THEORY OF CONTRIBUTORY NEGLIGENCE.

In actions for damages for injury caused by negligence, no defence is more frequent than that the defendant contributed to the accident which caused the injury. The law on this point is considered to be settled by Mr. Davies' donkey, "whose memory is embalmed in the delightful pages of 10 Meeson and Welsby" (Hagarty, C.J.O., in *Follet* v. *Toronto Street Railway Co.*, 15 A.R., p. 347). The decision in *Davies* v. *Mann*, and the limitation with which it must be taken, are discussed in a recent article in the *Harvard Law Review*, which we cite in full, adding some of the principal cases in our own courts:

The importance of the case of *Davies* v. *Mann** consists in this, that it led the way in introducing a principle, now firmly established in England, which was a distinct addition to the theory of contributory negligence. The general result of the cases before *Davies* v. *Mann*, none of them, however, being of commanding importance, except, perhaps, *Butterfield* v. *Forrester*,† is embraced in the proposition, that if the plaintiff was guilty of any negligence contributing to cause the injury complained of, he could not in any circumstances recover.

Davies v. *Mann* was decided in 1842. The facts, substantially as set forth in the reported case, are as follows: The plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, where at the time of the injury it was grazing, on the off side of a road about eight yards wide. The defendant's wagon, with a team of three horses, coming down a slight descent at what a witness termed "a smartish pace," ran against the ass and knocked it down, inflicting injuries from which it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses.

In addition to other instructions, the Judge of the trial directed the jury that, "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." The jury returned a verdict for the plaintiff, and the defendant moved for a new trial on the ground of misdirection.

During the argument in the Court of Exchequer, Parke, B., pointed out that it must be assumed that the ass was lawfully in the highway, as it was so alleged in the declaration, and that allegation was not denied by the defendant. The Court of Exchequer sustained the direction to the jury, and Baron Parke, in his opinion, which is more full than that of Lord Abinger, the other barons delivering no reported opinions, says:—

"This subject was fully considered by this court in the case of *Bridge* v. *The Grand Junction Railway Co.*, where, as it appears to me, the correct rule is laid down concerning negligence; namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence." "The Judge simply told the jury that the mere fact of negligence on

* 10 M. & W. 546.

† *Butterfield* v. *Forrester*, 11 East, 60 (1809.)