THE THEORY OF RECHTSSCHEIN IN GERMAN LAW AND ITS APPLICATION TO JAPANESE LAW — AS COMPARED WITH THE ANGLO-AMERICAN DOCTRINE OF ESTOPPEL *

(Continued)

by Ryoyu Kita

III. **Rechtsschein and estoppel as a universal rule of law.** Rechtsschein and estoppel come from different jurisdictions, but serve the same purpose. From the philosophical point of view, the subject which I have discussed is concerned with the dynamic security of law which René Demogue, a great contemporary French jurist, put in contrast with the static security of law.(127) He cuts under the conventional statement of an antithesis between the demand for legal security and the demand for legal change. The conflict, of which Roscoe Pound makes so much,(128) is, according to Demogue, a conflict between demands for two different kinds of security. He discloses the ambiguity of the phrase "legal security". There is, first, a conception of security which emphasizes the *status quo*. This conception of security favors a lasting situation. It centers about the notion that a person should not be deprived of his existing rights without his consent. It is conservative in a very literal sense. This is *sécurité statique*. But often when we speak of legal security, we are referring to law designed to promote business activity. Typical of this kind of security is the notion that

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* This is the last part of my research paper which I have mentioned in my article "A Study in Estoppel", 6 Shōgaku-tōkyu (The Economic Review) 3 (1955), p. 45 n. (1).

(127) Demogue, Les notions fondamentales du droit privé (1911), pp. 63 et suiv., 81.

(128) Pound, supra at p. 108.

one shall be protected if one deals with a person who has the appearance of being the owner of property, provided one has relied in good faith on this appearance. The purpose of such a notion is to make transactions easier. "The security thus assured is a leaven to activity, a bounty given to active individuals." It is, says Demogue, in the spirit of Western European law. Jerome Frank, a learned American jurist, added to this statement that it is also in the spirit of American-ism.[129] This is what Demogue terms *sécurité dynamique*, because it incites to action. In any nation, when it has arrrived at a certain degree of civilization, the spirit of human beings expriences the same demands which the law has to satisfy.[130] It is probable that all such nations have common and contemporaneous legal techniques to cope with the business situation in which the spirit of rationality and reasonableness is prevailing at the economic demand of modern capitalism. As a jural postulate of any civilized society, men must be able to assume that those with whom they deal in the general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. Hence, in a commercial and industrial society, a social interest in the security of transactions as an economic institution becomes of the first importance. Lord Campbell already said in Cairncross v. Lorimer (1860) : "The doctrine is found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have

(129) Frank, Law and the Modern Mind (1930), 6th printing (1949), p. 222.
(130) David, Traité Élémentaire de Droit Civil Comparé, p. 221 supra. See also Pound, op. cit., p. 133 et seq.

been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference drawn from his conduct."[131] The holding here cited reveals a perfect coincidence with the thinking of Rechtsschein. Here comes up a modern jus gentium. "It is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice."[132] One can say with assurance that estoppel and Rechtsschein are intrinsically the same, and that they consequently have a general applicability to the laws of all civilized nations.

However, the techniques through which the legal systems of those nations deal with the common problem are in reality more or less different, because the same postulates of justice can be satisfied to some extent[133] by various ways and means. It is true that the task of comparatists is to examine if the unification of various laws is possible within limits. They must not start a priori from the motive that, with a bit of good wish, the unification is now possible. The lagislature is not almighty, and it can not impose on jurists and the people the solutions which are repugnant to them; the good wish does not always exist, and the advantages of the unification might not deserve, in the eyes of the people, sacrifices which it would impose on them, and abandonment of those rules which, in the actual state of affairs, appear to be justified in one country by religious, moral, economic, social conceptions predominant therein.[134] Within these limitations there are

(131) Cited in Riezler, a. a. O.S. 65f.
(132) Halifax Union v. Wheelwright (1875), Court of Exchequer's judgment cited in Riezler, a. a. O. S. 66.
(133) David, supra at p. 221.
(134) Ibid., p. 171 et suiv.

practical but not ideological possibilities to seek a better legislative solution or to envisage the unification of law.[135]

Therefore, the uniform treatment of the present subject would be dangerous unless it were accompanied by policy consideration of non-legal materials involved therein. Enneccerus-Nipperdey properly said: "It is too one-sided a judgment to ascribe, on principle, all the consequences to the Rechtsschein, because many other entirely different grounds, especially pressing needs of transactions (so in case of money and bearer papers) or the special importance of the interests in controversy (so in case of land ownership and other real properties), even ethical viewpoints (legitimacy of a child from putative marriage) and so on have intervened or even prevailed."[136] On one hand there are many cases where no Rechtsschein effect is given to an appearance which has been created with the aid of the real owner.[137] On the other hand, an appearance for which the real owner has not given cause does not infrequently take legal effect.[138] However ubiquitous the demand for security of transactions may be, legal techniques of handling it have so recognizable variety that the formulation of a general principle appears out of the question. In this respect, great importance should be attached to a close inquiry case by case into those statutory rules which provide for the requirements and consequences necessary to found Rechtsschein.[139] Much more, when a

(135) Ibid., p. 221.

(136) Enneccerus - Nipperdey, Lehrbuch des Bürgerlichen Rechts I Erster Halbband, Allgemeiner Teil (1952), S. 305f.

(137) Ibid., S. 305 Anm. 9.

(138) Ibid., S. 305 Anm. 10.

(139) Prof. Eichler in his above cited letter addressed to me said, "Was die Rechtsscheintheorie anbetrifft, so bin ich der Auffassung, dass sich ein allgemeines Prinzip nur mit Vorsicht und Einschränkungen aufstellen lässt, denn es muss m. E. an Hand jedes einzelnen Rechtsinstitutes und jeder einzelnen Vorschrift geprüft werden, welche Voraussetzungen und Wirkungen *

comparison between different legal systems comes into question on the world-wide basis. There operate undoubtedly divergent interests, social and economic, accommodated in the backgrounds.

Nevertheless, I would like to call your attention to one important characteristic of the theory of Rechtsschein. It is a considerable degree of flexibility shown by the theory under circumstances, or "rubberlike elasticity" ("kautschukartige Beweglichkeit") by which Jacobi characterized the legal thinking of Rechtsschein.(140) If we cautiously and properly applied every constituent element of such elastic theory to a number of seemingly exceptional cases which were produced by Enneccerus-Nipperdey, we should probably find that they are no exceptions to a general principle of Rechtsschein. In this connection, it seems to me, the flexible construction of Naendrup's doctrine may prove best applicable to and best qualified for those borderline cases, because his analysis of a Rechtsschein operating to individuals in business transactions is based on well-grounded distinction between usual and unusual requirements. The decisive test of this distinction is of course a jural postulate of "good faith" (*Treu und Glauben*) or what Naendrup called "reasonableness and fairness" (*Zweckmässigkeit und Billigkeit*). It can be said with assurance that the theory of Rechtsschein is not designed to ground an excessive uniformity on the Procrustean bed. It rather serves to elucidate the grounds of what the traditional jurisprudence explained away with its favorite remarks: "This is a rule, and that is an exception."(141) Müller-Erzbach criticized the theory of Rechtsschein from his standpoint of interest jurispru-

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* für die Annahme eines Rechtsscheins in Betracht kommen. Insofern stehe ich der von Enneccerus-Nipperdey geäusserten Ansicht nahe." See also Eichler, a. a. O. S. 102.

(140) Jacobi, "Neue Angriffe auf die Rechtsscheintheorie im Wertpapierrecht", ZHR 99, S. 5 supra.

(141) Jacobi, Die Theorie der Willenserklärungen, Einleitung.

dence (*Interessenjurisprudenz*), saying, "The theory takes no heed to the prior interest which other persons have in their positions with relation to the representor"[142], but his argument is, no doubt, off the point. Suppose the "ostensible trader" doctrine should go so far as to put an ostensible trader so privileged as to employ the right to demand the statutory interest at the rate of 5% (instead of 4%) from the other contracting party (Art. 352 HGB and Art. 246 BGB). It would run counter to the spirit of the theory of Rechtsschein. The postulate of "Treu und Glauben" included in this theory does not permit an ostensible trader to invoke the principle of Rechtsschein to the other party's disadvantage (Arts. 157 and 242 BGB)[143]. In this respect, it is not on the same track with the Anglo-American law which gives a simple and sufficient relief in estoppel to meet the test of equity[144].

Legal relief in estoppel has often been compared to the German doctrine of *Verwirkung* (forfeiture) by German jurists who were sticking to the conceptualistic jurisprudence. They grasped it as a defense to an action arising out of a legitimate claim. For instance, Pl. (the company A) gives Def. (B) 1000 shares to secure the same sum of loan from the latter, and delivers to him 10 certificates in which A confirms that the shares are all paid in, though they are not in fact paid in. Later the liquidator of the company makes calls on them, but B requests him to strike off the roll of the shareholders. Held that Pl. is not allowed to make an allegation that the shares in

(142) Müller-Erzbach, "Die Kundgebungen im fremden Interessenbereich", Jher. Jahrb. 47 II. Folge, S. 265f supra. See also Müller-Erzbach, Deutsches Handelsrecht (2/3 Aufl. 1928), S. 456.

(143) Riezler, a. a. O. S, 167f. See also J. v. Gierke, Handelsrecht und Schiffahrtsrecht, S. 59ff. supra.

(144) Riezler, a, a, O. S. 168.

action is not paid in; he is estopped by his own contradictory representation in the certificates. But it is not always the case with estoppel. Substantive or adjective defense (*Einrede*) is sometimes granted to the plaintiffs in accordance with the doctrine of estoppel. Therefore, the doctrine of Verwirkung may be said to be more restricted. It is a special case of the principle of "venire contra factum proprium" (no one ought to derogate from his own act) or "Treu und Glauben"[146]. The most typical examples can be found in cases where a legitimte claim is preferred too late or where a plea of lapse of time or of statute of limitations is set up (*Ersitzung, Verjährung Ausschlussfrist*). One can defend himself against his plaintiff by a plea that trial is barred because of prescription, negative or positive. This may certainly underline the fact that Verwirkung is somewhat similar to estoppel,[147] but estoppel should fairly be compared with the more comprehensive theory of Rechtsschein. The juxtaposition of estoppel and Rechtsschein, I believe, is not inappropriate. My reasoning is this. In the first place, the principle of "Treu und Glauben" seems too broad to match estoppel, and, even if it were confined to the technical use, it seems still broader than estoppel, because it operates as a means of interpretation or reformation of contractual intention and of actual performance.[148] The principle in the latter sense should not be invoked until the other rules which are more technical give place to it. The theory of Rechtsschein has its proper place prior to such a broad principle and is tied with the same. Secondly, this theory actually

(145) Ibid., S. 66f.

(146) Enneccerus-Kipp-Wolff, Lehrbuch des Bürgerlichen Rechts I zweiter Halbband, Allgemeiner Teil, (1955), S. 989.

(147) David, supra at p. 135 n. (3). Cf. Dargent, Une théorie originale du droit anglais en matière de preuve: la doctrine de l'estoppel (Thèse Crenoble, 1943).

(148) Eichler, a. a. O. S. 93.

includes the doctrine of Verwirkung. Where a weak Rechtsschein expressed in an actual possession or in an unenforced claim has been strengthened by lapse of time, positive or negative prescription will arise on the part of the possessor or the obligor if he has acted in good faith.(149) This particular case does not belong to typical application of the theory of Rechtsschein such as that to a tripartite relation in which the original owner, middle-man, and bona fide third person stand, but a scrutiny into the case reveals that the second and third persons appear in the one and same person of the possessor or of the obligor, so that this man may be liable for unjust enrichment though the original owner will not be allowed to bring an action against him for such unjust enrichment. This fact suggests that one who is favored with prescription is under an unenforceable obligation (*Naturalobligation*).

While the doctrine of estoppel has been well known to European jurists, the theory of Rechtsschein has never influenced common law countries. The main reason for this is that it is not very long since the theory was established, and that, at least at the outset, the protagonists concentrated their efforts on a historical treatment of the subject, tracing back to the old Germanic law of Gewere.(150) It is quite natural that such a conventionalism in the inchoate study of Rechtsschein had no crushing effect on entirely different legal systems. In this connection, they should have highly appreciated Oertmann's warning that would open their eyes to the Rechtsschein effects in the field of commercial law which has an international character in spite

(149) Naendrup, "Verjährung als Rechtscheinswirkung" (1925), Jher. Jahrb. 75, S. 237ff.; "Ersitzung als Rechtscheinswirkung" (1929), Reichsgerichtspraxis im deutschen Rechtsleben III, S. 35ff. See also Westermann, a. a. O. S. 228ff.

(150) Naendrup, "Die Gewere-Theorien" (1910), Rechtscheinsforschungen Heft 2.

of its particular quality as a national law.[151] However, it must be noted that the theory of Rechtsschein has greatly influenced the other civil law countries, especially France and Italy.

IV. **French counterpart: la théorie de l'apparence.** France has long maintained the old Frank rule of "meuble n'a point de suite". This rule comes from *la saisine*, the French counterpart of *die Gewere*; therefore, it is equivalent to the Germanic rule of "Hand wahre Hand". It finds expression in Art. 2119 Code Civil. Against this historical background, the doctrine of bona fide acquisition of chattels is grounded on the actual text of Art. 2279 which simply reads "la possession vaut titre". In the middle of the eighteenth century, Bourjon found the rationale of the Article in "la sécurité du commerce", and suggested that the Article should require a qualification that it is only a bona fide transferee who gets a good title.[152] Planiol-Ripert thus commented on the Article as follows : "This presumption of a *propriété* is a product of tradition and bon sens".[153] *La théorie de l'apparence* is derived from such a product. The first work on this line is Jonesco's "Les effets juridiques de l'apparence en droit privé" (1927). Then came Laurent's "L'apparence dans le problème des qualifications juridiques" (1931) which I have already mentioned. It must be pointed out that French lawyers regard the problem as "un phénomène pathologique" of the modern law, saying "la théorie de l'apparence n'est pas une planche de salut à usage des étourdis et des négligence."[154] They have recourse to this theory, not for the sake of its dogmatics but rather for the purpose of justifying more persuasively the decided

(151) Cf. David, op. cit,, p. 182.
(152) Planiol-Ripert, Traité pratique droit civil francais, Tome III (1926), p. 365 et suiv.
(153) Ibid., p.356.
(154), Voirin, Dalloz (1929), 2, 82.

cases which have been collected by "arrêtistes", such as those concerned with the validity of a contract made with an ostensible heir,[155] and of a payment made to a person who presented a bill of exchange with a false signature.[156] However, there are some disputes as to whether a concubine has a right to recover damages for her man's death, and nowadays such a right tends to be denied by judicial decisions,[157] while on the other hand it is submitted on the basis of the théorie de l'apparence that the owner of a business is liable in "quasi-délit" for debts incurred by his manager.[158] According to Copper-Royer, the discussion of l'apparence takes place in cases of mistake (l'erreur). An apparent power can result from a certain circumstance of fact which is misleading and which does not correspond to a legal reality. Such a deceptive appearance is utilized in good or bad faith. One who provokes the mistake may act with a fraudulent intention in his own interest; he might also have acted innocently, or might even have acted only for his principal with a good or bad intent which might give rise to unjust enrichment on the part of the latter. The misuse of an apparent right puts in conflict two interests which should be equally respected, the interest of the principal on one hand, and the interest of the contracting third party on the other. French jurisprudence has proved itself extremely hesitant in the solution of such a problem. For the most part, judicial tribunals stuck to so strained or so far-fetched an interpretation that they asked themselves if the principal has committed a fault or a negligence sufficiently grave to mislead the third party and so to make his mistake easily excusable.

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(155) Laurent, op. cit., p. 226 et suiv.; Dalloz (1931), 1, 43.
(156) Laurent, op. cit., p. 155 et suiv.
(157) Savatier, Dalloz (1924), 2, 145; Roux, Sirey (1927), 1, 273; Voirin, Dalloz (1929), 2, 169; (1930), 1, 49; (1931) 2, 57; (1932), 2, 88.
(158) Voirin, Rev. trim. dr. civ. (1931), 301.

At this point the theory of l'apparence was introduced into the French jurisprudence, and proved capable to give a better reason for a limited number of cases in which the court, for the benefit of bona fide third persons, held liable the principal who had not committed such a grave fault or negligence.[159] Now this theory is in steady progress, so much so that it is applied to the requirements and consequences of putative marriage.[160] The last development seems to be closely related to the Italian *teoria dell'apparenza*.[161]

V. **Italian counterpart: la teoria dell'apparenza.** The most striking influence of the German "Rechtsscheintheorie" can be seen in Italy's academic world. The standard-bearer of this theory is L. Mossa who has long espoused the doctrine of l'apparenza in the field of commercial law, starting with an excellent work on "Il registro di commercio" (commercial registration) (1921). Of course there was a strong opposition to such a comparative method of study, because the Italian legal history has never known anything like *die Gewere* from which the "Rechtsscheintheorie" is derived.[162] But the genesis of this theory is one thing, and the present content of it is another. The latter is undoubtedly designed to explain more properly what is now commonly called the principle of good faith (*"il principio della publica fede"*). Since German civil law has a land register for the "Rechtsscheintheorie", Italian commercial law may well have a trade register for the "teoria dell'apparenza". In addition, it is a foregone conclusion that the German system of commercial registration originated in "matricula", a guild-

(159) Copper-Royer, Traité des Sociétés, Tome II (1939), pp. 31—91.
(160) Gallardo, Le role et les effets de la bonne foi dans l'annulation du mariage en droit comparé (1952).
(161) Ibid., p. 8 n. 1.
(162) Stolfi, L'apparenza del diritto (1934), p. 41.

merchant register of the medieval Italy.[163] It seems to me, however, that the Italian theory of l'apparenza has been considerably influenced by the political idea of organization. Ascarelli says that it is designed to meet the demand of politics (esigenza politica).[164] This means that the individual interest of a representor ought to be preceded by the general interest of the public who relies in good faith on his representation, because, once a person represented that his legal position would be transferred to his successor, the represented thing should not be changed by a posthumous act (l'azione postuma!) on the part of the representor, but it should have an effect on the public as it appears to the latter.[165] This idea savors of a sort of political ideology prevailing in the then Italy. Thus, various acts, such as signing a negotiable instrument, obtaining a membership in a business company, and giving an authority to an agent, a manager or an employee, came within the scope of the theory of l'apparenza. This theory covered all such acts with the new legal concept of *"atto creativo"* (creative act), dismantling them of the conventional concept of *"negozio giuridico"* (legal transaction) imbued with the so-called will theory.[166] A creative act is to organize a community in which the public interest is predominant. In 1937 Mossa made public his long-range work entitled "Diritto Commerciale", in which he emphasized the new principle of l'apparenza giuridica as operating between statute law and individual will in the modern society closely dependent upon business enterprises.[167] In such a highly organized society, says he, it is quite

(163) Rintelen, Untersuchungen über die Entwicklung des Handelsregisters (1914), S. lf.
(164) See Stolfi, loc. cit., p. 30.
(165) Sotgia, Apparenza giuridica e dichiarazione alla generalità (1930), pp.37, 150 e 187.
(166) Stolfi, loc. cit., p. 5.
(167) Mossa, Diritto Commerciale (1937), p. 6.

natural that the collective interest accommodated in the public reliance should precede the individual or personal interest on the part of an entrepreneur who made a public manifestation.[168] However, there is still a strong opposition to the effect that "demands of business transactions" (*le esigenze del commercio*) and "protection of bona fide persons" (*la tutela della buona fede*) are indeed favorite remarks made by respectable jurists, but, in substance, nothing but mere words which they may easily pervert to sustain judicial decisions contra legem under the fascinating name of "la teoria dell'apparenza".[169] This criticism, as it seems, comes from the confusion of the "teoria dell'apparenza" with the *teoria della dichiarazione* (the so-called representation theory). One of the antagonists said, "The representation theory, which protects the representee but which sacrifices the representor, is tempered by the *teoria dell'affidamento* (the Vertrauensprinzip) which finds little support among us. One may say that the representation prevails over the will, because the law should think more of the certitude than of the truth. But, in case of the discrepancy between the two elements, he cannot, without the other, give effect to an appearance of the will (*apparenza della volontà*), because, otherwise, he will venture to foment the bad faith on the part of the representee by not favoring the bad faith on the part of the representor."[170] But we must not forget that the Rechtsschein effect of an apparent intention is qualified not only by the *Vertrauensprinzip* but also by the *Veranlassungsprinzip* as we have already seen.

VI. **Application of the theory of Rechtsschein to Japanese laws.** Last but

(168) Loc. cit,, p. 36.

(169) Stolfi, loc. cit., p. 14.

(170) Stolfi, Teoria del negozio giuridico (1947), p. 103. By the way, I owe Prof. Stolfi a great debt of gratitude, because I have received the book here cited with compliments of the author.

not least, Japan is among those nations who have learned very much from the theory of Rechtsschein. The first relevant case in which the Supreme Court applied the thinking of Rechtsschein in accordance with statutory provisions is the so-called "tanomoshi-kō" case (Oct. 30, 1930; Case No. 703). *Tanomoshi-kō* is a financial guild for mutual aid which has been peculiarly recognized in Japanese folk law.(171) It is historically interesting as a precursor of the modernized *mujin-kaisha* (nutual loans and savings bank) or of the insurance companies.(172) In the present case, the promoter, at the time of the formation of his financial guild, used the respondent's name, with his consent, in guildsmen's passbooks, representing that the respondent was manager of the guild, so that the promoter might easily obtain a license and members for his organization. The appellant, a member of the guild, contends that, according to the statutes of the guild, the manager shall be jointly and severally liable with the other members to pay back the total amount of premiums paid in by each guildsman. The respondent demurs that he is neither manager nor member of the guild, not a guildsman in any sense of the word, but that he simply allowed the promoter, only once, to use his name as the name of the manager of the business, although the manager should be appointed from among the guildsmen subject to the statutes of the guild. The Supreme Court held that, whereas (1) according to Art. 109 Civil Code, where a person has held out to third persons that he has conferred powers of agency on another person, he is responsible for acts done between such other person and the third persons within the scope of such represented powers of agency, and (2) according to Art. 65 Commercial Code, where a person

(171) Nakata, "Tanomoshi-kō no Kigen" (The Origin of Tanomoshi-kō), Hoseishi-ronshū (Studies in Legal History) vol. III (1943), p. 18 et seq.

(172) Takayanagi, supra at p. xvii et seq.

who is not a member of a *gomei-kaisha* (a company corresponding to partnership) acts in a way calculated to induce the belief that he is a member, he is liable to a third person acting in good faith as though he were a member, therefore it is in the spirit of the law that a person, who represented that he would be liable for a legal transaction or who did an act which implied such a liability, should be liable to the other persons who relied in good faith on the representation or the act whether it be true or not, so that the security of transactions may be guaranteed." Prof. Komachiya annotated this decision, making it clear that it was a successful application of the doctrine of estoppel by representation which originated in English law.(173) In 1936 Prof. Izawa made public his comprehensive study of estoppel on the same lines as Bower did.(174) Moreover, he suggested that this principle is a sort of theory of Rechtsschein, although he did not proceed to a comparative study of the two.(175)

By this time, the "Rechtsscheintheorie" had heen known to Japan, because Dr. Tajima in his "Mimpō 192-jō no Kenkyū" (A Study of Art. 192 Civil Code) (1933) treated of the bona fide acquisition of a movable property on the basis of the same theory. The Bona Fide Acquisition article of the Japanese Code says that a person who in good faith and without fault has peacefully and openly commenced possession of a movable "immediately acquires the rights exercised by himself over such movable". Hence what had been popularly but erroneously known as "instantaneous prescription". But acquisition in this way involves no element of time, while time is an

(173) Hanrei-minji-hō (Annotated Civil Law Case Digests) (1930), p. 346 et seqq.

(174) Izawa, Hyōji-kōi no Kōshin-ryoku (Public Reliance on Misrepresentation), cited supra.

(175) See ibid., p. 8.

essential element of prescription.[176] The theory of Rechtsschein was invoked to eliminate such erroneous view. It was further introduced by Dr. Nōtomi into the sphere of Japanese commercial law. His magnum opus titled "Tegata-hō niokeru Kihon-riron" (The Basic Theory in the Law of Bills of Exchange) was dedicated to this attempt. There he contended that he could not agree to Prof. Izawa's attempt at applying the doctrine of estoppel to Japanese law obviously influenced by German law.[177] From the same historical viewpoint, K. Okagawa boldly applied the German "Rechtsscheintheorie" over the whole field of Japanese civil law. He did not only ground the "tanomoshi-kō" case on the theory of Rechtsschein,[178] but also indicated the possible scope of its application as follows: (1) bona fide acquisition of a movable property, (2) prescription, (3) representation of intention, (4) apparent authority, (5) bill of debt, (6) negotiable instruments, (7) adjudication of disappearance.[179] For convenience's sake, I would like to rearrange his illustrations for the following list.

Provisions of the Civil Code.

I. Artificial external facts.

1) Registration of conveyance (Art. 177).
2) Registration of incorporation (Arts. 45 II, 46 II).
3) Registration of marriage (Art. 748).
4) Registration of marriage property (Arts. 756, 759).
5) Adjudication of disappearance (Arts. 30, 31, 32).

II. Natural external facts.

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(176) Sebald, supra at p. 44 n. 14.

(177) Nōtomi, Tegata-hō niokeru Kihon-riron (The Basic Theory of the Law of Bills of Exchange), p. 379.

(178) Okagawa, "Hyōji no Kōshin-ryoku" (Public Reliance on Misrepresentation) (1941), 1 Hōshō-Kenkyū (The Review of Law and Commercial Sciences)2.

(179) Okagawa, "Shihō ni-okeru Rechtsschein-hōri no Tenkai" (Developments of the Theory of Rechtsschein in the Field of Civil Law) (1934), 4 Hōsei-Kenkyū (The Review of Law and Politics) 2.

1) Possession.
   a) Apparent possession (Art. 186 II).
   b) Transfer of a movable property (Art. 178).
2) Apparent ownership.
   a) Bona fide possession (Art. 186 I).
   b) Bona fide acquisition of a movable property (Arts. 192, 193, 194, 195.
3) Prescription (Arts. 145, 146, 147, 158, 159, 159-2, 160, 161).
   a) Acquisitive prescription (Arts. 162, 163).
   b) Extinctive prescription (Arts. 126, 167, 168, 169, 170, 171, 172, 173, 174, 174—2).
4) Declaration of intention (Arts. 93, 94, 95, 96).
5) Fraudulent misrepresentation made by an incapacitated person (Art. 20.
6) Apparent authority (Arts. 109, 110, 112).
7) Restriction imposed upon the power of agency (Art. 54).
8) Liability of a self-styled agent (Art. 117).
9) Assignment of an obligation.
   a) Against the parties' agreement to the contrary (Art. 466 II).
   b) Obligation performable to a named obligee (Arts. 467, 468).
   c) Obligation performable to order (Arts. 469, 472).
   d) Obligation performable to bearer (Art. 473).
10) Performance made to a person who has an apparent authority to receive it.
   a) Bearer of a receipt (Art. 480).
   b) Quasi-possessor of an obligation (Art. 478).
   c) Holder of an instrument of an obligation to order (Art. 470).
   d) Bearer of an instrument of an obligation performable to a named obligee or to bearer (Art. 471).

Turning to Japanese commercial law, there has been nothing written about the theory of Rechtsschein except for a few works on negotiable instruments. But my observation is that there are many noticeable examples of Rechtsschein in this branch of law. Let me show some of them from provisions of the Commercial Code.(180)

(1) Art. 12: "Matters to be registered cannot be set up against a third person acting in good faith until the registration and public notice thereof have been duly effected; even after the registration and public notice of such matters have been effected, they cannot be set up against a third person who for any reasonable cause has been unaware of them."

The current view is that this Article provides for the negative and the positive publicity effect (*die negative und die positive Publizitätswirkung*) of commercial registration.(181) But such bilateral treatment of the publicity effect passes my understanding, since the state of affairs existing before the registration cannot be ascribed by any means to the publicity effect of the subsequent registration. I suspect that the phrase "negative publicity effect" is merely a casuistic expression which makes no sense, because it does not account for the legal protection given to bona fide third persons. The reason for this protection is not that the matters to be registered have not yet been registered and made public, but that the existing state of affairs includes a conflict between the seeming and the real. For example, the appointment of a new manager cannot be set up against a bona fide

(180) In re the text of the Commercial Code of Japan, See The Commercial Code of Japan, translated by Attorney General's Office, Tōkyo, Japan (1951).

(181) See, e.g., Müller-Erzbach, Deutsches Handelsrecht, S.69 supra; J. v. Gierke, a.a. O. SS.55—57. supra. The two authors' views have a strong influence on Japan's contemporary jurists.

third person until it has been registered and made public. That is because the former manager still remains to be an apparent manager. If such an appearance existed on the register, one might say that the legal protection given to a third person acting in good faith on it amounts to "a" legal effect of the registration. But not "the publicity effect" of the registration. Publicity effect, in its technical and scientific legal use, means that duly registered matters can be set up against any third persons, even those who are ignorant of them, or, in other words, third persons cannot deny the truth entered in the register. However, third persons in the present case act in good faith on registered matters which have in fact turned out to be inaccurate because of the change of managers. Therefore, the "Rechtsschein" effect of the registration is quite in place. The employer shall be liable to such bona fide third persons for his failure to eliminate an appearance of managership remaining on the part of the former manager. The Rechtsschein expressed in the register thus operates positively but never "negatively".[182] Suppose an appearance of managership exists not on the register but as a matter of "natural external fact". The unregistered change of managers still comes to the same conclusion with the above case.[183] Should there be no former manager, then the first appointement of a manager can be set up against a bona fide third person, because a transaction by the appointee for effecting commercial transactions shall be effective as against his employer even though he has not disclosed the fact that he is acting for his employer (Art. 504

(182) Naendrup, "Rechtscheinswirkungen im Aktienrecht', S. 935 supra.

(183) Demelius, "M. Wellspachers Vollmachtslehre", ACP 153, S. 31 supra. This interpretation enables us to preclude the application of Art. 112 Civil Code, according to which extinguishment of powers of agency cannot be set up against third persons acting in good faith, unless such third persons were unaware of such fact "through their own negligence".

Commercial Code).[184] Transactions relating to bills and notes, however, are governed by the rule of disclosed agency,[185] so that, if the manager put his signature on a bill of exchange, representing that he merely acted in his own name but not for his employer, the appointment of the manager cannot be set up against even mala fide third persons, unless that matter has been registered and made public.[186] The last two cases, therefore, do not fall within the scope of the first part of the present Article, which provides for the Rechtsschein effect of matters yet to be registered. On the contrary, the second part of the Article prescribes for the publicity effect of duly registered matters. It is only natural that such matters operate "positively" as against any third persons. It can be said with assurance that the publicity effect is definitely positive,[187] because, even if an appearance of managership still remains somehow on the part of the former manager, it is a weak Rechtsschein which deserves no legal protection. But such a weak Rechtsschein may be justified in certain cases for the sake of "reasonableness", such as where the registered matters are inaccessible to a third person on account of a traffic tie-up or a natural disaster with the result that he is ignorant of them. In this case, he must raise a two-fold proof as to objective inaccessibility and subjective ignorance in order to refute a presumption that he is a mala fide third person (*"zweifach-widerlegliche Vermutung"*).[188] Thus, the theory of Rechtsschein casts a new light upon the Article. Of course, there is much room for the doctrine of estoppel, but the theory of Rechtsschein gives

(184) Cf. Art. 100 Civil Code.
(185) See Art. 8 Bills of Exchange Act, Art. 11 Checks Act.
(186) Judgment of the Tokyo Court of Appeal, May 17, 1921; but see Art. 17 Bills of Exchange Act.
(187) Naendrup, ebenda.
(188) Naendrup, a. a. O. S. 638. See Art. 15 II HGB.

a better answer for the whole implication of the Article.[189]

(2) Art. 14: "A person who has either intentionally or by negligence registered inaccurate matters cannot set up the inaccuracy of such matters against a third person acting in good faith."

The current view is that this Article is based on the Anglo-American doctrine of estoppel. But it seems to me that the Article should, at least de lege ferenda, apply to the cases where the registrar has registered inaccurate matters by mistake, or where such inaccurate matters have been registered on false application by a person who is not a party to those matters, because the parties to such registered matters have left the inaccuracy thereof intact. They should be bound to correct it as far as they have noticed it. Their failure to do so makes them liable by reason of Rechtsschein. Germany has established such a sort of custom law in spite of the fact that her Commercial Code does not include any article similar to the present Article.[190]

(3) The Japanese Commercial Code and the related Acts include many other provisions in which the theory of Rechtsschein is obviously realized. Here is a rough sketch of these provisoins. Seeing them in so wide a perspective, we can make the best use of them in practical application.

Provisions of the Commercial Code and the related Acts.

I. Commercial registration (artificial external facts of a business orgainization).[191]

A) Pre-procedural effect of apparent registration. This means an irrefutable presumption that an apparent registration is

(189) Kita, "Shōgyō-tōki no Rechtsschein" (The Rechtsschein Effect of Commercial Registration) (1954), 5 Shōgaku-tōkyū (The Economic Review) 1, p. 1.

(190) J. v. Gierke, a.a. O. S. 58. See also Kita, supra at p. 15 et seqq.

(191) Cf. Wellspacher, supra.

correct. The apparent registration of incorporation or of amalgamation has a creative effect in the following cases:[192]

a) Rescission or plea of nullity on certain grounds is cut off (Arts 191, 280—12 Commercial Code).

b) Action for nullity or rescission is precluded after the lapse of a certain period of time (Arts. 105 I, 136 I, 142, 428 I Commercial Code).

c) Rescission by judgment or judgment declaring nullity shall not affect certain transactions (Arts. 110, 136 III, 142, 428 III Commercial Code).

B) Intra-procedural effect of apparent registration. This means a refutable presumption that an apparent registration is correct. One who disputes such apparent registration must raise a proof that it is incorrect.[193]

C) Extra-procedural effect of apparent registration. Rechtsschein in the restricted sense of the word proves worthy of this effect. Bona fide third persons are protected from incurring detriment on the faith of an inaccurate registration in business transactions,

a) where such apparent registration has been made intentionally or negligently by the parties thereto (Art. 14 Commercial Code), or

b) where they have left intact such inaccurate registration (Arts. 12, 93 I, 115, 160 Commercial Code).[194]

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(192) In general, German jurists call this effect "heilende Wirkung" (curing effect). J. v. Gierke, a. a. O. S. 57. But see Lehmann, Handelsrecht II, Gesellschaftsrecht (1949), S. 33.

(193) Meyer, "Handelsregistererklärung und Widerruf der Prokura" (1917), ZHR 81, SS. 402, 411. See also Prausnitz, "Rechtsschein und Wirklichkeit im Handelsregister", ZHR 96, S. 35f. supra.

(194) In re Art. 93 I, see Judgment of the Supreme Court, Mar. 9, 1935; contra, Judgment of the Supreme Court, Feb. 8, 1939.

II. Commercial instrumentalities (natural external facts of a business organization)[195]. Action in reliance on their appearances is protected by reason of Rechtsschein or somehow on the ground of estoppel.

A) Extinction by prescription.

a) Period of prescription (Arts. 29, 93 II, 115 II, 145, 160, 644 II, 678 II Commercial Code).

b) Negative precription (Arts. 316, 522, 566, 567, 596, 615, 626, 663, 682, 683, 765, 766, 786, 798, 814 Commercial Code; Arts. 70, 77 I ⑧ Bills of Exchange Act; Arts. 51, 58 Checks Act).

B) Responsibility for representation.

a) Waiver (Art. 838 Commercial Code).

b) Silence (Arts. 26, 100 II, 509, 578, 595, 766 Commercial Code).

c) Misrepresentation (Arts. 28, 175 IV, 189 II, 191 latter part, 280—12 latter part, 498—2, 639, 795 Commercial Code; Arts. 7, 25 I latter part, 65 I latter part and II, 69 Bills of Exchange Act; Arts. 10, 50 Checks Act).

C) Action in good faith.

a) Performance made to the transferee of a business continuing to use the trade name of the transferor (Art. 27 Commercial Code).

b) Matters yet to be registered (Art. 12 Commercial Code), especially transfer of a trade name (Art. 24 II Commercial Code)[196].

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(195) Cf. Wellspacher, supra.

(196) But the current view is that "third persons" prescribed in Art. 24 should be literally interpreted as irrespective of their good or bad faith.

c) Liability of a self-styled member of a company (Arts. 83, 159 Commercial Code).

d) Restriction imposed upon the power of agency or upon the delegated authority (Arts. 7 II, 38 III, 43 II, 78 II, 261 III, 700 II, 714 Commercial Code).

e) Apparent authority (Arts. 42, 44, 262, 271 II Commercial Code).

f) Liability of a person who has consented to the use of his name in business (Arts. 23, 198, 201 II, 537 Commercial Code).

g) Formalism in certain commercial instruments (Arts. 572, 602, 627 II, 776 Commercial Code).

h) Bona fide acquisition of negotiable instruments (Arts. 205, 229, 519 Commercial Code; Art. 16 II Bills of Exchange Act; Arts. 21 Checks Act).

It is not within the limited scope of this paper to go into further details of the above list. But some words might well be added to show another important example from outside the scope of statutory provisions.

Prof. Maitani suggested that the theory of Rechtsschein is successfully appli cable to standardized forms of contract which have aroused some of juristic interest in the European and Anglo-American literature of commercial law. In a bulky volume entitled "Yakkan-hō no Riron" (The Theory of the Law of Standard Conditions) (1954), he concluded that a standardized form when openly manifested becomes irrevocable by reason of Rechtsschein or on the ground of estoppel.[197] This is a significant proposition from the viewpoint of the present discussion, all

(197) Maitani, "Yakkan-hō no Riron" (The Theory of the Law of Standard Conditions) (1954), pp. 462 et seqq.. 568 et seq.

the more so because the absence of a clue to the mystery of standardized forms has for a number of years been one of the most obvious gaps in the Commercial Code of Japan.

Japanese commercial law is nowadays among the laws of civilized nations such as Germany, France, Italy, Britain and the U. S. It is highly probable that all these nations go on the same track to the extent of their common legal problems. "People are just awakening from a self-centered legal sleep to an appreciation of the fact that we must hereafter go forward in a world which is increasingly one."(198)

N. B.

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2. An abbreviation of the same paper was made public in Prof. Maitani's *Beiträge zum Unternehmungsrecht*, 1956, Yuhikaku, Tokio.

3. all citations from non-English law books are my translations. That accounts for infelicities, if any, in English expression.

(198) Rabel, The Conflict of Laws, vol. I (1945), preface by William Draper Lewis, Director of the American Law Institute, p.xi.