
Davies v. Mann, 10 M.&W. 545 (Ex., 1842)¹³

At the trial, before ERSKINE, J., it appeared that the plaintiff, having fettered the forefeet of an ass belonging to him, turned it into a public highway, and at the same time in question the ass was grazing on the off side of a road about eight yards wide, when

the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after The learned judge told 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 found their verdict for the plaintiff

Godson now moved for a new trial, on the ground of misdirection. [That is, the defendant's lawyer appealed the judgment on the ground that the judge in the trial court had incorrectly instructed the jury on the law to be applied to the facts in this case.] The act of the plaintiff in turning the donkey into the public highway was an illegal one, and, as the injury arose principally from that act, the plaintiff was not entitled to compensation for that injury which, but for his own unlawful act would never have occurred The principle of law, as deducible from the cases is, that where an accident is the result of faults on both sides neither party can maintain an action. Thus, in *Butterfield v. Forrester*, 11 East 60, it was held that one who is injured by an obstruction on a highway, against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

LORD ABINGER, C.B. [A]s the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. [T]he 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 [A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road

[New trial denied.]