

ity and not of strict legal personal and property right prevails, and where a liability in damages is imposed for what was primarily a sin of omission rather than a sin of commission. The defendant, indeed, was held liable not because he did those things which he "ought not to have done," but because he "left undone those things which he ought to have done."

But neither the Flateau case nor the Marrs case can be reconciled with the strict rules of the past, which merely imposed a legal obligation for a negligent affirmative injury to personal or property rights. In both cases humanity was the impelling argument. In the Marrs case it is plain that the negligence in operating the train—the sin of omission—was merely an excuse for the judgment. The accident, indeed, happened an hour at least after the man had first been awakened. The engine crew had gone to supper in the interim. They could hardly have been expected to know that he was still in the yards. The judgment was really rendered because of the omission to lead the drunken man, when first awakened, from the labyrinth of tracks and to a place of safety. Nor can we believe that it was based upon the theory that the employees of the company, having once awakened the man, had assumed a responsibility to him and were bound to finish this work which they had begun and to incur a liability which they would not have incurred if they had let him alone. The fact was that, though a trespasser, he was in a position of danger from which, without danger or a serious loss to themselves, they could have extricated him, and the court, precedent or no precedent, was determined to hold them liable. The positive act, we believe, furnished an excuse for rather than the reason and purpose of the decision.

The subtle distinctions which are drawn in all these cases, indeed, must sooner or later be swept aside, and this both because the public as a whole has no respect for or interest in "nice questions," and because there is no merit or reason in them. The attempt which was made in the opinions in the Cappier case to draw a distinction between those cases in which the defendant has entered upon the care of the injured per-