December 1934

Appel and Error–Law of the Case–Second Appeal

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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. 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.

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. 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. The approach of the West Virginia decisions apparently has been that the binding force of the rule lies in the principle of res judicata, and the phrase res judicata is used interchangeably with that of the law of the case. The rule, however, though similar, is distinct from res judicata and stare decisis. It differs from res judicata in that the conclusiveness of the first judgment is not dependent upon its finality, and it merely ex-

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).
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 ques-
tions 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 in-
ference.\(^13\)

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 neces-
sary 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.

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\(^12\) *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, 43 W. Va. 488, 37 S. E. 603 (1900); Rowan v. Chen-
oweth, *supra* n. 12. Neither are *dicta* construed as the law of the case, ex-
cept where a party has insisted on a discussion on a particular question. Note (1885) 34 L. R. A. 321.
\(^15\) Note (1919) 1 A. L. R. 1267.
\(^16\) Pennington v. Gillaspie, *supra* n. 6; Wiggins v. Marsh Lumber Co., 79
W. Va. 661, 91 S. E. 532 (1917); State v. Vineyard, 85 W. Va. 235, 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