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The Basis of Recovery for Loss of Consortium

Bernard Schiff

limited to its own jurisdiction. As the domicile of the father determines the law that controls, it is easy to see how inconsistencies in the law between the states work a hardship and prevent adequate enforcement and relief. With the liberalization of divorce laws, a problem of care of unwanted children arises which is not met completely. Nor has liability as yet been determined between brother and sister for support.[79] In commercial fields uniform law has met with evident success, and a uniform system of family laws should be advocated.[80] The tremendous advance in the recognition of the moral obligation for support of dependent relatives, and its present enforcement by the courts is an indication that the public will continue, wherever possible, to remedy the weaknesses that still exist.

ROBERT M. POST.

THE BASIS OF RECOVERY FOR LOSS OF CONSORTIUM.

The family ways of English speaking peoples have changed greatly since the day when a wife was regarded as nothing more than the chattel of her husband.[1] The law had always recognized a right in the man to the exclusive possession of his wife, and any interference with his right of property in her would enable him to sue out a writ of trespass. The wife, on the other hand, was not recognized as a legal entity for either of two reasons: (1) she had vested rights but could not enforce them because of the disabilities of coverture,[2] or (2) she had no rights at all because of her inferior position in the marriage relationship.[3] Such procedural fiction served the courts until the passage of the Enabling Acts.[4] Then the problems arose as

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[79] Lee v. Smith, 161 Misc. 43, 291 N. Y. Supp. 47 (1936).

[80] Note (1908) 21 HARV. L. REV. 416, 510, 519, 583; Note (1911) 5 ILL. L. REV. 521–544.

[1] "The law of England and the United States on this topic (law of husband and wife), has undergone a remarkable change. * * * The old common law theory of marriage, that of unity of person and property in the husband, is so repugnant to modern ideas that it has been almost entirely swept away. * * *" 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) 5.

"Perhaps the characteristic of the twentieth century family that most sharply challenges the attention of the student of family history is its instability. It is a far cry from the closely knit, highly unified family organization of the ancient Romans or the Middle-Age Teutons to the more loosely organized household of modern time wherein each member tends to claim independence as an individual with a personality to be developed and respected." GOODSELL, A HISTORY OF THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION (1930) 456.

[2] Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889).

[3] 3 BL. COMM. *142, 143.

[4] One example of such legislation is that of New York, N. Y. DOM. REL. LAW §§ 50, 51, 52, 53, 56, 57, 59, 60.

to whether the husband still had a right to his wife's consortium for the loss of which the courts would allow recovery, and whether the wife had a reciprocal right in her husband which could now be protected.

At common law the meaning of the word "consortium" included society, conjugal rights, and services.[5] In any action for the loss thereof the predominant feature may have been the loss of society and conjugal rights [6] or it may have been the loss of services,[7] depending on which element was particularly interfered with; but in any event, the loss of services was most certainly an important reason for recovery. "* * * there will be found few cases * * * in which the husband's loss was regarded as one into which the element of service did not enter. The pleadings in the early cases, and the language of the opinions in them, clearly show that loss of service as well as society and affection were included in the legal meaning of the loss of 'consortium'." [8] The domestic duties of the wife and her subservience in the marriage relationship led to the recognition of the husband as the master, having a property right in his wife, and any interference with such right would enable him to obtain a writ of trespass. This was the only remedy available to the husband, since no other civil writ could be made to fit the facts and it was not until recent years that courts of equity would entertain such suits, no right in property being involved.[9] In support of the contention that it is not a property right is the fact that a husband, who is separated from his wife, cannot sue for loss of consortium resulting from negligent injuries, because he has suffered no loss of her society.[10] An unintentional injury

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[5] "Consortium is a property right growing out of the marriage relation for loss of which recovery may be had, and it includes exclusive right to services of spouse and also exclusive right to society, companionship, and conjugal affection." Riggs v. Smith, 52 Idaho 43, 11 P. (2d) 358 (1932).

"Originally the term 'consortium' was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all duties and obligations in respect to him, which she took on herself when she entered into it, and includes the right of society, conjugal affection, and services." Boden v. Del Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933).

[6] See Burke v. Johnson, 274 Ky. 405, 118 S. W. (2d) 731 (1938); Guevin v. Manchester Ry., 78 N. H. 289, 99 Atl. 298 (1916).

[7] "* * * there must be some loss of service so as to furnish a support to the allowance of damages for loss of comfort and society, the three elements making up the consortium * * *". Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W. 1019 (1913); Mead v. Baum, 76 N. J. L. 337, 342, 69 Atl. 962, 963 (1908) ("* * * the right to an action by the husband for an injury to his wife rests upon the same ground as the right of a master to sue for injuries to his servant").

[8] See Marri v. Stamford St. R. R., 84 Conn. 9, 78 Atl. 582, 583 (1911).

[9] *Ex parte* Warfield, 40 Tex. Cr. R. 413, 50 S. W. 933 (1899) (involving a question of whether injunction would lie to restrain alienation of affection); Hall v. Smith, 80 Misc. 85, 140 N. Y. Supp. 796 (1913) (action for alienation of affection; court, citing favorably *Ex parte* Warfield, *supra,* assumed that injunction would lie).

[10] Loughrey v. Penn. R. R., 284 Pa. 267, 131 Atl. 260 (1925).

to one of the spouses, seemingly, does not present much of a danger to the marital relationship, since it is not protected where the husband and wife live apart under articles of separation or a decree of divorce, whereas a recovery is allowed for an intentional interference with the relationship even where the parties live apart under articles of separation. Evidently the right to consortium is not a property right but an incident of the marital relationship which the courts will protect only in those instances where the public policy so requires.[11]

The fiction of recovery for loss of service was the basis of the actions for alienation of affection and criminal conversation,[12] although *dicta* in the early cases indicate that the recovery was for loss of the wife's affection and society.[13] The true reason for allowing such actions was the desire of the courts to save inviolate the marriage relationship and its sentimental elements which make for a congenial family life and the procreation of children, and so, the perpetuation of the state.[14] So important was the right of a husband to the conjugal society of his wife that its protection was extended to cases where the loss was the unintentional result of negligent injuries.[15] Here again the fiction of loss of service enabled the courts to reason to a recovery in terms of money. The loss of valuable services was something which could be measured in terms of compensatory damages, while the loss of conjugal affection and society was compensated for as an aggravation of the injury.

Since the enactment of the Enabling Acts there has been a decided division of authority as to whether a husband may maintain an independent action for the loss of his wife's consortium. An increasingly strong minority contends that the meaning of the word "consortium" has undergone a radical change, so that it no longer includes the element of service.[16] This conclusion is reached on the theory that the Enabling Acts have, in effect, taken away from the husband the right to his wife's services. It is argued that the husband now has only his right to the conjugal affection and society of his wife. This right, while it is sufficient to support an action for intentional interference therewith, on the ground of public policy, is not enough

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[11] See Colwell v. Tinker, 169 N. Y. 531, 536, 62 N. E. 668, 670 (1902).

[12] See note 5, *supra*.

[13] See Marri v. Stamford St. R. R., 84 Conn. 9, 78 Atl. 582, 583 (1911); Smith v. Nicholas Building Co., 93 Ohio St. 101, 112 N. E. 204, 205 (1915).

[14] See Colwell v. Tinker, 169 N. Y. 531, 536, 62 N. E. 668, 670 (1902), *supra* note 11.

[15] "Since Blackstone's day there has been an extension of the common law right of a husband to recover for loss of consortium to cases in which the personal injury sustained by the wife was the result of negligence, so that it is generally held that it makes no difference whether the injury is intentionally or negligently inflicted." Marri v. Stamford St. R. R., 84 Conn. 9, 78 Atl. 582, 585 (1911).

[16] Marri v. Stamford St. R. R., 84 Conn. 9, 78 Atl. 582 (1911); Feneff v. N. Y. C. & H. R. R., 203 Mass. 278, 89 N. E. 436 (1909); Bolger v. Boston El. Ry., 205 Mass. 420, 91 N. E. 389 (1910); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915).

to maintain an independent action where the interference is unintentional. Although the courts do put a pecuniary value upon the right in an action for alienation of affection, it is to punish and not to compensate.[17] The excessiveness of the damages awarded would seem to indicate that they were punitive rather than compensatory. The husband, having lost the exclusive right to the conjugal affection of his wife, had to be prevented from wreaking his vengeance on the wrongdoers to atone for the great wrong to his honor; and drastic measures were taken to preserve the family. The same reason (the protection of the exclusive right of the husband to the conjugal love of his wife) prompted the courts to extend the right to sue for the loss thereof where the wife was negligently injured. Here, however, there could be no punishment, the injury being unintentional, and the court would, under our rule of damages, be incapable of measuring in terms of money the actual compensatory value of such sentimental rights.[18] At first glance it would seem that these jurists had failed to realize that the legislature could never have intended to relieve the wife of the duty of rendering domestic services. Such independence would tend to destroy the marriage relationship, and "The bond of marriage being loosened, posterity degenerates, society goes headlong; and the floodgates of licentiousness once fully opened, the hand must be strong that can close them again." [19] They do not, however, lose sight of the right of the husband to have performance of the wifely services, so invaluable to domestic happiness, but contend, on the other hand, that the ordinary rule of damages allows pecuniary compensation only for the impairment or injury directly done.[20] If the husband has in fact, on account of his wife's injury, lost a service which she habitually rendered, then, as service, and according to the pecuniary value of it, he ought to be permitted to recover. Recovery should be according to the fact.[21]

The weight of authority, today, is still in favor of allowing recovery for loss of consortium (conjugal affection and society), whether the loss be the result of an intentional or unintentional interference. Under the guise of discarding the old fictions, new ones have been created and the old ones have been refurbished; so that, as reasons for allowing recovery we find the desire to insure the health and cleanliness of the husband and offspring, and that it is "archaic" to say the husband has a right to the personal enjoyment of his wife

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[17] "It (the law) does recognize invasion by willful misconduct. It inflicts heavy damages upon the enticer or seducer. But this for punishment and atonement rather than compensation. It comes within the range of concurrent and supplementary adjuncts to the criminal law for the prevention and redress of wrongs." Goldman v. Cohen, 30 Misc. 336, 337, 63 N. Y. Supp. 459 (1900).

[18] Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915), *supra* note 16.

[19] 1 SCHOULER, *op. cit. supra* note 1, at 14.

[20] Feneff v. N. Y. C. & H. R. R., 203 Mass. 278, 89 N. E. 436 (1909).

[21] Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915), *supra* note 16.

and a property interest in her body, unless the wife is given the same interest in her husband.[22] In actions for loss of services, where the wife was negligently injured, recovery is allowed on the ground that the husband never did have to prove the value of his wife's services, but that the jury, from their own observation and experience, could determine what was an adequate compensation for the technical loss of service.[23] One very recent and startling example of the confusion caused by these legal fictions is the case of *Rademacher* v. *Torbensen*.[24] The New York Supreme Court allowed the husband to recover in an action founded on negligence for loss of service and medical expenses for the care of his wife's injuries, incurred two months before the marriage. The court evidently felt that the husband, being duty-bound to care for his wife, was in fact entitled to recover for medical expenses; but there could be no such recovery unless the husband had, at the same time, a right to the service of the wife.[25] Such result certainly was unauthorized, for there is extensive authority to the effect that a husband cannot recover against one who commits a tort on the wife, prior to the marriage, while plaintiff was engaged to marry her;[26] and in the *Rademacher* case there was no evidence that the plaintiff was even engaged at the time of the injury to his wife. When the case was later reversed, the Appellate Division did not allow recovery for medical expenses.[27]

The wife, at common law, had no right to sue for any interference with her marital interests. Some legal writers even deny that the wife had any rights in the marriage relationship. The absence of cases on the subject leave it to conjecture whether the wife had such rights but could not exercise them because of her legal disability or whether, because of her inferiority in the marriage relationship, the law would not recognize such right in her.[28] The existence of the right in the wife must have been recognized, or else, when the wife was personally injured, whether before or after marriage, the cause of action would not abate upon her death or survive to her upon the death of her husband. So reasoned the New York Court of Appeals[29] when, in the light of the Enabling Acts, it granted to a plaintiff wife the right to recover for the alienation of her husband's affection. This was in accord with what was said in the English case of *Lynch* v.

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[22] Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923).

[23] Reeves v. Lutz, 179 Mo. App. 61, 162 S. W. 280 (1914).

[24] 169 Misc. 1030, 9 N. Y. S. (2d) 162 (1938), *rev'd*, 257 App. Div. 91, 13 N. Y. S. (2d) 124 (4th Dept. 1939).

[25] *Contra:* Marri v. Stamford St. R. R., 84 Conn. 9, 78 Atl. 582 (1911) (recovery for medical expenses granted, where recovery for loss of services denied); Bolger v. Boston El. Ry., 205 Mass. 420, 91 N. E. 389 (1910).

[26] Buchanan v. W. Jersey R. R., 52 N. J. L. 264, 19 Atl. 254 (1890); Mead v. Baum, 76 N. J. L. 337, 69 Atl. 962 (1908); Booth v. Baltimore & O. R. R., 77 W. Va. 100, 87 S. E. 84 (1915).

[27] Rademacher v. Torbensen, 257 App. Div. 91, 13 N. Y. S. (2d) 124 (4th Dept. 1939).

[28] 3 BL. COMM. *142, 143.

[29] Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889).

Knight [30] which recognized a legal right in the wife to her husband's consortium, the *dicta* in that case having been followed in almost every jurisdiction in the United States.[31] The courts have recognized that the legal right to consortium is one which is mutual to both husband and wife, and since both now have equal rights and remedies, either can sue to punish for any intentional interference with the right.[32]

The wife, having been granted the right to recover in actions for alienation of affection and criminal conversation,[33] on a par with the husband, was still to be denied the right to recover for loss of consortium where it was unintentionally caused. The fiction which today supports a husband's recovery in such actions, namely, that he is recovering for the valuable domestic services of his wife and as aggravation for the loss of conjugal society, tends to defeat a cause of action by the wife.[34] She has no right to any of the services of the husband, except in the sense that he is bound to support her, and since the right of action is predicated on the loss of service she has no remedy. Such result is indeed inconsistent with what the courts say. "We recognize that the so-called sentimental elements of consortium are substantial and vital factors in producing and sustaining the union with respect to the husband, including his right to receive the wife's services about the household and her assistance in the care of the children." [35] "It is to be said also that a wife has the same legal right in respect to the society and assistance of her husband, for these are rights, duties and obligations which by marriage both the husband and wife receive and take upon themselves, limited, however, in this state to cases where such loss is due to an intentional wrong or a direct attack on the marriage relation." [36] In other jurisdictions which come to the same conclusion the prevailing view is also that the wife's right to the companionship and society of her husband is on the same legal standing as the right of the husband to her society and should be afforded the same protection.[37] It is contended, how-

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[30] 8 Eng. Rul. Cas. 382, 9 H. L. Cas. 577 (1861).

[31] A remedy was consistently denied the wife in Maine and Wisconsin until legislation was enacted which gave her the right to sue. ME. REV. STAT. (1930) c. 74, § 7; WIS. STAT. (1931) § 246.07.

[32] Jaynes v. Jaynes, 39 Hun 40 (N. Y. 1886).

However, the mere fact that the injury was intentionally inflicted may not be sufficient to allow the wife to recover. In Boden v. Del Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933), where the defendant's servant intentionally ran an automobile against plaintiff's husband, it was held that she could not recover because defendant's act was not directed against her. See also Nieberg v. Cohen, 88 Vt. 281, 92 Atl. 214 (1914).

[33] Actions for alientation of affection and criminal conversation have been abolished, N. Y. CIV. PRAC. ACT § 61a-d.

[34] See Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915).

[35] Commercial Carriers v. Small, 277 Ky. 189, 126 S. W. (2d) 143, 146 (1939).

[36] *Ibid.*

[37] Haynes v. Knowlin, 129 Ind. 581, 29 N. E. 389 (1891); Kelley v. N. Y. R. R., 168 Mass. 308, 46 N. E. 1063 (1897); Holleman v. Harvard, 119 N. C.

ever, that the injuries to the wife are remote and "consequential" and so cannot be compensated for within the ordinary rule of damages.[38] The same must certainly be true of the damages suffered by the husband, unless his recovery is restricted to the monetary value of the services which he has in fact lost, and there is a tendency to so restrict his recovery.[39] The damages to a wife who lost the opportunity to bear children because of physical injuries to her husband which resulted in his emasculation [40] cannot be any more remote than the damages for which a husband recovers because a physician failed to properly care for the wife during her confinement.[41] Evidently the public policy which caused the extension of the right of the husband to sue (the protection of the right to conjugal love and society to prevent the breakup of the marriage relationship) is today no longer present.

The Enabling Acts have been interpreted in almost all jurisdictions [42] as removing all the disabilities of coverture and allowing to the wife all the remedies which her husband had. So that where the courts recognized a right in the wife to the conjugal affection and society of her husband, she was given a remedy for the intentional interference therewith; [43] but the majority of the courts cannot find a right in the wife which is damaged when the husband is negligently injured. One reason is that the compensation received by the husband is payment in full for the damages done and places the husband in the position where he can care for his wife as well as before the injury. But vigorous voices have been raised in protest against the hardship and unfairness which results from the unequivocal dismissal of such causes of action without regard to the merits of the case.[44] In this respect the case of *Bernhardt* v. *Perry* [45] is to be noted, for in the majority and dissenting opinions are set forth the opposing views as to whether the Enabling Acts have given the wife the right to sue for an unintentional interference with her marital rights. The ma-

150, 25 S. E. 972 (1896); Brown v. Brown, 124 N. C. 19, 32 S. E. 320 (1899); Cottle v. Johnson, 179 N. C. 426, 102 S. E. 769 (1920); Sims v. Sims, 79 N. J. L. 577, 76 Atl. 1063 (1910); Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102 (1912); Moberg v. Scott, 38 S. D. 422, 161 N. W. 998 (1917).

[38] Boden v. Del Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933), *supra* note 32.

[39] Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915); Schaupp v. Turner, 188 App. Div. 338, 177 N. Y. Supp. 132 (3d Dept. 1919) (In an action by a husband to recover the value of his wife's services and the expenses he was put to by reason of her being bitten by a vicious dog, it is incumbent upon him to prove the damage he has suffered, and without such proof he cannot recover).

[40] Landwehr v. Barbas, 241 App. Div. 769, 270 N. Y. Supp. 534 (2d Dept. 1934), *aff'd*, 270 N. Y. 537, 200 N. E. 306 (1936).

[41] Crooks v. Jonas, 204 N. C. 797, 169 S. E. 218 (1933).

[42] Except Maine and Wisconsin; see note 31, *supra*.

[43] See note 37, *supra*.

[44] Maloy v. Foster, 169 Misc. 964, 8 N. Y. S. (2d) 608 (1938).

[45] 276 Mo. 612, 208 S. W. 462 (1919).

jority opinion bases its conclusion on the generally accepted premises that the damages of the wife are too remote; that the damages which the husband recovers are, in legal contemplation, not only supposed to make him whole, but also enable him to discharge his marital duties in the same degree as before the injury; and that the wife would be recovering for injuries for which the husband had already received compensation. It contends that it was not the intention of the legislature to give a remedy where no rights had been interfered with and where a double recovery would result; the legislature merely intended to prevent the husband from reducing his wife's property to possession and becoming the owner thereof. Chief Justice Bond, on the other hand, proceeds upon the premise that even at common law a personal right to enjoy the consortium of her husband was recognized in the wife as one vested in her by the marital state, and that the Enabling Acts, in addition to removing the disability to sue for the loss thereof, have given her a property in her personal rights. This dissenting opinion is favorably cited and followed in *Hipp* v. *E. I. Dupont de Nemours and Co.*[46] which has gone far to release the wife from the feudal fetters of legal serfdom. Here the court recognized a cause of action as being made out by the wife of a man negligently injured by defendant, for personal injuries to herself which the court summed up as follows: (1) expenses paid by her, made necessary by her husband's injuries; (2) services performed in nursing and caring for him; (3) loss of support and maintenance; (4) loss of consortium; and (5) mental anguish. Such enumeration of plaintiff's injuries do not mean, however, that the court would compensate for each;[47] it does mean that the court recognizes a wrong for which the wife is entitled to have her day in court.

Although the rights of the wife have been recognized as being equal with those of the husband, her interest in the marital relationship is not as fully protected as is his. Generally a distinction is made between a wrong interfering with the marriage rights, which is intentional and that which is unintentional. Where the wrong is unintentionally inflicted the damages of the wife are said to be remote and "consequential", for which no recovery may be had.[48] Yet where a husband is negligently injured his spouse suffers an independent loss which is no less detrimental to the marriage relationship than is his. The right to consortium not being a property right, but one incident to the marriage relationship which will be protected only in certain

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[46] 182 N. C. 9, 108 S. E. 318 (1921).

[47] "While the wife cannot recover for any damages for which the husband might have recovered * * * we think that she could recover for those injuries which were sustained by her, for which the husband could not have recovered in this action. * * * We will not go more fully into the elements of damages which can be considered by the jury when the action goes back for a new trial." Hipp v. Dupont, 182 N. C. 9, 108 S. E. 318, 322 (1921).

[48] Boden v. Del Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933), *supra* note 32.

instances,[49] the courts are reluctant to allow the wife to sue for its loss since the danger that is presented to the relationship is not so great that negligent defendants should have the burden of paying excessive damages for the loss of something which is assumed by a jury. The injustice, however, of summarily dismissing a complaint on the ground that there is no authority to sustain it,[50] is manifested by such a situation as found in *Hipp* v. *Dupont*. The confusion arises from the failure of the courts to uniformly examine the facts of these cases to determine factually what the extent of the loss is and whether damages are recoverable without making a farce of our trial system. Public policy, as expressed in New York, has been to limit recovery by the husband for loss of his wife's consortium [51] and to require him to give proof of the value of his wife's services and the expenses to which he was put.[52] The danger of recovering excessive damages for sentimental elements, the loss of which is assumed, having been reduced to a minimum there is absolutely no reason why the wife should not be given her full, equal rights in the courts.

BERNARD SCHIFF.

FOREIGN LEGATEES AND DISTRIBUTEES UNDER SECTION 269 OF THE SURROGATE'S COURT ACT.

"Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment be withheld, the decree may direct that such money or other property be paid into the Surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto * * *."

This is the 1939 addition to Section 269 of the Surrogate's Court Act.[1] Appended to it was the following bill note: "* * * The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country

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[49] Colwell v. Tinker, 169 N. Y. 531, 536, 62 N. E. 668, 670 (1902), *supra* note 11.

[50] Maloy v. Foster, 169 Misc. 964, 8 N. Y. S. (2d) 608 (1938), *supra* note 44.

[51] N. Y. WORKMEN'S COMPENSATION LAW § 11; Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N. Y. Supp. 111 (1927) (no recovery by a husband for loss of his wife's services, when she is injured in the course of her employment and has received compensation under Workmen's Compensation Law).

[52] Schaupp v. Turner, 188 App. Div. 338, 177 N. Y. Supp. 132 (3d Dept. 1919), *supra* note 39.

[1] N. Y. Laws 1939, c. 343, in effect April 24, 1939.