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Appel and Error--Law of the Case--Second Appeal

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RECENT CASE COMMENTS

APPEAL AND ERROR — LAW OF THE CASE — SECOND APPEAL.

— In an action for wrongful death, the Supreme Court, on a previous writ of error, held it was error (1) to instruct the jury that plaintiff, through his agent, could not be guilty of contributory negligence, and (2) to refuse an instruction telling the jury that, if plaintiff's agent was contributorily negligent, plaintiff's recovery was barred.¹ On the new trial, with the same evidence and pleadings, a verdict for plaintiff was set aside by the successor to the trial judge, who held plaintiff's recovery barred by the contributory negligence of his agent as a matter of law. Plaintiff brought error. *Held*, as instructions not peremptory are properly considered only on the basis that the case is a proper one for the jury, the previous reversal on instructions given and refused held that the question presented was necessarily one for jury determination, which pronouncement is the law of the case, and not now open to question, even if the court now believed that plaintiff should be charged with contributory negligence as a matter of law. Hatcher, J., and Litz, J., dissented on the ground that the law of the case cannot be established by inference. *Hendricks, Adm'r v. Monongahela West Penn Public Service Co.*²

The doctrine of the law of the case is that, where there have been two appeals in the same case, between the same parties, and the facts are the same, matters decided on the first appeal control the further progress of the litigation and cannot be reexamined on the second appeal.³ For the disposition of that case only, the first decision is the law, the practical purpose of the rule being to put an end to litigation.⁴ The approach of the West Virginia decisions apparently has been that the binding force of the rule lies in the principle of *res judicata*,⁵ and the phrase *res judicata* is used interchangeably with that of the law of the case.⁶ The rule, however, though similar, is distinct from *res judicata* and *stare decisis*.⁷ It differs from *res judicata* in that the conclusiveness of the first judgment is not dependent upon its finality,⁸ and it merely ex-

¹ *Hendricks, Adm'r v. Monongahela West Penn Public Service Co.*, 111 W. Va. 576, 163 S. E. 411 (1932).

² 175 S. E. 441 (W. Va. 1934).

³ *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684 (1917).

⁴ *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644 (1900).

⁵ *Johnson v. Gould*, 62 W. Va. 599, 59 S. E. 611 (1907); *of. Worrall v. Munn*, 53 N. Y. (8 Sickels) 185 (1873) (basing rule on *stare decisis*).

⁶ *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009 (1910).

⁷ *Steinman v. Clinchfield Coal Corp.*, *supra* n. 3.

⁸ *Ibid.*

presses the practice of courts generally to refuse to reopen what has been decided, and is not a limit to their power.⁹ *Stare decisis* requires precedents to be followed after considering them, but the law of the case dispenses with the necessity for reconsideration in the further course of a litigation.¹⁰

The law of the case can be invoked only on questions actually considered and determined on the first appeal,¹¹ except that questions necessarily involved on the first appeal will not be considered again on the second appeal, although the opinion does not pass on them.¹² In West Virginia, however, a decision cannot be made to operate as the law of the case by mere uncertain argument or inference.¹³

The law of the case governs the decision on the second appeal or writ of error, even though the former decision was erroneous.¹⁴ This rule is not inflexible, however, and, following the modern trend of authority,¹⁵ the West Virginia court has held that where the position of the parties has not changed, and their rights have not been affected by reliance on the erroneous ruling, and it is necessary to reverse the case for other errors, the appellate court may correct its previous ruling.¹⁶ If the opinion on the prior appeal is ambiguous or conflicting, it will not conclude any question on the second appeal,¹⁷ since it is desirable that the basis of a reversal be made clear for the guidance of the trial court. In the instant case, the difficulty of determining what had previously been decided was great enough to split the appellate court, three to two. Thus, we may conclude, the decision on the first writ of error lacked the precision and certainty necessary to guide the circuit judge on a new trial.

—HERSCHEL H. ROSE, JR.

⁹ *Messenger v. Anderson*, 225 U. S. 436, 32 S. Ct. 739 (1912).

¹⁰ *Lummas, The "Law of the Case" in Massachusetts* (1929) 9 B. U. L. Rev. 225.

¹¹ *Henry v. Davis*, 13 W. Va. 230 (1878).

¹² *Ibid*; *Rowan v. Chenoweth*, 55 W. Va. 325, 47 S. E. 80 (1904); *Steinman v. Clinchfield Coal Corp.*, *supra* n. 3.

¹³ *Windon v. Stewart*, 48 W. Va. 488, 37 S. E. 603 (1900); *Rowan v. Chenoweth*, *supra* n. 12. Neither are *dicta* construed as the law of the case, except where a party has insisted on a discussion on a particular question. Note (1895) 34 L. R. A. 321.

¹⁴ *Griffin v. Boom and Lumber Co.*, 55 W. Va. 604, 48 S. E. 442 (1904).

¹⁵ Note (1919) 1 A. L. R. 1267.

¹⁶ *Pennington v. Gillaspie*, *supra* n. 6; *Wiggins v. Marsh Lumber Co.*, 79 W. Va. 651, 91 S. E. 532 (1917); *State v. Vineyard*, 85 W. Va. 293, 101 S. E. 440 (1919); *Culp, Adm'x v. The Virginian Railway Co.*, 80 W. Va. 98, 92 S. E. 236 (1917).

¹⁷ *Laidley v. Kline's Adm'r*, 23 W. Va. 565 (1884); *Beecher v. Foster*, 66 W. Va. 453, 66 S. E. 643 (1909).