LEWIS *v.* JONES.

Opinion delivered January 2, 1911.

APPEAL AND ERROR—FORMER OPINION AS LAW OF CASE.—When the testimony in a case upon a second appeal is the same as upon the former appeal, the law declared upon the former appeal is the law of the case.

Appeal from Polk Circuit Court; *James S. Steel,* Judge; affirmed.

Pole McPhetrige and *J. I. Alley,* for appellant.

Wright Prickett and *Elmer J. Lundy,* for appellee.

The facts developed in evidence on the second trial are substantially the same as on the first trial. The law as declared

by this court on first appeal is the law of the case now. 89 Ark. 368; 92 Ark. 350; *Id.* 554, 558.

WOOD, J. This is the second appeal in this case. When the case was here before, this court reversed the judgment and remanded the cause for new trial for error of the court in giving a peremptory instruction in favor of the plaintiff. On the second trial plaintiff again asked a peremptory instruction, which the court refused. Appellant here, who was appellee on the first appeal, contends that the ruling of the court in refusing the peremptory instruction was error.

The issues and facts on the first appeal are stated in the opinion to be found in 89 Ark 368 *(Jones* v. *Lewis)*. The issues are precisely the same, and the facts are substantially the same on this appeal as they were on the first. There was not any material change in the second trial from the testimony and the facts established in the first trial. At least, there was no such substantial change as to call for the application of a different rule of law. The facts being substantially the same, the law declared on the former appeal by this court was the law for the guidance of the trial court on the second trial. That court did not err in conforming its ruling on the second trial to the decision of this court on the former appeal. What we then declared being the law of the case on the second trial, we could not change it on this appeal, so as to affect the judgment herein, even if we were now convinced that the decision on the first appeal was erroneous. *St. Louis, I. M. & S. Ry. Co.* v. *Read*, 92 Ark. 350; *St. Louis, I. M. & S. Ry Co.* v. *York*, 92 Ark. 554, citing numerous Arkansas cases. But we are still of the opinion, after a careful consideration of the facts in the present record, that a peremptory instruction in favor of the plaintiff (appellant) should not have been given. It was a question for the jury as to what was the intention of the parties to the contract. See, in addition to the cases cited in former opinion, *Chilton* v. *Halstead* (Mo.), 130 S. W. Rep. 60.

Affirmed.