

question of fact, to withdraw the evidence from the jury, and decide on it himself. . . . He might hold in a proper case that there is no evidence for the jury of contributory negligence, but the moment that the question arises as to whether the injury resulted from the negligence of the defendants or the plaintiff, or in other words, the moment it appears that the facts and the proper inferences from the facts are in dispute, it becomes a question for the jury.

Per Osler, J.A., at p. 153: "But as there was a jury, it was their province to decide the question, arising upon disputed facts, whether the defendants were guilty of negligence causing the accident, and the further question arising in the same way, whether the plaintiff was guilty of contributory negligence."

His Lordship, after referring to *Brown v. G. W. R.*, 1 Times L.R. 406 and 614, and *Wright v. Midland*, *Ib.* 406, 412, goes on to say: "As regards the Davey case, the Master of the Rolls in both the cases just cited, says, 'If it pleases anybody to hear it, I have doubted, ever since I gave that judgment whether my brother Baggallay and my brother Manisty were not more right than we were (i.e. himself and L. J. Bowen), I have doubted whether even in that case we ought to have taken it from the jury.'"

These cases contain the important principles affecting this branch of the law. The distinction drawn between the functions of judge and jury is in many instances exceedingly fine, and it is not surprising that a judge sitting at *nisi prius* with a long docket ahead, and often without opportunity or means of giving the question careful consideration, should occasionally find his opinion reversed by an appellate Court. However clearly the law may be stated, there must be an element of uncertainty in non-suiting the plaintiff. This is apparent when we consider the somewhat anomalous position in which these actions are placed as regards the respective functions of the judge and jury. The judge has power to non-suit on the ground that there is no evidence of negligence to go to the jury. To decide this, he must necessarily be the judge of what is negligence before he can give an opinion