CASE AND COMMENT.

CONTRACT—ENTIRE—FAILURE TO PERFORM—EXPRESS CONDITION PRECEDENT.—In *Sumpter* v. *Hedges*[1] A. L. Smith, L.J., said that "the law is that where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered." From the circumstances where one party undertakes to do a specified thing in exchange for a promise by the other party to pay a single specified amount the court, according to this dictum, would imply or infer a condition which may be expressed in the form, "no cure, no pay." This doctrine re-appears in the reports. It is true that some courts treat the case of *Dakin & Co., Ltd.* v. *Lee*[2] as marking a turning point of the law with respect to entire building contracts. For example, Middleton, J. in *Burton* v. *Hookwith*[3] spoke of "the modern relaxation of the strict rule as to entire contracts now recognized in *Dakin* v. *Lee*." An examination of earlier cases does show, however, that prior to *Sumpter* v. *Hedges* and *Dakin & Co., Ltd.* v. *Lee* the general rule was that, in the absence of express indication to the contrary, entire performance is not a condition precedent to the right to recover the specified sum. If there is substantial performance the contractor is entitled to the stipulated price subject only to a cross-action or counterclaim for the omissions or defects in execution.[4]

In *Dakin & Co., Ltd. v. Lee*, where the doctrine of the earlier cases was re-affirmed, the plaintiffs contracted with the defendant to make certain repairs to the house of the latter who promised to pay a certain sum for the work. In an action to recover the price the defence was that the work had not been completed. Sankey, J. (now Lord Chancellor), speaking in the Divisional Court, purported to state the law in the following words: "Where a builder has supplied work and labour for the erection or the repair of a house under a lump sum contract, but has parted from the terms of the contract, he is entitled to recover for his services unless (1) the work that he has done is of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished." These exceptions are in the alternative. There is authority for the second

[1] [1898] 1 Q.B. 673.
[2] [1916] 1 K.B. 566.
[3] (1919), 45 O.L.R. 348 at p. 352.
[4] See *Broom* v. *Davis* (1794), cited 7 East 480(n); *Templer* v. *McLachlan* (1806), 2 B. & P.N.R. 136; *Mills* v. *Bainbridge*, cited 2 B. & P.N.R. 136; *Mondel* v. *Steel* (1841), 8 M. & W. 858; Sm. L.C., 13th ed., vol. 2, p. 19 *et seq.*

and third exceptions. With respect to the first, that is, where the work has been of no benefit to the owner, one is bound to speculate if the learned judge would allow the builder to recover if he had merely conferred a benefit amounting to one per cent. of the entire performance of his undertakings under the lump sum contract. The case of *Farnsworth* v. *Garrard*,[5] cited by Sankey, J., as authority for the first exception, gives poor support to it for it does not appear from the facts of the case that there was necessarily a substantial failure on the part of the plaintiff to perform the contract. In fact, Ridley, J., the other member of the Divisional Court, in *Dakin & Co., Ltd.* v. *Lee* treated the questions: was the contract substantially completed, and, was the work done of no use to the other party, as interchangeable. This was the view of the Court of Appeal in the *Dakin* case when the decision of the Divisional Court was affirmed on the ground that the plaintiffs had performed every essential part of their undertaking although the work did not in all respects comply with the specifications. In *Vigers* v. *Cook*[6] Bankes, L.J., pointed out that the statement of the law by Sankey, J., as set out above, "cannot be considered as an epitome of the decision of the Court of Appeal in the *Dakin* case." In a Canadian case, *Lacroix Bros. & Co.* v. *Cook*[7] Lamont, J.A. (then a member of the Saskatchewan Court of Appeal) said that "there is no suggestion in the judgments (of the Court of Appeal in the *Dakin* case) that if a plaintiff fails to perform an essential part of his contract, he can recover." Even with a substantial failure it might, however, be said that the building owner received some benefit.

It is of course always open to the owner to provide expressly for a complete and perfect performance on the part of the builder before he becomes liable to pay the specified sum. It is on this ground that two members of the Court of Appeal in *Eshelby* v. *Federated European Bank Co.*[8] distinguished the *Dakin* case. In the *Eshelby* case the defendants guaranteed the payment of moneys to become due under a contract to execute certain works made between the plaintiff

[5] (1807), 1 Camp. 38.

[6] [1919] 2 K.B. 475 at pp. 483-4.

[7] [1926] 4 D.L.R. 747 at p. 750. See also *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A.C. 190, where there was a substantial failure to perform an entire contract.

[8] (1931), 101 L.J.K.B. 245. For a Canadian case where entire performance was expressly made a condition precedent to payment, see *The Pas Construction Co.* v. *Olensky* (1930), 39 Man. R. 332. Trueman, J.A., at p. 338 said: "This being an entire contract, with the foregoing special provision, (i.e., an express condition precedent) cases dealing with contracts to do specified work for a lump sum, on which completion is not made a condition precedent to payment, have no application."

and another. In proceedings to recover upon the guarantee, Scrutton and Slesser, L.JJ., refused relief because they found that the defendants' liability was subject to the fufilment of an express condition precedent to liability to be found in the contract of suretyship, to wit, "subject to the said works being duly executed in accordance with this agreement."[9] Upon this reasoning there was no occasion to consider whether an implied condition precedent arises out of a lump sum contract. Greer, L.J., while deciding in favour of the defendants on a different ground, by way of *obiter dictum*, questioned whether the *Dakin* case could be reconciled with the principle laid down in a long series of cases based upon *Cutter* v. *Powell*.[10] As pointed out above, *Dakin & Co., Ltd.* v. *Lee* did not proclaim a new principle; it set out a principle as old as that of *Cutter* v. *Powell*, where recovery on an entire contract of service was not allowed in the face of an express condition precedent with respect to full performance, and the Court decided that no relief could be had in the circumstances upon an implied contract or *quantum meruit*. It is difficult to see how *Dakin & Co., Ltd.*, v. *Lee* is affected by the decision in *Cutter* v. *Powell*.

In *Diebel* v. *Stratford Improvement Co.*[11] the facts and issue were not unlike those in the *Eshelby* case. The plaintiff sued upon a contract by which the defendant company guaranteed payment for work done by him in erecting a factory. The building was sufficiently completed to be operated, but there were some defects in the construction. The plaintiff obtained judgment against the guarantor to the extent of the contract price less the sum which would be required to remedy the defects in the work. As there was no express condition precedent with respect to entire performance the principle of *Dakin & Co., Ltd.* v. *Lee* was applied. It is in this manner that *Eshelby* v. *Federated European Bank, Ltd.* may be differentiated. The case of *Dakin & Co., Ltd.* v. *Lee* has been followed and applied frequently in Canadian Courts,[12] and it may be considered as an offspring and a parent.

S. E. S.

[9] Cf. *Diebel* v. *Stratford Improvement Co.* (1916), 38 O.L.R. 407, *infra*, footnote no. 11.

[10] (1795), 6 T.R. 320.

[11] (1916), 38 O.L.R. 407.

[12] See *Brazeau* v. *Wilson* (1916), 36 O.L.R. 396; *Taylor Hardware Co.* v. *Hunt* (1917), 39 O.L.R. 85; *Canadian Western Foundry and Supply Co.* v. *Hoover* (1917), 37 D.L.R. 285; *Yakowchuk* v. *Crawford*, [1917] 3 W.W.R. 479; *Burton* v. *Hookwith* (1919), 45 O.L.R. 348; *House Repair and Service Co., Ltd.* v. *Miller* (1921), 49 O.L.R. 205; *Fisher* v. *Cox* (1921), 54 N.S.R. 226; *McGregor and McIntyre Co., Ltd.* v. *Sterling Appraisal Co., Ltd.* (1925), 57 O.L.R. 485; annotation: (1912), 1 D.L.R. 9.

DOMESTIC RELATIONS—LOSS OF CONSORTIUM OF HUSBAND. Contrary to common belief, it is still a moot point whether or not a married woman can bring an action for alienation of her husband's affections (*per quod consortium amisit*) without joining her spouse as co-plaintiff. Naturally her spouse would be reluctant to join with her in the action, hence our difficulty. Cases on this phase of law are none too plentiful and quite conflicting.

While to-day a woman enjoys political equality in the exercise of her franchise, or by the *Married Women's Property Act* of 1882[1] she has equality of legal status as if she were a *feme sole* in respect of her separate property, nevertheless matrimonial jurisprudence is anachronistic. The reason for the failure of our law to keep pace with married women's emancipation in other branches lies primarily in the peculiar nature of their marriage relationship. At common law one of the fictions most often referred to was that by marriage, the husband and wife became one legal person.[2] Two maxims cogently express the point: *"Vir et uxor consentur in lege una persona."*[3] (Husband and wife are one in the eyes of the law.) and, *"Uxor non est sui juris, sed sub potestate viri."*[4] (A wife is not her own mistress but is under the power of her husband.) The wife, by marriage, lost all legal identity. She became *civiliter mortua.* Her property became vested in the husband and she became legally a mere menial of the husband. Thus, this legal concept of the unity of the relationship of married life, namely, that a wife was the mere servant of her husband who was considered her master, well established itself into our early common law.[5]

Likewise, it was from early time recognized that the husband had an unquestioned right of action against anyone who seduced his wife. His right of action arose from the fiction that a wife is her husband's servant and an interference with the service of a servant is an actionable trespass.[6] The very nature of the relationship and duties which marriage imposed on the wife, together with her subservience to him in law, easily gave to the husband a proprietary interest in her.[7] Bracton in his treatise[8] wrote: "A husband may bring an action for an injury done to his wife, but not the converse. For it is worthy that a wife should be defended by

[1] 45 & 46 Vict., c. 75.
[2] 1 Bl. Com. 442; 2 Kent Com. 129.
[3] Co. Litt. 112.
[4] 3 Inst. 108.
[5] Holdsworth: History of English Law, 3rd ed., vol. 8, at pp. 429-30.
[6] *Guy* v. *Livesy* (1618), Cro. Jac. 501; 79 E.R. 428; *Hyde* v. *Scyssor* (1619), Cro. Jac. 538; 79 E.R. 462.
[7] 3 Bl. Com. 140.
[8] Bracton: 2 *De Legibus* (Twiss), 547.

her husband, but not a husband by a wife." Again, in *Lynch* v. *Knight*,[9] Lord Wensleydale, tracing the history of the rights of husband and wife,[10] said: "I agree with Baron Fitzgerald that the benefit which the husband has in the consortium of the wife is of a different character from that which the wife has in the consortium of the husband."

The historical basis of these actions, namely loss of services, was the basis for actions of enticement or alienation of affections. Later on, the principle was broadened to include violation of inherent marital rights so that a husband could sue for: (1) services; (2) loss of consortium; and (3) mental anguish. But just as it is essential that there be found some property interest in equity in order to grant an injunction, so here it was necessary to prove loss of services.[11] It is also important to note that while this branch of law developed so as to entitle the husband to more and more remedies, nevertheless the common law courts still adhered to the doctrine of legal unity of the marriage relationship and that the husband had much more to lose by the enticement of his wife than if the reverse were to happen.

Our problem, then, is to ascertain whether the old doctrine as regards the status of married women in actions for enticement of a spouse has been swept aside either by judicial decisions, or by parliamentary enactments. As to the former, it will be found that Canadian cases are in direct conflict with the leading English case,[12] although the question is as yet by no means definitely settled. In the United States the action brought either by a husband or wife appears to be more common than it is here and the rationale of those cases is of inestimable value to us in predicting the reaction of our courts in future cases of a similar nature.

An examination of United States cases[13] reveals that at common law some cases hold that no such right extends to the wife, others grant this right, while a third class of cases hold that a wife has such a right of action but that it exists merely in the abstract and remains in abeyance during coverture, being enforceable by her after the termination of the marriage relationship by death, divorce or legal separation. This latter novel view could hardly be deduced from our English authorities.

[9] (1861), 9 H.L. Cas. 577; 11 E.R. 576.
[10] (1861), 11 E.R. 576 at p. 598.
[11] The better view to-day is that loss of services need no longer be specifically averred. See *Ballard* v. *Money* (1920), 47 O.L.R. 132; *Bannister* v. *Thompson* (1914), 32 O.L.R. 34.
[12] See footnote no. 26 *infra*.
[13] See 30 Corpus Juris at p. 1119. For state of Australian authorities, see note: (1932), 48 Law Q. Rev. 322. See also note: (1931), 9 C.B. Rev. 319.

Coming to an examination of statutory provisions, we find, in tracing the development of the extension of legal rights to married women, that the *Married Women's Property Act* of 1882 is by far the most outstanding landmark. Confining ourselves to the point under discussion it is submitted that if under common law married women did not enjoy the privilege of instituting proceedings of this nature alone, then the Act[14] extended the right to them. But in spite of this seemingly clear, unambiguous and unequivocal language the courts of Ontario have, by a long series of cases, refused to extend to married women the right to sue for loss of consortium of her husband.

Some of the explanations adduced by noted text-writers and American case law for the reluctance on the part of our courts to extend to the wife civil rights of action for the enticement of her husband are hereafter enumerated.

Lack of property right by the wife in the companionship of her husband.[15] It is submitted that this view ought not to be taken as correct, especially since the contrary view is rigidly maintained by writers of repute. In the words of Eversley:[16] "Husband and wife are naturally entitled to each other's society, in other words to live together and cohabit as man and wife, for this right is the foundation of the married state and even under the Poor Law they are not separated when they become paupers and chargeable to the poor rate."[17]

Another reason advanced is that a wife's infidelity may impose on the husband the support of another man's child. A husband's infidelity on the other hand can inflict no such consequences on the wife since she is relieved of the onerous duty of supporting and maintaining her spouse. True as this may be, yet a husband's infidelity may impose financial burdens on him of which the wife is wholly ignorant, depriving her of luxuries which, although not legally entitled to, were nevertheless showered upon her previous to the enticement of her husband.

Again, the argument is put forth that a wife has many other redresses for such a wrong hence the doctrine, *ubi jus ibi remedium* should be sparingly invoked. The remedies open to a wife whose husband has been enticed are divorce and restoration of all her property both real and personal, alimony or legal separation. It is however submitted that many cases may arise where these remedies would be totally inadequate, leaving the deserted wife in unfortunate

[14] 45 & 46 Vict. c. 75, s. 1(2).
[15] See quotations from Bracton and *Lynch* v. *Knight, supra.*
[16] Eversley: *Domestic Relations,* 4th ed., at p. 152.
[17] *Reg.* v. *Bridgnorth* (1882), 9 Q.B.D. 765.

circumstances. It seems, however, that our courts are reluctant to extend the list of remedies available to married women since they enjoy privileges at the expense of the husbands. In a recent case,[18] McCardie, J., very lucidly pointed out their position as follows: "Wives however wealthy of purse or independent of character, possess powers and privileges which are wholly denied to husbands. Husbands are placed under burdens from which wives are free. Thus a husband living with his wife is liable to pay income tax upon her income, even though she may refuse to contribute anything to the household expenses . . . Again, a husband is liable for any tort his wife may commit provided it is not connected with a contract. It matters not whether the tort be negligence, slander, trespass or assault. . . . A wife, on the contrary, is not liable for her husband's tort, unless she authorized or joined in it. . . . Again, if a husband wrongfully converts to his own use the goods of his wife she may bring an ordinary action against him for pubic trial in the courts. But if a wife wrongfully converts to her own use the goods of her husband the only remedy of the husband is to apply to Court under special provisions of sec. 17 of the Married Women's Property Act. Finally a husband is liable for what are called 'necessaries' for his wife, even though his wife's income largely exceeds his own and even though she refuses to pay a penny towards the expenses of the joint home."[19]

It is difficult to appreciate why the legal unity of husband and wife ought to bar the wife's right of action, not against her husband, but against a third party. On the contrary, one would expect the rule that in actions for alienation of a husband's affections the name of the husband should not be permitted to be joined with that of his wife for a wrong in which he was a participant (joint tort feasors), instead of the converse.

In *Lynch* v. *Knight*[20] the question as to whether a married woman could sue without joining her husband in the action was considered in a dictum. Nevertheless the opinions of the learned judges carry with them great weight. Lords Campbell and Cranworth believed that an action ought to lie,[21] while Lord Wensleydale definitely said that no such right of action will lie.[22] Notwithstanding this case being purely a dictum on this point, it is nevertheless often incorrectly cited as a proposition of law.[23]

[18] *Gottliffe* v. *Edelston,* [1930] 2 K.B. 378.
[19] [1930] 2 K.B. 378 at pp. 381-2.
[20] *Supra.*
[21] 11 E.R. 576 at p. 597.
[22] *Ibid.*
[23] Eversley: *Domestic Relations,* 4th ed., at p. 152.

In *Butterworth* v. *Butterworth*[24] the point again arose as a dictum. In the course of his judgment, McCardie, J., said:[25] "The better view is that women cannot sue due to the husband's higher position in life." This case then, seems to imply that the *Married Women's Property Act* does not alter the common law as regards this point.

Gray v. *Gee*[26] is the only reported English case which is directly on the point.[27] In *Gray* v. *Gee* a married woman was held by Lord Darling to have a good cause of action against another and the law is now in conformity with a long line of American decisions on this point.[28] While this case is the latest English authority on the subject it is by no means finally decided that a married woman has the right to sue for the loss of the consortium of her husband, because it is a King's Bench decision and it is quite probable that a case will eventually come before the House of Lords which learned body may express such conflicting views as were laid down in *Lynch* v. *Knight*. It would appear, however, that *Gray* v. *Gee* is sound law.

An odd feature of the Canadian cases on this topic is that, with one exception,[29] they have all arisen in Ontario Courts. It is therefore not safe to conclude that the other provinces of Canada will follow the Ontario Courts in preference to the English King's Bench. One of the earliest of these cases, *Quick* v. *Church*[30] held that the action was maintainable by a wife. This was chiefly arrived at by a citation of United States cases. Four years later this case was expressly over-ruled by the leading Ontario case of *Lellis* v. *Lambert*[31] which adhered to the old common law doctrine and interprets the effect of the *Married Women's Property Act* "as not extending to confer such a right of action upon the wife . . ."[32] The case of *Sheppard* v. *Sheppard*[33] appears to be in direct conflict with the above cases although many ingenious attempts to distinguish

[24] (1920), 36 T.L.R. 265.
[25] (1920), 36 T.L.R. 265 at p. 267.
[26] (1923), 39 T.L.R. 429.
[27] See unreported case, *Willston* v. *Horner* (Times 6th Feb., 1926).
[28] See 30 Corpus Juris at p. 1118 *et seq.* for citation of United States cases and discussion of subject. Also admirable article "Breakdown of Consortium" in 30 Colum. L. Rev. 650.
[29] See *Paris* v. *Montreal Trams. Co.*, 18 Que. P.R. 91, where the headnote reads: "A complete absence of judicial authority in default of authority from her husband renders a married woman absolutely incapable of taking judicial proceedings."
[30] (1893), 23 O.R. 262.
[31] *Lellis* v. *Lambert* (1897), 24 O.A.R. 653.
[32] Other Ontario cases which have adopted *Lellis* v. *Lambert* are: *Lawry* v. *Tuckett* (1901), 2 O.L.R. 162; *Weston* v. *Perry* (1909), 14 O.W.R. 956; *Ney* v. *Ney* (1912), 21 O.W.R. 523; *Seguin* v. *Laferriere* (1924), 25 O.W.N. 607; *Talmage* v. *Talmage*, [1928] 3 D.L.R. 15. Per Osler, J.A. (1897), 24 O.A.R. 653 at p. 665.
[33] (1922), 51 O.L.R. 520.

it have been made by the courts.[34] In this case a wife sued her husband's parents for uttering slanderous words which caused her husband to sue her for divorce, thus depriving her of his consortium. It was held that the action was maintainable.

In any event, irrespective of what the reader's attitude may be on this question, he will probably be in accord with the opinion of McCardie, J., when he remarked:[35] "I have considered with care the intricate provisions of the *Married Women's Property Act*, 1882. At every point of research, on every aspect of the case, I find nothing but confusion, obscurity and inconsistency. I find privileges given to a wife which are wholly denied to a husband, and I find that upon the husband there has fallen one injustice after another. I hope that the day is not too far distant when the vital and far-reaching relationship of husband and wife will receive the attention of Parliament. When that day comes I trust that the present features of injustice will be removed, that the existing obscurities will be made clear and that the great institution of marriage will gain a new dignity and a new strength through a wise and beneficient amendment of the law."

ROBERT A. KANIGSBERG.

Dalhousie Law School.

* * *

TRUST—CHARITABLE BEQUEST—MASSES FOR DEAD. The case of *Re Hallisy*[1] recently decided by the Court of Appeal of Ontario is one of interest and importance. A testator bequeathed to his executors and trustees the sum of two thousand dollars to be placed in trust in perpetuity, and he directed that the interest be given yearly to the Rector of a Cathedral for masses to be said for the souls of himself, his wife, son and daughter. Jeffrey, J., upon an originating motion held that the bequest was void.

The general rule is that property may not be made inalienable for an indefinite period, but it was early settled that a charitable trust may last forever. In *Re Zeagman*[1a] decided by Hodgins, J.A., in 1916, it was held that a bequest for the saying of masses forever for the repose of souls is not superstitious in Ontario. His judgment was, however, that the gift was void because, not being a charitable bequest, it offended the rule against perpetuities. Notwithstanding that the advancement of religion is one of the recognized divisions of charitable trusts, Hodgins, J.A., was of the opinion that the gift

[34] Per Middleton, J.A., in *Talmage* v. *Talmage*, [1928] 3 D.L.R. 15 at p. 17.
[35] *Gottliffe* v. *Edelston*, [1930] 2 K.B. 378 at p. 392-3.

[1] [1932] O.R. 486.
[1a] 37 O.L.R. 536.

in question was not charitable on the ground that "it was not for the public or some section of the public." He said: " . . . The trust in question here, namely, to apply and expend the income for the saying of masses for the soul of the testator and his descendants forever may be carried out by the celebration of a mass in private irrespective of the presence of any congregation, in which service reference to the testator or his descendants will depend wholly on the memory and mental intention of the celebrant who, in a few years, would find it impossible to know who the descendants were for whom he was to pray." Fitzpatrick, C.J., in *Cameron* v. *Church of Christ, Scientist,*[2] emphasized the necessity for gifts for religious purposes being public in their nature in order that they may be treated as charitable. He said: "Again, whilst in *In re White*[3] it was held that in accordance with the authorities a bequest for religious purposes must be considered as a good charitable gift, the cases all treat these purposes as necessarily of a public nature . . . ; there may well be religious purposes which are not of such a nature and consequently not charitable." In answer to the reasoning of Hodgins, J.A., in *Re Zeagman,* Latchford, C.J., speaking for the Court of Appeal in *Re Hallisy,* said: "It does not appear on what the assumption that the celebrant might not be aware who were the persons in favour of whose should the trust had been created." The foregoing is an exact excerpt from the printed judgment[4] and we can only infer that there has been a typographical error in the report. The learned Chief Justice then proceeded to treat the case of *Bourne* v. *Keane,*[5] decided by the House of Lords in 1919, as holding that bequests for the saying of masses for the repose of souls are charitable. The House of Lords decided that an immediate gift for masses for the dead is not void as superstitious but valid, but it was not held it is charitable. There is a *non sequitur* in reasoning that because a gift is valid therefore it is charitable.

The result reached by the Court of Appeal in *Re Hallisy* is a desirable one. Surely a religious ceremony believed by so many of His Majesty's subjects in Canada to be a solemn sacrament may properly be classified under the heading "advancement of religion." It does not appear that such a gift is not sufficiently public in its nature. It is to be regretted that the grounds for the decision of the Ontario Court are not on their face more cogent.

S. E. S.

[2] (1918), 57 Can. S.C.R. 298 at pp. 306-7.
[3] [1893] 2 Ch. 41.
[4] [1932] O.R. 486 at p. 489.
[5] [1919] A.C. 815.