

1951

Indorsement of a Check by a Person of the Same, or Similar, Name to That of the Payee--Keck v. Browne

Robert F. Stephens
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Banking and Finance Law Commons](#)

Click here to let us know how access to this document benefits you.

Recommended Citation

Stephens, Robert F. (1951) "Indorsement of a Check by a Person of the Same, or Similar, Name to That of the Payee--Keck v. Browne," *Kentucky Law Journal*: Vol. 39 : Iss. 4 , Article 13.

Available at: <https://uknowledge.uky.edu/klj/vol39/iss4/13>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

INDORSEMENT OF A CHECK BY A PERSON OF THE SAME, OR SIMILAR,
NAME TO THAT OF THE PAYEE — KECK V BROWNE

In the recent Kentucky case of *Keck v. Browne*,¹ the court was faced with the problem of determining which of three parties should bear the loss caused by a forged check. Ben Browne, who resided at 461 Woodlawn Avenue, Lexington, was employed by John Keck, Commissioner of Highways of the Commonwealth of Kentucky. Prior to the formation of the contract, Keck had corresponded with Browne at his home address. The contract, however, did not contain the street address. After services had been rendered, a check in the amount of \$3,949.92 was drawn, payable to Ben Browne. The check was mailed with the following address, "Ben Browne, Lexington, Ky." The Lexington Post Office delivered the check to Ben Brown, 561 McKinley Street, Lexington. The recipient endorsed and presented the check to a local merchant who was acquainted with Brown. The merchant, not being able to cash such a large check, went with the forger to the First National Bank and Trust Co., of Lexington. The statement of facts is ambiguous but apparently this bank was a mere paying bank and not the drawee. Although Brown was not known at the bank, the merchant was, and upon his identification of Brown as Browne, the check was okayed by the teller and a vice-president of the bank. Brown absconded, and when the forgery was subsequently discovered, the bank refused to stand the loss. *Held*: the loss must fall on the drawer, the Commonwealth, rather than on the First National Bank, or on the payee, the real Ben Browne.

This case is an interesting example of the problem presented when the drawer of a check, or other negotiable instrument, attempts to deliver the check to the named payee, but, in some way, the check gets into the hands of another person with the same, or a similar, name. This other person then endorses the check, and cashes it before the error can be detected. Upon whom must the loss fall?

Most courts have said that an indorsement by a person having the same name as the payee constitutes a forgery. Thus, at first glance, it might seem that the loss would fall on the bank cashing the check. However, this may or may not be true, depending upon the nature of the fact situation. As pointed out by Professor Britton,² there are three basic fact situations in which the problem may arise. The first is where the instrument falls into the hands of the third person by virtue of an act over which the drawer has no control. An example of this would be in case of a theft. Here, the loss falls upon the person who takes the instrument from the forging payee.³ The second category is one in which the third person gets the check solely because of the act of the drawer. This is best illustrated by the leading American case of *Slattery & Co. v. National City Bank*.⁴ There the drawer had dealings with H. E. Richards of Rockdale, Texas, and with Harold E. Richards of Bartlesville, Oklahoma. The check in question was mistakenly sent by the drawer to the party in Texas, instead of the one in Oklahoma. The check was forged, and the loss was placed upon the drawer. The third category may be termed the "in-between" group, i.e.,

¹ 314 Ky. 151, 234 S.W. 2d 183 (1950).

BRITTON, *BILLS AND NOTES* 726 (1943).

² *Ibid.*

³ *Ibid.*

⁴ 114 Misc. 48, 186 N. Y. S. 679 (N. Y. City Cts. 1920).

where there was a negligent act on the part of the drawer, combined with either a negligent act on the part of the drawee or the paying bank; or an intervening act which contributed to the acquisition of the check by the third person; or a combination of several or all of the above possibilities.

American courts, guided by the Uniform Negotiable Instruments Law, have developed a rather standard rationalization of and solution to the general problem. The relevant part of the statute is section 23:

“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 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.”⁶

This statutory provision codifies the general rule of the Law Merchant that when there is a forged instrument, no title passes, and the drawer of the instrument cannot be held for the loss. As stated previously, the effect of this is to place the basic liability for a forged check upon the paying bank.

By the wording of the statute, it can be seen that “the party against whom it is sought to enforce such right” may be “precluded from setting up the forgery.” This is simply a way of stating that the court may work an estoppel upon the drawer, if the loss has been occasioned by his conduct. Thus, the application of the estoppel doctrine presents an exception to the general rule. The troublesome question is to determine what conduct on the part of the drawer is sufficient to invoke an estoppel.

The Kentucky court, in deciding the principal case, relied mainly upon the estoppel exception. In discussing the rule, the court had this to say, “where one of two innocent persons must suffer by the acts of a third, he whose conduct enabled such third person to occasion the loss, must sustain it.”⁷ Applying this rule to the facts of the case, the court said, “In the first place, the imposter had to obtain possession of the check before he could forge it. Who made this possible? Is it not obvious that it was the failure of appellants [Keck] properly to address the envelope containing the check?”⁸ The court also relied heavily on the well known Kentucky case of *Citizens Union National Bank v. Terrill*,⁹ saying that the facts of this case were “substantially” similar to that one, in which the estoppel rule was applied. It is submitted that in holding that the act of the Commonwealth in leaving off the street address of the recipient was sufficient to estop it, the court fell somewhat short in its application of the basic rules of estoppel. It is fundamental that the negligence necessary to set up any estoppel must be in the transaction itself,¹⁰ and that mere general carelessness is not sufficient.¹¹ It is said that there must be a duty owing from the person

⁶ KY. REV. STAT. sec. 356.023 (1948).

⁷ *Kentucky Title Savings Bank and Trust Co. v. Dunavan*, 205 Ky. 801, 266 S.W. 667 (1924); 9 C. J. S. 738; note, 21 TENN. L. REV. 316 (1950).

⁸ 314 Ky. 151, 155, 234 S.W. 2d 183, 185.

⁹ *Id.* at 156, 234 S.W. 2d, at 185.

¹⁰ 244 Ky. 16, 50 S.W. 2d 60 (1932).

¹¹ *People's Trust Co. v. Smith*, 215 N. Y. 488, 109 N.E. 561 (1915); 19 AM. JUR. 694.

¹² *Ibid.*

estopped to the other person,¹⁸ and that the act of the person being estopped must be the proximate cause of the loss.¹¹ Furthermore, the rule of estoppel is held to be inapplicable where two parties are equally culpable,²⁵ or when the party asserting the estoppel has been contributorily negligent.²⁶

It will be noted that when the check was delivered to the Lexington Post Office, that office delivered the letter to the wrong man. Was not this act a type of intervening negligence? If it was, the negligence of the drawer may not have been the proximate cause of the loss.¹⁷ It may be argued that the paying bank was also negligent. Note that the name of the forger was *Brown*, while the name of the payee was *Browne*. Was the means of identification used by the drawee bank sufficient? It would seem not, for they relied on the word of a local merchant, who himself may have been careless in making sure *Brown* was the true payee.¹⁸ Nowhere in the facts is it shown that the bank asked for any written identification, which would have revealed the discrepancy in spelling. Surely such is not a reasonable business practice, especially in view of the fact that *Browne* was a regular customer of the bank,¹⁹ and the fact that it was such a large check. Thus, it appears that the negligence of the bank was at least equal to, and probably greater than, the negligence of the drawer. If so, the paying bank should not have been able to invoke the estoppel.²⁰

As previously noted, the court stated that the facts of the present case were "substantially" within the facts of the *Terrill* case. An examination of this case shows that the cases are easily distinguishable. *Terrill*, a master commissioner, had in his possession certain money that was due to Joe Cunningham, who resided in Louisville. Prior to sending the check in question, there had been correspondence concerning the matter with the wrong Joe Cunningham, also in Louisville. The imposter had kept up the exchange of letters, and by virtue of this correspondence, he had induced *Terrill* into sending him the check. This case also involved the rights between the drawer of the check and a paying bank. The drawer was held estopped. It seems obvious that in the *Terrill* case there was no question of any negligence, other than on the part of the drawer. Furthermore, the improper mailing by the drawer, *Terrill*, was due to the inducement by the forger through the means of the *prior* correspondence. There had been no prior correspondence with the wrong party in the *Keck* case, and it is said that in cases of such prior dealings, the forger gets title because

¹² *Vecchia v. Fidelity Union Trust Co.* 114 N. J. L. 470, 177 Atl. 429 (1935).

¹⁴ *Montgomery Ward & Co. v. Central Co-op Ass'n*, 201 Minn. 425, 276 N.W. 731 (1937); 19 AM. JUR. 694.

¹⁵ *Stark v. Stephens*, 76 Colo. 440, 233 Pac. 619 (1925).

¹⁶ *Blue Grass Taxi Garage Co. v. Shepherd*, 304 Ky. 390, 200 S.W. 2d 936 (1947); 21 C. J. 1170.

¹⁷ *Cf. Blue Grass Taxi Garage Co. v. Shepherd*, *supra*, note 16.

¹⁸ Brief of Appellants, p. 40.

¹⁹ *Id.* at 25.

²⁰ It is worthy of note that Ben *Browne*, the payee, may have been negligent, so as to enable the Commonwealth to invoke an estoppel against him. Although he had had prior correspondence with *Keck*, in which his street address appeared, the contract had the same address as that put on the check (brief of appellants, p. 24). It might be argued that the drawer of the check could rely on this address. Such a proposition would also tend to show a lesser degree of negligence on the part of the drawer at least toward the payee. In the case of *Jung v. Second Ward Savings Bank*, 55 Wis. 392, 13 N.W. 235 (1882), the payee, *Phillip Jung*, in Germany, directed the drawer to mail a draft to him at "Weisbaden, Germany." The court held that so addressing the draft was not an act of negligence.

of an "intent" on the part of the drawer.²¹ The *Terrill* case would seem to fall within the second group set out, *i.e.*, where the act of the drawer was the sole cause of the loss.

The fact situation in the main case clearly falls into the "in-between" group. The solution of the problem in such a case depends largely upon the legal effect of the acts of the drawer, payee, and drawee. The court must determine whether there is sufficient evidence to invoke an stoppel. It is submitted that in the *Keck* case, the facts were not sufficient to eston the drawer, and that the loss should have been placed on the paving bank.

ROBERT F STEPHENS

IMPUTATION OF NEGLIGENCE BETWEEN HUSBAND AND WIFE— HALE V HALE

The doctrine of imputed negligence, originated in the English case of *Thorogood v. Bryan*,¹ is said to be based upon the idea that such a relationship may exist between an injured person and another that it would be inequitable to permit the injured person to recover where the other party to the relationship was negligent. Can it be said that under this theory the marital relationship, standing alone, is sufficient for the imputation of negligence of one spouse to another? This very question was raised in the recent Kentucky case of *Hale v. Hale*.

In that case, a child was killed when, due to the negligent driving of her father, the station wagon in which the family was riding went over an embankment. Suit was brought against the father by the administrator of the child's estate, for the benefit of the mother. Defendant's demurrer was sustained in lower court; the Court of Appeals reversed. There were two grounds of defense. The first, the common law disability of one spouse to sue another, was disposed of by the court with the observation that the Kentucky Constitution² expressly provides that the action may be maintained in every case by the administrator of the decedent, and for the benefit of those named in the statute.⁴ The second defense, and the one in which we are primarily interested, was that the negligence of the father should be imputed to the mother, so as to bar recovery for the benefit of the mother by the child's administrator. Plaintiff contended that the sounder and more modern rule is that negligence will not be imputed on the basis of the marital relationship alone. The Court of Appeals, in discussing the problem said:

"The question of imputed negligence is not a new one, the decisions in this state and elsewhere are somewhat in conflict. The better rule is that negligence is not to be imputed by reason of the marital relation alone."⁵

²¹ BRITTON, BILLS AND NOTES 720 (1943).

¹ 8 C. B. 115, 18 L. C. P. 336 (1849); See Keeton, *Imputed Contributory Negligence*, 13 TEX. L. REV. 161 (1935).

312 Ky. 867, 230 S.W. 2d 610 (1950).

² KY. CONST. sec. 241.

⁴ KY. REV. STAT. sec. 411.130 (1948).

⁵ *Supra*, note 2, at 870.