

FORT SMITH v. McLEAN.

4-3025

Opinion delivered May 22, 1933.

APPEAL AND ERROR—FORMER DECISION AS LAW OF CASE.—The decision of this court on a prior appeal holding that the evidence presented a question for the jury was the law of the case on a second trial where the evidence was virtually the same.

Appeal from Sebastian Circuit Court, Ft. Smith District; *J. Sam Wood*, Judge; reversed.

George W. Dodd, for appellant.

Cravens & Cravens, for appellee.

KIRBY, J. This is the second appeal of this case, a sufficient statement of which appears in the former opinion in *McLean v. Fort Smith*, 185 Ark. 582, 48 S. W. (2d) 228.

The court directed a verdict in said cause, from which the appeal was taken, and this court reversed and remanded with directions for a new trial on April 11, 1932.

The facts developed upon this trial are virtually the same as were shown upon the first trial, and were in sharp conflict as to whether the building was a nuisance, and because that question was not submitted to the jury the cause was reversed.

Upon this trial upon virtually the same conflicting evidence, the court refused to submit the question to the jury of whether the building constituted a nuisance in fact or at common law which could be abated by the

city, submitting only the question of damages for its destruction to the jury—in effect directing a verdict upon the very question for which the cause was remanded in the first appeal for determination by the jury—and, of course, erred in doing so, the former decision being the law of the case. *McLean v. Ft. Smith, supra*. See also *Murphy v. Cupp*, 182 Ark. 334, 31 S. W. (2d) 396.

The court erred in refusing to leave to the determination of the jury the question of whether the building constituted in fact a nuisance that the city could abate, the ordinance giving it no such right unless the building was in fact a nuisance.

For this error, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.
