitimate appearance does not exist in the situation of claims.*"

63 Rongen 2012, p. 498. English translation: "*Due to the fact that notification only provides defective publicity to third parties, it is commonly held that notification should not be an absolute constitutive requirement for the valid delivery of a named claim under the current law. It is also advisable that notification should not fulfill the function under the context of introducing a new provision for protecting third parties in the situation of multiple disposals of a named claim.*"

In addition to the above-mentioned defects of notification as a method of communicating information, notification also has some practical drawbacks.

If the assignment or pledge involves many claims, then the assignee or the pledgee needs to inquire about each claim with the debtor, which is costly and hampers the fluidity of transactions.[64] Moreover, where future claims are involved, the debtor's identity might not be ascertained.[65] In this situation, transacting parties are unable to notify the debtor, nor third parties are able to make inquiries with the debtor.[66] Inevitably, the disposal of future claims has to be restricted, as Dutch law did before 2004.[67] In reality, creditors often do not want their debtors to know that the claim against the debtor has been assigned or pledged to another person.[68] This resistance also casts doubt on the desirability of adopting notification as a method of publicity for claims.

The above-mentioned practical difficulties imply that notification is not an appropriate method of publicity. If the law imposes a duty of disclosure on the debtor and grants protection to the inquirer's reliance on the debtor's disclosure, then the smooth operation of transactions would be significantly affected. In general, a method of publicity should not cause significant inconvenience to concluding transactions. Otherwise, it should be replaced by another method or abolished.[69]

In a nutshell, notification to debtors does not qualify as a method of publicity for claims. Truly, notification can address the problem of antedating and creates an opportunity for third parties to acquire some information by inquiring with the debtor notified. However, it fails to make the assignment of or the proprietary encumbrance over claims visible to third parties. The aim of preventing the occurrence of conflicts cannot be realized. Moreover, the likelihood that the information provided by the debtor is incomplete or incorrect is high. As a result, *bona fide* acquisition by third parties is not generally recognized by law. Lastly, notification is not an appropriate method of publicity because it causes many inconveniences to transactions.

64 Von Wilmowsky 1996, p. 393; Akseli 2013, p. 212.
65 Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.10.
66 Von Wilmowsky 1996, p. 393; Akseli 2013, p. 212.
67 Rongen 2012, p. 497.
68 Verhagen 1997, p. 164.
69 Here, the recognition of the undisclosed assignment by Dutch law in 2004 is an example. By doing so, individuals can avert the burden of notification by turning to notarization or private registration. See Rongen 2012, p. 481-482. Another example is possession. As has been shown above, the requirement of actual delivery under the *traditio* rule hampers the smooth operation of transactions. However, this problem can be addressed by recognizing indirect possession and fictional delivery (*traditio ficta*), which amounts to abandoning the requirement of publicity. Unlike possession, however, notification cannot be carried out in a fictional way, and the term "indirect notification" is never used.

4.1.2 Notification and Third-Party Effect: Strange Interferers

After arguing that notification is not an eligible method of publicity for claims, we move on to discuss the question of whether notification is useful for different types of third party: strange interferers, subsequent acquirers, and general creditors. As has been shown above, these three types of third party demand different proprietary information (see 2.2.2.2).

In this part, we argue that notification is, in principle, of no importance for strange interferers. Moreover, notification provides no proprietary information for general creditors (see 4.1.5). In some of the literature, the function of publicity of notification for subsequent acquirers is discussed under the context of the assignment and pledge of claims, instead of the protection of claims. For this reason, a detailed and comparative discussion concerning the importance of notification for subsequent acquirers will be provided later in 4.1.3 and 4.1.4. To the issue of protection of claims, the formality of notification is not relevant.

In principle, personal rights are difficult to be unlawfully interfered with (see 2.1.3.2). Personal rights are a legal relationship between two or more particular parties. The core of this relationship is that the creditor is entitled to request the debtor to do or not to do something. In other words, the object of personal rights is the performance by the debtor, rather than the thing or service the creditor intends to obtain.[70] Therefore, despite the proprietary aspect of claims as a type of wealth, the legal nature of claims determines that they are not generally susceptible to unlawful interference. As a legal relationship *inter partes*, personal rights are mainly protected by imposing a liability on the particular debtor. Creditors rarely enjoy protection under tort law. One exception here is where third parties cause damage to the creditor by intentionally inducing the debtor to breach the contract.[71]

The way of protecting personal rights corresponds to the failure of notification to convey any indication to strange interferers. In general, notification is only related to the assignment and pledge of personal rights: when a personal right is transferred or pledged by the creditor to another person, it is better for the transferee or the pledgee to notify the debtor. However, the personal right does not become visible to third parties because of the notification. In this aspect, direct possession differs from notification. Direct possession can convey an abstract indication by the physical proximity between the possessor and the thing possessed. In the viewpoint of some scholars, possession of personal rights is possible in the case of assignment. Possession of a personal right refers to the factual enjoyment of this right

70 For example, A plans to buy a bicycle from B, and they have created a contract; before ownership of this bicycle passes to A, he merely has a right to request transfer, a right which is personal in nature. If the bicycle is destroyed by a third party, A has no right to sue this third party. The reason is simple: A's personal right, as a legal relationship with respect to performance between A and B, is not interfered with.

71 Non-Contractual Liability Arising out of Damage Caused to Another, p. 546-555.

and the exercise of the entitlements of this right.[72] However, according to this viewpoint, possession of personal rights does not give rise to any physical proximity, and this kind of possession is only mental.

> "*Wat de onlichamelijke schuldvorderingen betreft, kan er geen fysieke band met de bezitter bestaan; een onmiddellijke machtsverhouding van de schuldeiser ten aanzien van zijn schuldvordering is enkel intellectueel te vatten.*"[73]

In sum, notification to debtors is useless for strange interferers for two reasons. One reason is that personal rights are difficult to be interfered with because they are a legal relationship *inter partes*. Even in exceptional situations where personal rights are damaged, notification has nothing to do with the protection of personal rights. The other reason is that notification is only relevant to the disposal of personal rights. Even if the debtor is notified of the disposal, the personal right involved does not become visible to strange interferers.

4.1.3 Notification and Third-Party Effect: Subsequent Acquirers in Outright Assignment

In general, the disposal of claims is a *quasi*-proprietary problem, which has been pointed out above (see 4.1.1.1). For the disposal of claims, there is an issue of how to determine the priority between competing interests with respect to the same claim. Usually, this conflict occurs between subsequent acquirers. To examine the importance or non-importance of notification for subsequent acquirers, we will select two types of disposal for the following comparative discussion. These two types are outright assignment of claims and pledge of claims. Here, outright assignment means that the assignment does not have any purpose of providing security, forming a contrast to the security assignment. The comparative discussion includes English law, German law, and Dutch law. For simplicity, the discussion focuses on receivables.[74] Receivables are a personal right (claim) for monetary payment: the object of performance is a certain amount of money.

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72 Lebon 2010, p. 173.

73 Lebon 2010, p. 171. English translation: "*Where an intangible personal right is involved, no physical proximity exists with the possessor; the creditor's direct relationship of domination with respect to the claim is only mental.*"

74 In practice, other claims might also be able to be assigned or pledged. For example, where a buyer obtains a claim for transferring ownership of a bicycle against the seller, this buyer can assign or pledge this claim. However, the assignment of this claim often occurs in the situation where the bicycle, a future thing for the buyer, is intended to be transferred. Therefore, the assignment needs to be discussed under the context of the disposal of future things, which is a complicated issue. The pledge of the claim is closely related to the pledge of the bicycle. According to the rule of substitution, the bicycle will be pledged when the buyer obtains ownership of the bicycle. Therefore, the assignment and pledge of the claim are often a temporary pre-stage for transferring and pledging the bicycle. See Schuijling 2016, p. 355.

In this part, we discuss the outright assignment of receivables. It first provides an introduction to English law, German law, and Dutch law. After that, there is a comparative and conclusive analysis concerning the role notification plays in the assignment. As to pledge of receivables, a comparative and conclusive discussion will be offered in another part (see 4.1.4). In that part, we also devote attention to the security assignment of receivables, a kind of assignment for the purpose of providing security.

4.1.3.1 English Law

The rule of assignment of receivables is in English law complicated, mainly due to the dichotomy between common law and equity law, the distinction between outright assignments and security assignments (mortgages), and the difference in the treatment of companies and individuals. In practice, it is not always easy to distinguish an outright assignment of receivables from a security assignment.[75] However, these two types differ in some aspects, especially the possibility of registration: the security assignment is registerable, while the outright assignment, such as a factoring agreement, is not registerable.[76] Here, we only deal with the outright assignment, and the security assignment and pledge of receivables are discussed later (see 4.1.4).

S. 136 of the Law of Property Act (LPA) is a general provision for "*absolute assignment*", including both outright and security assignments.[77] According to this provision, a valid assignment has to fulfill two requirements, regardless of whether the assignor is a company or an individual: (1) the contract of assignment should be in writing and signed by the assignor; and (2) a written notification should be given to the debtor involved. If one of these two conditions is not satisfied, the assignment will not take effect between the assignor and the assignee.

However, this strict provision is somewhat relaxed by equity law, which makes a distinction between legal (or statutory) assignment and equitable assignment. The latter can be made by "*purely informal means*": neither the requirement of a written contract nor the requirement of a written notification is necessary in equity law.[78] In other words, an equitable assignment can take effect on the basis of an oral agreement. Equitable assignment can yield some proprietary effects and give rise to a fiduciary relationship between the assignor and the assignee.[79] For example, the debtor

75 Goode 2013, p. 98.

76 Bridge 2009, p. 166.

77 S. 136 (1) LPA (1925): "*Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice […].*"

78 Bridge 2009, p. 136.

79 Tolhurst 2016, p. 67.

can discharge himself by performing the obligation to the assignor when the debtor is not notified, but the money paid is "*treated as the assignee's and (provided it remains traceable) it may be claimed by the assignee even if the assignor is insolvent*".[80] More importantly, an equitable assignment prevails over the subsequent disposal of the same claim, provided that the subsequent acquirer does not act in good faith. This consequence is in line with the conventional doctrine of notice in equity law: only the *bona fide* acquirers are free from the binding force of equitable interests.[81]

However, the law of equity does not mean that notification to debtors is not of no relevance. In general, notification plays a fundamental role in determining the priority between competing assignments.[82] Before clarifying this role, it should be first mentioned that under equity law notification can be made free from any formality, which means that it does not have to be in writing.[83]

If a claim is assigned by the creditor two times, then the assignee who notifies the debtor earlier will usually have a superior position. In this situation, notification averts the risk that equitable assignees might be defeated by a competing assignee who obtains legal title to the claim in good faith.

> "*A notice compliant with the requirements of equitable assignment ought to suffice for the purpose of establishing the order of priority between competing assignments, since, whether the assignment is an equitable or a statutory one, the rule of priority is the same.*"[84]

This effect of priority of notification can be traced to the landmark case *Dearle v. Hall* (1828). This case pinned down an exception to the *nemo dat* rule, a rule which regulates competing equitable interests according to the date of creation.[85] In light of this case, where there are two equitable assignments with respect to the same claim, the assignee who notifies the debtor earlier will earn a superior position.[86]

> "*The equitable interest of the assignee is also liable to be defeated by a subsequent assignee who acquires the legal interest in the receivables for value and without notice of the prior equitable interest.*"[87]

In justifying the notification-first rule, there are four approaches: (1) the first assignor who fails to notify the debtor is guilty of "*gross negligence*" and thus should be responsible for this foreseeable consequence; (2) the first

80 Kötz 2010, p. 1299.
81 Gray 2009, p. 1093.
82 Tolhurst 2016, p. 77.
83 Guest and Liew 2018, no. 3-63.
84 Bridge 2009, p. 170.
85 Smith and Leslie 2018, no. 27.44.
86 Smith and Leslie 2018, no. 27.49.
87 Parsons 2008, p. 149.

assignment is not complete until a notification is made; (3) notification can convert the legal creditor, namely the assignor, to be a trustee for the second assignee; and (4) notification can preclude fraudulence by creating a chance to inquire with the debtor.[88] It is held that, among these approaches, only the last seems convincing.[89] The function of preventing fraudulence is also articulated by Chadwick in the case of *United Bank of Kuwait v. Sahib*.[90]

> "*The rule is based upon the inequity of allowing an assignee, who has taken no step (by giving notice to trustees to whom inquiry might be made) to protect subsequent assignees against the possibility of fraud on the part of the assignor, from setting up his prior assignment against those who have been deceived.*"[91]

In a nutshell, notification to debtors leads to effectiveness against *bona fide* third parties in the situation of outright assignment in English law. If there are two competing assignments with respect to the same claim, then the assignee who notifies the debtor earlier will usually prevail. If it is the second assignee who notifies the debtor earlier, then this assignee can be protected from the first assignment when that assignee is in good faith. In this sense, we can say that *bona fide* acquisition of receivables is recognized by English law.

4.1.3.2 German Law

In German law, receivables can be validly transferred without having to satisfy any formalities (§ 398 BGB). The transfer takes effect upon the creation of a contract of transfer, and this contract does not have to be in writing. Notification is not a prerequisite of assignment. It is only related to the problem of performance. If the debtor of the claim assigned is not notified, then the obligation can be performed to the assignor, namely the original creditor. If there are two competing assignments, then the failure to notify the debtor of the first assignment will not place the first assignee in an inferior position.[92]

> „*Es möge G seine Forderung gegen S zunächst (wirksam) an A abgetreten haben und sie später noch einmal an B abtreten. Dann ist diese zweite Abtretung – weil von einem nichtgläubiger vorgenommen – unwirksam; Gläubiger des S ist also A.*"[93]

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88 Guest and Liew 2018, no. 6-03-6-06.
89 Guest and Liew 2018, no. 6-06.
90 Guest and Liew 2018, no. 6-06.
91 *United Bank of Kuwait v. Sahib* [1997] Ch 107 at 119 (ChD), cited from Smith and Leslie 2018, no. 27.61.
92 Kötz 2010, p. 1296.
93 Medicus 2004, p. 365. English translation: "*G first assigns his claim against S (validly) to A and then assigns this claim to B. The second assignment is ineffective, because it is done by a non-creditor. As a result, the creditor of S is A.*"

In this sense, we can say that German law applies the *nemo dat* rule to resolve the conflict between conflicting assignments. In general, this rule has no exceptions: *bona fide* acquisition of receivables is impossible under German law.[94] Moreover, notification to debtors is irrelevant in determining the priority. According to § 408 BGB, if a claim is assigned twice and the debtor is only informed of the second assignment, then the debtor can perform the obligation to the second assignee, despite the fact that the second assignee is not a legal creditor.[95] This provision is only to protect the debtor's reliance in respect of performance. It has nothing to do with the assignment *per se*. In this situation, the second assignee obtains performance in the absence of any legal basis. Thus, the first assignee (the actual creditor) is entitled to require the second assignee to disgorge the performance on the basis of unjust enrichment (§ 816 BGB).[96]

In a nutshell, German law takes a formality-free approach to the assignment of receivables. Notification is related only to the issue of performance by the debtor. In the situation of conflicting assignments, what matters is the date of assignment, rather than the time of notifying the debtor. As a result of this approach, the process of the assignment is totally invisible to third parties, and there is a problem of fraudulent antedating in practice.

> *„Aufgrund der Formlosigkeit der Zession und dem gleichzeitigen gesetzgeberischen Verzicht auf ihre Anzeige (Denunziation) besteht die Gefahr eines betrügerischen Zurückdatierens von Abtretungsvertragen. Und in der Tat kommt sie vor."*[97]

German law has its own special way of constructing the legal structure of assignments. In Chapter 3, we have shown that German property law has the "principle of separation (*Trennungsprinzip*)" and the "principle of abstraction (*Abstraktionsprinzip*)" (see 3.4.2.2). These two principles are also applicable to the assignment of claims.[98]

> *„Der Abtretungsvertrag bedeutet eine Verfügung über die Forderung. Er muss daher unterschieden werden von dem Kausalgeschäft […]. Nach dem Abstraktionsprinzip ist die Wirksamkeit der Abtretung grundsätzlich unabhängig von der Wirksamkeit des Kausalgeschäfts. So kann die Abtretung wirksam sein, wenn der zugrundeliegende Kauf unwirksam ist […]."*[99]

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94 Bülow 2012, Rn. 636.

95 Rakob 2009, p. 115.

96 Schlechtriem 2003, p. 304.

97 Nörr, Scheyhing and Pöggeler 1999, p. 150. English translation: "*Due to the informality of assignments and the legislative renunciation of notification (denunciation), there is a risk of fraudulent antedating of assignments. In practice, it happens.*"

98 Medicus 2004, p. 365.

99 Medicus and Lorenz 2015, p. 365. English translation: "*The agreement of assignment refers to a disposal of the claim. Here, it must be distinguished from the causal legal act […]. According to the principle of abstraction, the validity of the assignment is independent of the validity of the causal legal act. Therefore, the assignment can still be effective when the underlying contract of sale is invalid […].*"

The principle of abstraction leads to an important legal consequence to third parties in the situation of successive transactions. For example, A sells due to a deception a claim to B, and B further assigns the claim to C. The legal relationships between the parties in this case can be summarized as follows: (1) the underlying relationship between A and B is voidable; (2) the assignment from A to B is in general not affected by the defect of the underlying relationship due to the principle of abstraction, which implies that B acquires the claim;[100] (3) the assignment between B and C is valid, and there is not any defect in B's authority of disposal; and (4) C can obtain the claim, irrespective of whether C is in good faith. This hypothetical case indicates that the principle of abstraction has a function of protecting third parties and facilitating the certainty of subsequent transactions.

In German law, an assignment might be made for the purpose of acquisition or the purpose of security, which gives rise to a distinction between outright assignment and security assignment. The absence of a requirement of notification provides significant convenience for creditors who want to use receivables as collateral.[101] As shown later, a security assignment is a popular alternative to the pledge of receivables which requires notification in German law (see 4.1.4.2).

4.1.3.3 Dutch Law

Under Dutch law, the assignment of receivables is, in principle, only possible in the outright sense: the security assignment is expressly prohibited (art. 3:84 (3) BW).[102] Dutch legislators use "undisclosed pledge (*stil pand*)" as an alternative. This pledge is discussed later (see 4.1.4.3).

In general, receivables can be assigned under Dutch law in two ways: "disclosed assignment (*openbare cessie*)" and "undisclosed assignment (*stille cessie*)".[103] The difference between these two ways is whether a notification is given to the debtor. Disclosed assignments are regulated by art. 3:94 (1) BW.[104] According to this paragraph, valid transfer of receivables does not take place until two requirements are fulfilled: a private deed is reached, and notification is made by the assignor or the assignee to the debtor involved. A private deed does not have to be authenticated, which causes a

100 Schlechtriem 2003, p. 291.
101 Rakob 2009, p. 92.
102 Timmermann and Veder 2009, p. 185.
103 Snijders and Rank-Berenschot 2017, p. 302.
104 Art. 3:94 (1) BW: "*Buiten de in het vorige artikel geregelde gevallen worden tegen een of meer bepaalde personen uit te oefenen rechten geleverd door een daartoe bestemde akte, en mededeling daarvan aan die personen door de vervreemder of verkrijger.*" English translation: Art. 3:94 (1) BW: "*In cases other than those provided for in the preceding article, rights to be exercised against one or more specific persons are delivered by means of an appropriate instrument and notice thereof given by the alienator or acquirer to those persons.*"

risk of antedating. To avert this risk, this paragraph stipulates notification be made.[105]

The undisclosed assignment, as its name indicates, does not require notifying the debtor (art. 3:94 (3) BW). In the discussion above, we have mentioned that this form of assignment was recognized in 2004 to avoid the practical inconvenience caused by the requirement of notification. There are two methods to carry out an undisclosed assignment: one is authenticating the deed of assignment, and the other is registering the private deed at an office of the tax authorities.[106] An authentic deed is usually made before a notary. It should be noted that the register is not open to the public because the principal purpose of registration is to prevent "*backdating*".[107] This is the reason why registration does not produce any legal effect different from notarization: where the deed of assignment is notarized, the risk of fraudulent antedating can also be averted. Notarization and registration are often said to perform a function of publicity similar to notification, at least in preventing antedating.

> "*Voor de stille cessie eist de wet echter een authentieke of geregistreerde onderhandse akte, dit ter compensatie van het gebrek aan publiciteit van deze leveringsvorm bij gebrek van een eis van mededeling aan de debitor cessus.*"[108]

In the situation of double assignment, the *nemo dat* rule will be applied. The assignment completed first will prevail because the assignor loses the authority of disposal afterwards. Depending on the type of the two assignments (disclosed or undisclosed) chosen, different requirements have to be satisfied. Notification is not always a source of priority: (1) if the two assignments are carried out as disclosed assignments, then the earlier notification implies a superior legal position; (2) if there are two undisclosed assignments, then notification is totally irrelevant; (3) if a conflict exists between a disclosed assignment and an undisclosed assignment, then notification can lead to priority only when it occurs before the completion of authentication or registration.[109] In other words, if a claim has been validly alienated in an undisclosed way, then any later disclosed assignment of this claim will not succeed, even though the debtor receives notification of the later assignment.

105 Snijders and Rank-Berenschot 2017, p. 302.
106 Timmermann and Veder 2009, p. 183.
107 Timmermann and Veder 2009, p. 210.
108 Snijders and Rank-Berenschot 2017, p. 302. English translation: "*However, law requires an authentic or privately-registered deed for the undisclosed assignment, which can compensate the lack of publicity of this form of assignment due to the absence of any notification to the debtor involved.*"
109 Snijders and Rank-Berenschot 2017, p. 303.

In principle, protection against unauthorized disposals is not possible, except for art. 3:88 BW.[110] Art. 3:86 BW, a provision concerning the *bona fide* acquisition of corporeal movables, does not include claims, because claims do not have any outward appearance that can legitimize the assignor's authority of disposal.[111]

The provision of art. 3:88 BW can be applied to the case of successive disposals: A assigns a claim to B who later assigns this claim to C. If the A-B assignment proves to be invalid not due to A's lack of the authority of disposal, then C is still able to acquire the claim when he is in good faith at the moment of notifying the debtor involved, despite the fact that B has no authority to dispose.[112] The main function of this provision is to facilitate security of transactions by preventing the principle of causation from affecting subsequent acquirers: "*een rem op al te rigoureuze consequenties van het causale stelsel voor derden*".[113] To apply art. 3:88 BW, one requirement is that the assignee acts in good faith when the debtor involved is notified in the situation of undisclosed assignments (art. 3:94 (3) BW). The requirement of good faith up to the moment of notification implies a difference between a disclosed assignment and undisclosed assignment. The assignee of disclosed assignments can claim legal protection under art. 3:88 BW, while the assignee of undisclosed assignments is only able to do so after notifying the debtor.[114] In the aspect of this *bona fide* acquisition, undisclosed assignments are "discriminated against": the two formalities associated with the undisclosed assignment, notarization and private registration, cannot give rise to *bona fide* acquisition of claims. Notification is necessary for the application of art. 3:88 BW in the assignment of claims.

4.1.3.4 Comparative and Conclusive Analysis

A Differences and Similarities

From the introduction above, we find that notification has different legal effects in the three jurisdictions. In general, notification is involved in two situations: (1) one is double assignment, where the creditor assigns the same

110 Art. 3:88 (1) BW: "*Ondanks onbevoegdheid van de vervreemder is een overdracht van een registergoed, van een recht op naam, of van een ander goed waarop artikel 86 niet van toepassing is, geldig, indien de verkrijger te goeder trouw is en de onbevoegdheid voortvloeit uit de ongeldigheid van een vroegere overdracht, die niet het gevolg was van onbevoegdheid van de toenmalige vervreemder.*" English translation: Art. 3:88 (1) BW: "*Although an alienator lacks the right to dispose of property, the transfer of registered property, a personal right or other property to which Article 86 does not apply, is valid if the acquirer is in good faith and if the lack of the right to dispose results from the invalidity of a previous transfer, which itself did not result from the alienator's lack of the right to dispose at that time.*"

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

112 Reehuis and Heisterkamp 2019, p. 266.

113 Snijders and Rank-Berenschot 2017, p. 329. English translation: "*[…] a brake against the extensive consequences of the principle of causation to third parties.*"

114 Asser/Bartels & Van Mierlo 2013, nr. 461.

receivable twice to different persons; and (2) the other is successive assignments, where a creditor (the first hand) assigns a receivable on the basis of an invalid or voidable contract to another person (the second hand) who later alienates the claim to a third party (the third hand). As to whether the second assignee can obtain the claim in these two situations, notification plays different roles in the three jurisdictions.

In English law, notification has an effect of *bona fide* acquisition in the situation of double assignment: the second assignee in good faith might prevail over the first assignee by notifying the debtor earlier. A rationale behind this notification-first rule is publicity and self-responsibility: "*As the first assignee has enabled a fraud to be committed on the second assignee, it is only fair that he should be postponed*".[115] A similar consideration can be found in the rule of "seller in possession" (s. 24 SGA): where a purchaser allows the seller to remain in possession of the corporeal movable, this purchaser might be defeated by a third party in good faith because he fails to complete the purchase and exposes himself to the risk.[116] The comparison of these two rules indicates that the role notification plays in the assignment of claims resembles the role played by delivery in the transfer of corporeal movables.

However, the notification-first rule is only applied to double assignment ("A-B and A-C" transactions), and successive assignments ("A-B-C" transactions) fall outside the scope of application. In the latter situation, if the A-B assignment is void, then this assignment will be treated as having never happened: it does not "*create any rights or obligations at all*" *ab initio*.[117] Furthermore, the third party (C) cannot obtain the claim from B. This is a result of the *nemo dat* rule. If the assignment is voidable, then a different consequence will occur.[118] In general, a voidable transaction does not affect the acquisition, because the transaction is valid under statutory law before being rescinded. However, the acquisition is subject to an equitable interest. Therefore, before the rescission, the assignee can give a good title to "*a sub-purchaser who buys without notice of the buyer's defective title and in good faith*".[119] If B (as the second hand) acquires the claim on the basis of a voidable contract, then there is the possibility that C (as the third hand) can obtain the claim.[120]

In Dutch law, the starting point is that notification is not necessarily relevant because of the recognition of the undisclosed assignment, and it is the *nemo dat* rule that regulates the conflict of double assignment ("A-B and A-C" transactions). Where a claim is assigned twice to different persons,

115 Smith and Leslie 2018, no. 27.61.
116 Merrett 2008, p. 387.
117 Cartwright 2016, p. 161.
118 In Chapter 3, we have introduced that voidable title is an exception to the *nemo dat* rule in the English law of corporeal movables (see 3.4.3.1).
119 Bridge, Gullifer, McMeel and Worthington 2013, p. 231.
120 Bridge, Gullifer, McMeel and Worthington 2013, p. 101.

the assignment completed earlier will prevail. Therefore, notification is not necessarily decisive: a later disclosed assignment does not prevail over an earlier undisclosed assignment.[121] Notification is different from possession: the former does not lead to any factual control which can legitimize the assignor's authority to dispose.[122] The later disclosed assignment cannot succeed, regardless of whether the assignee is in good faith.

However, notification has an effect of *bona fide* acquisition in the context of art. 3:88 BW. In successive assignments ("A-B-C" transactions), the second assignee might be protected from defects (except the defect in the authority to dispose) of the previous assignment, provided that this assignee is in good faith at the moment of notifying the debtor. It should be noted that the purpose of art. 3:88 BW is to preclude the adverse effect of the principle of causation over the security of transactions, rather than the publicity effect of notification.[123] This is easy to understand. The previous assignment (between A and B) might be carried out as an undisclosed assignment. Therefore, we cannot say that the third party (C) in the later assignment (between B and C) has any reliance over notification. Notification may never occur in the previous assignment. Moreover, art. 3:88 BW does not require third parties to continue being in good faith after notifying the debtor, and it suffices that they are in good faith at the moment of notification.[124] In other words, if the debtor tells third parties that the previous assignment is defective, they can still obtain the claim.

Therefore, Dutch law differs from English law in the aspect of protecting third parties. Notification is necessary for legal protection in the case of successive assignments ("A-B-C" transaction) in Dutch law, while it only triggers an effect of priority in the case of double assignment ("A-B and A-C" transaction) in English law. In this aspect, German law resembles Dutch law, but these two jurisdictions take different approaches.

In principle, *bona fide* acquisition of claims is not recognized by German law as well as Dutch law in the situation of double assignment. This is because claims differ from property rights: the former lack an outward appearance to legitimize the assignor's authority to dispose.[125] However, these two jurisdictions differ in the legal effect of notification. Where a claim is assigned twice, the assignment which takes effect earlier will prevail in German law. In German law, notification has nothing to do with the assignment *per se*, and it is only related to the issue of performance by the debtor. Unlike German law, Dutch law takes notification as a prerequisite for disclosed assignment.

121 Reehuis and Heisterkamp 2019, p. 236-237.
122 Snijders and Rank-Berenschot 2017, p. 315.
123 Snijders and Rank-Berenschot 2017, p. 329.
124 Asser/Bartels & Van Mierlo 2013, nr. 461.
125 Medicus and Lorenz 2015, p. 365; Snijders and Rank-Berenschot 2017, p. 315.

In the situation of successive assignments, German law differs partially from English law, but resembles Dutch law significantly. Due to the principle of abstraction, a defect of the underlying relationship usually does not affect the transfer of the claim. This principle facilitates the security of transactions and averts the undesirable chain of influence over later transactions. Dutch law does not recognize the principle of abstraction. However, the aim of transactional security is honored under art. 3:88 in the BW. As a scheme to break the chain, this provision is made to inhibit the chain effect over third parties. Therefore, German law and Dutch law have different rules but reach a similar outcome in terms of the protection of third parties.[126]

In general, the preceding observation can be shown in the following table (Figure 9).

	Double Assignment (A-B & A-C)	Successive Assignment (A-B-C)
English Law	The *Dearle v. Hall* rule: C enjoys *bona fide* acquisition by earlier notification.	The *nemo dat* rule: C enjoys no *bona fide* acquisition except in the situation of voidable title.
German Law	The *nemo dat* rule: C enjoys no *bona fide* acquisition regardless of earlier notification.	The principle of abstraction: C enjoys protection regardless of good faith.
Dutch Law	The *nemo dat* rule: C enjoys no *bona fide* acquisition.	The rule of art. 3:88 BW: C enjoys *bona fide* acquisition after notification.

Figure 9

B Notification, Publicity, and Assignment

As has been shown above, there is a consideration of preventing fraudulence behind the English judgement in *Dearle v. Hall* (see 4.1.3.1). This consideration can also be found from the distinction between a disclosed assignment and an undisclosed assignment in Dutch law (see 4.1.3.3). In general, the consideration is not groundless. Notification is helpful for addressing the problem of antedating and provides a chance for potential assignees to obtain some information from the debtor. If a claim has been assigned or pledged, and the debtor has been notified, then the debtor might disclose the assignment or pledge to potential assignees. According to some scholars, a prudent assignee is expected to inquire with the debtor about the claim assigned.[127]

However, notification cannot completely prevent fraudulent antedating, as has been pointed out above (see 4.1.1.2.C). More remarkably, the possibility of inquiry and disclosure cannot make notification qualify as a method

126 Here, an important difference should be noted. To claim the legal protection under art. 3:88 BW, the third party has to be innocent before notifying the debtor involved. However, this requirement of good faith does not exist in German law. Under the principle of abstraction, the third party is entitled to acquisition, regardless of whether this party is in good faith.

127 Smith and Leslie 2018, no. 27.83.

of publicity, which has also been argued above (see 4.1.1.2.C). Among the reasons given above, the most important two are: (1) the debtor bears no legal duty to provide complete and correct information to third parties; and (2) the reliance of third parties on the information obtained from the debtor is not generally protected.[128] As notification is not an eligible outward appearance for claims, it fails to provide a firm basis for allowing the assignee in good faith to prevail over the actual creditor. As pointed out by some English lawyers, the notification-first rule produces "*at least as much injustice as it has prevented*".[129]

As also has been shown, German law and Dutch law provide legal protection to third parties in the situation of successive assignments. However, this protection cannot be explained on the basis of publicity that notification does not have. Art. 3:88 BW is mainly a result of legal policy: facilitating the transactional security by restricting the application of the principle of causation. This provision does not indicate that notification leads third parties to have any reliance. The reason is simple: third parties do not have to continue being in good faith after notifying the debtor, and it suffices that they are in good faith at the moment of notification.[130] In German law, notification is entirely irrelevant. The second assignee as a third party is entitled to acquire the claim by virtue of a valid contract of assignment only. Moreover, under the principle of abstraction, the second assignment does not have any defect in the assignor's authority to dispose. This implies that the third party does not even have to be in good faith. This further implies that protection has nothing to do with publicity and the third party's reliance.

4.1.4 Notification and Third-Party Effect: Subsequent Acquirers in Pledge and Security Assignment

Receivables are an important form of collateral. In general, receivables can be used to secure the performance of obligations in two ways: security assignment and pledge. The former involves an assignment for the purpose of security. The latter creates a limited property right of pledge over receivables. In this part, we first introduce English law, German law, and Dutch law. After that, a comparative and conclusive analysis is provided. It can be found that the notification to debtors plays different roles and produces different legal effects in these three different jurisdictions.

128 Guest and Liew 2018, no. 6-06; Verhagen 2002, p. 249.
129 Guest and Liew 2018, no. 6-07.
130 Asser/Bartels & Van Mierlo 2013, nr. 461.

4.1.4.1 English Law

In English law, receivables can be used as collateral in two ways: security assignment (mortgage) and charge.[131] It is noteworthy that a pledge can only exist on corporeal movables because this security device is necessarily associated with possession.[132] Mortgage refers to a security assignment, which can take two forms: statutory assignment and equitable assignment. This distinction concerns whether the requirements under s. 136 of the Law of Property Act (LPA) are fulfilled.[133] According to this statutory rule, statutory assignment requires a written contract and a written notification. In contrast, assignment can occur under equity law due to a valid agreement, which is known as equitable assignment. For this form of assignment, notification is irrelevant.

Charge, a limited proprietary interest, neither exists in common law nor in the LPA (1925). It is an equitable security interest. Charge can be either fixed or floating, depending on whether the collateral has been fixed at the moment of creation.[134] Charge and mortgage differ obviously in terms of the legal form: the former is a limited property right, while the latter involves an assignment. However, the difference between charge and mortgage is not as obvious as it appears. These two terms are often used interchangeably in legal theory, judicial practice and legislation.[135] For example, s. 859A Companies Act (2006) expressly stipulates that charge includes mortgages.

For creating a charge or mortgage, two steps are involved: attachment and perfection. Roughly speaking, attachment implies that the security interest comes into existence, and perfection means that the security interest can be effective against third parties.[136] In general, registration is the method of perfection.[137] Registration can grant some substantial benefits to the secured creditor: it makes the charge or mortgage enforceable against

131 Bridge 2009, p. 150.
132 Bridge 2009, p. 150.
133 Bridge, Gullifer, McMeel and Worthington 2013, p. 417.
134 *Illingworth v. Houldsworth*, [1904] A. C. 355 at 358.
135 Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.54.
136 About the meaning of the two terms, we can see the following two excerpts. "*Attachment is a term to describe the process whereby the chargee acquires a particular kind of proprietary interest in a specific asset. The effects of attachment are that first, the charge can be enforced on that property without any further act on the part of the chargee, second, the chargor cannot dispose of that property or any interest therein free of the charge without the consent of the charge, and third, that the chargee has priority over any other interests arising after the date of the agreement for the charge under the nemo dat (first in time) rule, unless an exception applies.*" See Beale, Bridge, Gullifer and Lomnicka 2018, no. 6.72. "*The expression 'perfection' is a useful way to describe any steps that a secured creditor has to take in order to be able to make the security effective against other secured creditors, trustees in bankruptcy and company liquidators or administrators.*" See Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.01.
137 In present English law, companies and individuals do not share the same register. Moreover, the register for the mortgage created by individuals is not open to the public. See Beale 2016, p. 5.

other secured creditors and bankruptcy administrators. In many situations, registration of a charge or mortgage leads to constructive knowledge of the existence of this charge or mortgage.[138] For example, a fixed charge which is registered can defeat a later assignment, albeit that the assignee first notifies the debtor. This is because registration leads to "*constructive notice*", and the assignee can no longer claim that he or she is in good faith.[139] Therefore, registration restricts the application of the notification-first rule: where a mortgage or charge has been registered, subsequent assignees are assumed to know this encumbrance exists.[140]

However, perfection by registration does not completely dispense with the importance of notification.[141] An important reason is that there is a 21-day gap between attachment and perfection. Upon valid attachment, the charge or mortgage can be perfected by registration within 21 days. If the receivables are assigned during this blind period, then there will be a conflict between this assignment and the registered mortgage or charge. This conflict needs to be resolved according to the *nemo dat* rule and the notification-first rule.[142] Another reason is that an outright assignment does not have to be registered. If a receivable is assigned but not for the purpose of security, and later the assignor mortgages or charges this claim, there will be a conflict between the two disposals. Here, this conflict needs to be resolved under the notification-first rule. If the assignee fails to notify the debtor, while the mortgagee or chargee sends a notification, then the mortgagee or chargee will prevail, provided that he or she is in good faith.[143]

In sum, English law uses registration as a means of publicity for the mortgage and charge of receivables. This narrows the scope where notification matters for determining the priority between competing proprietary interests. However, notification is not completely irrelevant. It is important in the situation where registration plays no role, such as the 21-day blind period and un-registerable outright assignment.

4.1.4.2 German law

In German law, receivables can be used as collateral in two ways: pledge and security assignment. These two ways differ in terms of notification.

According to § 1280 BGB, notification to debtors is necessary for a valid pledge over receivables.[144] As a result, if a creditor pledges his claim twice

138 Guest and Liew 2018, no. 6-48.
139 Guest and Liew 2018, no. 6-59.
140 Goode 2013, p. 179; Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.10.
141 Goode 2013, p. 109-110.
142 Bridge 2009, p. 166-167.
143 Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.14.
144 § 1280 BGB: „*Die Verpfändung einer Forderung, zu deren Übertragung der Abtretungsvertrag genügt, ist nur wirksam, wenn der Gläubiger sie dem Schuldner anzeigt.*" English translation: § 1280 BGB: "*The pledging of a claim, for which a contract of assignment suffices, is effective only if the creditor gives notice thereof to the debtor.*"

to different persons, then the pledge communicated to the debtor first will prevail, regardless of whether the pledgee knows about the other pledge. Pledge of receivables is governed by the first-to-notification rule: notification is decisive for determining the priority between competing pledges.[145] It is often held that the requirement of notification is based on the consideration of publicity.[146] Notification plays a delivery-like role.[147] In addition to the effect of priority, notification is also related to the debtor's performance. In the absence of an agreement to the contrary, the debtor of the claim pledged has to offer payment to the pledgor and the pledgee jointly, when the claim becomes due.[148]

In addition to pledge, "security assignment (*Sicherungsabtretung*)" is also a method to provide security. The security assignment is a pledge-like device: both pledgees and security assignees enjoy a preferential position and are entitled to release the receivable involved from the insolvency assets. However, the security assignment is different from pledge in the aspect of notification. Like the outright assignment, security assignment does not require notifying the debtor. The decisive factor for determining the priority between two competing security assignments is the date of occurrence, rather than the time of notification.

> "*If there is more than one assignment of security of the same receivable, the first assignment takes precedence (so-called 'priority principle' (Prioritätsprinzip)). Unlike in the case of a pledge, the second assignment does not create a lower ranking security right.*"[149]

About the security assignment of receivables, particular attention needs to be paid to "global assignment (*Globalzession*)". It arises where the debtor assigns all present and future receivables to the secured creditor, and the future receivables are automatically acquired by the secured creditor as soon as they come into existence.[150] The global assignment has a problem concerning the specificity of the collateral. Under the principle of specificity, individuals are required to identify the receivables assigned with sufficient accuracy. In German law, "*all trade receivables*" is a description which can meet this requirement, and individuals do not have to describe the receivables involved by indicating any specific information.[151] Under a global assignment, the assignee can become the new creditor without having to

145 Haag and Peglow 2008, p. 214.
146 Herrmann 2003, p. 154; Mincke 1997, p. 204.
147 Augustin and Kregel 1996, § 1280, p. 132; MüKoBGB/Damrau 2017, § 1280, Rn. 1.
148 § 1285 (1) BGB: „*Hat die Leistung an den Pfandgläubiger und den Gläubiger gemeinschaftlich zu erfolgen, so sind beide einander verpflichtet, zur Einziehung mitzuwirken, wenn die Forderung fällig ist.*" English translation: § 1285 (1) BGB: "*Where performance is to be made to the pledgee and the creditor jointly, they are reciprocally obliged to cooperate in the collection if the claim is due.*"
149 Haag and Peglow 2008, p. 214.
150 Haag and Peglow 2008, p. 214.
151 Rakob 2009, p. 98.

do any extra act when future receivables come into existence. The assignee often needs, only for practical purposes, more information about the receivables, such as the debtors' name and the amount of these claims.[152] Moreover, the insolvency administrator cannot avoid the global assignment by claiming the hardening period, a period of three months within which the insolvent debtor is not able to dispose of its assets.[153]

German law treats pledge and security assignment differently in terms of notification, despite both devices performing the same function. Due to the irrelevance of notification to the security assignment, this device is much more popular than pledge.[154] It seems difficult to say whether this different treatment causes any systematic incoherence. After all, both assignment and pledge are a disposal of receivables. If notification is required for pledge due to the consideration of publicity, then there is no reason to dispense with this requirement for assignment.[155]

As demonstrated above, German law does not recognize *bona fide* acquisition of claims (see 4.1.3.2). In general, *bona fide* acquisition is not possible in the situation of pledge or security assignment either. If the pledgor does not have the authority to dispose, then a pledge cannot be created validly, irrespective of whether the debtor has been notified, or whether the pledgee is in good faith. The reason is simple: claims lack an outward appearance to legitimize the pledgor's authority of disposal.[156] However, the principle of abstraction can offer some protection to third parties, whether in good faith or not, in the situation of successive transactions. Due to this principle, where the pledgor obtains a claim on the basis of a defective contract, this pledgor might still have the authority to dispose of this claim. As a result, the pledge can be validly created, regardless of whether the pledgee is in good faith.

4.1.4.3 Dutch Law

As has been pointed out above, security assignment is prohibited by Dutch law (art. 3:84 (3) BW), and pledge is the only device of security. Like outright assignment, pledge also includes "disclosed pledge (*openbaar pand*)" and "undisclosed pledge (*stil pand*)", depending on how the pledge is created.

According to art. 3:236 (2) BW and art. 94 (1) BW, a disclosed pledge has to fulfill two conditions: one is making a valid deed of pledge, and the other is sending a notification to the debtor.[157] As we have shown above, notification may cause significant inconveniences (see 4.1.1.2.C). For this reason, Dutch law introduced the undisclosed pledge in 2004. Like the undisclosed

152 Rakob 2009, p. 98.
153 Rakob 2009, p. 96-102.
154 Haag and Peglow 2008, p. 213.
155 Meijers 1954, p. 222.
156 Bülow 2012, Rn. 636.
157 Rank 2008, p. 25.09.

assignment, undisclosed pledge can also be created in two ways: authentication and private registration. Individuals may create a pledge by making a deed of pledge before a notary, and the pledge takes effect upon the completion of the deed being notarized. If the transacting parties do not want to involve a notary, they are allowed to conclude a private deed and then register this deed with an office of the tax authorities. The register is not open to the public. As mentioned above, the main purpose of notarization and registration is to address the problem of fraudulent antedating.[158]

In general, the priority between competing pledges of the same receivable is determined by applying the *nemo dat* rule. According to art. 3:246 (3) BW, the pledge which is successfully created earlier will prevail.[159]

> "*The order of priority among various rights of pledges over the same collateral is, in principle, determined by the moment at which the pledges were created, the general rule being that the earlier pledge prevails ('first in time, first in right').*"[160]

Since whether a pledge is validly created depends on how the pledge is created, notification is not the sole factor that should be taken into consideration. Therefore, a later disclosed pledge has a lower rank than an earlier undisclosed pledge, regardless of whether the disclosed pledgee is in good faith.[161] Notification given by a pledgee who has a lower rank cannot increase its ranking.[162]

> "*Zou men een pandhouder die zijn recht nog niet heeft medegedeeld een zwakkere positie geven dan degene die het wel (reeds) heeft gedaan, dan zou dit licht tot ongerechtvaardigde rangwisselingen kunnen leiden en bij het ontstaan van twijfel aan de soliditeit van de pandgever zouden pandhouders zich haasten tot mededeling over te gaan, daardoor wellicht een onnodige deconfiture uitlokkende.*"[163]

In general, notification only leads to priority in two situations: (1) where there are two competing disclosed pledges, the pledge of which the debtor is notified earlier will prevail; (2) where there is a conflict between a disclosed pledge and an undisclosed pledge, the former only prevails when the

158 Timmermann and Veder 2009, p. 210.

159 Art. 3:246 (3) BW: "*Rust op de vordering meer dan één pandrecht, dan komen de in de vorige leden aan de pandhouder toegekende bevoegdheden alleen aan de hoogst gerangschikte pandhouder toe.*" English translation: Art. 3:246 (3) BW: "*Where more than one right of pledge encumbers a claim, the powers granted to the pledgee in the preceding paragraphs can only be exercised by the most senior ranking pledgee.*"

160 Rank 2008, p. 25, 28.

161 Rank 2008, p. 25, 28.

162 Asser/Bartels & Van Mierlo 2013, nr. 226.

163 Parlementaire Geschiedenis (3) 1981, p. 764. English translation: "*If a pledgee, who has not yet notified the debtor of his right, has a legal position inferior to those who have done that, then there would be an unjustified interchange of rankings; pledgors would hurry for notification when the pledgor's solvency is doubted, which might cause an unnecessary collapse.*"

notification is given to the debtor before the completion of the authentication or private registration of the latter. In these two situations, the pledge created earlier has a higher ranking.

Bona fide acquisition of pledge is not recognized by Dutch law. The pledgor must have the authority to dispose. Otherwise, the right of pledge cannot be validly created, irrespective of whether the pledgee is in good faith, or whether the debtor has been notified.[164] The reason is simple: claims do not have any outward appearance to legitimize the pledgor's authority to dispose.[165] However, according to art. 3:239 (4) BW, art. 3:88 BW should be applied in favor of third parties acting in good faith in the situation of successive transactions.[166] Under art. 3:88 BW, where a pledgor acquires the claim pledged on the basis a defective contract, the pledgee may still be able to obtain a right of pledge. As a result, art. 3:88 BW restricts the influence of previous transactions over later transactions. It should be noted that, according to art. 3:239 (4) BW, this provision is only applied if the pledgee acted in good faith at the moment of notification. As a result, art. 3:88 BW does not apply to the pledge made in the undisclosed way through an authentic deed or private registration. Notification is necessary for *bona fide* acquisition of pledge of claims.

4.1.4.4 Comparative and Conclusive Analysis of Notification

A Differences and Similarities

From the introduction above, we find that similarities and differences exist between the three jurisdictions in the use of receivables as collateral. For example, security assignment is prohibited by Dutch law, but German law and English law recognize this type of security device. In the following discussion, we concentrate on the role played by notification to debtors.

Firstly, notification is necessary for creating a right of pledge in German law and disclosed pledge in Dutch law, but it is often irrelevant to mortgage and charge in English law. In general, it is registration that serves as the method of perfection in English law. Mortgage and charge of receivables can be made enforceable against third parties by registration. The scope of application of the notification-first rule has been significantly narrowed by registration. However, notification still has some importance in the situation where registration plays no role, such as an outright assignment and the 21-day blind period.

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164 Asser/Bartels & Van Mierlo 2013, nr. 225.

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

166 Art. 3:239 (4) BW: "*Artikel 88 geldt slechts voor de pandhouder wiens recht overeenkomstig lid 1 is gevestigd, indien hij te goeder trouw is op het tijdstip van de in lid 3 bedoelde mededeling.*" English translation: Art. 3:239 (4) BW: "*Article 3:88 only applies to the pledgee whose right has been established according to paragraph 1, if he acted in good faith at the moment of notification as meant in paragraph 3.*"

Secondly, each of the three jurisdictions recognizes a device of security which can be created without involving notification, because notification causes much inconvenience. In German law, this device is the security assignment. It is the undisclosed pledge in Dutch law. An important difference exists between undisclosed pledge and security assignment: the former requires notarization or private registration, while the latter is not subject to any formality. In English law, mortgage and charge take registration as the method of perfection. Therefore, notification does not create a significant issue for legal practice. Here, we note that registration under English law differs from registration under Dutch law: the former is open to the public when the pledgor is a company, while the latter cannot be inspected by third parties.[167]

Thirdly, where notification is made, third parties in good faith cannot be protected on the basis of this notification against the defect of the security provider's authority to dispose. As shown above, German law and Dutch law do not recognize *bona fide* acquisition of the right of pledge over claims. Even though legislators of both jurisdictions hold that notification has some publicity effect,[168] they refuse to treat notification as an outward appearance. The security provider's authority to dispose is not legitimized. In English law, registration has significantly narrowed the scope of application of notification. Nevertheless, notification can still give rise to *bona fide* acquisition in some situations. For example, where a receivable is assigned and then mortgaged, the person who notifies the debtor earlier will win.[169] Here, we can find an interesting difference: notification is initially treated as a method of publicity in German law and Dutch law, but the effect of *bona fide* acquisition is denied; notification has an effect of *bona fide* protection in some situations under English law, though it has been generally replaced by registration in the field of secured transactions.

Lastly, the outright assignment and the secured transaction (including pledge and the security assignment) might be treated differently in the aspect of notification, despite the fact that both form a disposal. In principle, property rights on an object should share the same method of publicity: the method of publicity for ownership should not be different from that for limited property rights (see 2.2.3.2). However, the disposal of claims has a patchy system of publicity. English law has introduced registration to the mortgage and charge of claims, but outright assignment is not registerable. German law requires notification as a condition for pledge of claims, but assignment (whether outright or security) does not need notification. Dutch law has a different problem here. Truly, Dutch law treats assignment and pledge of claims equally: both can be either disclosed or undisclosed.

167 In English law, the register for the mortgage (and charge) provided by individuals is not open to the public either.

168 Meijers 1954, p. 222; Snijders and Rank-Berenschot 2017, p. 302; Herrmann 2003, p. 154; Mincke 1997, p. 204; Augustin and Kregel 1996, § 1280, p. 132.

169 Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.14.

However, there are three ways of "publicity": notification, notarization, and private registration. If a claim is first disposed of in one way and then disposed of in another way, then discrepancy will arise. For example, where a claim is first pledged on the basis of a notarized deed and then pledged by notifying the debtor involved, this debtor cannot be expected to disclose that the claim was already pledged. In principle, one kind of property should only have one method of publicity, which has been pointed out above (see 2.2.3.2).

In general, the preceding discussion and comparison can be shown in the following table (Figure 10).

	Irrelevance of Notification	Relevance of Notification
English Law	Mortgage and Charge: Registration	Mortgage and Charge: Notification in the Blind Period
German Law	Security Assignment: No Publicity	Pledge: Notification
Dutch Law	Undisclosed Pledge: Notarization and Private Registration	Disclosed Pledge: Notification

Figure 10

B Notification, Publicity, and Pledge

As we have argued above, notification does not qualify as a method of publicity for the outright assignment of claims (see 4.1.3.4.B). Therefore, there is no reason to say that notification can be a method of publicity for a security assignment. In this part, we focus on notification and pledge of claims from the perspective of publicity.

There is a strong inclination to treat notification as a method of publicity for the pledge of claims. For example, German law allows claims to be assigned in the absence of any notification, but requires notification as a condition for the valid pledge of claims. In general, there are three explanations for the requirement of notification for the pledge of claims. The first explanation is that notification creates a possibility for third parties to know about the existence of this proprietary encumbrance.[170] The second is that notification prevents the pledgor from disposing of the claim, thus avoiding the problem of "*false appearance of wealth*".[171] The third explanation is that notification precludes fraudulent antedating by fixing the date of creation.[172]

In general, the former two explanations are not convincing, and the third explanation does not mean that notification qualifies as a method of publicity for claims. As has been argued, notification only creates a possibility for third parties to know about the disposal of claims, but it is too defective to be a method of publicity (see 4.1.1.2.C). The debtor involved

170 MüKoBGB/Damrau 2017, § 1280, Rn. 1.
171 Beale, Bridge, Gullifer and Lomnicka 2018, no. 14.10.
172 Timmermann and Veder 2009, p. 210.

bears no duty to provide information, and the reliance of third parties on the information provided by the debtor is not protected by law. Therefore, pledge of claims is not necessarily made transparent to third parties. Moreover, notification causes much inconvenience, which makes it inappropriate to be a method of publicity. This is why claims can be used as collateral in the absence of notification in the three jurisdictions.

Due to similar reasons, there is a problem of "*false appearance of wealth*", and this problem cannot be addressed by notification. Even after notifying the debtor involved, reliable information cannot be necessarily obtained by third parties (see 4.1.1.2.C). In fact, this problem does not exist in reality, because pledge and security assignment of claims often occur without involving any notification. The debtor is not notified of the secured transaction. As a result, third parties will not inquire with the debtor. For third parties, there is no reason to believe that no secured transaction exists simply because the debtor declares that no relevant notification needs to be given.

As to the third explanation, we have argued that the function of preventing antedating does not make notification qualify as a method of publicity (see 4.1.1.2.C). After all, preventing antedating is not preventing the occurrence of conflicts.

4.1.5 Notification and Third-Party Effect: General Creditors

In principle, general creditors can only get paid on the basis of the debtor's unencumbered assets in the event of the debtor's insolvency. Therefore, general creditors have an interest in knowing which assets belong to the debtor and how much encumbrance exists over these assets (see 2.2.2.2.C). The insolvent debtor's personal rights form a part of these assets, provided that they are not pledged or assigned. For this reason, publicity of pledge and assignment of personal rights is often said as important for general creditors. Moreover, notification is often treated as a method of publicity for claims. If a personal right is assigned or pledged in the absence of a notification of the debtor, the problem of "*false appearance of wealth*" will arise.[173] This consideration is held by E.M. Meijers during the recodification of the BW.[174] A similar consideration also exists in German law. As has been shown, pledge of claims requires notifying the debtor under German law (see 4.1.4.2). Just like the delivery of corporeal movables, this requirement is also stipulated to serve a purpose of publicity.[175]

However, we hold that, like possession of corporeal movables, notification is not useful for general creditors. Firstly, notification cannot perform the function of publicity in the situation of assignment and pledge, which

173 Rongen 2012, p. 474.
174 Meijers 1954, p. 222.
175 Augustin and Kregel 1996, § 1280, p. 132.

has been argued above (see 4.1.1.2). Notification cannot make the assignment or pledge of claims transparent to subsequent acquirers, let alone general creditors. Truly, notification provides an opportunity for third parties to obtain some information from the debtor. However, it is too defective to qualify as a method of publicity.

Secondly, a creditor might have many debtors, and it is difficult and costly to inquire all debtors to know whether these claims have been pledged. For this reason, the general creditor rarely inquires all the debtors of his or her debtor in reality. Even if general creditors carry out a costly investigation, the information obtained will become outdated after a short period. This is because the claims owned by the debtor are always in fluctuation, and the debtor is entitled to pledge his or her claims after the investigation. Moreover, it is imaginable that the debtor is often unwilling to disclose his or her debtors to the general creditor, because this information is an important commercial secret.

Thirdly, valid disposal of claims can take place independently from notification. In principle, general creditors can only distribute the claims owned by the insolvent debtor and encumbered with no proprietary security. However, whether a personal right belongs to the insolvent debtor is a question affected by multiple factors. Notification is never a decisive factor nor a reliable indicator. As has been shown, law generally recognizes that assignment or pledge of claims can successfully occur in the absence of notification, for the purpose of the smooth operation of transactions (see 4.1.3 and 4.1.4). In practice, the disposal of claims in the absence of notification is ordinary, such as securitization, factoring, and the pledge of bulk receivables. Therefore, general creditors cannot obtain reliable information by inquiring the debtor notified.

Fourthly, general creditors will not pay particular attention to the claims owned by the debtor. As has been argued above, general creditors are mainly concerned about the overall financial health of the debtor (see 2.2.2.2.C). Even if we assume that the proprietary information concerning claims can be obtained reliably through inquiring the debtor, this information is not important to potential creditors. The reason is simple: the information cannot indicate the overall financial health of the debtor. In contrast, financial reports include more comprehensive information and thus more useful for general creditors.[176] Moreover, notification is of no value for involuntary creditors, such as tort victims. This kind of general creditor has no chance to decide whether to have a claim of compensation.[177]

On the basis of the preceding reasons, we can conclude that notification fails to allow general creditors to obtain any useful information. However, this does not mean that notification has no value to general creditors. Notification helps to determine the date of assignment and pledge, addressing the

176 Van den Boezem and Goosmann 2010, p. 61.
177 LoPucki 1994, p. 1893.

problem of fraudulent antedating to some extent. However, we have argued above that the function of preventing antedating should not be exaggerated (see 4.1.1.2.C). Notification has some defects in tackling the problem of antedating, and there are better solutions, such as notarization and private registration. Moreover, this function only concerns how to resolve conflicts, rather than how to prevent the occurrence of conflicts.

4.1.6 Conclusion

Personal rights (claims) are a legal relationship *inter partes* and not subject to the principle of publicity. However, as a type of wealth, personal rights can be assigned, pledged and distributed by creditors in the situation of the debtor's insolvency. In this sense, personal rights have a proprietary aspect. Due to this reason, personal rights may also involve a problem of publicity. Notification is often treated as a method of publicity for this type of wealth. In the preceding discussion, we have examined the question whether notification can convey any useful information to third parties.

In general, notification conveys no useful information to strange interferers. The protection of creditors is mainly based on the rule concerning default by debtors, which has nothing to do with notification. Notification is not useful for general creditors. This is because notification can neither indicate how many claims the insolvent debtor has, nor show whether these claims have been pledged or assigned for the purpose of security. More importantly, general creditors are mainly concerned about the general financial health of the debtor, rather than how many unencumbered claims are owned by the debtor.

In terms of the role played by notification in the situation of disposal of claims (assignment and pledge), it has been shown that many divergences exist between the three jurisdictions. It is a controversial issue whether notification should be treated as relevant in determining the priority between competing disposals. This issue is closely related to the question whether notification has any effect of publicity. About this question, a negative answer has been argued by this research on the ground of two important reasons.

The first reason is that notification only creates a possibility to inquire the debtor involved. It does not guarantee that subsequent acquirers can obtain reliable information. The debtor has no duty to provide information, and the information provided might be incomplete or incorrect. As a result, notification cannot be used to realize the purpose of preventing conflicts. The second reason is that notification cannot be an appropriate method of publicity. Notifying and inquiring the debtor is costly, especially when a large number of claims are involved. Moreover, the requirement of notification implies that the disposal of future claims might become impossible. Due to these reasons, notification cannot be seen as a method of publicity for claims. In the preceding discussion, we have shown that English law

introduces registration for charge and mortgage of claims. However, the outright assignment remains hidden in English law.[178]

Due to the absence of a method of publicity, individuals cannot obtain reliable information in the field of the transaction of claims. Property rights existing on claims remain in a hidden state ubiquitously. This implies a high possibility of conflicts between different transactions. In general, the conflict is regulated by the *nemo dat* rule: the person who obtains a property right with respect to the in-question claim earlier has a better position. Undoubtedly, this rule is disadvantageous to subsequent acquirers: they have to be cautious about earlier but hidden property rights. Potential acquirers have to bear a heavy burden of investigation, which further affects the liquidity of personal claims. In the viewpoint of some scholars, protection against unauthorized disposal should be granted to subsequent acquirers in good faith to make claims as transferable as corporeal things.[179]

Obviously, claims have played an important part in current transactions and should have as high negotiability as corporeal things. However, claims neither have an abstract outward appearance (namely possession of corporeal movables), nor a clear and reliable means of publicity (registration of immovable property). There is not any proper fulcrum to introduce a general rule of *bona fide* acquisition of claims. Therefore, the insufficient protection of subsequent acquirers in good faith is not a result of legal policy, but a result of the lack of a reliable method of publicity. In English law, the notification-first rule grants protection to subsequent acquirers in good faith. However, as notification does not qualify as a means of publicity, this rule produces "*at least as much injustice as it has prevented*".[180]

4.2 Documental Recordation

In the preceding section, we have discussed claims and notification to debtors. In practice, some claims are embodied within a document (security), such as the bill of exchange and the warehouse receipt. This document record details of the claim embodied, which allows outsiders to know this claim. Moreover, the disposal of the claim usually does not require any notification to debtors, but cannot validly take place without involving the document.[181] For example, the assignment of the claim often requires the document to be delivered to the assignee. Claims of this kind are known as "*documentary intangibles*" in English writings.[182] In this research, they are termed "documental rights" or "documental claims".

178 Akseli 2013, p. 211.
179 Verhagen 2002, p. 256.
180 Guest and Liew 2018, no. 6-07.
181 Goode 2010, p. 52.
182 Goode 2010, p. 52.

In this section, particular attention is paid to documental rights and documental recordation. At first, there is a general introduction of securities (documents). After that, we discuss two types of securities: securities to goods (see 4.2.2) and securities of payment (see 4.2.3). The discussion focuses on how these two types of securities function as a method of publicity for documental claims. Just like the last section, this section also includes a comparative study of English law, German law and Dutch law.

4.2.1 Introduction of Securities

4.2.1.1 Categories of Securities

In this research, the concept of securities is used to describe documents which embody a personal right, such as the right of payment or the right of recovery of goods. This concept is an academic term in German law (*Wertpapier*) and in Dutch law (*waardepapier*).[183] It is equivalent to "document of title", the document containing a title to payment or goods, in English law.[184] In addition to "document of title", English law also has another relevant term: negotiable instrument. Negotiable instrument mainly refers to securities to payment.[185]

According to the content of the right embodied and the field of application, securities can be roughly categorized into three groups.[186] The first group is securities of payment, which include bills of exchange, cheques and promissory notes.[187] As these securities involve the payment of a certain amount of money, they are also called monetary documents. The second group is securities to goods, including warehouse receipts and bills of lading.[188] The last group is capital securities or investment securities, which

183 Zöllner 1978, p. 1; Reehuis and Heisterkamp 2019, p. 233.
184 Bridge, Gullifer, McMeel and Worthington 2013, p. 637.
185 Bridge, Gullifer, McMeel and Worthington 2013, p. 640; James 1991, p. 17-23.
186 Bridge, Gullifer, McMeel and Worthington 2013, p. 12.
187 This type of securities is known as "negotiable instrument" in English law, "*Wertpapiere des Zahlungs- und Kreditverkehrs*" in German law, and *mutanis mutandis* "*schuldvorderingspapieren*" in Dutch law. See Zöllner 1978, p. 3-4; Reehuis and Heisterkamp 2019, p. 233.
188 This type of securities is known as "document of title to goods" in English law, "*Wertpapiere des Güterumlaufs*" in German law, and *mutanis mutandis* "*zakenrechtelijk papier*" in Dutch law. See Zöllner 1978, p. 4-5; Reehuis and Heisterkamp 2019, p. 233. However, it should be noted that the Dutch term "*zakenrechtelijk papier*" is in German legal theory a kind of "*forderungsrechtliches Wertpapier*", as opposed to "*sachenrechtliches Wertpapier*" which only includes *Hypotheken-, Grundschuld-* and *Rentenschuldbrief*. This is because securities to goods do not embody the right of ownership of the goods involved, but only a personal claim of delivery of the goods. See Zöllner 1978, p. 8-9. Just as Dutch scholar Mulder points out, the "*zakenrechtlijk papier*" embodies a personal right. See Mulder 1948, p. 11.

mainly refer to shares (stocks) and bonds (debenture).[189] The categorization indicates that securities play an important role in different sections of the market economy, such as the transaction of goods, payment, and the capital market. In general, securities not only evidence but also embody a right.[190] Disposal of the right embodied is largely realized by disposing of the securities, a kind of corporeal movable. As a result, the right embodied can be disposed of like a tangible and movable thing. For this reason, the right is often said to be "objectified (*verkörpert*)",[191] thereby having a "*somewhat hybrid nature*".[192]

According to the way in which securities are issued and transferred, there is a distinction between bearer securities, order securities, and named securities. Bearer securities are a document which does not specify the name of the entitled.[193] This type of document is alienated just like a corporeal movable: delivery of the document is necessary.[194] In general, the holder of the document is assumed to be the person who enjoys the right embodied.[195] In contrast, order securities need to specify the name of the entitled by including a clause like "to X or order".[196] Disposal of this type of document not only requires delivery of the document, but also usually involves endorsement.[197] In general, the last endorsee is the person who enjoys the right embodied. Like order securities, named securities also specify the name of the entitled.[198] However, named securities do not "embody" a right. The entitled cannot dispose of the right by disposing of the named document, and the right can, in principle, be validly disposed of without involving the document.[199] As a result, the entitled is not necessarily the person whose name is indicated by the document. In the viewpoint of some scholars, the main purpose of the named document is to prove the existence of the right involved.[200] In the following discussion, named securities are excluded.

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189 This type of security is known as "*Wertpapier des Kapitalmarkts*" in German legal theory. See Zöllner 1978, p. 2. It is broader than the concept of "*lidmaatschapspapier*" in Dutch legal theory, because bonds (debentures) are not a kind of "*lidmaatschapspapier*". See Reehuis and Heisterkamp 2019, p. 233. German legal theory has a particular term, namely "*Mitgliedschaftspapier*", equivalent to the Dutch term "*lidmaatschapspapier*". This particular term mainly refers to shares. See Zöllner 1978, p. 8.

190 Bridge, Gullifer, McMeel and Worthington 2013, p. 638.

191 Hueck and Canaris 1986, p. 2; Brox and Henssler 2009, p. 259.

192 Zöllner 1978, p. 17; Bridge, Gullifer, McMeel and Worthington 2013, p. 11.

193 This type of document is called "*Inhaberpapiere*" in German law and "*toonderpapier*" in Dutch law. See Zöllner 1978, p. 9-11; Zevenbergen 1951, p. 329.

194 Zevenbergen 1951, p. 336; Hueck and Canaris 1986, p. 24.

195 Zevenbergen 1951, p. 329; Hueck and Canaris 1986, p. 24.

196 This type of document is known as "*Orderpapier*" in German law and "*orderpapier*" in Dutch law. See Zöllner 1978, p. 12-14; Scheltema 1993, p. 84; Zevenbergen 1951, p. 63.

197 Zöllner 1978, p. 13.

198 This type of document is known as "*Rektapapier*" or "*Namenspapier*" in German legal theory and "*rektapapier*" in Dutch legal theory. See Zöllner 1978, p. 11-12; Scheltema 1993, p. 86; Zevenbergen 1951, p. 52.

199 Zöllner 1978, p. 11; Hueck and Canaris 1986, p. 22.

200 Scheltema 1993, p. 86. However, different opinions exist. See Zevenbergen 1951, p. 52-57.

4.2.1.2 Challenges to Securities

In the last several decades, securities experienced a significant challenge. This challenge is that the traditional paper-based securities, especially capital securities, have been dematerialized to a large extent due to the development of technology.[201] Capital securities have experienced a significant dematerialization: most certificated securities have become uncertificated. Many countries have built an electronic central system for the transfer and settlement of capital securities. Investors are provided with an electronic account of securities linked to this system. Most capital securities are stored in an electronic account and transferred through the electronic central system, and only a few capital securities still have a tangible form.[202] As a result, possession and delivery of certificates are not involved in the transaction of most capital securities. Due to this reason, capital securities are not included in the following discussion.

Dematerialization also occurs in the field of securities to goods and securities of payment under the context of electronic commerce.[203] The transaction of securities of payment has become partially paperless, such as the emergence of electronic cheques.[204] However, electronic monetary securities are not common yet due to the concern about safety, especially the integrity and reliability of the electronic information.[205] In fact, the biggest challenge against the traditional monetary securities comes from new means of payment, especially the payment card.[206] Nevertheless, paper-based securities of payment are still used in practice.[207] As to securities to goods, some of them, such as warehouse receipts, might have taken an electronic form and are used in commercial practice.[208] However, strong resistance exists in the progress of the digitalization.[209] For example, businessmen still show reluctance to electronic bills of lading due to the concern about the safety of electronic information.[210] For bills of lading, widespread digitalization does not occur yet.[211]

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201 Haentjens 2007, p. 33.
202 Rogers 2012, p. 50.
203 UNCITRAL Yearbook 2003, p. 283.
204 Geva 2007, p. 689; Geva 2015, p. 96.
205 Botchway 2004, p. 525; Zwitser 2006, p. 2; Guest 2016, no. 5-004.
206 Rogers 2012, p. 4-5. Payment cards are issued by financial institutions, such as the bank, to a customer. With a payment card, the cardholder can access the funds in the customer's designated bank accounts and make payments by the transfer of electronic funds.
207 For example, around "*70 billion checks are written and processed each year in the United States. All of these checks are written on paper, and some of them are transported in physical form for long distances within the U.S. banking system—a process that requires airplane and truck fuel.*" See Clarkson, Miller and Cross 2017, p. 480.
208 UNCITRAL Yearbook 2003, p. 287-288; Winn and Wright 2019, p. 9.36-9.37.
209 Salomons 2008 (2), p. 76.
210 Van Maanen and Claringbould 2017, p. 9; Aikens, Lord and Bools 2016, no. 2.123.
211 Goode, Kronke and Mckendrick 2015, p. 291; Aikens, Lord and Bools 2016, no. 2.124.

> "*Shippers, consignees, carriers, and intermediaries all incur expenses due to the delays caused by the handling and transmittal of paper documents. Paper documents are also, in some ways, less secure than electronic transmissions. However, many participants in the process harbor concern about security and about how the controlling functions of the bill of lading can be retained in the electronic version.*"[212]

In a nutshell, traditional paper-based securities have been dematerialized to a large extent, but they still play a role in commercial transactions. Therefore, the following discussion concerning traditional securities is not totally useless.

4.2.1.3 The Scope of the Following Discussion

This research focuses on the principle of publicity in the law of movables. In revealing the publicity effect of securities for the personal right embodied, we only pay attention to securities to goods and securities of payment. These two types of securities will be discussed in separation because they differ in legal consequences as well as the field of application. The transfer of securities of payment means the transfer of the monetary claim embodied (see 4.2.3). This type of document is mainly used in the field of payment. The transfer of securities to goods means that the claim of recovery of the goods, rather than the right of ownership of the goods, is alienated.[213] The transfer is also closely related to the disposal of the goods. As will be seen later, transfer of securities to goods has an effect of delivery of the goods (see 4.2.2). Securities to goods are mainly used in the commercial transaction of goods. Capital securities are not included in the following discussion. This is because they have been dematerialized to a very large extent, as just mentioned. Moreover, the typical kind of capital securities, i.e. shares, embodies a right of membership,[214] while Chapter 4 mainly focuses on claims.

In the following discussion, we do not pay attention to the issue of the debtor's defense: can the debtor refuse to perform the debt to the new creditor by claiming that he or she has a defense against the original creditor? In the preceding discussion of notification to debtors, this issue is also excluded (see 4.1.1.1.C). As has been pointed out there, the debtor's defense against the assignee concerns the performance of obligations and thus the obligational aspect of the claim.[215] The issue of the debtor's defense should be carefully distinguished from the acquisition of claims: acquiring a claim does not necessarily mean that the acquirer can require the debtor to provide the performance.[216] In general, the issue of acquisition concerns

212 Beecher 2006, p. 627.
213 Goode 2010, p. 52.
214 Reehuis and Heisterkamp 2019, p. 233.
215 Van Empel and Huizink 1991, p. 50-52.
216 Stranz and Stranz 1952, p. 108; Tiedtke 1985, p. 241.

who the owner of the document is and who the creditor is. Only after ascertaining the creditor can we answer whether and to what extent the creditor can request the debtor to perform the obligation. In this sense, the issue of acquisition is a "preliminary question (*Vorfrage*)" to the issue of the debtor's defense.[217] In the following discussion, we only focus on this preliminary question. As to whether the debtor can refuse performance on the ground of a defense against the original creditor, providing a brief answer here seems sufficient.

It has been pointed out that the debtor can, in principle, claim his or her defenses without being affected by the disposal of the claim (see 4.1.1.1.C). However, securities to goods and securities of payment are differently treated in this aspect in favor of the new creditor. Roughly speaking, the debtor of a document is not allowed to refuse to provide performance to the new creditor by claiming that he or she has a defense out of the legal relationship with the original creditor.[218] This is known as the exclusion of "personal defenses (*persönliche Einwendungen* in German law and *persoonlijke verweermiddelen* in Dutch law)".[219] Here we take the bill of exchange as an example. The holder of a bill of exchange has this bill accepted by a bank by fraud and then transfers the bill to a third party who is in good faith with respect to this defective acceptance. In this case, the third party is able to require the acceptor (the bank) to pay, and the latter cannot refuse on the ground of the original holder's fraud.

4.2.2 Securities to Goods

In the literature concerning securities to goods, this type of document is often treated as an "appearance of rights (*Rechtsschein*)"[220] or an "appearance of the authority of disposal (*schijn van beschikkingsbevoegdheid*)".[221] In particular, this appearance lays a basis for *bona fide* acquisition of the goods involved by third parties in good faith.[222]

> "*Die den Erwerber legitimierende Übertragung des Traditionspapiers schafft den dafür erforderlichen und ausreichenden Publizitätsakt, ohne daß es überhaupt auf den Besitzmittlungswillen des Papierschuldners ankommt. Wie der besitzende Veräußerer durch*

217 Stranz and Stranz 1952, p. 109.
218 The exclusion of personal defenses is pinned down by art. 6:146 BW, for bills of exchange by art. 116 WvK, and for bills of lading by art. 8:414 and art.8:441 (2) BW in Dutch law. In German law, the corresponding provision is art. 17 WG for bills of exchange and § 364 (2) HGB for securities to goods. In English law, s. 29 BEA excludes personal defenses for bills of exchange.
219 Goode 2010, p. 533; Zöllner 1978, p. 130; Hueck and Canaris 1986, p. 102; Hammerstein 1998, p. 43; Scheltema 1993, p. 128.
220 Hueck and Canaris 1986, p. 203; Schnauder 1991, p. 1648.
221 Scheltema 1993, p. 96-99; Vriesendorp 1994, p. 242.
222 Zevenbergen 1951, p. 68.

> *den unsichtbaren Rechtsschein des mittelbaren Besitzes, so wird der nicht-besitzende Veräußerer durch den Rechtsschein des Papiers legitimiert. Das muß als Grundlage für den gutgläubigen Erwerb genügen.*"[223]

To reveal the function of publicity of securities to goods, we need to focus on two aspects: (1) the effect of publicity for the claim of recovery embodied within this type of document; and (2) the effect of publicity for the goods involved. As we will see, securities to goods embody a personal right of recovery against the direct possessor of the goods, usually the issuer of the document. Usually, this personal right is disposed of by disposing of the document. On the other hand, securities to goods are closely related to the disposal of the goods involved. For example, transfer of the document can yield an effect of delivery, which means that the goods involved are delivered to the acquirer of the document. This effect is important for the disposal of the goods, especially when the disposal occurs under the *traditio* system that requires delivery for the disposal of corporeal movables.

In disclosing the function of publicity of securities to goods, we discuss two issues: (1) the legal effect of this type of securities in the disposal of the goods; and (2) the blocking effect of this type of securities in the disposal of goods.[224] The first issue concerns the legal effect yielded by securities to goods. For example, what legal consequences can be given rise to by transferring securities to goods? The second issue mainly concerns whether the goods under a document can be disposed of without involving this document. For example, can the goods under a document be transferred in the way of *traditio longa manu* but independently from this document? As we will see later, this issue is directly related to the reliability of securities to goods as a method of publicity for goods.

Here, English law, German law and Dutch law are selected for the comparative study of the two issues. An introduction to securities to goods in these three jurisdictions is first provided (see 4.2.2.1-4.2.2.3). After this

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223 Schnauder 1991, p. 1648. English translation: "*The legitimized transfer of the traditio document provides the acquirer with necessary and sufficient publicity, which is nearly independent from the possessory intention of the document debtor. Like the possessing vendor who is legitimized by the invisible appearance of rights of indirect possession, the non-possessing vendor is legitimized by the appearance of rights of the document. This suffices for being a basis for the bona fide acquisition.*"

224 In fact, the function of publicity of securities to goods is also indicated by the following aspect: the reliance of third parties on the document is protected against the debtor's defense on the ground of the personal legal relationship with the original creditor. In general, the debtor of the document is not entitled to refuse performance to the new creditor in good faith by claiming that there is a defect in his or her personal legal relationship with the original creditor. The restriction over the debtor's means of defense is often explained by the "theory of appearance of rights (*Rechtsscheintheorie*)": third parties can safely assume that they can enforce the right obtained just as the document shows. See Staub/Canaris 2004, § 364, Rn. 26; Brox and Henssler 2009, p. 263-264; Zwitser 2012, p. 39; Van Empel and Huizink 1991, p. 85. In general, the protection of third parties against personal defenses is an issue in the law of obligations. Therefore, it is not discussed here. See Van Empel and Huizink 1991, p. 50-52.

introduction, there is a comparative discussion (see 4.2.2.4). On the basis of this comparative discussion, we reveal the rationale of publicity of securities to goods (see 2.2.2.5-4.2.2.6).

4.2.2.1 English Law

A The Legal Effect of Securities to Goods

As mentioned above, securities to goods are known as the "document of title to goods" in English law. This term is used in two senses: the common law sense and the statutory law sense.[225] The crucial difference between these two senses lies in whether transfer of the document can lead to a shift of possession of the goods concerned.[226] In the common law sense, documents of title to goods represent indirect possession (constructive possession) of the goods, thus the transfer of these documents can allow the acquirer to become an indirect possessor.[227] In this process, any attornment by the direct possessor of the goods is not necessary.

In English law, bills of lading are the only document of title to goods in the common law sense: the transfer of bills of lading has an effect of delivery. Transfer of the other documents concerning goods (such as delivery orders, warrants and warehouse certificates) have no effect of delivery.[228] The principal function of these other documents is to provide "*proof of the possession or control of goods*".[229] However, these other documents are called by English lawyers as "*a document of title in the statutory sense*".[230] This is because s. 1 (4) of the Factors Act (1898) expressly includes these documents, together with the bill of lading, under the concept of "*document of title*".[231] Moreover, this paragraph also applies for the purpose of the SGA (1979).[232] As a result, transfer of these other documents can yield an effect of delivery under some statutory rules, such as s. 24 and s. 25 SGA (see 3.4.3.1). The distinction between the document of title to goods in common law and that in statutory law reminds us that possession is a vague concept in English law. In understanding this concept, the context under which it is used is important: "*a person might have possession (control) for the purposes of one legal rule but not for another*".[233]

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225 Benjamin 2014, p. 1168.
226 Benjamin 2014, p. 1168, 1394.
227 Benjamin 2014, p. 1168-1169.
228 Bridge 2014, p. 429.
229 Benjamin 2014, p. 1171.
230 Benjamin 2014, p. 1398.
231 S. 1 (4) FA (1898): "*The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented […].*"
232 S. 61 (1) SGA (1979): "'*document of title to goods' has the same meaning as it has in the Factors Acts […].*"
233 Rostill 2016, p. 21.

In common law, other documents than the bill of lading might not lead to the acquisition of indirect possession. Indirect possession has to be obtained via ordinary methods, namely attornment. In other words, individuals can obtain indirect possession only when the direct possessor acknowledges that the goods are held on their behalf.[234] In general, attornment is a separate act, which cannot be inferred from the transfer of these documents. To understand this, we take two different types of document as an example: delivery orders and delivery warrants. Delivery orders are issued by sellers to require the direct possessor (such as a warehouseman) to deliver the goods to buyers. Delivery orders do not have any effect of delivery in common law. The direct possessor who fails to respond to the delivery order held by a buyer only owes an obligation to the seller.[235] Delivery warrants are made by the direct possessor (such as a warehouseman) who undertakes to deliver the goods. Despite this acknowledgment in advance, indirect possession of the goods does not pass to the acquirer of delivery warrants until the direct possessor attorns to the acquirer separately.[236]

In terms of the effect of delivery of securities to goods, English law seems to stick to a principle of *numerus clausus*: whether a document has the effect of delivery cannot be decided by individual parties, but by commercial custom.

> "*At common law, a document can become a 'negotiable' (i.e. transferable) document of title only by virtue of a mercantile custom to this effect; and it follows from the reasoning on which this submission is based that a document cannot acquire the characteristic of this kind of transferability merely by virtue of the intention of the parties to it, or of one, as expressed in its terms.*"[237]

On the other hand, the list is also open, because commercial custom determines whether a document is qualified as a document of title and has the effect of delivery.[238] It is imaginable that once a document is commonly deemed as a document of title in commercial transactions, there is no reason to refuse to add this document into the closed list.[239]

Here, it is worthwhile noting that the lack of the effect of delivery of most documents (except the bill of lading) does not impede the transaction of goods. This is because English law insists on the consensual principle: ownership can be transferred independently from delivery (see 3.4.2.1). Just as pointed out by English lawyers, the transfer of ownership and the transfer of possession (delivery) are two separate matters: the requirement of attornment by the actual possessor never affects the transfer of owner-

234 Benjamin 2014, p. 1394.
235 Bridge 2015, p. 77.
236 Bridge 2015, p. 77.
237 Benjamin 2014, p. 1395.
238 Bridge, Gullifer, McMeel and Worthington 2013, p. 659.
239 Goode 2010, p. 53; Zwitser 2006, p. 10.

ship.[240] Moreover, transfer of bills of lading has an effect of delivery, but this does not necessarily give rise to the "*passing of property in the goods to the buyer*", because what matters is the parties' intention.[241] However, it should be noted that where a document other than the bill of lading is issued for certain goods, these goods cannot be pledged through pledging this document.[242]

It is not completely correct to say that other securities to goods than the bill of lading do not have any effect of delivery. These securities can be a document of title to goods in statutory law. For example, transfer of these documents is stipulated as an equivalent to delivery of the goods in the situation of *bona fide* acquisition.[243] Under s. 24 SGA (seller in possession after sale) and s. 25 SGA (buyer in possession after sale), the transfer of documents of title to goods, which includes warehouse receipts and delivery orders, can satisfy the requirement of delivery.[244] In this situation, the attornment by the actual possessor is unnecessary.[245]

If possession is treated as an outward appearance of ownership of the goods involved, and delivery is necessary for *bona fide* acquisition, then a document of title (in the statutory law sense) can also be seen as an outward appearance, and the transfer of this document has the effect of delivery. In the situation of *bona fide* acquisition, the unauthorized transferor's control of the document represents possession of the goods,[246] and the transfer of the document to the transferee in good faith amounts to delivery of the goods.[247] Therefore, though a document to goods might fail to lead to delivery in the situation of authorized disposals, this document can make delivery of the goods involved dispensable in the situation of *bona fide* acquisition (s. 24 and s. 25 SGA).

B The Blocking Effect of Securities to Goods

As just shown, English law draws a distinction between the document of title in the common law sense and that in the statutory law sense. Under common law, only the bill of lading is a document of title and has the effect of delivery. In practice, however, the buyer might not obtain the bill of lading after having acquired ownership of the goods involved. For example,

240 Benjamin 2014, p. 1397.
241 Bridge 2014, p. 300; Peel 2002, p. 141-142.
242 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.41.
243 Benjamin 2014, p. 1399.
244 S. 24 SGA (1979): "*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.*"
245 Benjamin 2014, p. 1399.
246 Bridge 2014, p. 235.
247 Bridge 2014, p. 241.

the ship arrives before the bill of lading, and the buyer cannot present the bill of lading to the carrier.[248] In this very situation, the carrier bears no obligation to deliver the goods to the buyer, according to the predominant opinion.[249] In principle, the carrier is obliged to deliver the goods to the person who holds the bill of lading. Otherwise, the carrier will expose him- or herself to the risk of misdelivery.

Here it is noteworthy that transfer of ownership of the goods under a bill of lading is not dependent on this bill in English law. The main reason is that English law sees the transfer of ownership and delivery of the goods as two separate issues: whether and when ownership is transferred is contingent on the individuals' intention (see 3.4.2.1). In the case of pledge, the goods can be pledged without involving the bill of lading under equity law.[250] However, before delivering, and when necessary endorsing, the bill of lading to the pledgee, the pledge created cannot be enforced against third parties in good faith, such as another pledgee who obtains possession of the bill.[251] Therefore, the pledge is not perfected until the bill of lading is properly involved.[252]

As has been shown above, the transfer of other documents than the bill of lading cannot give rise to an effect of delivery in common law, and the transferee cannot obtain indirect possession until the direct possessor attorns to him or her. This implies that these other documents might be held by another person than the indirect possessor of the goods involved. For example, a warehouseman acknowledges holding the goods stored on behalf of the transferee when the transferor remains in control of the warehouse receipt. As also has been shown above, what matters for the transfer of goods is the parties' intention in English law. This implies that these other documents might be held by another person than the owner of the goods. For example, the owner transfers ownership of the goods under a warehouse receipt to the transferee but retains this warehouse receipt. In sum, other documents than the bill of lading are not necessarily held by the owner of the goods.

The above-shown divergence between securities to goods and ownership triggers a risk. This risk is that the owner first transfers ownership of the goods to one person by retaining the document, and then uses this document to mislead another person. In this very situation, the latter person is able to claim *bona fide* acquisition under some conditions. Among these conditions, one is that this person obtains the document from the previous

248 Goode 2010, p. 1158.

249 Aikens, Lord and Bools 2016, no. 5.3-5.10. However, the carrier might also agree to deliver the goods to the buyer who does not receive the bill yet. Usually, the buyer needs to offer a letter of indemnity to dispel the carrier's fear about the risk of misdelivery. See Aikens, Lord and Bools 2016, no. 5.66-5.68.

250 Zwitser 2005 (1), p. 170.

251 Zwitser 2005 (1), p. 170.

252 Curwen 2007, p. 162; Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.37.

owner (see s. 24 and s. 25 SGA).[253] Here there are still two questions: (1) if the former person obtains the document, can the latter person successfully claim *bona fide* acquisition; and (2) if the former person does not obtain the document but has acquired indirect possession of the goods in the way of attornment, can the latter person successfully claim *bona fide* acquisition after obtaining the document? In the following discussion, we analyze these two particular questions in a hypothetical case involving a warehouse receipt.

In this hypothetical case, A stores his goods in the place of B (the warehouseman) and transfers the goods together with the warehouse receipt to C. After this transfer, A pledges the goods to D who obtains indirect possession of the goods from B: B acknowledges holding the collateral for D. Is D able to acquire a property right of pledge?

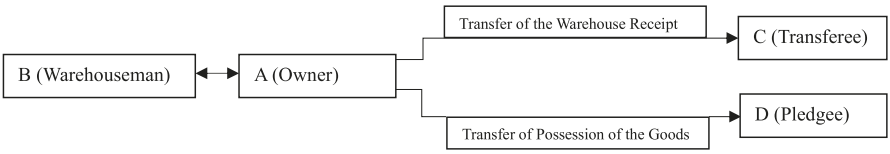

Figure 11

According to a landmark precedent ("*City Fur v. Fureenbond*"), D can acquire the right on the ground of s. 24 SGA (seller in possession after sale), a provision of *bona fide* acquisition.[254] As warehouse receipts are not a document of title under common law (see 4.2.2.1.A), the transfer of the warehouse receipt neither deprives A of his indirect possession, nor allows C to obtain indirect possession of the goods. A is still in possession of the goods after the transfer, despite the fact that he is neither in actual control of the goods nor the warehouse receipt.[255] However, if A or C has notified B of the transfer, and B immediately agrees to hold the goods on behalf of the new owner C, then D will lose the chance to obtain the right of pledge. B's attornment to C means that A loses his possession completely on the one hand, and C obtains indirect possession of the goods on the other hand. After the attornment, the possibility of *bona fide* acquisition by D will be excluded.

The analysis above indicates that the transferee who merely obtains the document of title involved is not absolutely safe. The risk of *bona fide* acquisition by third parties still exists before the direct possessor attorns to the transferee. About the hypothetical case, one doubt is whether D should be expected to be aware of the abnormality of the secured transaction. As the collateral is warehoused goods, should D pay particular attention to A's failure to present the warehouse receipt? If the answer is positive, then it

253 Bridge, Gullifer, McMeel and Worthington 2013, p. 363-366.
254 *City Fur Manufacturing Co Ltd v. Fureenbond (Brokers) London Ltd* [1937] 1 All E. R. 937, see Bridge 2014, p. 235-236.
255 Bridge 2014, p. 236.

seems difficult to say that D is in good faith with respect to A's authority to dispose.[256]

Now let us reverse the way of transferring the right of ownership and the way of creating the right of pledge. A transfers ownership of the goods to C, and C obtains B's attornment and thus becomes an indirect possessor. After this transfer, A pledges the goods to D by giving up the warehouse receipt. Is D able to obtain a property right of pledge?

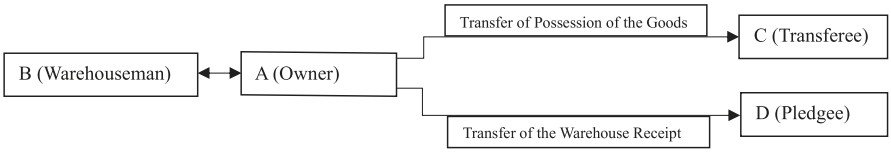

Figure 12

On the basis of a literal understanding of s. 24 SGA, D seems able to acquire a right of pledge: A is in direct possession of the document and delivers it to D.[257] For the application of this provision, what matters is the seller's possession of the document and the delivery of this document to third parties in good faith. It is irrelevant whether the seller remains in possession of the goods involved. Therefore, the buyer who allows the seller to retain the document to goods involved will run a risk out of s. 24 SGA: a third party in good faith might prevail after obtaining this document.

In sum, the transfer of securities to goods is neither a condition for acquisition of ownership of the goods, nor a condition for acquisition of possession of the goods. However, securities to goods are treated as a cause for the reliance of third parties in good faith. As a result, to entirely preclude the risk of *bona fide* acquisition by third parties, the transferee not only needs to obtain attornment by the direct possessor, but also acquire the document from the transferor.

4.2.2.2 German Law

Securities to goods are known as *Güterpapiere* in German law.[258] The concept of *Wertpapiere* (literally the document of value) is broad and includes other securities than securities to goods, such as shares, bonds, cheques and bills

256 "*Depending on the circumstances, a potential transferee may expect from the third party's type of business that this person will usually issue documents. If so, and goods are offered without related documents being presented, the buyer may have reason to be suspicious and may wish to check with the third party before proceeding further.*" See Acquisition and Loss of Ownership of Goods 2011, p. 611.

257 This way of understanding is in line with the rule that the unpaid seller cannot enforce his or her right of lien or right of stoppage against *bona fide* third parties who obtain the document of title to the goods. See Bridge, Gullifer, McMeel and Worthington 2013, p. 380.

258 Staub/Canaris 2004, § 363, Rn. 52.

of exchange. Generally speaking, German law has a closed list of securities.[259] Individuals are not entitled to create a new type of document to goods as they wish. In general, there are four types of document to goods: the "bill of lading (*Konnossement*)", the "shipping note (*Ladeschein*)", the "warehouse receipt (*Lagerschein*)", and the "delivery order (*Lieferschein*)".[260] The former two types are a freight document. The biggest difference between the delivery order and the warehouse receipt is that the former is made by depositors, while the latter is issued by warehousemen.[261] In this part, we focus on two issues: one is the legal effect of securities to goods, and the other is the blocking effect of securities to goods.

A The Legal Effect of Securities to Goods

In general, securities to goods are a document embodying a personal right, thereby being treated as a kind of "obligational document".[262] This personal right is a claim of recovery against the direct possessor of the goods, usually the issuer of the document.[263] It is often held that securities to goods "objectify" the claim of recovery, so that the claim can be disposed of just like a corporeal movable.[264] Disposal of the document implies that the claim embodied is disposed of. For example, transfer of a document to goods allows the transferee to obtain the claim of recovery embodied within this document,[265] and pledge of the claim can be realized by pledging the document (§ 1292 BGB).[266] In addition, objectification of the claim of recovery by the document lays a basis for *bona fide* acquisition of the claim: third parties in good faith can acquire the claim by *bona fide* acquisition of the document, even when the document is stolen by the transferor (§ 935 BGB).[267]

259 Hueck and Canaris 1986, p. 196; Zöllner 1978, p. 25.
260 Hueck and Canaris 1986, p. 194-196.
261 Staub/Canaris 2004, § 363, Rn. 37.
262 Zöllner 1978, p. 8-9.
263 Hueck and Canaris 1986, p. 193; MüKoHGB/Langenbucher 2018, § 363, Rn. 45.
264 Hueck and Canaris 1986, p. 199; Staub/Canaris 2004, § 363, Rn. 55.
265 Zöllner 1978, p. 153; MüKoHGB/Langenbucher 2018, § 364, Rn. 7.
266 Here the pledge of the claim of recovery by pledging the document should be carefully distinguished from the pledge of the goods *per se*. The object of the former pledge is the claim of recovery, while the object of the latter pledge is the goods under the document. On the other hand, these two pledges are closely related in two aspects. The first aspect is that if it is uncertain whether the claim of recovery or the goods *per se* are pledged when the document is delivered for the purpose of pledge, it will be assumed that the goods *per se* are pledged, provided that the document involves ascertainable goods. See MüKoBGB/Damrau 2017, § 1292, Rn. 3. The second aspect is that when the claim of recovery pledged is realized, the pledge of the claim "continues" existing on the goods delivered by the debtor of the document due to the rule of "real substitution (*dingliche surrogation*)" (§ 1287 BGB). In fact, the outcome of this rule is that a new pledge comes into existence on the goods, which is known as "pledge on substitutes (*Surrogationspfrandrecht*)". See Staub/Canaris 2004, § 364, Rn. 13; Heymann/Horn 2005, § 364, Rn. 5.
267 Heymann/Horn 2005, § 363, Rn. 27. However, *bona fide* acquisition of the claim does not mean that *bona fide* acquisition of the lost goods is possible, as will be seen later.

In terms of the way of disposing of the document, there is a distinction of bearer securities and order securities. If the document is made out to bearer, then the document needs to be delivered to the transferee in the case of transfer or the pledgee in the case of pledge.[268] If the document is made out to a particular person or his or her order, both delivery and endorsement are required (§ 364 HGB).[269] In the situation of transfer, the transferor records the transferee's name on the back of the document. Delivery is not confined to be actual, and *traditio per constitutum possessorium* also suffices.[270] In the situation of pledge, the endorsement usually includes a mark of pledge, such as "*zur Verpfändung* (for pledge)" or "*zur Sicherheit* (for security)". However, the endorsement for pledge may not include such mark, which is known as "concealed endorsement for pledge (*verdeckte Pfandindossament*)".[271] The absence of a mark of pledge does not affect that a pledge is validly created between the pledgor and the pledgee.[272] It is noteworthy that the pledgor needs to deliver the document in the way prescribed by § 1205 and 1206 BGB.[273] Therefore, *traditio per constitutum possessorium* is excluded when the document is under direct possession of the pledgor.[274] If the document is under indirect possession of the pledgor, then the pledgor needs to provide indirect possession and notify the direct possessor.[275]

As a personal right, the claim of recovery embodied within order securities to goods can also be disposed of according to civil law rules (the BGB) without involving endorsement. This concerns the blocking effect of the document and will be discussed later.

Securities to goods are not only related to the disposal of the claim of recovery, but also to the disposal of the goods *per se*.[276] In general, "transfer (*Übertragung*)" of securities to goods recognized by law has an "effect of delivery (*Traditionswirkung*)" of the goods.[277] For this reason, securities to goods are termed "*traditio* document (*Traditionspapiere*)".[278] As has been shown above, German law has a *traditio* system for the disposal of corporeal movables (see 3.4.2.2). The effect of delivery implies that the transfer of a document to goods allows the goods under this document to remain where they are. Upon the transfer of the document, the transferee obtains

268 Tiedtke 1985, p. 286.
269 Staub/Canaris 2004, § 364, Rn. 1; Heymann/Horn 2005, § 364, Rn. 1.
270 Staub/Canaris 2004, § 364, Rn. 1; Heymann/Horn 2005, § 364, Rn. 1.
271 MüKoHGB/Langenbucher 2018, § 364, Rn. 18.
272 MüKoHGB/Langenbucher 2018, § 364, Rn. 18.
273 MüKoBGB/Damrau 2017, § 1292, Rn. 3; Westermann 2011, p. 1206-1207.
274 Brehm and Berger 2014, p. 528.
275 Brehm and Berger 2014, p. 528.
276 MüKoHGB/Langenbucher 2018, § 363, Rn. 59.
277 Hueck and Canaris 1986, p. 199. Here, it should be noted that just delivering the document is not sufficient, the ownership of the document must be transferred. The new law deliberately requires transfer of the document, rather than mere delivery of the document. See MüKoHGB/Herber 2018, § 524, Rn. 14.
278 Wieling 2006, p. 351.

(indirect) possession of the goods involved, and the requirement of delivery is fulfilled.[279] The effect of delivery is confirmed by § 448,[280] § 475g,[281] and § 524 HGB.[282] The effect also implies that mere transfer of the document does not suffice for transferring or pledging the goods.[283] Other requirements, especially the power of disposal and valid agreement of the transfer or pledge, also have to be satisfied.[284]

As to the way of understanding the effect of delivery, there are controversies. The "absolute theory (*absolute Theorie*)" treats § 448, § 475g and § 524 HGB as three provisions independent from the BGB.[285] In contrast, the effect of delivery should be understood under the BGB according to the "relative theory (*relative Theorie*)". The document to goods embodies a claim of recovery. Transfer of the document implies the transfer of the claim, which suffices for *traditio longa manu* under § 931 BGB.[286] According to this provision, indirect possession of the goods can be provided by assigning the claim of recovery.[287] The predominant viewpoint is a third theory: the "representation theory (*Repräsentationstheorie*)". According to this theory, the document represents indirect possession of the goods, and transfer of the document can represent delivery of the goods.[288] The effect

279 McGuire 2008, p. 107.

280 § 448 HGB: "*Die Begebung des Ladescheins an den darin benannten Empfänger hat, sofern der Frachtführer das Gut im Besitz hat, für den Erwerb von Rechten an dem Gut dieselben Wirkungen wie die Übergabe des Gutes. Gleiches gilt für die Übertragung des Ladescheins an Dritte.*" English translation: § 448 HGB: "*The issuance of the shipping note to the consignee named therein has the same effect as the delivery of the goods for the acquisition of rights to the goods, provided that the carrier is in possession of the goods. The same applies to the transfer of the shipping note to third parties.*"

281 § 475g HGB: "*Die Begebung des Lagerscheins an denjenigen, der darin als der zum Empfang des Gutes Berechtigte benannt ist, hat, sofern der Lagerhalter das Gut im Besitz hat, für den Erwerb von Rechten an dem Gut dieselben Wirkungen wie die Übergabe des Gutes. Gleiches gilt für die Übertragung des Lagerscheins an Dritte.*" English translation: § 475g HGB: "*The issuance of the warehouse receipt to the person, who is named therein and entitled to receive the goods, has the same effect as the delivery of the goods for the acquisition of rights to the goods, provided that the warehouseman is in possession of the goods. The same applies to the transfer of the warehouse receipt to third parties.*"

282 § 524 HGB: "*Die Begebung des Konnossements an den darin benannten Empfänger hat, sofern der Verfrachter das Gut im Besitz hat, für den Erwerb von Rechten an dem Gut dieselben Wirkungen wie die Übergabe des Gutes. Gleiches gilt für die Übertragung des Konnossements an Dritte.*" English translation: § 524 HGB: "*The issuance of the bill of lading to the person, who is named therein and entitled to receive the goods, has the same effect as the delivery of the goods for the acquisition of rights to the goods, provided that the shipper is in possession of the goods. The same applies to the transfer of the bill of lading to third parties.*"

283 Hueck and Canaris 1986, p. 200.

284 Zöllner 1978, p. 150.

285 Hueck and Canaris 1986, p. 200; Wieling 2006, p. 353.

286 Hueck and Canaris 1986, p. 199; Wieling 2006, p. 353.

287 § 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, then delivery may be replaced by assigning the claim of recovery of the thing to the acquirer by the owner.*"

288 Hueck and Canaris 1986, p. 200; Wieling 2006, p. 353.

of delivery falls under § 929 BGB, a provision concerning actual delivery, instead of § 931 BGB.[289] The three theories do not differ substantially in legal consequences.[290]

Furthermore, transfer of the document can also make delivery of the goods *per se* unnecessary for *bona fide* acquisition of the goods. According to the representation theory, the *bona fide* acquisition occurs under § 932 BGB, a provision concerning *bona fide* acquisition in the way of actual delivery and *traditio brevi manu*.[291] In contrast, the relative theory explains *bona fide* acquisition under § 934 BGB, a provision concerning *bona fide* acquisition in the way of *traditio longa manu*.[292] In general, it is immaterial which provision is applied.[293] In addition to delivery, the other requirements of *bona fide* acquisition also have to be fulfilled. For example, the third party must be in good faith with respect to the transferor's defective authority of disposal and pay a reasonable price.

As to *bona fide* acquisition in the situation involving a document to goods, particular attention should be paid to § 935 BGB. According to this provision, *bona fide* acquisition is not applicable to lost, missing or stolen things, except currency and bearer securities. Therefore, ownership of lost or stolen bearer securities to goods might be acquired by a third party from an unauthorized transferor. Here two points should be noted. The first point is that *bona fide* acquisition of a bearer document to goods does not necessarily mean that the goods under this document are acquired. If the goods *per se* are lost or stolen contrary to the owner's will, *bona fide* acquisition of the goods remains impossible.[294] In other words, *bona fide* acquisition of lost or stolen documents cannot make *bona fide* of lost or stolen corporeal movables possible. The second point is that *bona fide* acquisition of the bearer document to goods implies that the claim of recovery embodied is acquired. This forms an exception to the rule that *bona fide* acquisition of personal rights is generally impossible in German law (see 4.1.3.2). § 935 BGB is a rule applicable to the *bona fide* acquisition of bearer securities to goods.

289 Hueck and Canaris 1986, p. 200; Wieling 2006, p. 353.

290 The three theories differ in the following issue: whether the document debtor needs to have possession of the goods. For example, in light of the absolute theory, the holder of a warehouse receipt can deliver the goods by transferring this receipt, even though the warehouseman does not have possession of the goods. However, according to the relative theory, the goods cannot be successfully delivered by transferring the receipt when the warehouseman is not possession of the goods. Under the representation theory, a precondition for the effect of delivery is that the debtor of the document has possession of the goods. In other respects, the representation theory does not have substantial differences from the relative theory either. This is why some German scholars think that it does not matter which approach is adopted. See Staub/Canaris 2004, § 363, Rn. 102; Hueck and Canaris 1986, p. 200; Zöllner 1978, p. 153-154; Brox and Henssler 2009, p. 334.

291 Zöllner 1978, p. 154.

292 Hueck and Canaris 1986, p. 201-202.

293 Zöllner 1978, p. 154.

294 Zöllner 1978, p. 155; Tiedtke 1985, p. 281.

To the acquisition of order securities to goods from an unauthorized transferor, another rule is applicable.[295]

B The Blocking Effect of Securities to Goods

In German law, the existence of securities to goods does not mean that civil law rules (the BGB) are inapplicable. In general, where a document to goods is made out for certain goods, both the claim of recovery embodied and these goods can be disposed of under the BGB.

For example, the claim of recovery can be transferred in the way of "assignment (*Zession*)" according to § 398 BGB.[296] Endorsement is unnecessary for the assignment, and § 364 HGB is not relevant. However, as an extra requirement, the assignor has to deliver the document to the assignee.[297] Here *traditio per constitutum possessorium* suffices for satisfying this requirement.[298] This implies that the new creditor does not necessarily obtain actual control of the document. If the claim is transferred in the way of assignment, *bona fide* acquisition is impossible.[299] Moreover, the claim of recovery can be pledged under § 1274 BGB, a provision concerning the pledge of rights. Just like in the situation of assignment, there is an extra requirement: the document needs to be delivered to the pledgee.[300] Due to this extra requirement, notifying the debtor, usually the direct possessor who bears the duty to deliver the goods, is unnecessary.[301] Pursuant to § 1280 BGB, pledge of an ordinary claim requires notifying the debtor of this claim (see 4.1.4.2).

In addition to the claim of recovery, the goods under a document can also be transferred according to the civil law (the BGB), especially the rules concerning the acquisition of corporeal movables in the way of *traditio longa manu* (§ 931 BGB).[302] Securities to goods are usually issued by the direct possessor of the goods, such as a warehouseman or carrier, who acknowledges holding possession for and owes a right of recovery to the holder of the document. The holder has indirect possession as well as a claim of recovery against the direct possessor. For this reason, German law allows the holder to dispose of the goods in the way of *traditio longa manu* by directly assigning the right of recovery to the transferee.

295 According to § 365 (1) HGB, art. 16 (2) WG, a paragraph concerning the *bona fide* acquisition of bills of exchange, is also applicable to securities to goods. About this paragraph, a detailed discussion will be provided later (see 4.2.3.2.B).
296 MüKoHGB/Langenbucher 2018, § 364, Rn. 9; Staub/Canaris 2004, § 364, Rn. 18.
297 MüKoHGB/Langenbucher 2018, § 364, Rn. 9; Staub/Canaris 2004, § 364, Rn. 18.
298 MüKoHGB/Langenbucher 2018, § 364, Rn. 9; Staub/Canaris 2004, § 364, Rn. 18.
299 MüKoHGB/Langenbucher 2018, § 364, Rn. 10; Staub/Canaris 2004, § 364, Rn. 24.
300 MüKoBGB/Damrau 2017, § 1292, Rn. 17; Staub/Canaris 2004, § 364, Rn. 23.
301 MüKoBGB/Damrau 2017, § 1292, Rn. 17; Staub/Canaris 2004, § 364, Rn. 23.
302 MüKoHGB/Langenbucher 2018, § 363, Rn. 73.

However, transfer of the goods in the way of *traditio longa manu* only takes effect when, as an extra requirement, the document is delivered to the transferee. This requirement is an outcome of judicial precedents.[303] For fulfilling the requirement, delivery of the document suffices. The document does not have to be transferred. This means that endorsement is unnecessary when the document is made out to order.[304] The rationale behind the extra requirement is that the document should be in the hands of the real owner, so that the transferor is precluded from using the document to mislead others.[305]

> "*Da der Anspruch auf Herausgabe der Ware im Papier verkörpert ist, bleibt er untrennbar mit der Urkunde verbunden und kann deshalb auch nicht gesondert von ihr geltend gemacht werden. Infolgedessen können Güter, über die ein Traditionspapier ausgestellt ist, durch Einigung und Abtretung des Herausgabeanspruchs nur übereignet werden, wenn gleichzeitig auch das Papier übergeben wird. Das verbriefte Recht auf Herausgabe soll nicht vom Besitz am Papier getrennt werden.*"[306]

Before the document is given up to the transferee, the right of recovery cannot be validly assigned. Not only does this imply that delivery of the goods is not completed, but also that ownership of the goods does not pass to the transferee.[307] To add a word, even though the transferee is not aware of the existence of the document, the goods cannot be acquired until the document is handed over.[308] Thus, a risk of acquiring no ownership due to the fraudulent retention of the document by the transferor exists for the transferee.[309] This concerns the problem of the invisibility of securities to goods, which will be discussed later (see 4.2.2.5.C).

The extra requirement averts the divergence between possession of the document and ownership of the goods to a large extent. Nevertheless, the divergence might still occur. This is because both *traditio per constitutum possessorium* and *traditio longa manu* are an eligible method to deliver the document to the transferee.[310] In these two situations, the transferee does not obtain actual control of the document. In general, where the document

303 Hueck and Canaris 1986, p. 205.
304 Staub/Canaris 2004, § 363, Rn. 142.
305 Staub/Canaris 2004, § 363, Rn. 142; Hueck and Canaris 1986, p. 205; Tiedtke 1985, p. 285-286.
306 NJW 1968, p. 591, cited from Schnauder 1991, p. 1648. English translation: "*Since the claim to recover the goods is embodied within the document, the claim remains inseparably related to the document and thus cannot be enforced independently from the document. As a result, the goods, for which a traditio document is issued, can only be transferred by agreement and assignment of the claim to recover when this document is handed over at the same time. The documentalized right to recover should not be separated from possession of the document.*"
307 Staub/Canaris 2004, § 363, Rn. 143.
308 Hueck and Canaris 1986, p. 205.
309 MüKoHGB/Frantzioch 2018, § 475g, Rn. 73.
310 Staub/Canaris 2004, § 363, Rn. 142; MüKoHGB/Langenbucher 2018, § 363, Rn. 73.

is still controlled by the transferor, there is a possibility that the document is used by the transferor to mislead third parties. Furthermore, there is a need to protect third parties in good faith.[311]

A question regarding the blocking effect can arise in the following hypothetical case: A transfers his goods stored at the place of a warehouseman to B via transferring the warehouse receipt, then A pledges the same goods to innocent C through assigning the claim of recovery and notifying the warehouseman. In this situation, B can safeguard his ownership against C, because C cannot claim *bona fide* acquisition due to the defect in delivery. After transferring ownership of the goods and the document to B, A loses ownership of the goods as well as the claim of recovery against the warehouseman. As *bona fide* acquisition of claims is generally impossible in German law, C is not able to acquire the claim of recovery from C. As a result, delivery through assigning the claim is impossible. According to the German legal theory, what § 934 BGB can cure is the "defect of ownership (*Mangel des Eigentums*)", rather than the defect of delivery.[312] Even if C obtains actual control of the goods later, he cannot acquire a pledge due to the absence of valid delivery, regardless of whether he is in good faith. In general, German law is different from English law (s. 24 SGA and "*City Fur Manufacturing Co Ltd v. Fureenbond (Brokers) London Ltd*") here: under English law, C is able to obtain indirect possession and acquires the pledge.

The existence of a document to goods does not prevent the goods from being able to be pledged according to § 1205 (2) BGB, a paragraph concerning the pledge of corporeal movables.[313] For this way of pledge, endorsement is not necessary when the document is made out to order. However, an extra requirement is that the document needs to be delivered to the pledgee. Pursuant to § 1205 (2) BGB, when the corporeal movable collateral is under factual control by a third person, notifying this person is necessary. The extra requirement of delivery of the document to the pledgee makes such notification dispensable.[314] It is unclear whether this extra requirement can be fulfilled by *traditio per constitutum possessorium*. It seems that the answer is negative. As has been shown above, in the situation of pledge of the document *per se*, *traditio per constitutum possessorium* is excluded when the document is under direct possession of the pledgor.[315]

311 In fact, the extra requirement of delivery of the document has been doubted by some scholars. Where this requirement is completely abolished, it suffices that third parties in good faith can be protected by entitling them to *bona fide* acquisition when the original owner uses the document retained to mislead them. See Staub/Canaris 2004, § 363, Rn. 144.

312 Staub/Canaris 2004, § 363, Rn. 143-144.

313 Schnauder 1991, p. 1648.

314 Schnauder 1991, p. 1648.

315 MüKoBGB/Damrau 2017, § 1292, Rn. 3; Westermann 2011, p. 1206-1207; Brehm and Berger 2014, p. 528.

4.2.2.3 Dutch Law

In Dutch law, securities to goods are known as "proprietary securities (*goederenrechtelijk waardepapier*)". However, this term is misleading: securities to goods do not represent ownership or any limited property right of the goods, but only a personal claim of recovery.[316] The right embodied within a bearer and order document is termed "right to bearer and order (*recht aan toonder en order*)" respectively in the BW (art. 3:93 BW). In general, Dutch law has an open system of bearer and order securities.[317] This open system is confirmed in the landmark case "*Zürich/Lebosch*".[318] There are three typical securities to goods: the "warehouse receipt (*ceel*)", the "bill of lading (*cognossement*)", and the so-called "CT-document" (the combined transport document).[319]

A The Legal Effect of Securities to Goods

As just mentioned, the right embodied within securities to goods is a claim of recovery of the goods. Due to the existence of the document, this claim can be disposed of like a corporeal movable.[320] For example, the claim can be transferred and pledged by transferring and pledging the document respectively.[321] If the document is made out to bearer, then delivery of the document is necessary for the transfer and pledge of the document (art. 3:93 and 3:236 (1) BW). If the document is made out to order, then both delivery and endorsement are required (art. 3:93 and 3:236 (1) BW). In the situation of pledging an order document, the endorsement usually includes a mark of pledge, such as "*ter verpanding* (for pledge)".[322] As to the question whether the endorsement for pledge can be made in a "concealed (*geheime*)" manner,

316 Mulder 1948, p.11; Van Maanen and Claringbould 2017, p. 2.
317 Van der Lely 1996, p. 71.
318 Zwitser 2006, p. 9.
319 Van der Lely 1996, p. 70-71; Reehuis 2004, p. 54.
320 Reehuis and Heisterkamp 2019, p. 233.
321 Here, it should be noted that where a document to goods is pledged, the object of the pledge is, in essence, the right of recovery of the goods, rather than the goods themselves. In general, whether the goods are pledged is a question depending on the bilateral agreement between the pledgor and the pledgee. See Van Maanen and Claringbould 2017, p. 4. However, the pledgee of the document, namely pledge of the claim of recovery, is often also a pledgee of the goods involved. Where the document is given up for the purpose of pledge, parties have an intention to pledge the goods involved in normal situations. As a result, pledge of the document is pledge of the goods. See Logmans, p. 262. However, it is not always so. For example, if ownership of the goods is not acquired by the pledgor when the document is pledged, then only the claim of recovery can be pledged. See Zwitser 2006, p. 227. However, on the basis of the rule of "substitution (*zaakvervanging*)", the pledge of the claim can "continue" existing on the goods delivered by the debtor of the document. See Steneker 2012, p. 131.
322 Zwitser 2012, p. 223.

the predominant opinion is in favor of a positive answer.[323] Therefore, the lack of a mark of pledge does not affect the valid creation of pledge.

As the claim of recovery is embodied within a document, *bona fide* acquisition of the claim is possible for third parties by acquiring this document in good faith.[324] In Dutch law, *bona fide* acquisition of rights to bearer and order and that of corporeal movables are regulated in the same provision, namely art. 3:86 BW.

Securities to goods are closely related to the disposal of the goods. As has been shown above, Dutch law has a *traditio* system for the disposal of corporeal movables (see 3.4.2.3). Where a document is issued for certain goods, "transfer (*levering*)" of this document can yield an effect of delivery of the goods.[325] This legal effect is affirmed by art. 6:607 (1) BW, a paragraph concerning the warehouse receipt,[326] as well as art. 8:417 and 8:924 BW, two provisions concerning the bill of lading.[327] Due to the effect of delivery, securities to goods are called "*traditio* documents (*Traditionspapieren*)".[328] In understanding the effect, two points should be noted.

The first point concerns the way to understand the effect of delivery. The predominant opinion seems to be that the effect occurs in the sense of *traditio longa manu*.[329] As shown above, a claim of recovery is embodied within the document to goods. According to Van der Lely, transfer of the document leads to the assignment of the claim of recovery, which suffices for providing possession of the goods.[330] However, delivery through assigning the claim of recovery is not explicitly recognized by the BW. Pursuant to art. 3:115 (c) BW, *traditio longa manu* requires either acknowledgment by or notification to the person who is in factual control of the goods.[331] In

323 Zwitser 2006, p. 223-224; Asser/Van Mierlo 2016, nr. 149; Van Maanen and Claringbould 2017, p. 4.

324 Reehuis and Heisterkamp 2019, p. 235.

325 Asser/Van Mierlo 2016, nr. 159.

326 Art. 7:607 (1) BW: "*Indien ter zake van een bewaarneming een ceel of een ander stuk aan toonder of order is afgegeven, geldt levering daarvan vóór de aflevering van de daarin aangeduide zaken als levering van die zaken*." English translation: Art. 7:607 (1) BW: "*If a warehouse receipt or another document to order or to bearer has been made for the sake of custody, then delivery of this receipt or document, before delivery of the goods, is treated as delivery of the goods.*"

327 Art. 8:417 BW: "*Levering van het cognossement vóór de aflevering van de daarin vermelde zaken door de vervoerder geldt als levering van die zaken*." English translation: Art. 8:417 BW: "*Before delivering the goods mentioned in the bill of lading by the shipper, delivery of the bill of lading is treated as delivery of the goods.*"

328 Zevenbergen 1951, p. 59.

329 Snijders and Rank-Berenschot 2017, p. 117; Zwitser 2005 (1), p. 169; Van der Lely 1993, p. 115-118; Mijnssen and Schut 1991, p. 108-109; Scheltema 1993, p. 33.

330 Van der Lely 1996, p. 96-97.

331 In this aspect, art. 3:115 (c) BW is different from § 931 BGB. The latter only requires assignment of the claim of recovery for *traditio longa manu*. However, the former requires that the third party who is in factual control of the goods has to acknowledge holding the goods for the transferee or, at least, the third party is notified of the transfer. In the viewpoint of Dutch legislators, this extra requirement is necessary for the transferee's acquisition of factual control of the goods. See Rank-Berenschot 2012, p. 67.

contrast, the satisfaction of this requirement is unnecessary for securities to goods to yield an effect of delivery. For this reason, some Dutch scholars see the transfer of the document as a special or independent form of delivery, though they recognize that this form of delivery is closely connected to *traditio longa manu*.[332] However, it is possible to argue that the issuer of the document, i.e. the person who is in factual control of the goods, has expressed an acknowledgment in advance when making out the document.[333] According to this argument, the legal effect of delivery falls under *traditio longa manu*.

The second point is that only transfer of the document does not suffice for acquiring ownership of the goods. Except the requirement of delivery, the other requirements for the valid transfer of the goods also have to be fulfilled. Therefore, the transferor needs to have authority to dispose, and there must be a valid legal ground (usually a contract) for the transfer.

The effect of delivery might also occur in the situation of *bona fide* acquisition of the goods (art. 3:86 BW). In practice, the transferor may neither have legal ownership of the goods nor be a legal holder of the document.[334] For example, the unauthorized transferor is a thief of the document. In this very situation, the transferee is still able to acquire ownership of the goods when certain conditions are satisfied. Among these conditions, one is that possession of the goods is provided to the transferee. According to Van der Lely, possession of the goods is provided in the following way: the innocent transferee obtains ownership of the document from the illegal holder (art. 3:86 (3) BW), which further allows the transferee to acquire the claim of recovery (art. 3:86 (1) BW) and indirect possession of the goods.[335] In sum, three *bona fide* acquisitions occur: one is *bona fide* acquisition of the document, another is *bona fide* acquisition of the right of recovery, and the third is *bona fide* acquisition of ownership of the goods.[336]

B The Blocking Effect of Securities to Goods

Now let us turn to the issue of the blocking effect of securities to goods in Dutch law. Here one question is whether the claim embodied in a document to goods can be transferred in a different way from that prescribed by art. 3:93 BW. In general, this question is answered in the negative. For the sake of legal certainty, the way of transferring property is pinned down

332 Reehuis 2015, p. 101; Zevenbergen 1951, p. 323.

333 Zwitser 2005 (1), p. 169; Van Maanen and Claringbould 2017, p. 8.

334 Van der Lely 1996, p. 127.

335 Van der Lely 1996, p. 125.

336 Here it should be mentioned that *traditio per constitutum possessorium* of a document is in principle not an eligible method for *bona fide* acquisition ownership of the document, which further means that the right of recovery cannot be obtained in good faith (art. 3:90 (2) and 3:111 BW). As a result, possession of the goods cannot be provided when the unauthorized transferor retains factual control of the document, and *bona fide* acquisition of the goods is impossible. See Van der Lely 1996, p. 126.

by law, and individuals cannot choose a way not recognized by the BW.[337] As a result, the right to bearer or order has to be transferred according to art. 3:93 BW, a provision which requires delivery of and, when necessary, endorsement of the document.[338] Individuals are not allowed to transfer the claim embodied according to art. 3:94 BW, a provision regulating the assignment of "claims to the named (*vorderingen op naam*)". Moreover, the claim of recovery has to be pledged according to art. 3:236 (1) and 3:237 (1) BW, instead of art. 3:236 (2) in combination with art. 3:94 (1) and art. 3:239 (1) BW. In other words, the claim cannot be pledged independently from the document by notifying the debtor, and non-possessory pledge (*vuistloos pand*) cannot be created on the claim embodied within an order document.[339]

In the viewpoint of Dutch legislators, the blocking effect is recognized to avoid the divergence between the document and the claim embodied.[340] If the claim is assigned without involving the document, and the document remains in factual control of the assignor, then the assignee would not obtain the claim. However, an exception exists. The claim embodied within a document can be assigned under art. 3:94 BW, if the transferor loses factual control of this document.[341] This exception is implied by the "under the control of the transferor (*in de macht van de vervreemder*)" in art. 3:93 BW.

Another question is whether the goods under a document can be disposed of without involving this document. In particular, can the goods be delivered according to art. 3:115 (c) BW, a paragraph concerning *traditio longa manu*? With respect to this question, the Hoge Raad provided a negative answer in the landmark case "*Bosman/Condorcamp*".[342] In this case, the Hoge Raad held that the possessory pledge (*vuistpand*) over the shipped goods could not be created independently from the order bill of lading at the expense of the holder of the bill, despite the fact that the creditor had obtained factual control of the goods.[343] According to some Dutch scholars,

337 Reehuis 2004, p. 4.

338 Zwitser 2012, p. 34. Art. 3:93 BW: "*De levering, vereist voor de overdracht van een recht aan toonder waarvan het toonderpapier in de macht van de vervreemder is, geschiedt door de levering van dit papier op de wijze en met de gevolgen als aangegeven in de artikelen 90, 91 en 92. Voor overdracht van een recht aan order, waarvan het orderpapier in de macht van de vervreemder is, geldt hetzelfde, met dien verstande dat voor de levering tevens endossement vereist is.*" English translation: Art. 3:93 BW: "*Delivery required for the transfer of rights to bearer, the bearer paper of which is under the control of the alienator, is made by delivery of the paper in the manner and with the consequences specified in articles 90, 91 and 92. The same applies to the transfer of rights to order, the order paper of which is under the control of the alienator, provided endorsement is required for delivery.*"

339 Vriesendorp 1994, 247; Scheltema 1993, p. 107.

340 Parlementaire Geschiedenis (3) 1981, p. 391.

341 Reehuis 2004, p. 75.

342 *Bosman/Condorcamp*, HR, 26-11-1993, NJ 1995, 446.

343 Van der Lely 1996, p. 132-133.

the judgement implies that the goods under a document cannot be pledged in the way of *traditio longa manu* by circumventing this document.[344]

> "*Geformuleerd volgens de hier gebruikte begrippen: door het in het leven roepen van een zakenrechtelijke waardepapier wordt de bevoegdheid de zaak 'longa manu' te verpanden opgeschort. Een recht van vuistpand op de zaak dient voortaan door middel van verpanding van het recht op afgifte aan toonder of order te worden gevestigd. Dit pandrecht komt tot stand door het waardepapier uit de macht van de pandgever te brengen.*"[345]

In the viewpoint of Vriesendorp, delivery of the goods independently from the document is impossible, because the direct possessor (detentor in Dutch law) of the goods is only liable to deliver the goods to the legal holder of the document.[346] The only exception is that the owner loses factual control of the document.[347] In this very situation, the goods can be delivered according to art. 3:115 BW, especially in the way of *traditio longa manu*. However, opposite opinions exist.[348]

In another landmark case ("*EWL/Fortis*"),[349] the Hoge Raad held that non-possessory pledge created over the goods under an order bill of lading was not enforceable against the shipper and the holder of the bill of lading.[350] The bill of lading plays a decisive role in the transaction of the goods shipped, and the principle of publicity requires that the property right of the goods must be mentioned by the bill of lading.[351] For the goods under a bill of lading, non-possessory pledge cannot be created according to art. 3:237 BW at the expense of the holder of this document. This judgement is criticized by some scholars.[352]

However, the necessary involvement of the document does not mean that the document will be necessarily given up by the owner. For example, in the situation of transfer of the goods, the requirement of transferring the document might be satisfied in the way of *traditio per constitutum possessorium* (art. 3:90 and 3:115 (b) BW).[353] Here the transferor acknowledges hold-

344 Vriesendorp 1994, 246; Zwitser 2005 (2), p. 189-190.

345 Van der Lely 1996, p. 133. English translation: "*According to the terminologies used here: where a proprietary document is created, the authority to pledge the goods in the way of 'longa manu' will be excluded. A possessory pledge over the goods needs to be created by pledging the claim of recovery to order or bearer. The latter pledge comes into existence by depriving the pledgor of the control of the document.*"

346 Vriesendorp 1994, 246.

347 Van der Lely 1996, p. 105.

348 Van Maanen and Claringbould 2017, p. 8. According to Zwitser, the viewpoint of the Hoge Raad amounts to restricting the owner's authority to dispose. It neither conforms to the general principles of Dutch property law nor be in line with English law and German law. See Zwitser 2005 (2), p. 189-190.

349 *EWL/Fortis*, HR, 17-10-2003, NJ 2004, 52.

350 Zwitser 2005 (1), p. 168.

351 Zwitser 2005 (1), p. 168.

352 Zwitser 2005 (1), p. 169-170.

353 Van der Lely 1996, p. 104; Reehuis 2004, p. 74.

ing the document on behalf of the transferee, thereby becoming a detentor of the document.[354] However, the transferor remains in factual control of the document, and there is a divergence between the document and the ownership of the goods.[355] The transferor may use the document retained to mislead others.[356] Correspondingly, the transferee is exposed to the risk of *bona fide* acquisition by a third party. According to art. 3:86 BW, where the document is still held by the transferor, third parties are entitled to acquire ownership of the goods when obtaining the document in other ways than *traditio per constitutum possessorium*, provided that the other requirements are also fulfilled.[357]

In the situation of pledge of the goods under an order document, the basic rule is that this document cannot be circumvented. According to the viewpoints of the Hoge Raad in "*Bosman/Condorcamp*" and "*EWL/Fortis*", two conclusions can be made: (1) possessory pledge by directly controlling the goods is only enforceable against the holder of the document when the pledge is indicated by the document;[358] and (2) non-possessory pledge created directly on the goods is unenforceable against the holder of the document.[359] Therefore, the order document to goods has a strong blocking effect in terms of pledging the goods: to enforce the pledge against the holder of the document, the document has to be involved in such a way that the holder is able to be aware of the existence of the pledge.

4.2.2.4 Comparative Analysis

A The Legal Effect of Securities to Goods

From the preceding introduction of English law, German law and Dutch law, it can be found that similarities and differences exist between these jurisdictions. Securities to goods are a *traditio* document in Dutch law and German law, because transfer of this type of document has an effect of delivery of the goods. This effect might be construed as a special way of delivery or a form of *traditio longa manu*. Moreover, securities to goods embody a claim of recovery of the goods in German law and Dutch law. Disposal of this claim can be realized by disposing of the document. In contrast,

354 Here it should be noted that art. 3:90 (2) BW stipulates a relative legal effect for *traditio per constitutum possessorium*. According to this paragraph, the transferee cannot enforce the right embodied in the document against an older right, which further implies that the transferee cannot enforce ownership of the goods against an older right with respect to the same goods. See Van der Lely 1996, p. 104.

355 Here, there is also a divergence between the claim of recovery and possession of the document: when the document is transferred in the way of *traditio per constitutum possessorium*, the claim is also transferred to the acquirer. As a result, the original creditor continues holding the document.

356 Snijders and Rank-Berenschot 2017, p. 298.

357 Van der Lely 1996, p. 104-105.

358 Zwitser 2005 (2), p. 189.

359 Zwitser 2005 (1), p. 168.

English law has a dual system: only bills of lading are a *traditio* document under common law, and the other types of securities to goods only produce the *traditio* effect under statutory law, especially in the situation of *bona fide* acquisition of corporeal movables (s. 24 and s. 25 SGA). As a result, where a document to goods, except the bill of lading, is transferred, the direct possessor bears no liability to deliver the goods to the transferee of the document.

This difference of German law and Dutch law from English law cannot be fully understood until we note the difference between these jurisdictions in the transfer of ownership of corporeal movables. As has been stressed above, English law has a consensual system: the transfer of ownership has nothing to do with possession, and what matters is the parties' intention. Under this consensual system, there is no need to see the transfer of warehouse receipts and the like as a way of delivery, at least in the situation of authorized disposals. On the contrary, both Dutch law and German law accepts the *traditio* rule, which implies that ownership of corporeal movables cannot pass in the absence of delivery. To coordinate securities to goods and the *traditio* rule, it is necessary to treat the transfer of securities to goods as a means of delivery. Otherwise, the goods could not be disposed of smoothly on the basis of the document.

The restrictive approach adopted by the English common law with respect to other securities to goods than the bill of lading has been tempered by statutory law, especially in the situation of *bona fide* acquisition of goods. For example, according to s. 24 and s. 25 SGA, the transfer of securities to goods amounts to delivery of the goods. With respect to these two provisions, some English scholars hold that the transfer of the document is, in essence, a form of fictional delivery.[360] Therefore, there is a divide in the system of English law. From a systematic perspective, there is no reason to grant no effect of delivery to the transfer of securities to goods in the situation of authorized disposals, but equate the transfer with fictional delivery in the situation of *bona fide* acquisition. English lawyers often explain this differential treatment on the basis of commercial custom. In commercial practice, participants commonly deem that the transfer of a bill of lading entitles indirect possession to the transferee, while the transfer of other securities to goods does not have such effect.[361]

B The Blocking Effect of Securities to Goods

In general, the blocking effect might occur in two situations: disposal of the claim of recovery embodied and disposal of the goods involved. Here, the first question is whether the claim of recovery can be disposed of without involving the document. In German law, the claim of recovery can, just like an ordinary claim, be disposed of according to civil law. For example, the claim can be transferred in the way of "assignment (*Zession*)" (§ 398 BGB).

360 Bridge 2014, p. 241.
361 Benjamin 2014, p. 1395.

This means that endorsement is not necessary when the claim is embodied within an order document. However, an extra requirement is that the document has to be delivered to the assignee. For fulfilling this requirement, *traditio per constitutum possessorium* suffices. In Dutch law, the claim cannot be disposed of without involving the document, except when the creditor loses factual control of the document. For example, "assignment (*cessie*)" (art. 3:94 BW) is in principle not applicable to the claim embodied within a bearer document or an order document. To transfer the claim, the creditor has to transfer the document, including in the way of *traditio per constitutum possessorium*. To pledge the claim, the document has to be controlled by the pledgee (art. 3: 236 (1) BW), except when the document is made out to bearer and pledged in the non-possessory way (art. 3:236 (1) BW).

The second question is whether the goods under a document can be disposed of independently from this document. In general, where a document of title is issued for certain goods, there might be a conflict between the holder of this document and the possessor of these goods. For example, ten bicycles are stored at the place of a warehouseman, and the owner disposes of these bicycles to two persons: one person obtains the warehouse receipt, while the other obtains possession of the bicycles *per se*. In general, this kind of conflict occurs due to one of the following two reasons: (1) the goods are allowed to be disposed of without involving the document; and (2) the document has to be transferred or delivered, but parties are entitled to transfer and deliver the document in the way of *traditio per constitutum possessorium*. Due to these two reasons, the previous owner has a chance to use the document retained to mislead third parties. On account of this, should law prevent the divergence between the document and the goods, and how to prevent? In this aspect, the three jurisdictions differ.

English law takes the most lenient approach. In general, ownership of the goods is transferred at the moment decided by the transacting parties. Neither transfer of the document nor delivery of the goods is necessary.[362] In principle, delivery is a separate issue from the transfer of ownership, and transfer of a document to goods cannot yield an effect of delivery in common law, except when this document is a bill of lading. For the transferee, the main benefit of acquiring the document is that the risk of *bona fide* acquisition by a third party can be averted. As has been shown above, third parties in good faith might prevail over the transferee by obtaining the document (see 4.2.2.1.B). Therefore, we can say that English law encourages but never requires parties to obtain the document to goods. Undoubtedly, this lenient approach implies that the legal owner of the goods may not be the person who holds the document.

362 English judges tend to treat the transfer of the bill of ladings as an indication of the bilateral consent on the transfer of ownership of the goods involved. See Aikens, Lord and Bools 2016, no. 6.30; Zwitser 2005 (2), p. 191.

German law is more restrictive than English law in this aspect. Due to the *traditio* rule, parties usually transfer the document to goods to satisfy the statutory requirement of delivery. However, German law allows parties to dispose of the goods in the absence of transferring the document. For example, the goods can be validly transferred in the way of *traditio longa manu*, which requires the transferor to assigns the claim of recovery against the direct possessor to the transferee. In this very situation, however, an extra requirement is that the document has to be delivered (either actually or fictionally) to the transferee. The purpose of this requirement is to guarantee that the new owner of the goods controls the document, so that the original owner cannot use the document to mislead third parties. In general, the goods can also be pledged in a similar way under the extra condition that the document is delivered to the pledgee.

Different from German law, Dutch law does not allow individuals to circumvent the document by directly resorting to *traditio longa manu*, at least when the document is under the transferor's control. Due to this restriction, the divergence between ownership of the goods and factual control of the document is alleviated to a large extent. However, the difference between German law and Dutch law is not as significant as it appears. Firstly, the additional requirement of delivering the document in German law can lead to a similar outcome: the transferee obtains factual control of the document. Secondly, both Dutch law and German law allow the document to be delivered in a fictional way. For example, *traditio per constitutum possessorium* suffices for delivering the document to the transferee, which means that the document might remain in factual control by the transferor.

In principle, pledge of the goods under an order document relies on this document in Dutch law: (1) possessory pledge cannot be created by directly controlling the goods by the pledgee, unless the pledge is indicated by the document ("*Bosman/Condorcamp*"); and (2) non-possessory pledge of the goods themselves is unenforceable against the holder of the document ("*EWL/Fortis*"). In this aspect, German law has differences and similarities. In German law, the goods can be pledged in the way of *traditio longa manu* under the extra condition that the document is delivered to the pledgee. The extra condition guarantees that the pledgee possesses the document. To use the goods as a collateral, the owner can also transfer ownership of the goods for the purpose of security.[363] Therefore, it is possible that the owner transfers the ownership in the way of *traditio longa manu* and satisfies the extra requirement of delivery though *traditio per constitutum possessorium*. In this situation, the original owner might use the document retained to mislead others, and there is a need to protect those who are in good faith and obtain the document from the original owner.

363 In general, the security transfer of ownership in German law resembles the non-possessory pledge in Dutch law: both are a non-possessory device of security (see 3.5.3.1).

4.2.2.5 The Function of Publicity of Securities to Goods: Two Rights

To reveal the function of publicity of securities to goods, we need to pay attention to two aspects: the personal right embodied within this type of document and the property right of goods for which the document is issued. Securities to goods not only embody a claim of recovery, but are also closely related to the disposal of the goods. For example, transfer of securities to goods has an effect of delivery. Due to this effect, securities to goods can be used to simplify the delivery of the goods.[364] To reveal the function of publicity of securities to goods, we also need to consider the distinction between order securities and bearer securities. This distinction has been introduced above (see 4.2.1.1). As will be shown later, these two types of document differ in terms of publicity.

A The Function of Publicity and the Right Embodied

A1: General Introduction

In general, the right embodied by a document to goods is neither ownership nor any other property right with respect to the goods, but a personal claim of recovery of the goods. This is why securities to goods are an obligational document.[365] Under Dutch law, possession of the document to goods means possession of the right of recovery embodied.[366] According to German lawyers, securities to goods is a tool with which the legal holder enjoys a right of recovery against, for example, the warehouseman, the shipper or the carrier.[367] Moreover, securities to goods are an outward appearance of the claim of recovery: holding this type of document generally implies enjoying a right to require the debtor to deliver the goods. This lays a basis for *bona fide* acquisition of the right of recovery.[368] As has been pointed out above, personal rights lack an outward mark, and *bona fide* acquisition of personal rights is not generally recognized (see 4.1.3). The right of recovery embodied within a bearer or order document to goods is special: the right is "objectified (*verkörpert*)" by this document and has an outward appearance.[369] By holding the document, the holder informs third parties that he or she enjoys the claim of recovery. In exceptional situations, such as stolen, lost or forged documents, the holder does not enjoy the claim of recovery in law.

In general, the embodied right of recovery can, just like a corporeal movable, be acquired by third parties in good faith. It is often held that *bona fide* acquisition of the embodied right shares the same rationale with

364 Hueck and Canaris 1986, p. 200-201; Zöllner 1978, p. 153.
365 Zöllner 1978, p. 9; Mulder 1948, p. 11.
366 Van der Lely 1996, p. 82.
367 Zöllner 1978, p. 5. In English law, only the bill of lading is a document of title to goods in the common law sense. The acquirer of a bill of lading obtains the claim of recovery against the carrier, thereby becoming an indirect possessor of the goods shipped.
368 Brox and Henssler 2009, p. 263-264.
369 Hueck and Canaris 1986, p. 2.

that of corporeal movables: both *bona fide* acquisitions are based on the possessor's factual control.[370] In the situation of *bona fide* acquisition of the right of recovery embodied within a document to goods, the third party is misled by the document to believe that the holder is the true creditor. In the situation of *bona fide* acquisition of a corporeal movable, the third party is said to believe that the possessor is the true owner.[371] For this reason, Dutch law regulates *bona fide* acquisition of corporeal movables and that of the right embodied within bearer documents or order documents by the same provision, namely art. 3:86 BW.

A2: Bearer Securities to Goods

As has been pointed out above, securities to goods can be made out to order or bearer (see 4.2.1.1). Bearer securities to goods do not specify the name of the creditor, i.e. the person who is entitled to request the debtor to deliver the goods involved. This type of document is alienated just as a corporeal movable: delivery of the document is necessary.[372] In general, the holder of the document is assumed to be the person who enjoys the claim of recovery.[373] Where a bearer document is issued for certain goods, the holder of this document is assumed to be entitled to require the direct possessor of the goods, usually the issuer of the document, to deliver these goods. On the basis of this assumption, *bona fide* acquisition of the claim of recovery is granted to third parties in good faith. In understanding the function of publicity of bearer securities, three aspects need to be noted.

Firstly, bearer securities to goods do not specify the creditor's name, let alone the holder's legal position, thus this type of document can neither indicate whether the holder is a legal holder having ownership of the document, nor whether the holder really enjoys the claim of recovery embodied. For example, the holder might obtain the document in an illegal way, such as theft. In this very situation, the illegal holder neither has ownership of the document, nor enjoys the claim embodied.[374] Incorrect information is communicated: the illegal holder appears to have ownership of the document and enjoy the claim embodied.

Secondly, the holder might only have indirect possession of the document. The communication of information by bearer securities is based on the factual control exercised by the holder over the document. The factual control must be visible to third parties. In the situation where the holder is only in indirect possession of the document, third parties cannot be made aware of the holder's legal position by such indirect possession. This is because, as has been argued above, indirect possession *per se* is invisible (see 3.2.2.1).

370 Snijders and Rank-Berenschot 2017, p. 315; Reehuis and Heisterkamp 2019, p. 235.
371 However, *bona fide* acquisition of corporeal movables cannot be fully explained on the basis of the unauthorized transferor's possession. This has been stated above (see 3.4.3.4).
372 Zevenbergen 1951, p. 336; Hueck and Canaris 1986, p. 24.
373 Zevenbergen 1951, p. 329; Hueck and Canaris 1986, p. 24.
374 Hueck and Canaris 1986, p. 24.

Thirdly, bearer securities to goods are disposed of under the requirement of delivery, and the specific legal ground on which the document is delivered cannot be shown to third parties. In general, there are various legal reasons for which the document can be delivered. For example, the document might be delivered to transfer the claim, pledge the claim, or create a right of usufruct over the claim.[375] The specific legal ground is not made visible through delivery of the document. In this sense, we can say that bearer securities to goods are an ambiguous method of publicity for the claim of recovery. Moreover, the document might be delivered in the way of *traditio per constitutum possessorium*, which means that the transferor retains factual control of the document. In essence, this way of delivery is invisible, and no indication can be conveyed to third parties (see 3.2.2.2.B).

In sum, bearer securities to goods are a defective means of publicity for the claim of recovery embodied. The holder shows his or her legal position with respect to the claim through possession of the document. Therefore, our observations concerning possession (a method of publicity for corporeal movables) in Chapter 3 are, in general, also applicable to bearer securities (a method of publicity for the claim of recovery embodied).

A3: Order Securities to Goods

Apart from bearer securities, law also recognizes a better means of publicity for the claim of recovery: order securities to goods. Order securities to goods specify the name of the creditor who is entitled to further transfer the document. Moreover, the order document is transferred in a different way from the bearer document: the former not only needs delivery, but also endorsement.[376] In general, endorsement makes the order document more informative and reliable than the bearer document: the legal position of the endorsee might be shown by the endorsement.

> "*Tegenover derden wordt de positie van den geëndosseerde beheerst door den inhoud van het endossement, door hetgeen het endossement aan hen kenbaar maakt.*"[377]

For example, when an order document to goods is pledged, endorsement of this document often contains a mark of "for pledge", "for security" or the like.[378] From the perspective of publicity, this mark is important for third parties: it shows the legal position of the endorsee. The mark makes the right of pledge visible and allows third parties to know whether there is any

375 Zevenbergen 1951, p. 27-28.

376 Zevenbergen 1951, p. 69; Hueck and Canaris 1986, p. 23.

377 Zevenbergen 1951, p. 70. English translation: "*The position of the endorsee against third parties is determined by the content of the endorsement, which has been made visible to them by the endorsement.*"

378 Zevenbergen 1951, p. 320; Heymann/Horn 2005, § 364, Rn. 5. In addition to the endorsement for pledge, the document might also be endorsed for the purpose of collection, which can indicate that the endorsee is merely an agent of the endorser. See Zevenbergen 1951, p. 320; Staub/Canaris 2004, § 364, Rn. 10.

proprietary encumbrance existing on the claim.[379] However, endorsement might fail to guarantee that the relationship of pledge is made visible for two reasons.

Firstly, the pledge of an order document to goods requires endorsement of this document in German law and Dutch law, but failure to include a mark of pledge does not affect the valid creation of the pledge.[380] In other words, the endorsement for pledge can be made in a "concealed" way.

> "*Wordt een vordering aan order verpand zonder dat dit uit het endossement blijkt, dan is de verpanding overigens geldig. De houder is dan jegens derden als volledig rechthebbende gelegitimeerd. In zijn verhouding tot de pandgever zal hij zijn recht echter slechts als pandhouder mogen uitoefenen.*"[381]

In general, where an order document is endorsed to the pledgee in the absence a mark of pledge, the pledgee will, in relation to third parties, be legitimized as the person who fully enjoys the claim of recovery.[382] As a result, the endorser exposes him- or herself to the risk out of *bona fide* acquisition by third parties in good faith. If the pledgee transfers the document to a third party, this party might be able to acquire the document and the claim embodied at the expense of the pledgor. In general, however, this outcome is not unfair to the pledgor. The pledgor could easily avoid the risk of *bona fide* acquisition by showing the true legal position of the pledgee by endorsing the document with a mark of pledge.

Secondly, the requirement of endorsement might be circumvented by disposing of the claim of recovery embodied as an ordinary claim. As has been shown above, German law allows the claim to be assigned and pledged according to the BGB (see 4.2.2.2.B). For this way of disposal, endorsement is unnecessary. As an extra requirement, the document has to be delivered to the assignee or pledgee, but this requirement cannot make the disposal visible to third parties. The reason is simple: there are various reasons for which the document might be delivered.[383] Moreover, the extra requirement might fail to avert the possibility that the assignor uses the document to mislead third parties, because *traditio per constitutum possessorium* is not excluded. If this occurs, there is a need to protect third parties in good faith. In general, this protection is not unfair to the new

379 Zevenbergen 1951, p. 71.

380 Zwitser 2006, p. 84; MüKoHGB/Langenbucher 2018, § 364, Rn. 18. An opposite opinion exists. According to this opinion, the requirement of publicity and the nature of the document to order require that the endorsement must indicate the existence of the pledge. See Scheltema 1993, p. 107.

381 Asser/Van Mierlo 2016, nr. 149. English translation: "*If the pledge of a claim to order is not shown by the endorsement, then the pledge is still valid. The holder is legitimized as fully entitled against third parties. In his relationship with the pledgor, he can only enforce his right as a pledgee.*"

382 Zevenbergen 1951, p. 70.

383 In the case of pledge, the pledgee cannot use the order document delivered to him or her to mislead third parties. This is because the pledgee is not an endorsee of the document.

creditor: the new creditor could avoid this situation by obtaining factual control of the document or recording him- or herself as the last endorsee on the document.

B The Function of Publicity and the Goods Involved

B1: General Introduction

Though as a document only embodying a claim of recovery, securities to goods also play an important role in the disposal of the goods involved. In general, disposal of the goods is usually associated with the disposal of the document. The legal position of the holder with respect to the document is often decisive for the holder's legal position with respect to the goods involved.[384] For example, pledge of a document to goods not only means that the claim of recovery embodied is pledged, but also that the goods are pledged in most situations.[385] From the pledge of the document, it can be inferred that the parties also have an intention to pledge the goods involved. Transfer of a document to goods often means transfer of ownership of the goods. However, exceptions exist.[386] For example, the seller might reserve ownership of the goods but unconditionally transfer the document to the buyer; the document might also be transferred to an agent for the purpose of collecting the goods.[387] In these two situations, the buyer and the agent do not obtain ownership of the goods but are made to look like the owner of the goods. For this reason, we need to discuss the function of publicity of securities to goods for the goods involved.

In general, securities to goods imply that the goods are now under the factual control of the issuer (debtor) of the document and will be delivered to the holder (creditor) of the document. The document does not represent ownership of the goods, and transfer of the document does not necessarily mean that ownership of the goods passes to the transferee.[388] The reason is simple: there are different grounds on which a document to goods is under the holder's control.

> "*Es gibt daher nach geltendem Recht keinen strikten Parallelismus zwischen dem Eigentum am Traditionspapier und dem Eigentum an den Gütern. Vielmehr können mit Hilfe eines Traditionspapiers keine weitergehenden Rechtsfolgen erzielt werden als durch die Übergabe der Güter. Daraus folgt ohne weiteres, dass es zur Übereignung der Güter außer der Übertragung des Traditionspapiers zusätzlich einer Einigung bezüglich der Güter bedarf. Diese ist im Übrigen auch aus praktischen Gründen unterläßlich;*

384 Zevenbergen 1951, p. 321.
385 Zevenbergen 1951, p. 321; MüKoBGB/Damrau 2017, § 1292, Rn. 3; Van Maanen and Claringbould 2017, p. 4; Zwitser 2006, p. 227. In English law, s. 3 FA (1889) expressly provides that "*pledge of the document of title to goods shall be deemed to be a pledge of the goods*".
386 Claringbould 1998, p. 24.
387 Claringbould 1998, p. 24-25.
388 Zevenbergen 1951, p. 321-322; Tiedtke 1985, p. 281.

> *insbesondere läßt sich erst aus ihr und nicht schon aus der Einigung bezüglich der Papierübertragung entnehmen, ob die Güter übereignet, verpfändet oder mit einem Nießbrauch belastet werden sollen.*"[389]

Holding a document to goods only implies that the holder has indirect possession of and is entitled to acquire direct possession of the goods by virtue of this document. In general, the document represents indirect possession of the goods or functions as a means to possess the goods.[390] The agreement on the disposal of the document should be separated from the agreement on the disposal of the goods themselves.[391]

However, this does not mean that, in terms of publicity, securities to goods have no difference from indirect possession, an invisible legal relationship which does not qualify as a method of publicity (see 3.2.2). In general, third parties are able to collect some proprietary information concerning the goods from this type of document. To understand this, we need to consider the distinction between bearer securities to goods and order securities to goods.

B2: Bearer Securities to Goods

It has been shown that bearer securities to goods are an ambiguous and defective means of publicity for the claim of recovery embodied (see 4.2.2.5.A). In general, a similar conclusion can be made for bearer securities to goods as a means of publicity for the goods involved. This becomes obvious when we realize that the core of indirect possession is the claim of recovery (see 3.2.2.1).

Firstly, bearer securities to goods can, at most, indicate the existence of indirect possession of the goods. This type of document does not specify the creditor's name, let alone the holder's specific legal position with respect to the goods. It is impossible to know from the bearer document whether the holder has any property right with respect to the goods. In general, factual control of a bearer document to goods only indicates that the holder has indirect possession of the goods.[392] Indirect possession is an invisible legal relationship between the indirect possessor and the direct possessor (see 3.2.2.1). The bearer document to goods can make this legal relation-

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389 Hueck and Canaris 1986, p. 20. English translation: "*Therefore, there is no strict parallel between ownership of the traditio document and ownership of the goods under the current law. Rather, with the help of a traditio document no more legal consequences can be caused than delivery of the goods. As a result, the transfer of goods also requires an agreement concerning the goods, apart from the transfer of the traditio document. Moreover, this is also a necessary result of practical reasons; in particular, only from this agreement rather than the agreement regarding the transfer of the document, it is possible to know whether the goods are transferred, pledged or encumbered with a usufruct.*"

390 Tiedtke 1985, p. 284; Zevenbergen 1951, p. 323.

391 Zevenbergen 1951, p. 321-322; Staub/Canaris 2004, § 363, Rn. 105.

392 In English law, other documents to goods than the bill of lading do not allow the holder to enjoy indirect possession or a claim of recovery against the direct possessor (see 4.2.2.1.A).

ship visible to third parties, indicating that the holder of the document, as an indirect possessor of the goods, has a certain right with respect to the goods. However, the bearer document cannot show the content of this right to third parties. In this sense, we can say that bearer securities to goods are an abstract and thus ambiguous method of publicity for the goods involved.

Secondly, bearer documents to goods are transferred under the requirement of delivery, but the legal ground on which the document is delivered is not made visible to third parties. The document might be delivered for the purpose of transferring ownership of the goods, pledging the goods, or creating a right of usufruct on the goods. In general, the specific agreement concerning the disposal of the goods cannot be shown by the delivery of the document.

Thirdly, the holder may only have indirect possession of the bearer document, and delivery of the document does not necessarily allow the receiver to obtain actual control of the document. Indirect possession is invisible (see 3.2.2). As a result, where the holder is only in indirect possession of the document, his or her legal position with respect to the goods is completely hidden to third parties. In addition, the bearer document can be delivered in the way of *traditio per constitutum possessorium*, which allows the transferor to retain factual control of the document. As a result, the transferor appears to have indirect possession of the goods involved, and the transferee's legal position with respect to the goods is completely invisible.

B3: Order Securities to Goods

Apart from bearer securities, individuals can also choose a better information-communicating method: order securities to goods. Order securities need to specify the creditor, and transfer of this type of document not only requires delivery, but also endorsement. This makes the order document more informative and reliable than the bearer document: the legal position of the endorsee with respect to the goods might be shown by the order document.

For example, when the goods under an order document are pledged, this document might be endorsed to the pledgee by recording a mark of "for pledge", "for security" or the like.[393] From the perspective of publicity, this mark is important: it indicates that an encumbrance of pledge exists on the goods involved. Not only does the mark allow third parties (in particular the potential acquirer of the goods) to know the existence of the encumbrance, but also prevent the pledgee from using the document to mislead this parties.[394] Moreover, the mark also brings benefits to the pledgor: his or her legal position is shown by the document to third parties. However, the endorsement for pledge might fail to indicate the existence of the pledge in several situations.

393 Zevenbergen 1951, p. 320; Heymann/Horn 2005, § 364, Rn. 5.
394 Zevenbergen 1951, p. 71.

The first situation is that the endorsement for pledge is made in a "concealed" way. As has been shown above, pledge of an order document to goods requires endorsement in Dutch law and German law, but failure to include a mark of pledge does not affect the valid creation of the pledge.[395] In the absence of such a mark, the right of pledge is invisible to third parties. The "concealed" endorsement for pledge legitimizes, in the relationship to third parties, the pledgee as the legal owner of the goods involved.[396] As a result, if the pledgee transfers the goods to a third party, this party is able to acquire ownership of the goods on the basis of the rule of *bona fide* acquisition. In general, this outcome is not unfair to the pledgor, the true owner of the goods. The pledgor could endorse the document by including a mark of pledge to show that the endorsee is only a pledgee.[397]

The second situation is that the goods are pledged in the absence of endorsement. As has been shown above, German law allows the goods to be disposed of in the way of *traditio longa manu* by assigning the claim of recovery (see 4.2.2.2.B). For pledging the goods in this way, an extra requirement is that the document must be delivered to the pledgee. Despite this extra requirement, the property right of pledge remains invisible to third parties. The reason is simple: there are various legal grounds on which the document might be delivered. In general, the pledgee cannot use the order document delivered to him or her to mislead third parties. This is because the last endorsee of the document is still the pledgor, rather than the pledgee. However, a risk here is that the pledgee might forge an endorsement to make him or her appear to be the owner. This concerns the defect of securities to goods as a means of publicity, which will be discussed immediately.

C Two Defects of Securities to Goods as a Method of Publicity

As a means of publicity, securities to goods have two defects. The first one is that they have a risk of unsafety. As has been mentioned above, securities to goods might be held by an illegal possessor, such as a thief who obtains possession of the document in an unlawful way. Moreover, it is possible that securities to goods are forged by the holder. In these situations, the holder, who is neither the true creditor nor the owner of the goods involved, appears to enjoy the claim of recovery and even ownership of the goods.

The requirement of specifying the creditor makes the order securities to goods more secure than the bearer document.[398] For the illegal possessor of

395 MüKoHGB/Langenbucher 2018, § 364, Rn. 18; Asser/Van Mierlo 2016, nr. 149.

396 MüKoHGB/Langenbucher 2018, § 364, Rn. 18; Asser/Van Mierlo 2016, nr. 149.

397 Therefore, as a means of publicity for corporeal movables, securities to goods are different from possession. As has been shown, delivery of the movable collateral for the purpose of pledge might make the pledgee look like the owner of the collateral, which means that the pledgor is exposed to the risk of *bona fide* acquisition by third parties when the pledgee illegally disposes of the collateral (see 3.5.2.2.B). With a document to goods, not only is the pledgor able to pledge the goods, but also to avoid the risk of *bona fide* acquisition.

398 Goode 2010, p. 528.

the order document, it is more difficult to use the document to mislead others: the illegal possessor has to forge document to make him or her appear to be a legal holder of the document.

> "*Seine Funktion liegt vor allem darin, dass im Gegensatz zum Inhaberpapier dem Berechtigten einen gewissen Schutz vor den Gefahren des gutgläubigen Erwerbs bietet; den na der Berechtigte namentlich im Papier benannt ist, bedarf es bei dessen Übertragung durch einen Nichtberechtigen einer Unterschriftenfälschung, und darin liegt eine nicht zu unterschätzende praktische und psychologisches Barriere.*"[399]

In general, when a bearer document is made out or obtained, it can be assumed that the parties are aware of and thus willing to accept the higher risk of safety.

The risk of safety does not mean that bearer securities to goods are not qualified as a means of publicity. There are two reasons to say so. These two reasons have been shown in discussing possession as a means of publicity for corporeal movables (see 3.2.1.2.C). One reason is that the holder of securities to goods is usually the legal creditor and has a right with respect to the goods involved in reality. The other reason is that law grants certain remedies to the legal creditor when the document is controlled by a person who incorrectly appears to enjoy the claim of recovery. For example, the legal creditor can recover, on the basis of the right of ownership, the document from illegal possessors. Where there is a forgery of the document, this forgery can be rectified.

The second defect is that securities to goods *per se* have a problem of invisibility: the existence of securities to goods is not necessarily known.[400] For example, in the transfer of the goods for which a document is made out, the transferee might be unaware of the existence of this document, especially when the transferor conceals the document on purpose. This might cause two undesirable outcomes: (1) the transferor retains and uses the document to mislead third parties after the transaction; and (2) the possible proprietary encumbrance over the goods cannot be shown by the document to the transferee. However, the problem of invisibility should not be overstated.[401]

In most situations, the acquirer of the goods under a document is aware of the existence of the document, because the transferor shows and delivers the document. It seems rare that the transferor attempts to retain the document by fraudulently keeping silent on or denying the existence of the

399 Hueck and Canaris 1986, p. 23. English translation: "*Unlike bearer documents, the primary function of the order document is to provide the entitled with certain protection against the risk of bona fide acquisition. In particular, when the entitled is named in a document, transfer of this document by an unauthorized person requires forgery of the signature, which is a practical and psychological barrier that should not be underestimated.*"

400 Quantz 2005, p. 56.

401 Acquisition and Loss of Ownership of Goods 2011, p. 611.

document. Where the goods are in direct possession by a warehouseman, shipper or carrier, it is abnormal that transferor does not show the document to the transferee. It can be expected that the transferee, usually as a professional businessman, will be suspicious about the absence of the document and further check with the direct possessor.[402] Nevertheless, whether the transferee really knows the existence of the document in a specific situation is a question depending on the circumstances involved. If the transferee is unaware of and fails to obtain the document, and the transferor uses the document to mislead third parties, then *bona fide* acquisition by third parties might occur at the expense of the transferee.[403]

4.2.2.6 The Function of Publicity of Securities to Goods: Three Third Parties

In the preceding discussion, we have shown the legal position of third parties with respect to securities to goods. In general, there are three types of third party: strange interferers, subsequent acquirers, and general creditors (see 2.2.2.2). Third parties in the preceding discussion of securities to goods only refer to subsequent acquirers. Securities to goods are a method of publicity mainly important for subsequent acquirers and convey no useful information to the other two types of third party. This is implied by the fact that securities to goods are used for the transaction of the goods involved.

A Securities to Goods and Strange Interferers

The claim of recovery embodied within securities to goods is a personal right which is, in principle, difficult to be interfered with (see 2.1.3.2). Obviously, securities to goods, as a kind of corporeal movable, are susceptible to illegal interference. The owner and possessor of the document are entitled to certain remedies against the illegal interferer on the basis of ownership and possession of the document respectively. However, illegal interference with the document is another issue that should be distinguished from the interference with the claim of recovery embodied.

The goods for which a document is made out might be illegally interfered with. However, this document is irrelevant to the illegal interference with the goods: it provides no useful information to strange interferers. Instead, it is often direct possession of the goods *per se* (namely factual control exercised by the debtor of the document) that conveys a useful indication to strange interferers, who in return can adjust their behaviors (see 3.3.2.2). To avoid misunderstandings, it should be noted that this does not mean that the holder of the document, as an indirect possessor of the goods, enjoys no legal protection against illegal interference with the goods (see 3.3.3).

402 Acquisition and Loss of Ownership of Goods 2011, p. 611.
403 MüKoHGB/Frantzioch 2018, § 475g, Rn. 73.

B Securities to Goods and General Creditors

In general, securities to goods are useless for general creditors. The principal reason is that general creditors are mainly concerned about the overall financial health of the debtor, and knowing about the proprietary relationships concerning one or more specific assets is useless for them because the information will become outdated after a certain period (see 2.2.2.2.C).

Bearer securities to goods are an ambiguous method of publicity which is of no importance for general creditors. This type of document can, at most, show that the holder has indirect possession of the goods involved. However, as has been argued above, possession conveys no useful information to general creditors (see 3.5). Truly, order securities to goods are able to convey clear information, such as the existence of pledge on the goods. However, the pledgor and the pledgee are entitled to pledge the goods without recording any mark of pledge on the document. Moreover, the goods might be pledged in the absence of any endorsement in some jurisdictions. In these situations, the pledge is validly created with binding force over general creditors.[404] For this reason, order securities to goods are not reliable for general creditors.

It is worthwhile noting that securities to goods cannot address the problem of fraudulent antedating (see 2.2.2.2.C). Bearer securities to goods are disposed of under the formality of delivery. Delivery, especially *traditio per constitutum possessorium*, is not an appropriate method to fix the date of the disposal. Even in the situation which involves an order document, the problem cannot be addressed properly for two reasons. One reason is that the goods under this document might be disposed of in the absence of endorsement. The other reason is that recording the date of the disposal on the document is not necessary for valid endorsement.[405] As a result, the date of disposal cannot be ascertained on the basis of the document *per se*.

C Securities to Goods and Subsequent Acquirers

Securities to goods are an important means of publicity for subsequent acquirers, such as the transferee and pledgee of the goods. In the preceding comparative and conclusive discussions, we have shown the importance of securities to goods for and the legal protection granted to subsequent acquirers. Here, a brief reiteration suffices.

In general, this type of document is treated as an outward appearance of the claim embodied and the goods involved. For a person who intends to obtain a property right with respect to the goods under a document, this

404 The lack of this binding force might be beneficial for general creditors. For example, where the document is pledged with a concealed endorsement, the pledgee can only claim that he or she has a property right of pledge, rather than ownership of the goods. This means that the surplus after enforcement of the pledge can be distributed to general creditors. For subsequent acquirers who obtains the document from the pledgee, *bona fide* acquisition is available.

405 Zevenbergen 1951, p. 144; Schnauder and Müller-Christmann 1991, p. 72-73.

person can safely assume that the holder of the document enjoys the claim of recovery and ownership of the goods, unless the document contains a contrary indication. For example, if the document includes a mark of pledge, indicating that the holder is a pledgee, then there is no reason to entitle the person to *bona fide* acquisition of the goods from the holder.

4.2.2.7 Conclusion

Securities to goods are a method of publicity with two defects for the claim of recovery embodied and the goods involved. In principle, disposal of the claim and the goods involves the document. Moreover, the document acts as an outward appearance and lays a basis for *bona fide* acquisition of the claim and the goods by third parties.

Order securities to goods can be used to provide clear proprietary information concerning the claim embodied and the goods involved. For example, when the claim or the goods are pledged, a mark of pledge can be recorded on the document. Truly, the endorsement for pledge might be made in a "concealed" way, and the pledgee has a chance to use the document to mislead third parties; the pledgor and the pledgee might choose to pledge the goods without any endorsement, and the pledgee perhaps uses the document to mislead third parties. However, this does not give rise to an unjust outcome. On the one hand, third parties in good faith are protected at the expense of the pledgor on the basis of the rule of *bona fide* acquisition; on the other hand, the pledgor can avert such *bona fide* acquisition by recording a mark of pledge on the document. If the pledgor fails to do so, then it can be assumed that he or she is willing to accept the risk of *bona fide* acquisition by third parties.

Bearer securities to goods are an ambiguous method of publicity, because this type of document conveys information via factual control of the document. Unlike order securities, bearer securities do not record any mark that can indicate the existence of, for example, the property right of pledge. As a result, it is impossible for third parties to know from a bearer document the specific legal position of the holder of this document. To address this problem, the law grants legal protection to third parties in good faith by the rule of *bona fide* acquisition, when the holder of the bearer document is not the true creditor (or owner). In general, the *bona fide* acquisition is not unfair to the original creditor (or owner). The creditor (or owner) could request an order document and then record his or her legal position on this document. If the creditor (or owner) fails to do so and agrees to just have a bearer document, then it can be assumed that he or she is aware of and willing to bear the risk out of *bona fide* acquisition by third parties.

Both order securities to goods and bearer securities to goods run a risk of unsafety and have a problem of visibility. The risk of safety does not make these two type of document unqualified as a means of publicity for two reasons: (1) the document is controlled by the true creditor (or owner) in most situations; and (2) where the holder of a document does not have

any legal ground to keep this document, there is a scheme of rectification. The problem of invisibility exists but should not be overstated. In practice, the document is usually shown and delivered by the owner in the disposal of the goods. Even if the owner may attempt to conceal the document, the counterparty will be usually suspicious about the absence of a document and will further check with the direct possessor.

As a means of publicity, securities to goods are useful and important for subsequent acquirers. In general, they convey no useful information to general creditors and strange interferers. The problem of fraudulent antedating cannot be addressed by securities to goods (see 4.2.2.6.B.).

4.2.3 Securities of Payment

In this part, we focus on another type of document: securities of payment or monetary securities. This type of document known as "*Wertpapieren des Zahlungs*" in German law and "*betalingspapieren*" in Dutch law. Roughly speaking, securities of payment correspond to negotiable instruments in English law.[406] Securities of payment mainly include the bill of exchange ("*gezogene Wechsel*" in German law and "*wissel*" in Dutch law), the promissory note ("*eigen Wechsel*" in German law and "*promesse*" in Dutch law), and the cheque ("*Scheck*" in German law and "*cheque*" in Dutch law). Bills of exchange are different from promissory notes in the person who bears the liability to pay: the debt of bills of exchange is mainly performed by a third party (the drawee or acceptor), while the promissory note requires the maker to pay the sum. Cheque is a special bill of exchange. Like bills of exchange, cheque also requires a third party (i.e. the bank of which the maker is a customer) to provide payment. However, unlike bills of exchange, cheque is not or not intended to be accepted by the maker's bank because the maker has sufficient funds in the bank.[407]

The three types of instrument of payment are monetary securities which differ from securities to goods discussed above. Monetary securities concern the payment of a certain amount of money, while the latter involves the delivery of certain goods. However, the nature of the right embodied by the two types of securities has no difference: both embody a personal right. As a means of publicity, monetary securities and securities to goods are also different in the subject matter of publicity. The former are only related to the claim of payment embodied, while the latter not only concern the claim of delivery embodied, but also the goods involved (see 4.2.2.5).

The rationale of publicity of monetary securities only concerns how to show the embodied right of payment to third parties. For the sake of simplicity, the following discussion mainly focuses on bills of exchange to

406 However, the concept of negotiable instrument might be used more broadly by including the bill of lading by some English lawyers. See Sealy and Hooley 2009, p. 525.

407 Guest 2016, no. 13-003.

reveal this rationale of publicity. The bill of exchange "*epitomizes*" the use of monetary securities in transactions, and the observations about the bill of exchange are generally applicable to the other types of instrument of payment.[408] The following discussion involves two issues: (1) the transfer of pledge of bills of exchange; and (2) the protection of third parties in good faith.[409] Transfer and pledge are two representative forms of disposal of the claim embodied within bills of exchange. For this reason, we first show how the bill of exchange is involved as a method of publicity in the situation of transfer and pledge. The second issue concerns whether and how third parties are protected due to their reliance on the bill of exchange. To reveal the function of publicity of the bill of exchange, discussing the second issue is inevitable.

In this part, an introduction of English law, German law and Dutch law is provided first (see 4.2.3.1-4.2.3.3). Following this introduction, there is a comparative discussion (see 4.2.3.4). In the end, we attempt to reveal the function of publicity of securities of payment (see 2.2.3.5-4.2.3.6).

4.2.3.1 English Law

A The Transfer and Pledge of Bills of Exchange

English law recognizes a number of negotiable instruments of payment, among which the most important one is the bill of exchange. It is regulated by the Bills of Exchange Act (1882) (hereafter abbreviated as BEA). This act is also applicable to, with necessary modifications, cheques and promissory notes.[410] In brief, the bill of exchange is a negotiable document drawn by one person (the drawer) to request another person (the drawee or acceptor) to pay a certain amount of money to a third person (the payee) at a certain moment. It embodies a personal claim, and the creditor enjoys a right to require the debtor to pay. However, the claim is special in two aspects: the

408 Goode 2010, p. 521.

409 In fact, the function of publicity of securities of payment is also shown by the legal exclusion of "personal defenses (*persönliche Einwendungen* in German and *persoonlijke verweermiddelen* in Dutch)". Where a claim embodied is transferred, the debtor cannot refuse payment to the new creditor by claiming that there is a defect in his or her personal legal relationship with the original creditor (art. 17 WG, art. 6:146 (1) BW, and art. 116 WvK). The legal exclusion of personal defenses is often explained by the notion of "appearance of rights (*Rechtsschein*)": the new creditor can safely rely on the content of the document. See Goode 2010, p. 533; Hueck and Canaris 1986, p. 104; Zöllner 1978, p. 133-134; Hammerstein 1998, p. 43-44; Zevenbergen 1951, p. 34. In general, the legal protection of third parties against personal defenses is an issue falling under the law of obligations. Therefore, it is not discussed here. See Van Empel and Huizink 1991, p. 50-52.

410 S. 73 BEA: "*A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.*" S. 89 (1) BEA: "*Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.*"

way of disposal and the protection of third parties under the rule of "*the holder in due course*". The second aspect will be dealt with later.

Roughly speaking, the method of transferring and pledging a bill of exchange is dependent on the type of this bill. If the bill of exchange is made payable to bearer, then the debtor has to perform the obligation of payment to the person who holds the bill of exchange. Both pledge and transfer of the bill require delivery, namely the shift of possession of the bill.[411] If the bill of exchange is made payable to order, then the debtor has to pay to the last endorsee who is often also the possessor of the bill of exchange. Order bills of exchange need to be disposed of through endorsement plus delivery.[412] Therefore, for the disposal of both bearer and order bills of exchange, delivery is necessary. According to s. 2 BEA, the concept of delivery includes both actual delivery and constructive delivery.[413] For example, the transferor's acknowledgment of controlling the bill for the transferee suffices for fulfilling the requirement of delivery.[414] In theory, the bill of exchange can also be pledged by the pledgor attorning to the pledgee, which means that factual control of the document is retained by the pledgor.[415] As a result, the requirement of delivery cannot guarantee that the document is always controlled by the transferee or the pledgee.

In the situation of pledging order bills of exchange, it is unclear whether a mark of pledge has to be recorded on the document.[416] The BEA includes no specific provision with respect to the endorsement for pledge. It seems that the rules concerning the endorsement of collection, a kind of "restrictive endorsement", as opposed to "full endorsement", will apply to the pledge of bills of exchange.[417] Therefore, the endorsee/pledgee is entitled to receive the payment, but cannot transfer the bill of exchange.[418] It can be imagined that if the existence of the pledge is not indicated by the bill of exchange, which implies that the endorsee/pledgee appears to be a full creditor, then third parties in good faith will be protected.[419]

As has been indicated above, the bill of exchange embodies a personal right of payment. Therefore, it is also possible that the creditor transfers this personal right in the way of assignment.[420] To assign the right, the conditions required for the assignment of ordinary claims have to be fulfilled. However, the assignee's legal position may be overridden by the legal posi-

411 S. 31 (2) BEA: "*A bill payable to bearer is negotiated by delivery*."
412 S. 31 (3) BEA: "*A bill payable to order is negotiated by the indorsement of the holder completed by delivery*."
413 S. 2 BEA: "'*Delivery' means transfer of possession, actual or constructive, from one person to another.*"
414 Hedley and Hedley 2001, p. 46.
415 Beale, Bridge, Gullifer and Lomnicka 2018, no. 5.27.
416 UNCITRAL Yearbook 1971, p. 124.
417 UNCITRAL Yearbook 1971, p. 124; Chalmers 1919, p. 166; Guest 2016, no. 5-032.
418 Guest 2016, no. 5-034; Goode 2010, p. 565-566.
419 Ashcroft and Ashcroft 2013, p. 273.
420 Guest 2016, no. 5-067; Chalmers 1919, p. 150.

tion of a subsequent party who acquires the same claim from the creditor in the way of endorsement.[421] Moreover, *bona fide* acquisition is not available to the assignee: the assignee cannot obtain a better title than the assignor.[422] In sum, the bill of exchange does not have blocking effect in English law. The existence of the bill of exchange does not mean that the creditor cannot assign the claim embodied without involving the document.

B The Holder in Due Course

Bills of exchange have the feature of negotiability. In general, this feature includes two aspects: (1) the right embodied within bills of exchange can be disposed of like a corporeal movable; and (2) *bona fide* transferees for value are able to acquire a better title than the transferor.[423] The first aspect has been discussed above. Now we turn to the second aspect.

The second aspect is based on the rule of "*the holder in due course*" (s. 29 BEA).[424] According to this rule, a holder in due course can acquire the bill of exchange free from any defects of the earlier parties' title, including the personal defenses an earlier party has against another earlier party.[425] In general, the rule of "*the holder in due course*" can give rise to two important outcomes: (1) *bona fide* acquisition of the claim embodied; and (2) legal protection against personal defenses raised by the debtor. As has been mentioned above, the second outcome will not be discussed (see 4.2.1.3).

> "*The bolder in due course is in a powerful position. He can acquire a good title from or through a thief. He is not affected by the fact that any predecessor obtained the bill by fraud or pursuant to a fraudulent or otherwise illegal purpose, or that the consideration given for the bill by a predecessor has wholly failed, as where the original holder took the bill as payment for goods which he failed to deliver or which were lawfully rejected. […] The only limitation on the right of the holder in due course is that, where a signature on the bill has been forged or is otherwise of no legal effect, he has no rights against those who were parties to the bill prior to the ineffective signature, for vis-a-vis those parties he is not a holder at all.*"[426]

421 Guest 2016, no. 5-067; Chalmers 1919, p. 151.

422 Guest 2016, no. 5-007.

423 Sealy and Hooley 2009, p. 526; Furmston and Chuah 2013, p. 343.

424 S. 29 BEA: "(1) *A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact: (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.* (2) *In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.*"

425 Furmston and Chuah 2013, p. 353.

426 Goode 2010, p. 533.

As an exception to the *nemo dat* rule, *bona fide* acquisition of bills of exchange (precisely speaking, *bona fide* acquisition of the right embodied) can arise in two types of situations: (1) the transferor is not the creditor and has no title to the bill of exchange; and (2) the transferor is the creditor and has defective title to the bill of exchange.[427]

For example, where a bill of exchange is stolen by a thief who then transfers this bill to a third party, this third party is able to acquire the bill and the claim embodied under certain conditions.[428] In this situation, the thief has no title to the bill of exchange. Nevertheless, the legal creditor from whom the bill of exchange is stolen might lose the right to recover the bill from the third party. The possibility of *bona fide* acquisition by the third party only exists when the bill of exchange is payable to bearer.[429] If the stolen bill is payable to order, which means that endorsement is necessary, then the thief has to forge the signature of the legal creditor. Pursuant to a provision concerning forged and unauthorized signatures (s. 24 BEA),[430] the third party, whether in good faith or not, cannot acquire the bill of exchange against the previous parties including the legal creditor.[431] The third party has "*no rights against those who were parties to the bill prior to the ineffective signature*" and is only entitled to request the thief/forger to pay.[432] This amounts to excluding the possibility of *bona fide* acquisition by the third party.[433]

The rule of "*the holder in due course*" is also applicable to the situation where the transferor only has a defective title. For example, the transferor obtained the bill of exchange from the original creditor by fraud. In this very situation, the transferor might only have a voidable title to the bill of exchange: the original creditor is entitled to make this title void, which is "*a matter of the general law*".[434] It seems that the original creditor has an equitable title to the bill of exchange in equity law.[435] Nevertheless, the transferee, as a third party, is able to acquire from the transferor the bill of exchange

427 Guest 2016, no. 4-062.
428 Guest 2016, no. 4-066.
429 Guest 2016, no. 4-062.
430 S. 24 BEA: "*Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.*"
431 Guest 2016, no. 3-006; Byles 2002, p. 218.
432 Goode 2010, p. 533.
433 In the case of forgery, however, an exception is estoppel. Briefly speaking, where the legal creditor has admitted the signature or would have avoided the forgery of his or her signature, the rule of estoppel may require the legal creditor to pay the third party. See Guest 2016, no. 3-079; Byles 2002, p. 278.
434 Byles 2002, p. 230.
435 The term "*defects of title*" refers to matters which were known as "*equities attaching to the bill*" before the enactment of the BEA. See Guest 2016, no. 4-062.

free from the binding force of the equitable title of the original creditor.[436] In this case, the original creditor's signature is not forged by the transferor, thus the provision concerning forged and unauthorized signatures (s. 24 BEA) is not applicable.

According to s. 29 BEA, certain conditions have to be satisfied for obtaining the legal position of "*the holder in due course*". One condition is that the holder must be in good faith and has no notice of the defect in the title of the person who negotiates the bill of exchange.[437] Another condition is that "*the holder should himself furnish value, so that he could not rely on value provided by the predecessors*".[438] This condition precludes a donee from acquiring a better title than the title the donor has. A third condition is that the bill of exchange must be "*complete and regular on its face*".[439] If the bill has conveyed a warning to the transferee, then the transferee can no longer obtain a better title than the title of the transferor. For example, where the endorsement is irregular, the third party will not be a holder in due course.[440] In the end, to be a holder in due course, the third party has to qualify as a "holder" of the bill of exchange.[441] For being a holder, it is necessary that the third party must have possession of the bill, whether direct or indirect.[442] As indirect possession suffices, it seems that *bona fide* acquisition is not excluded where the bill of exchange is delivered in the way of *traditio per constitutum possessorium*.[443]

4.2.3.2 German Law

In German law, there are two kinds of monetary securities: (1) one is the *Wechsel*, including *eigener Wechsel* and *gezogener Wechsel*; and (2) the other is the "cheque (*Scheck*)". In general, *eigener Wechsel* is promissory note: the drawer him- or herself bears a duty to pay a certain amount of money.[444] *Gezogener Wechsel* is equivalent to the English term "bill of exchange": a third party, instead of the drawer, is required to pay a certain amount of money.[445] For the purpose of convenience, we use the term "bill of exchange" to represent *Gezogener Wechsel*, and our following discussion only focuses on this type of monetary document. Bills of exchange are regulated by the *Wechselgesetz* (1933) (abbreviated as WG).

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436 Guest 2016, no. 4-0623. The relationship between *bona fide* acquisition and voidable title has also been discussed in the situation of corporeal movables (see 3.4.3.1.B).
437 Byles 2002, p. 220.
438 Goode 2010, p. 535.
439 Guest 2016, no. 4-052.
440 Byles 2002, p. 219.
441 Byles 2002, p. 219; Guest 2016, no. 4-051.
442 Byles 2002, p. 93; Guest 2016, no. 1-021.
443 As to *bona fide* acquisition and *traditio per constitutum possessorium* in the situation of ordinary corporeal movables, a detailed discussion has been provided (see 3.4.3.1.D).
444 Zöllner 1978, p. 51; Moshenskiĭ 2008, p. 7.
445 Zöllner 1978, p. 51.

A The Transfer and Pledge of Bills of Exchange

Different from English law, German law does not allow a bill of exchange to be drawn to bearer. The bill of exchange must indicate the payee's name. Otherwise, the issuance will be incomplete.[446] In principle, once a bill of exchange is validly made out, this bill can be disposed of in the way of endorsement. This way of disposal is laid down by art. 11 (1) WG.[447] For a valid endorsement, the endorser has to declare the transfer by indicating the name of the transferee on the back of the bill of exchange.[448] In addition, the bill of exchange also needs to be delivered to the endorsee, including in the way of *traditio per constitutum possessorium*.[449]

The claim embodied can also be pledged in the way of endorsement (§ 1292 BGB).[450] According to art. 19 (1) WG, valid endorsement for pledge requires a mark of pledge, such as "value for security (*Wert zur Sicherheit*)" or "value for pledge (*Wert zum Pfand*)". There is no doubt that the mark has a function of publicity: third parties can be informed that an encumbrance of pledge exists on the claim embodied.[451] If the pledgor does not record such mark, however, a right of pledge still exists between the pledgor and the pledgee.[452] This is known as "concealed endorsement for pledge (*verdeckte Pfandindossament*)".[453] In this case, the pledgee appears to be the full creditor for third parties, which creates a possibility of *bona fide* acquisition when the pledgee disposes of the bill of exchange.[454] To pledge bills of exchange, the pledgor also needs to deliver the document to the pledgee in the way prescribed by § 1205 and 1206 BGB.[455] As a result, *traditio per constitutum possessorium* is excluded when the document is under actual possession by the pledgor. If the bill of exchange is indirectly possessed by the pledgor, then the pledgor not only has to transfer indirect possession to the pledgee, but also notify the direct possessor.

The claim embodied in a bill of exchange can also be disposed of in another way than the way of endorsement. As a personal right, the claim can be transferred in the way of "assignment (*Zession*)" under the BGB.[456]

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446 Zöllner 1978, p. 70; Hueck and Canaris 1986, p. 64-65.

447 Art. 11 (1) WG: "*Jeder Wechsel kann durch Indossament übertragen werden, auch wenn er nicht ausdrücklich an Order lautet*." English translation: Art. 11 (1) WG: "*Each bill of exchange can be transferred by endorsement, even when it is not expressly declared as payable to order.*"

448 Zöllner 1978, p. 13.

449 Schnauder and Müller-Christmann 1991, p. 72.

450 § 1292 BGB: "*Zur Verpfändung eines Wechsels oder eines anderen Papiers, das durch Indossament übertragen werden kann, genügt die Einigung des Gläubigers und des Pfandgläubigers und die Übergabe des indossierten Papiers*." English translation: § 1292 BGB: "*For pledging a bill of exchange or any other instrument that may be transferred by endorsement, agreement between the creditor and the pledgee and the delivery of the instrument endorsed suffice.*"

451 Zöllner 1978, p. 105.

452 Schnauder and Müller-Christmann 1991, p. 86.

453 Zöllner 1978, p. 105.

454 Schnauder and Müller-Christmann 1991, p. 86; Tiedtke 1985, p. 265.

455 MüKoBGB/Damrau 2017, § 1292, Rn. 3; Westermann 2011, p. 1206-1207.

456 Hueck and Canaris 1986, p. 81; Schnauder and Müller-Christmann 1991, p. 69.

This reminds us that the claim embodied within securities to goods can be disposed of in both the way of endorsement and that of assignment in German law (see 4.2.2.2.B). According to § 398 BGB, a claim can be assigned on the basis of an agreement, and notifying the debtor involved is not necessary.[457] As an extra requirement, the assigner has to deliver the document to the assignee to make the "state of the right (*Rechtszuständigkeit*)" and the "appearance of the right (*Rechtsschein*)" consistent with each other.[458] To fulfill this extra requirement, the assignor does not have to give up actual control of the document to the assignee. For example, *traditio per constitutum possessorium* also suffices.[459] This can, more or less, be explained by the following viewpoint: there is no reason to treat bills of exchange differently from other corporeal movables.[460] If the claim embodied is transferred in the way of assignment, then the possibility of *bona fide* acquisition of the claim will be excluded due to the lack of endorsement.[461]

The claim embodied within bills of exchange can be pledged in another way than endorsement. As a personal right, the claim can be pledged according to the general rules of civil law (§ 1274 BGB).[462] For this way of pledge, delivery of the document to the pledgee is necessary.[463] However, due to this extra requirement, notifying the debtor is unnecessary.[464] According to § 1280 BGB, providing notification to the debtor is essential for creating a property right of pledge on ordinary claims (see 4.1.4.2). If the claim is pledged in the civil-law way under the extra condition of delivery of the document, then *bona fide* acquisition will not be available to the pledgee.[465]

B The Function of Negotiation

In general, endorsement of bills of exchange has a "function of negotiation (*Transportfunktion*)" in German law.[466] This function involves three aspects: (1) the claim embodied can be transferred by transferring the bill of ex-

457 § 398 BGB: "*Eine Forderung kann von dem Gläubiger durch Vertrag mit einem anderen auf diesen übertragen werden (Abtretung). Mit dem Abschluss des Vertrags tritt der neue Gläubiger an die Stelle des bisherigen Gläubigers.*" English translation: § 398 BGB: "*A claim may be transferred by the creditor to another person by agreement with that person (assignment). When the agreement takes effect, the new creditor steps into the shoes of the previous creditor.*"

458 Hueck and Canaris 1986, p. 82; Schnauder and Müller-Christmann 1991, p. 69-70.

459 Hueck and Canaris 1986, p. 81; Schnauder and Müller-Christmann 1991, p. 70.

460 Hueck and Canaris 1986, p. 82-83. As we have pointed out above, ownership of corporeal movables can be transferred in the way of *traditio per constitutum possessorium* in German law (see 3.4.2.2.B).

461 Hueck and Canaris 1986, p. 83.

462 MüKoBGB/Damrau 2017, § 1292, Rn. 17.

463 MüKoBGB/Damrau 2017, § 1292, Rn. 17.

464 MüKoBGB/Damrau 2017, § 1292, Rn. 17.

465 Schnauder and Müller-Christmann 1991, p. 86.

466 Hueck and Canaris 1986, p. 88; Zöllner 1978, p. 92. In addition to this function, endorsement also has a "function of legitimization (*Legitimationsfunktion*)" and a "function of guarantee (*Garantiefunktion*)". The former function implies that the endorsee is legitimized as the entitled, and the latter function means that every endorser is responsible for the payment. See Zöllner 1978, p. 91-93; Hueck and Canaris 1986, p. 87-93.

change; (2) the claim can be acquired from an unauthorized transferor by third parties in good faith on the basis of *bona fide* acquisition of the bill of exchange; and (3) personal defenses of previous debtors are restricted for the benefit of the endorsee.[467] The first aspect has been just discussed, and the third aspect will not be discussed here (see 4.2.1.3).

In general, *bona fide* acquisition of the claim embodied within a bill of exchange is possible by *bona fide* acquisition of ownership of this bill of exchange.[468] This possibility is recognized by art. 16 (2) WG.[469] This paragraph is not only applicable to the situation where the original creditor loses factual control of the bill of exchange contrary to his or her will, but also to the situation where the original creditor voluntarily gives up factual control of the bill.[470] In the former situation, the bill of exchange might be stolen from the original creditor and then transferred by the thief to a third party.[471] In the latter situation, the bill of exchange might be deposited by the original creditor and then transferred by the custodian to a third party.[472] The rule of *bona fide* acquisition is also applicable when the transferor obtains the factual control of the bill of exchange on the basis of a defective consent made by the original creditor.[473]

In the situation where the transferor obtains factual control of the bill of exchange contrary to the original creditor's will, forgery of signatures might arise. For example, A draws a bill of exchange to B who later endorses this bill to C, D steals the bill from C and then transfers it to E who is in good faith. The endorsement appears consistent because the thief D forges an endorsement by C to D. In this case, E is able to acquire the bill of exchange and the claim embodied on the basis of art. 16 (2) WG, provided that all

467 Hueck and Canaris 1986, p. 88-91.

468 Hueck and Canaris 1986, p. 89; Tiedtke 1985, p. 240.

469 Art. 16 (2) WG: "*Ist der Wechsel einem früheren Inhaber irgendwie abhanden gekommen, so ist der neue Inhaber, der sein Recht nach den Vorschriften des vorstehenden Absatzes nachweist, zur Herausgabe des Wechsels nur verpflichtet, wenn er ihn in bösem Glauben erworben hat oder ihm beim Erwerb eine grobe Fahrlässigkeit zur Last fällt.*" English translation: Art. 16 (2) WG: "*If the bill of exchange has somehow been lost to the original holder, the new holder, who proves his or her right according to the rule of the preceding paragraph, is only obliged to give up the bill if he or she acquired it in bad faith or was grossly negligent in acquiring the bill.*"

470 Bülow 2004, p. 100.

471 Bülow 2004, p. 100.

472 Zöllner 1978, p. 95; Schnauder and Müller-Christmann 1991, p. 77.

473 Bülow 2004, p. 100; Stranz and Stranz 1952, p. 109; Schnauder and Müller-Christmann 1991, p. 77. Here, it is necessary to mention the relationship between the principle of abstraction and the validity of the bill of exchange. The German law of bills of exchange accepts the principle of abstraction. Under this principle, the underlying legal relationship of obligations does not affect the bill of exchange itself. However, the principle cannot guarantee that the bill of exchange is necessarily valid, because the validity of bills of exchange is determined by some factors, such as the legal capacity of the parties involved, the authority of the agent, and the validity of the "declaration of intent (*Willenserklärung*)". See Zöllner 1978, p. 36. For example, where a bill of exchange is endorsed and delivered because of fraud, the endorsement *per se* is voidable, and the endorsee lacks a valid basis to keep the bill of exchange. If the fraudulent endorsee further transfers the bill to a third party, then *bona fide* acquisition is possible to this third party.

relevant conditions are satisfied. As a result, E can require A (the drawer) or B (a previous endorser) to provide the payment.[474] In principle, C bears no duty of payment to E.[475]

According to art. 16 (2) WG, the third party must be in good faith or, precisely speaking, with no gross negligence.[476] Moreover, the endorsement must be consistent without any break, which implies that the transferor must be the last endorsee or a regular holder.[477] The third party in good faith is not expressly required by art. 16 (2) WG to offer consideration, but § 816 BGB imposes an obligation of return over the third party who acquires the bill gratuitously.[478]

Here, a question is whether the bill of exchange has to be delivered to the third party in good faith. Though the WG does not directly provide an answer, the "return of bills of exchange (*Herausgabe des Wechsels*)" implies the requirement of delivery: the third party has to obtain possession of the bill of exchange.[479] As to whether *traditio per constitutum possessorium* suffices for satisfying this requirement, the prevailing opinion is in favor of a positive answer.[480] Therefore, *bona fide* acquisition of bills of exchange is different from *bona fide* acquisition of ordinary corporeal movables in the requirement of delivery.[481] In the case of bills of exchange, the reliance of third parties on the endorsement matters, and whether direct possession of the document is given up to third parties is irrelevant.[482]

4.2.3.3 Dutch Law

In Dutch law, the most important three types of securities of payment are "bills of exchange (*wissel*)", "promissory note (*promesse* or *orderbriefje*)" and "cheques (*cheque*)".[483] These securities of payment are regulated by the BW

474 Schnauder and Müller-Christmann 1991, p. 80; Zöllner 1978, p. 98.

475 The principle of abstraction is not applicable to the question whether C bears a duty of payment to E. The principle only insulates the bill of exchange from the underlying legal relationship. However, the validity of the bill itself is affected by some factors. In this case, C does not express any valid consent to the endorsement forged by D, thus the endorsement is invalid. In general, the question needs to be answered by applying the rationale of "appearance of rights". See Zöllner 1978, p. 98-99; Hueck and Canaris 1986, p. 112-113; Bülow 2004, p. 282. According to this rationale, the person, whose signature is forged, is only liable for the payment when the forgery is attributable to his or her act or omission. Usually, forgery of the signature of a person cannot be attributed to this person, which means that he or she does not bear any duty of payment to the third party (E in this case). See Bülow 2004, p. 282.

476 Zöllner 1978, p. 94.

477 Bülow 2004, p. 99; Tiedtke 1985, p. 242.

478 Baumbach, Hefermehl and Casper 2008, p. 193.

479 Hueck and Canaris 1986, p. 89; Bülow 2004, p. 99.

480 Hueck and Canaris 1986, p. 89; Zöllner 1974, p. 238.

481 As we have shown above, *traditio per constitutum possessorium* is not an eligible form of delivery for *bona fide* acquisition of ordinary corporeal movables (see 3.4.3.4.B).

482 Hueck and Canaris 1986, p. 89.

483 Hammerstein 1998, p. 6-7; Mees 1980, p. 5.

and the *Wetboek van Koophandel* (1838) (abbreviated as WvK). As will be seen later, the BW, which took effect since 1992, includes some modifications to the WvK.[484] In this part, we focus on the bill of exchange.

A The Transfer and Pledge of Bills of Exchange

In general, the way of transferring the right embodied within securities, including the bill of exchange, is determined by art. 3:93 BW. According to this provision, the right embodied within a bearer document is transferred by delivering this document, and a right embodied within an order document is transferred by delivery plus endorsement of this document.[485] According to art. 100 WvK, the bill of exchange can only be made payable to order.[486] Therefore, endorsement is necessary for transferring bills of exchange.[487] As has been shown above, the way of transfer is statutory in Dutch law and cannot be contracted out for the sake of legal certainty (see 4.2.2.3.B).[488] The creditor of the bill of exchange is not allowed to transfer the claim in the way of "assignment (*cessie*)" under art. 3:94 BW.[489] This would lead to a divergence between the document and the claim, as pointed out by Dutch legislators.

> "*Het zou niet raadzaam zijn daarnaast de mogelijkheid van cessie toe te laten. Deze zou er gemakkelijk toe kunnen leiden dat wel het recht overgaat, maar het toonder- of orderpapier niet in handen van de verkrijger komt.*"[490]

484 Scheltema 1993, p. 100-102.

485 Art. 3:93 BW: "*De levering, vereist voor de overdracht van een recht aan toonder waarvan het toonderpapier in de macht van de vervreemder is, geschiedt door de levering van dit papier op de wijze en met de gevolgen als aangegeven in de artikelen 90, 91 en 92. Voor overdracht van een recht aan order, waarvan het orderpapier in de macht van de vervreemder is, geldt hetzelfde, met dien verstande dat voor de levering tevens endossement vereist is.*" English translation: Art. 3:93 BW: "*Delivery required for the transfer of rights to bearer, the bearer document of which is under the control of the alienator, is made by the delivery of the document in the manner and with the consequences specified in articles 90, 91, and 92. The same applies to the transfer of rights to order, the order document of which is under the control of the alienator, under the condition that endorsement is required for delivery.*"

486 Hammerstein 1998, p. 16. However, bill of exchange does not have to include an order clause. According to art. 110 WvK, the bill which is not clearly indicated to be payable to order can also be transferred in the way of endorsement. If a bill of exchange lacks an order clause, this bill will also be assumed to be an order bill of exchange. See Zevenbergen 1951, p. 103; Mees 1980, p. 39.

487 Art. 110 (1) WvK: "*Elke wisselbrief, ook die welke niet uitdrukkelijk aan order luidt, kan door middel van endossement worden overgedragen.*" English translation: Art. 110 (1) WvK: "*Each bill of exchange, including those which are not expressely declared as payable to order, can be transferred through endorsement.*"

488 Reehuis 2004, p. 4.

489 This has been confirmed by the Hoge Raad (see 4.2.2.3.B). However, some scholars hold the opposite opinion. See Van Empel 2002, p. 57.

490 Parlementaire Geschiedenis (3) 1981, p. 391. English translation: "*Moreover, it is not advisable to recognize the possibility of assignment. This could easily lead to the situation that the right passes while the order or bearer document remains in the hands of the transferor.*"

However, if the creditor loses factual control of the bill of exchange, and endorsement is impossible, then assignment is permitted.[491] In this very situation, there is no reason to deny the creditor's right to dispose.

To transfer the claim embodied in the way of endorsement, the transferor needs to deliver the bill of exchange to the transferee.[492] This requirement of delivery does not mean that the transferor has to give up actual control of the bill of exchange to the transferee, because *traditio per constitutum possessorium* is permitted.[493] When the transferor agrees to hold the document for the acquirer, the claim embodied can also pass to the latter, provided that the other conditions are fulfilled. However, there is a risk associated with *traditio per constitutum possessorium*. This form of delivery only yields relative effect: the acquisition is subject to the property right existing on the claim earlier (art. 3:90 (2) BW).[494]

The claim embodied within bills of exchange can be pledged in the way of endorsement. According to art. 3:236 (1) BW, pledge of the claim not only requires endorsement of the bill of exchange, but also factual control of the document by the pledgee.[495] Pursuant to art. 118 WvK, the endorsement must contain a mark of pledge, such as "value for security (*waarde tot zekerheid*)" or "value for pledge (*waarde tot pand*)", to show the existence of the pledge. Undoubtedly, from the perspective of publicity, this mark is important for third parties. Here, there are two questions that have direct connection with the function of publicity of the endorsement for pledge. The first question is whether "concealed endorsement for pledge (*geheim pandendosement*)" is permitted.[496] In general, most lawyers are in favor of a positive answer.[497] In their view, the absence of a mark of pledge does not affect the valid creation of the pledge between the pledgor and the pledgee, and the pledgee is, in relation to third parties, legitimized as the creditor of the bill of exchange.[498] The second question is whether it is possible to create a silent pledge over bills of exchange payable to order. The prevailing

491 Parlementaire Geschiedenis (3) 1981, p. 391; Snijders and Rank-Berenschot 2017, p. 298.
492 Scheltema 1993, p. 92; Zevenbergen 1951, p. 139.
493 Reehuis 2004, p. 74; Snijders and Rank-Berenschot 2017, p. 298.
494 Reehuis 2004, p. 74.
495 Art. 3:236 (1) BW: "*Pandrecht op een roerende zaak, op een recht aan toonder of order, of op het vruchtgebruik van een zodanige zaak of recht, wordt gevestigd door de zaak of het toonder- of orderpapier te brengen in de macht van de pandhouder of van een derde omtrent wie partijen zijn overeengekomen. De vestiging van een pandrecht op een recht aan order of op het vruchtgebruik daarvan vereist tevens endossement.*" English translation: Art. 3:236 (1) BW: "*The right of pledge on a corporeal movable, on a right payable to bearer or order, or on the usufruct of such a thing or right, is established by bringing the thing or the document to bearer or order under the control of the pledgee or of a third person agreed upon by the parties. Furthermore, endorsement is required for the establishment of a right of pledge on a right payable to order or on the usufruct thereof.*"
496 Hammerstein 1998, p. 37.
497 Zwitser 2006, p. 83-84; Zevenbergen 1951, p. 154; Asser/Van Mierlo 2016, nr. 149. However, opposite opinions exist. See Scheltema 1993, p. 106.
498 Zevenbergen 1951, p. 155; Asser/Van Mierlo 2016, nr. 149.

view is that, according to art. 3:237 BW, it is impossible to create a silent pledge on an order bill of exchange.[499] As a result, both endorsement and delivery of the document are necessary for pledging bills of exchange.

B Protection of Reliance

In general, bills of exchange are a "reliable document (*betrouwbaar waardepapier*)" for third parties.[500] In general, the protection of the reliance of third parties includes two aspects: one is *bona fide* acquisition of the bill of exchange and the claim embodied, and the other is the limitation of personal defenses of the debtor.[501] The second aspect is not discussed here (see 4.2.1.3).

As has been shown above, *bona fide* acquisition of ordinary claims is not generally recognized by Dutch law (see 4.1.3.3). However, according to art. 3:86 (1) BW, the right embodied within bearer or order securities can be acquired, just like a corporeal movable, from the unauthorized transferor.[502] If the document is stolen by the transferor, then art. 3:86 (3) BW is applicable.[503] According to this paragraph, the transferee is able to acquire the document and the right embodied without having to wait for three years. The legal protection granted to third parties in good faith is also recognized by art. 115 (2) WvK.[504] In general, the rationale behind the legal protection is that the document creates an "appearance of rights (*schijn van recht*)" for third parties.[505]

If the order bill of exchange was obtained by the unauthorized transferor from the original creditor through an illegal means, such as theft, then

499 Scheltema 1993, p. 107; Steneker 2012, p. 94; Snijders and Rank-Berenschot 2017, p. 466. However, opposite opinions exist. See Zwitser 2006, p. 83-84.

500 Mees 1980, p. 26; Van Empel and Huizink 1991, p. 48.

501 Mees 1980, p. 26.

502 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 the transferor lacks the right to dispose, the transfer pursuant to articles 90, 91 or 93 of a movable object, unregistered property, or a right to bearer or order is valid, if the transfer does not have a gratuitous basis and the acquirer acts in good faith.*"

503 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 […] het geld dan wel toonder- of orderpapier betreft.*" English translation: Art. 3:86 (3) BW: "*Nevertheless, the owner of a corporeal movable, who has lost its possession due to theft, may recover it during a period of three years from the day of theft, except for […] in the case of money or paper payable to bearer or order.*"

504 Art. 115 (2) WvK: "*Indien iemand, op welke wijze dan ook, het bezit van den wisselbrief heeft verloren, is de houder, die van zijn recht doet blijken op de wijze, bij het voorgaande lid aangegeven, niet verplicht den wisselbrief af te geven, indien hij deze te goeder trouw heeft verkregen.*" English translation: Art. 115 (2) WvK: "*If someone lost possession of the bill of exchange in any way whatsoever, then the holder is not obliged to return the bill of exchange when he or she proves the right according to the preceding paragraph and obtains the right in good faith.*"

505 Zevenbergen 1951, p. 28; Mees 1980, p. 26.

bona fide acquisition usually involves a forgery of the original creditor's signature. To make the endorsement appear consistent, the unauthorized transferor needs to forge the endorsement by the original creditor. For example, A draws a bill of exchange to B, C steals this bill from B and then transfers it to D; C forges the endorsement by B to C; D is in good faith. In this situation, D is able to acquire ownership of the bill of exchange and the claim embodied, provided that relevant conditions are fulfilled.[506] After *bona fide* acquisition, D can require A to pay. The issuance of the bill by A is valid and independent from C's forgery (art. 106 WvK).[507] Moreover, B is, in principle, not liable for the payment.[508]

For *bona fide* acquisition of the bill of exchange, certain requirements have to be satisfied. The first requirement is that the unauthorized transferor appears to be the legal creditor, which means that he or she must be formally legitimized as a regular holder of the document.[509] For example, the endorsement of the bill of exchange has to be consistent without any break. The second requirement is that the third party must be in good faith with respect to the defect in the transferor's authority to dispose.[510] The third requirement is that the third party offers consideration to the transferor.[511] In addition, possession of the bill of exchange is provided to the third party in good faith in a way other than *traditio per constitutum possessorium*.[512] In the aspect of delivery, *bona fide* acquisition of bills of exchange and that of ordinary corporeal movables do not differ.

4.2.3.4 Comparative Analysis

From the preceding introduction, we can find that the bill of exchange plays an important role in the disposal of the claim embodied in English law, German law and Dutch law: (1) the claim can be deposed of by disposing of the bill of exchange; and (2) the reliance of third parties in good faith on the bill of exchange is extensively protected. However, the three jurisdictions differ in whether the claim embodied within bills of exchange can be disposed of without involving the document. Moreover, they also have some differences in *bona fide* acquisition of the bill of exchange and the claim embodied.

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506 Zevenbergen 1951, p. 155-156; Hammerstein 1998, p. 39.

507 Zevenbergen 1951, p. 93-94; Van Empel and Huizink 1991, p. 67.

508 The question whether B bears a duty of payment to D needs to be answered according to art. 6:147 BW. Pursuant to this provision, B might bear the obligation of payment to D when the forgery is attributable to B's act or omission. In general, the possibility of such attribution is low in the situation of forgery of signatures. See Van Empel and Huizink 1991, p. 68.

509 Hammerstein 1998, p. 39; Scheltema 1993, p. 100.

510 According to the old rule of art. 115 (2) WvK, having no gross negligence suffices. However, art. 3:86 BW modifies this rule. See Hammerstein 1998, p. 39.

511 The old rule of art. 115 (2) WvK does not includes such requirement. However, art. 3:86 BW requires the third party in good faith to provide counter performance, thereby excluding the possibility of *bona fide* acquisition by a donee. See Scheltema 1993, p. 102.

512 Snijders and Rank-Berenschot 2017, p. 317; Scheltema 1993, p. 98.

A The Blocking Effect of Bills of Exchange

Briefly speaking, blocking effect means that the existence of a bill of exchange excludes the possibility of disposing of the claim embodied without involving this bill. Typically, the effect concerns the question whether the claim embodied can be transferred, just as an ordinary personal right, in the way of assignment. With respect to this question, English law, German law and Dutch law have different rules.

In English law, the bill of exchange does not have blocking effect. As a personal right, the claim embodied within bills of exchange can be transferred in the way of assignment. For the assignment, neither endorsement nor delivery of the bill is necessary. However, the assignee, namely the new creditor, cannot benefit from the rule of "*the holder in due course*". In other words, the assignee is not allowed to claim *bona fide* acquisition and cannot obtain a better title than the assignor's title. Moreover, the assignee's legal position might be prevailed over by the legal position of a third party in good faith to whom the original creditor transfers the same claim in the way of endorsement.

Like English law, German law also permits the claim embodied within bills of exchange to be transferred in the way of assignment according to the BGB. However, an extra requirement is that the document has to be delivered to the assignee. This requirement is to avoid the divergence between the claim embodied and the outward appearance (i.e. the bill of exchange). However, the divergence cannot be completely averted because *traditio per constitutum possessorium* suffices for satisfying the requirement of delivery. In German law, when the claim embodied is transferred in the way of assignment, the assignee cannot claim *bona fide* acquisition. Moreover, if the assignor retains factual control of the bill of exchange and further disposes of the bill to a third party, then this third party might be entitled to *bona fide* acquisition at the expense of the assignee's interests. Therefore, English law and German law have no substantial differences in terms of the legal consequences of the assignment.

Unlike English law and German law, Dutch law recognizes the blocking effect of bills of exchange. In Dutch law, the creditor of a bill of exchange has to dispose of the claim embodied in the way of endorsement, at least when the creditor has factual control of the document. In the viewpoint of Dutch legislators, the recognition of the blocking effect is to guarantee that the claim and the document can be transferred simultaneously from one person to another.[513] As mentioned above, however, this legislative target cannot be completely realized due to the possibility of *traditio per constitutum possessorium*: the transferor can alienate the bill of exchange but retains factual control of the document.[514] In the case of bearer bills of exchange, the transferor has a chance to use the document retained to mislead third parties. In the case of bills of exchange payable to order, the transferor usually does

513 Parlementaire Geschiedenis (3) 1981, p. 391.
514 Snijders and Rank-Berenschot 2017, p. 298.

not have such chance. Though the bill is retained by the transferor, the last endorsee of the document is the transferee, the new creditor. As a result, the transferor cannot use the bill retained to mislead third parties, unless he or she erases the endorsement or forges an endorsement to him- or herself.

In general, there seem to be no sufficient reasons to prohibit the assignment of the claim embodied within bills of exchange, even when endorsement is possible.[515] For the transacting parties, the way how the claim is transferred belong to their own affairs. For third parties, what matters is that their reliance will be protected.[516] In principle, when the transferee acquires the claim embodied in a way that allows the transferor to retain the bill and appear to be the true creditor, *bona fide* acquisition by a third party in good faith is not unfair to the transferee. This way of transfer is chosen, at least approved, by the transferee. It can be assumed that the transferee is aware of and thus is willing to accept the risk out of *bona fide* acquisition by the third party.[517]

B Bona Fide *Acquisition of Bills of Exchange*

From the preceding introduction, it can be found that *bona fide* acquisition of bills of exchange and the claim embodied is recognized in the three jurisdictions. In general, *bona fide* acquisition is not only possible when the original creditor loses factual control of the document contrary to his or her will, but also when the original creditor voluntarily gives up factual control of the document. However, an important difference exists in the situation where *bona fide* acquisition is associated with forgery of signatures by the unauthorized transferor. Here, we use a hypothetical case to show this difference between the three jurisdictions. In this case, A draws a bill of exchange to B, C steals this bill from B and transfers it to D; C forges the endorsement by B to him- or herself; D is in good faith and obtains the bill of exchange.

In principle, both A and B do not have to pay D under English law. This is because B's signature is forged by C and thus ineffective, and D has "*no rights against those who were parties to the bill prior to the ineffective signature*".[518] As a result, D can only require C to pay. However, according to German law and Dutch law, A bears a duty to pay, and B, in principle, does not have to pay D. The endorsement by B to C is an outcome of forgery, thus B bears no duty to D. Under the "principle of the independence of the declaration of bills of exchange", the validity of A's signature and undertaking of payment is not affected by the forgery.[519] In general, it can be said that

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515 Zwitser 2006, p. 83-84; Van Empel and Huizink 1991, p. 56-57.

516 Staub/Canaris 2004, § 363, Rn. 144.

517 In essence, the blocking effect of bills of exchange concerns the legal effect of publicity. About the legal effect of publicity, a general discussion is provided in Chapter 5 (see 5.1.4).

518 Goode 2010, p. 533.

519 This principle is known as the "*Prinzip der Selbständigkeit der Wechselerklärungen*" in German law (art. 7 WG) and the "*beginsel van zelfstandigheid der wisselverklaringen*" in Dutch law respectively. See Hueck and Canaris 1986, p. 60; Zevenbergen 1951, p. 93-94.

German law and Dutch law are in favor of third parties in good faith, while English law is in favor of the party whose signature is forged.

The requirements of *bona fide* acquisition of bills of exchange are only slightly different between the three jurisdictions. For example, the third party has to be in good faith and furnish value, and the unauthorized transferor has to appear to be a regular holder. Here a difference which deserves our attention concerns the possibility of *bona fide* acquisition in the situation of *traditio per constitutum possessorium*. If the bill of exchange is delivered to the third party in the way which allows the transferor to retain factual control of the document, can the third party claim *bona fide* acquisition? It seems that a positive answer can be found from German law and English law, while Dutch law clearly provides a negative answer.[520]

4.2.3.5 The Function of Publicity of Securities of Payment: The Claim of Payment

After the comparative discussion of bills of exchange, a representative type of securities of payment, we now turn to the function of publicity of securities of payment. In general, the function of publicity of this type of document is rooted in the notion of "objectification (*Verkörperung*)": the claim of payment is embodied within and thus made visible by the corporeal document.[521] The notion has been mentioned in discussing the function of publicity of securities to goods (see 4.2.2.5). Unlike securities to goods which are not only related to the claim of recovery embodied but also to the goods involved, securities of payment only concern the claim of payment embodied. Here, we focus on the publicity of the claim of payment by securities of payment. As will be seen later, bearer documents and order documents differ in this aspect.

In general, securities of payment can provide proprietary information concerning the claim embodied to third parties. For a person who intends to acquire a claim, it is always necessary to ascertain, for example, the "owner" of and the proprietary encumbrance over this claim. Securities of payment are useful in this aspect. In principle, it can be assumed that the holder of securities of payment is the creditor when the document includes no contrary indication or warning. Even if the assumption is overturned in the end, the third party can still, under certain conditions, acquire document and the claim embodied on the basis of the rule of *bona fide* acquisition.[522]

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520 Here it should be noted that the exclusion of the possibility might find its legal basis from different rules in Dutch law. For example, if it a pledgee who transfers the bill of exchange to a third party in the way of *traditio per constitutum possessorium*, both art. 3:111 and art. 90 (2) BW will exclude *bona fide* acquisition. If it is a thief who transfers the bill of exchange to a third party in the way of *traditio per constitutum possessorium*, then only art. 90 (2) BW can be applied to exclude *bona fide* acquisition. The two provisions, *traditio per constitutum possessorium* and *bona fide* acquisition of ordinary corporeal movables have been discussed above (see 3.4.3.4.B).

521 Zöllner 1978, p. 15; Van Lier 1937, p. 13.

522 Tiedtke 1985, p. 242.

Therefore, securities of payment provide the claim of payment an "external state (äußerer tatbestand)" on which third parties can rely.[523]

According to whether the creditor's name is specified by the document and how the document is transferred, there is a distinction between bearer securities and order securities (see 4.2.1.1). In the above, we have discussed the function of publicity of securities to goods on the basis of this distinction (see 4.2.2.5). Here we discuss the function of publicity of securities of payment also on the basis of this distinction. In general, order securities of payment are different from bearer securities of payment in publicity: the former can convey clearer and more detailed information than the latter. Moreover, it will be shown that, just like securities to goods, securities of payment also have a risk of unsafety and a problem of invisibility.

A Bearer Securities of Payment

Bearer securities of payment do not specify the creditor's name. Therefore, the creditor cannot be ascertained on the basis of the recordation of the document. The claim embodied within a bearer document of payment has a close link with the factual control of this document. The holder of the document shows his or her legal position with respect to the document and thus the claim by factual control of the document. To understand this, two aspects should be noted.

The first aspect is that only the person who directly possesses the document can show his or her legal position to third parties. Indirect possessors of the document cannot make their legal position visible to third parties. This is because indirect possession is invisible to third parties (see 3.2.2). As a result, where a bearer document is transferred in the way of *traditio per constitutum possessorium*, third parties cannot be made aware of the transfer.

The second aspect is that the direct possessor of the document is neither necessarily the owner of the document, nor the true creditor. There are various grounds on which direct possession of the document can be obtained. The direct possessor might be the owner of the document and thus the true creditor. However, the direct possessor might also be an agent holding the document for the creditor, a pledgee having a property right of pledge on the claim, a finder, or even a thief who has no legal interest with respect to the claim. In general, direct possession of the document cannot show the specific legal ground on which the document is under factual control by the possessor. This reminds us that direct possession is merely an abstract and thus ambiguous method of publicity for corporeal movables (see 3.2.1.2).

B Order Securities of Payment

Compared with bearer securities of payment, securities payable to order can convey clear and more detailed information concerning the claim embodied. This is not only because order securities of payment specify the

523 Hueck and Canaris 1986, p. 23.

creditor's name, but also because they are usually transferred in the way of endorsement. To make out an order document, the drawer has to indicate the creditor's name clearly. In doing so, the true creditor can be ascertained not only on the basis of possession of the document, but also on the basis of the recordation by the document. If the creditor intends to transfer the document and the claim embodied, the new creditor's name is usually recorded on the document: the new creditor replaces the original creditor and becomes the last endorsee.[524] If the order document is endorsed for the purpose of pledge or agency, the document often records a mark of pledge or agency. From the perspective of publicity, this mark is important for third parties: not only is the specific legal position of the endorsee with respect to the claim made visible, but also is the true creditor shown to third parties. However, order securities of payment might fail to perform a function of publicity in the following two situations.

The first situation concerns the blocking effect of securities of payment. The claim might be disposed of in a way involving no endorsement. As has been shown above, English law allows, under no extra condition, the creditor to assign the claim embodied just as an ordinary claim; German law allows, under the extra condition of delivering the document to the assignee or pledgee, the claim to be assigned and pledged according to the BGB. The unconditional or conditional denial of blocking effect implies two outcomes: (1) the document cannot show the transfer or pledge of the claim; and (2) the assignor or pledgor might retain the order document and use it to mislead third parties. As has been argued above, where the claim embodied can be disposed of independently from the document, there is a need to protect *bona fide* third parties who rely on the document (see 4.2.3.4.B). In essence, the issue of blocking effect concerns whether delivery and endorsement of securities of payment, a means of publicity, are a necessary requirement for the disposal of the claim embodied. Is this means of publicity a condition for acquisition of the claim or merely a condition for the legal effect of enforceability against third parties in good faith? The issue of blocking effect has nothing to do with whether order securities of payment can be qualified as a means of publicity.

The second situation is that the endorsement for pledge and agency might be made in a "concealed" way: the document does not record a mark of pledge or agency. As a result, the legal relationship of pledge or agency is not visible to third parties, and the endorsee appears to be the owner of the document as well as the true creditor. If the pledgee or agent disposes of the document to a third party in good faith, then this third party will often be protected at the expense of the true creditor's interests. In general, this

524 Here it is necessary to mention that the new creditor's name is not recorded on the document in the situation of blank endorsement: the endorser only puts his or her name on the document without naming the endorsee. In general, blank endorsement is not prohibited and can make the order document become a bearer document. See Goode 2010, p. 528; Hueck and Canaris 1986, p. 97; Mees 1980, p. 20.

protection of the third party is not unfair to the true creditor. This is because the true creditor allows the pledgee or agent to appear as the person who enjoys the claim embodied. It can be assumed that the true creditor is aware of and is willing to accept the risk out of *bona fide* acquisition by the third party. In essence, the issue of "concealed" endorsement only concerns whether parties are allowed to decide not to show their legal relationship to third parties clearly. The recognition of "concealed" endorsement does not mean that securities of payment cannot qualify as a means of publicity.

C Two Defects of Securities of Payment as a Means of Publicity

In general, securities of payment have two defects as a means of publicity for the claim of payment embodied. The two defects, which also exist for securities to goods, have been discussed above (see 4.2.2.5.C). One defect is that securities of payment have a risk of unsafety: the holder might obtain the document through an illegal means or forge the content of the document. The other defect is that securities of payment have a problem of invisibility: the existence of the document is not necessarily known by third parties.

As we have argued when discussing securities to goods, the risk of safety is not a sufficient reason to completely deny that securities of payment, especially order securities, are a means of publicity (see 4.2.2.5.C). This is because the document is usually controlled by a legal holder, and there is a scheme of rectification.[525] The problem of invisibility should not be exaggerated. If the holder of a bill of exchange wants to pay the purchase price to the seller by this bill, then delivering the bill to the seller is necessary for making him or her accept this means of payment. If the holder of the bill of exchange attempts to conceal the bill by transferring the claim embodied in the way of assignment, the assignee can often know about the existence of the bill by consulting the debtor.

4.2.3.6 The Function of Publicity of Securities of Payment: Three Types of Third Parties

In the above, we have discussed the function of publicity of securities to goods for the three types of third parties: strange interferers, subsequent acquirers, and general creditors (see 4.2.2.6). It has been argued there that securities to goods are, as a means of publicity, only important for subsequent acquirers and of no use for strange interferers or general creditors. In general, this conclusion is also applicable to securities of payment.

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525 For example, the legal holder can recover the document from the hands of illegal possessors. See Bülow 2004, p. 320; Byles 2002, p. 445. In German law, the legal creditor who loses the document can initiate a proceeding of annulment (i.e. *Aufgebotsverfahren*) to nullify the document. See Bülow 2004, p. 320. If the document includes a forgery, then this forgery can be rectified. See Byles 2002, p. 277.

Firstly, the claim of recovery embodied within securities of payment is a personal right which is, in principle, difficult to be illegally interfered with (see 2.1.3.2). Therefore, there is no reason to say that this method of publicity is useful for strange interferers in avoiding conducting illegal interferences. To avoid misunderstandings, it is necessary to note that illegal interference with securities of payment *per se* is another issue and should be distinguished from the illegal interference with the claim of payment embodied. As a corporeal movable, securities of payment *per se* might be damaged.

Secondly, securities of payment are, in general, useless for general creditors. The principal reason is that general creditors are mainly concerned about the overall financial health of the debtor, and knowing about the proprietary relationships of one or more specific assets is meaningless for general creditors (see 2.2.2.2.C). Moreover, securities of payment cannot address the problem of fraudulent antedating (see 4.2.2.6.B). Even in the situation of the order document which usually involves endorsement, the date of the disposal of the claim embodied does not have to be recorded on the document when the document is transferred or pledged.[526] As a result, the date when the claim is disposed of cannot be ascertained on the basis of the document *per se*.

Thirdly, securities of payment are an important means of publicity for subsequent acquirers, such as the acquirer and pledgee of the claim. In general, this type of document is treated as an outward appearance of the claim embodied. For a person who intends to obtain a property right with respect to the claim embodied within securities of payment, this person can safely assume that the holder enjoys the claim just as the document shows. Moreover, *bona fide* acquisition is, in principle, possible for the person when the holder's authority to dispose proves to be defective, unless he or she knows or should know the defect. For example, if the document includes a mark of pledge, indicating that the holder is only a pledgee who cannot dispose of the claim, then there is no reason to entitle the person to *bona fide* acquisition of the claim.

4.2.3.7 Conclusion

Securities of payment are a method of publicity with two defects for the claim of payment embodied. In principle, the disposal of the claim involves the document. Moreover, the document acts as an outward appearance of the claim and lays a basis for *bona fide* acquisition of the claim by third parties in good faith. The two defects are that securities of payment have a risk of unsafety and a problem of visibility. The risk of safety does not make these two types of document unqualified as a means of publicity. The problem of invisibility exists but should not be overstated.

526 Zevenbergen 1951, p. 144; Schnauder and Müller-Christmann 1991, p. 72-73.

Order securities of payment can be used to provide clear proprietary information concerning the claim embodied. For example, when the claim is pledged, a mark of pledge can be recorded on the document. Truly, the endorsement for pledge might be made in a "concealed" way, and the pledgor and pledgee might choose to pledge the claim in the absence of any endorsement. In both situations, the pledgee perhaps uses the document to mislead third parties. However, this does not give rise to an unfair outcome to the parties involved. On the one hand, third parties in good faith are protected at the expense of the pledgor under the rule of *bona fide* acquisition; on the other hand, the pledgor can avert such *bona fide* acquisition by recording a mark of pledge on the document. If the pledgor fails to do so, then it can be assumed that he or she is willing to accept the risk of *bona fide* acquisition by third parties.

Bearer securities of payment are an ambiguous method of publicity, because this type of document conveys information via factual control of the document. Bearer securities do not record any mark that can indicate the existence of, for example, the right of pledge. As a result, it is impossible for third parties to know from a bearer document the specific legal position of the holder. Fortunately, legal protection is granted to third parties in good faith by the rule of *bona fide* acquisition, when the holder who disposes of the document is, for example, just a pledgee. In general, such *bona fide* acquisition is not unfair to the true creditor, i.e. the pledgor. The true creditor could request an order document and then record his or her legal position on this document. If the true creditor does not do so and agrees to just have a bearer document, then it can be assumed that he or she is aware of and willing to bear the risk out of *bona fide* acquisition by third parties.

As a means of publicity, securities of payment are useful and important for subsequent acquirers. In general, they convey no useful information to general creditors and strange interferers. Securities of payment is not an appropriate way to address the problem of fraudulent antedating. This is because the date when the claim is disposed of does not have to be recorded on the document.