3. Suppose that the plaintiff in *Davies* v. *Mann* was present by the roadside with the donkey, and that half an hour before the accident occurred he had fallen asleep, and was asleep at the time of the accident, the other facts remaining the same. What rule is to be applied? In *Davies* v. *Mann*, Baron Parke puts the case of negligently running over a man lying asleep in the highway, and implies that the injured man could recover. If so, it follows that the duty of the plaintiff to avoid the consequences of the defendant's negligence exists only when the plaintiff has full capacity, after the peril is imminent, to use due care.

4. Again, it may be supposed that the plaintiff in *Davies* v. *Mann* was present at the time of the accident, but so intoxicated that he was incapable of exercising care. What rule is to be applied? This case is like the last in this respect, that the plaintiff in point of fact has no capacity to avoid the accident, any more than if he was not upon the ground. But in this case the incapacity was due to a cause which the law ought to restrain. The general rule undoubtedly is, that if a man is injured while intoxicated, the intoxication alone is not a bar to his action.* But an intoxicated man is in constant danger of inflicting harm

North Western Ry. Co., presents a case similar, but not identical, with that presented above, by changing the facts in *Davies* v. *Mann*. The Radley case was an action for negligently pushing empty trucks against the plantiff's bridge, whereby it was thrown down, the plantiff or his servants not being at the time on the ground. The additional facts supposed were, that a servant of the plaintiff was on the bridge after it was in imminent peril, but stood by and failed to give the alarm; while the defendant's servants felt the resistance of the bridge soon after the plaintiff's servants saw it in danger, and instead of stopping the trucks to investigate, stupidly passed on. The learned author of the article referred to assumes that the plaintiff could still recover, and sums up the law in this general rule: "The result is, that the party *who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent*, is considered solely responsible for it; and this will be found, we believe, to be true in all such cases, whether the series be long or short." This rule apparently rests upon the theory that contributory negligence is wholly a question of proximate cause, and if the assumption is correct, it follows logically that the person guilty of the last negligence, whether it be an act or an omission, is alone responsible; for his negligence is the sole proximate cause. It also follows logically that wherever the plaintiff's negligence precedes that of the defendant, it is not *contributory* negligence; and that the rules of contributory negligence can apply only where the negligence of the plantiff, is concurrent and simultaneous with that of the defendant. But the cases of *Davies* v. *Mann* and *Radley* v. *London & North Western Ry. Co.* are cases of successive negligence, and are considered by the courts to be cases of contributory negligence also. This shows that the logical theory of proximate causation is not the basis, or at any rate, not the sole basis, of contributory negligence.

In the cases where both plaintiff and defendant have been guilty of negligence contributory to the accident, and both are present at the time of the accident, the true question is believed to be this: Could the accident, after the peril was imminent, be avoided by either party, by the use of due care? If it could, the one who fails to use due care to avoid cannot recover. It cannot be said as matter of law, when both parties are present, that it is negligence on either side not to avoid, or to take precautions to avoid, the consequences of the other's negligence. Thus in *Spaight* v. *Tedcastle*, 6 App. Cas. 217, both parties were present at the time of the accident, and the plaintiff recovered, but on the ground that he, or the pilot in charge of his vessel, was not guilty of any negligence when the peril was imminent. *Washington* v. *Baltimore & Ohio R. R Co.*, 17 W. Va. 190, which presents similar facts, and contains an elaborate review of authorities goes upon the same ground.

* 2 Thompson, Negligence, 1174.