tion would protect the creditors against such arbitrary action by the director.

The trend in recent years has been toward more strict recognition of the fiduciary duties of the corporation director. The earlier condonation of "arms length" dealings between director and stockholders, has been replaced by the imposition of a fiduciary duty where the director has acted inequitably.[26] In addition, the Securities Exchange Act of 1934 forbids "quick turns" in securities by directors.[27] The *Manufacturers Trust* case is an exception to the previous strict enforcement of the fiduciary obligations of directors of insolvent corporations.[28] The decision encourages the director to place his personal interest above that of the corporation, employee, creditor, and community. In discouraging such a result Judge Hand has adopted the better view and has declared "before accepting the excuse in the case of debts, I would put the burden on the director of proving, not only that he genuinely expected by a composition to continue the business, but that his expectation was well founded; and nothing short of both would serve as an excuse."[29]

CORPORATIONS

RETROACTIVE COMPENSATION TO DIRECTOR-OFFICERS

A generally accepted tenet of corporate law has long prohibited compensation to director-officers for past services.[1] Early cases required that the provisions for compensation be included within a formal authorization prior to the rendition of services.[2] Modern courts found the requirement satisfied by an "implied agreement" where there had been an oral or tacit understanding

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26. See note 6 *supra.*

27. 48 STAT. 896 (1934), 15 U.S.C. § 78p (b) (1940). "Quick turns" refer to any profit realized by a person from transactions within a period of six months in securities issued by a corporation in which he is an officer, director or major stockholder. The Act provides that such profit shall inure to the benefit of the corporation.

28. See note 11 *supra.*

29. *See,* In re Calton Crescent, 173 F.2d 944, 952 (2d Cir. 1949) (dissenting opinion).

1. The rule is aptly stated in Crichton v. Webb Press Co., 113 La. 167, 177, 36 So. 926, 932 (1904) where the court said, "The salaries fixed are not too large, but the resolutions fixing them can, as a matter of course, have operation only in the future." Hurt v. Cotton States Fertilizer Co., 159 F.2d 52 (5th Cir. 1947); Maux Ferry Gravel Co. v. Branegan, 40 Ind. 36 (1872); 5 FLETCHER, CYCLOPEDIA CORPORATIONS 449 (perm. ed. 1931); STEVENS, CORPORATIONS 758 (2d ed. 1949); BALLENTINE, CORPORATIONS 187 (rev. ed. 1946); WASHINGTON, CORPORATE EXECUTIVES' COMPENSATION 188 (1942). Of course, unanimous ratification by the stockholders would make retroactive compensation valid. Boyum v. Johnson, 127 F.2d 491 (D. Minn. 1942); Godley v. Crandall, Godley Co., 212 N. Y. 121, 105 N. E. 818 (1914); Kreitner v. Burweger, 174 App. Div. 48, 160 N. Y. Supp. 256 (1916). A few courts have allowed ratification by a majority of the stockholders, although the effect of this is to undermine the rule against retroactive compensation in many instances. Russell v. Henry C. Patterson Co., 232 Pa. 113, 81 Atl. 136 (1911); Tefft v. Schaefer, 136 Wash. 391, 239 Pac. 837 (1925).

2. Maux Ferry Gravel Co. v. Branegan, 40 Ind. 361 (1872); Klein v. Independent Brewing Co., 231 Ill. 594, 83 N. E. 434 (1907); Godley v. Crandall, Godley Co. 212 N. Y. 121, 105 N. E. 818 (1914).

as to remuneration upon which the officer had relied.[3] And the "outside services" doctrine was developed to condone compensation for the performance of past services which were clearly outside the scope of the officer's usual duties.[4] Pervading all the cases, however, is the requirement of some type of prior agreement if the compensation is to be regarded as something more than a mere gift.[5] The time of the agreement, rather than the time of payment, is the governing factor.[6]

A decision of the Delaware Supreme Court has repudiated, or at least seriously qualified the established prohibition of retroactive compensation and has introduced an added threat to stockholder security by adopting a criterion of "reasonableness" to determine the validity of unbargained-for compensation.[7]

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3. In these cases there was clearly an agreement for compensation prior to the services, although there had been no formal authorization by the directors. Church v. Harnit, 35 F.2d 499 (6th Cir. 1929) *cert. den.* 281 U. S. 732 (1929); Sotter v. Coatsville Boiler Wks., 257 Pa. 411, 101 Atl. 744 (1917); 5 FLETCHER, CYCLOPEDIA CORPORATIONS 385, 451 (perm. ed. 1931); BALLENTINE, CORPORATIONS 192 (rev. ed. 1946). *See* Boyum v. Johnson, 127 F.2d 491, 495 (8th Cir. 1942).

4. Kenton v. Wood, 56 Ariz. 325, 107 Pac. 380 (1940); Morris v. North Evanston Bldg. Corp., 319 Ill. App. 298, 49 N. E.2d 647 (1943); 5 FLETCHER, CYCLOPEDIA CORPORATIONS 387 (perm. ed. 1931); BALLENTINE, CORPORATIONS 188 (rev. ed. 1946). It should be noted that this doctrine does not apply when the ordinary duties are performed unusually well. Huffake *et al.* v. Kreiger's Assignees, 21 Ky L. Rep. 887, 53 S. W. 288 (1899).

5. This is not to say that director-officers cannot make donations of corporate funds. Gifts to charity and other subscriptions have been upheld when they served a business purpose. Fort Worth City Co. v. Smith Bridge Co., 51 U. S. 294 (1894) (payment to get desirable location for bridge); State Bd. of Agric. v. Citizens State R. Co., 47 Ind. 407 (1874) (donation to fix site of state fair near streetcar tracks); Steinway v. Steinway Sons, 17 Misc. 43, 40 N. Y. Supp. 718 (1896) (advertising value). From the foregoing it can be seen that pure gifts "for the sake of giving" are not tolerated. In 6 FLETCHER, CYCLOPEDIA CORPORATIONS § 2940 (perm. ed. 1931) it was said, "The modern rule of the majority of the courts recognizes the power of a business corporation to make subscriptions and donations . . . in the expectation of receiving a pecuniary benefit therefrom or furthering business interests . . ." Note, 31 COL. L. REV. 136 (1931).

6. The scope of this discussion includes only compensation paid to director-officers. In the case of ordinary employees courts have been more disposed to allow extra compensation. Neff v. Gas & E Shop, 232 Ky. 66, 22 S. W.2d 265 (1929) (bonuses upheld when employees did not contract for them); BALLENTINE CORPORATIONS 191, 192 (rev. ed. 1946). The courts have reasoned that there is little likelihood of fraud, since employees have no control over business policy, and at the same time certain benefits accrue to the corporation when the bonuses are granted from year to year. *Cf.* Putnam v. Juvenile Shoe Corp., 307 Mo. 74, 269 S. W. 593 (1925). By the same reasoning bonuses granted when a corporation is about to go out of business have been denied. Warren v. Lambeth Waterworks, 21 Times L. R. 685, 25 E. E. Dig. 503 (1905); *cf.* Atl. City and Suburban Gas and Fuel Co. v. Johnson, 81 N. J. Eq. 351, 88 Atl. 163 (1912).

7. The "standard of reasonableness" has been used often by the courts in determining the validity of the amount of compensation paid under a *prospective* agreement. Rogers v. Hill 289 U. S. 582, (1933) (compensation must bear a reasonable relation to the value of the services); Gray Co. v. United States, 35 F.2d 958 (Ct. Cl. 1929); WASHINGTON, CORPORATE EXECUTIVES' COMPENSATION, 194-216 (1942); Notes, 25 N. CAR. L. REV. 479 (1947), 17 MINN. L. REV. 433 (1933).

In 1939, Maguire became a major stockholder, director, and president of the Thompson Automatic Arms Corporation. Due to his skillful financial maneuvers and acumen in production management (with perhaps an assist from the war which aided the sub-machine gun market considerably), the company, previously on the brink of collapse, became a huge success. Salary increases were voted to Maguire in March, 1940, and in March, 1941, each being made retroactive for several months. In a stockholder's derivative suit Blish, a minority stockholder, complained that the retroactive features of the compensation were void and constituted spoilation and waste of corporate assets.[8] Although there was no finding that the extra compensation had been agreed upon in advance, the Delaware Supreme Court held the increases valid under an "exception" to the general rule against retroactive remuneration where the amount awarded is not unreasonable in view of the services rendered. *Blish v. Thompson Automatic Arms Corporation,* 64 A.2d 581 (Del. 1948).

In holding that Thompson's directors had the power to grant themselves retroactive pay increases,[9] the court relied upon three earlier decisions. In *Osborne v. United Gas Improvement Co.*[10] a pension plan was attacked as begin retroactive in operation. However, the court pointed out that the issue of retroactivity was not controlling, for the pension plan had been authorized by statute, and was valid by virtue of legislative authority. In *Wyles v. Campbell*[11] and *Koplar v Warner Bros. Pictures*[12] the compensation in question was obviously not retroactive in operation, having been bargained for in the employment contract. The rule of reasonableness was quite properly invoked to determine whether the amount of the compensation was

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8. Blish also charged that attorney's fees paid by the corporation in a former derivative suit against Maguire should have been paid by Maguire personally. A note in 63 HARV. L. REV. 351 (1949) discusses this aspect of the case and concludes that even though the suit was against Maguire for his activities as promoter and underwriter, the corporation was entitled to reimburse him the costs of his defense. From the facts presented in the opinion by the court it is not clear whether the corporation actually did reimburse Maguire. Blish v. Thompson Automatic Arms Corporation, 64 F.2d 581, 607 (Del. 1948). If so, it is the first case where a promoter-underwriter has been allowed reimbursement from the corporation of costs of defending a derivative suit involving the corporation.

9. It might appear that the "outside services" doctrine would apply, for the court spoke of Maguire's services as being "extraordinary." Blish v. Thompson Automatic Arms Corp. 64 A.2d 581, 607 (Del. 1948). However, Maguire performed no more than his duties called for, and the fact that he was proficient would not invoke the outside services doctrine. See cases cited note 4 *supra.*

10. 354 Pa. 57, 46 A.2d 208 (1946) (pension to all employees, including director-officers).

11. 77 F. Supp. 343 (D. D. C. 1948) (compensation to an executive *not* a director).

12. 19 F. Supp. 173 (D. Del. 1937) (compensation to director-officers).

justified as a matter of business policy. In none of these cases, then, was *retroactive* compensation appraised under the standard of reasonableness.[13]

The inadequacy of cited authority alone is not to condemn a decision that speaks well for itself, but the Delaware court, talking in terms of "reasonableness" has ignored the basic considerations underlying the rule against retroactive compensation. This prohibition was conceived from a fear that director-officers, as fiduciaries in control of the corporate purse strings,[14] might allow their personal appetites to prevail over the stockholders' interests.[15] Accordingly, the courts required the officers to show a justifiable reason for paying out the corporate assets.[16] To be more than a gift, the compensation must serve some business purpose which will operate as a substantial benefit to the corporation. Because Maguire's services here were more beneficial than anticipated, it does not follow that the corporation was benefited by paying the added compensation. It is only where the provisions for extra compensation are included within a prospective agreement that certain benefits to the corporation become apparent. The director-officer

13. The "exception" applied by the court, "where the compensation is not unreasonable in the light of the services rendered," was possibly taken from an annotation on the subject in 164 A. L. R. 1133 where the same words are used. However, the cases cited there make it clear that the "circumstances" must include some sort of prior agreement. Boyum v. Johnson, 127 F.2d 491 (8th Cir. 1942) (bonus denied because there was no prior agreement); Balch v. Investors Royalty Co. 7 F. Supp. 420 (N. D. Okla. 1934) (bonus denied—no prior agreement); Wiseman v. Musgrave, 309 Mich. 523, 16 N. W.2d 60 (1944) (extra pay upheld under outside services doctrine); Wineburgh v. Seeman Bros., 21 N. Y. S.2d 180 (S. Ct. N. Y. County 1940) (bonus upheld—implied agreement present).

14. Courts have disagreed as to the legal status of corporate director-officers. Some have said they hold a "position of trust": Stevenson v. Sicklesteel Lbr. Co., 219 Mich. 18, 188 N. W. 499 (1922); A. J. Anderson Co. v. Kinsolving, 262 S. W. 150 (Tex. Civ. App. 1924); Steeple v. Max Kiner Co., 121 Wash. 47, 208 Pac. 44 (1922). Some courts have labeled them "trustees": Ellis v. Ward, 137 Ill. 509, 25 N. E. 530 (1890); Williams v. McKay, 40 N. J. Eq. 189 (1832); Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163 (1901); 3 FLETCHER, CYCLOPEDIA PRIVATE CORPORATIONS § 838 (perm. ed. 1931). Other courts have called them "agents": Briggs v. Spaulding, 141 U. S. 132, (1891); New Haven Tr. Co. v. Doherty, 75 Conn. 555, 54 Atl. 209 (1903); BALLENTINE, PRIVATE CORPORATIONS 359 (1927). For an excellent discussion of the whole problem see Uhlman, *The Legal Status of Corporation Directors,* 19 B. U. L. REV. 12 (1939); Johnson, *Corporate Directors as Trustees in Illinois,* 23 ILL. L. REV. 653 (1928). But despite different labels, all courts agree that director-officers have a *fiduciary* duty. McEwen v. Kelley, 140 Ga. 720, 79 S. E. 777 (1913); Touchett Inc. v. Touchett, 264 Mass. 499, 163 N. E. 184 (1928); BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 221 *et seq.* (1934); WORMSER, FRANKENSTEIN INCORPORATED, 124 *et seq.* (1931).

15. In Davoue v. Fanning, 1 Chanc. Rep. 251 (N. Y. 1816), Chancellor Kent pointed out, "The inquiry is not whether there was, or was not, fraud in fact. It is to guard against the uncertainty and *hazard* of abuse, and to remove the trustee from temptation . . ." Butts v. Wood, 37 N. Y. 319 (1867); Steeple v. Max Kiner Co., 121 Wash. 47, 208 Pac. 44 (1922); 5 FLETCHER, CYCLOPEDIA CORPORATIONS 415 (perm. ed. 1931).

16. Dodd, *For Whom Are Corporate Managers Trustees,* 45 HARV. L. REV. 1145, 1146 (1932), "it is undoubtedly the traditional view that a corporation is an association of stockholders founded for their private gain and to be managed by its board of directors solely with that end in view." However, there seems to be a trend away from the "traditional view." See note 23 *infra.*

then acts upon an expectation of future remuneration which is directly related to his own efforts. This expectation provides an incentive[17] to him, and both he and the corporation benefit from his success. Further, the "holding out" of extra compensation, especially when based on profits or sales, assists the corporation in attracting[18] and retaining[19] proficient executives. Retroactive compensation, by definition, lacks these ingredients. Consequently, the general rule has denied to director-officers the power to award themselves unexpected pay for past services.

Even the "rule of reason" applied by the Delaware court should strike down retroactive compensation since it confers no benefit upon the corporation.[20] The danger in applying this test, one borne out by the *Maguire* decision, is that the use of the word "reasonable" is conducive to the erroneous assumption that director-officers, under some circumstances, may have the power to compensate themselves retroactively. That this is no fanciful hazard is illustrated by the disrepute into which the test of reasonableness has fallen in its own bailiwick, prospective compensation. Concededly, there have been many instances where directors have voted what would seem to be unreasonable salaries to themselves and yet their action has been sustained by the

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17. In Diamond v. Davis et al, 38 N. Y. S.2d 103, 113 (Sup. Ct. N. Y. County 1942) the court said that a properly authorized bonus may be granted "as an incentive to retain his services, sharpen his interest, intensify his zeal, spur him on to more ardent effort in the interest and for the benefit of the company . . ." Marsh v. Arch Rib Truss Co., 56 Cal. App.2d. 811, 33 P.2d 412 (1943); In re Woods Estate, 299 Mich. 635, 1 N. W.2d 19 (1941).

18. In Wyles v. Campbell, *supra* note 11, the court found, "Mr. Campbell was unwilling to come to Valspar unless he should have an opportunity to acquire a stock interest in the corporation in case of his success in its operation." McQuillen v. Nat'l Cash Register Co., 112 F.2d 877 (4th Cir. 1940), *cert. denied*, 311 U. S. 695 (1941) (discussion of the benefits of an incentive contract); Bennett v. Madison Sales Co., 264 Ky. 728, 95 S. W.2d 604 (1936); BALLENTINE, PRIVATE CORPORATIONS 194 (rev. ed. 1946).

19. Wyles v. Campbell, *supra* note 11; Meyers v. Cowden, 47 N. Y. S.2d 471 (Sup. Ct. Westchester County 1944). Today, with proficient executives at a premium, a compensation plan which will retain good executives is highly beneficial to the corporation. WASHINGTON, CORPORATE EXECUTIVES COMPENSATION 3 (1942); DIMOCK AND HYDE, BUREAUCRACY AND TRUSTEESHIP IN LARGE CORPORATIONS 108 (T.N.E.C. MONOGRAPH 11 1940).

20. Only three cases have been found where the court spoke in terms of "reasonableness" where retroactive compensation was involved. Ransome Concrete Mach. Co. v. Moody, 282 Fed. 29 (2d Cir. 1922) said that in the absence of actual fraud retroactive compensation may be valid, depending on the facts. The facts were that there had been an informal agreement prior to the services, and later formal authorization approving the prior action. In Matthews v. Headley Choc. Co., 130 Md. 522, 100 Atl. 645 (1917) the court spoke in terms of "reasonableness," but the real ground of the decision was the fact that the complaining stockholders had purchased their shares after the transactions in question had occurred. In Chamberlain v. Chamberlain, Case and Boyce, 124 Misc. 480, 209 N. Y. Supp. 258 (1925) the creditors of the corporation brought the suit, but the directors owned all the stock and had ratified their own actions. At least two cases have held compensation which was retroactive only for a short period "reasonable" under the principle of *de minimis*. Francis v. Brigham Hopkins Co., 108 Md. 233, 70 Atl. 95 (1908); Russell v. Henry C. Patterson Co., 232 Pa. 113, 81 Atl. 136 (1911).

courts as reasonable because of the vagueness of the standard and the extreme reluctance to substitute judicial for managerial discretion.[21] This has resulted in an allowance to the directors of almost unlimited power over the disposition of corporate funds. Such an amorphism is not a suitable replacement for the definite and easily applied standard of the flat prohibition against retroactive compensation.

Recent years have seen the apparently unlimited legislative and judicial extension of the powers of the corporate director.[22] Few, indeed, are the safeguards left to protect the shell of ownership retained by the stockholders.[23] A cursory examination of the investment market reveals a paucity of needed risk capital, which in part has resulted from an awareness by the investor that the risks of loss will fall upon him while the management will take the cream of any prosperity.[24] Decisions like that in *Maguire* point up the

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21. Seitz v. Union Brass, Metal Mfg. Co., 152 Minn. 460, 189 N. W. 586 (1922); Heller v. Boylan, 29 N. Y. S.2d 653 (Sup. Ct. N. Y. County 1941); Holmes v. Republic Steel Corp., 69 N. E.2d 396 (C. Pl. Ohio 1946); Washington, *The Corporate Executive's Living Wage*, 54 HARV. L. REV. 733 (1941); Note, 25 N. CAR. L. REV. 479 (1947).

22. The following states have placed legislative restrictions on bringing stockholder's derivative suits, either by requiring the stockholder to own a minimum amount of stock, or that the stock have a minimum market value: California (CALIF. STAT. 1949, c. 499, effective Oct. 1, 1949); New York (N. Y. GEN. CORP. LAW § 61 b); New Jersey (N. J. REV. STAT., Cum. Supp. 14:3-15, N.J.S.A. 14:3-15); Pennsylvania (PENN. STAT. ANN. [Purdon, Supp. 1945] title 12 § 1322); Wisconsin (WISC. STAT. [1945] § 180.13 [31]). The purpose of these acts is to prevent merely harrassing suits where the complainant has no substantial interest. In effect, however, the statutes also drastically restrict the minority shareholders' ability to protect their interests. Ballentine, *Abuses of Shareholder's Derivative Suits: How Far is California's New 'Security for Expenses' Act Sound Regulation?*, 37 CALIF. L. REV. 399 (1949); Hornstein, *New aspects of Stockholder's Derivative Suits: the Company's Role, and a Suggestion*, 25 CORN. L. Q. 361 (1940).

Minority shareholders have found the courts equally reluctant to entertain stockholder's suits, or if they do, to give relief in recent years. Cohen v. Beneficial Ind. Loan Corp., 337 U. S. 541 (1949); Otis Co. v. Penn. R. Co., 57 F. Supp. 680 (E. D. Pa. 1944); Stella v. Kaiser, 87 F. Supp. 525 (S. D. N. Y. 1949); Notes, 31 VA. L. REV. 695 (1945), 45 YALE L. J. 661 (1934); Frey, *Noteworthy Decisions in the Law of Private Corporations: 1940-1945*, 94 U. OF PA. L. REV. 265 (1946); see note 21 *supra*.

23. BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 68 (1932) "the owner of industrial wealth is left with a mere symbol of ownership, while the power, the responsibility and substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lies control." Comment, 47 MICH. L. REV. 547 (1949); Notes, 17 FORDHAM L. REV. 259 (1949), 25 N. CAR. L. REV. 479 (1948).

Perhaps one reason for this trend is the lack of stockholder interest which typifies the average corporation, DIMOCK AND HYDE, BUREAUCRACY AND TRUSTEESHIP IN LARGE CORPORATIONS 114 (T.N.E.C. MONOGRAPH 11, 1940). However, lack of interest on the part of the stockholders should not influence the courts where a stockholder does try to enforce his rights.

24. "A dynamic enterprise system requires a large and continuing flow of capital into new plants. It requires that the capital be 'take a chance' capital—capital provided by those willing to assume the risk . . . This kind of capital can only be provided out of the savings of individuals . . . It cannot be provided by institutional investors . . .

"For some years now individuals have been furnishing a deplorably small proportion

necessity of retaining the rule against retroactive compensation in all its vigor as one of the needed bulwarks against the further decline in the supply of risk capital.

WORKMEN'S COMPENSATION

COMPENSATED EMPLOYEE'S RIGHT TO SUE PHYSICIAN FOR AGGRAVATION

Despite a general tendency to construe Workmen's Compensation statutes liberally for the benefit of employees, the majority of courts have reached the result that an injured workman who accepts compensation is precluded from suing a physician for negligent aggravation of the original injury.[1] This result has recently been adopted by the Supreme Court of Appeals of West Virginia.

Makarenko broke his arm in the course of his employment at a coal mine. Because of Dr. Scott's negligence in treating the injury, the bone had to be refractured in an effort to properly align the arm. The treatment failed and the arm was permanently deformed. Makarenko's employer was a subscriber to the West Virginia Workmen's Compensation Fund, and compensation was awarded for both the original injury and the aggravation. The payments were based upon a fifteen per cent permanent disability. In addition, medical expenses of nearly $300 were paid from the fund. After accepting this award, Makarenko sought to recover $20,000 from Dr. Scott for the deformity and accompanying pain resulting from the negligent treatment. The Supreme Court of Appeals of West Virginia held that Makarenko, having accepted compensation, was precluded from suing Dr. Scott. *Makarenko v. Scott et al.*, 55 S. E. 2d 88 (W. Va. 1949).

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of risk capital nourishing our economy." *The Forgotten Men*, 21 THE OUTLOOK (Standard and Poor's) 970 (1949).

High taxes are, of course, a major factor in this trend. Bachrach, *Advantageous Tax Positions In Security Transactions*, 25 TAXES 720 (1947); Wolder, *The Dividend*, 25 TAXES 911 (1947); *Compensation and Incentives for Industrial Executives*, INDIANA UNIVERSITY BUSINESS PLANNING PROJECT No. 11. There is evidence, however, that lack of control by the stockholders is also a factor. REPORT OF ANNUAL MEETING, STANDARD OIL CO. OF NEW JERSEY 28 (1949) (point was made that a contributing factor which accounted for lack of risk capital was unrestricted control by director-officers); see note 23 *supra*.

1. Roman v. Smith, 42 F.2d 931 (D. Idaho 1930); Paine v. Wyatt, 217 Iowa 1147, 251 N. W. 78 (1933); McIntosh v. Atchison, etc., Ry. 109 Kan. 246, 198 Pac. 1084 (1921); Vatalaro v. Thomas, 262 Mass. 363, 160 N. E. 269 (1928); Hanson v. Norton, 340 Mo. 1012, 103 S. W.2d 1 (1937); Burns v. Vilardo, 26 N. J. Misc. 277, 60 A.2d 94 (1948); Polucha v. Landes, 60 N. D. 159, 233 N. W. 264 (1930); Alexander v. Von Wedel, 169 Okla. 341, 37 P.2d 252 (1934); McDonough v. Nat'l Hosp. Ass'n., 134 Ore. 451, 294 Pac. 351 (1930); Revell v. McGaughan, 162 Tenn. 532, 39 S. W.2d 269 (1931); Anderson v. Allison, 12 Wash.2d 487, 122 P.2d 484 (1942); Ross v. Erickson Const. Co., 89 Wash. 634, 155 Pac. 153 (1916); *Cf.* McConnell v. Hames, 45 Ga. App. 307, 164 S. E. 476 (1932); Hoover v. Globe Indemnity Co., 202 N. C. 655, 163 S. E. 758 (1932).