THE THEORY OF RECHTSSCHEIN IN GERMAN LAW AND ITS APPLICATION TO JAPANESE LAW — AS COMPARED WITH THE ANGLO-AMERICAN DOCTRINE OF ESTOPPEL (1)

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I. The scope and purpose of this paper. Appearances are deceptive![2] Probably this old saying is what experience teaches and what experience has inculcated in human nature, although I cannot find out what nation's language it originated in and what period of historic times it comes from. From time immemorial human beings might have learned such a general truth by experience and have imparted it from generation to generation in terms of epigram.

As a matter of legal policy, there are two conceivable remedies for deceptive appearances. One is the penalty paid by a person who wrongfully made an appearance of veracity, and the other is the protection given to another person who relied in good faith on this appearance. The former is the chief concern of the doctrine of estoppel,[3] and the latter is the major point of

(1) This is the main part of my research paper which I mentioned in the previous issue of the present periodical. See Kita, "A Study in Estoppel", 6 Shōgaku-tōkyu (The Economic Review) 3 (1956), p. 45 n. (1).

(2) There are corresponding expressions used in other countries: Der Schein trügt (in Germany); L'apparence trompe (in France); L'apparenza inganna (in Italy).

(3) See Harris v. Prince, Tex. Civ. App., 98 S. W. 2d 1022, 1026 ("'Estoppel' in its broadest sense is penalty paid by one perpetrating wrong by known fraud or by affirmative act which, though without fraudulent intent, may result in legal fraud on another"), cited in Black, Law Dictionary, 4th ed. (1951), p. 649.

the theory of Rechtsschein.[4] It is my purpose in the present paper to review the developments of this theory in comparison with that doctrine and to consider the possibilities and limitations of its application to Japanese civil and commercial laws.

Rechtsschein and estoppel come from different jurisdictions, German and English respectively, but, if such a historical consideration be set aside, both legal principles reveal a strange coincidence with each other.[5]

The basic idea of estoppel, as I have already mentioned in a separate article,[6] is that one should be tied even to an untruth if he once told it. Although it is a self-evident moral precept that no one ought to tell a lie, yet there is a great need to mold such plain ethics into a legal technique capable of coping with the actual conditions of any modern society in which many people make no bones about telling a lie. At the foundation of our complex economic framework of society, diverse individual interests are constantly and implicitly in conflict, so that they tend to get involved in a tissue of falsehoods. Such a deep-rooted social evil cannot be eradicated by the use only of moral law. Hence developed the doctrine of estoppel which is designed to preclude one from speaking against his previous statement, in order that a boost may be given to honesty in the business of life. Estoppel thus enables the moral intuition of equity and

(4) Therefore, the theory of Rechtsschein should be grasped, first of all, as the "protection of reliance" doctrine. See Eichler, Die Rechtslehre vom Vertrauen——Privatrechtliche Untersuchungen über den Schutz des Vertrauens (1950), SS. 8, 102f.

(5) See Wellspacher, Das Vertrauen auf äussere Tatbestände im bürgerlichen Rechte (1906), S. 118f.; Riezler, Venire contra factum proprium (1912), S. 65.

(6) Kita, id.

fair play to come down to brass tacks on the technical consideration of legal problems. It is "a rule which, within the limits approved by law, is of great equity".[7]

As compared with this, the theory of Rechtsschein places emphasis on the difficulty of distinguishing the true from the false. The intricacy of industrial organizations and the briskness of commercial transactions make it too troublesome for ordinary people to come to grips with legal rights and relationships accommodated therein. Therefore, if experience shows that, in an overwhelming majority of cases, such a legally relevant factor finds formal expression in a certain external fact, then it is a great convenience to depend on this fact for solution of legal problems which may eventually arise in connection with that factor. But, when the external fact happens to stand for no legal truth whatsoever, it is a logical conclusion to take the fact for an untruth even though someone innocent acts on it. There arises a necessity to protect this person for the security of transactions (Verkehrssicherheit). The theory of Rechtsschein is designed to meet such economic demand for facilitating the business activity.

The foregoing analysis points to the difference in primary purpose between Rechtsschein and estoppel. The viewpoint of Rechtsschein is protective policy because an external fact constituting a Rechtsschein justifies public reliance thereon,[8] while that of estoppel is punitive justice because one estopped from speaking against his statement is bound to make it good.[9]

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(7) Blackburn, Treatise on the Contract of Sale, p. 162.

(8) Jacobi, Die Theorie der Willenserklärungen (1910), S. 32.

(9) See Seavey, Studies in Agency (1949), p. 83 n. 45.

For all practical purposes, however, Rechtsschein and estoppel are two different expressions of one and the same thought. Both legal principles deal with the common problem of discrepancy between the seeming and the real. In such cases there is enough ground for technical congruence between the notion that a person who by his words gave the appearance of honesty should be tied thereto and the notion that another who acted in good faith on this appearance should be assured of its truthfulness. The two notions are complements each of the other if they come to practical application. Accordingly, estoppel acts as something more than a deterrent to a piece of dishonesty on the part of the representor. Indeed, it operates to put the representee entitled to its benefits in the same position as if the represented thing were true.[10] This fact accounts for the preponderance of the appearance over the right between the two parties. The legal relief in estoppel really aims at punitive justice, but in its "relative" form.[11] If one is forbidden in law to contradict his own representation even though it be to say the truth, it follows that another with whom he deals is guaranteed against the instability of the represented transaction. For this reason, it may be safely said that the secondary purpose of estoppel is to make transactions easier and to promote business activity.

Rechtsschein and estoppel have no common and contemporaneous origin. First, the doctrine of estoppel originated in the adjective law of evidence. Growing out of such classical concept of estoppel, the so-called "estoppel by representation" has

(10) May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, 458, cited in Black, Law Dictionary, p. 648 supra.

(11) Bower, The Law relating to Estoppel by Representation (1923), p. 22.

emerged as a substantive rule relative to the security of transactions. This development started derivatively from the equity in the middle of the eighteenth century. In Pickard v. Sears (1837), the English common law court made the first approach to a general statement of the principle in its modern form.[12] In contrast with this, the theory of Rechtsschein has developed from the substantive law relating to the openly manifested transfer of a real right ("Publizitätsprinzip"). It was established by German scholars of civil law in the first decade of the present century, three score years later than the doctrine of estoppel by representation settled into shape in English law. This fact, it seems to me, amply shows how backward Germany was in terms of capitalistic developments while England as the most advanced capitalist nation in Europe had to set up a legal safety device so early in order to regulate increasingly rampant business malpractices.[13] "In keeping up with the advancement in modern capitalism," said Wellspacher, the forerunner of a comprehensive study in Rechtsschein, "the law has separated a third party's legal position from the internal factors unknown or inaccessible to him, and has established more and more provisions ordaining the external forms of expression applicable to legal rights and relationships as determinative and conclusive for the benefit of the third person involved in a business transaction concerned therewith, so that the stability of transactions might be guaranteed."[14] Thus a conflict between the right and its appearance (der

(12) 6 A. & E. 469, 474. See also Bower, supra at p. 9, n. (g).

(13) Miyamoto, "Eihō niokeru Kinhangen-hōri no Hattenkatei——Hyōji-shugi Hatten no Ichi-taiyō" ("Developments of Estoppel as a Representation Theory in English Law"), 23 Hōgaku-ronsō (Kyōto Imperial University Law Review) 2, p. 194 et seq.

(14) Wellspacher, a. a. O., Einleitung S. vii.

Gegensatz von Recht und Rechtsschein) came into question among German legal writers.[15] In an effort to solve this problem, they brought forth a declaratory theory——the so-called representation theory (die Erkläruugstheorie) ——as a rival to the will theory (das Willensdogma) which had been conventionally accepted. The theory of Rechtsschein came to the fore against this background. Nowadays, however, this subject-matter does not seem to be so hotly discussed as it was at the outset; yet it emerges time and again in the doctrinal interpretation of Sachenrecht (the law of real rights).[16] It may well be pointed out that the problem of Rechtsschein is of historical rather than dogmatical significance, since putting together all the conflicts of such sort in the light of the Publizitätsprinzip is based upon predominantly historical correlations between them.[17]

In Japan the study of Rechtsschein, I believe, has gained a practical importance since the Showa era (1926-) started. With World War I as a turning point, her national economy made epochal progress by leaps and bounds, but soon afterwards it suffered from overproduction and plunged into a tight money situation

(15) Jacobi, "Der Scheck als Wertpapier", Zeitschrift für das Gesamte Handelsrecht und Konkursrecht (hereinafter ZHR) 63 (1909), S. 86.

(16) See e. g. Westermann, Lehrbuch des Sachenrechts (1951), SS. 207, 208, 216, 225, 262, 315, 385ff., 461. The term "Rechtsschein" is sometimes used to present mere formalities of law in contrast with its actual conditions, as is exemplified in Curt Eduard Fischer's "Rechtsschein und Wirklichkeit im Aktienrecht", Archiv für die Civilistische Praxis (hereinafter ACP) 154 (1955), S. 85. This is of course another matter unless we intend to expand the scope of the theory of Rechtsschein so far.

(17) Eichler, a. a. O., S. 102 Anm. 125. In his letter of April 7, 1952, by which I was enlightened on many points, Prof. Eichler told me, "M. E. können die auf historischem Wege gewonnenen Ergebnisse einer dogmatischen Untersuchung vom heutigen Standpunkte nur in beschränktem Masse nutzbar gemacht werden." This must be the main reason for the apparent decline of the so-called "Rechtscheinsforschung".

which brought forth a financial panic in 1927. A representing director of a bank which had been closed down on account of money stringency made a public statement in a newspaper of nation-wide circulation to the effect that all the depositors were guaranteed out of his purse against a risk of bankruptcy on the part of his bank. Certainly this announcement had a reassuring effect upon them and won high praise among the public. But the fact is that he transferred his property to another corporate enteprise he participated in during this time. In other words, the canny and dishonest banker underhandedly put his proposed guaranty beyond the reach of the innocent creditors who relied on his fraudulent misrepresentation. However enraged they might be, they were told that there was no legal remedy for such a double-dealing.(18) But, to tell the truth, this was not a fair solution. The theory of Rechtsschein should have been invoked to protect those innocent people. Suppose you take a look at the more recent cases which have been brought to the Supreme Court. In most of those cases concerning bills and notes, you will repeatedly find the situation in which the Court should have invoked the principle of Rechtsschein, for they are such that a person liable on the instrument refuses to pay on demand, insisting on any of its infirmities for which he himself is in fact responsible, or that he claims acquittal of his liability on the instrument, taking advantage of any defects in the title of the negotiator.(19) The Court, however, decided those cases, drawing on

(18) See Izawa, Hyōji-kōi no Kōshin-ryoku——Shōji niokeru Kinhangen (Public Reliance on Misrepresentation —— Estoppel in Commercial Transactions) (1936), p. 2.

(19) Dr. Kōtaro Tanaka, C. J. of the Japanese Supreme Court, sustains application of estoppel to the above cases. See Tanaka, Tegata-Kogitte-Hō (The Laws of Bills and Checks), p. 47.

the broad and somewhat far-fetched principle of good faith. Of course this principle might govern the whole field of law, but such a sweeping generalization would put the law all the more in jeopardy unless it were well constructed in terms of technical applicability.[20] It seems quite natural that there come up a new elaborate and fertile theory as a directly applicable medium for legal reasoning just the same way the good faith doctrine (der Grundsatz von Treu und Glauben) developed into a legal technique of Rechtsschein. It is a well known fact that the Civil Code and the Commercial Code of Japan were substantially patterned after the German Codes.[21] Consequently, they have ample scope for the theory of Rechtsschein. Furthermore, the difficult problems of Anglo-Americanization with which they are now confronted will be somehow solved as far as Rechtsschein is comparable to estoppel. I hope this comparative study may contribute to our better understanding of Japanese law and to its jurisprudential amelioration in so wide a perspective.[22]

II. Developments of the so-called "Rechtsscheintheorie" reviewed in comparison with the doctrine of estoppel. The so-called "Rechtsscheintheorie" was established by German civil law writers in the early years of this century. Wellspacher, the forerunner, modified

(20) "Good Faith" in its broadest signification incurs blame for confusion of the law with the moral, if it is brought into the sphere of legal sanctions. What is more, it will give all judges so great a deal of leeway in relation to the positive law that the legal security will be at stake. This observation is set forth in Hedemann, Die Flucht in die Generalklauseln (1933). It is thus submitted that good faith in its technical and legal use should have the more limited and definite signification. See Eichler, a. a. O., SS. 13—36.

(21) Sebald, The Civil Code of Japan (1934), preface; Takayanagi, "Historical Introduction" to The Commercial Code of Japan (1931), p. xxxv.

(22) In respect to the benefits derived from the study of foreign law and of comparative law, see David, Traité élémentaire de droit civil comparé (1950), passim.

the so-called "Legitimationstheorie"[23] (the "right of disposition" doctrine) in better explanation of a movable property from a person who has no right to dispose of it, and then expanded such revamped theorization over the whole field of German civil law by way of finding out a fundamental principle, which he summarized as follows: "If a person acts in reliance on an external fact which, according to the statutory provisions or the general idea of business, constitutes a formal expression of a certain right, legal relationship, or other legally relevant factor, then his reliance shall be favored with legal protection, as far as that external fact has been raised with the aid of another person who shall incur detriment due to such legal protection given to the former."[24] This proposition has a merit in making it quite clear that reliance on certain external facts —— not good faith ("bona fides") alone——deserves legal protection, or, in other words, that those facts are objectively supposed to justify good faith. Taking "registration" and "possession" for two main examples, he classified such external facts into the following two groups:

(1) Registration and possesion.

(2) Artificial external facts.

a) Registration of incorporation.

b) Registration of marriage.

c) Registration of marriage property.

d) Certificate of inheritance, and letters of administ-

(23) See Regelsberger, "Der sogenannte Rechtserwerb vom Nichtberechtigten", Jherings Jahrbücher (hereinafter Jher. Jahrb.) 47 (1900), S. 363.

(24) Wellspacher, a. a. O., S. 115. This ground-breaking work is highly appraised by many legal writers. See Eichler, a. a. O., S. 102 Anm. 125; Demelius, "M. Wellspachers Vollmachtslehre-Zur 30. Wiederkehr seines Todestages (21. 2. 1923)" (1954), ACP 153, S. 1.

ration.

(3) Natural external facts.

a) Deeds: bill of debt, transfer deed, and written power of agency.

b) Other external facts.

The expansion of the principle of public manifestation (das Publizitätsprinzip) to so wide an area outside the scope of official registration (the so-called "Publizitätsform") was very much conducive to subsequent establishment of the "Rechtsscheintheorie", although Wellspacher himself did not term it so.[25] However, his excellent analysis is primarily concerned with the theorizing about legal protection given to a person who acted on a deceptive appearance. Consequently, it is still defective in legal technicality for dealing with another person who made the appearance as such. His phraseology "as far as that external fact has been raised with the aid ("Zutun") of another person" is so immature and so naive that it falls short of justification of the detriment incurred by this person as a logical result of legal protection given to the former person. His argument did not hold water when he said that, in most cases, statute law would give a clue to the proper interpretation of this simple word "Zutun".[26]

He was, I imagine, thinking about something like an "estoppel by assisted misrepresentation" which was contradistinguished by Ewart from an "estoppel by personal misrepresentation",[27] for, as

(25) But he used the word "Rechtsschein" in some pages of the book cited here. For instance, see ibid., S. 62 supra ("der durch die Urkunde erzeugte Rechtsschein").

(26) Ibid., S. 115. Cf. Stintzing, "Besitz, Gewere, Rechtsschein" (1912), ACP 109, S. 411.

(27) Ewart opines that the term "estoppel by representation" is irrelevant to *

it has been seen in the above table of contents, his argument started from the Germanist theory that the direct possession of chattels derived from the indirect possession of the same is in effect similar to the apparent right to immovables entered into the land register.[28] To illustrate, when B, who has borrowed a book from A, sells it as if he were the proprietor himself or otherwise were authorized to do so, and actually delivers it to the bona fide buyer C, then C will acquire a good title to it in such good faith.[29] In this case, the real proprietor A has transferred direct possession to B so as to cloth him with apparent ownership. This fact means that A has assisted B in making a false representation which appears true due to A's actual delivery of the book to C. The situation is almost the same as where an incorrect entry is made in a public register because of something wrong with the party who has a real right. Thus, where the landlord A has assisted B in acquiring an ostensible ownership to A's land by false registration, subsequent conveyance on sale from B to C will be justified by C's action in reliance on the land register. This thinking closely resembles Ewart's idea of assisted misrepresentation. However, Wellspacher here intended to present only the minimum possibility of generalization to cover the both groups of external facts,[30] because it was submitted

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* cases of assisted misrepresentation, because it is not the representor, who is estopped, but the person who assisted the representor in inducing a third person to act on the faith of the representation. See Ewart's criticism of Bower's The Law Relating to Estoppel by Representation in 37 Harv. L. Rev. 170. As for the details of his doctrine, see Ewart, An Exposition of the Principle of Estoppel by Misrepresentation (1900).

(28) Wellspacher, a. a. O., S. 2ff.

(29) See Art. 932 I Satz 1 BGB. For convenience's sake, the alternatives for actual delivery as prescribed in Art. 932 I Satz 2, 933, 934, are put aside for a moment.

(30) Wellspacher, a. a. O., S. 115.

by himself that there were statutory limitations on legal protection of reliance on those external facts.

First, the BGB, as a rule, places no emphasis on how registration as an external fact has come into existence in individual cases, while it makes a point of granting relief to the bona fide transferee of possession only in cases where this external fact has been raised with the aid of the party who is to suffer detriment as a result of that relief. This is a reason for division between artificial external facts and natural ones. The bona fide third parties will be given more protection in the former group of cases than in the latter, for they are mostly supposed to acquire a good title simply because they have acted in good faith on false entries in a public register, whatever causes of this erroneous registration may be.[31] But it can be said that, in so far as the false registration has been induced by the party thereto, protection of the third parties' action in reliance thereon may fit in with the rule governing the latter group of external facts.[32] The same observation has strongly actuated the Reichsgericht —— at least before the enforcement of the BGB and HGB —— to found the judicial approval of legal protection of reliance on the commercial register (das Handelsregister).[33] But the Commercial Code denied such protection and enabled anyone to plead the untruth contained in the commercial register.[34] Now this register was

31) See Art. 892 BGB.

32) Wellspacher, id. supra.

33) Ibid., S. 116. See Erkenntnisse vom 17. Jänner 1898 (Entsch. 40, S. 146), vom 22. Oktober 1887 (Entsch. 19, S. 197).

34) Cf. Art. 15 II HGB. It is still a strong opinion that this provision does not give any protection to third parties who acted in good faith on registration or public notice. See J. v. Gierke, Handelsrecht und Schiffahrtsrecht (6. umgearbeitete Aufl. 1949), S. 57.

compelled to be a contrast to the land register, in spite of the fact that no difference could otherwise be seen between the two as the same public registers. It is true that, shortly after the enforcement of the HGB, the Reichsgericht still went its own way proclaiming, "If a person has brought about a registration and its public notice as to the formation of his commercial firm, then he is not allowed to plead that those items, which have been officially registered on his application, do not correspond to the real state of affairs, as far as this is at his disposal."[35] Strange to say, this decision is somewhat similar to an application of the Anglo-American doctrine of estoppel. Ever since, however, such legal thinking has been confronted with a setback coming from the codified law, and, under this pressure, it has been to some extent "petrified".[36] Should it have found general expression at this stage in its development, there might have been no better proposition than Wellspacher's "Zutun" doctrine. Perhaps he could not afford to go deep into particulars of such broadly formulated principle, though he recognized that it had yet to be thrashed out. The task of analysis was left to the theory of Rechtsschein. At present the German jurisprudence shows a growing tendency to fill a wide gap between the land register and the commercial register. Action in reliance on the land register is less favored, and that on the commercial register is more protected than ever before. The credit, of course, goes to the theory of Rechtsschein.[37]

Secondly, there is another reason why Wellspacher had to be

35) Entscheidung vom 3. März 1902 (Entsch. 50, S. 429).
36) Wellspacher, a. a. O., S. 117.
37) Eichler, a.a. O., S. 101 Anm. 124.

satisfied with the ambiguous wording "Zutun". It is because his doctrine was in so striking contrast with those theories of the relation between will and representation, which were prevailing under the BGB, that it was considered incapable of becoming a rule of law. As he himself admitted, it was quite difficult to reconcile his doctrine with the then generally accepted interpretation of statutory provisions relating to declaration of intention (Willenserklärung) and defective intention (Willensmangel). In this respect, he found that the English doctrine of "estoppel" revealed a strange coincidence with his viewpoint, citing Schuster's definition of estoppel that *"wenn jemand, auch ohne sein Verschulden, durch Worte oder Handlungen oder Unterlassungen einen anderen zur irrtuemlichen Annahme einer Tatsache verleitet und dieser andere durch die Annahme dieser Tatsache zu einer Handlung oder Unterlassung veranlasst wird, durch welche er Schaden erleidet, so ist der Urheber der falschen Annahme verpflichtet, dem anderen gegenueber so zu verfahren, als ob die betreffende Tatsache wirklich vorhanden gewesen waere"*[38] This principle operates in the field of judicial process so as to ground a judgement not on the real legal status but on the apparent constituent fact. He notices, however, that in English law protection of reliance on such external fact covers a wider range than in German law, as is exemplified in the matter of legal capacity, in some cases of which the validity of a contract formed by an insane person was held dependent upon an express impression that he made on the other contracting party. Such contracts are valid unless a competent person intending to avoid

(38) Schuster, Der englische Aktienschein, S. 331. Cited in Wellspacher, id supra.

them produces evidence that the other party was aware of the unsoundness of mind on the part of the insane. In the leading case for this doctrine, the rule was thus stated: "The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory but executed in the whole or in part and the parties cannot be restored altogether to their original positions."[39] Wellspacher opines that this treatment of insane persons dealing in business is more appropriate than the remedies in the civil law countries.[40] He says, "It is unfair and unjust to approve the civil law effect of the unsoundness of mind only to the lunatic's advantage, and thus to discriminate in favor of the insane against the sane. Moral sympathy has indeed less reason in business law than anywhere else, and defective 'intention' or lack of 'free will' (Art. 104 Z. 2 BGB) can raise no bar against a well-settled legal rule which in many cases makes light of the absence of will or otherwise presumes the presence of an intention, where there is none in fact, for the security of transactions. It is also a mistake to resort exclusively to psychiatry to ascertain the unsoundness of mind from the viewpoint of insane persons. Nor should the civil law accept offhand the results of criminal law brought about from entirely different motives. Anyway, the modern civil law must not at any moment ignore the cognoscibi-

(39) Molton v. Camroux(1848), 2 Exch. 487; affirmed (1849), 4 Exch. 17. See Williston and Thompson, Selections from Williston on Contracts (rev. ed. 1938), p. 270.

(40) Cf. Art. 109 II BGB. This provision is based on the premise that contracts of a legally incapacitated person are void and validated only by his guardian's subsequent approval (Art. 105, 108).

lity of the insanity."[41] In this connection, Wellspacher may be regarded as the first to enter into a comparative study between the German principle of Rechtsschein and the English doctrine of estoppel. Furthermore, he traces an analogy of that principle with Austrian and French counterparts, so that it may prove prevailing all over the world as a universal rule in its nature.[42]

The defect of Wellspacher's doctrine was made good by Meyer. He replaced the idea of "Zutun" by the principle of causing ("Veranlassungsprinzip") on the basis of the Germanic legal history dating back to the medieval law of "Hand wahre Hand". He says, "Not only possession and land registration but also any other cognizable typical forms of expression of rights raise a presumption of such rights as corresponding thereto, namely create Rechtsschein."[43] From this standpoint, he explains that the reason why the bona fide transferee gets a good title is because the owner of the right has given cause for a Rechtsschein which the former can set up against the latter, or has neglected to effect a cure for it.[44] This thinking is, says Meyer, based on relative justice (relative Gerechtigkeit) between the parties.[45] The same basis is given to the rule of "Hand wahre Hand", the oldest form of the Veranlassungsprinzip. The rule comes from the ancient legal system of "Gewere" concerned with a sort of homestead ("Haus und Hof"). All legal issues were solved by way of Gewere, the only form of expression of a right. Conveyances did

(41) Wellspacher, a. a. O., S. 119f.
(42) Wellspacher, a.a. O., S. 121ff.
(43) Meyer, Das Publizitätsprinzip im Deutschen Bürgerlichen Recht (1909), S. 97.
(44) Ibid., S. 95.
(45) Ibid., S. 85ff.

not come into legal effect until they were represented in Gewere. On the other hand, one who had obtained a Gewere was prsumed to have a right expressed in it. If someone stole another's chattels, he got a presumptive Gewere thereon. This presumption had to be broken by a specific procedure taken by the real owner, in order that he could regain the stolen chattels. The procedure was composed of two steps, one was called "cry" ("Gerüfte") and the other subsequent to it "pursuit" ("Spurfolge"). Thus an action of "Anefang" was brought.(46) The whole process enabled the owner to make notorious the defect in the title of the thief who had otherwise been favored with publicity of a presumptive Gewere in his hand. However, in cases where the owner had transferred direct possession of his chattels to another at his own will and not against his will as in case of theft, an action of Anefang was unavailable to the owner to get the chattels back from a third party who had obtained a legal Gewere thereupon by transaction with the transferee of direct possession— in most cases, a borrower or a bailee to whom the owner had entrusted possession. The owner had no alternative but to ask this entrustee to hand the chattels back to himself. He was not entitled to pursue the third person for recovery of the same, because he had caused his entrustee to put on an appearance of ownership on which the third person should reasonably have acted in good faith. At least since he had given cause for such appearance, he had to put up with the third party's acquisition of title even though not in good faith. This is the classical concept of "Hand wahre Hand" which presents a sharp contrast to

(46) Ibid., S. 9ff.

the Roman law of "*nemo plus iuris ad alium transferre potest quam ipse habet*" (One cannot transfer to another a larger right than he himself has). This is what Otto von Gierke pointed out, "das soziale Element im Privatrecht" as contradistinguished from the individual element in Roman law.(47) In this connection, Meyer stresses the fact that the civil law, unlike the criminal law seeking absolute justice, has a social mission to realize relative justice by means of such typical formalism as mentioned above. This reminds me of the Anglo-American doctrine of estoppel whose basis is, as already seen, relative justice between the parties litigant. Common law did not know anything equivalent to the rule of "Hand wahre Hand", but it rather started from the rule: *nemo dat quod non habet.*(48) It is with the increasing pressure of the social interest in the security of transactions through economic development and commercial expansion that the equity slowly affected this common law principle and brought about the rule of estoppel against a person who "induced" another to act in reliance. It was an early settled rule to protect a bona fide purchaser in the open market; this was generally acknowledged in common law except for a horse trade.(49) Now the principle of, as it were, inducement was introduced into legislation, and was properly reconciled with the old-established rule of Roman law. We can see an interesting combination of both sources of the law in the Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), s. 21 (1) of which provided that "Subject to the

(47) O. v. Gierke, Die soziale Aufgabe des Privatrechts (1889), S. 13.

(48) Riezler, a. a. O., S. 105.

(49) Ibid., ebenda. For a brief explanation of the history of Roman law coming to such maturity, see Pound, An Introduction to the Philosophy of Law (1954), p. 139 et seqq.

provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".[50]

In the United States, the concept of bona fide purchase is quite familiar to law students. Text-writers explain it as follows: "It is a tricky concept. If a bad man steals a book and trades it for a necktie, the owner of the book can replevy it or hold the necktie-seller for converting it. But in at least three types of cases the bona fide purchaser from the bad man is protected: (1) We shall come back to cases of money, or other negotiable property. (2) If the owner intends to pass title to the bad man, his right to get the book back because of fraud may be cut off when the bad man sells it. (3) The owner who clothes the bad man with apparent ownership or apparent authority to sell may be 'precluded' from asserting his ownership."[51] The third type is tantamount to legal protection given to a bona fide third person based on the "Veranlassungsprinzip" derived from the Gewere whose etymological signification is *vestitura*, Bekleidung (=clothing).[52] The second and third types of cases have previously been prescribed in the Uniform Sales Act (Sect. 24 and 23), but now the Uniform Commercial Code has consolidated and rewritten them into its Section 2—403 under the title

(50) Riezler, a. a.O., S. 106.

(51) Braucher, Sutherland & Willcox, Commercial Transactions, Text-Forms-Statutes (1953), p.25f.

(52) Hübner, Grundzüge des Deutschen Privatrechts (5. durchgesehene Aufl. 1930), S. 200f.

of "Good Faith Purchase of Goods". The Code lays down a new principle to cover cases where the owner of goods entrusts possession of them to a merchant who deals in goods of that kind. In such cases the merchant is given power to transfer the rights of the entruster to a "buyer in ordinary course of business" (UCC Sect. 2—403 (2)). Suppose you take your watch to a watch-seller for repairs, and he wrongfully sells it. The Code, unlike the present law, would protect the buyer. Under the Code, a dealer left in possession of sold goods would merely be one example of the application of this new principle (cf. USA Sect. 25). In all such cases as enumerated above, bona fide purchase usually means (1) purchase (2) for value (3) in good faith and (4) without notice of the defect.[53] It is now quite clear that the Good Faith Purchase article of the Code is based on principles of agency or of apparent agency or ownership or other estoppel,[54] and that the rule stated therein is inseparably linked with the principle of inducement or causation.

Reverting to the Veranlassungsprinzip, this is likewise closely connected with the history of legal protection of bona fide purchasers in Germany. As already stated, the rule of "Hand wahre Hand" lacks an important element : "good faith". It operates to protect third persons whether they acted in good faith or not. Its literal meaning which was prevailing in the medieval law is that, where you have left something in trust with someone, you must demand it from him (*"Wo du deinen Glauben gelassen hast, da musst du ihn suchen"*), and neither more nor

(53) Braucher, Sutherland & Willcox, id., p. 26.

(54) See The American Law Institute, Uniform Commercial Code (Text and comments edition 1952), Sect. 2—403 Comment 1.

less than this. It is with the commercial expansion of municipalities in the late Middle Ages that the rule was modified for the benefit of the owner by some municipal regulations, which successfully entitled him to recover his property from a third person who had acquired it in bad faith. In these statutes there are some traces of the canon-law idea of "bona fides" or of "exceptio doli generalis" which was penetrating the then gemeines Recht. The original meaning of this general concept found expression in the principle of "Treu und Glauben", and its derivative meaning in the technical term "in gutem Glauben" (in good faith)[55]. Thus, the rule of "Hand wahre Hand" has come down to the provisions of the BGB with a qualification that the third person cannot get a good title unless he acquired possession from his transferor in good faith.[56] To put it another way, the pressing need of modern business for more relative justice has changed the medieval law derived from the Gewere into the Veranlassungsprinzip combined with the Rechtsschein. It seems to me that Meyer minimized the significance of this metamorphosis without heeding the essential difference between Gewere and Rechtsschein when he emphasized the typical formalism as the least common denominator of both legal thoughts.[57] He attached too great importance to the history of the Publizitätsprinzip itself which serves only to show the extent to which the theory of Rechtsschein is applica-

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

(56) See Art. 932 BGB.

(57) Meyer, a. a. O., SS. 85, 88. In this respect, Wellspacher drew a line of demarcation between the two, saying "The ancient and medieval law stuck to external state of things because of its inability to pierce them through, while the modern law is willing to neglect internal factors because an inquiry into them does not meet the requirement of the present-day legal life". (Wellspacher, a. a. O., Einleitung S. viii.)

ble. It should have been noticed that the history of the "good faith" doctrine was as important as that of the typical formalism if any historical study were in order. As it was, all that Meyer did was to conclude that the Publizitätsprinzip coupled with the Veranlassungsprinzip should develop into a comprehensive theory of Rechtsschein. He did not go into technical details of this theory, though he suggested that it would be capable of answering so many vexed questions all over the field of civil law, such as centering about representations of intention, negotiable instruments and burdens of allegation.(58)

From the viewpoint of the present discussion, his achievement seems to be that he brought forth the theory of Rechtsschein in close relation to the theory of compensation for damages which was developing a tendency to the Veranlassungsprinzip. The orthodox doctrine that "where there is no fault, there is no liability" has gradually been discarded, and, instead of it, the new principle of Veranlassung has come to the fore by the name of "liability without fault" doctrine. Some legal writers tried to explain it away by expanding the Roman concept of "culpa".(59) But this is quite a thin pretense. Suppose an offeror made a misrepresentation on account of something wrong with a telegraph he used. In spite of the fact that he offered "MK 100" by wire, it was accepted as "MK 900" by the offeree. The new theory does not place so much emphasis on the offeror's internal factor (fault) as rather on his external factor (representation itself), because he caused his offeree to hear "MK 900". The crux of the matter is that the offeree incurred damages in reasonable reliance

(58) Meyer, a. a. O., S. 97.

(59) E. g. Jhering, "Culpa in Contrahendo" (1861), Jher. Jahrb. 4, S. 1ff.

upon a misrepresentation which the offeror had made without fault. Whether the latter did it with or without fault, Meyer pointed out, it makes no difference to the former in view of relative justice. The mere fact that he did it or that he gave cause for such damages makes him liable, and a far-fetched application of the "culpa" doctrine is accordingly inappropriate.(60) The theorization about Rechtsschein is also free from this doctrine and subject to the Veranlassungsprinzip. The relation between the theory of Rechtsschein and the theory of compensation for damages recalls me to the basic nature of estoppel as a tort theory, based upon a misrepresentation of facts by one person to another which creates a situation in which it is desirable to prevent harm to the other by requiring the first to make good his words.(61) There can be traced some analogy between Rechtsschein and estoppel.

Meyer's argument was strongly backed up by Otto Fischer who delivered a lecture on "Sein und Schein im Rechtsleben", suggesting the possible effects of Rechtsschein extending far beyond the original scope of it as already known.(62) For instance, he pointed out that a certain legal effect of a death declaration might properly be explained in terms of a legally approved appearance of death ("der juristische Totenschein").(63) Another vital point in his contention is that an original owner, who by his action or inaction contributed to an appearance of ownership

(60) Meyer, a. a. O., SS. 90, 91, 92.

(61) Seavey, Studies in Agency (1949), p, 184.

(62) Fischer, "Sein und Schein im Rechtsleben" (1909), Internationale Wochenschrift für Wissenschaft, Kunst und Technik Nov. 13, S. 1449 Anm. 1. He delivered this lecture when he was inaugurated as President of the Breslau University at which Meyer was on the teaching staff as professor of law.

(63) See Art. 1348 I BGB.

on the part of his entrustee, be allowed to defend himself against the second by an action for damages in tort or for unjust enrichment though he has no defense to set up against a bona fide third person to whom the second has transferred possession. The security of ownership will thus be reconciled at a minimum with the security of transactions.(64)

Fischer's suggestion became true, as the research of Rechtsschein began to bring fruits. Jacobi first applied the theory of Rechtsschein to the subject of representation of will, the notorious issue trembling in the balance of the subjective will theory and the objective representation theory. He concluded : "The reasons for the legal effect of a representation without will are (1) that the representation is usually intended to raise an idea of the representor's will in the representee's mind even though the representor has in fact no such will, and (2) that, even if the representation were not intended to do so, it creates an appearance of the representor's will for a cause imputable to him, thus inducing the representee to believe that the representor has a real intention as inferred from the appearance, and to act on the basis of such belief."(65) Reason (1) enabled Jacobi to replace the conventional concept of "Rechtserfolgswille" (intention of giving legal effect to the representation), which was the target of bitter criticism from the representation theory, by the new concept of "Absicht der Vorstellungserweckung" (intention of raising an idea of the representor's will in the representee's mind). From this viewpoint, he explained away a representation with mental reservation, taking it for a perfect declaration of

(64) Fischer a. a. O., S .1453.

(65) Jacobi, Die Theorie der Willenserklärungen, S. 33 supra.

intention.[66] There were a number of hot discussions of Art. 116 BGB (mental reservation). Jacobi trimmed them away by means of the above doctrine. Reason (2) is of course the major point of his argument. As far as this reason is concerned, he deals with mistake, fraud and duress, which, in accordance with the provisions of the BGB, shall make a legal transaction voidable. If the representor excercised his right of avoidance, then his representation would become void in retroactive effect, so that it could prove no better than an apparent but not real intention.[67] This is the same with the effect of a presumptive Gewere under the old Germanic law.[68] Sometimes a claim for damages would collaterally arise on the part of the representee who acted in good faith on such an infirm representation.[69] Jacobi fairly argues that such weakened legal consequences are fitting and proper to this kind of representation, because, strictly speaking, it is not a perfect declaration of intention but a mere appearance of intention.[70] The so-called representation theory or the like objective theories cannot properly elucidate this point. Jacobi did not go to such extremes nor fell back on the other extreme, namely the notorious will theory.[71]

It is true that he brought the term "Rechtsschein" only to bear on the second reasoning, but the same term, it seems to me, is also relevant to the basis of the first reasoning should the

(66) Ibid., S. 25f.

(67) This proposition was first made by Meyer who said, "The reason for the retroactive force of avoidance is that avoidance is to assert a substantive right against a Rechtsschein." Meyer, a. a. O., S. 97. See also Jacobi, a. a. O., S. 33 Anm. 1.

(68) Jacobi, a. a. O., S. 39f.

(69) See Art. 122 BGB.

(70) Jacobi, a. a. O., S. 34.

(71) Ibid., S. 3f.

representation with mental reservation be regarded as an appearance of will which the representor intended to create.[72] Thus the theory of Rechtsschein can extend over the whole field of representation of intention.

The doctrine of estoppel does not cover so wide a range. For comparison's sake, let us take the following case for example. Supposing a proposal sent by telegram was misquoted by the telegraph company and was accepted by the offeree in its mistaken form, the offeror is estopped from claiming that he did not make the offer which was delivered. The same principle applies to the other party. He may answer, "I do not accept your offer." But the wire reads, "I do accept your offer." He should be bound by the message delivered since he took the risk of that medium.[73] This thinking unmistakably coincides with Jacobi's second reasoning. Estoppel may thus prevent either party from denying an agreement although in fact there was none. However, this case must not be confused with a contract actually in existence but the existence of which depended upon mistake. In the latter case, there was no mistake in offer and acceptance, but the parties were mistaken about material facts which induced them to enter into the contract. The mistake in inducement did not prevent the formation of a contract, though the contract may be subject to

(72) The problem of "mental reservation" on which there have been so hot debates in Europe has not even been discussed in the case-oriented literature of the common law. It is the expression of the mutual assent and not the mental assent itself, which is the vital element in the contract. "The meeting of minds which is essential to the formation of a contract is not determined by the secret intention of the parties, but by their express intention, which may be wholly at variance with the former" (Brewington v. Mesker, 51 Mo. App. 348). See Fuller, op. cit., p. 94.

(73) 13 C. J. 301, sec. 117; For a full discussion, see Strong v. West'n Union T. Co., 18 Id. 409, 109 Pac. 917.

rescission. If a mutual mistake was not material but related to some minor particular of a contract, the contract is not even voidable. This may show that estoppel is not the basis of holding liable one who contracts under mistake. In other words, he is bound not on the ground of estoppel but on the ground of contract itself.(74) Nevertheless, the view here stated is open to question. What would be the rationale for the proposition that "a contract exists but is voidable" if the justification for the right of avoidance involved therein came to the question? In this respect, Jacobi properly opines that it depends upon the division between a weak Rechtsschein and a strong one whether the contract is voidable or not. Strictly speaking, there was no contract but an appearance of intention which, in accordance with its degree of cogency or intensity, gives a wholly or partly unassailable position. This corresponds squarely to the relative efficacy of Gewere.(75) If the appearance gives a partly unassailable position, it is subject to rescission, and this rescission must be reconciled with a claim for damages on the part of the representee or bona fide third persons who relied on that appearance. Of course, much the same is the common law effect of a mutual mistake. Either party harmed by the mistake is allowed to rescind his agreement, subject to return of any consideration he has received, only in cases where innocent third persons will not be harmed by avoidance of the contract.(76) But the proposition that rescission will not be allowed if the rights of an innocent party have

(74) Williston on Contracts, § 20.

(75) Jacobi, a. a. O., S. 36.

(76) Rest., Contracts, § 504; Capelli v. Dondero, 123 Cal. 324; Philippine etc. Co. v. Gov't of P. I., 247 U. S. 385; see also Lasier v. Meyer, 315 Ill. 362, 146 N. E. 465.

intervened is beyond the reach of the doctrine of estoppel. As to the other factors which prevent the exercise of the free will in the formation of a contract, no great difference can be seen. Here one who was induced in reliance on fraudulent or innocent misrepresentation or under undue influence to enter into a contract can avoid the contract, and, if he does so, he must return the consideration he had received.(77) But, if the representor should transfer the land or chattels received under the contract to a bona fide purchaser for value, the above remedy is cut off, because the transferee gets a good title.(78) As already stated, the doctrine of trasfer to a bona fide purchaser for value is based on the rule of estoppel, but the whole implication of the subject may be explained as well or better by the theory of Rechtsschein as on the ground of estoppel.

Having succeeded in couching the representation of intention in terms of the principle of public manifestation of real property, Jacobi emphasized the theory of Rechtsschein as a "fundamental principle governing German civil law".(79) There were two more protagonists of this theory among his colleagues. One was Naendrup and the other Krückmann. Both played active parts in expanding the possible scope of its application.

Naendrup may be regarded as the most important figure who gave a finishing touch to the theory of Rechtsschein. He compiled his long-range works into a series entitled "Rechtscheinsforschungen". In one volume of it he summarized the

(77) Rest., Contracts, §§476, 480, 484, 496, 497, 499; 13 C. J. 394, secs. 303, 304; 13 C. J. 617, 620, secs. 672, 679; Williston on Contracts, §1500.

(78) Foster v. Mckinnon, L. R. 4 C. P. 704; USA Sect. 24. See also UCC Sect. 2—403 supra.

(79) Jacobi, a. a. O., S. 32.

theorizing about Rechtsschein, according to which a person shall obtain the rights he claims under the following circumstances[80]:

(1) He has relied without grave fault on an appearance.

(2) This appearance is generally approved by law as reliable.

(3) As a rule, it comes into existence or remains in existence, owing to the intention or negligence on the part of another person who will incur detriment when legal protection is given to the former person.

(4) But, sometimes when its existence is not imputable to the latter person's intention or negligence, the appearance was at least caused by this person to exist or subsist, or otherwise is justified at least for the sake of reasonableness or fairness.

(5) The person himself usually offers values or goods, in order that he can in effect acquire, maintain or complete valuable meterials or means of subsistence which are subject-matters of the rights he claims.

It is quite clear that those requirements necessary to found the effect of a Rechtsschein are designed to balance the interests of both sides, a person who made an appearance and another who acted on it.

Requirement (1) is the so-called Vertrauensprinzip (the good faith doctrine)[81]. There are two notions as to the meaning of reliance in good faith. One is that it means positive reliance on

(80) Naendrup, "Begriff des Rechtscheins und Aufgabe der Rechtscheinsforschung", Rechtscheinsforschungen Heft 1 (1912), SS. 3—8 und dortige Anmerkungen.

(81) Manigk, Das rechtswirksame Verhalten (1939), S. 164f.

an appearance, or the definite belief that the appearance is truthful. The other maintains that negative reliance is sufficient to invoke Rechtsschein, and that it means that a person who relied in good faith on an appearance did not know inexistence of a real right corresponding to the appearance, and that is enough. If this notion is applied to a representation, it comes to mean that the representee does not notice inexistence of a real intention on the part of the representor, and that it is all what it means.(82) Naendrup is not necessarily clear in this respect, but he does not seem to have intended to controvert the latter notion which was prevailing in judicial decisions and law commentaries.(83) Another thing which must be pointed out is that he indicated the significance of the "without grave fault" requirement, which his predecessors had overlooked or left intact in analyzing the elements of the theory of Rechtsschein. However, rejection of a grave fault is to permit a slight fault. This treatment may consequently lead an original owner or a holder of any rights to too unfavorable a position in relation to a bona fide third party in civil transactions where justice and public policy require the latter to take a higher degree of care. By the way, the Japanese law requires him to be without even slight fault in most cases of civil transaction, but to be at most without grave fault in cases of commercial transaction. This is, I believe, a good idea enough to reconstruct the theory of Rechtsschein on the more proper foundation. The same line of criticism is found in a German jurist's study of Art. 932 BGB (bona fide acquisition of a movable

(82) Ibid., S. 165.

(83) Fischer, Die Frsitzungserfordernisse titulus und bona fides, S. 16; Stintzing, Die Uebertragung der beweglichen Sachen, S. 14.

property[84]. Should the Article require that the bona fide transferee acted without ordinary fault, then it would be a foregone conclusion that Art. 892 I (bona fide acquisition of realty) and Art. 2366 (bona fide acquisition of heritage) should impose the same requirement on bona fide third persons, since realty and heritage are less marketable by nature than chattels, so that the law has a reason to think that much of the real owner for the security of ownership (Eigentumssicherheit). But Art. 932 II actually reads, "The transferee was not in good faith when he noticed or did not notice with grave fault that the chose in action did not belong to the transferor", while neither Art. 892 I nor Art. 2366 involves any literally similar passage. Therefore, it is submitted by the weight of authority that the transferee in cases of the latter two provisions may be in good faith not only with slight fault but also with grave fault[85]. Such a literal interpretation is certainly justified by authenticity of the land register or of the inheritance certificate, but in complete disregard of the difference in marketability between movables and immovables. It is unfair and unjust to permit any fault on the part of a bona fide transferee of realty or of heritage while disapproving of a grave fault on the part of a bona fide transferee of chattels more marketable than the former property. By the same token, both Art. 892 I and Art. 2366 do not seem to consider any grave fault to be permissible, if more attention should be paid to their spirit and letters. Naendrup thus elucidated that they presuppose impermissible grave faults

(84) Koban, Zweifragen aus dem bürgerlichen Rechte (1909), S. 105f.

(85) Enneccerus-Wolff, Lehrbuch des Bürgerlichen Rechts III Sachenrecht (1932), S. 131. But here Wolff says, "This is de lege ferenda deplorable" (Anm. 17 supra).

in cases where a strong Rechtsschein expressed in a public register or certificate turns out to be infirm because of the land registry's acceptance of an adverse registration or because of the probate court's request for return of the inheritance certificate.(86) Discovery of such implications led him to a general statement that bona fide acquirers must have relied without grave fault on a Rechtsschein. From the viewpoint of the present comparative study, this statement is de lege ferenda relevant to commercial transactions rather than to civil transactions, although he grounded it primarily on the provisions of the Civil Code but not on those of the Commercial Code. In Anglo-American law the phrase "in good faith" usually means "in reliance as a reasonable man" or "as a man of ordinary prudence", but the Sales Article of the Uniform Commercial Code says that good faith in case of a merchant "includes observance of reasonable commercial standards"(87). It is only natural that the test of reasonableness in commercial transactions is different from that in civil transactions, because the subject-matters of both transactions are not the same in marketability.

Requiremeut (2) is based upon the principle of public manifestation (Publizitätsprinzip). The point of practical import is that reliable appearance must not be an arbitrarily selected one such as a specially designed cap of an hotel employee standing at a railway station to attract and pick up travelers. It does not necessarily make his employer and hotel proprietor liable for a contract made by him with a traveler, unless he has an authority

(86) Naendrup, a. a. O. S. 3 Anm. 1.

(87) UCC Sect. 2—103 (1) (b). See also Braucher, Sutherland & Willcox, id. supra. In re "reasonable men", see Low v. Bouverie (1891), 3 Ch. 82 per Kay, L. J.

to do so as an agent of the hotel proprietor.[88] Accordingly, Naendrup properly emphasized that appearance here should have a legally approved reliability, showing some typical examples: apparent right to inheritance expressed in an inheritance certificate (Arts. 2366, 2367 BGB), apparent conveyance of a real property recorded in a public register (Art. 892 BGB), apparent ownership based on actual delivery or the alternative therefor (Arts. 932 I, 933, 934 BGB) and apparent obligation on presentment of a bill of debt for payment (Art. 405 BGB).[89] Of course he did not intend to make an exhaustive treatment of the subject, but to show the extent to which the theory of Rechtsschein applied under the Publizitätsprinzip. In this respect, it seems to me, the better answer is found in Wellspacher's work which dealt in detail with artificial external facts and natural external facts over the whole field of civil law as it has already been seen. But it is a great regret that their analyses did not go further into the provisions of the Commercial Code in which the theory of Rechtsschein might strike a good prospect.

Requirements (3) and (4) stand for the principle of causing (Veranlassungsprinzip). Requirement (3) is adopted by Art. 935 I BGB which does not protect a finder of stolen or lost chattels, and by Art. 892 BGB which provides that a real ownership be preceded by an ostensible ownership wrongfully entered in a public register as long as the real owner fails to claim an adverse registration.[90] Requirment (4) is adopted by Art. 935 II

(88) Wellspacher, a. a. O., S.113; see also Fischer, a. a. O., S. 1456.
(89) Naendrup, a. a. O., S. 4 Anm. 1.
(90) Ibid., S. 5 Anm. 3.

BGB which admits a legal effect of Rechtsschein to an apparent ownership expressed in the stolen or lost money or bearer paper by reason of negotiability, and in the stolen or lost chattels delivered at public auction by reason of authenticity.(91) Blank acceptance of a bill, in which more than the agreed sum is written, also meets this requirement.(92) The above two requirements correspond roughly to the vital elements of estoppel: intention or negligence, and silence or inaction.(93) Naendrup's Veranlassungsprinzip does not only include "intention or negligence", but it can be reconciled with "silence or inaction", for his so-called "reasonableness or fairness" as a cause of imputation of deceptive appearances to a real owner means in substance the real owner's silence or inaction as to his own right.(94) "Silence" ("Verschweigung") is considered an inducement by inaction, that is, as it were, a negative Veranlassung. Historically, it is also true that Verschweigung formed the basis of Gewere which is the origin of the Veranlassungsprinzip.(95)

Reqnirement (5) was, for the first time, brought by Naendrup into the theory of Rechtsschein. At this point one can safely say that the theory which had been inchoate and rather bold came

(91) Ibid., S. 6f. Anm. 1 u. 2.

(92) Ibid., S. 5 Anm. 5, S. 10 Anm. 3, S. 11.

(93) For instance, cf. Black, Law Dictionary, p. 1186 ("An estoppel arises when one by acts, representations, or admissions, or by silence when he ought to speak, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief-").

(94) Naendrup, a. a. O., S. 6f. Anm. 2. See also Naendrup, "Rechtscheinswirkungen im Aktienrecht" (1931), Arbeiten zum Handels-, Gewerbe- und Landwirtschaftsrecht Nr.62, S. 940 Anm. 277. Here he exemplified Verschweigung by a case where the inaccuracy of the registered matters is left intact.

(95) Meyer, Vom Rechtsschein des Todes (1912), S. 16f. See also Jacobi, a. a. O., S. 40; Hübner, a. a. O., S. 16f.

to maturity. But this additional requirement, as it seems, is indefinite and vague, because it must "usually" be satisfied by a bona fide person. Sometimes his acquisition for value is not necessary for a Rechtsschein to take legal effect. For instance, in case of a gift a person who acted in good faith on a representation purporting such a gratuitous promise will be protected. Therefore, the requirement now in question is not absolute. By this requirement Naendrup seems to have meant to say that legal protection by reason of Rechtsschein be limited to an acquisition by legal transaction or the like act and must not be extended to an acquisition by attachment or garnishment, and that, if the bona fide transferee had not offered any value, legal protection once given to him should be revoked by reason of unjust enrichment (Art. 816 I BGB).(96) Therefore, it may well be said that the gratuitous promise was not Naendrup's major concern.

However, my observation is that this last requirement poses an interesting problem from the viewpoint of comparative law. The German "Rechtsscheintheorie" had considerable influence on the other civil law countries in Europe these thirty years, as it will be seen later. J. Ch. Laurent, a famous French jurist, followed suit putting forward "la théorie de l'apparence", and apparently took the same position as Naendrup did. He said, "It is required that the bona fide third person must have acquired the chattels for value in terms of title transfer."(97) Furthermore, such a proposition recalls me to the complicated relation between estoppel and consideration which has come down hereto-

(96) Naendrup, a. a. O., S. 7 Anm.1 u. 2. See also Oertmann, "Grundsätzliches zur Lehre vom Rechtsschein" (1930), ZHR 95, S. 459.

(97) Laurent, L'apparence dans le problème des qualifications juridiques (1931), pp. 92, 268 e. s.

fore through the history of Anglo-American law. The bona fide purchase for value was so easily founded on estoppel, while the gratuitous promise without consideration seemed irreconcilable and inconsistent with it. Is there reason in all these? It is simply because of the confusion of the requirement of detriment in estoppel with the contractual idea of consideration. Estoppel is fundamentally not a contract theory but rather a tort theory. It deals with a misrepresentation which creats a situation in which it is desirable to prevent harm to the representee by requiring the representor to make good his words.(98) The same thing can be said as to Rechtsschein. How can responsibility for words (Haftung aus dem Worte) be rationalized? The usual response is a tort theory of liability for damages (Pflicht zum Schadensersatz). If we advance from this doctrine a step further, we can reach the theory of Rechtsschein, a rule of acquisition in good faith of a good title.(99) But the theory of Rechtsschein is different from the doctrine of estoppel on one vital point: the requirement of detriment. Of course the original owner must incur detriment when legal protection is given to the bona fide transferee by reason of Rechtsschein, because the latter will acquire a good title to the former's property. But such detriment is far from the same with the requirment of detriment in estoppel. Detriment in estoppel must have occurred on the part of the bona fide transferee. He deserves legal relief, because he was induced to alter his position to his detriment on the faith of a representation which the transferor

(98) Seavey-Keeton-Thurston, Cases on Torts (1950), p. 695 et seqq. See also Seavey, Studies in Agency, p. 184 supra.

(99) Jacobi, a. a. O., S. 32.

had made with the aid of the real owner. Such change of position is an essential element of promissory estoppel and of quasi-estoppel. Unless the promisee has altered his position in reliance on an informal promise without consideration, he would have no remedy in promissory estoppel. Quasi-estoppel operates against a representor who induces another to believe that he does not intend to enforce his contractual right against such other, and to prejudice his position with relation to the representor. In all these cases, alteration of position for the worse does not amount to consideration, but acts as alternative for it not in the sense of exchange value but in the sense of bindiug force. The representor is bound to keep faith with the representee so that the former can not contradict his own representation upon which the latter acted in good faith. If the representee's prejudiced position were mistaken for an exchange price, the doctrine of estoppel could not but confine itself to the good faith purchase for value, and, as a result, it would find a great difficulty in applying to an informal promise without consideration. But the modern German law does not include anything like a rule of consideration.(100) Probably this fact is the main reason why the theory of Rechtsschein set aside the requirement of detriment. However, it must be pointed out that this requirement reflects the basic nature of estoppel as a tort theory of liability for damages.

(100) In the Middle Ages the Germanic law had an idea of causa debendi. Where something was exchanged for a promise, that something was a causa debendi. This theory was rationalized by canon law and casuist writings, and, as it were, the theory of an equivalent arose therefrom in the seventeenth century. The equivalent theory is believed to have influenced the Anglo-American doctrine of consideration to a great extent. But the German Civil Code omits all reference to the requirement of a causa or consideration for the validity of contracts. See Pound, Introduction to the Philosophy of Law, p. 141 et seqq.

Since the theory of Rechtsschein is of the same nature, it should not completely neglect the significance of "detriment". In this regard, it is worthy of note that Naendrup referred to Art. 816 I BGB which provides for annulment of the Rechtsschein effect by reason of unjust enrichment. To illustrate, a bona fide transferee for value did incur detriment by offering that value, but on the other hand a benefit accrued to the transferor who had no right of disposition, and so the second party comes under a legal duty to return the benefit to the real owner. If the bona fide third person were a donee, and if the second party were a donor who had no authority to make such gift, then the donee did not incur any detriment but rather gained a benefit by receiving the donation, and so this man is now liable to make restitution to the real owner.(101) Such a tripartite relation is the subject of the present Article. The only question which remains to be solved is how to deal with the situation in which the parties concerned are two, the representor and the representee. If a bona fide purchase for value took place between them, there arises no question of unjust enrichment, and consequently no need of restitution, for, in such cases, the representor himself was the original owner who lost his title and at the same time gained a benefit by accepting a counter-value from the representee. In the case of a donation, the representee would gain a benefit by receiving it, but, in this case, the Rechtsschein effect of the donative representation should be final and definite, because the representor himself was at the same time a bearer of apparent intention and a bearer of real intention. It is

(101) Naendrup, id., S. 7 Anm. 1 supra. See also Enneccerus-Lehmann, Lehrbuch des Bürgerlichen Rechts II Schuldrecht (1950), S. 849ff.

impossible to find a reason in the analogy of such temporary effect of Rechtsschein as is given in cases where an apparent owner and a real owner are not one and the same person but two different parties.[102] As a rule, a donation does not require any special form. It takes legal effect with ordinary delivery or registration. But there is an exception to this rule. A gift promise (Schenkungsversprechen) requires authentication by public act (Art. 518 BGB).[103] The gift promise so authenticated, though given without real intention, should take a Rechtsschein effect for the benefit of the bona fide promisee who relied on an apparent intention expressed in that promise.[104] This treatment of the subject is quite different from the doctrine of promissory estoppel which applies to an informal gratuitous promise in so far as this promise induced the promisee to alter his position for the worse.[105] Apart from this minor point, however, the theory of Rechtsschein actually makes it depend, within limits, upon the requirement of detriment whether the Rechtsschein effect of a transaction is temporary or not, though it seems prima facie free from such requirement. As a matter of fact, there is no doubt that the theory of Rechtsschein is in most cases invoked to grant relief to bona fide third persons who incurred detriment as a result of his good faith purchase for value. The Rechtsschein effect of this transaction is not temporary; in other words, it cannot be revoked by reason of unjust enrichment. As far as

(102) Naendrup, a. a. O., S. 7 Anm. 2.

(103) Enneccerus-Lehmann, a. a. O., S. 471f.

(104) Naendrup, ebenda.

(105) But see the recommendations of the Law Revision Committee in their Sixth Interim Report (England). Paragraph 29 of the Report is a proposition that a written promise though without consideration be binding.

such is the usual case of Rechtsschein, Naendrup's statement formulated in requirement (5) is not unwarranted. On the contrary, it serves my purpose of demonstrating that Rechtsschein and estoppel have a common foundation. It seems to me that this is a sort of convergent evolution bringing the two different species close to each other at the demand of business transactions for reconciliation of conflicting interests accommodated therein.

Naendrup went on to indicate some possibilities of Rechtsschein in the field of judicial process. First, the right of action (Klagrecht) is a right to claim protection of a certain appearance (Rechtscheinsschutzanspruch). The parties litigant have burdens of persuading the judge on particular disputed issues, and either of them will lose if the judge is not persuaded of the truth of his allegations, but he will win if his allegations prove what appears true in the eyes of the judge. This may be called a "Rechtschein existing for the judge".(106) Secondly, there is another Rechtschein which exists "for the legal community" (die Rechtsgemeinschaft). It is divided into three kinds of Rechtschein in accordance with their cogency and intensity in the eye of the legal community. (1) Post-procedural Rechtschein. This means the finality of a judicial decision.(107) (2) Intra-procedural Rechtschein. This means the refutable presumption of law.(108) (3) Pre-procedural Rechtschein. This means the irrefutable presumption of law.(109)

Naendrup did not stop here, but further enlarged the concept of Rechtschein to the extent that it included the real expression of the right and of the law. He said: In the medieval law there were

(106) Naendrup, a. a. O., SS. 13—16 u. dort. Anm.
(107) Ibid., S. 16f.
(108) Ibid., S. 18f.
(109) Ibid., S.20f.

two types of Gewere, real Gewere and apparent Gewere. And so is the modern law. Here are two types of expression of the right. One is a real form of expression of the right, and the other an apparent form of expression of the right. For example, accurate registration creates a real Rechtschein, and inaccurate registration raises an apparent Rechtschein. The relation between the two reveals the whole implication of a Rechtschein problem involved in the public registration.(110) Much the same situation is true of the law. There are two expressions of justice, real and apparent. The actual conditions of the legal community sometimes run counter to the mere formalities of the legal system. In such cases, the law-maker must do his social duty to find out a real expression of justice which is in conflict with an apparent expression of justice.(111) This is a "Rechtschein existing for the law-maker" or "for the legal community in law-making".(112)

Such an expanded concept of Rechtsschein may be helpful for us to study the legal history of Rechtsschein and the social philisophy of law, but it will be of no technical use, as Naendrup himself acknowledged.(113) Practically important is the main part of his argument which dealt with a "Rechtschein existing for an individual" according to his terminology.(114) And it may be as well important from the viewpoint of the present discussion that he introduced the theory of Rechtsschein into the sphere of civil procedure. Now it occurs to me that Rechtsschein

(110) Ibid., SS. 24—27 u. dort. Anm.
(111) Ibid., SS. 27—29 u. dort. Anm. See also C. E. Fischer, "Rechtsschein und Wirklichkeit im Aktienrecht", ACP 154, S. 87, cited supra.
(112) Naendrup, a. a. O., S. 30.
(113) Ibid., SS. 31—36 u. dort. Anm.
(114) Ibid., SS. 2, 23, 30.

may possibly cover a wider range than estoppel by judgment, because it includes varieties such as Rechtsschein in persuasion of a judge (richterliche Vermutung), Rechtsschein in finality of a judgment (materielle Rechtskraft eines Urteils), Rechtsschein in refutable presumption of law (Rechtsvermutung) and Rechtsschein in irrefutable presumption of law (praesumptio iuris et de jure).[115]

An adventurous work on this line was undertaken by Krückmann, another zealous protagonist and one of Naendrup's colleagues. In a voluminous treatise titled "Nachlese zur Unmöglichkeitslehre"[116] he delineated the widest possible scope of this theory, thus concluding "Rechtsschein ist alles!"[117]. He was a Romanist and a student of adjective law, while the other scholars espousing the theory were Germanists and specialists in substantive law. He divided the concept of Rechtsschein into two classes : intra-procedural Rechtsschein and extra-procedural Rechtsschein. The division closely resembles Bower's classification of estoppel : estoppel by representation and estoppel per rem judicatam. The extra-procedural Rechtsschein means "possession of a real right or of an apparent right" which is prescribed in statutory provisions of the substantive law or generally acknowledged in the usage of business and trade.[118] The intra-procedural Rechtsschein includes the legal effect of such possession of a right in the field of judicial process, and this effect is called "Rechtsscheinschutzanspruch".[119] Krückmann further proceeded to demon-

(115) In common law countries there is a jury system under which "estoppel by verdict" exists instead of richterliche Vermutung.
(116) (1910), Jher. Jahrb. 57, S. 1.
(117) Ibid., SS. 1, 62, 169.
(118) Ibid., SS. 109ff., 122.
(119) Ibid., SS. 156ff., 162.

strate the principle of Rechtsschein through the history of Roman law. This excursion into Roman law was made in his admirable study, "Sachbesitz, Rechtsbesitz, Rechtsschein in der Theorie des gemeinen Rechts" (1912).[120]

In the meantime, the rapidly expanding theory of Rechtsschein was under fire from some quarters of the academic world. Stintzing was so careful not to jump to the hasty conclusion of Rechsschein from the Roman "possessio" or from the Germanic "Gewere" that he defined Rechtsschein as a manifestation ("Kundgabe") expressed in delivery or registration to the effect that the deliverer or the conveyer has a right of disposition.[121] In this respect, his view is similar to Wellspacher's doctrine which modified the "Legitimationstheorie" (the "right of disposition" doctrine), because the transferor does not have a legitimate power of disposition but a merely apparent right of disposition. The most violent criticism came from Certmann who proposed that the scope of the theory of Rechtsschein should be more rigidly restricted so that it could have more technical use and more practical significance. He bluntly rejected the doctrines of Rechtsschein which Meyer, Naendrup and Krückmann so zealously embraced in the matter of avoidance of a representation, declaration of death, intrinsic validity of a judgment, possession of a right, and presumption of law.[122] Furthermore, he pointed out that all the protagonists had indulged in scholastic subtleties and niceties without taking notice of a vast uncultivated area in which the theory of Rechtsschein is potentially fruitful, that is

(120) ACP 108, S. 179.
(121) Stintzing, "Besitz, Gewere, Rechtsschein", ACP 109, S. 429 supra.
(122) Oertmann, a. a. O., SS. 443—457.

to say problems of "ostensible trader" (Scheinkaufmann) and "de facto corporation" (tatsächliche Aktiengesellschaft), and so forth.[123] Indeed, attention should have been directed from civil law to commercial law!

In the field of commercial law, negotiable instruments and commercial registrations have long since drawn a special attention as problems pertinent to the theory of Rechtsschein.[124] Centering about these problems, there have been attacks on and defenses of the theory,[125] but its field of application has been steadily growing It reminds me of the Anglo-American doctrine of estoppel which has been in constant progress.[126]

—to be continued—

Correction:

The following parenthesized words are inadvertently omitted in the second line of page 63.

"……in better explanation of (the bona fide acquisition of) a movable property……"

(123) Ibid., S. 485. See also Naendrup, "Rechtscheinswirkungen im Aktienrecht", Arbeiten zum Handels-, Gewerbe- und Landwirtschaftsrecht Nr. 62 (1931).

(124) Jacobi, Grundriss des Rechts der Wertpapiere im allgemeinen (1928) ; Prausnitz, "Rechtsschein und Wirklichkeit im Handelsregister", ZHR 96 (1931), S. 10.

(125) Müller-Erzbach, "Die Kundgebungen im fremden Interessenbereich", Jher. Jahrb. 47 II Folge (1933) ; Jacobi, "Neue Angriffe auf die Rechtsscheintheorie im Wertpapierrecht", ZHR 99 (1934), S. 1.

(126) As to estoppel in taxation, it was early known to the German jurists interested in the Rechtsscheintheorie. See Erler, "Estoppelgrund und Steuerrecht", Zeitschrift für die Akademie des Rechts (1941).