The Law of the Case Doctrine in Kentucky

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THE LAW OF THE CASE DOCTRINE IN KENTUCKY

Law made on appeal affects two groups of people—those who look to it as a precedent, a guide to action; and the parties to the appeal themselves. When settlement of litigation requires more than one appeal, the effect on the parties themselves takes on a rigid importance.¹

Probably no other procedural rule more acutely reflects the policy conflict between two of the most important goals in the law, stability and progress, than does the rule of the "law of the case."² The rule itself has been stated in various ways in Kentucky but in its simplest form it merely requires that questions of law passed on by an appellate court in remanding a case for further proceedings be considered final and therefore binding in all subsequent stages of the litigation, including a second appeal to the same appellate court.³ The doctrine has two distinct aspects recognized by the Kentucky Court of Appeals;⁴ the first is the proposition that upon the retrial of the case, a trial court should obey the mandate of the appellate court, and the second is that the appellate court itself is bound by its previous decision in any subsequent review.⁵

While the doctrine of the "law of the case" is similar to the theories of res judicata and stare decisis, the Kentucky Court of Appeals has not effectively tied together their relation. Despite the lack of an adequate comparison between these doctrines in Kentucky law, at least a brief consideration of their similarities is necessary for a full understanding of the "law of the case." The essence of res judicata is that a final judgment conclusively settles the rights and liabilities of the parties and thus precludes any further litigation in a subsequent action.⁶ By comparison the "law of the case" does not settle any rights, but merely establishes the law which controls these rights until the judgment is final.⁷ Another fundamental distinction lies in the application of these two doctrines. The "law of the case" theory applies only to successive

³ Copley v. Craft, 341 S.W.2d 70, 71 (Ky. 1960).
⁴ The phrase "law of the case" has been used in many distinct senses. See Lummus, The Law of the Case in Massachusetts, 9 B.U.L. REV. 225 (1929). Its use in this comment will be confined only to the rulings of an appellate court. For a discussion of its application to intermediate appellate courts see Comment, "Law of the Case" in the Intermediate Appellate Courts, 14 TEX. L. REV. 511 (1938).
⁵ See, e.g., W. T. Grant Co. v. Indian Trail Trading Post, Inc., 438 S.W.2d 91 (Ky. 1968); Wenk v. Ruby, 412 S.W.2d 247 (Ky. 1967); Martin v. Frasure, 352 S.W.2d 817 (Ky. 1961). These represent the most recent cases stating that the "law of the case" is binding upon both the trial court and the Court of Appeals.
⁶ See note 1 supra, at 754.
⁷ Id.
appeals in the same case whereas res judicata applies only when a new and different law suit is involved. The concept of stare decisis is more readily distinguishable from the "law of the case." In fact the Kentucky Court has stated that res judicata and the "law of the case" are both founded on entirely different considerations than stare decisis. Basically stare decisis is merely a principle that requires courts to consider past decisions as precedents in future actions. Stare decisis like res judicata differs from the "law of the case" in that it applies only when there are two distinct law suits.

Neither res judicata nor stare decisis has been cited in Kentucky as the basis for the "law of the case" doctrine. The Kentucky Court has managed to use this theory in case after case without sufficiently explaining its exact legal basis. The Court has indicated that whether the rule is regarded as an application of the doctrine of res judicata, or of stare decisis, or simply a rule of expediency, it is the law recognized in this state. The Court's reluctance to establish any legal grounds for the "law of the case" rule can be explained by the fact that in Kentucky it seems to be founded on a policy basis rather than a legal basis. This policy is simply that at some time there must be an end to litigation and a final decision upon which the parties can rely. Much of the difficulty in the application of the "law of the case" doctrine is a result of the direct clash between this policy and the principle that justice requires a reversal of any erroneous judgment.

It would seem that a doctrine such as the "law of the case" would have originated in the law of Kentucky only after a thoughtful consideration of the consequences involved in its application. It developed, however, by constant repetition and reliance on some early cases. These cases did not discuss or explain the reason behind the doctrine or its origin. The first application of this principle in Kentucky was in the case Meredith v. Clarke. In Meredith the Court on the second appeal of the case held that no error could be assigned in a subsequent appeal that occurred in the first proceedings. While the exact phrase

8 Id.
9 Payne v. City of Covington, 123 S.W.2d 1045, 1051 (Ky. 1938).
10 Stare decisis has been recognized as less forceful and subject to looser adherence than the "law of the case." See Daniel's Adm'r v. Hoofnel, 155 S.W.2d 469 (Ky. 1941).
11 Howard v. Commonwealth, 70 S.W. 1055, 1059 (Ky. 1902).
12 See Ball v. Middlesboro Coca-Cola Bottling Works, 99 S.W.2d 205 (Ky. 1936); Sowders v. Coleman, 4 S.W.2d 731 (Ky. 1928). The notion that the "law of the case" is a rule of policy and not a rule of law has been recognized in other jurisdictions. See 5 Am. Jur. 2d Appeal & Error § 744 (1962).
14 2 Ky. (Sneed) 189 (1802).
"law of the case" did not appear in the opinion, the decision illustrated the Court's first use of this legal principle. This principle was applied in several other Kentucky decisions before the phrase "law of the case" was initially used in the case Sims v. Reed and Wife. In Sims the Court stated that its former opinion was binding on both the parties and the Circuit Court, "... and must be taken in this court, as well as in the Circuit Court, to be the law of this case." The Court in Sims did not attempt to define the term or explain its origin. It appeared to take for granted that the meaning of this phrase was so well-known that its mere use furnished an adequate reason for the decision. Thus, without any explanation the phrase "law of the case" was introduced into Kentucky law.

Other state courts have stated that the reason for applying the "law of the case" rule is that the appellate court lacks the legal power to change or modify its own judgments except on a rehearing and that once the mandate has been issued for a retrial the case is taken out of the jurisdiction of the appellate court. This theory was also used in Kentucky in some of the early decisions. In Richardson v. Ferguson the Kentucky Court of Appeals held that it has no "power" to retry questions following a new trial in a case that was before it on a former appeal. Later decisions indicated that the rule was not founded on this lack of power but on the policy that litigation should be ended as speedily as is consistent with an orderly administration of justice.

15 LeGrand v. Baker, 22 Ky. 235 (1827); Morgan v. Dickerson's Heirs, 17 Ky. 20 (1824); Rowland v. Craig, 2 Ky. (Sneed) 330 (1804).
16 51 Ky. 51 (1851).
17 Id. at 52.
18 Since its first use in the Meredith and Sims cases the "law of the case" doctrine has been applied in a multitude of situations arising in Kentucky. A detailed analysis of the specific examples is beyond the scope of this comment. A few select examples of its wide application include: whether a particular question is a question of fact for the jury to decide, Deegan v. Wilson, 157 S.W.2d 68 (Ky. 1941); related to instructions generally, T. E. Vasseur v. Rose, 415 S.W.2d 361 (Ky. 1939); questions of damages, Bender v. Kaelin, 90 S.W.2d 367 (Ky. 1936); constitutional questions, Madden's Ex'r v. Commonwealth, 126 S.W.2d 463 (Ky. 1939); validity of contracts, Dorton v. Ashland Oil & Refining Co., 197 S.W.2d 274 (Ky. 1946); probate matters, Preston's Heirs v. Preston, 130 S.W.2d 797 (Ky. 1939); questions of title to property, Catlin v. Justice, 156 S.W.2d 107 (Ky. 1941); principal and agent relationship, Gill v. Wall, 239 S.W.2d 235 (Ky. 1951); negligence and contributory negligence, Carter Coal Co. v. Dozier, 200 S.W. 917 (Ky. 1918).
21 1 Ky. L. Rep. 66 (1830).
The Kentucky Court has consistently applied a rigid application of the doctrine of the "law of the case" and in *Newman v. Newman* the Court announced that it still followed the "ancient and honored" rule that the final decision of an appellate court is the "law of the case" whether right or wrong. The *Newman* case represents the most recent application of the so called "right or wrong" rule recognized in numerous decisions by the Kentucky Court of Appeals. Stated in its simplest form the "right or wrong" rule stands for the proposition that a former decision by an appellate court in the same case is binding upon it on a second appeal, irrespective of whether the former decision was right or wrong. The "law of the case" rule standing alone does not imply that courts are bound even after discovering a mistake. Thus, in essence the "right or wrong" rule is an extension of the doctrine of the "law of the case" in that it makes the doctrine applicable even when the Court's former decision in the case was erroneous. The first application of the "right or wrong" rule in Kentucky occurred in the case *Bradford v. Patterson*. In *Bradford* the Appellate Court held that it was bound by its decision even if convinced that it had made an error in the former appeal. The Court reasoned that this result was dictated by the possibility that any attempt to correct past errors may lead to new errors being committed. In most of the decisions applying the "right or wrong" rule, the Court declared its adherence to the rule but did not specifically find that the former decision was in fact erroneous. However, in a few cases the Court refused to alter its former decision even though it specifically found or implied that the former decision was wrong. No explanation was given in any of these decisions with regard to the origin of the "right or wrong" rule, nor was any attempt made to justify its application. Thus, just as the "law of the case" rule was introduced into Kentucky law through mere repetition, so was its extension in the form of the "right or wrong" rule.

An appellate court's refusal to reverse a former decision which

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23 451 S.W.2d 417, 420 (Ky. 1970).
24 See, e.g., H. D. Martin v. Frasure, 352 S.W.2d 817 (Ky. 1962); Taylor v. Mills, 320 S.W.2d 111 (Ky. 1958); Wallis v. Illinois Cent. R. Co., 171 S.W.2d 225 (Ky. 1943); Finley v. Thomas, 134 S.W.2d 243 (Ky. 1940); Insurance Co. of N. America v. Creech Drug Store, 94 S.W.2d 654 (Ky. 1936); Commonwealth v. Combs, 50 S.W.2d 497 (Ky. 1932); Robinson v. Chesapeake & O. Ry. Co., 13 S.W.2d 500 (Ky. 1912); Vanhoose v. Chesapeake & O. Ry. Co., 283 S.W. 953 (Ky. 1926); Bates v. City of Monticello, 190 S.W. 1074 (Ky. 1917); Hopkins v. Adam Roth Grocery Co., 49 S.W. 18 (Ky. 1899); L. & N. R.R. Co. v. Hennen, 11 Ky. L. Rep. 784 (1894); Bradford v. Patterson 8 Ky. (1 A. K. Marsh.) 464 (1819).
26 Id.
27 See e.g., Cain v. Union Cent. Life Ins. Co., 93 S.W. 622 (Ky. 1906); Brown v. Marion Nat. Bank, 35 S.W. 926 (Ky. 1896).
might be erroneous could clearly result in injustice in many instances. The only policy in favor of such a harsh rule is that which supports the "law of the case" rule itself, i.e., to put an end to litigation. The basic rationale is that once a court has handed down an opinion and the parties have relied upon it as being final, then neither party should be allowed to question it. This is a valid justification for the "law of the case" rule but it is questionable whether it supports an extension to the limits of the "right or wrong" rule. Where the appellate court's first decision is "clearly erroneous" there is no reason to mechanically follow it under the pretext of finality. Under these circumstances the notion that justice requires a reversal of any erroneous judgment far outweighs the policy of putting an end to litigation.

Recognizing the injustice of the "right or wrong" rule, the Kentucky Court of Appeals in the case of Union Light, Heat & Power Company v. Blackwell's Administrator, took the first step away from its rigid application.28 The Court in Union Light noted the strict adherence to the rule in Kentucky that an appellate court's decision was the "law of the case" for a subsequent trial on appeal however erroneous the decision may have been. Turning away from this strict approach, the Court recognized that the rule should be subject to certain exceptions. However, it indicated that the "exception must be rare and the former decision must appear to be clearly and palpably erroneous."29 The Court criticized the past decisions which bound a judge to an erroneous decision, stating that under such circumstances an appellate court should admit its error rather than sanction an unjust result. The Court in Union Light proposed the following balancing test stating that an exception should be recognized:

... where it clearly appears that the result of the error to be cured far outweighs any harm that may be done in the particular case, especially where no rights have accrued or become vested and no substantial change has been made in the status of the parties by reason of the former decision.30

The Union Light case was thus an indication that Kentucky was following the trend of authorities by recognizing that the administration of justice requires some flexibility in the "law of the case" rule.31

The decision in Union Light presumably implied that Kentucky would no longer follow the strict "right or wrong" rule but would

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28 291 S.W.2d 539 (Ky. 1956).
29 Id. at 542.
30 Id. at 543.
31 For a list of cases in support of this trend see 5 C.J.S. Appeal & Error §§ 1824, 1825. The conditions that have led to the departure from the strict application of the rule are summarized in Annot., 87 A.L.R.2d 275 (1963).
apply the “clearly erroneous” rule discussed in that case. In several subsequent decisions this implication was proven to be true.\textsuperscript{32} In the most recent of this line of cases, Gossett v. Commonwealth, the Court recognized the flexibility of the “law of the case” rule in allowing an appellate court to admit and correct past errors where substantial injustice might otherwise result.\textsuperscript{33} In line with the decision in Union Light, the Court noted that this flexibility was limited to situations where the former decision is “clearly and palpably erroneous.”\textsuperscript{34} However, following Gossett, the Court in Newman v. Newman\textsuperscript{35} indicated not only that it was reluctant to make any exceptions to the “law of the case” rule but also that the “right or wrong” rule remained viable. In Newman the Court recognized that on rare occasions it has simply announced that it was incorrect in a previous opinion and proceeded to examine the merits upon a second appeal. It was made clear that this action should be taken only in the most urgent situation where the equities in the case compelled the court to correct an injustice.\textsuperscript{36} The Newman case seemed to re-emphasize the importance of finality stressed in the earlier decisions and that the “right or wrong” rule should be followed except in rare cases.

A cursory examination of the most recent case in Kentucky dealing with the problem of the “law of the case” rule might indicate a renewal of the trend established in the Union Light and Gossett line of cases to recognize exceptions to this rule.\textsuperscript{37} On the first appeal in Lake v. Smith the Court of Appeals reversed the trial judge and held that the issues of agency and scope of employment were jury questions.\textsuperscript{38} On retrial of the case, the trial judge followed the mandate of the Appellate Court and submitted these contested issues to the jury. However, on the second appeal of this case the Appellate Court reversed the trial judge again, this time for doing precisely what it had directed him to do.\textsuperscript{39} Thus, on the second appeal of the same case the Court simply reversed its prior decision and held that the trial judge should not have submitted the case to the jury but should have directed a verdict for the defendant. A strict application of the “law of the case” rule would have bound the Court of Appeals to follow its past decision, but

\textsuperscript{32} See e.g., Gossett v. Commonwealth, 441 S.W.2d 117 (Ky. 1969); White v. Commonwealth, 360 S.W.2d 198 (Ky. 1962), citing the Union Light case supra note 28. While these were criminal cases they reflected the changing attitude in Kentucky law.

\textsuperscript{33} Gossett v. Commonwealth, 441 S.W.2d 117, 118 (Ky. 1969).

\textsuperscript{34} Id.

\textsuperscript{35} 451 S.W.2d 417 (Ky. 1970).

\textsuperscript{36} Id.

\textsuperscript{37} Lake v. Smith, 467 S.W.2d 118 (Ky. 1971).

\textsuperscript{38} Unreported opinion.

\textsuperscript{39} 467 S.W.2d 118, 120 (Ky. 1971) (dissenting opinion).
instead it reasoned that the rule was not applicable under the facts of the \textit{Lake} case. The Court's basis for not applying the rule was simply that the former opinion becomes the "law of the case" "only where the facts are substantially identical or the same, upon the trial of each case."\textsuperscript{40} This was merely a recognition of the principle well settled in Kentucky law that where the facts at the second trial are substantially the same as on the first trial the effect given to the testimony at the first trial becomes the "law of the case" for any subsequent trial.\textsuperscript{41} However, where different questions arise on the second appeal and the second appeal presents a substantially different set of facts, the former decision is not controlling.\textsuperscript{42} Thus, where the evidence presented at the second trial is materially different than the evidence given at the first trial the doctrine of the "law of the case" is not applicable.\textsuperscript{43} Where the evidence at the second trial is merely cumulative, however, the Kentucky Court has adhered rigidly to the "law of the case" rule.\textsuperscript{44}

A problem arises during the second trial when the decisive facts in issue have been established to some extent at the first trial. The decision as to whether the new evidence is \textit{merely cumulative} or \textit{substantially different} lies within the complete discretion of the appellate court. This discretion is emphasized by the test announced in \textit{Lake} whereby the Court makes a "comparison of the evidence at the two trials to determine if the substance and probative effect of that at the second trial was equal or superior to that of the first."\textsuperscript{45}

The decision in \textit{Lake} places the trial judge in a considerable dilemma; he must ask the following question concerning the appellate court's first decision in the case:

\begin{itemize}
    \item \textsuperscript{40} 467 S.W.2d 118, 119 (Ky. 1971) citing language from its former opinion in \textit{Reibert v. Thompson}, 194 S.W.2d 974, 975 (Ky. 1946).
    \item \textsuperscript{41} This principle has not been fully discussed in any Kentucky case but for examples of its wide application see Commonwealth Dept. of Highways v. Arnett, 425 S.W.2d 749 (Ky. 1968); Big Sandy Realty Co. v. Stansifer Motor Co., 294 S.W.2d 528 (Ky. 1956); Reibert v. Thompson, 194 S.W.2d 974 (Ky. 1946); Bryant v. Chesapeake & O. Ry. Co., 157 S.W.2d 124 (Ky. 1941); Ins. Co. of N. America v. Creech Drug Store, 94 S.W.2d 654 (Ky. 1936); Kentucky Road Oil Co. v. Sharp, 78 S.W.2d 88 (Ky. 1935); United Talking Mach. Co. v. Metcalfe, 191 S.W. 881 (Ky. 1917).
    \item \textsuperscript{42} See \textit{Smith v. Feltner}, 83 S.W.2d 506 (Ky. 1935); Cincinnati, N.O. & T.P. Ry. Co. v. Perkin's Adm'r, 235 S.W. 776 (Ky. 1921).
    \item \textsuperscript{43} See \textit{Title Ins. & Trust Co. v. McCracken Co.}, 92 S.W.2d 89 (Ky. 1936); Royal Collieries Co. v. Wells, 50 S.W.2d 948 (Ky. 1932); Burley Tobacco Growers' Co-op. Ass'n v. Brown, 17 S.W.2d 1002 (Ky. 1929); Cincinnati, N.O. & T.P. Ry. Co. v. Alexander, 272 S.W. 896 (Ky. 1925); Louisville & N. R. Co. v. Benke's Adm'r, 195 S.W. 417 (Ky. 1917); Louisville & N. R. Co. v. Stewart's Adm'r., 174 S.W. 734 (Ky. 1915).
    \item \textsuperscript{44} See \textit{City of Louisville v. Redmon}, 137 S.W.2d 350 (Ky. 1940); \textit{Saunders v. Lincoln Co. Bd. of Educ.}, 117 S.W.2d 914 (Ky. 1938); \textit{Snyder v. Snyder}, 107 S.W.2d 857 (Ky. 1937).
    \item \textsuperscript{45} 467 S.W.2d 118 (Ky. 1971).
\end{itemize}
[D]oes the opinion really mean what it says, or must I guess concerning how some corroborative evidence will strike the fancy of the appellate court on a second appeal?46

Where the trial judge considers the evidence to be substantially the same on the second trial, he is compelled to follow the mandate of the appellate court. However, doing just this in Lake, the trial judge was reversed. As previously noted, this places the appellate court in the inconsistent position of having reversed the trial judge for doing precisely what it had previously directed him to do. The Kentucky Court justified this action in Lake on the theory that the evidence at the second trial was substantially different. The dissenting opinion of Judge Reed, however, points out that a comparison of the transcripts of evidence reveals that the only new evidence presented was corroborative testimony of facts already considered in the first appeal.47

Based on this observation, Lake seems to indicate that the “law of the case” rule may be circumvented merely by introducing corroborative evidence at the second trial relevant to the same issue fully considered at the first trial. This is clearly in conflict with the established treatment of this rule in past Kentucky decisions, which had always required the evidence to be substantially different before recognizing an exception to the “law of the case” rule. This is a strong indication that the Court of Appeals misapplied the “law of the case” rule in Lake. If the Court was compelled to reverse the lower court, it should have done so under the clearly erroneous exception to the “law of the case” and not under the substantial variance in the evidence rule. Rather than use this rule as a justification for its results, the Court should have simply admitted that the first decision was wrong. Thus, instead of reversing the trial judge for committing an error, the Court should have relied solely on the clearly erroneous doctrine and held that the “law of the case” rule was not applicable because the former decision was clearly erroneous. This would have been a clear indication that the Kentucky Court was returning to the Union Light and Gossett line of cases. However, the Court’s reluctance to admit its own mistake has led to a precedent which could potentially cause a great deal of confusion as to the proper application of the “law of the case” doctrine.

While Lake did not firmly establish that the Kentucky Court would apply the doctrine of the “law of the case” with less rigidity, the decision carried this implication. It is possible to read Lake narrowly as merely an application of the substantial variance in the evidence rule which was previously recognized in Kentucky decisions. Read

46 Id. at 121 (dissenting opinion).
47 Id.
CozNvMNrS broadly, however, Lake introduces the possibility that the Kentucky Court of Appeals is de-emphasizing the policy of finality in favor of justice. Regardless of which of these competing interests is emphasized, the Court should thoughtfully balance them rather than mechanically follow the “law of the case” doctrine. When faced with a situation similar to Lake, it should welcome the opportunity to correct its past mistakes instead of attempting to camouflage them in its rationale of the case. Only when this is done will the “law of the case” doctrine serve any useful purpose in Kentucky law.

Michael McGraw

FEDERAL INCOME TAXATION—A SURVEY OF COMMUTING DEDUCTIONS UNDER § 162 OF THE INTERNAL REVENUE CODE AND THE RAMIFICATIONS OF UNITED STATES V. CORRELL

The scope of this comment is specifically limited to the deductibility of commuting expenses where a taxpayer drives to work, and returns to his residence that same day. The cases to be discussed are those in which the taxpayer has incurred only transportation expenses as distinguished from situations in which transportation as well as meals and lodging are involved. The statutory language in the commuting area is very general, and subjecting this problem to judicial scrutiny has resulted in confusion and divergent treatment among taxpayers.

1 INT. REV. CODE OF 1954, § 162, TRADE OR BUSINESS EXPENSES.
   (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
   (2) traveling expenses (including amounts expended for meals and lodging . . .) while away from home in the pursuit of a trade or business . . . .

2 Some of the confusion in this area may be because of the generally small amounts involved in the taxpayer’s claim which limit the attorney’s research time.

3 Compare Gregorio Castillo, 1971-87 Tax Ct. Mem. (April 26, 1971) with Donald W. Fausner, 55 T.C. 620 (1971). On identical facts Fausner was allowed a portion of his commuting expenses because he was required to carry his flight bag and suitcase with him, but Castillo’s deduction was denied only because he lived in the Ninth instead of the Second Circuit. (controlled by Sullivan v. Comm’r., 368 F.2d 1007 (2d Cir. 1966)). Compare United States v. Tauferner, 407 F.2d 243 (10th Cir. 1969), with Edmerson v. United States, 25 Am. Fed. Tax R.2d 70-1263 (D.C. Wash. 1970). In these cases the courts reached opposite results with respect to taxpayers who commuted to employment located in a remote area. Compare Berhow v. United States, 279 F. Supp. 737 (D. Neb. 1968), with William B. Turner, 56 T.C. No. 3 (April 8, 1971). Here the courts were divided on the question of whether the taxpayers could deduct commuting when working temporarily at a distant job site.