has met with great disapproval. It has been attacked upon various grounds, but principally as being a nullification of the whole doctrine of contributory negligence.

As this case is a qualification upon the general doctrine of contributory negligence, let us first inquire what is the foundation of that doctrine itself. One view, and perhaps the prevailing view, is, to ascribe it to the maxim, *in jure non remota sed proxima causa spectatur.** The plaintiff cannot recover because he is himself the proximate cause of the injury; and conversely, a plaintiff's negligence in order to defeat his action must be a proximate cause. Another view is, that the plaintiff is in the condition of a joint tort-feasor, seeking to recover indemnity for his own wrong. A third view is, that the plaintiff is disentitled because he is himself partly to blame for the injury. This last may not be properly classified as a distinct view or theory of the subject, but rather as another method of stating either or both of the first two views; but it is a form of statement which points to a moral standard as the foundation of the law, and has the sanction of use by a Judge of the highest rank and authority.† Still other views have been advanced, as that the plaintiff falls under the maxim *volenti non fit injuria.* But a series of cases in England under the Employers' Liability Act of 1880 has brought out so clearly the distinction between contributing to an injury by an act or omission, which is or may be contributory negligence, and consenting to it without a negligent act or omission, which is the case intended by the maxim, that further discussion of that view is superfluous.‡

In the light of those theories let us examine *Davies* v. *Mann.* The plaintiff's negligence consists in the act of leaving the donkey fettered in the highway. That is the last act done by him before the accident, and his subsequent intervening conduct has no connection with the case. For the accident which follows, applying the test of moral or personal blame, if he had ordinary intelligence, he is to blame at least in part, and there are strong grounds for holding him as much to blame as the defendant. His want of care and the defendant's want of care are each necessary elements in the result. Remove either, and the mischief would not have happened.

If again, a man guilty of contributory negligence is to be treated as a joint tort-feasor, the plaintiff in *Davies* v. *Mann* is a joint tort-feasor, and is seeking to obtain indemnity for his own wrong. The damage complained of is the result of his negligence and the defendant's negligence conjoined. But this is an inapt and unfortunate form of statement; for a joint tort-feasor the plaintiff cannot be.

* "It [contributory negligence] rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury." *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, 697, per Bowen, L. J. So Pollock, Torts, 374; and Wharton, Negligence, § 133.

† Lord Blackburn, in *Cayzer* v. *Carron Company*, 9 App. Cas. 873, 880, 881.

‡ *Weblin* v. *Ballard*, 17 Q. B. D. 122; *Thomas* v. *Quartermaine*, 17 Q. B. D. 414; 18 Q. B. D. 685; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Thrussel* v. *Handyside*, 20 Q. B. D. 359; *Osborne* v. *London & Northwestern Ry. Co.*, 21 Q. B. D. 220; *Membery* v. *Great Western Ry. Co.*, 14 App. Cas. 179.