

the conductor in giving the order was not reasonable and proper; (7) that the plaintiff himself was not guilty of any negligence in attempting to get off the train when he did, or in the manner of his attempt; and (8) that the plaintiff's injury was attributable to the negligence of the conductor in not stopping the train.

The appeal was heard by MULLOCK, C.J.Ex.D., BRITTON and SUTHERLAND, JJ.

I. F. Hellmuth, K.C., and G. A. Walker, for the defendants.

L. F. Heyd, K.C., for the plaintiff.

MULLOCK, C.J. (after setting out the facts and part of the evidence and referring to the judgment of Osler, J.A., 13 O.W.R. at p. 881):—On the present appeal the defendants argued that, inasmuch as the evidence in support of the plaintiff's case at the second trial, with the exception of that of Egerton (who was not called as a witness at the second trial), was substantially the same as that adduced in the plaintiff's behalf at the former trial, this case is practically *res judicata*.

I do not feel myself, however, in a position to give effect to that argument. The cause of the accident, according to the finding of the jury at the first trial, was, "Conductor, because he had no right to put them off the train while moving," and one of Mr. Justice Osler's reasons for ordering a new trial was the uncertainty as to the meaning of that answer to the question, which is quite open to his observation that it is an "assertion of a proposition of law rather than a finding of fact."

I construe Mr. Justice Osler's judgment as being to the effect that the jury did not clearly find actionable negligence on the part of the defendants; and his observation that, but for Egerton's evidence, the case might have been properly withdrawn from the jury is, I think, obiter. . . .

[The Chief Justice then set out the questions put to the jury and their answers.]

There was evidence, I think, in support of these findings, which could not properly have been withdrawn from the jury. According to the evidence of the plaintiff and Sharpe (the plaintiff's companion, who was also "stealing a ride"), the conductor ordered the plaintiff off whilst the train was in motion, going at a speed of from 10 to 13 miles an hour; his order was imperative and accompanied by violent language and his walking towards the two men. It was for the jury to determine whether, from his language and demeanour, the conductor in-