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COMMENTS

THE LAW OF THE CASE DOCTRINE

WILLIAM S. STINETTE

The recent Washington case of *Gaffney v. Scott Publishing Co.*,¹ was the second appeal in an action for libel. In the course of the opinion rendered on the first appeal,² the Court determined that the publication in question was libelous per se and, in effect, stated that truth is the only defense to an action based on such a publication. At the second trial, the defendants attempted to rely on the usually accepted defense of privilege,³ but that defense was stricken by the trial court. On the second appeal, the defendants alleged this ruling to be error. The appellate court affirmed the judgment of the trial court holding that the decision on the first appeal had established the law of the case. In the course of the opinion, the court considered that some of the law of libel as established in its previous decisions might be open to question, but concluded that the law of the case doctrine prevented it from then undertaking any such reconsideration.

A rule of law which requires a court to perpetuate its previous errors appears to be one which would bear examination. Such a rule is the doctrine of the law of the case. The doctrine is very similar in purpose to that of *res judicata*. Both are doctrines of repose, expressions of a policy of the law that the litigation of a controversy should terminate when the parties have had their day in court. Very generally, the doctrine of *res judicata* is designed to prevent further litigation of a cause of action which has terminated and merged into a final judgement. The law of the case doctrine is designed to produce the same result within litigation not yet carried to a final judgement. It precludes further consideration of certain questions which have been prosecuted to what might be termed a final judgement, either because the remedies provided for review of the decision of those questions have been exhausted or because those remedies have not been pursued and have ceased to be available.

The doctrine of the law of the case does not appear to involve legal

¹ *Gaffney v. Scott Publishing Co.*, 141 Wash. Dec. 181, 248 P. 2d 390 (1952).

² *Gaffney v. Scott Publishing Co.*, 35 Wn. 2d 272, 212 P. 2d 817 (1949).

³ PROSSER, *TORTS*, p. 841 (1941).

principles of any great difficulty. The confusion which seems to exist is probably the result of a general lack of familiarity with it. This area of the law has received only slight attention from legal writers and is one which has been treated in an extremely casual manner by the courts. In a number of Washington cases, the court has applied the law of the case doctrine to questions involved in earlier proceedings in the same case entirely without citation of authority. Particularly in the less frequented areas of the doctrine's application, there appear to have been conflicting lines of decision running concurrently.⁴ Injecting still further confusion into the situation, the doctrine has been treated as if it were two separate rules. The decision of an appellate court on the first appeal, as in the *Gaffney* case, is said to establish the law of the case for subsequent trials and appeals of the same case. The other situation, and probably a more familiar application of the doctrine, is the rule that the instructions of a trial court establish the law of the case on an appeal from the judgment of the trial court when exception is not taken to those instructions.⁵ Commentators and legal encyclopedias have treated each application of the doctrine as though it were a separate rule. For example: "The doctrine of the law of the case applies only to rulings by an appellate court and does not apply to rulings by the trial court."⁶ Both applications appear to be expressions of the single principle that the ruling or decision of *any* court is final and will not be reconsidered in any subsequent proceeding in the same case unless review of that decision or ruling is sought by means of the appropriate procedure. In the case of a trial court, it is obvious that review is usually available, but the principle is no less applicable to a court of last resort since a means of review is still available, a petition for rehearing addressed to the court itself.⁷ The separate treatment of the two applications of the doctrine has, however, resulted in the growth of rules with respect to one application which do not necessarily apply to the other. For that reason, this discussion will be confined to questions involved in

⁴ *Manson v. Foltz*, 170 Wash. 652, 17 P. 2d 616 (1932) (holding the doctrine to apply to questions which could have been presented on the first appeal); *Hamilton v. Caldwell*, 195 Wash. 683, 81 P. 2d 815 (1938) (holding the doctrine to be restricted to questions presented and decided on the first appeal); *Buob v. Feenaughty Machinery Co.*, 4 Wn. 2d 276, 103 P. 2d 325 (1940) (holding the doctrine to apply to questions which could have been presented on the first appeal); *Columbia Steel Co. v. State*, 34 Wn. 2d 700, 209 P. 2d 482 (1949) (holding the doctrine to be restricted to questions presented and decided on the first appeal).

⁵ *Peters v. Dulien Steel Products Inc.*, 39 Wn. 2d 889, 239 P. 2d 1055 (1952).

⁶ 5 C.J.S. 1821, citing *Lawrence v. Ballou*, 37 Cal. 518 (1869).

⁷ *Miller v. Lake Irrigation Co.*, 33 Wash. 132, 74 Pac. 61 (1903).

a first appeal which are considered to establish the law of the case in the trial court on remand and in the appellate court itself on a subsequent appeal.

The problems with respect to that phase of the doctrine group themselves into two general areas. First, it must be determined whether or not a particular question involved in the first appeal falls within the application of the doctrine and establishes the law of the case for subsequent proceedings. Second, it must be determined what effect those questions, as the law of the case, will have on a subsequent trial or appeal of the case. It is proposed to consider these two problems in that order, and primarily as they have been treated in the Washington decisions.

THE FIRST APPEAL

The doctrine of the law of the case is most commonly applied to prevent reconsideration of questions of law⁸ which have, on the first appeal, been presented, decided, and were necessary to the disposition of that appeal.⁹ The limitation of the doctrine to questions of law is not a limitation inherent in the doctrine but is a reflection of the usual rule that appellate courts do not determine questions of fact. In applying the doctrine to this most obvious area, however, the courts tend to make sweeping general statements by way of dictum as to the applicability of the doctrine to other classes of questions. These statements indicate that the doctrine may also apply: (a) to questions necessarily involved in the decision on the first appeal, though neither urged upon the court nor discussed in the court's opinion; (b) to questions not necessary to the disposition of the case on the first appeal but urged upon the court and decided by it; (c) to questions urged upon the court but not decided by it; (d) and to questions neither urged upon the court nor decided by it but which could properly have been presented on the first appeal.

Questions necessarily involved in the determination of the case on the first appeal, though neither urged upon the court for decision nor discussed in the court's opinion, appear to call for the application of the doctrine as strongly as questions both urged upon the court and actually decided.¹⁰ As examples of this application, the power of a

⁸ *Sloan v. West*, 63 Wash. 623, 116 Pac. 272 (1911).

⁹ *Buob v. Feenaughty Machinery Co.*, 4 Wn. 2d 276, 103 P. 2d 325 (1940), and cases therein cited.

¹⁰ *Swick v. School District of Borough of Tarentum*, 344 Pa. 197, 25 A. 2d 314 (1942); *Elson v. Pridgen*, 241 Ala. 233, 2 So. 2d 110 (1941); *Coats v. General Motors Corp.*, 11 Cal. 2d 601, 81 P. 2d 906 (1938).

special administratrix to file the claim necessary to perfect a cause of action against a city was held to have been necessarily involved in the determination of the previous appeal with the result that the filing of the claim could not be questioned on the second appeal.¹¹ The same result was reached with respect to the commencement of an action on a policy of insurance within the time limited by the policy.¹² The question of the jurisdiction of the court, although it is always necessarily involved, is not always treated in the same manner. A number of cases have held that the question of jurisdiction is not foreclosed by the first appeal where it was not there urged and considered.¹³ In a Washington case, the court not only took that position but cast some doubt on whether it could be considered the law of the case that the court had jurisdiction even where that question was raised and decided on the previous appeal. In *Elsom v. Tefft*,¹⁴ the court said: "No doubt a court of final resort has the power, and no doubt it is its duty, to ignore or refuse to recognize a judgement which it has pronounced without having jurisdiction of the parties to the cause and the subject matter which it determines, . . ." That appears to be the proper result in light of RCW 4.32.190.¹⁵ There is, however, authority holding that the question of jurisdiction is to be treated no differently than other types of questions which were necessarily involved on the first appeal, a position to which the Washington court has more recently adhered.¹⁶ These two positions are not necessarily in conflict. It is conceivable that while the doctrine may never preclude questioning whether the power conferred upon the court enables it to hear and determine the case before it, it may be applicable to questions of jurisdictional fact, that is, the facts of the particular case which constitute the basis for the court's jurisdiction.

Questions considered on the first appeal are usually regarded as not establishing the law of the case where the conclusion reached was clearly dictum.¹⁷ There is some authority, however, to the effect that

¹¹ *Morehouse v. City of Everett*, 141 Wash. 399, 252 Pac. 157 (1926).

¹² *Moore v. National Accident Society*, 49 Wash. 312, 95 Pac. 286 (1908).

¹³ *City of Stuart v. Green*, 91 F. 2d 603 (C.A. 5th 1937); *Western Smelting and Refining Co. v. Benj. Harris & Co.*, 302 Ill. App. 535, 24 N.E. 2d 255 (1939).

¹⁴ *Elsom v. Tefft*, 148 Wash. 195, 268 Pac. 177 (1928).

¹⁵ RCW 4.32.190 [RRS § 263] ". . . excepting always the objection that the court has no jurisdiction, . . . which objection can be made at any stage of the proceedings, either in the superior or supreme court."

¹⁶ *Davis v. Davis*, 16 Wn. 2d 607, 134 P. 2d 467 (1943); *Security Trust & Savings Bank v. Southern Pacific Ry. Co.*, 19 Cal. App. 2d 420, 65 P. 2d 818 (1937); *Lincoln Joint Stock Land Bank v. Brown*, 224 Iowa 1256, 278 N.W. 294 (1938).

¹⁷ *In re Norton's Estate*, 177 Or. 342, 162 P. 2d 379 (1945); *Spencer v. Nelson*, 108 Cal. App. 217, 238 P. 2d 169 (1951); *Morrison v. Dominion National Bank*, 172 Va. 293, 1 S.E. 2d 292 (1939).

even though the decision of a particular question was not necessary to the disposition of the case on the first appeal, that decision will establish the law of the case where the question was urged upon the court for decision.¹⁸ The author has been unable to discover any instance in which the Washington court has dealt with or discussed this application of the doctrine.

There is some authority indicating that questions urged upon the court on the first appeal but neither decided in the opinion nor necessarily involved in the actual determination are presumed to have been decided adversely; hence such questions establish the law of the case and may not be reconsidered.¹⁹ The doctrine has been applied to this class of questions only infrequently, and it is probably open to question whether, in light of the modern trends in the application of the doctrine, it would still be so applied. More recently the Washington court has limited the doctrine to questions actually presented and decided on the first appeal or necessarily involved in the disposition of that appeal.²⁰

That position taken by the Washington court would, if adhered to, also eliminate from the application of the doctrine the remaining area in which it has been applied. It has been held that questions which would have been determined on the first appeal, had they been presented, may not be considered on a subsequent appeal.²¹ This is the most nebulous basis for the application of the doctrine. It can readily be determined whether a particular question was raised on the first appeal and there is no great obstacle in determining whether the court had to decide a particular question in order to reach the result of the first appeal, but it is far from certain whether or not the court would have considered a particular question had it been urged. It should be noticed that questions neither urged nor considered but which were necessarily decided are considered apart from this class of questions. If it is to be assumed that the court would, were they presented, decide only questions necessary to the disposition of the appeal, then the two classes of questions are coextensive. The Washington court has, however, given reason to believe that this is not so. There is a

¹⁸ *Sutherland v. Friedenbloom* (Tex. Civ. App.), 200 S.W. 1099 (1918).

¹⁹ *Manson v. Foltz*, 170 Wash. 652, 17 P. 2d 616 (1932); *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100 (1888).

²⁰ *Columbia Steel Co. v. State*, 34 Wn. 2d 700, 209 P. 2d 482 (1949).

²¹ *Lustenberger v. Boston Casualty Co.*, 300 Mass. 130, 14 N.E. 2d 148, 115 A.L.R. 1055 (1938); *Meyers v. Meyers*, 214 Ark. 273, 216 S.W. 2d 54 (1948); *E. F. Pritchard Co. v. Heidelberg Brewing Co.*, 314 Ky. 100, 234 S.W. 2d 486 (1950); *Lonnecker v. Borris*, 295 Mo. 453, 245 S.W. 2d 53 (1951).

line of cases, as indicated above, which limit the doctrine to questions actually presented and decided and questions necessarily involved. There is another line of cases which indicate that the doctrine also applies to questions which would have been determined on the first appeal had they been presented.²² If this is an indication that the court regards the two classes of questions as separate, then the results of applying the doctrine to questions which would have been determined had they been presented would be unfortunate. Since the conclusion reached as to such questions would then be dictum on the first appeal, there would be no objective basis for determining whether or not a particular question would fall within that class. It is submitted that the doctrine cannot properly be applied to questions which would have been determined had they been presented since this application of the doctrine is either a restatement of the rule that questions necessarily involved may not be reconsidered or it precludes reconsideration of questions which do not provide a basis for that result.

EFFECT OF THE DOCTRINE IN SUBSEQUENT PROCEEDINGS

Once it has been decided that a particular question falls within the application of the law of the case doctrine, it is the general rule that it will not be reconsidered in subsequent proceedings. An unfortunate choice of language in a few of the cases conveys the impression that the doctrine does not come into operation until the second appeal is taken, and then only if the evidence introduced at the second trial is substantially the same as that introduced at the first trial.²³ The doctrine does, however, apply to the trial court as well as to the appellate court itself.²⁴ The law of the case, as established on the first appeal, is binding upon the trial court. In one Washington case, the trial court on remand of the case exceeded the directions of the appellate court in entering the judgment. The judgment was held to be void to the extent that the trial court had exceeded the directions of the appellate court.²⁵ More recently, however, the Washington court

²² *Bradley v. S. L. Savidge, Inc.*, 21 Wn. 2d 556, 152 P. 2d 149 (1944); *Buob v. Feenaughty Machinery Co.*, 4 Wn. 2d 276, 103 P. 2d 325 (1940); *Manson v. Foltz*, 170 Wash. 652, 17 P. 2d 616 (1932).

²³ *Cook v. Stimson Mill Co.*, 41 Wash. 314, 83 Pac. 419 (1906); *Weyerhaeuser Sales Co. v. State Tax Comm.*, 34 Wn. 2d 927, 209 P. 2d 490 (1949).

²⁴ *Bunn v. Bates*, 36 Wn. 2d 100, 216 P. 2d 741 (1950).

²⁵ *State ex rel. Waterman v. Superior Court*, 127 Wash. 37, 220 Pac. 5 (1923).

²⁶ *State ex rel. McBee v. Superior Court*, 162 Wash. 695, 299 Pac. 383 (1931); *Golubic v. Rasnich*, 249 Ky. 266, 60 S.W. 2d 616 (1933); *Taylor v. Bunnell*, 211 Cal. 601, 296 Pac. 288 (1931); *Palazzolo v. Sackett*, 254 Mich. 289, 236 N.W. 786 (1931); *Hagist v. Vogt* (Tex. Civ. App.), 296 S.W. 985 (1927).

has adopted what appears to be the usual view that, although reversible error is thereby committed, the failure of the trial court to follow the decision of the appellate court does not render the judgment void or invalid. The appropriate remedy is another appeal and reversal.²⁶

In the appellate court itself, questions within the doctrine will usually not be reconsidered on a subsequent appeal. There are, however, three general exceptions to this rule: (1) A substantial change in the facts at the second trial which renders a decision reached on the first appeal no longer applicable will remove that decision from the doctrine.²⁷ However, a change in the evidence which is merely cumulative will not free the case from the doctrine.²⁸ (2) If new parties are involved, the decisions reached on the first appeal may not be the law of the case as to them. The doctrine applies only to parties involved in the first appeal and their privies.²⁹ (3) The third exception to the doctrine arises where, between the first and second appeals, another case has been decided in which the decision rendered on the first appeal has been overruled. This situation was considered by the Washington court in the case of *Shell Oil Co. v. Henry*.³⁰ In the intervening period between the two appeals, a similar case³¹ involving the same questions was decided by the court contrary to the decision rendered on the first appeal.³² In the second *Henry* case, the court refused to apply its earlier decision as the law of the case, holding, ". . . if our former decision in this case . . . is the law of the case, then that law has been overruled by the *Robinson* case." The result in the *Henry* case was reached without any review of authority and leads to an anomolous situation when compared with the rules which the court, as in the *Gaffney* case, has otherwise applied to erroneous decisions. This decision indicates that the Washington court applies the doctrine of the law of the case even to situations where the court is convinced that its previous decision was wrong. There seems to be no rational basis for the application of the doctrine to previous decisions which are clearly erroneous except in the situation where the purely fortuitous occurrence of an intervening appeal in a separate case has enabled the court to overrule its previous decision.

²⁷ *Schofield v. Northern Pacific Ry. Co.*, 13 Wn. 2d 18, 123 P. 2d 755 (1942).

²⁸ *Kansas ex rel. Beck v. Occidental Life Ins. Co.*, 95 F. 2d 935 (C.A. 10th 1938).

²⁹ *Kansas ex rel. Beck v. Occidental Life Ins. Co.*, supra, *In re Carother's Estate*, 168 Cal. 691, 144 Pac. 957 (1914).

³⁰ *Shell Oil Co. v. Henry*, 175 Wash. 298, 27 P. 2d 582 (1933).

³¹ *Robinson v. Shell Oil Co.*, 172 Wash. 611, 21 P. 2d 246 (1933).

³² *Shell Oil Co. v. Henry*, 169 Wash. 438, 14 P. 2d 32 (1932).

CONCLUSION

The more recent Washington cases indicate that the doctrine of the law of the case is as much a hard and fast rule modernly as it was in the days of the earliest decisions of the court. It would be difficult to find a more extreme application of the doctrine than that in the *Gaffney* case. Some courts, however, have indicated a more liberal attitude toward making exceptions to the doctrine where the circumstances of a particular case make that result desirable. The Supreme Court of the United States, in comparing the doctrine of the law of the case to that of *res judicata* has stated, "And although the latter [*res judicata*] is a uniform rule, the 'law of the case' is only a discretionary rule of practice."³³ Earlier decisions of that court considered the doctrine as a binding rule from which even the court itself could not escape.³⁴ Recent decisions of several state courts have adopted the same approach to the application of the doctrine.³⁵ In Alabama, the law of the case doctrine has been abrogated by statute,³⁶ seemingly without entangling the Alabama court in a mass of prolonged litigation.

Of course rules of procedure are necessary if an appellate court is to operate efficiently; and it appears that a rule of procedure is quite justifiable as long as it enables the court more efficiently to perform its function of properly adjudicating disputes between litigants. So much of the law of the case doctrine as finally puts at rest questions which the court is convinced that it decided correctly on a previous appeal seems to be a justifiable and desirable rule of procedure, but it is submitted that the doctrine as it is applied in *Gaffney v. Scott Publishing Co.* is not justifiable as a procedural aid to proper adjudication but is rather an instance of procedure for procedure's sake. The law of the case doctrine should be abandoned where its application is to force the court to perpetuate previous error. As long as the court continues to regard the doctrine as a binding rule from which there is no escape, that result cannot be avoided. It is submitted that the more

³³ *United States v. United States Smelting, Refining, and Mining Co.*, 339 U.S. 186 (1950).

³⁴ *Peace v. Germania Ins. Co.*, 97 U.S. 362 (1877).

³⁵ *In re Reamer*, 331 Pa. 117, 200 Atl. 35, 119 A.L.R. 589 (1938) ("rule of the law of the case is one largely of convenience and public policy . . . it must be accommodating to the needs of justice . . ."); *State ex rel. Weede v. Bechtel*, 239 Ia. 1298, 31 N.W. 2d 853, 8 A.L.R. 2d 1162 (1948) ("the doctrine of 'law of the case' is not invariably applied . . . and should not be utilized to accomplish an obvious injustice"); *Maxie v. Gulf, M. & O. Ry. Co.*, 258 Mo. 1100, 219 S.W. 2d 322, 10 A.L.R. 2d 1273 (1949) ("[the doctrine is] not to be applied where manifest injustice to the parties would result").

³⁶ Alabama Code 1940, Title 13 § 28.

modern approach announced by the United States Supreme Court, considering the doctrine as only "a discretionary rule of practice," should be adopted by the Supreme Court of Washington.

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