

through negligence, and if, while in that state, he receives an injury through negligence of another, which he has no capacity to avoid, why may not the law say, upon grounds of policy, that his incapacity, being due to his own folly, shall be no excuse? Upon authority, however, it must be said that this case has been put several times by Judges, and always with the implication that the plaintiff could recover.* In *Nashville & Chattanooga Railway v. Smith*,† plaintiff's intestate was intoxicated and on the track of the defendant at the time of the accident, and the same was the fact in *O'Keefe v. Chicago, Rock Island & Pacific R.R.*,‡ and in *Button v. Hudson River R.R. Co.*|| But in each of those cases the result was made to depend upon general questions, the rule in *Davies v. Mann*, or the duty or capacity to avoid the accident after the peril is imminent, not being clearly presented or discussed.

5. It is obvious that the last two cases considered may also arise with reference to the defendant. Suppose that in *Davies v. Mann* the driver at the time of the accident had been asleep upon his wagon, or so drunk that he was incapable of using due care to avoid the donkey, the other facts remaining the same. The case where the driver is intoxicated has been put by way of illustration from the bench,§ with a strong implication that the plaintiff might recover. There can be little doubt that this is the result which would be reached by the court in a case like the one supposed. But it is submitted that the same rule should be applied to a plaintiff in the like situation; and that wherever one person, present at the place of the accident, is incapacitated, by a cause due to his own fault, from using due care to avoid the consequences of another's negligence, he should be held to the same standard of care as if the incapacity did not exist.

The results of these several cases, and of the discussion thus far, may be summarized thus:

The general rule of contributory negligence, founded largely, if not wholly, upon considerations of public policy, is this: that if a plaintiff has been guilty of any negligence which contributed proximately to the injury, he cannot recover. But it is the duty of both plaintiff and defendant to use due care to avoid the consequences of each other's negligence. If the defendant alone can avoid the

* "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury." Coleridge, J., in *Clayards v. Dethick*, 12 Q.B. 439, 445. So Blackburn, J., in *Radley v. London & North Western Ry. Co.*, L. R. 10 Ex. 100, 105; Ellsworth, J., in *Isbell v. New York & New Haven R. R.*, 27 Conn. 393, 404; *Ridley v. Lamb*, 10 U.C.R., 354; *McGunnigal v. G. T. Ry. Co.*, 33 U.C.R., 194.

† 6 Heisk. 174

‡ 32 Iowa, 467.

|| 18 N. Y. 248.

§ "If in *Davies v. Mann* the driver of the wagon, if in *Tuff v. Warman* the crew of the steamer, had become half an hour before the collision so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collision occurred, the defendant in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be exempt if they were so thoroughly drunk as to have lost muscular power, the defendants would be exempt from all responsibility, according to rule of instruction for the jury suggested by the thirteenth exception." *Scott v. Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377, 395, per Pigot, C. B.