

ance of his claim, that is, for the items of \$50.34 and \$19.74, the plaintiff is entitled to judgment on the report.

*Ordered accordingly.*

CLARK, J., did not sit: the others concurred.

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[Merrimack, December, 1877.]

SHERBURNE v. TEBBETTS.

One may break his covenant by disabling himself to perform it.

DEBT, on a bond conditioned to convey to the plaintiff a tract of land. Plea, *non est factum*, with a brief statement of performance. Facts found by the court.

*I. A. Eastman and T. Cogswell*, for the defendant.

*J. Y. Muiridge*, for the plaintiff.

SMITH, J. The defence was performance. The defence set up was the conveyance by the defendant to one Lamprey, at the request of the plaintiff's father, the plaintiff's agent. But the court having found the fact to be that the plaintiff's father was not authorized to make the request or to assent to the conveyance, the defence fails on the facts. Whether proof of such a conveyance, assented to by the plaintiff or by his authorized agent, would be admissible under the plea of performance, we need not inquire.

*Exceptions overruled.*

STANLEY, J., did not sit: the others concurred.

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[Hillsborough, June, 1879.]

SCHEER v. BEDFORD.

SMITH, J. The declaration alleges that the plaintiff's wife was injured in June, 1875, in consequence of a defective highway, and that he suffered damage from loss of her society and services, and incurred expenses for physicians' bills, nursing, and board, while she was disabled. The case comes to the law term upon an agreement of the parties: but the only fact admitted is the immaterial one that the plaintiff's wife has commenced an action to recover

for her personal injuries. The parties desire the opinion of the court upon the question what damages the plaintiff is entitled to recover. No plea or demurrer has been filed. The facts alleged are neither admitted nor denied. What the issues will be is mere matter of conjecture. It does not seem necessary or useful to consider how far the common-law right of the husband to the services of his wife has been affected by *c.* 2040, *s.* 1, Laws 1865 (G. S., *c.* 164, *s.* 1), until the facts are found by agreement or otherwise, or something is presented more substantial than a hypothetical case. *State v. Stevens*, 36 N. H. 59; *Sceva v. True*, 53 N. H. 627.

*Case discharged.*

STANLEY, J., did not sit; the others concurred.

*Sulloway & Topliff*, for the plaintiff.

*J. Foster and D. Cross*, for the defendants.

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[Merrimack, June, 1882.]

ELA v. ELA.

LIBEL, for divorce. At the trial term the facts were found, a divorce was decreed, and the defendant excepted.

*S. C. Eastman and J. Y. Mugridge*, for the plaintiff.

*S. Dana and C. P. Sanborn*, for the defendant.

STANLEY, J. There was evidence for the plaintiff on the questions of fact, and no error of law appears.

*Exceptions overruled.*

ALLEN, J., did not sit: the others concurred.

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[Merrimack, June, 1882.]

WALLACE v. MOULTON.

ASSUMPSIT. The defendant was in the employ of Webster, and was taken sick. Wallace was called to attend her as a physician, and charged the defendant six dollars, which Webster paid without Moulton's request, understanding that it would be allowed in settlement with Moulton for her labor. Subsequently, Moulton sued Webster on account for the labor, and Webster filed a set-off, which included the item of six dollars paid Wallace. After the set-