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declaratory judgment at an earlier stage of their dealings. In another case,[35] the Supreme Court, per Chief Justice Moschzisker, said that the declaratory judgments act is an excellent piece of legislation when kept within proper bounds. To summarize, a declaratory judgment will not be granted: 1. When the court is asked to decide moot or imaginary cases that do not exist in fact.[36] 2. When a mere advisory opinion is asked for, to which the answer would not be binding, and the judgment rendered would not be *res judicata*.[37] 3. Where the court has no jurisdiction over the subject-matter or the parties.[38] 4. Where there is another statutory remedy available which has been specially provided for the particular type of case.[39] 5. Where the court is asked to pass upon future rights in anticipation of an event that may not happen, unless special circumstances warrant an immediate decision and all parties appear in court.[40]

C. Richard Iobst

LIABILITY OF DRAWER ON FORGED ENDORSEMENTS OF NEGOTIABLE INSTRUMENTS

As a general rule,[1] the drawer-depositor, upon showing a forged endorsement on his check, is permitted to recover the amount paid thereon by the drawee-bank. The reason for this rule is that there is a contract implied from the relation of the parties and from general business custom, between the bank and its depositor, to the effect that the former is to pay the latter's check to the person designated

[35]Taylor v. Haverford Township, supra.

[36]Bell Telephone Co. v. Lansdowne Borough, supra.

[37]Carter et al., School Directors v. Blakely Borough School District, supra.

[38]Additional Law Judge, 53rd Judicial District, supra.

[39]Shallenberger v. Shallenberger, supra.

[40]Conemaugh Iron Works Co. v. Delano Coal Co., 298 Pa. 182 (1929).

[1]Cf. 52 A. L. R. 1297; 22 A. .L R. 1228.

by the depositor and to none other. If a check is payable to order, the bank has authority to pay it only to the payee named or to another person who becomes the holder by genuine endorsement. In other words, it is the duty of the bank to pay out the depositor's funds only according to his order, and payment on a forged endorsement does not follow the order originally given, gives the bank no right to debit the account of the depositor for the amount so paid, and is held to be payment out of the bank's own funds.[2]

However, courts have held that the circumstances surrounding the issuance of the check may relieve the drawee from the operation of the general rule under one of two theories. The first is that the primary intention of the drawer is that the check is to be used by the person with whom he is dealing, notwithstanding the fact that he has been deceived as to the identity of that person, and that if such person endorses the name of the person he was thought to be, there is no forgery since the check has been endorsed by the person intended to endorse. The second theory is that the credulity and gullibility of the drawer in allowing himself to be imposed upon prevents his seeking shelter under the forgery,—an application of the rule that "as between two innocent persons, he who by his acts makes loss possible, must bear it".

In situations where the imposter impersonates the payee named in the check the cases in Pennsylvania adopt the first theory.[3] These decisions of our courts can only be justified, if they are to be justified at all, as a reliance upon the rule of the law merchant which is embodied in Sec. 9, sub-sec. 3 of our Negotiable Instruments Act of 1901,[4] which states as follows: "The instrument is payable to bearer * * * * when it is payable to the order of a fictitious

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[2]Snyder v. Corn Exchange National Bank, 221 Pa. 599; McNeely v. Bank of N. A., 221 Pa. 588, 593; National Union Fire Ins. Co. v. Mellon Nat'l. Bank, 276 Pa. 212; Houser v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613.

[3]Land Title & Trust Co. v. Northwestern National Bank, 196 Pa. 230; Snyder v. Corn Exchange National Bank, 221 Pa. 599.

[4]May 16, P. L. 194.

or non-existing person, *and such fact was known to the person making it so payable*". Now, it will be seen from an examination of this section that the intention of the drawer is the controlling fact as to whether the payee named is a fictitious person; and, that the instrument be treated as payable to bearer because of the non-existence of the payee named, knowledge of that fact by the drawer is essential. The payee named is a fictitious person within the purview of the Negotiable Instruments Act, if the drawer "intended to use his (payee's) name, and did use it, as that of a person who should never receive the checks nor have any right to them". "The intent of the drawer of the check in inserting the name of the payee is the test of whether the payee is a fictitious person."[5] It would be puerile and absurd to say that the *actual* intention of the drawer of the instrument in these cases of direct impersonation is that the payee named "should never receive the checks nor have any right to them", or that the drawer had *actual* knowledge of the non-existence of the named payee. However, some force might be accredited to the argument that the "legal" intention of the drawer, arising from his negligence in failing to ascertain the true state of affairs, is that the payee named is a fictitious person; or that the drawer has knowledge "in law" of the non-existence of the named payee, due to the same consideration, viz., his negligence. But this is, in effect, to adopt the second theory of liability of the drawer,—to apply the rule that "as between two persons, he who by his acting makes loss possible, must bear it". It would seem that the courts might to farther and fare far worse than to abandon the intent theory entirely, and confine their decisions in these cases to a consideration of the facts with a view to applying thereto the second, the negligence, theory. To say that the actual intent of the drawer is that the instrument is to be paid to the person with whom he is dealing is, as was said in a Rhode Island

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[5]Snyder v. Corn Exchange National Bank, 221 Pa. 599. See also National Union Fire Insurance Company v. Mellon National Bank, 276 Pa. 212.

case,[6] a downright "perversion of words". Section 23 of the Negotiable Instruments Act recognizes and adopts the estoppel theory, and by the use of the word "precluded" rejects the intent theory. If the actual intention of the drawer of the instrument is that the person with whom he is dealing shall use it, there is no necessity for "precluding" the drawer from setting up the forgery. The Negotiable Instruments Act was not the work of novices, but on the contrary, its framers were men learned in the law, who submitted the results of their labors only after years of arduous research and profound application to the subject.

It is not the purpose of this note to consider the various types of cases calling for an application of the principles here involved, e. g., the direct impersonation cases, the cases in which the mails have been employed for the purpose of impersonation, etc. We will therefore address ourselves to a more particular consideration of the cases in which there has been no impersonation,—no misrepresentation of identity by the impostor in *persona propria*,—but where the misrepresentation has been one as to agency,—where the impostor falsely represents that he is the agent of the named payee, thereby procures the drawing of the check, and thereafter forges the endorsement on which it is honored and paid by the drawee-bank.

Whatever may be said in support of an application of the intent theory in the direct impersonation cases, in situations involving pretended agency it is apparent at first glance that it can have no application, because obviously it is not the primary intention of the drawer that the alleged agent use the instrument, and hence, the check has not been endorsed by the person intended to endorse.

Section 23 of the Negotiable Instruments Act provides as follows: "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired

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[6]Tolman v. American National Bank, 22 R. I. 462, 48 Atl. 480.

through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority".

There is no decision in Pennsylvania, nor is there any provision in the act itself, specifying what particular acts will preclude the drawer of the instrument from setting up the forgery.[7] In the absence of any judicial or statutory specifications of what particular circumstances will raise an estoppel against the drawer, the courts have laid down a rule, which has been variously expressed, to the effect that such acts as will charge the drawer with having been the proximate cause of the loss resulting from forgery of an endorsement will constitute grounds for an estoppel.[8] "The drawer must use the care of a man of ordinary prudence." "The question is whether, in view of the nature of the transaction and the situation of the parties, the drawer of the check omitted to use ordinary care and prudence."[9] "Where the loss is the result of the drawer's own fault or neglect, he has no standing to complain of the action of the bank in paying the check."[10]

It follows, therefore, that the only question presented by any case is whether, in view of all the circumstances, the drawer was so negligent in drawing the check and delivering it to the pretended agent as to become the proximate cause of the loss resulting from the forged endorsement by the alleged agent. These cases present a situation with regard to which the authorities in Pennsylvania, at first glance, appear to be in direct conflict. There are two cases[11] in Pennsylvania which in their broad, general essentials are similar, and which present diametrically op-

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[7]Cf. Land Title & Trust Co. v. Northwestern Nat'l. Bank, 196 Pa. 230; Iron City Nat'l. Bank v. Fort Pitt Nat'l. Bank, 159 Pa. 46; Marcus v. People's Nat'l. Bank, 57 Pa. Super. Ct. 345.

[8]Falconi v. Magee, 47 Pa. Super. Ct. 560.

[9]Houser v. National Bank of Chambersburg, 27 Pa. Super Ct. 613.

[10]Marcus v. People's National Bank, 57 Pa. Super. Ct. 345, citing Iron City National Bank v. Fort Pitt National Bank, 159 Pa. 46, and Land Title & Trust Co. v. Northwestern National Bank, 196 Pa. 230.

[11]Houser v. National Bank of Chambersburg and Marcus v. People's National Bank, supra.

posite conclusions on what are ostensibly similar facts. There are, however, distinguishing features in the two cases which, perhaps, permit of their being reconciled. In both cases the impostor fraudulently represented that he was the agent of the payee named in the check. In the *Marcus* case, however, the payee was a non-existent person, and the court justified its conclusion in holding the drawer-depositor liable, on the ground that he had put into circulation an instrument which was not susceptible of genuine endorsement, and in so doing had exposed the bank to extraordinary risks which he had no right to expect it could guard against. In the *Houser* case, on the other hand, the named payee was a real person whom the pretended agent, as her attorney, had represented in other previous transactions; too, the pretended agent was a member of the bar in good repute among other members of the same bar, and the drawer of the check throughout the transaction was represented by competent counsel. The court took into consideration all these circumstances in order to show that, despite ordinarily prudent precautions, the drawer had nevertheless been imposed upon, and held the drawee-bank liable for the loss.

The *Houser* case seems to represent the better position, and is in accord with the general doctrine obtaining in this class of cases in other jurisdictions.[12] It is to be seriously doubted whether the drawer of the check in the *Marcus* case did not exercise the care of a man of ordinary prudence. The pretended agent was a member of the bar of Lackawanna County, and in pursuance of the fraud he produced pretended muniments of title to the land on which, as security, he sought to and did obtain advances of money in the form of checks to which he attached the forged endorsements of the payees named. It is a question of considerable nicety as to whether an ordinarily careful and prudent man would not have done as the drawer there did, in the circumstances. The court, in the *Marcus* case, failed to advert to the well-recognized distinction between cases

[12]Cf. 22 A. L. R. 1228. 1249, and cases there cited.

of impersonation and pretended agency, but apparently relied on general statements in the case of *Land Title & Trust Company v. Northwestern National Bank*,[13] to the effect that there is a duty incumbent upon the depositor not to subject the bank to extraordinary risks, such as entrusting a check to one who, he had reason to suppose, would make a fraudulent use of it. The *Marcus* case has been cited and the principles therein laid down quoted and impliedly approved by the Supreme Court in *National Union Fire Insurance Company v. Mellon National Bank*,[14] and in *Market Street Title & Trust Company v. Chelten Trust Company*.[15] Neither of these cases involved situations where the check was procured and the endorsement forged by a pretended agent, and for that reason it is of importance to note that in neither case was it necessary to refer to the distinction between such cases and cases of impersonation of the named payee. Nor did the Supreme Court in either case take cognizance of the failure of the Superior Court in the *Marcus* case to mark the aforesaid distinction. However, if, as the court in the *Marcus* case decides, the drawer was so negligent as to become the proximate cause of the loss resulting from the forged endorsement, the result ultimately reached therein is to be commended.

As has been reiterated time and time again in our decisions, the primary duty of determining, and the consequences of a failure to so determine the genuineness of the endorsement, are upon the bank which pays the check.[16] If the bank is to avoid liability for the failure to perform this duty, it must affirmatively show that the drawer was at equal or greater fault. The mere fact that there is a duty incumbent upon the drawer to determine the fact and the extent of the pretended agent's authority is not sufficient to shift the liability. The mere delivery of an order instrument to another is not such an act as will charge the drawer with being the proximate cause of the loss result-

[13]196 Pa. 230.
[14]276 Pa. 212, 218.
[15]296 Pa. 230, 236.
[16]McNeeley v. Bank, 221 Pa. 588.

ing from the forgery of an endorsement by the person thus given possession of the instrument.[17] Nor is the fact that the drawer himself was deceived in the transaction which led to the giving of the check sufficient, of itself, to preclude him from holding the bank to its contract with him to pay his checks only to the payee or to one who claims through a genuine endorsement.[18] As was well said in the *Houser* case,—"The law of the relation between a bank and its depositors does not hold the latter to the extremely high degree of care which would make it impossible for an impostor to obtain from him a check payable to his alleged principal. While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, it is not the law that he is bound so to prepare the check that no one else can successfully tamper with it. The same principle applies to the delivery of the check. Where it is not actually delivered into the hands of the payee, but is given to his pretended agent, the drawer must use the care of a man of ordinary prudence, in view of all the circumstances; but having done that, he is not precluded by the fact that he was deceived in the transaction which led to the giving of the check, from holding the bank to its contract with him to pay his checks only to the payee or to one who claims through a genuine endorsement".

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[17]Falconi v. Magee, 47 Pa. Super. Ct. 560.

[18]Houser v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613.