duty to make the order he should have made. On the evidence which was given it appears clear that the husband, at any rate, had entirely repudiated the deed of separation by declining to be bound by it, and that the wife had also repudiated it by writing the letter of 1st June 1921 and by bringing this suit. Therefore we think that the proper thing to do is to say that the deed, having been repudiated by both parties, does not constitute a bar to a petition by the wife for restitution of conjugal rights.

For these reasons we think that the appeal should be allowed and a decree made for restitution of conjugal rights.

Appeal allowed. Decree for restitution of conjugal rights. Respondent to pay costs in Supreme Court and in High Court.

Solicitor for appellant, *W. J. Creagh.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SYMONS . . . . . APPELLANT;
PLAINTIFF,

AND

STACEY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

HOBART, *Feb.* 13, 14.

MELBOURNE, *Mar.* 24.

Knox C.J., Isaacs, Gavan Duffy and Starke JJ.

Negligence—Contributory negligence—Direction to jury.

A spring-dray in which the plaintiff was being driven by her husband came into collision with a motor-car driven by the defendant. At the trial of an action brought by the plaintiff to recover damages for injuries sustained by her through the alleged negligence of the defendant, the defence of contributory negligence was raised. The plaintiff's rights were treated by the Judge, without objection by either party, as being identical with those of her husband. The case put by the trial Judge to the jury was whether the

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plaintiff or the defendant was responsible for the collision. The jury found "that there had been negligence on both sides." The Judge then further directed the jury that, if both parties were negligent in equal degree, the verdict must be for the defendant; that, if the plaintiff were negligent in a material way, she should not recover damages, but that the jury could say whose negligence was the decisive cause of the trouble; and that all he (the Judge) could do was to instruct them to apportion the blame as best they could. The jury then found that "both parties were equally negligent." Judgment was thereupon entered for the defendant.

Held, that, assuming the plaintiff to be so identified with her husband as to be responsible for his conduct, the direction as to contributory negligence was insufficient since it failed to point out to the jury that if the defendant had been guilty of negligence the plaintiff was entitled to succeed unless by the exercise of the care and skill which her husband was bound to exercise he could have avoided the consequences of the defendant's negligence; and, therefore, that there should be a new trial.

Requisites of contributory negligence discussed.

Decision of the Supreme Court of Tasmania reversed.

APPEAL from the Supreme Court of Tasmania.

An action was brought in the Supreme Court by Beatrice Maud Symons against Edward Archibald Stacey in which the plaintiff, by her declaration, alleged that the defendant so negligently and unskilfully drove and managed a motor-car upon and along a public highway, namely, at the corner of Harrington and Davey Streets, Hobart, that the same collided with and was forced and driven against a horse and cart in which the plaintiff was then being driven along the same highway, whereby the plaintiff was permanently injured. The plaintiff claimed £500 damages. The defendant pleaded not guilty.

The action was tried before *Crisp* J. and a jury. It appeared that the plaintiff was in a spring-dray which was being driven by her husband along Harrington Street, and that the dray came into collision with a motor-car driven by the defendant along Davey Street. Contradictory evidence was given as to the circumstances in which the collision took place. Nothing was said at the trial as to whether the plaintiff was or was not responsible for her husband's acts, but the case was treated by the Judge, without objection by either party, as though the plaintiff's rights were identical with those of her husband.

The jury having found that "both parties were equally negligent," a verdict and judgment were entered for the defendant. The plaintiff thereupon moved before the Full Court for a new trial on the grounds (*inter alia*) (1) that the learned Judge was wrong in directing that the verdict or finding of the jury was a verdict for the respondent, and (2) that there had been a mistrial. The Full Court, by a majority (*Nicholls* C.J. and *Crisp* J., *Ewing* J. dissenting), dismissed the motion.

From that decision the plaintiff now appealed to the High Court.

The other material facts are sufficiently stated in the judgments hereunder.

Lodge (with him *Ogilvie*), for the appellant. On the finding of the jury the appellant was entitled to a verdict. If the finding of the jury means that the appellant's husband and the defendant were both to blame, that entitles the appellant to a verdict; for she was not identified with her husband, and if two independent tortfeasors are both guilty of negligence each is liable (*Thompson* v. *London County Council* (1)). If the finding meant that the appellant and the respondent were both guilty of negligence, the appellant was still entitled to a verdict in the absence of a finding that she could not by the exercise of reasonable care have avoided the consequence of the respondent's negligence. If the finding has the latter meaning, there was no evidence of negligence on the part of the appellant. If a verdict should not be entered for the appellant, there should at least be a new trial, for there was no proper direction as to contributory negligence. [Counsel also referred to *Mills* v. *Armstrong*—*The Bernina* (2); *Municipal Tramways Trust* v. *Buckley* (3); *Bridge* v. *Grand Junction Railway Co.* (4); *Thompson* v. *North-Eastern Railway Co.* (5); *Ex parte Freemen and Stallingers of Sunderland* (6).]

[ISAACS J. referred to *Wellwood* v. *King Ltd.* (7).]

Davenport Hoggins, for the respondent. The verdict in effect

(1) (1899) 1 Q.B., 840.
(2) (1888) 13 App. Cas., 1; (1887) 12 P.D., 58, at p. 83.
(3) (1912) 14 C.L.R., 731, at p. 737.
(4) (1838) 3 M. & W., 244.
(5) (1860) 30 L.J. Q.B., 67, at p. 71.
(6) (1852) 1 Dr., 184.
(7) (1921) 2 I.R., 274.

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was a verdict for the respondent, and in the circumstances the direction was a proper one.

Cur. adv. vult.

March 24.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The appellant, Beatrice Maud Symons, sued the respondent, Edward Archibald Stacey, for that he so negligently drove a motor-car upon a public highway that the same collided with a horse and cart in which the appellant was being driven along the same highway, whereby the appellant was injured. The appellant was in a spring-dray driven by her husband, and at the time of the collision they had reached a point near the intersection of Harrington and Davey Streets, Hobart. The respondent pleaded not guilty. Evidence was called on both sides.

The case put to the jury by the learned trial Judge was whether the appellant or the respondent was responsible for the collision. The appellant's rights were treated as identical with those of her husband. The jury found " that there had been negligence on both sides." The learned trial Judge then gave a further direction to the jury as follows :—" I have not directed you on the legal consequences of the dual negligence of both parties. . . . If both parties were negligent in equal degree, then the verdict must be for the defendant " (the respondent). " If plaintiff " (the appellant) " were negligent in a material way, she should not recover damages, but you can say whose negligence was the decisive cause of the trouble. . . . The law is most unsatisfactory on the point, and all I can do is to instruct you to apportion the blame as best you can." The jury then found that " both parties were equally negligent." At this point the learned Judge said to counsel for the appellant : " That is a verdict for the defendant " (respondent), " is it not ? " And, counsel answering " I suppose it is, your Honor," judgment was entered for the respondent.

A motion was made to the Supreme Court for a new trial upon several grounds, but only two need be mentioned: (1) that the learned Judge was wrong in directing that the verdict or finding of the jury was a verdict for the respondent, (2) that there has been a mistrial.

The argument in the Supreme Court was that the appellant, if her husband was guilty of contributory negligence, was not so identified with him as to be responsible for his conduct and therefore precluded from suing the respondent (*The Bernina* (1)). The majority of the learned Judges of the Supreme Court rejected this contention because " the case for the plaintiff " (appellant) " before the jury was presented as though she and her husband were identical." It is unnecessary to express any opinion upon this aspect of the case, for the charge of the learned Judge upon the question of contributory negligence, which was open on the plea of not guilty, was insufficient. The learned Judge was apparently of opinion that, if the appellant was guilty of negligence which had contributed to the accident—if, to use his own words, she had been " negligent in a material way,"—then she should not recover damages. Such a direction is erroneous. As Lord *Blackburn* said in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2), " the received and usual way of directing a jury . . . is to say, that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendants' negligence he cannot recover." (See also *Municipal Tramways Trust* v. *Buckley* (3) and *Bridge* v. *Grand Junction Railway Co.* (4).) On the learned Judge's charge the jury might well have thought that the plaintiff (appellant) was not entitled to recover, though she (or her husband) could not have avoided the consequences of the defendant's (respondent's) negligence by the exercise of reasonable care. The verdict founded upon the direction given by the learned Judge cannot stand, for it is quite impossible to say whether the negligence of the appellant (or her husband) found by the jury was such as precluded her from recovering in this action. Consequently a new trial must be had.

The respondent must pay the costs of the appeal to the Supreme Court and to this Court, and the parties must, in any event, abide their own costs of the first trial.

ISAACS J. This case arises out of a collision between the respondent's motor-car and a spring-cart in which the appellant and her

(1) (1888) 13 App. Cas., 1.
(2) (1878) 3 App. Cas., 1155, at p. 1207.
(3) (1912) 14 C.L.R., 731.
(4) (1838) 3 M. & W., at p. 247.

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husband were, the appellant being thrown to the road and injured.

On the appeal three important questions were raised: (1) whether the finding of the jury that "both parties were equally negligent" entitled the respondent to a verdict and judgment; (2) whether the appellant was "identified" with her husband, the actual driver, so that his negligence could be vicariously imputed to her; and (3) whether, having regard to the conduct of the trial, the question of "identification" was now open to the respondent. In view of the opinion of the whole Court as to the first question, it was unnecessary to hear argument on the others, and therefore I say nothing as to them. The Court during the argument intimated its opinion that, even if the plaintiff were not "identified" with her husband, the issue of the defendant's responsibility was not sufficiently determined. I do not say that a finding in the words of the jury would not in some circumstances be sufficient to entitle a defendant to the verdict—indeed I am of opinion that they often would; but I am clear that the finding is indecisive in the circumstances of this appeal. As the case is to go to retrial I state my reasons guardedly, and without dwelling on the facts deposed to.

The evidence and the addresses of counsel gave rise to various controversies, and possible alternative situations, and it is in view of their nature and of the directions of the learned trial Judge that I am unable to attribute to the finding acted upon by the Full Court the necessary conclusion which, apart from the other contentions raised, would justify the entry of a verdict for the defendant. The evidence for the appellant and her counsel's address to the jury invited an opinion from the jury that the respondent was guilty of what may be conveniently called "initial" negligence in several ways, and that the appellant was entirely free from any want of care, either initially or in the course of the events narrated. On the other hand, the respondent put forward a case which, if believed, not merely rebutted the charge of negligence against him, but affirmatively asserted negligence by the appellant's husband, who was driving the cart and who, for the present purpose only, I treat as if either he were the agent of the appellant, or otherwise his conduct could be vicariously attributed to the plaintiff.

But, further, the respective cases raised other possibilities, which the jury would have to consider, arising from negligence on both sides, more or less closely connected, possibilities which I am unable to say they did or did not consider. They would have to determine whether, having regard to the sequence and proximity of the events and the whole of the attendant circumstances of time, place and conduct, the accident was caused by the respondent's fault entirely, or the appellant's fault entirely, or the combined fault of both. It is not discoverable whether they found the negligence to be contemporaneous, or whether they found the initial negligence was by the appellant or the respondent, or, in either case, that the other party should reasonably have avoided the accident.

There is nothing to be found in the charge of the learned Judge which leads me to think that the jury addressed their minds to the consideration of the questions which the law requires the tribunal of fact to consider in order that the tribunal of law may decide the question of legal responsibility. And unless the nature and relation of what is compendiously, but incompletely, called "contributory negligence" are borne in mind and given effect to by the required directions, a mistrial is never unlikely.

The most recent case dealing with contributory negligence is *Admiralty Commissioners* v. *Owners of Steamship Volute* (1), decided by the House of Lords in a case of collision between two vessels to which the conduct of both vessels in fact contributed. The question was as to the "contributory negligence" of the vessel injured. The luminous judgment of Lord *Birkenhead* L.C., concurred in by the whole House, after passing in review many cases of importance, has settled on an authoritative basis a question long the subject of various attempts on the part of jurists to formulate. I refer to the responsibility for damage where the negligence on both sides, though not contemporaneous, is yet so closely connected in point of time and circumstance as not to be clearly severable. From that, and other cases of great authority, the following considerations pertinent to the present case appear.

A defendant is not liable at law for negligence unless his negligence is "the cause" of damage to another. (See per Lord *Sumner* in

(1) (1921) 38 T.L.R., 225.

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British Columbia Electric Railway Co. v. Loach (1).) If the "cause" of such damage is wholly or partly the conduct of the plaintiff himself or those who represent him, he is not at liberty to say the defendant's negligence is "the cause." Lord *Sumner* in *Loach's Case* (2), speaking of assumed contributory negligence on the part of the deceased, says: "He would have owed his death to his own fault, and whether his negligence was *the sole cause* or *the cause jointly* with the railway company's negligence would not have mattered." (See also per Lord *Cairns* L.C. in *Slattery's Case* (3).) In the *Volute Case* (4) Lord *Birkenhead* also uses the expression "*the sole cause.*" But, in determining what was "the cause" of the injury, we have to remember, as was said by Lord *Halsbury* L.C. in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (5), according to the familiar maxim of the law "it is the proximate and not the remote cause that is looked at for legal purposes." This is the central consideration of the whole matter. Accordingly no "negligence" of the plaintiff is regarded as "contributory" so as to disentitle him to rely on proved negligence of the defendant, unless it is a *proximate* cause of the damage he has sustained. In *Glasgow Corporation* v. *Taylor* (6) Lord *Sumner* makes this plain in a passage which I quote as very important. The learned Lord, with reference both to contributory negligence of a child and to the vicarious attribution to it of its parent's negligence, says:—"The child's own contributory negligence, in the true sense of the term, is for the defender to prove; so, it would seem, is the parent's. In the former case it must be direct, or not remote; in the latter it is not easy to see, apart from cases where the parent's negligence is continuing, so as to constitute a joint cause of the injury concurrent with the negligence of the defender, why the neglect to have the child better taught or to keep it in charge of a competent person is not too remote to be a contributory cause of the accident."

The question then arises: When is "negligence" (so called) of the plaintiff to be regarded as a proximate cause so as to be deemed "contributory"? In part that is answered by *Wightman*

(1) (1916) 1 A.C., 719, at p. 727.
(2) (1916) 1 A.C., at p. 722.
(3) (1878) 3 App. Cas., at p. 1167.
(4) (1921) 38 T.L.R., at p. 230.
(5) (1898) A.C., 200, at p. 205.
(6) (1922) 1 A.C., 44, at pp. 65-66.

J. in *Tuff* v. *Warman* (1), in a well known but not always properly appreciated passage. The learned Judge says :—" It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not ; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened ; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff." That is confirmed by the case of *Dowell* v. *General Steam Navigation Co.* (2), in the passage quoted by Lord *Birkenhead* in the *Volute Case* (3).

Two points of importance as to the legal significance of the expression " contributory negligence " are involved in those passages. The first is that " negligence " in that connection really means unreasonable " conduct." " Negligence " is usually employed to denote absence of care towards others, but in this connection the conduct of a plaintiff which disentitles him to recover notwithstanding the true " negligence " of the defendant has, to some extent at all events, caused him damage, may be either want of care for another, that is, negligence strictly so called, or want of care or caution for his own safety, more properly called " neglect." The issue as to his own conduct is not whether he is responsible to another, but whether he is really the author or an author of his own misfortune. The other point involved is the meaning of " contributory." It is technical. It is not satisfied by a contribution in fact as a *sine qua non*, and it is more than possible that in the present case the jury may not have had this in mind. No negligence on the part of

(1) (1858) 5 C.B. (N.S.), 573, at p. 585.

(2) (1855) 5 E. & B., 195.

(3) (1921) 38 T.L.R., at p. 228.

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the plaintiff is in law "deemed" (Lord *Birkenhead* was careful to use the word "deemed") "contributory" unless, where the initial negligence is that of the defendant, the plaintiff by exercising the care and caution reasonably to be expected of him in the circumstances would have avoided the damage, or unless, where the initial negligence is that of the plaintiff, the defendant, even by the exercise of such care and caution as he reasonably should have exercised in the whole circumstances, could not in the result have avoided the consequences of the plaintiff's negligence or carelessness. Only in those cases can the plaintiff's conduct be considered a *causa causans*, or, in other words, a proximate cause. Lord *Birkenhead* approaches the matter in this way in the *Volute Case* (1) :—He takes first the two extreme points, one of clear severability, and the other of clear inseparability, of the negligence of the respective parties. In the first, the plaintiff, it appears, was negligent. But it also appears that the defendant's negligence is subsequent and severable, and that the plaintiff's negligence need not have resulted in any injury. In that case, *the defendant's negligence is deemed to be the cause*, and he is liable. Prior maritime cases are cited. At law it is really the typical donkey case (*Davies* v. *Mann* (2)); another instance being *Tuff* v. *Warman* (3). Instances could, of course, be given of severability with the opposite result, because the defendant's negligence being remote only, the plaintiff's negligence would be regarded as the sole cause. But they are immaterial, because in order to disentitle the plaintiff it is sufficient if his negligence is contributory merely. The other extreme point taken by Lord *Birkenhead* is where no severability is possible in time or circumstance. The plaintiff's negligence creates such a position of danger that the defendant, though doing what is no doubt a *sine qua non* of the accident and what is not in fact the best that could have been done, does not act unreasonably in the circumstances created by the plaintiff himself. There no negligence whatever is imputable to the defendant, and the *plaintiff's negligence is regarded as the sole cause*, and he of course, fails. But between these termini of clear separateness on the one hand and clear dependence on the other, the Lord Chancellor

(1) (1921) 38 T.L.R., at p. 227. (2) (1842) 10 M. & W., 546.
(3) (1858) 5 C.B. (N.S.), 573.

proceeds to consider the intermediate cases where contributory negligence can properly arise. Where negligence on both sides exists and is contemporaneous (here we must remember the meaning of the "negligence" assumed), there is no doubt contributory negligence arises. But he declines to draw a hard and fast line by reason merely that the negligence is or is not contemporaneous. The negligence of one party may be so closely connected or so intermingled with that of the other party that no clear line can be drawn, and then the matter must be dealt with on broad common-sense principles according to circumstances. The issue in such a case is, of course, as always, whether the defendant's negligence was the sole cause of the injury to the plaintiff, or whether the plaintiff's negligence was the proximate cause, or a proximate cause, of his own injury. That intricate position may be precisely that of the present case, if certain views of the situation as presented by the parties be accepted by the jury.

No single formula is possible for placing the necessary issues of fact before the jury. There are precedents which indicate the proper questions according to varied circumstances. In *Municipal Tramways Trust* v. *Buckley* (1) the law was stated in terms that might well have afforded a sufficient guide in the present case. Other cases which afford great assistance in framing the necessary questions or giving the requisite directions to a jury are *Davies* v. *Mann* (2), *Tuff* v. *Warman* (3), *Bridge* v. *Grand Junction Railway Co.* (4), *Dowell's Case* (5) and *Slattery's Case* (6), and, with special reference to a case like the present, *Reynolds* v. *Thomas Tilling Ltd.* (7).

I agree that a new trial should be had between the parties.

My brother *Gavan Duffy* asks me to state that he agrees with my judgment.

Verdict and judgment entered thereon and order of Full Court set aside. New trial to be had and case remitted to Supreme Court for that

(1) (1912) 14 C.L.R., 731.
(2) (1842) 10 M. & W., 546.
(3) (1857) 2 C.B. (N.S.), 740; affirmed (1858) 5 C.B. (N.S.), 573.
(4) (1838) 3 M. & W., 244.
(5) (1855) 5 E. & B., 195.
(6) (1878) 3 App. Cas., at p. 1207, per Lord *Blackburn*.
(7) (1903) 19 T.L.R., 539; affirmed (1903) 20 T.L.R., 57.

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purpose. Respondent to pay appellant's costs of motion for new trial and of this appeal. Parties to abide their own costs of first trial in any event.

Solicitor for the appellant, *T. A. Okines.*

Solicitor for the respondent, *C. Davenport Hoggins.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WATKINS AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

COMBES AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1922.

HOBART, *Feb.* 16, 17.

MELBOURNE, *Mar.* 24.

Knox C.J., Isaacs, Gavan Duffy and Starke JJ.

Undue Influence—Fiduciary relationship—Transfer of property—Consideration—Independent advice—Burden of proof.

A woman sixty-nine years of age having transferred certain land to the defendants in consideration that the defendants would maintain her for the rest of her life, and the Supreme Court of Tasmania having after her death set aside the transfer as having been procured by the defendants by undue influence, on appeal to the High Court

Held, on the facts, that the transaction was properly set aside:

By *Knox* C.J., *Gavan Duffy* and *Starke* JJ., on the ground that at the time the transfer was made the transferor was under the complete dominion of the defendants, that in the absence of independent advice the transaction could not stand, and that the advice of a solicitor who acted for all parties in the transaction and obtained his original instructions for it from the defendants was not independent advice;