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STUDENT NOTES

A CONSIDERATION OF THE DOCTRINE OF "THE LAW OF THE CASE" IN KENTUCKY.

The use of the words "law of the case" as an answer to a subsequent appeal in many comparatively recent cases before the Court of Appeals of Kentucky has aroused curiosity as to the principles embodied in such a peremptory phrase. The first time it appeared in a Kentucky opinion, as far as the writer has been able to ascertain, was in 1851 in the case of *Sims v. Reed and Wife*.¹ Since the opinion in that case the phrase has continued to appear as a rule of law, with an occasional short statement of the reasons and purported principles underlying its use.²

The doctrine, according to the Kentucky court, is that "one adjudication settles all errors relied upon for reversal, whether mentioned in the opinion or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error."³ The policy behind the doctrine is to put an end to litigation and to prevent presentation of cases piecemeal.⁴ West Virginia uses *res judicata* as the basis.⁵ The Kentucky court does not state exactly what is the legal basis⁶ but seems to place it on *res judicata*,⁷ just as does the West Virginia court.

Although it was not until 1851 that the term appeared, the rule was applied in this jurisdiction as early as 1802 in *Meredith v. Clarke*.⁸ On the second appeal of this case the question arose as to how far back in the proceedings and records the plaintiff could assign errors. It was held that he could assign no errors which occurred before the suing

¹ 51 Ky. 51, 52 (1851).

² See *Sowers v. Coleman*, 223 Ky. 633, 4 S. W. (2d) 731 (1928). The statement by Willis, J., at p. 634, that, "the doctrine . . . is well developed and understood in this jurisdiction", might be open to argument.

³ *Sowers v. Coleman*, 223 Ky. 633, 634, 4 S. W. (2d) 731 (1928).

⁴ *Sowers v. Coleman*, 223 Ky. 633, 4 S. W. (2d) 731 (1928); *Ball v. Middlesboro Bottling Works*, 266 Ky. 364, 99 S. W. (2d) 205 (1936).

⁵ *Johnson v. Gould*, 62 W. Va. 599, 59 S. E. 611 (1907). See also (1934) 41 W. Va. Law Quarterly 74-75.

⁶ *Howard v. Commonwealth*, 114 Ky. 372, 385, 70 S. W. 1055 (1902); *Legrand v. Baker*, 22 Ky. 235, 244 (1827).

⁷ *Brown v. Marion National Bank*, 18 Ky. L. Rep. 186, 35 S. W. 926 (1896); *Hopkins v. Adam Roth Grocery Co.*, 105 Ky. 357, 49 S. W. 18 (1899); *Bassett v. Bassett*, 179 Ky. 567, 200 S. W. 915 (1918); *Ball v. Middlesboro Bottling Works*, 266 Ky. 364, 99 S. W. (2d) 205 (1936); *Castleman v. Buckner*, 180 Ky. 350, 202 S. W. 681 (1918).

⁸ 2 Ky. (Sneed) 189 (1802).

The preface of this reporter states that this was the first volume published under the authority of the Kentucky Legislature.

out of the first writ of error. This holding states precisely the doctrine of the law of the case. From 1802 to 1851 several cases held that an appellant could not on a second appeal question the rulings made by the court on the first appellate hearing.⁹ The transition from an application of the rule without naming it to the use of the rule under the term of "law of the case", seems to have taken place without any explanation by the court as to the origin of the term.

Considering the doctrine on principle it is possible to recognize component parts of two distinct legal principles: (1) *res judicata*—invoked primarily for reasons of public policy to end litigation and (2) *stare decisis*—a maxim more or less binding every judge to follow what has been decided before him.

While the law of the case has been said to be stronger than *stare decisis* in that it dispenses with the need of considering again what has been previously decided in the same suit, and weaker than *res judicata* since it is without force beyond the particular case and does not limit the power of the court,¹⁰ this would not seem to hold true in Kentucky, since this state apparently uses *res judicata* as the basis. Once applied, it precludes a consideration of facts, rulings, objections or contentions that *might have been* relied on for reversal on the first appeal¹¹ by the exercise of reasonable diligence by the parties.¹²

The Kentucky court has assumed that it has no legal power to change or modify its former ruling¹³ and says the former opinion is equally binding on the court as well as the parties,¹⁴ yet the United States Supreme Court has held the doctrine, in the absence of a statute, not to be a limit to a court's power.¹⁵ Conceding that it is not a limit to a court's power, our court follows the doctrine rather strictly and will not exercise the power whether former conclusions were right or wrong.¹⁶

Even though the rule as set forth in the first appeal has been over-

⁹ Rowland v. Craig, 2 Ky. (Sneed) 330 (1804); Morgan v. Dickerson's Heirs, 17 Ky. 20 (1824); Legrand v. Baker, 22 Ky. 235, 244 (1827).

¹⁰ Lummus, *The "Law of the Case" in Massachusetts*, (1929) 9 Boston Univ. Law Rev. 225.

See also Southern Railway Co. v. Clift, 260 U. S. 316, 319 (1922).

¹¹ Correll v. People's Bank, 246 Ky. 356, 55 S. W. (2d) 8 (1932).

¹² Blanton v. Wilson, 234 Ky. 637, 28 S. W. (2d) 970 (1930).

¹³ Chandler v. Riggs, 3 Ky. Opin. 77 (1868).

¹⁴ Wheeler v. Cin., N. O. & Texas Pac. Ry. Co., 171 Ky. 436, 188 S. W. 462 (1916).

¹⁵ Messenger v. Anderson, 225 U. S. 436 (1912).

See p. 444 where Holmes, J., says, "*This court*, (U. S. Supreme Court) at least, is free when the case comes here."

¹⁶ Graziani v. Ambrose, 201 Ky. 466, 257 S. W. 21 (1923); Great American Ins. Co. v. Clayton, 266 Ky. 409, 99 S. W. (2d) 172 (1936). Note (1930) 67 A. L. R. 1390.

ruled in a subsequent case,¹⁷ the first opinion is the law of *that* case on the second appeal. This refusal to reverse an erroneous decision which has been overruled before the second appeal, may work a hardship in isolated cases but such a refusal has a foundation outside of the one usually relied upon by the courts.¹⁸ Since the court has handed down an opinion on the case and the other party has relied upon it as being final, the present appellant should not be allowed to question it but should be precluded from unsettling what has been fittingly determined. The present appellant had his opportunity on the first trial to present all his pleadings, theories, and evidence, and to make all objections. On the first appeal he had opportunity to present all his arguments, therefore he should not be allowed to say on the second appeal that he now has a stronger argument for his case. Litigants should be able to rely on an opinion of a court of last resort as having some finality, even if sometimes lacking in infallibility.

Today, Kentucky by reason of having only one appellate court, can not be criticized for a manifestly unjust application of the law of the case as can many states which have more than one appellate court. In some states having a series of appellate courts, the decision of the intermediate court is the law of the case on appeal to the court of last resort. In others the rule obtains that the court of last resort is not bound by an opinion of an intermediate court.¹⁹ The present trend seems to be in favor of the rule that an intermediate opinion is not binding on the court of last resort when the first decision was erroneous.²⁰ Although Kentucky can have no intermediate appellate court without a constitutional amendment,²¹ there was at one time the Superior Court which was an intermediate court.²² During the life of this court its opinion was the law of the case on appeal to the Court of Appeals²³ and a Court of Appeals decision was conclusive on the Superior Court on a subsequent appeal of the same case.²⁴ The Superior Court clung just as tenaciously to the law of the case doctrine in apply-

¹⁷ *Brown v. Marion Natl. Bank*, 18 Ky. L. Rep. 136, 35 S. W. 926 (1896). The first opinion in this case in 92 Ky. 607 was overruled by *Sydner v. Mt. Sterling Bank*, 94 Ky. 231 (1893).

Cain v. Union Central Life Ins. Co., 123 Ky. 59, 93 S. W. 622 (1906). The first opinion in this case in 22 Ky. L. Rep. 1712, 56 S. W. 724, was overruled by *Insurance Co. v. Spinks*, 119 Ky. 261, 84 S. W. 1160 (1904)

¹⁸ See *Bradford v. Patterson*, 8 Ky. 464 (1819) for the court's explanation on the basis of "political necessity".

¹⁹ For present state of the law on this point see Note and annotations 118 A. L. R. 1286.

²⁰ See Note (1934) 41 W. Va. Law Quarterly 74-75, for a note on a recent West Virginia case.

For a note on a recent Texas case, see Note (1936) 14 Texas L. Rev., 511-518.

²¹ Ky. Constitution (1892), section 135; see also, sec. 109.

²² The Superior Court was created in 1882 (See Gen. Stat. p. 348—*Bullitt and Feland*, 1888) but abolished by Kentucky Constitution (1892), section 119.

²³ *Adams Express Co. v. Hoeing*, 88 Ky. 373, 11 S. W. 205 (1889).

²⁴ *Berry v. City of Newport*, 7 Ky. L. Rep. 438 (1885).

ing it to its opinions²⁵ as does the present day Court of Appeals. It would seem that there is justifiable criticism of the rule when applied so as to give intermediate courts power over the court of last resort, since a party should have the benefit of an opinion by the court of last resort when he is otherwise entitled to an appeal to the highest court.

Just what is the law of a particular case one can not venture to say until the Court of Appeals has ruled in that case. However, we may gather from the multitude of decisions that when one fails to object to evidence and does not complain on the first appeal as to its admission, he is estopped to allege error on its admission in a second trial;²⁶ where the facts and circumstances on the second and third trial in respect to issue are substantially the same as those on the first trial, the first opinion becomes the law of the case;²⁷ the opinion on the first appeal settles the question as to sufficiency of pleading;²⁸ and instructions given on the first trial and approved in the first opinion become the law of the case and can not be considered on the second appeal,²⁹ but if the opinion is only on a demurrer and the factual situation presented by answer and trial is different, the doctrine does not apply.³⁰

The doctrine itself is one that is strongly supported by legal principles and in a jurisdiction such as Kentucky where there is only one appellate court, which is the court of last resort, the doctrine of necessity must be applied strictly or else the court will be continually reviewing its own decisions. The rule does put a burden on the bar, but not an undue one. It is the duty of every attorney to prepare thoroughly his client's case for trial, to conduct the trial in an expert manner, and on the first appeal to present his whole case and every just argument therefor. Though the doctrine works a hardship in a particular case, a criticism of the rule is not justified when the doctrine is thoroughly analyzed with a view to following the most equitable course. Even though the court seems to say that it has no alternative but to follow the rule, certainly the court may make use of its sound discretion as to whether an application of the law of the case is equitable in a given instance.

As has been previously stated, in rare cases where a subsequent opinion has overruled the first, the most equitable course for the court to follow is to uphold the first opinion as the law of that case. Any other rule would tend to inject uncertainty into the law. Parties should not have their rights prejudiced by a court later reversing its previous decision so as to necessitate a restitution of property to the disadvantage of the party who has relied on the first holding.

²⁵ *Mt. Sterling and O. Turnpike Co. v. Hamilton*, 14 Ky. L. Rep. 720 (1893); *Miles and Co. v. Commonwealth*, 16 Ky. L. Rep. 92 (1894).

²⁶ *C. & O. Ry. Co. v. Lang's Admr.*, 141 Ky. 592, 133 S. W. 570 (1911).

²⁷ *Ky. Road Oiling Co. v. Sharp*, 257 Ky. 278, 78 S. W. (2d) 38 (1934).

²⁸ *Correll v. People's Bank*, 246 Ky. 356, 55 S. W. (2d) 8 (1932).

²⁹ *Templin v. Cornelius*, 243 Ky. 719, 49 S. W. (2d) 550 (1932).

³⁰ *Title Ins. and Trust Co. v. McCracken County*, 263 Ky. 302, 92 S. W. (2d) 89 (1936).

However, since the rule applies also to criminal cases,¹ it is believed that should a subsequent decision overrule the first opinion in a criminal case, the court should refuse to apply the law of the case when such application would exact an unjust penalty. Equitable considerations should be paramount in any application of the law of the case doctrine.

JOHN L. YOUNG

SOME CONSTITUTIONAL ASPECTS OF THE KENTUCKY MUNICIPAL HOUSING COMMISSION ACT.

Housing legislation in the United States probably had its birth in the state of New York, where the first of a series of Tenement House Laws was passed in 1867,¹ providing that it was illegal to build a tenement house covering one hundred per cent of a lot, that a ten-foot yard had to be left at the rear for light and air, and that a wholly subterranean room could not be rented for human habitation. Kentucky passed its first Housing Law in 1910,² the act being limited to cities of the first class, that is, Louisville. The law had merely to do with limiting the specifications of houses with relation to the size of the lots they occupied, with certain provisions as to light, ventilation, and fire-prevention. In 1920, the Kentucky Housing Act³ was passed. This act still applied only to cities of the first class, and did not effect any appreciable change in the existing law. This act was repealed in 1922.⁴

The National Industrial Recovery Act of 1933⁵ laid the foundation for the present housing law in Kentucky. This act provided for certain grants of funds to states which would enact laws providing for low-cost housing projects. Passed in order to take advantage of the grants offered by the federal law, the Kentucky Municipal Housing Commission Act⁶ provides that cities of the first and second class be authorized "to acquire, establish, erect, maintain and operate low-cost housing projects within the corporate limits of such municipality . . . for the purpose of providing adequate and sanitary living quarters for individuals and families"; that as a matter of legislative determination and "in order to promote and protect the health, safety, morals, and welfare of the public, it is necessary in the public interest to confer these powers upon the cities"; that the cities may create a Municipal Housing Commission with the power to engage in low-cost housing and slum clearance projects, fixing rental rates, and establishing rules and by-laws governing the use of the premises included in the project; that the commission may acquire the land it deems necessary for the project, either by agreement with the owners, or by condemnation

¹ *Wedding v. Commonwealth*, 218 Ky. 115, 290 S. W. 1059 (1927).

² New York Laws 1867, c. 908.

³ Kentucky Acts 1910, c. 41, p. 120.

⁴ Kentucky Acts 1920, c. 68.

⁵ Kentucky Acts 1922, c. 123.

⁶ 48 Stat. 95, 40 U.S.C.A. (Supp.) c. 8.

⁷ Kentucky Acts 1934, c. 113.