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Torts and Workmen's Compensation

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the view expressed by the court appears to be a sound interpretation of the codal provisions. However, in one respect it appears that the court seriously erred. In refusing to dismiss the case as of nonsuit and declaring the sale not subject to rescission for lesion beyond moiety, the court denied the absent coheirs any right to assert the rescission at a future time. As they had been made parties to the action and were before the court the decision would be *res judicata.*[8] Under the exceptional circumstances of this case, in the absence of affirmative showing that the absent coheirs did not desire to join in the action, it would have been far preferable to dismiss the action of the plaintiffs as of nonsuit in justice to the possible interests of the absentees.[9]

IV. TORTS AND WORKMEN'S COMPENSATION

*Wex S. Malone**

A. TORTS

Standards of Care

The Louisiana Supreme Court was recently urged to impose liability without regard to fault upon an oil driller whose well blew during the course of the drilling operation.[1] The result of this calamity was the destruction of a large part of the plaintiff's rice crop which was being cultivated on a six hundred acre tract nearby. The plaintiff sought to fasten strict liability on the defendant under the doctrine of *"sic utere tuo, ut alienum non laedas"*[2] and under the doctrine of *Rylands v. Fletcher,*[3] which had been applied in an identical situation by the Supreme Court of California several years before;[4] although that court, like the court of Louisiana, had rejected the same doctrine with reference to other so-called ultrahazardous activities.

The supreme court managed to avoid the choice of doctrine by finding that the defendant was liable under ordinary prin-

8. Art. 2286, La. Civil Code of 1870.

9. The circumstances suggest that the absentees by accepting service may have intended to acquiesce in plaintiffs' demand.

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1. Watkins v. Gulf Refining Co., 206 La. 942, 20 So. (2d) 273 (1944).

2. Art. 667, La. Civil Code of 1870.

3. L.R. 1 Ex. 265 (1866), affirmed L.R. 3 H.L. 330 (1878). Bohlen, The Rule in Rylands v. Fletcher (1911) 59 U. of Pa. L. Rev. 298.

4. Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928). See Carpenter, The Doctrine of Green v. General Petroleum Corporation (1932) 5 So. Calif. L. Rev. 263.

ciples of negligence. Resort was had to the res ipsa loquitur rule. And the court re-announced the familiar statement that, where damages are caused by an instrumentality under the exclusive control of a defendant and they would not ordinarily have occurred if the party in control had used due care, the mere showing of the happening of the accident places upon the defendant the burden to exculpate itself from the imputation of fault.

The details of the conduct of the drilling operations were spread over six pages of the printed report, and an evaluation of the care exercised by the defendant requires an intimate knowledge of drilling processes which most of us do not possess. Nevertheless, the writer, after consultation with persons familiar with oil production, ventures the opinion that the operations in this case were conducted in accordance with accepted practices prevailing in the locality. Although the court suggested four particulars in which the defendant fell short of due care,[5] these were largely the result of substituting hindsight for foresight. By viewing an occurrence of this sort after the fact it is nearly always possible to suggest some additional precaution which, if adopted, *might* have prevented the occurrence. The court does not mention the fact that some of the omitted precautions which it suggested either threatened the successful prosecution of the enterprise or the safety of the operators (as in the "snubbing in" operation). Likewise the opinion largely ignores the fact that the determination as to what method or methods should be adopted to control the blow out must be made under emergency conditions. The several available procedures are all uncertain in effectiveness, and the choice is substantially affected by the operator's appraisal of the situation prevailing when the catastrophe arises. The only circumstance that cast suspicion on the defendant's conduct was the use of standard equipment in the face of knowledge that drilling was to be done in a high pressure area. Even here, however, it is doubtful that heavier equipment would have avoided the catastrophe.

The above remarks are not made by way of criticism of the case. They are intended merely to show that there are effective ways of imposing strict responsibility through the use of the language of negligence, and without resort to doctrines of absolute liability. The network of negligence rules permits of innumerable variations; and in hitching the standard of care up to top-notch, gadgets such as res ipsa loquitur are of immense service

5. Watkins v. Gulf Refining Co., 206 La. 942, 960, 20 So. (2d) 273, 279 (1944).

to the court.[6] Although the court still assures operators that they can avoid the risk of liability for damage resulting from blowouts provided they use "due care," this is poor comfort to oil producers who are familiar with the procedures followed by the defendant in the instant case and who know what precautionary measures are feasible in their own operations. Yet it is believed that the court reached a desirable conclusion. Oil drilling is hazardous even when all precautions have been taken. The profits are large, and those who are exposed to the dangers are rightly indifferent to the success of the defendant's venture. He, not his victims, should be forced to bear the loss. The use of the negligence-via-res ipsa loquitur route toward absolute liability simply gives the court a better control of the dispute and permits a possible retreat in extreme instances. This is good judging technique.

There is a well established rule everywhere that the carrier of passengers, unlike the freight carrier, is not an insurer of safety. Nevertheless, his situation differs from that of the ordinary defendant who is charged with negligence. The carrier of passengers must affirmatively exonerate himself from the presumption of negligence that arises when the passenger shows that he was injured through the agency of the carrier. It is usually said that the carrier of passengers must show that he has exercised the "highest degree of care." Thus the courts are required to distinguish different degrees of fault in these cases. In a recent decision a passenger sought to impose liability upon the defendant carrier by a showing of fact which admittedly would not have made the carrier liable if he had been a private defendant.[7] The driver of the defendant's bus was proceeding on the right side of the highway as he approached an oncoming mowing machine which was followed by two trucks. The first of these trucks suddenly retarded its speed upon approaching the mowing machine ahead so as to avoid the danger of passing in the face of the oncoming bus. The driver of the second truck

6. The use of res ipsa loquitur in cases involving injuries by dangerous substances and instruments is described in Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70, 95.

7. Gross v. Teche Lines, Inc., 207 La. 354, 21 So. (2d) 378 (1945). Compare the interesting case, Wichita Transp. Corp. v. Braly, 150 F. (2d) 315 (C.C.A. 10th, 1945), noted in (1946) 34 Geo. L. J. 114, where a passenger was thrown to the floor of the defendant's bus when it was brought to a sudden stop in an emergency. The court held that the defendant could not exonerate itself from blame merely by showing that all care had been used in bringing the bus to a halt; it must likewise show that the emergency was not of its own making.

was inexcusably unaware of the situation in front of him. When the first truck suddenly checked its speed, he was unable to slow down sufficiently to remain in the traffic line, and he attempted to pass. This brought him into headlong collision with the bus, which by this time had reached the mowing machine. During this period the busdriver was unaware that any vehicle behind the mower intended to pass it. When the situation became apparent to him, he drew the bus sharply over to the right and onto the shoulder. It was here that the collision took place. The court held that the busdriver violated no duty to his passengers by not maintaining his bus under such control that it could immediately stop when it became apparent that a blockage of the highway had occurred. In the absence of some suspicious circumstance the driver of a vehicle is entitled to assume that one of several oncoming vehicles will not disregard an obvious peril and attempt to overtake the others at such a time. The imposition of a more rigid requirement upon the carrier of passengers under the guise of enforcing the duty of "highest care" would unreasonably interfere with speedy and efficient passenger service.

Interests Protected—Emotional Disturbance

Vogel v. Saenger Theatres, Incorporated,[8] is the only decision of any importance during the last term on the subject of emotional disturbance. This case has been treated in detail elsewhere in the Louisiana Law Review,[9] and only a brief reference is appropriate here. The plaintiff, a cripple, was refused admission to the defendant's motion picture theater, on the asserted ground that his presence during crowded hours involved a safety hazard. This action was apparently in compliance with a fixed rule of the defendant's establishment. The refusal was apparently made in the presence only of the attendant and the plaintiff's wife. For this reason no claim for damages for defamation was asserted. The plaintiff based his case upon the discourteous treatment that was accorded him, although evidence of any unnecessary rudeness was meager. In allowing recovery, the supreme court emphasized the breach of contract by the defendant and treated the damages for emotional disturbance as incidental thereto. In previous decisions the Louisiana Supreme Court has taken a more liberal and straightforward approach to

8. 207 La. 835, 22 So. (2d) 189 (1945).
9. Note (1945) 6 LOUISIANA LAW REVIEW 475.

the problem of recovery for intentionally inflicted emotional disturbance. For example, in *Nickerson v. Hodges*[10] the victim of a practical joke was allowed to recover for the ensuing mental anguish without reference to any other breach of duty. This decision was grounded squarely on Article 2315 of the Louisiana Civil Code. In the present case the court preferred to adopt a more timid attitude which it had manifested in the earlier cases of *Lewis v. Holmes*[11] and *O'Meallie v. Moreau,*[12] although those decisions did not offer very striking analogies to the situation before the court.[13] Perhaps the court's reluctance to adopt the more direct approach of the *Nickerson* case arose from the fact that it did not consider that the facts of the present controversy presented a situation wherein the defendant's conduct was sufficiently insolent to be dealt with as an independent tort. Perhaps, too, it was felt that discourtesy is not as clearly a violation of prevailing notions of right and wrong as was manifested by the heartless practical jokers of the *Nickerson* case who buried a phony pot of gold with the intention of enjoying the embarrassment of their victim. The accompanying contract breach was therefore resorted to in order to lend added weight to the instant decision.

Nuisance and Injunctive Relief

In the case of *Magee v. Yazoo & Mississippi Valley Railroad Company,*[14] the defendant maintained a roundhouse in a residential section of Bossier City with the result that the nearby homes of the eight plaintiffs were covered with smoke, soot and cinders. The court awarded substantial damages, including an item for mental anguish. The defendant contended that damages for mental anguish are allowed only in suits for personal injuries and not in suits for property damages. Ordinarily, compensation of this nature is denied, except so far as it might be an accompaniment of the plaintiff's own physical injury or sickening. However, in nuisance cases the annoyance, inconvenience and physical discomfort which usually accompany the nuisance are difficult to distinguish from mental anguish. Since all the first

10. 146 La. 735, 84 So. 37 (1920).
11. 109 La. 1030, 34 So. 66 (1903).
12. 116 La. 1020, 41 So. 243 (1906).
13. In each of these earlier cases the plaintiff's emitional disturbance consisted of embarrassment or disappointment arising out of its failure to receive the promised performance, while in the instant decision the wrong, if any, was the discourteous conduct that accompanied the breach.
14. 206 La. 121, 19 So. (2d) 21 (1944).

mentioned items are compensable, the court was correct in refusing to draw the distinction urged upon it by defendant's counsel. It stated that worry, discomfort and inconvenience, which had been currently recognized as compensable items in previous cases, were indistinguishable from mental anguish as that term was used in the present case.

Since the nuisance complained of was a result of continuing activity, it was clear that periodic damage suits would not afford an adequate remedy. Full relief could be provided only by an injunction ordering the defendant to refrain from future intrusions upon the adjoining landowners' rights. The right to such injunctive relief, in addition to an award of damages to date of trial, is well established by the cases. Defense counsel urged, in the instant case, that substantial efforts had been made to eliminate the smoke, soot and cinders through the installation of so-called smoke suppressors and fly ash suppressors. While this equipment perhaps helped the situation, it was not sufficient to afford necessary relief and the trial judge had ordered the defendant railway company to abate the nuisance. Following a traditional injunction technique, the court merely ordered abatement of the condition, leaving the methods to be worked out by the defendant.

In overruling an objection that the decree offered no suggestion as to what additional steps should be taken, the supreme court approved the trial judge's statement that it was for defendant and not the court to ascertain and apply the remedy. After pointing out that the nuisance still remained, despite the railroad's efforts, the trial judge concluded:

> " 'I am not convinced that everything has been done which can be done to remedy the condition of which complaint is made. Not being a practical railroad man, no suggestion is offered, but defendant ought to think of a way to abate the nuisance.' "[15]

This practical technique of placing the burden of devising the means of abating the nuisance squarely on the wrongdoer's shoulders, without serious effort to draw definite lines for his guidance, is a practical one, and has been generally adopted. That the railroad had not exhausted the possible means of abatement is indicated by the supreme court's suggestion that the erection of a roundhouse with a smoke eliminator on a tall cen-

15. 206 La. 121, 137, 19 So. (2d) 21, 26.

tral smoke stack, while expensive, would probably achieve the necessary result.[16]

B. Workmen's Compensation

Employer-Employee Relationship

Courts are continuously faced with the necessity of distinguishing an employee, who is entitled to compensation, from an independent contractor, who does not receive the benefit of the Workmen's Compensation Act. Sometimes a person who enters upon an enterprise as an independent contractor may abandon his work and undertake a specific task under the direction of his employer. If he is injured at such a time, he is entitled to compensation, even though the deviation from his independent undertaking is temporary only.[17] Thus, in *Langley v. Finlay*[18] the deceased had undertaken the task of cleaning defendant's oil well which had ceased to produce. Before his work was completed the defendant decided to make a test for production, which involved several operations. The deceased abandoned his cleaning work with the understanding that he should resume if the test were unsuccessful. He assisted the defendant's agent in the testing procedure, and at times participated in the job without any detailed supervision, and he supplied his own equipment. During these operations the derrick collapsed and fell upon him, killing him instantly. His widow was allowed compensation, despite the defendant's contention that deceased was either an independent contractor or a volunteer. Certainly the deceased had no interest in the result of the testing, except insofar as the failure of the tests might involve a resumption of his cleaning operations, which by that time had been virtually completed. Also, it seems clear that he gave his assistance in the testing operations with the tacit understanding that he would be paid therefor, and he participated at the request of the defendant's agent. For this reason the conclusion of the supreme court that he was not a volunteer seems clearly correct.

During the course of the opinion the court took occasion to hold expressly that casual employments are covered by the Louisiana Workmen's Compensation Act. Although recovery for injuries arising out of casual employments had been allowed

16. The above discussion of injunctive relief against nuisance was prepared with the collaboration of Dale E. Bennett, Associate Professor of Law, Louisiana State University.

17. 4 Schneider, Workmen's Compensation (3 ed. 1941) §1076.

18. 207 La. 307, 21 So. (2d) 229 (1944).

previously on many occasions, the matter has not been expressly passed upon before by the supreme court.[19] In view of the fact that compensation is permitted under the Louisiana Workmen's Compensation Act only where it is shown that the injury arose out of an employment in the course of the employer's hazardous business, the exclusion of casual employments would be an undesirable further restriction which would not be warranted by the terms of the Workmen's Compensation Act.

In the case of *Laine v. Junca*[20] plaintiff was a field hand who voluntarily assisted in running some mules into a pen. The person who regularly performed this duty was on the scene at the time, and it does not appear that the plaintiff was requested to give assistance. There is no evidence, however, that his help was objected to in any way. He was denied compensation for the loss of an eye occasioned by his being struck in the face with the whip he was holding. The decision that he was a mere volunteer is not very convincing. Farming operations are not generally divided into such specialties. It is difficult to believe that if the plaintiff had struck a bystander in the face with the whip, recovery would have been denied on the ground that the employee was not acting in the course of his employer's business. The explanation of the case probably lies in the fact that the defendant was engaged in a purely agricultural pursuit, although this fact had not been expressly set up by him.

Prematurity of Suit; Prescription

Prior to 1926 an employee was entitled to a judgment fixing the amount of compensation, the terms of payment, and other matters in dispute between him and his employer, notwithstanding the fact that when this suit was brought he was being paid compensation at the maximum allowable rate.[21] In that year, however, the present amended Section 18(1)(B) was included in the Workmen's Compensation Act.[22] This section provides in substance that an action for compensation will be regarded as premature and will be dismissed unless the complaint alleges

19. The court of appeal held that casual employees are protected by the Workmen's Compensation Act in Ranson-Rooney v. Overseas Ry., 134 So. 765 (La. App. 1931). This judgment was reversed by the supreme court on grounds that left the matter of casual employment undecided. Rooney v. Overseas Ry., Inc., 173 La. 183, 136 So. 486 (1931).

20. 207 La. 280, 21 So. (2d) 150 (1945).

21. Ford v. Fortuna Oil Co., 151 La. 489, 91 So. 849 (1922); Daniels v. Shreveport Producing & Refining Corp., 151 La. 800, 92 So. 341 (1922); Hulo v. City of New Iberia, 153 La. 284, 95 So. 719 (1923).

22. La. Act 85 of 1926, § 18(1)(B) [Dart's Stats. (1939) § 4408(1)(B)].

"that the employee or the dependent is not being or has not been paid . . . the *maximum per centum of wages* to which petitioner is entitled" under the act.

Thereafter, the courts of appeal took the position that an employee cannot institute an action for compensation where he has been paid or is still being paid compensation at the maximum rate fixed by the act. Under these circumstances his petition will be dismissed as premature even though the employer or his insurer may deny the employee's claims either as to the length that time payments shall continue, or even with respect to the amount of future payments.[23] In such instances the act adequately protects the employee's interest with reference to prescription.[24]

Difficulty has arisen where, following the accident, the employer, in lieu of paying compensation, maintains the employee on the payroll in one capacity or another, either at his former salary or at least with a wage that equals the maximum allowable compensation rate. Several questions arise in this situation. First, is the employee subject to the one year prescriptive period? If so, he is forced into an embarrassing election during his first year of disability. He must choose to sue or not to sue. If he sues, he will lose, in all probability, an advantageous wage which exceeds the maximum allowable compensation. If he refrains from suit, he does so at the risk that his benefactor-employer may discharge him after one year and interpose a successful plea of prescription to his claim for compensation. The provisions of Section 31 of the act are none too clear with reference to this situation. The language of this section deals expressly only with the effect of *compensation payments* in preventing the running of the prescriptive period.[25] In 1940 in the case of *Carpenter v. E. I. Du Pont de Nemours and Company*[26] the Court of Appeal for the First Circuit held that payment in the form of wages for lighter service, which exceeded in amount the maximum allowable compensation, operated like compensation payments on the running of prescription, and that the employee could safely institute his action within one year after the pay-

23. Moss v. Levin, 10 La. App. 149, 119 So. 558 (1929), on rehearing 120 So. 258 (La. App. 1929); Reiner v. Maryland Casualty Co., 185 So. 93 (La. App. 1938).

24. ". . . Where, however, such payments have been made in any case, said limitations shall not take effect until the expiration of one year from the time of making the last payment. . . ." La. Act 20 of 1914, § 31, as last amended by La. Act 29 of 1934, § 1 [Dart's Stats. (1939) § 4420].

25. Ibid.

26. 194 So. 99 (La. App. 1940).

ment of wages ceased or the wage fell below the allowable compensation rate.

Recently the supreme court has deprived the *Carpenter* case of much of the significance it was assumed to possess.[27] Arnold, who was employed by the Solvay Process Company, lost an eye in the course of his employment. For six years thereafter he was maintained on the payroll at the same or an increased wage and he rendered full and unimpaired service to his employer. When the employer finally ceased wage payments, Arnold instituted suit for compensation for the specific injury of loss of an eye. The supreme court upheld the district and circuit courts by announcing that the one year prescriptive period applied and Arnold's action was barred. At the same time it distinguished the *Carpenter* case by finding that in the latter case the wage greatly exceeded the earning capacity of plaintiff, who was furnishing reduced services. The rule as announced in *Arnold's* case would place the employee in the position of having to determine at his peril during the first year whether the wage which he continues to receive is earned or is a sugar-coated compensation payment. Only if the latter conjecture proved to be correct could he assume that it is safe to wait beyond the one year period.

Further light, however, was thrown on the matter in the recent case of *Thornton v. E. I. Du Pont de Nemours and Company.*[28] An employee who had enjoyed his employer's generosity by being retained on the payroll at full wages for reduced service for eleven months instituted suit shortly before the expiration of the one year period following the accident. Upon being served with process the employer immediately discharged him and placed him on a compensation basis. The employer likewise filed a plea of prematurity, based on Section 18(1) (B), already noted. The supreme court, speaking through the chief justice, found that Thornton had done well to institute his action before the expiration of one year following the accident; for otherwise he would have fallen before a plea of prescription. Said the court, wage payments, unlike payments of compensation, do not preclude the employee from instituting action at any time within the prescriptive period. Section 18(1) (B) does not apply to such payments, even though the language of this section refers to *"the maximum per centum of wages* to which the petitioner is entitled under the provisions" of the act. Since the employee is

27. Arnold v. Solvay Process Co., 207 La. 8, 20 So. (2d) 407 (1944).
28. 207 La. 239, 21 So. (2d) 46 (1944).

free to institute his action at any time under these circumstances, there is no reason why his cause should not be barred one year after the accident. There was a vigorous dissent by Justice Rogers, in which Justice Odom concurred.

Under the majority opinion there appears to be little or nothing left of the *Carpenter* case. In Arnold's case the court had attempted to distinguish it on the ground that the payments to Carpenter were compensation in disguise. But the *Thornton* case seems indistinguishable on its facts. It is true that in the latter case the court is directly concerned with prematurity of action under Section 18(1)(B), but both the majority opinion and the minority opinion seem to agree that so long as the plaintiff cannot sue, because of prematurity, the employer cannot include that period of disability in determining the time of prescription. They likewise seem to agree that so long as the employee is free to sue there is no reason why prescription should not run. Thus the two problems are inseparable, and the statements in the opinion with reference to the running of prescription cannot be disregarded as being mere dicta.

The situation, as it now stands, may be summarized as follows: Under the majority opinion the employee who is paid on a wage basis following his accident is free at any time to sue for compensation and thus relieve himself of the uncertainty of his employer's welcome but perhaps capricious generosity. At the same time he cannot enjoy that generosity for more than a year without risking the success of his compensation claim.

Under the minority opinion, the employer could bestow wage benefits in installments equal to or greater than the maximum allowable compensation rate for as long as he may choose, and at the same time he may deny all the petitioner's rights. In so doing, however, he would gain nothing by way of prescription. This applies only to wages which are unearned and are bestowed as gratuities. In cases of *earned* wages we must assume the minority opinion has accepted the rule of the *Arnold* case and would permit immediate suit.

Miscellaneous

The Workmen's Compensation Act establishes the basis of compensation in terms of the wages that the plaintiff was receiv- at the time of the accident. Where an employee who was injured in 1937 returned to work on two occasions thereafter during the year 1939 at a higher hourly wage, and during the course of his re-employment suffered an aggravation of his injury, he is not

entitled to compensation based on the higher pay rate.[29] Perhaps a more difficult problem would have faced the court if the plaintiff had been able to characterize the aggravations as separate "accidents."[30]

V. BUSINESS AND COMMERCIAL LAW

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BANKRUPTCY. CORPORATIONS. INSURANCE

BANKRUPTCY

Revival of debt discharged in bankruptcy. What constitutes promissory language sufficient to support subsequent legal action on a debt discharged in bankruptcy? In *Irwin v. Hunnewell*,[1] applying the well settled doctrine that a promise to pay a debt discharged in a bankruptcy proceeding must be direct, definite, unequivocal and more than a mere acknowledgment or expression of an intention, hope, desire or expectation to pay, the court held that the plaintiff's action could not be maintained against the bankrupt.[2] A message had been sent to the plaintiff that the bill for his services "was to be taken care of" and that the account "would be paid." This was held not to be a definite promise to pay the debt. An expression in a subsequent letter that, after payment of certain debts to the bankrupt's employer, the plaintiff would "come first," was likewise held to be ineffective as a promise. Similarly the bankrupt's expression—"my intentions were good and the delay unavoidable"—coupled with an offer to assign the proceeds of a life insurance policy payable at death of the bankrupt to the plaintiff was held not to revive the discharged debt.[3]

The reason underlying the rule requiring an express and unequivocal promise to revive a debt discharged in bankruptcy is that the discharge in bankruptcy extinguishes the pre-existing debt and does not merely bar the remedy.[4] In Louisiana, despite vacillation in the jurisprudence on the question of whether

29. Holliday v. Martin Veneer Co., 206 La. 897, 20 So. (2d) 173 (1944).

30. Compare the interesting rationalization along this line in Harris v. Southern Carbon Co., Inc., 162 So. 430 (La. App. 1935).

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1. 207 La. 422, 21 So. (2d) 485 (1945).

2. 7 Remington, A Treatise on the Bankruptcy Law of the United States (1939) § 3505.

3. See Linton v. Stanton, 4 La. Ann. 401 (1849).

4. See 7 Remington op. cit. supra note 2, at § 3501.