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NOTES.

The war has caused a falling off of approximately 70 per cent. in the attendance at the Law School and the consequent reduction of the Editorial Board to one-third its normal size.

As already announced to our subscribers, of whose loyalty we have since then had abundant evidence, we find it impossible under the circumstances to publish more than four, instead of the usual eight, numbers during the current scholastic year.

Owing to the small size of the board there will necessarily be a reduction in the amount of editorial matter, but members of the Faculty will from time to time contribute notes signed by them.

LAW REFORM AND THE WAR—One of the outstanding results of the war is disregard for precedent and the application of common sense and expediency in adapting means to ends. The individualism which was the boast of Americans only a short time ago has been supplanted by a kind of state socialism directed by all-powerful dictators who administer affairs with very little regard to the so-called "inalienable" rights of the individual. We are accepting orders from which there is no appeal, commanding us to do or not to do things which heretofore were left entirely to individual initiative. The American citizen is thus receiving a training far-reaching in its consequences.

Is it possible that these things shall not be felt in the field of law and of legal administration?

During the last decade, noteworthy progress in volume and intensity has been made toward the reform of law and procedure. The organization and publications of the American Judicature Society to promote the efficient administration of justice, the reports of committees of the American Bar Association and of local bar associations, discussions in learned societies devoted to political and social science, the reform instituted in Connecticut, New Jersey, Illinois, Pennsylvania, California, Massachusetts and other states, the proposed reforms advocated by the leaders of the bar in New York and Mississippi, the constant discussion at meetings of the state and local bar associations through the United States, newspaper agitation, the long bibliography of procedural reform, all indicate that criticism of our law and procedure which a generation ago was confined almost exclusively to the layman has been taken up by the legal administrators and experts themselves.

Much of this is due to the work of the better law schools of the country whose teachers have fostered a spirit of free and critical inquiry through presentation of the law to their students not only as it is, but as it ought to be.

This was the condition at the outbreak of the war. And now it is more than probable that the example set during this world conflict, which brushes aside every plea and every precedent that would obstruct the translation of need into action, will further stimulate the already powerful movement toward legal reform throughout our country, and that with the close of the war a determined and irresistible impulse will have been given to that reforming tendency whose aim is to unify the law, to adapt it more closely to the needs and actual conditions of society and to simplify legal procedure. One of the most significant phenomena attendant upon this change of attitude is the character of the criticism levelled a sacro-sanct institutions by their own administrators. Judges and lawyers boldly speak of nonsensical and outworn rules which they themselves are obliged to administer, they criticise most unflinchingly and unsparingly the procedure of the courts in which they themselves are the officials, and they advocate the tearing down and

reshaping of much of the system which they or their predecessors have helped to build up. When criticism of this character emanates from such sources we may expect radical changes in the effort to adapt the law to the new conception of its relation to society.

David Werner Amram.

IS A TAXICAB COMPANY A COMMON CARRIER?—A common carrier of passengers is one who undertakes for hire to carry all persons who may apply for such service.[1] It is not necessary that the carriage should be over a definite route nor at specified intervals. Thus, it has been held from an early period that hackmen are common carriers.[2] The undertaking to serve the public generally is evidenced by their occupying stands on the streets, by the display of signs, or by otherwise signifying a readiness to carry all who apply. Baggage transfer companies are likewise common carriers.[3]

In accordance with the above principles and by analogy to the case of hackmen and transfermen, it follows that taxicab companies are common carriers. This was so decided in two cases, one in Missouri[4] and the other in West Virginia,[5] where the question of the liability of the taxicab company was in issue. The West Virginia court thus described the position of the company: "Defendant followed the business of transporting persons for hire from one part of the city to another, and held itself out to serve one and all who should apply to it for transportation upon payment of the fares agreed upon and usually charged:—this being true, it is of course a public or common carrier of passengers." So far as the right to regulate the duties of a taxicab company are concerned, it was decided in a Supreme Court case[6] in New York that a municipal ordinance relative to public hackmen applies to taxicabs, it being well recognized in New York that hackmen who profess to serve the public generally are common carriers.

[1] Thompson, Carriers of Passengers, 26; Gillingham v. Ohio River R. Co., 35 W. Va. 588 (1891). This is in accord with the historic definition of a common carrier of goods: "Any one undertaking for hire to carry the goods of all persons indifferently is a common carrier." Gisbourn v. Hurst, 1 Salk. 249 (1710).

[2] "From time immemorial it has been held that the business of a public hackman is affected with a public interest and falls within the principle of the common law which was long ago asserted by Lord Chief Justice Hale in his treatise *De Portibus Maris.*" Seabury, J., in the Taxicab Cases, 143 N. Y. Sup. 279, 289 (1913). See also Munn v. Illinois, 94 U. S. 113, 125 (1876); Bonce v. Dubuque Street Ry. Co., 53 Iowa 278 (1880).

[3] Parmelee v. Lowitz, 74 Ill. 116 (1874). A moving van company has been held in Pennsylvania to be a common carrier. Lloyd v. Haugh, 223 Pa. 148 (1909).

[4] VanHoeffen v. Columbia Taxicab Co., 179 Mo. App. 591 (1913).

[5] Brown Shoe Co. v. Hardin, 87 S. E. 1014 (1916).

[6] The Taxicab Cases. 143 N. Y. Sup. 279 (1913).

In a recent case [7] in New York the question arose whether a taxicab company is a common carrier, so as to enable a person who was injured while riding in one of its cabs to obtain double indemnity from an accident insurance company under a policy which provided for the payment of such indemnity where "the bodily injury is sustained by the assured while in a public conveyance provided by a common carrier for passenger service." The plaintiff and a companion entered the taxicab at a street corner, where the company maintained a public stand and office. The trip was an ordinary one to another part of the city, and the injury occurred while the plaintiff was attempting to alight from the taxicab at his destination. The court decided that the taxicab company was not under the circumstances a common carrier, and that consequently the plaintiff was not entitled to recover double indemnity from the insurance company. This result was reached on the following grounds: (1) That the defendant company had the right to refuse carriage to "any objectionable person, because of condition, appearance, disease, or for any other proper or legal reason"; (2) that the taxicabs were not operated on any "defined or definite route"; (3) that the plaintiff and his companion had the exclusive right to occupy the taxicab until their destination was reached. The court cited in support of its decision a Tennessee case,[8] where a similar decision was handed down without an opinion, and a United States Supreme Court case,[9] where it was held that in so far as a taxicab company furnished cars from its central garage on orders, which it claimed the right to refuse, it was not a common carrier, such service being regarded as similar to that of a livery stable.

The reasons given and the authorities cited are not sufficient to support the decision in the New York case under discussion. The right to refuse persons who are objectionable because of disease or other legal reason is possessed by all common carriers.[10] The fact that the carriage is not over a definite route is not material, for, as already pointed out, this quality is present in the case of hacks and transfer companies. The assumption that the plaintiff had the right to occupy the vehicle exclusively is not determinative of the question. Mr. Justice Holmes in the United States case cited by the court regarded this right as consistent with the position of the company as a common carrier.[11] Furthermore, there seems to be no difference, so far as the right to exclusive occupancy is concerned, between taxicabs and hacks.

[7] Anderson v. Fidelity & Casualty Co. of N. Y., 166 N. Y. Sup. 640 (1917).

[8] Darnell v. Fidelity & Casualty Co., 46 Ins. L. J. 523 (1915).

[9] Terminal Taxicab Co., Inc., v. Kutz, 241 U. S. 252 (1915).

[10] Pullman Co. v. Krauss, 145 Ala. 395 (1906), (disease); Pittsburg, etc., R. Co. v. Van Dyne, 57 Ind. 576 (1877), (intoxication); Atchison, etc., R. Co. v. Weber, 33 Kan. 543 (1885), (violent conduct); Stevenson v. West Seattle Land Co., 22 Wash. 84 (1900), (obscene language).

[11] Terminal Taxicab Co., Inc., v. Kutz, 241 U. S. 252, 254 (1915).

The authorities relied upon by the court are of little weight—the Tennessee case, because the decision was accompanied by no opinion, and the United States case, because the situation there was different, as the cabs in question did not occupy public stands on the streets, but were obtained from the garage by order only.

A question somewhat similar to that of the New York case arose in a recent case in Pennsylvania.[12] Here the plaintiff, who was injured while riding in a taxicab was permitted to recover double indemnity under a policy, which stipulated that such indemnity should be paid when the injury occurred in "a public conveyance, provided for passenger service and propelled by steam, gasoline, *etc.*" This statute differs from the one in the New York case in not specifying that the "public conveyance" is to be provided by a "common carrier." This difference, however, is more apparent than real, for it would seem to follow on principle that a company operating a public conveyance was in that connection a common carrier. Although it is not clear from the opinion whether the court considered that the plaintiff and his party had the right to occupy the taxicab exclusively,[13] their reasoning appears to be broad enough to cover the facts of the New York case, and they probably would have decided that the defendant company in that case was a common carrier.

Both on principle and by analogy to hack and transfer companies, taxicab companies occupying public stands on the streets or otherwise holding themselves out to serve the public should be held to be common carriers for all purposes.

Edwin R. Keedy.

TORTS—CONTRIBUTORY NEGLIGENCE—"LAST CLEAR CHANCE"—In practically every common law jurisdiction it is held as a general proposition of law that the contributory negligence of the plaintiff destroys his right to recover from an equally negligent defendant, or at least operates to reduce the damages which should be awarded to him, but in practically every common law jurisdiction it is equally true that the plaintiff by his pure negligence, exposing himself to the risk of the injury, does not forfeit under all circumstances his right to damages for the injuries caused him by another. It is uni-

[12] Primrose v. Casualty Co. of America, 232 Pa. 210 (1911).

[13] Two statements of the court on this point are apparently conflicting: (1) "Those who rode in them . . . were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company from which all but themselves were excluded." (2) "The use of no one of its machines was limited to any particular person, but anyone able to pay the price for riding in it, while it was under the control of and being operated by one of the company's employees, could do so."

versal law that a person who deliberately takes advantage of an opportunity which another has negligently afforded him to inflict injury upon such other is liable to compensate him for the harm which he intentionally inflicts.[1]

In many jurisdictions contributory negligence is no bar to the recovery of damages caused by the wanton misconduct of another.[2] In so far as the conduct is really wanton, in so far as it is characterized by conscious indifference to the obvious risk which it creates, this is nothing more than a recognition that mere inadvertence does not excuse conscious or deliberate wrongdoing. In the great majority of American jurisdictions as well as in England, it has for years been accepted law that a defendant, who after discovering a plaintiff in a position of helpless peril into which his own negligence has put him, continues to act without taking such precautions as are then possible and so brings injury upon the plaintiff, is "solely" responsible for the ensuing harm.[3]

Many of the jurisdictions which profess to allow recovery to a negligent plaintiff only where the defendant's act is wanton or wilful, reached substantially this same result by branding as wanton a failure to take ordinary precautions to avert the accident when the plaintiff's helpless peril is discovered.[4]

A number of American jurisdictions have held that, where the relation between the plaintiff and defendant is such that the defendant owes a duty to the plaintiff to be on the lookout to discover whether the plaintiff is or is not in a position of danger, the defendant is as fully responsible if he could and should have discovered the plaintiff's helpless, though negligent, peril, in time to avert the accident as when he knew of it.[5] It is impossible in the short space of a note to discuss the causes which have led to these views.

It may be said, however, that the thought underlying them is that the defendant, who could, but did not, avert the catastrophe after he did or should have known of its imminence, is to be regarded as the ultimate final or decisive cause of the accident. It follows from this view that in the crisis the plaintiff must not be able

[1] Steinmetz v. Kelly, 72 Ind. 442 (1880); Birmingham, etc., Co. v. Jones, 146 Ala. 277 (1906); Wynn v. Allard, 3 W. & S. 524 (Pa. 1843).

[2] Banks v. Braman, 188 Mass. 367 (1904); Alger, Smith & Co. v. Duluth Superior Trac. Co., 93 Minn. 314 (1904); Md. B. & W. R. R. v. McBrown, 46 Md. 229 (1874).

[3] Iowa Cent. R. R. v. Walker, 203 Fed. 685 (1913); see cases cited in note to that case, Bohlen's Cases on Torts, p. 1387.

[4] Parsons, J., in Cavanaugh v. B. & M. R. R., 76 N. H. 68 (1911); Smith v. N. & S. R. R., 114 N. C. 728 (1894); Cole v. Metro. St. Ry., 121 Mo. App. 605 (1906); Rawitzer v. St. Paul City Ry., 90 Minn. 84 (1904); and see Ga. R. Co. v. Lee, 92 Ala. 262 (1890).

[5] Teakle v. San Pedro, etc., R. R., 32 Utah 276 (1907); and cases cited in the notes to that case in Bohlen's Cases on Torts, pp. 1387-1390.

to control the situation, and that the defendant shall have the power to do so. Therefore, the majority of jurisdictions hold that where the plaintiff had the physical ability, if he had been upon the alert, to avoid the accident, he cannot recover against a defendant who had a similar physical ability, but who also through inadvertence did not realize the necessity of using it.[6]

So a plaintiff, who without taking any pains to observe whether a car is approaching upon a level crossing, walks upon it, is not allowed to recover from a defendant railway, whose engineer or motorman is guilty of a like inadvertent failure to observe his danger.[7]

There are, however, some jurisdictions which seem to believe that defendants owe plaintiffs a higher degree of vigilance than the paintiffs owe to themstlves, and hold that a plaintiff who is in full possession of his faculties, but who in a moment of carelessness walks, without looking, directly into the path of an oncoming car or train may recover, though the only fault alleged against the driver of the car or train is his failure to observe that the plaintiff is drifting into peril.[8]

In the great majority, if not all of these cases, however, there are two features: 1st, the ensuing collision harms only the plaintiff; thus, creating that sympathy which the primitive law showed to the injured man—a sympathy which still subsists in many juries, and, as these cases show, in some courts; 2nd, the defendant is a corporation carrying on a business, which, though necessary to the public, is primarily conducted for the profit of the corporation and its stockholders, and the accident happens upon a public highway or other place upon which private travelers had originally an exclusive right, but over which these corporations are permitted, because of their public utility to carry on, in derogation of the originally exclusive right of the ordinary public, a business which, unless conducted with the utmost care is bound to create a considerable risk to their use of the highway. It may well be that this situation has led the court to instinctively feel that a company exercising peculiar rights over a previously public way and conducting thereon a business dangerous in the highest degree, unless conducted with the most scrupulous care, should be held to the highest standard of diligence and vigilance. While there is this diversity of opinion above noted, there is a substantial unanimity in holding that the plaintiff by his negligence must have put himself in a posi-

[6] French v. Grand Trunk R. R., 76 Vt. 441 (1904); and cases cited in notes to that case in Bohlen's Cases on Torts, pp. 1390-1392.

[7] French v. G. T. R., *supra*.

[8] Birmingham L. & P. Co. v. Brantley, 141 Ala. 614 (1904); Cons. R. Co., v. Rifcowitz, 89 Md. 338 (1899); Murphy v. Wabash, 228 Mo. 56 (1910); Hutchinson v. St. Louis, etc., R. R., 88 Mo. App. 376 (1901); Lassiter v. Raleigh, etc., R. R., 133 N. C. 244 (1913); Memphis St. Ry. Co. v. Haymns, 112 Tenn. 712 (1904).

tion in which he is physically helpless, or he must by such obvious inattention or absent-mindedness indicate that he cannot be expected to control the event, and that the defendant must, at the time when he did or could have observed the plaintiff's peril, have had the ability to avert the accident. So the overwhelming weight of authority in America is to the effect that a precedent act of negligence, whether of commission or omission, whereby the defendant has put it out of his power to avert the accident after discovering that it is impending, does not make him responsible to a plaintiff who has, through his negligence, exposed himself to the peril, and, this is so though the plaintiff's negligence consists not merely of an inadvertence or absent-mindedness which precludes him from exercising his power of self-protection, but is some more or less deliberate act which placed him in a helpless position in the path of the danger.[9]

In a recent case, *British Columbia Rwy. Co.* v. *Loach*,[10] the British Privy Council decided that a defendant is the sole responsible cause of an accident, if a precedent act of negligence, which itself occurred long before the plaintiff's negligence, has made unavailing the obviously proper precautions which the defendant's agent took to avert the accident when he was first able to perceive that it was imminent. In that case a man named Sands, the plaintiff's decedent, who was driving with a friend, was run down and killed at a level crossing by a car of the railway company. Neither he nor his friend appeared to have seen the car until they were so close to the crossing that they could not stop in time to prevent the collision. There were no circumstances which could have excused their failure to see the car. Their view was unobstructed and there was plenty of light. Thus, they were unquestionably guilty of contributory negligence in driving upon the crossing in the face of a peril, which the least use of their senses would have shown them. The driver of the car appears to have seen the wagon approaching the crossing while the car was still so far from it that, had the brakes been in good order, he could have stopped it in time to prevent the collision. He attempted to do so, but the brakes being out of order the car did not stop and the collision occurred. It also appeared that the car was running at an excessive speed.

Lord Sumner, who delivered the opinion of the Privy Council, said in answer to the argument that if the defendant's negligence continued up to the moment of the collision, so did the deceased's contributory negligence, "The consequences of deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done and his contributory negligence will not disentitle him to re-

[9] Trow v. Vermont Central R. R., 24 Vt. 487, and cases cited in the notes to that case in Bohlen's Cases on Torts, p. 1394, 1397.

[10] 1 A. C. Reports (1916) 719.

cover if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

He adopts the opinion of Anglin, J., in *Brenner* v. *Toronto Railway Co.*,[11] to the effect that "where a situation of imminent peril has been created, either by the joint negligence of both plaintiff or defendant, or it may be by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time of some perceptible duration during which both or either may endeavor to avert the impending catastrophe, and notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence which produced such a state of inability is not merely the part of the inducing causes —it is, in very truth, the efficient, the approximate, the decisive cause of the incapacity, and therefore of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff."

Those jurisdictions which have taken the so-called humanitarian view and allowed recovery where both the plaintiff and defendant are equally able to avert the accident, and are equally guilty of inadvertence continuing until the opportunity to control the event is over, might very properly take the same final step. They have already substantially repudiated the theory that recovery is permitted only where the defendant's negligence is subsequent to that of the plaintiff. Having imposed upon the defendants a superior duty of vigilance, they may well go further and insist that they maintain their equipment in such condition as to make such vigilance effective. Otherwise, as Lord Sumner said in *British Columbia Railway Co.* v. *Loach*,[12] "the defendant company would be in a better position where they had supplied a bad brake but a good motorman, than where the motorman was careless but the brake efficient."

Francis H. Bohlen.

TORTS—TRESPASS—ACTION FOR THE DEATH OF A HUMAN BEING—A recent case in England [1] has again brought up that apparent anomaly in the common law that there may be no civil action for the death of a human being, though there may be for an

[11] 13 Ontario Law Reports 423.

[12] Note 9, *supra*.

[1] Admiralty v. S. S. Amerika, 1917 A. C. 38 (Eng.).

injury not resulting in death. The first reported case to hold this is *Higgins* v. *Butcher*.[2] This was an action of trespass by a man for the beating of his wife, whereof she died. But the court compared it to the case of a servant who had been killed. The next case is *Baker* v. *Bolton*,[3] decided by Lord Ellenborough. In this case also a man was suing for damages from the death of his wife. This rule was apparently never questioned until 1873, when Bramwell objected to it in a dissenting opinion in *Osborn* v. *Gillett*.[4] Here the death of a daughter was complained of. However, this case was followed in *Clarke* v. *London Omnibus Co.*,[5] another case of the death of a daughter. Canada[6] and the United States[7] have also accepted this as the common-law rule.

There has been much discussion as to the reason for the rule. On the face of it, it seems absurd that a man can recover for an injury to his servant or a member of his family not resulting in death, but may not for an injury resulting in death. The greater injury would seem to be the latter, and should be recompensed if any was. We do find the suggestion that the reason is the impossibility of adequately compensating for a person's death. But again we suggest the absurdity of refusing any damages merely because enough cannot be given.

Bevan[8] advances the interesting theory that the rule arose before the Black Death when servants were abundant and were hired by the year. An injury to one resulting in sickness or disability caused expense to the master; whereas if one was killed it was a very easy matter to find another, and there were no damages. This however hardly explains why one could not recover for the death of a wife or child.

The rule is sometimes referred to as coming within the maxim *"actio personalis moritur cum persona."* But here the person bringing the action is not the one who is dead, but another who has been injured because of his relation to the dead person, and the maxim is clearly inapplicable.

Tanfield in *Higgins* v. *Butcher*, as reported by Yelverton,[9] gives as the reason for the rule that the felony drowns the offense. This has given rise to the theory that there was a rule of public policy which forbade entirely a civil action for a felony. If such were the case it would also be applied to larceny or burglary. But the true rule is that the right to bring a civil action is suspended until after

[2] Noy 18 Yelv. 89 (Eng. 4, Jac. I).
[3] 1 Camp. 493 (Eng. 1808).
[4] L. R. 8 Exch. 88 (Eng. 1873).
[5] (1906) 2 K. B. 648 (Eng.).
[6] Monaghan v. Horn, 7 Can. S. C. R. 407 (1892).
[7] Ins. Co. v. Brame, 95 U. S. 754 (1877).
[8] Bevan, Negligence (3rd Ed.) 1: 182.
[9] See note 2, *supra*.

the criminal prosecution. This being satisfied, trespass could be brought for what in fact amounted to burglary [10] or larceny, provided the additional facts required to make the trespass a felony were not alleged. The defendant would not be allowed to plead his own felony as a bar to the action.[11] But where death resulted from the act of the defendant, the ground of complaint could not be alleged without alleging felony, for at that time every homicide was a felony. Trespass would not lie for a felony. "For the king alone is to punish felony, except the party bring an appeal."[12] The nature of the action of trespass itself and not any rule of public policy prevented it from being brought for the death of a person.

Another theory for this rule that trespass will not lie for the death of a human being is discussed by Lord Sumner in *Admiralty* v. *S. S. Amerika.*[13] Trespass was an action primarily for injuries to one's personal rights. Among these was the right to the service of one's wife, or daughter, or servant. This was based not upon any contract, but upon the status between them. Therefore, when anyone injured one's wife or servant, so that her services were lost to the husband or master, an action would lie for the loss during the continuance of the disability. But when the wife or servant died, the status was ended. One had no right to the services of a dead person, nor had a husband or master any right to the life of his wife or servant. Hence with the death the injury ceased and no action would lie for subsequent damages. If the death was immediate it was *"damnum absque injuria."* "Whether or not this be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it at any rate provides, though somewhat imperfectly, an intelligible basis for the existing rule sufficient to prevent your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary." So Lord Sumner himself regards this theory as only an afterthought.

We must in all probability turn to the history of the development of the action of trespass to find the true explanation for the rule. For a long time in England homicide was an emendable offense, which could be satisfied by the payment of bot to the kinsfolk of the dead man, and wite to the king. When this system became too elaborate and burdensome it rapidly fell into disuse. Its place was taken by the criminal prosecution for offenses against the king's peace, and the new action of trespass for damages from personal injuries. The writ of appeal persisted for felonies for a long time

[10] Markham v. Cob, Noy 82 (Eng. 1625).
[11] Lutterell v. Reynell, 1 Mod. 252 (Eng. 1670).
[12] Higgins v. Butcher, Noy 18.
[13] See note 1, *supra.*
[14] Admiralty v. S. S. Amerika, at 55, see note 1, *supra.*

before it was superseded by the indictment. This private action gave the relatives of the person killed the personal satisfaction which trespass gave for minor injuries. The wrongdoer was punished and the relatives took part in the punishment. As late as the reign of Henry IV they were allowed to drag the body of the appellee to the place of execution.[15] As the king gained greater power he was able to enforce a forfeiture of the goods of a felon. This prevented the appellant from obtaining any satisfaction, except the purely sentimental gratification derived from participation in the execution. This lack of substantial satisfaction, together with the ecclesiastical ban upon the ordeal, the necessity for the appellant to prosecute the appeal in person, the right of the appellee to force a trial by battle, and the severe punishment for a false appeal, caused this action to become more and more unpopular. It had to be brought within a year and a day of the death. For a long time indictments were not allowed to be brought within that time lest appeals be discouraged. After this rule was abolished, an appeal was allowed to be brought after the indictment, even though there was an acquittal, though an appellee, if acquitted, could not later be indicted. However, the writ of appeal came to be used only as means of blackmail and rapidly fell into disfavor, though not actually abolished until 1819, after the famous case of *Ashford* v. *Thornton*.[16]

The action of trespass developed while the writ of appeal was still used. That action giving a remedy for all wrongs amounting to a felony, the action of trespass was only used for lesser injuries; for the law would not multiply actions for the same offense. By the time the writ of appeal ceased to be used the action of trespass was well established within certain limits, among them that it would not lie for a felony. At the time trespass developed, any killing of a human being was a felony. The modern distinction between murder, manslaughter, and excusable or justifiable homicide did not grow up until sometime after the indictment took the place of the appeal. The slayer was left on the king's mercy if there were the attenuating circumstances which now excuse or justify. Hence trespass would not lie for any death. This limitation upon the action still persisted, though the original reason for it no longer existed. Thus an examination of the historical development of the action of trespass offers a logical explanation of the apparent anomaly.

A very interesting discussion of the Roman, French and Spanish authorities on this same point may be found in the Louisiana cases,

[15] 4 Blk. 316.
[16] 1 B. and Al. 405 (Eng. 1818).

Hugh v. *R. R.*,[17] and *Hermann* v. *R. R.*[18] In neither case were counsel able to persuade the court that the civil law differed from the common law.

E. N. V.

[17] 6 La. Ann. 495 (1851).
[18] 11 La. Ann. 5 (1856).