Chapter 19: Civil Procedure and Practice

Wendell F. Grimes
§19.1. Law of the case: General. The rule of the law of the case is regarded as lying between res judicata and stare decisis. Law of the case is defined as judicial discretion not to re-examine a point decided at an earlier stage of the same case. On the appellate level the Supreme Judicial Court will usually exercise its discretion not to re-examine questions decided in an earlier appeal in the same case. However, if application of the doctrine would lead to injustice, the Court has the power to re-examine, and will do so.

Similarly, at the trial level there is power on the part of a judge to review, modify, or vacate an earlier order made in the same case by himself or by another judge, until final judgment or decree. But though there is power so to do there is no duty. Thus a point not timely and properly saved cannot be revived by bringing it forward once more, demanding another ruling, and claiming exceptions from the later ruling. The judge may refuse to reconsider the matter. Usually by a doctrine of conformity or judicial comity one judge will not re-examine the orders and rulings made earlier in the same case by another judge. Whether he wishes to rely on the earlier order as "law of the case" or reopen the point is a matter for his discretion, exercisable to the end that a just result be reached.

WENDELL F. GRIMES is Professor of Law at Boston College Law School. He is a member of the Massachusetts and Federal Bars.

5 306 Mass. at 599, 29 N.E.2d at 143.
§19.2. Law of the case: Discretion of judge. During the 1961 Survey year two cases were decided that involved the question of reexamination of a point previously decided. In *Shine v. Campanella & Cardi Construction Co.*,¹ an action of tort was referred to an auditor whose findings of fact were not to be final. After an auditor’s finding for the defendant, the plaintiff’s motion to strike portions of the auditor’s report was allowed by a judge of the Superior Court, to which the defendant excepted. Later trial of the case before a different judge and jury resulted in verdicts for the plaintiff. The defendant’s only exception concerned the ruling on the motion to strike. The defendant contended that “the action of the first judge was in effect a ruling on the admissibility of evidence to be offered at a later trial before a different judge, without knowing what the evidence would be at the later trial.”² The Supreme Judicial Court, in rejecting the defendant’s contention, refused to accept the argument that the first judge deprived the second judge of inherent power to use discretion and that the first judge improperly restricted the jury trial.

The record does not show what occurred at that trial with reference to the auditor’s report; whether, for example, the defendants asked for any additional ruling in that respect. The second judge could have relied upon the ruling of the first judge as the law of the case [citations omitted]. On the other hand, he would not have been obliged to apply the rule of the law of the case. *Gleason v. Hardware Mut. Cas. Co.*, 331 Mass. 703, 709-710. His was the power to act to the end that a just result be reached. *Falzone v. Burgoyne*, 317 Mass. 493, 498, and cases cited. In his discretion, he could have revised the earlier ruling in any way which seemed proper to him.³

§19.3. Law of the case: Establishment. The second case involving law of the case was *Poland v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority.*¹ The plaintiff sued for the fair value of legal services rendered to the defendant. The defendant’s answer set up res judicata. The case was sent to an auditor, who made alternative findings on whether a prior recovery by the plaintiff from the defendant constituted res judicata. Thereafter each party filed an insistence on trial by jury. Motions for judgment filed by each party were heard together, the issue precipitated by the motions being whether the defendant’s defense of res judicata was valid. The judge who heard the motions ruled that the plaintiff’s prior recovery did not bar his action for fair value of his services. The defendant took no exceptions.

   ² 342 Mass. at 152, 172 N.E.2d at 694.

§19.4

CIVIL PROCEDURE AND PRACTICE

Thereafter, at the outset of the jury trial before another judge, rulings were made expunging from the auditor's report the alternative findings on res judicata and precluding the submission of any evidence on the issue of res judicata. To these rulings the defendant excepted. The Supreme Judicial Court ruled that exceptions taken at the jury trial to the rulings did not preserve the point since no timely exceptions were taken to the first ruling on the motions for judgment; thus the earlier ruling became the law of the case simply because timely exceptions were not taken. Therefore, the judge at the jury trial committed no error when in his discretion he elected not to disregard the prior ruling on res judicata. That he had power to disregard or modify the prior ruling is clear; his failure to exercise the power as a matter of his discretion constitutes no error. Were the judge to exercise his discretion and modify or vacate a prior ruling, exceptions to such order modifying or vacating the prior ruling would be necessary to preserve the point for appeal.

§19.4. Law of the case: Conclusions. These two cases serve a good purpose in pointing out the existence of a power in a second judge to review a prior ruling in the same case by a different judge. Exercise of the power is a matter of discretion to the end that justice and a fair result be accomplished. Too often have instances been encountered in which a prior ruling has been regarded as irrevocably frozen. In a trial court comprising many judges, in which more than one judge may make rulings before the end of a single case, the Supreme Judicial Court is performing a very useful supervisory function in reminding the trial bench of this inherent power in each member.