

RECENT DEVELOPMENTS IN BONA FIDE PURCHASE UNDER THE JAPANESE LAW OF BILLS AND NOTES

By RYŌYŪ KITA

Professor of Commercial Law

Prologue

This paper aims at presenting a case study in bona fide purchase of a negotiable instrument which falls within the controversial definition of what we call "valuable paper" after the pattern of the German law, but not at adventuring into such a vexed question of academic delineation.¹ The widest possible scope of my study covers those cases and materials which have come under the heading of the present paper. There have been comparatively few litigations over the topic. Among them a recent decision of the Supreme Court is the focal point of my discussion. It is a case of action for the payment of a promissory note, and common law writers may possibly cite it by saying "Ogasawara Iron-Works, Ltd. v. Sun-Veneer Industrial Co., Ltd.; Supreme Court Decision at Minor Tribunal No. 3,² January 12, 1960; Civil Case (Appeal) No. 207, 1956; Supreme Court Reports, Civil Cases, Vol. 14, No. 1, p. 1."

Let me illustrate the case at first and then proceed to scrutinize it in the light of precedents and doctrines.

¹ The Anglo-American concept of negotiable instrument is narrower than the German idea of "valuable paper" (*Wertpapier*), because it includes bearer instruments and order instruments but excludes nominative papers (such as a cheque made payable to a specified person with the words "not to order" or equivalent words) and commercial papers (such as carriage notes, bills of lading, warehouse receipts and dock warrants). Historically, our legislation and jurisprudence have been under the strong influence of the German idea placing emphasis upon rights embodied in paper. But we have to notice some repercussions of late tending to reconstruct them from the teleological or functional viewpoint very close to the Anglo-American concept. For a full discussion, see Kiichi Homma, "Yūcashōken no Gainen nitsuite" (About the Concept of Valuable Paper), *Shōhō oyobi Hoken no Kenkyū* (Studies in Commercial Law and Insurance Business), A Collection of Essays in honour of Prof. Aoyama, p. 1; see also Teruhisa Ishii, "Yūcashōken-riron no Hansei" (Some Reflections on the Theory of Valuable Paper), *Shōhō no Shomōndai* (Problems of Commercial Law), A Collection of Essays in honour of Prof. Takeda, p. 441.

² The Supreme Court is composed of 15 members (the president and 14 judges) and is divided into two kinds of tribunals: Major and Minor. Major Tribunal is the full court consisting of all members *in banco*, but at present nine of them constitute the quorum required for the session. Minor Tribunal is a divisional court now consisting of 5 members in bench, but attendance by three of them meets the quorum according to the Judicature Act, 1947, and supplementary regulations. In the present case 5 full members attended. It follows that there are three such divisional courts in the organisation of the Supreme Court. For further details, see Hajime Kaneko, *Saibanhō* (The Law of Judicature), *Hōritsugaku Zenshū* (Japanese Jurisprudence), Vol. 34, p. 106.

Case Digest

I. Facts

The X Company, a coal dealer in the city of Fukuoka,³ has never set up any office, branch or sub-branch, in the city of Nagoya.⁴ About the middle (May and June) of 1954, however, a man calling himself "A, Director, Manager of Nagoya Sub-Branch Office, X Company" happened to stay in the same city, using cards to that effect; opened an office under the name of "Nagoya Sub-Branch Office, X Company;" and started commission business in coal trade, telling his prospective customers and others that the Company's main office was located in Fukuoka. There was in fact one A' on the board of the X Company, but his whereabouts is now unknown, and it is a guess whether he is identical with A or not.⁵

In the present case, the Y Company on June 22, 1954, executed a promissory note for ¥347,000.00 payable to the order of "Nagoya Sub-Branch Office, X Company" on September 9, 1954, and delivered it to A, who in turn delivered it to the Z Company on the following day by endorsement in the name of "A, Director, Manager of Nagoya Sub-Branch Office, X Company." On September 11, 1954, two days after maturity, the Z Company duly presented the note but was refused payment. Now, the Z Company sued both the X Company and the Y Company for payment thereof. The Nagoya District Court entered a judgment for the plaintiff Z Company against the defendant Y Company with the co-defendant X Company absent,⁶ ruling that "both of the defendants should pay jointly to the plaintiff the sum of ¥347,000.00 with interest at the rate of 6% *per annum*, from September 12, 1954, until fully paid." The defendant Y Company appealed to the Nagoya High Court, by which the judgment of the trial court was affirmed, and, on its further appeal, reaffirmed by the Supreme Court all the same.

II. Issues

(1) The defendant's contention at the trial can be analyzed as follows:

a) The note in question was swindled by A from the maker erroneously believing in A's willingness to find some financial sources for him; the maker thus handed over the note to A in expectation of A's proposed services, but the latter has not acted up to the engagements.

b) The present endorsement is invalid in its irregular form, because it describes the Nagoya Sub-Branch Office of the X Company as principal and its director-manager A as agent; by the weight of authority,⁷ a sub-branch office by itself is incapable of becoming an

³ The city of Fukuoka is the capital of Fukuoka Prefecture in Kyūshū, the southern tip of Japan, where the coal mining is one of the main local industries.

⁴ Nagoya is about midway between Kyōto and Tōkyō, namely in the central part of Japan and is the fourth largest city in this country.

⁵ In fact A stands for Masahisa Inuzuka and A' stands for Isamu Inuzuka. Both family names are precisely the same.

⁶ The X Company did not appear at the trial nor produced any plea.

⁷ For instance, see Sapporo District Court decision, Dec. 20, 1952, *Inferior Court Reports, Civil Cases*, Vol. 3, No. 12, p. 1746; Tōkyō District Court decision, Aug. 24, 1955, *Case Bulletin (Hanrei Jihō)*, No. 63, p. 11.

author of any legal transactions in bills or notes.

c) The present endorsement is also invalid in its illegal nature, because it constitutes either a forgery or a signature of a fictitious person or an act done by an unauthorized agent, seeing from these fact situations :

1. The X Company's Nagoya Sub-Branch Office does not exist.
2. It is yet to be known whether A is another name of A' or not.
3. Neither A nor A' has been granted the authority or the power of agency by the X Company.

(The defendant produced an affidavit of the X Company's representing director testifying those situations.)

d) Even if the form of the endorsement shows an uninterrupted series of transfers, the last transferee, the Z Company, is not deemed to be a lawful holder ; it is easy to refute prima facie presumption that he is a holder in due course (Art. 16 I BNA),⁸ because there is counter-evidence that he has obtained the note through invalid endorsement of illegal nature.

e) The Z Company gets no title to the note even under the provision of bona fide purchase (Art. 16 II BNA),⁹ which makes good only a single defect, namely the lack of title on the part of the prior party, provided that his endorsement itself is valid in nature as well as in form ; accordingly, the provision is not applicable to those cases of disability, unauthorized agency, defective intention and other infirmities on the part of the transferor.

(2) Judgment of the High Court dismissed the defendant's appeal on the following grounds :

a) Since there is no evidence of such engagements as alleged under a) above, it can only be said that A has fraudulently taken the note from the maker erroneously believing in A's authority to act for the X Company, simply because A pretended to have such authority.

b) There are no such irregularities in the form of the endorsement as alleged under b) above, because it apparently manifests the X Company as principal in the business of its Nagoya Sub-Branch Office and its director-manager A as agent for the Company, thus disclosing the principal's contractual capacity in his corporate name and the agent's representative capacity in his official title.

c) About the appellant's contention under c) above, it must be held that the endorsement constitutes neither a forgery nor a signature of a fictitious person, because an existing person calling himself "A" wrote down "A" by way of proving his own identity, but, from the affidavit of the X Company's representing director,¹⁰ it is rather a fair inference that A acted without authority for the X Company by such endorsement as well as by the preceding receipt of the note.

d) It is truly said by the appellant under d) above that the word "deemed" of the BNA

⁸ Art. 16 I of the Act concerning Bills of Exchange and Promissory Notes (hereinafter called BNA), 1932, reads : "The possessor of a bill of exchange is deemed to be the lawful holder if he establishes his title to the bill through an uninterrupted series of endorsements—." This paragraph applies *mutatis mutandis* to promissory notes according to Art. 77 I (1) of the same Act.

⁹ Art. 16 II BNA reads : "Where a person has been dispossessed of a bill of exchange, in any manner whatsoever, the holder who establishes his right thereto in the manner mentioned in the preceding paragraph is not bound to give up the bill unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross negligence." This paragraph also applies *mutatis mutandis* to promissory notes according to Art. 77 I (1) BNA.

¹⁰ II, 1, c, *supra*.

should be read in terms of refutable presumption,¹¹ but there is no sufficient evidence to refute such presumption in the present case, where the mere writing of words apparently purporting an uninterrupted series of transfers in the form of endorsement should reasonably be relied upon.

e) It is also true for all practical purposes that the Z Company is a lawful holder, because it has acquired the note in good faith due to A's unauthorized agency and fraudulent misrepresentation as such, and, furthermore, because A has a certain right *vis-à-vis* the Y Company if he discharges his duty as an unauthorized agent in conformity with Art. 8 of the BNA;¹² therefore, the appellant's contention under e) above cannot be upheld.

(3) The grounds for further appeal by the appellant from the foregoing judgment can be summarized as follows:

a) The rationale for A's fraud as set forth under a) above is not a vital question in the present case.

b) Nor is the formal requirement of the endorsement as reviewed under b) above; though it is still to be submitted that the mere addition of words "Manager of Sub-Branch Office" does not reveal A's representative capacity as a matter of legal form.

c) One of the major issues in the present case is the validity of the endorsement in its nature. Although the Court begged the question in finding the fact of unauthorized agency under c) above, yet it is on a more reasonable construction that the endorsement now in question should be held to constitute a forgery or a signature of a fictitious person, which fact makes the endorsement wholly inoperative as presupposed by Art. 7 of the BNA.¹³ To illustrate:

1. The addition of words describing A as "Manager of Nagoya Sub-Branch Office" is the misuse of a representative capacity since there exists no such office within the structure of the X Company; and in this respect it is a forged signature.

2. Suppose A is the very same person as A', then this is the author of the endorsement while that is a fictitious name used by him; and so his writing of such name is the signature of a fictitious person.

3. If A is a different person from A', his endorsement with the intention of acting for the X Company should be regarded as an act done by an unauthorized agent in so far as he was granted no authority by the Company, but it is quite clear in the present case that he did not intend to act for the Company; for this reason, he was not an unauthorized agent though the Court held him as such.

¹¹ According to the phraseology of Japanese lawyers, "*minasu*" means irrefutable presumption of law (*praesumptio iuris et de jure*) while "*suiteisuru*" means refutable presumption of law. Art. 16 I BNA is obviously mistaken in adopting the former word instead of the latter one. It is a well known fact that such infelicities of expression have come out due to the draftsmen's mistranslation of the Geneva Convention providing a Uniform Law on Bills of Exchange and Promissory Notes, 1933. See also p. 31, *infra*.

¹² Art. 8 BNA reads: "Whosoever puts his signature on a bill of exchange as representing a person for whom he had no power to act is bound himself as a party to the bill and, if he pays, has the same rights as the person for whom he purported to act. The same rule applies to a representative who has exceeded his powers." This provision applies *mutatis mutandis* to promissory notes according to Art. 77 II BNA.

¹³ Art. 7 BNA reads: "If a bill of exchange bears signatures of persons incapable of binding themselves by a bill of exchange, or forged signatures, or signatures of fictitious persons, or signatures which for any other reason cannot bind the persons who signed the bill of exchange or on whose behalf it was signed, the obligations of the other persons who have signed it are none the less valid." This provision also applies *mutatis mutandis* to promissory notes according to Art. 77 II BNA.

d) Since the Court thus found the fact of the endorsement by an unauthorized agent, which proves invalid according to Art. 113 Civil Code¹⁴ and whose invalidity is also presupposed by Art. 7 of the BNA in its phraseology reading “—signatures which for any other reason cannot bind the persons—on whose behalf it (the promissory note) was signed—,” the *ratio decidendi* under d) above is absolutely incomprehensible in maintaining *contra legem* that there is no rebutting evidence in this case in spite of the appellant’s pertinent contention fortified with the affidavit of the X Company’s representing director and other proofs against the statutory presumption (Art. 16 I BNA). From the technical point of view, the invalidity of the endorsement by an unauthorized agent is a real defence available to the X Company as principal against any action on the note even if the Z Company brings it as a holder in due course, and the invalidity of the endorsement in favour of the present holder is a personal defence which all the parties liable may set up against the Z Company (Art. 17 BNA).¹⁵ In any case it is to be noted that the Z Company cannot be deemed to be a lawful holder, because it has acquired no good title to the note even though the endorsement thereof apparently purports an uninterrupted series of transfers.

e) The *ratio decidendi* under e) above is a blazing misconstruction of Art. 16 II BNA, which would rather apply to another person, say B, who may purchase the note in good faith from the Z Company; the validity of the second endorsement in such case is unaffected by the first invalid endorsement (Art. 7 BNA), so that B can get title while the Z Company cannot. In this context the court is obviously mistaken, and its *obiter dictum* about the duty of an unauthorized agent is a strained interpretation of Art. 8 BNA, not to speak of deviating from the main issues pertaining to the present case. Even if A discharges his study as an unauthorized agent, he has no right of recourse by slipping into the Z Company’s shoes, but only the same rights as the X Company has for which he purported to act; in consequence, he has no right whatsoever *vis-à-vis* the Y Company, which can set up against him the absence of the contractual basis since such personal defence is available to the same company against the X Company.¹⁶ Nevertheless, the Court dared to support a certain right of A against the Y Company, deliberately ignoring the statutory context: “If he pays, (he) has the same rights as the person for whom he purported to act.”

III. Decision

The following is the tenor of a judgment delivered by the Supreme Court for the appellee: “In view of the facts found by the courts below the endorsement of the promissory note now under review shows an uninterrupted series of transfers as a matter of legal form, and the Z Company has acquired the note thereby in good faith (there is no allegation and no proof of the grave fault on the part of the same company acquiring the note), thus being in possession thereof at present; therefore, it is a fair observation that an action on the note

¹⁴ Art. 113 I of the Civil Code reads: “If a person having no power of agency makes a contract as an agent of another, such contract shall not be effective against the principal, unless it is ratified by him.”

¹⁵ Art. 17 BNA reads: “Persons sued on a bill of exchange cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder in acquiring the bill has knowingly acted to the detriment of the debtor.” This provision also applies *mutatis mutandis* to promissory notes according to Art. 77 I (1) BNA.

¹⁶ Kōhei Izawa, *Tegatahō Kogittehō* (The Law on Bills and Notes and the Law on Cheques), p. 154, cited here by the appellant.

by the Z Company, the present holder, against the Y Company, the maker thereof, should not be barred by the fact that a man calling himself "A" styled himself an agent or a representative of the X Company without being actually in such a position when he received the note as issued by the Y Company and then transferred it to the Z Company by the foregoing endorsement. In conclusion it follows that the judgment of the lower court is warranted in admitting the Z Company's claims and that the Y Company's argument is wholly unfounded."

All concurred.¹⁷

Comments

The above-cited *ratio decidendi* is so briefly stated that one can hardly understand it without reference to the other materials accommodated in the judicial process as a whole. To discover, then, what is really at stake between the parties litigant, we must review the overall picture of the present case.

(1) In whose favour did the Y Company make the note? To whom was it issued? Who is the payee? Such is the first problem we have to face. There are two conceivable answers; one takes it for granted that he is the X Company, and the other insists that he is the individual A.

a) The "X Company" theory seems to be upheld by the courts (II, 2, a, *supra*) though with some ambiguities. Most annotators do not hesitate to suggest that the maker referred to the real X Company existing in the city of Fukuoka,¹⁸ but this cannot be so simply surmised since the said company was a stranger to him. The issuance of the note is a manifestation of intention, and the crux of the matter is who purports to be described by the Y Company as "Nagoya Sub-Branch Office, X Company." By these words did the Y Company manifest the intention of addressing the note to the real X Company? A casuistic response is of course in the affirmative. But there can be another approach to the problem, a more realistic way of construing the situation in accordance with the dominant intention of the maker; for the Y Company, as it seems to me, might in fact mean the fictitious X Company whose business the individual A appeared to carry on, instead of the real X Company with which the Y Company had nothing to do even in mentioning its name as the name of the payee,¹⁹ because the Y Company as the maker only misbelieved A's non-existing company to be an existing one.²⁰ By the same token, there is a precedent for the validity of a promissory note made payable to the order of a non-existing person. In this case the

¹⁷ Five judges all attended. See footnote 2, *supra*.

¹⁸ Ōhara, *Hanrei Hyōron* (Case Review), No. 28; Takeuchi, *Hōgakukyōkai Zasshi* (Law Association Review), Vol. 78, No. 5; Kitamura, *Hōritsu no Hiroba* (Forum on Laws), Vol. 13, No. 5; ditto, *Hōsō Jihō* (Lawyers' Journal), Vol. 12, No. 3; Fukami, *Shōji-hōmu Kenkyū* (Commercial Law Review), No. 174; Komatsu, *Hōritsu Ronsō* (Meiji University Law Review), Vol. 34, No. 2.

¹⁹ According to the Supreme Court Reports now under review it was not until the Z Company demanded payment from the Y Company that the Y Company began to locate the X Company as the payee. The fact that the maker tried to get in touch with the real X Company at such a later stage in the course of the event is worthy of note, as the appellant pointed out.

²⁰ Cf. Shioda, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 42, No. 6, which is partly of the same opinion.

Tōkyō District Court said:²¹

“The defendant admits that he made a promissory note as the plaintiff alleges and delivered it to one Kiyozō Minamoto styling himself a managing director of the Kōyō Glass Company. This inchoate instrument undoubtedly meets all the formal requirements of a promissory note, and the very writing therein does not include any terms which on a reasonable construction may be held unenforceable (e. g., maturity before the date of issuance). Therefore, it must be submitted that, once the instrument is placed in the course of negotiation, it comes into legal force as a promissory note even if the items written therein are contrary to the facts. Thus no one can deny the potential efficacy of the instrument as a promissory note although the Kōyō Glass Company there stated as payee does not exist. In the present case, however, the note was delivered by the defendant to a man styling himself a representative of a non-existing company. As a result, it may be said that the note was issued when it was placed in the course of negotiation, getting out of the defendant’s hands, but there can be no action on the note so long as the *soi-disant* representative is in possession of it (as would be the case if the note were lost and not yet found).”

b) The “individual A” theory may seem to find some expression in the defendant’s contention (II, 1, a, *supra*) although the defendant for his part does not place so great emphasis upon it (II, 3, a, *supra*). Some annotators confirm this line of argument by contending that it is pertinent to the actual conditions of the case to regard the words “Nagoya Sub-Branch Office, X Company” as written in terms of A’s trade name so that A himself may be referred to, because A has made common use of the title “Manager of Nagoya Sub-Branch Office, X Company” by way of proving his own identity in business transactions, apart from his possible offence of injuring the fame or misusing the trade name of the X Company, and, furthermore, because it made no difference to the Y Company whether or not A was actually a sub-branch office manager of the X Company, since the former company was unacquainted with the latter one.²² However, who could go so far as to say that A has made common use of the above title, while he used it for so short a span of time (in May and June, 1954, as the facts show), quite unlike the case where a man has carried on his own business by the name of his wife for so long a time that her name is generally accepted as a means of his personal identification?²³ Neither can it be said that the Y Company did not care at all in business affairs whether or not A was manager of a sub-branch office of the X Company, if it is true that the Y Company issued the note with a view to soliciting A for financial services in reliance on his assumed title, simply because he pretended to have such title (II, 1, a, *supra*; II, 2, a, *supra*). The only way out may be to conclude that A is the payee in view of the fact that his procurement of the note, constituting an act done by an unauthorized agent, has not been ratified by the X Company as principal,²⁴ but

²¹ Tōkyō District Court decision, Feb. 25, 1955, *Inferior Court Reports, Civil Cases*, Vol. 6, No. 2, p. 353. See also Seiji Tanaka & Wataru Matsumoto, *Hanrei-taikei Tegatahō Kogitehō* (The Case Law on Bills, Notes and Cheques), pp. 121, 268.

²² Izawa, *Hōgaku Ronshū* (Kansai University Law Review), Vol. 10, No. 3; Hamada, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 46, No. 5.

²³ Supreme Court decision, Jul. 13, 1921, *Supreme Court Reports, Civil Cases*, Vol. 27, p. 1318. The Supreme Court here referred to is now defunct as a result of the postwar reform of the judiciary. But its decision here cited remains a leading case about signature by an alias. See Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 8 *per* Takeo Suzuki. See also Izutarō Suehiro, Case No. 114, *Hanrei Minjihō* (Annotated Civil Case Digests), 1921.

²⁴ Takeuchi, *Hōgakukyōkai Zasshi* (Law Association Review), Vol. 78, No. 5, *supra*.

it is a sort of consequentism and does not suffice for a convincing argument.

The crux of the matter is, I repeat, a manifestation of intention in which the issuance of the note consists. Are the existence of the X Company and A's purported agency thereof a matter of indifference to the maker? On the contrary, A's fraudulent impersonation of the X Company seems to be the active cause of or the inducing reason for the issuance of the note to him. An American text-writer properly says:²⁵ "Suppose there is no such person as P, and A fraudulently represents that he is an agent of P, and thereby induces M to issue a check to A payable to the order of P. Does A get title? No, because M did not so intend. A has acquired possession only. M intended that A should have possession only and intended that P should have title. The fact that there was no such person as P does not convert M's intention to transfer title to P into an intention to transfer title to A under the name of P."

(2) Next question is this: In whose name did A endorse the note? Who is the endorser? There are also two answers very much similar to the first mentioned two; the notion that the endorser is the X Company for which A purported to act, and the notion that the individual A is the endorser. The courts seem to be of the former opinion (II, 2, b, *supra*), but there is much room for discussion as to whether A did purport to act for the real X Company or for the fictitious X Company, because the endorsement of the note is also a manifestation of intention. The appellant contends that A did not intend to act for the real X Company (II, 3, c, 3, *supra*). If so, it would be reasonable to suppose that A meant the fictitious X Company when he mentioned the endorser's name, whatever sense it may make that he should act for such a company. Some annotators take one step farther to insist that A purported to act for himself in the present endorsement, because he used to refer to himself, the individual A, as "A, Director, Manager of Nagoya Sub-Branch Office, X Company" in business affairs.²⁶ But nothing could be farther from the truth. He has used such a description for too short a space of time to prove his own identity thereby, and it is doubtful whether the Z Company as the endorsee did take it that way, seeing from the subsequent fact that it sued the X Company as well as the Y Company. Thus the "individual A" theory is no more appropriate to the endorsement of the note in question than to the issuance of the same. In this respect, the "X Company" theory seems advisable to choose, all the more so if it is qualified with the notion that A endorsed the note in the name of his company which was in fact non-existent.

(3) Does the present endorsement in its form purport an uninterrupted series of transfers? This is the third question to answer. It is well settled that a series of transfers in the order of the maker~the payee (the first endorser)~the endorsee (the present holder) shall not necessarily be taken for interrupted even if the name of the payee and the name of the first endorser are not stated literally the same way.²⁷ For instance, one and the same person may be described as "Ikeno Mining Station, Ikeno Mining Department" in his capacity as payee and then described as "Fusazō Gotō, Chief of Ikeno Mining Station" in his capacity as

²⁵ William Everett Britton, Handbook of the Law of Bills and Notes (Hornbook Series), p. 718 *e seq.*

²⁶ Izawa, *Hōgaku Ronshū* (Kansai University Law Review), Vol. 10, No. 3, *supra*; Hamada, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 46, No. 5, *supra*.

²⁷ Kazuo Hamada, "Uragaki no Renzoku" (An Uninterrupted Series of Endorsements), *Shōhō Enshū* (Hypothetical Case Studies on Commercial Law), Vol. 2, p. 143.

endorser. In this case "Ikeno Mining Station" is to be identified in the chain of title.²⁸ Another example is a recent case where it was held that "Branch Office Manager Oka, Ehime Mujin, Ltd." as payee and "Yoshie Oka, Northern County of Uwa District" as first endorser meant the same individual Oka.²⁹ There seems to be a conflict of authority, but it depends on a reasonable construction of the inconsistent statement of the two names.³⁰ The formal position of the present endorsement undoubtedly comes closer to the Ikeno Mining Station case than to the Oka case, because it is quite clear on the face of the note that the payee is the X Company and on the back of the same that the first endorser is also the X Company represented by A.³¹ Thus one and the same person is identified in the chain of title, and the form of endorsement in this case evidently shows an uninterrupted series of transfers; even though the fact is that the endorsement in the name of a non-existing company³² or otherwise by an unauthorized agent³³ intervenes in the course of negotiation or in the process of circulation. The decisive test is the common-sense concept of continuity in the form of endorsement.³⁴ In this connection it is to be noted that there are learned arguments and decided cases giving support to the Y Company's pleading that the present endorsement is invalid in its irregular form so as to interrupt the continuity thereof (II, 1, b, *supra*).

To illustrate, A's assumed title is divided into two parts: "Manager of Nagoya Sub-Branch Office, X Company" and "Director, X Company." About the former part of his title there has been a conflict of authority. Sometimes such a statement on the note was held wholly inoperative to the company unless the *soi-disant* manager was technically an

²⁸ Supreme Court decision, Jan. 22, 1935, Supreme Court Reports, Civil Cases, Vol. 14, p. 34. The Supreme Court here referred to is now defunct, but its decision here cited remains a leading case about an uninterrupted series of endorsements. See also Tōkyō Court of Appeals decision, Jul. 27, 1934, cited in Komachiya & Izawa, *Shōji Hanreishū* (A Collection of Commercial Cases), Supplement I, p. 292. For examples of postwar precedents, see Supreme Court decision, Jun. 8, 1954, Supreme Court Reports, Civil Cases, Vol. 8, No. 6, p. 1029 ("Uwajima Shipbuilding Yard, Ltd." as payee and "Shōzō Nakamura, Manager of Tōkyō Sub-Branch Office, Uwajima Shipbuilding Yard, Ltd." as first endorser); Supreme Court decision, Nov. 25, 1952, Supreme Court Reports, Civil Cases, Vol. 6, No. 10, p. 1051 ("Kyūsaburō Katori, Bandai Food Industry, Ltd." as endorsee and "Kyūsaburō Katori, Director-President, Bandai Food Industry, Ltd." as endorser).

²⁹ Supreme Court decision, Sep. 30, 1955, Supreme Court Reports, Civil Cases, Vol. 9, No. 10, p. 1513. For comments on this case, see Murata, *Mīnshōhō Zasshi* (Civil and Commercial Law Review), Vol. 34, No. 2; Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 152, *per* Ichirō Sakai; Izawa, *Hanrei Hyōron* (Case Review), No. 3, p. 15.

³⁰ See Kazuo Hamada, "*Uragaki no Renzoku*" (An Uninterrupted Series of Endorsements), *Shōhō Enshū* (Hypothetical Case Studies on Commercial Law), Vol. 2, *supra* at p. 145 emphasizing this viewpoint.

³¹ Kōhei Izawa, "*Zenishutoku to Tegatakōben*" (Bona Fide Purchase and Defences), *Shōhō Enshū* (Hypothetical Case Studies on Commercial Law), Vol. 2, p. 154, 156.

³² Supreme Court decision, Sep. 23, 1955, Supreme Court Reports, Civil Cases, Vol. 9, No. 10, p. 1403. See also Sakai, *Mīnshōhō Zasshi* (Civil and Commercial Law Review), Vol. 34, No. 2; Takeuchi, Case No. 35, *Shōji Hanrei Kenkyū* (Commercial Case Studies), 1955; Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 156, *per* Kazuo Hamada.

³³ Supreme Court decision, Jun. 8, 1954, Supreme Court Reports, Civil Cases, Vol. 8, No. 6, p. 1029. See also Ichirō Sakai, "*Uragaki no Renzoku*" (An Uninterrupted Series of Endorsements), *Sōgō Hanrei Kenkyū Sōsho* (Overall Case Study Series), *Shōhō* (Commercial Law), 3, p. 5.

³⁴ Takeo Suzuki, *Tegatahō Kogittehō* (The Law on Bills and Notes and the Law on Cheques), p. 236 *e seq.*; Kenichirō Ōsumi & Ichirō Kawamoto, *Tegatahō Kogittehō* (Commentary on the Law of Bills and Notes and on the Law of Cheques), Pocket Edition, p. 132.

ostensible manager (Art. 42 Commercial Code),³⁵ sometimes it was held sufficient to show that the manager was acting for the company.³⁶ Much the same conflict has been seen about the latter part of A's title also. By the weight of authority such a description is tantamount to a disclosed agency,³⁷ yet a few scholars contend that it does not constitute a statement of the signer's representative capacity, because under the existing Company Law a mere director, who is not a representing director, has no authority to represent the company (Art. 261 Commercial Code).³⁸ However, a common sense will tell that the signer's representative capacity can be somehow or other recognized in the situation where the word "Director" is interposed between the signature and the company's name.³⁹ There is even a stronger case where the words describing the signer as

"Shōshū Sasaki

ZUIGONJI TEMPLE

91 chōnai, Matsushima-chō, Miyagi County, Miyagi Prefecture"

in three lines purports his capacity as agent for the temple.⁴⁰ Anyway, the signer need not add words directly meaning agency or representation; the only thing for him to do is to write those letters by which one can recognize that the signer is acting not for himself but for the other person.⁴¹

³⁵ See footnote 7, *supra*. Art. 42 Commercial Code reads: "An employee invested with a title indicating that he is the principal person in charge of the business of the principal office or of a branch office shall be deemed to have the same authority as that of a manager of the principal office or of a branch office. This shall not, however, apply in respect of juridical acts.—The provisions of the preceding paragraph shall not apply in cases where the other party has acted in bad faith."

³⁶ Tōkyō High Court decision, Oct. 7, 1952, *Hanrei Taimusu* (Decided Case Times), No. 30, p. 48; Supreme Court decision, Jun. 8, 1954, Supreme Court Reports, Civil Cases, Vol. 8, No. 6, p. 1029.

³⁷ Supreme Court decision, Oct. 6, 1921, Supreme Court Reports, Civil Cases, Vol. 27, p. 1781, reviewed by Yoshitarō Hirano, Case No. 147, *Hanrei Minjihō* (Annotated Civil Case Digests), 1921; the lower court decision before Supreme Court decision, Feb. 16, 1940, Supreme Court Reports, Civil Cases, Vol. 19, No. 3, p. 190; Ōsaka District Court decision, Dec. 15, 1953, Inferior Court Reports, Civil Cases, Vol. 4, No. 12, p. 1874; Ōsaka District Court decision, Dec. 10, 1958, *Hanrei Taimusu* (Decided Case Times), No. 86, p. 86. There are numerous cases decided to the same effect about the statement of various titles. Nowadays, however, most of them will probably come under Art. 262, Commercial Code, reading: "A company shall be liable to a third person acting in good faith for any act done by a director invested with any title such as president, vice-president, chief director or managing director from which it may be assumed that he has authority to represent the company even in cases where such person has no power of representation."

³⁸ Seiji Tanaka, *Shinpan Tegatahō Kogittehō* (The Law on Bills and Notes and the Law on Cheques, rev. edn.), pp. 71, 77. Art. 261 I Commercial Code reads: "The company shall appoint by the resolution of the board of directors the particular director who shall represent the company." The provision was made by the Amendment, 1950. But even before the Amendment the same situation might have resulted if a representing director had been determined by the Articles of Incorporation. See Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 41, *per* Ichisuke Ōtsuka.

³⁹ Takeo Suzuki, *Tegatahō Kogittehō* (The Law on Bills and Notes and the Law on Cheques), *supra* at p. 151. See also Takeda, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 12, No. 1, p. 135.

⁴⁰ Sendai High Court decision, Feb. 23, 1953, Inferior Court Reports, Civil Cases, Vol. 4, No. 2, p. 301. See also Seiji Tanaka & Wataru Matsumoto, *Hanrei-taikei Tegatahō Kogittehō* (The Case Law on Bills, Notes and Cheques), p. 464.

⁴¹ Supreme Court decision, Mar. 27, 1907, Supreme Court Reports, Civil Cases, Vol. 13, No. 3, p. 359, which is still a leading case about the form of disclosed agency on a negotiable instrument. See also Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 40, *per* Ichisuke Ōtsuka.

The foregoing discussion is by no means concerned with the question as to whether or not the X Company is in fact the payee and the first endorser. This question has already been dealt with under (1) and (2) above.

(4) The fourth question is whether the present endorsement constitutes a forgery, a signature of a fictitious person or an act done by an unauthorized agent. All the proponents of the "X Company" theory are positive in denying the fictitiousness of the said company for the very reason of its real existence in the city of Fukuoka,⁴² but the Y Company rather seems to insist upon the fictitiousness of the person A who is specified as the agent of the X Company in the present endorsement (II, 1, c, *supra*; II, 3, c, *supra*). Judgment of the High Court denies this kind of fictitiousness as well (II, 2, c, *supra*), but, since it is yet to be known whether A is identical with A' or not, there is no conclusive evidence that A is *not* a fictitious name used by A' while on the other hand there is no conclusive evidence either that A *is* a fictitious name used by A'. The same thing can be said about the "individual A" theory. However, it is an undeniable fact that a man calling himself "A" dealt face to face with the maker and then with the first endorsee, whether he misrepresented his name or not. A man's name is the verbal designation by which he is known, but the man's visible presence is a surer means of identification.⁴³ Therefore, even if the name is fictitious, the person who made such a signature is not fictitious nor non-existent.⁴⁴ In this context, the High Court is presumably justified in making a legal reasoning that the present endorsement constitutes neither a forgery nor a signature of a fictitious person, because an existing person calling himself "A" wrote down "A" by way of proving his own identity (II, 2, c, *supra*). If so, the endorsement may be regarded as an act done by that person for himself under the "individual A" theory while under the "X Company" theory it would be an act done by him without authority from but for the said company. The former viewpoint involves no further problems, because it visualizes the ordinary course in which title and possession both pass from the Y Company through A to the Z Company. Should the latter viewpoint be taken, however, there comes up another controversial problem; i. e., whether the endorsement now in question falls within the category of forgery or of unauthorized agency in so far as the X Company is concerned.

⁴² See footnote 18, *supra*.

⁴³ This statement is quoted from a famous American case, *Montgomery Garage Co. v. Manufacturers' Liability Insurance Co.*, 1920, 94 N.J.L. 152, 109 A. 296, 22 A.L.R. 1224. Britton on Bills and Notes, *supra* at p. 720. A cheque was obtained by an imposter who dealt face to face with the drawer. Payment of the cheque was stopped. An innocent purchaser recovered from the drawer. The court based the result on the dominant intention idea, saying: "In the present case the plaintiff has merely carried out the drawer's intention. In other cases of fraudulent impersonation the drawer is sometimes said to have a double intent: First, to make the check payable to the person before him; and secondly, to make it payable to the person whom he believes the stranger to be. But the courts have almost unanimously held that the first is the controlling intention." And the above statement followed this saying.

⁴⁴ In this respect there must be a clear distinction between fictitious person and fictitious name, which seems to be overlooked in this country.

⁴⁵ The opinion that the misuse of a representative capacity constitutes a forgery is proposed by Takizō Yamao, *Tegatahō Kenkyū* (Studies on the Law of Bills and Notes), p. 141; Kōtarō Tanaka, *Tegatahō Kogittehō Gairon* (General Principles of the Law on Bills and Notes and of the Law on Cheques), p. 202; Jōji Matsumoto, *Tegatahō* (The Law of Bills and Notes), p. 74. In contrast, the opinion that it constitutes an unauthorized agency is adopted by Sei Takeda, *Tegatahō Kogittehō* (The Law on Bills and Notes and the Law on Cheques), p. 32; Kōhei Izawa, *Tegatahō Kogittehō* (The Law on Bills and Notes and the Law on Cheques), p. 157.

In the present case A fraudulently misrepresented himself to be the agent of the X Company, thus misusing the Company's name and a representative capacity thereby. Is the situation a forgery or an unauthorized agency? There is a conflict of learned opinions,⁴⁶ but the courts have heretofore solved the question by taking it into consideration whether or not the *soi-disant* agent intended to act for the principal.⁴⁶ In other words, if he had such an intention, it will be a matter of unauthorized agency, and, if he had no such intention, a forgery will result. This is, however, a far from reasonable solution, because the dividing test is an internal factor inaccessible to a third party: intention.⁴⁷ One opinion which has recently become influential is that we should speak of an unauthorized agency rather than of a forgery in case where a form of representation is manifested in the instrument.⁴⁸ A's position in relation to the X Company is indeed a case in point. Even though the X Company is regarded as A's fictitious company instead of the real X Company of Fukuoka, it is reasonable to suppose that the present endorsement is tantamount to an unauthorized agency.⁴⁹

(5) The above argument leads to a further inquiry. Is there any sufficient evidence to refute prima facie presumption that the Z Company is a lawful holder (Art. 16 I BNA)? This is the fifth question, but it has nothing to do with the "individual A" theory from which it follows that the position before and after the first endorser A is uninterrupted in fact as well as in form. The question is only concerned with the "X Company" theory which makes it clear that the position before and after the said company as the first endorser is in form but not in fact uninterrupted. The note in question was fraudulently procured and subsequently endorsed by A in the name of the X Company. In either case it proved to be an act done by a purported agent without authority from the principal. It is invalid because of its illegal nature (II, 1, c and d, *supra*) unless ratified by the principal (Art. 113 I Civil Code). Even if the principal ratified the procurement, the endorsement shall remain ineffective against him unless it is also ratified by him. Of course it may be possible under circumstances to introduce some elements of apparent authority into such a case,⁵⁰ but this will rather show that the counter-evidence to the statutory presumption by Art. 16 I BNA should be found in the position after the endorser and not in the position before him. Now, suppose the endorser is a non-existent company, as the modified "X Company" theory insists; then there is no possibility of ratification since no principal exists. Therefore, the endorsement in this case will definitely prove invalid, thus rebutting the statutory presumption that the endorsee is a lawful holder.

Nevertheless, in finding the fact of the endorsement by an unauthorized agent, the High Court decision did not proclaim the invalidity of such endorsement, and so it is beyond

⁴⁶ Supreme Court decision, Sep. 28, 1933, *Hōritsu Shinbun* (Law Paper), No. 12620, p. 5. The Supreme Court here referred to is now defunct, but its decision here cited remains of some great importance.

⁴⁷ Sei Takeda, "Tegata no Gixō to Mukendairi" (Forgery and Unauthorized Agency in the Law of Bills and Notes), *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 1, No. 6.

⁴⁸ Takeo Suzuki, *Tegatahō Kogitkehō* (The Law on Bills and Notes and the Law on Cheques), *supra* at p. 162.

⁴⁹ *Ibid.*, p. 157 note (15). Cf. Ōsaka District Court decision, Jul. 2, 1952, *Inferior Court Reports*, Civil Cases, Vol. 3, No. 7, p. 930, applying Art. 8 BNA to a representing director of a non-existing company as the maker of a promissory note, so that the security of transactions in this negotiable instrument may be guaranteed. See Seiji Tanaka & Wataru Matsumoto, *op. cit.*, p. 68.

⁵⁰ None of such elements are present in the case here discussed, where the endorsement has been made on the day following the procurement, even if this was immediately ratified by the principal.

comprehension that the High Court went so far as to say that there was no rebutting evidence (II, 2, c and d, *supra*).⁵¹ More incomprehensible, the High Court opines *contra legem* that the virtual reason for a presumptive title on the part of the present holder lies in the statutory duty of the purported agent who dealt with him (II, 2, e, *supra*).⁵² How can the result be rationalized?

(6) Now we come to the last but not least problem. Will it be possible to invoke the rule of bona fide purchase (Art. 16 II BNA) in the present case? It is of course out of the question under the "individual A" theory, but under the "X Company" theory the point might be argued *pro* or *con*. The prevailing view⁵³ and decided cases⁵⁴ have been in the negative just like the Y Company's pleading that Art. 16 II BNA should not give curing effect to A's position as an unauthorized agent (II, 1, e, *supra*). In contrast, there is a growing tendency of the academic world towards the novel thought that bona fide purchase should be secured not only in the situation where the endorser is not entitled to transfer the instrument, but also in all cases where the endorsement turns out to be invalid by reason of disability, unauthorized agency, defective intention and other infirmities on the part of the transferor.⁵⁵

It is doubtful whether the Supreme Court decision discussed in the present paper fully supported this dissenting opinion or not. Yet the Supreme Court undoubtedly fell in with it at least in so far as the subject of unauthorized agency was concerned;⁵⁶ for it is crystal-clear that the Court dealt with the case in terms of bona fide purchase and so treated the endorsee as a bona fide purchaser in spite of finding the fact of the endorsement by an unauthorized agent in this case. Strictly speaking, even those precedents above referred to⁵⁷ did not go the length of saying that the statutory provision of bona fide purchase could cover no other defects than the lack of title on the part of the prior party, but simply argued in *obiter dicta* that this kind of defect should be cured by reason of bona fide purchase. Therefore, the Supreme Court decision now under discussion is worthy of note in that it paved the way for a new development in bona fide purchase of negotiable instruments. Otherwise stated, it is an epochal progress of our case law that the curing effect of Art. 16

⁵¹ See Kitamura, *Hōsō Jihō* (Lawyers' Journal), Vol. 12, No. 3; Shioda, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 42, No. 6; Komatsu, *Hōritsu Ronsō* (Meiji University Law Review), Vol. 34, No. 2.

⁵² See Izawa, *Hōgaku Ronshū* (Kansai University Law Review), Vol. 10, No. 3.

⁵³ E. g., Jōji Matsumoto, *Tegatahō* (The Law of Bills and Notes), p. 62; Sei Takeda, *Tegatahō Kogitkehō* (The Law on Bills and Notes and the Law on Cheques), p. 39; Kōtarō Tanaka, *Tegatahō Kogitkehō Gairon* (General Principles of the Law on Bills and Notes and of the Law on Cheques), p. 169; Teruhisa Ishii, *Shōhō* (Commercial Law), II, p. 405; Kenichirō Ōsumi, *Tegatahō Kogitkehō Kōgi* (Handbook of the Law on Bills and Notes and of the Law on Cheques), p. 54; Kōhei Izawa, *Tegatahō Kogitkehō* (The Law on Bills and Notes and the Law on Cheques), p. 183; Seiji Tanaka, *Shinpan Tegatahō Kogitkehō* (The Law on Bills and Notes and the Law on Cheques, rev. edn.), p. 92.

⁵⁴ E. g., Supreme Court decision, Mar. 15, 1910, Supreme Court Reports, Civil Cases, Vol. 16, p. 215; Supreme Court decision, Mar. 22, 1917, Supreme Court Reports, Civil Cases, Vol. 23, p. 392; Supreme Court decision, May 23, 1931, *Hōritsu Shinbun* (Law Paper), No. 3281, p. 12.

⁵⁵ Takeo Suzuki, *op. cit.*, p. 251. See also Tōkyō District Court decision, Mar. 20, 1909, *Hōritsu Shinbun* (Law Paper), No. 565, p. 9.

⁵⁶ Ōhara, *Hanrei Hyōron* (Case Review), No. 28; Kitamura, *Hōsō Jihō* (Lawyers' Journal), Vol. 12, No. 3; Izawa, *Hōgaku Ronshū* (Kansai University Law Review), Vol. 10, No. 3; Takeuchi, *Hōgaku Kyōkai Zasshi* (Law Association Review), Vol. 78, No. 5.

⁵⁷ See footnote 54, *supra*.

II BNA was extended to the case of unauthorized agency by a judicial decision of the Supreme Court making a major issue of it. Now it may be said with more or less assurance that the Supreme Court cast in its lot with the dissenting opinion among our law scholars.

On the other hand there are some annotators who try to couch the present case in terms of the prevailing view.⁵⁸ They say that it is an exceptional case to which the doctrine of bona fide purchase still applies, because they see no reason why the X Company having no title to transfer should be so protected as in the ordinary case where the instrument might be endorsed by an unauthorized agent for the principal who has title thereto. Indeed, quite a few text-writers of this country in advocacy of the prevailing view find it necessary for the protection of the principal to leave the case of unauthorized agency outside the scope of bona fide purchase,⁵⁹ and, as a corollary, may be supposed to approve of bona fide purchase in the extraordinary case here discussed, i. e., the case where the principal *per se* has no title to the instrument so long as he refrains from ratifying the procurement, not to mention the endorsement, of the same by the *soi-disant* agent. From such a viewpoint the Supreme Court decision leaves nothing to be desired.

However, it is the typical way of a miller drawing water to his own mill. In an attempt to rationalize the Supreme Court decision, some possibility of ratification makes it difficult to explain it away in the light of the prevailing doctrine.⁶⁰ It is not unlikely that the X Company will ratify the procurement but not the endorsement of the note by A lest title thereto should pass to the Z Company, and this may give a good reason for protecting the interest of the X Company from the danger of bona fide purchase by the Z Company. But such a counter-argument does not hold water, provided that the X Company is non-existent as the qualified "X Company" theory insists; for there is no possibility of ratification by such company.

It seems more tenable, therefore, to say that the conventional disapproval of bona fide purchase in the ordinary case of unauthorized agency should not be so much justified for the sake of the principal as rather by reason that such defect is easy for the transferee to find at the time of negotiation. In this respect one can equate the case with those infirmities which, like disability and defective intention on the part of the transferor, are incident to the transfer itself, but not with his lack of title which is the obscure position prior to the transfer.⁶¹ The German doctrine of "juridical appearance" (*die Rechtsscheintheorie*) makes the same proposition, according to which bona fide purchase comes into existence if the transferee only relied upon the appearance of good title on the part of the transferor, but not if the transferee acted in good faith upon the appearance of mere authority on the part of the transferor.⁶² There must be a rigid distinction between the two kinds of appearances, because

⁵⁸ Fukami, *Shōjihōmu Kenkyū* (Commercial Law Review), No. 174; Shioda, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 42, No. 6; Komatsu, *Hōritsu Ronsō* (Meiji University Law Review), Vol. 34, No. 2; Hamada, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 46, No. 5.

⁵⁹ E. g., Kenichirō Ōsumi, *Tegatahō Kogitkehō Kōgi* (Handbook of the Law on Bills and Notes and of the Law on Cheques), p. 54; Tadao Ōmori, *Tegatahō Kogitkehō Kōgi* (Handbook of the Law on Bills and Notes and of the Law on Cheques), p. 120.

⁶⁰ Cf. Hamada, *op. cit.*, noticing this possibility in spite of his viewpoint referred to in footnote 58, *supra*.
⁶¹ Ichirō Kawamoto, "Yūcashōken niokeru Rechtsschein" (Juridical Appearances on Valuable Papers), *Kōbe Hōgaku* (Kōbe University Law Review), Vol. 2, No. 4, p. 725; see also Ichirō Kobashi, "Jacobi no Tegatariron ni tsuite" (About Jacobi's Theory on Bills of Exchange and Promissory Notes), *Shihō* (Journal of Private Law), No. 14, p. 102.

⁶² Ernst Jacobi, *Wertpapiere*, S. 166f.; derselbe, *Wechsel- und Scheckrecht*, S. 57f.

the former represents the fact that the transferor appears to have a right of disposition in his own name while the latter stands for the situation where the transferor appears to have a right of disposition in the name of another person who is in point of law the real transferor.⁶⁸

The above statement is also true to the well-recognized concept of bona fide purchase of movables in the field of real property (Art. 192 Civil Code),⁶⁴ from which the basic idea of Art. 16 II BNA is derived and then extends over the prevailing view on bona fide purchase of share certificates (Art. 229 Commercial Code).⁶⁵ Nevertheless, the dissenting opinion on Art. 16 II BNA maintains that disability, defective intention, unauthorized agency and the like infirmities on the part of the transferor are as much difficult to find from the façade of the endorsement as his lack of title, so much so that the transferee will naturally tend to act on the appearances to the contrary.⁶⁶ If the point at issue is no more than the difficulty of distinguishing the true from the false, the best solution may be to make the creator of such deceptive appearances responsible to his adverse party,⁶⁷ but a promissory note, as the dissenting opinion goes on,⁶⁸ is a valuable paper in so great need of negotiability that bona fide purchase should be approved of in the former cases as well as in the latter case. Take for instance a case of unauthorized agency, where a man for his part made an appearance of authority from the principal for whom he purported to act. The dissenting opinion finds it insufficient to hold him responsible for such an appearance (Art. 8 BNA) and proposes to treat his adverse party as a bona fide purchaser of the instrument "unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross negligence" (Art. 16 II BNA). From this viewpoint it is to be noted that bona fide purchase of a negotiable instrument differs from the equivalent rule of a movable property in the following points:⁶⁹

a) In case of bills and notes a bona fide purchaser is only required to be without grave fault while in case of a movable property he is further required to be without even slight fault (Art. 192 Civil Code). Since rejection of a grave fault is to permit a slight fault, this treatment may well be grounded on high reliability of the instrument showing an uninterrupted series of transfers in the form of endorsement.⁷⁰

⁶⁸ Ōhara, *Hanrei Hyōron* (Case Review), No. 28, *supra*, sustains the dissenting opinion from the viewpoint of his so-called *Rechtsschein*, which seems to have been created by his confusion of thought.

⁶⁴ E.g., Sakae Wagatsuma, *Bukkenhō* (The Law of Real Property), p. 135; Junichi Funabashi, *Bukkenhō* (The Law of Real Property), p. 237.

⁶⁵ E.g., Kenichirō Ōsumi, *Zentei Kaishahō Ron* (Company Law, rev. edn.), Vol. 1, p. 315; Teruhisa Ishii, *Shōhō* (Commercial Law), I, p. 255. This view has recently been confirmed by Ōsaka District Court decision, Apr. 1, 1963, *Hanrei Taimusu* (Decided Case Times), No. 146, p. 1615; Case 408, New Commercial Cases, *Shōjihōmu Kenkyū* (Commercial Law Review), No. 296.

⁶⁶ Takeo Suzuki, *op. cit.*, *supra* at p. 252.

⁶⁷ Cf. Shinichirō Michida, *Nichibei Shōjihō no Jissai* (Comparative Studies of Japanese and American Business Laws and Practices), p. 69 *e seq.*

⁶⁸ Takeo Suzuki, *op. cit.*, p. 252.

⁶⁹ Cf. Ryōyū Kita, "Dōsan Zenishutoku no Minpōteki Kōsei to Shōhōteki Kōsei" (Dichotomy of Good Faith Purchase in Terms of Civil and Commercial Transactions), *Shihō* (Journal of Private Law), No. 24, p. 122. Our Civil Code provides for bona fide purchase of goods while our Commercial Code omits all reference thereto. The fact is usually viewed in the light of "commercialization of the Civil Law" (*Kommerzialisierung des bürgerlichen Rechts*), but such a broad observation often leads to a one-sided argument which definitely favours the bona fide purchaser. My discussion takes a hint from the points here thrashed out.

⁷⁰ Cf. Ryōyū Kita, "The Theory of *Rechtsschein* in German Law and its Application to Japanese Law" (written in English), *Shōgaku Tōkyū* (Economic Review), Vol. 6, No. 4, pp. 55, 84.

b) The rule of bona fide purchase in Art. 192 Civil Code does not apply to lost or stolen goods and chattels (Art. 193 Civil Code), but lost or stolen bills and notes are an exception to this exception so that boost may be given to their negotiability; for a person who has been dispossessed of a negotiable instrument "in any manner whatsoever" cannot demand recovery from an innocent purchaser of it (Art. 16 II BNA).⁷¹

c) The phraseology reading "in any manner whatsoever" implies a further distinction of negotiable instruments from movables in general. Not only that it makes no difference whether a prior holder of title lost possession by his own conduct or not, but also that it covers all the cases where the loss has been caused through endorsement void or voidable by reason of some infirmities pertaining to the endorser's position.⁷²

The first two points have also been quite clear in the prevailing view, and in consequence the last one is peculiar to the dissenting opinion. This opinion is now gaining more and more support among annotators of the present case, and there is a further attempt at bringing it to bear on share certificates.⁷³ In addition, all the advocates emphasize a fact that our dissenting opinion is the generally accepted view in Germany⁷⁴ whose legislation and jurisprudence have been a most striking influence in this country for a long time. From the viewpoint of comparative law the fact goes for something.

In face of the growing tendency of such Germanization there arises a criticism that they are mixing up a voluntary act of bona fide purchase (Art. 16 II BNA) with a compulsory act of payment in due course (Art. 40 III BNA), because in their opinion the curing effect of the former would be as far stretched as the discharging effect of the latter.⁷⁵ But they defend themselves by saying that there is no such confusion of thought on their part, because they recognize the distinction in literal meaning between the purchaser's "bad faith or gross negligence" and the payer's "fraud or gross negligence"⁷⁶ though Art. 16 II and Art. 40 III of the BNA infelicitously adopt one and the same expression in this context: "*akui matawa judaina kashitsu.*" The Japanese "*akui*" generally in its technical use implies knowledge of the existence of a fact and particularly in its strict sense of the word means fraud. It is well settled that the word "*akui*" in Art. 40 III BNA should be strictly construed in terms of the Geneva Convention providing a Uniform Law on Bills of Exchange and Promissory Notes, 1933, so that the payment of negotiable instruments may be simplified and expedited.⁷⁷ In other words, he who pays at maturity is validly discharged "unless he has been guilty of fraud or gross negligence." But he who purchases in due course is certainly less favoured, because his position deserves no legal protection in conformity with Art. 16 II BNA unless he has been in good faith and without grave fault. Good faith in this case means, of course,

⁷¹ *Ibid.*, p. 88.

⁷² Takeo Suzuki, *op. cit.*, p. 251.

⁷³ Jirō Matsuda & Chūichi Suzuki, *Jōkai Kabushiki-kaisha Hō* (Commentary on the Law of Joint-Stock Companies), Vol. 1, p. 176; Masao Sanekata, *Kaisha Hōkagu* (Company Law), II, p. 373.

⁷⁴ Staub-Stranz, Wechselgesetz, Anm. 21, 23, 27, 27a, 28 zu Art. 16; Ulmer, Wertpapiere, S. 237.

⁷⁵ Izawa, *Hōgaku Ronshū* (Kansai University Law Review), Vol. 10, No. 3; Hamada, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 46, No. 5.

⁷⁶ Takeuchi, *Hōgakukyōkai Zasshi* (Law Association Review), Vol. 78, No. 5.

⁷⁷ Cf. Helmut Henrichs, *Der Schutz des gutgläubigen Wechselwerbers nach dem einheitlichen Wechselgesetz der Genfer Verträge unter besonderer Berücksichtigung der Rechtsentwicklung in den Vertragsstaaten*, 1962. Art. 40 III BNA reads: "He who pays at maturity is validly discharged, unless he has been guilty of fraud or gross negligence. He is bound to verify the regularity of the series of endorsements, but not the signature of the endorser."

ignorance of the existence of a fact: the lack of title on the part of the transferor.

Be that as it may, more importance should be attached to a further analysis of a state of mind on the part of the purchaser, the Z Company, whether the prevailing view or the dissenting opinion is pertinent to the present case.⁷⁸ The unanimous judgment of the Supreme Court is quite meagre in such an analysis. The Court bluntly said: "The Z Company has acquired the note in good faith; there is no allegation and no proof of the grave fault on the part of the same company acquiring the note." Had the Court taken a step farther, it would have come across a pair of vital issues: (i) Did the Z Company believe A to be the very holder of title? (ii) Did the Z Company believe that the holder of title was the X Company and that A was its agent? If the answer to the first question is in the affirmative, the doctrine of juridical appearance will operate to prevent the Y Company from setting up the lack of delivery against the Z Company acting in good faith and without grave fault, because the Y Company had given cause for the situation where A appeared to be the very holder of title.⁷⁹ In consequence the Z Company is to be treated as if it were a bona fide purchaser in the sense of Art. 16 II BNA, but the result is not a straight-out application of this Article. If the answer to the second question is in the affirmative, it will follow from the conventional viewpoint that the Z Company is no more than in a position to bind A as a party to the note in conformity with Art. 8 BNA, because the Company has acquired the note from A without knowing his lack of authority but with full knowledge of his lack of title. The dissenting opinion, however, upholds the Z Company's bona fide purchase against the Y Company (and against the X Company as well?), simply because A's lack of authority was unknown to the Z Company (II, 2, e, *supra*). It is not quite clear from the *ratio decidendi* of the Supreme Court that the Z Company's bona fide purchase should also be tenable against the X Company, but the judicial process as a whole shows that the same result is attained by judgment of the trial court, as affirmed by the High Court and then reaffirmed by the Supreme Court, ordering both of the defendants, the X Company and the Y Company, to pay jointly to the plaintiff Z Company a certain sum of money payable on the note.

Seeing from the fact that the Z Company so sued the X Company as well as the Y Company, the Z Company did not believe A to be the very holder of title, but perhaps believed that the holder of title was the X Company and that A was its agent. Then, the doctrine of juridical appearance is out of place here. Instead, the better solution may be found either in the conventional application of Art. 8 of the BNA or in the revamped theorization about Art. 16 II of the same Act. That is a matter of alternative value judgment. In the present case the Supreme Court definitely took the first step towards reconstruction of the latter Article in accordance with the dissenting opinion. This new development will certainly promote the negotiability of bills and notes to a great extent, but on the other hand it will make the former Article that much more effaceable and so obliterate the statutory duty of an unauthorized agent for all practical purposes.

⁷⁸ See Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 63 *per* Ryōyū Kita.

⁷⁹ Yoshimitsu Nōtomi, *Tegatahō niokeru Kihonriron* (The Basic Theory in the Law of Bills and Notes), p. 530.

Epilogue

A short excursion into a thicket of various issues involved in the present case now seems to remind me of a classical antithesis between the demand for static security and the demand for dynamic security.⁸⁰ In a commercial society it is true that a social interest in the security of transactions becomes of the first importance as an economic institution. But such a consideration should not be carried to an unreasonable length without heed of a jural postulate for static security. In this respect the Supreme Court has given no fully cogent reasons for discarding the conventional concept of bona fide purchase. By the same token, there is a more recent case⁸¹ where the Supreme Court has experienced a stumbling block about substantially the same facts as in the case heretofore discussed. The only point of difference in those facts is that the Z Company further transferred the note to another person, the B Bank, and then took it back through the so-called "return" endorsement by the same bank. Held it a typical case of bona fide purchase, because "the Z Company should be regarded as a party who has acquired the note from a person having no title thereto—since the X Company took no title thereto." But the judgment of the lower court, which was affirmed by the Supreme Court, declared as follows: "We cannot accept the prevailing view that Art. 16 II of the BNA is confined to cases where the transferor of bills or notes has no title to them and does not cover cases where there are defects such as disability, defective intention and unauthorized agency on the part of that person." In view of this definite statement there is no denying something inconsistent of the Supreme Court decision still savoring of the prevailing view though sounding like an improper application of it. Here the existence of A as an unauthorized agent is overlooked and attention is focussed upon "good faith" in which the Z Company has acquired the note. Nevertheless, the Court has failed to analyze this vital element of bona fide purchase. It may be one of the main reasons why we could find no sufficiently convincing argument here. In this connection we must keep in mind Karl Binding's satirical remark which has often been cited as a criticism on the subject. "*Die gute bona fides! Sie steigt im Wert mit dem Wechsel ihres Inhabers!*" (The happy *bona fides!* It gains more and more significance with every change of its bearer!)⁸²

—15 November, 1963—

⁸⁰ Ryōyū Kita, "The Theory of Rechtschein in German Law and its Application to Japanese Law" (written in English), *Shōgaku Tōkyū* (Economic Review), Vol. 7, No. 4, p. 35.

⁸¹ Supreme Court decision, Dec. 24, 1961, Supreme Court Reports, Civil Cases, Vol. 15, No. 10, p. 2519. For comments on this case, see Hamada, *Minshōhō Zasshi* (Civil and Commercial Law Review), Vol. 46, No. 5; Mibuchi, *Hōsō Jihō* (Lawyers' Journal), Vol. 14, No. 1; Sakae Wagatsuma, *Tegata Kogitte Hanrei Hyakusen* (100 Selected Precedents on Bills, Notes and Cheques), p. 158 *per* Gensei Takada. Those commentators all agreed to the decision of the Supreme Court, but the first one tries to come to the same conclusion from the viewpoint of the "individual A" theory.

⁸² Karl Binding, *Die Ungerechtigkeit des Eigentumserwerbs vom Nicht-Eigentümer*, 1908, S. 27.