

general proposition of contributory negligence. The plaintiff's negligence contributes to his injury, and he cannot recover.

In the Pennsylvania case of *Stiles v. Geesey*,* the facts were similar to those here supposed, and the plaintiff failed in his action upon the general ground that he was guilty of contributory negligence. The relation of *Davies v. Mann* to the case was not considered.

2. Suppose the plaintiff in *Davies v. Mann* was himself actually present by the roadside at the time of the accident, and negligently allowed the donkey to remain in the way of the approaching team, the other facts remaining unchanged. In this case, by the use of due care, he could avoid the injury as well as the defendant. It is his duty so to do, and on these facts it is submitted he could not recover. It would be the grossest inequality and injustice to impose upon the defendant the duty of avoiding the consequences of the plaintiff's negligence where he can do so by the use of due care, unless a corresponding duty were imposed upon the plaintiff.

This result also follows as a matter of authority from *Butterfield v. Forrester*.† There, the plaintiff, while riding violently through the streets of Derby at night-fall, ran against an obstruction which had been placed across the highway by the defendant, and fell, with his horse. After a verdict for the defendant, Lord Ellenborough, in refusing a rule for a new trial, said: "One person being in fault will not dispense with another's using due care for himself. Two things must concur to support this action: an obstruction in the highway, and no want of ordinary care to avoid it on the part of the plaintiff."‡ In *Butterfield v. Forrester*, the defendant was not present at the time and place of the injury, and in that respect the case differs from the one here supposed; but *Butterfield v. Forrester* imposes upon the plaintiff the same duty of avoiding the consequences of the defendant's negligence, which in *Davies v. Mann* is imposed upon the defendant to avoid the consequences of the plaintiff's; and that duty, if it exists at all, must exist when the opposite party is present as well as when he is absent. *Butterfield v. Forrester* has been said to be irreconcilable with *Davies v. Mann*;|| but in answer to that criticism it may be observed that *Butterfield v. Forrester* was referred to with approval by Baron Parke in *Bridge v. Grand Junction Ry. Co.*, in a passage which he quotes and reaffirms in *Davies v. Mann*. Moreover, it is one of the oldest cases in the law of contributory negligence, having been decided in 1809, and has ever since been unquestioned law. So far from being in conflict with *Davies v. Mann*, it is the exact converse§ of *Davies v. Mann*; and the two cases are to be considered as illustrations of the working of the same great principle—the duty of one person to avoid the consequences of another's negligence—applied to different facts.¶

*71 Penn St. 439.

† 11 East, 60; *Castor v. Uxbridge*, 39 U.C.R., 113.

‡ 11 East, 61.

|| "The two rules, placed side by side, as some courts are in the habit of placing them, contradict each other and make nonsense." † Thompson, Negligence, 1155.

§ See *The Bernina*, 12 P. D. 58, 62, (8) per Lord Esher; and *id.* 89, 3, (a) per Lindley, L. J.

* An article reviewing Beach on Contributory Negligence, 2 Law Quarterly Review, 506, presumably from the pen of Sir Frederick Pollock, by adding certain facts in *Radley v. London &*