cases, *Dowell* v. *Steam Navigation Co.*, *Davies* v. *Mann* was explained as a case where the negligence of the plaintiff was not contributory within the meaning of the law of contributory negligence. But in *Radley* v. *London & Northwestern Railway Co.*, Lord Penzance, in moving for judgment and stating the established law of contributory negligence, forever set aside that explanation of *Davies* v. *Mann*. His Lordship said:—

"The law in these cases of negligence is, as was said by the Court of Exchequer Chamber, perfectly well settled and beyond dispute. The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann*, supported in that of *Tuff* v. *Warman*, and other cases, and has been universally applied in cases of this character without question."*

This opinion was assented to by Lord Blackburn and Lord Gordon, and emphatically by Lord Cairns. In the recent case of *The Bernina*, Lord Esher† and Lord Justice Lindley‡ stated the law substantially in the same terms.

The case of *Davies* v. *Mann* being thus approved and established in England, and also in Ireland,‖ is generally stated to be law in the United States;§ but a very brief examination of cases will show that *Davies* v. *Mann*, although cited without criticism by our courts, is generally cited as an authority for the proposition that if the plaintiff is guilty of any negligence contributing directly, or as a proximate cause, to the injury complained of, he cannot recover. The further question, whether the defendant could by the use of due care avoid the consequences of the plaintiff's negligence, is ignored; and *Davies* v. *Mann* is explained as a case where the plaintiff was allowed to recover because his negligence was not contributory.¶

From American text-writers, on the other hand, the case of *Davies* v. *Mann*

* 1 App. Cas. 758-9; *Nicholls* v. *G. W. Ry. Co.*, 27 U.C.R., 382; *Rastrick* v. *G. W. Ry. Co.*, 27 U.C.R., 396; *Winckler* v. *G. W. Ry. Co.*, 18 U.C.C.P., 250; *Bradley* v. *Brown*, 32 U.C.R., 463; *Anderson* v. *Northern Ry. Co.*, 25 U.C.C.P., 301; *Beckett* v. *G. T. Ry. Co.*, 13 A.R., 174; *Ryan* v. *Canada Southern Ry. Co.*, 10 O.R., 745; *Casey* v. *C. P. Ry.*, 14 O.R., 574; *Blake* v. *C. P. R.*, 17 O.R., 177; *Atkinson* v. *G. T. Ry.*, 17 O.R., 220; *Hutchinson* v. *C. P. Ry.*, 17 O.R., 341; *Jones* v. *G. T. Ry.* 16 A.R., 37; *Crawford* v. *Upper*, 16 A.R., 440; *Weir* v. *C. P. Ry.*, 16 A.R., 100; *St. John* v. *Macdonald*, 15 S.C.R., 1.

† 12 P. D. 61, (5.) ‡ 12 P. D. 89, 3 (*b.*)

‖ *Scott* v. *Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377.

§ "We know of no court of last resort in which this rule is any longer disputed." Shearman and Redfield, Negligence, (4th ed.), § 99.

¶ *Marble* v. *Ross*, 124 Mass. 44, 48, per Morton, J.