accident by the use of due care, and does not, the plaintiff may recover. If the plaintiff alone can avoid it, and does not, he cannot recover. If both can avoid it, neither can recover. If neither can avoid it, the general rule applies, and the plaintiff cannot recover.

A few more questions remain to be considered. It has already been said that the principal objection to the rule in *Davies* v. *Mann* is, that it does away with the entire law of contributory negligence. *Davies* v. *Mann*, it is said, decides that the plaintiff can recover damages for an injury sustained by him if the defendant by the use of due care could avoid doing the injury. But a defendant is never liable for negligence except in the case where he could avoid doing the injury by the use of due care. Therefore negligence of a plaintiff is never a bar to his action. The answer is, that the rule of *Davies* v. *Mann* does not apply to every case of contributory negligence, but only to those cases where the defendant is on the ground and by the use of due care can avoid the injury. Outside of that limited class of cases the general rule, embraced in the first proposition of Lord Penzance, has full and unrestricted application.

It has been suggested that the rule in *Davies* v. *Mann* should be modified in the manner following: "Although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation*, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages."* In *Davies* v. *Mann* the defendant did not discover the peril before the accident, but he was held bound to use due care independent of the fact of discovery, so that the rule here suggested is a different rule from that in *Davies* v. *Mann*.† If the defendant had discovered the peril and had not used due care to avoid it, that fact would be strong evidence, and in some cases almost conclusive evidence, of wilfulness. And, as has been already stated, if the act of the defendant is wilful, negligence is out of the case. The discovery of a danger, under the rule in *Davies* v. *Mann*, is of no importance except in so far as it tends to prove wilfulness.

Finally, it is urged that the rule in *Davies* v. *Mann* should be discarded, and that there are two other well-established principles "which fix liability upon a defendant in every case where liability can properly be imposed."‡ Those principles are: (1) that remote negligence of the plaintiff is not in law contributory, and (2) that contributory negligence is no defence for a wilful wrong. But if the suggestions here offered are well founded, the rule in *Davies* v. *Mann* has a field of usefulness outside of either of those principles; and it rests upon sufficient grounds.

* 2 Thompson, Negligence, 1157, note 1.

† The rule requiring the defendant to use due care to avoid the consequences of discovered negligence prevails in several States. See *Isabel* v. *Hannibal & St. Joseph R. R.*, 60 Missouri, 475; *Morris* v. *Chicago, Burlington, & Quincy Ry.*, 45 Iowa, 29; *Woods* v. *Jones*, 34 La. Ann 1086.

‡ Sprague, Contributory Negligence and the Burden of Proof, p. 7 (in pamphlet).