

close their faculties to what must have been apparent to the most casual observer, and say that, under the circumstances surrounding Marrs, they owed him no duty, and could after that treat him as a trespasser. They knew he was intoxicated and in the yard, and, having seen him twice before within an hour in a drunken stupor, they had no right to assume that when left to himself he would not again sink into a torpor, as he had done twice before. . . . This being true they owed him one of two alternative duties—either to see him safely out of the yard, which common humanity required, or, failing in this, watch out for him as the engine moved about in the corporation's business."

In this last case there was no invitation and the injured man was a trespasser. It is to be noticed, however, that the employees of the railway company awakened and perhaps to that extent took him under their care. It is also to be noticed that the decision turns rather upon the alleged subsequent negligence of operating the engine in the yard when the switching crew knew or should have known that Marrs was wandering around therein, than on the failure to see him safely out of his dangerous position when he was first discovered and awakened. The analogy, therefore, which the court in the Flateau case, to which we have just referred, saw between this case and the one under its immediate consideration, is not perhaps as clear to others as it was to the Minnesota tribunal. In the Marrs case, there was a sin of commission as well as one of omission. In the Flateau case there was a sin of omission alone. In the Marrs case the employees of the railroad company, so the court held, negligently ran over the man rather than negligently failed to see him in safety from the yards. In the Flateau case the defendant did no affirmative physical act of which complaint could be made or on which an action of tort could be based. He merely denied the permission to stay with him overnight. There was no force and no violence. There was a verbal refusal of a verbal request and that was all. The Flateau case, indeed, is perhaps the first case to be found in the books in which the law of human-