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CPLR 1411: Comparative Negligence Statute Applies to Loss of Consortium Action and Operates to Reduce Consortium Award by Degree of Spouse's Contributory Negligence

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the traditional view that economic losses are only recoverable in a breach of warranty cause of action. It is hoped that *The Survey*'s treatment of these and other developments in New York law will be of help and of interest to the New York practitioner.

CIVIL PRACTICE LAW AND RULES
ARTICLE 14A—COMPARATIVE NEGLIGENCE

CPLR 1411: Comparative negligence statute applies to loss of consortium action and operates to reduce consortium award by degree of spouse's contributory negligence

In New York, a cause of action for loss of consortium is considered to be derived from, not independent of, the injured spouse's direct cause of action.[1] Consequently, prior to the enact-

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[1] Liff v. Schildkrout, 49 N.Y.2d 622, 632, 404 N.E.2d 1288, 1291, 427 N.Y.S.2d 746, 749 (1980); *see, e.g.*, Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 507-08, 239 N.E.2d 897, 902-03, 293 N.Y.S.2d 305, 312 (1968); Maxson v. Tomek, 244 App. Div. 604, 605, 280 N.Y.S. 319, 320 (4th Dep't 1935); *cf.* Reilly v. Rawleigh, 245 App. Div. 190, 191, 281 N.Y.S. 366, 367 (4th Dep't 1935) (derivative action for child's medical expenses). The loss of consortium cause of action has been described as encompassing "not only loss of support or services, [but] also . . . such elements as love, companionship, affection, society, sexual relations, solace and more." Millington v. Southeastern Elevator Co., 22 N.Y.2d at 502, 239 N.E.2d at 899, 293 N.Y.S.2d at 308.

Before the widespread adoption of comparative fault principles, most jurisdictions held that an injured spouse's contributory negligence would bar any recovery by the consortium spouse on the ground that the loss of consortium cause of action was derived from the personal injury claim. *See, e.g.*, Note, *Torts—Action for Loss of Consortium—Husband's Contributory Negligence as a Bar*, 11 WAYNE L. REV. 824, 827 (1965). Commentators have criticized the derivative status of loss of consortium claims, noting that such status permitted the courts effectively to impute negligence. *See, e.g.*, Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 211-12 (1921); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 354-56 (1954); Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 630-31 (1976); note 16 *infra*. Notably, the loss of consortium cause of action has been envisioned as analogous to claims for property damage occurring when a contributorily negligent person damages his spouse's automobile in a collision with a third party. *See* James, *supra*, at 354-56. Observing that the spouse's negligence is not imputed to the owner of the car in an action for property damage, commentators have argued that the loss of consortium plaintiff should not be subject to the imputation of fault and should be treated as having an "independent" claim. *See* Gregory, *The Contributory Negligence of Plaintiff's Wife or Child In An Action for Loss of Services, Etc.*, 2 U. CHI. L. REV. 173, 174-91 (1935); James, *supra*, at 354-56. One author has suggested a compromise position under which consortium claims would be considered only factually derivative. Love, *supra*, at 630-31. Under this view, the consortium plaintiff would be required to establish a prima facie case in favor of his spouse against the defendant. *Id.* The action, however, would be considered independent for all other purposes, thus precluding imputation to the spouse of the primary plaintiff's negligence. *Id.*

New York has refused to hold that consortium claims can exist independently of the spouse's personal injury claim. *See, e.g.*, Liff v. Schildkrout, 49 N.Y.2d 622, 632, 404 N.E.2d

ment of New York's comparative negligence statute,[2] the injured spouse's contributory negligence, which precluded recovery under a direct cause of action, also barred recovery under a derivative loss of consortium cause of action.[3] Upon passage of the comparative negligence statute in New York, several lower courts, citing the derivative nature of the loss of consortium cause of action, have reduced the consortium plaintiff's award by an amount proportionate to the injured spouse's degree of culpable conduct.[4] Nonetheless, the propriety of such a reduction had not been considered by a New York appellate court.[5] Recently, in *Maidman v. Stagg*,[6] the

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1288, 1291, 427 N.Y.S.2d 746, 749 (1980). In *Liff*, the Court of Appeals rejected a spouse's claim for permanent loss of consortium in a wrongful death action. *Id.* The Court noted that "it [cannot] be said that a spouse's cause of action for loss of consortium exists in the common law independent of the injured spouse's right to maintain an action for injuries sustained." *Id.*

[2] CPLR 1411-1413 (1976). CPLR 1411 provides that the culpable conduct attributable to a plaintiff or decedent will reduce an award of damages to the extent that such fault caused the injury. CPLR 1411. The legislative history of CPLR 1411 and its accompanying sections does not indicate an intention to expand the rights of loss of consortium plaintiffs or to change the principles of case law regarding the attributability of culpable conduct. Meyer v. State, 92 Misc. 2d 996, 1006, 403 N.Y.S.2d 420, 427-28 (Ct. Cl. 1978); *see* THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 232, 242 (1976).

[3] *See* Maxson v. Tomek, 244 App. Div. 604, 605, 280 N.Y.S. 319, 320 (4th Dep't 1935); *cf.* Reilly v. Rawleigh, 245 App. Div. 190, 191, 281 N.Y.S. 366, 367 (4th Dep't 1935) (derivative action for child's medical expenses). The overwhelming majority of contributory negligence jurisdictions held that recovery in a loss of consortium action was barred by the spouse's culpable conduct. *See, e.g.*, Pioneer Constr. Co. v. Bergeron, 170 Cal. 474, 478-83, 462 P.2d 589, 591-94 (1969); Ross v. Cuthbert, 239 Or. 429, 435-36, 397 P.2d 529, 530-33 (1964); Desjourdy v. Mesrobian, 52 R.I. 146, 147, 158 A. 719, 719-20 (1932); RESTATEMENT (SECOND) OF TORTS § 494 (1965). *Contra*, Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980) (mere concurrent negligence of injured spouse does not bar consortium spouse's recovery). Various reasons have been advanced for this rule, including the derivative nature of the consortium claim, the characterization of the action as an assignment of the injured spouse's cause of action, the propriety of imputing negligence by virtue of the marital relationship, and the fact that the rule is "well settled." Handeland v. Brown, 216 N.W.2d 574, 575-77 (Iowa 1974). The New York courts have justified their application of the rule by reiterating the derivative nature of the consortium claim. Liff v. Schildkrout, 49 N.Y.2d 622, 632-34, 404 N.E.2d 1288, 1291-93, 427 N.Y.S.2d 746, 749-50 (1980); *see, e.g.*, Leo v. Reile, 11 App. Div. 2d 1083, 1083, 206 N.Y.S.2d 465, 467 (4th Dep't 1960); Balestrero v. Prudential Ins. Co. of America, 283 App. Div. 794, 794, 128 N.Y.S.2d 295, 296 (2d Dep't 1954).

[4] *See, e.g.*, Lane v. Great Atl. & Pac. Co., N.Y.L.J., Nov. 3, 1980, at 12, col. 2 (Sup. Ct. App. T. 1st Dep't); Abbate v. Big V Supermarkets, Inc., 95 Misc. 2d 483, 485, 407 N.Y.S.2d 821, 823 (Sup. Ct. Orange County 1978); Lieberman v. Maltz, 99 Misc. 2d 112, 113, 415 N.Y.S.2d 382, 383 (N.Y.C. Civ. Ct. Kings County 1978).

[5] *Injured Spouse's Negligence Trims Consortium-Loss Award*, N.Y.L.J., Aug. 14, 1981, at 1, col. 2.

[6] 82 App. Div. 2d 299, 441 N.Y.S.2d 711 (2d Dep't 1981).

Appellate Division, Second Department, held that a spouse's loss of consortium damages should be reduced in proportion to the other spouse's negligence.[7]

In *Maidman*, the plaintiff brought suit for personal injuries arising from an automobile accident,[8] and his wife sued for loss of consortium damages.[9] The jury found the plaintiff seventy-five percent at fault, and awarded his estate twenty-five percent of his total damages.[10] The wife was awarded $20,000, but the jury did not indicate how it determined that sum.[11] The defendant thereupon requested that the jury be compelled to reveal whether the husband's culpable conduct was considered in computing the wife's award.[12] The trial court, however, denied the defendant's request and entered judgment for the plaintiffs.[13]

On appeal, the Appellate Division, Second Department, held that the trial judge erred in neglecting to instruct the jury to reduce the wife's award in proportion to her husband's negligence, and ordered a new trial for the sole purpose of determining her damages.[14] Writing for a unanimous court,[15] Justice Rabin conceded that a minority of comparative negligence jurisdictions, in accordance with criticisms written when the contributory negligence rule was prevalent,[16] had held that the loss of consortium cause of action was an independent claim.[17] Notwithstanding such

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[7] *Id.* at 306-07, 441 N.Y.S.2d at 716.

[8] *Id.* at 299-300, 441 N.Y.S.2d at 712. As the plaintiff was crossing the street, he was struck by the defendant's automobile. *Id.*

[9] *Id.*

[10] *Id.* The plaintiff died of causes unrelated to the collision before the trial concluded, and his wife was appointed temporary administratrix of the estate. *Id.* Since the plaintiff had testified before his death and the court was convinced that prejudice would not result if the trial continued, the judge refused to declare a mistrial. *Id.* at 307, 441 N.Y.S.2d at 716.

[11] *Id.* at 300, 441 N.Y.S.2d at 712.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 306-07, 441 N.Y.S.2d at 716.

[15] Justices Damiani, Titone, and Mangano concurred in an opinion authored by Justice Rabin. *Id.* at 307, 441 N.Y.S.2d at 716.

[16] Several text writers and commentators have noted that the bar of contributory negligence operates unfairly by precluding innocent consortium plaintiffs from obtaining any damages. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 892-94 (4th ed. 1971); Gilmore, *supra* note 1, at 211-12; Gregory, *supra* note 1, at 192-93; James, *supra* note 1, at 354; Note, *The Development of the Wife's Cause of Action for Loss of Consortium*, 14 CATH. LAW. 246, 257-58 (1968) [hereinafter cited as Note, *Loss of Consortium*]; *see* note 1 *supra*.

[17] 82 App. Div. 2d 299, 304-05, 441 N.Y.S.2d 711, 714 (citing Macon v. Seaward Constr. Co., 555 F.2d 1, 2-3 (1st Cir. 1977); Lantis v. Condon, 95 Cal. App. 3d 152, 155-58, 157 Cal.

authority, Justice Rabin reasoned that because the loss of consortium cause of action was "closely interconnected" to the injured spouse's personal injury claim, both should be subject to pro rata comparative negligence reductions.[18] Moreover, observed the court, prior to the enactment of New York's comparative negligence statute, the state's courts had held that an action for loss of consortium was derivative in nature.[19] Justice Rabin concluded that since the statute was not intended to alter judge-made law, it did not affect the derivative status of loss of consortium claims.[20]

By deeming the action for loss of consortium to be derivative, the second department has aligned itself with the majority of comparative negligence jurisdictions.[21] It is submitted that such an

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Rptr. 22, 23-26 (1979)).

[18] 82 App. Div. 2d at 305, 441 N.Y.S.2d at 715. Noting that the loss of consortium claim, coupled with the spouse's personal injury claim, "represent[ed] the total compensable damages" resulting from the injury to the spouse, the court found no reason to recognize an "independent" consortium claim. *Id.* Moreover, characterizing the spouse's loss of consortium as an indirect injury, the court noted that it would be anomalous to hold that the injured spouse's recovery for direct personal injuries would be diminished in proportion to his culpable conduct, but that the consortium spouse's award would be unaffected. *Id.* Additionally, the court distinguished those cases where one spouse has suffered personal injuries or property damages because of the concurrent negligence of the other spouse and a third party. *Id.* In such situation, the court reasoned, the non-negligent spouse has suffered a direct injury and properly is entitled to an undiminished recoupment of losses. *Id.*

Notably, the *Maidman* court relied upon Meyer v. State, 92 Misc. 2d 996, 403 N.Y.S.2d 420 (Ct. Cl. 1978), for an analysis of the application of comparative negligence to consortium claims. In *Meyer*, the plaintiff was injured when he fell from a bridge at the state university he was attending. *Id.* at 997-98, 403 N.Y.S.2d at 422. He sued for damages and his father sued for medical expenses. *Id.* The son was found to be 50% negligent. *Id.* at 1003, 403 N.Y.S.2d at 426. In directing a 50% reduction of the father's award for medical expenses, the Court of Claims first determined that a derivative action was a suit for personal injury within the meaning of CPLR 1411. *Id.* at 1004-06, 403 N.Y.S.2d at 426-28; *see* Constantinides v. Manhattan Transit Co., 264 App. Div. 147, 151, 34 N.Y.S.2d 600, 604 (1st Dep't 1942) (father's action for medical expenses is "personal injury" within the meaning of § 37-a of the New York General Construction Law); Bailey v. Roat, 178 Misc. 2d 870, 871, 36 N.Y.S.2d 465, 467 (Sup. Ct. Tioga County 1942) (action for medical expenses for personal injuries is analogous to derivative action for loss of consortium). The *Meyer* court reasoned that because the son's culpable conduct was "imputed" to the father, the father was entitled to only half of the cost of the medical expenses. 92 Misc. 2d at 1004-06, 403 N.Y.S.2d at 427-28.

[19] 82 App. Div. 2d at 302, 441 N.Y.S.2d at 713.

[20] *Id.* at 306, 441 N.Y.S.2d at 715; *see* note 2 *supra.*

[21] *See, e.g.*, Eggert v. Working, 599 P.2d 1389, 1391 (Alaska 1979); Nelson v. Busby, 246 Ark. 247, 254-55, 437 S.W.2d 799, 803 (1969); Hamm v. City of Milton, 358 So. 2d 121, 123 (Fla. Dist. Ct. App. 1978); White v. Lunder, 66 Wis. 2d 563, 574, 225 N.W.2d 442, 449 (1975); *cf.* Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980) (loss of consortium deemed independent in contributory negligence jurisdiction). *But see* Feltch v. General Rental Co., 421 N.E.2d 67, 71 (Mass. 1981) (3 months prior to *Maidman* decision, Massachusetts joined

approach, because it engenders equitable results, largely moots criticisms authored in the contributory negligence era.[22] Indeed, irrespective of the conceptual soundness of designating the loss of consortium cause of action "independent,"[23] the value of doing so in a comparative negligence jurisdiction is questionable, since the net economic impact upon the marital unit in such jurisdiction is not, as in a contributory negligence jurisdiction, controlled by the derivative or independent status of the loss of consortium claim.[24] Conversely, only the extent of the injured spouse's negligence is determinative of the magnitude of the consortium spouse's recovery.[25]

Because such a result was one of the principal rationales for terming loss of consortium causes of action independent in the first instance,[26] the sole remaining distinction between derivative and independent loss of consortium causes of action appears to involve

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minority).

[22] The *Maidman* court noted that application of comparative negligence principles to the consortium plaintiff's award would work an equitable result since the defendant would not have to pay more than his share of the consortium damages and the injured spouse would not indirectly collect more than his due. 82 App. Div. 2d at 306, 441 N.Y.S.2d at 716; *see* Abbate v. Big V. Supermarkets, Inc., 95 Misc. 2d 483, 485, 407 N.Y.S.2d 821, 823 (Sup. Ct. Orange County 1978) (full consortium recovery results in unfairness to defendant).

[23] *See* notes 1 & 16 *supra.*

[24] When a court in a contributory negligence jurisdiction views the loss of consortium claim as derivative in nature, the spouse cannot recover any damages if the injured spouse was contributorily negligent. *See* Gilmore, *supra* note 1, at 211-12; James, *supra* note 1, at 354-55; Note, *Loss of Consortium, supra* note 16, at 257-58. Conversely, if the court views the claim as independent of the personal injury action, the spouse can recover all of her loss of consortium damages, regardless of the injured spouse's negligence. *See* Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980). In comparative negligence jurisdictions, however, loss of consortium damages are recoverable regardless of whether the action is deemed derivative or independent. *Compare* Feltch v. General Rental Co., 421 N.E.2d 67, 71 (Mass. 1981) (loss of consortium is an independent claim and spouse may recover all damages) *with* Maidman v. Stagg, 82 App. Div. 2d at 306, 441 N.Y.S.2d at 715 (loss of consortium is derivative in nature and spouse may recover to the extent that negligent spouse was not at fault).

[25] *See, e.g.,* Eggert v. Working, 599 P.2d 1389, 1391 (Alaska 1979); Maidman v. Stagg, 82 App. Div. 2d at 306, 441 N.Y.S.2d at 715. There does appear to be one situation in which the degree of fault attributable to the negligent spouse will not be inversely proportional to the magnitude of the consortium spouse's recovery in a comparative negligence jurisdiction, namely, when the loss of consortium cause of action is deemed independent of the personal injury claim and the defendant has no right of contribution. *See* Feltch v. General Rental Co., 421 N.E.2d 67, 71-72 (Mass. 1981); *cf.* Macon v. Seaward Constr. Co., 555 F.2d 1, 3 (1st Cir. 1977) (court construing New Hampshire law was uncertain whether a defendant would be compelled to pay more than his share).

[26] *See, e.g.,* Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980); Comment, *Husband and Wife—Negligence—Contributory Negligence of Wife as Bar to Action by Husband for Consequential Damages*—Thibeault v. Poole, 13 B.U.L. REV. 725, 728 (1933).

placement of the initial burden of liability. If a loss of consortium cause of action is deemed independent, the full burden, at the outset, will be placed upon the defendant.[27] If, however, the loss of consortium cause of action is considered derivative, the burden of liability will be shared by the defendant and, to the extent of the spouse's negligence, by the consortium plaintiff.[28] It is submitted that, procedurally, the latter approach is preferable. Of course, mere pro rata reduction is less cumbersome, since it obviates the need for a counterclaim for contribution.[29] Moreover, CPLR 1412 seems to mandate such an approach. The statute provides that contributory negligence is an affirmative defense which the defendant must plead and prove.[30] In addition, several courts have held that section 1412 precludes the defendant from counterclaiming against the negligent spouse for contribution for consortium damages.[31]

The *Maidman* decision, which sanctions diminution of the consortium claimant's recovery when the defendant properly has pleaded the injured spouse's contributory negligence,[32] reaffirms New York's policy of assessing damages concomitantly with fault.[33]

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[27] *See* Lantis v. Condon, 95 Cal. App. 3d 152, 159-60, 157 Cal. Rptr. 22, 26 (1979); Love, *supra* note 1, at 631 n.237.

[28] *See, e.g.*, Maidman v. Stagg, 82 App. Div. 2d at 306-07, 441 N.Y.S.2d at 716.

[29] The Supreme Court of Wisconsin, in White v. Lunder, 66 Wis. 2d 563, 225 N.W.2d 442 (1975), noted that reduction in the first instance simplifies application of a comparative negligence statute. *Id.* at 574, 225 N.W.2d at 449; *see* Love, *supra* note 1, at 631-32 n.237.

[30] CPLR 1412 provides that "[c]ulpable conduct claimed in diminution of damages, in accordance with section fourteen hundred eleven, shall be an affirmative defense to be pleaded and proved by the party asserting the defense." CPLR 1412 (1976).

[31] Two courts have determined that a defendant's counterclaim for contribution against a negligent spouse was unwarranted, since CPLR 1412 required the defendant to plead comparative negligence as an affirmative defense. *See* Abbate v. Big V. Supermarkets, Inc., 95 Misc. 2d 483, 485, 407 N.Y.S.2d 821, 823 (Sup. Ct. Orange County 1978); Lieberman v. Maltz, 99 Misc. 2d 112, 113, 415 N.Y.S.2d 382, 383 (N.Y.C. Civ. Ct. Kings County 1979). In Lane v. Great Atl. & Pac. Co., N.Y.L.J., Nov. 3, 1980, at 12, col. 2 (Sup. Ct. App. T. 1st Dep't), the court directed the jury to find both the degree of fault of the plaintiff and the sum representing the total damages otherwise recoverable by the consortium claimant in order to assess the proportionate abatement of the consortium award. *Id.*; *cf.* Meyer v. State, 92 Misc. 2d 996, 1006, 403 N.Y.S.2d 420, 427-28 (Ct. Cl. 1978) (parents' action for medical expenses).

[32] Maidman v. Stagg, 82 App. Div. 2d at 306-07, 441 N.Y.S.2d at 716.

[33] *See* THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 232, 238-39 (1976); SIEGEL, § 468, at 627-28 (party's liability assessed in accord with his responsibility for damages); *cf. id.* § 172 (CPLR Article 14 allows contribution among joint tortfeasors in proportion to each's responsibility). A 1974 bill proposing the institution of a comparative negligence statute which would bar from recovery plaintiffs who were more than 50% negligent was vetoed because it would

To the extent that the harsh consequences of contributory negligence are mitigated by New York's comparative negligence statute, the necessity for an independent consortium action is diminished, since preservation of the consortium spouse's suit no longer is a genuine concern. Hence, it is expected that other New York courts will follow the lead of the *Maidman* court and will apply comparative negligence principles to derivative loss of consortium claims.

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Banking Law § 673: Violations of civil banking regulations held to constitute criminal misapplication of bank funds

Section 673 of the New York Banking Law[34] provides that a bank officer who "abstracts or willfully misapplies" a bank's funds, property or credit is guilty of a felony.[35] Interpreting the predecessor statute,[36] the Court of Appeals has stated that a bank officer can be convicted of willful misapplication without a showing of an intent to injure or defraud.[37] Moreover, an officer who "knowingly" uses bank funds in a manner not authorized by law to benefit himself possesses a sufficiently criminal state of mind to be convicted under the provision.[38] Recently, in *People v. Kagan*,[39] the Appel-

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have prolonged the harshness of the contributory negligence rule. THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 232, 238-39 (1976).

[34] N.Y. BANKING LAW § 673 (McKinney 1971).

[35] Section 673 of the Banking Law provides:

> Any officer, director, trustee, employee or agent of any corporation to which the banking law is applicable, or any employee or agent of any private banker, who abstracts or wilfully misapplies any of the money, funds or property of such corporation or private banker, or wilfully misapplies its or his credit, is guilty of a felony. Nothing in this section shall be deemed or construed to repeal, amend or impair any existing provision of law prescribing a punishment for any such offense.

Id.

[36] Section 673, enacted pursuant to ch. 1031, § 18 [1965] N.Y. Laws 1757, was originally part of the penal law. *See* ch. 185, § 11 [1939] N.Y. Laws 2281 (current version at N.Y. BANKING LAW § 673 (McKinney 1971)).

[37] People v. Marcus, 261 N.Y. 268, 278, 185 N.E. 97, 99 (1933); *see* People v. Kresel, 243 App. Div. 137, 141, 277 N.Y.S. 168, 174 (3rd Dep't 1935); People v. Berardini, 150 Misc. 311, 314, 269 N.Y.S. 381, 384 (N.Y.C. Gen. Sess. N.Y. County 1934). *Marcus* and *Kresel* arose out of the same factual situation.

[38] People v. Marcus, 261 N.Y. 268, 277-78, 185 N.E. 97, 98-99 (1933). In *Marcus*, two bank officers borrowed money from the bank in order to satisfy debts incurred by corporations which they controlled. *Id.* at 276, 185 N.E. at 97-98. Because the loan exceeded the