

annual interest on the notes, the principal of which was not due, was a breach of the condition of the mortgage, and the amount of that interest should have been included in the conditional judgment. *Muzzy v. Knight*, 8 Kansas 456; *Butler v. Blackman* (Ct. 1877), 6 Reporter 615; *Richard v. Holmes*, 18 How. 143; Jones on Mort. 1176.

Case discharged.

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

HOWE, *Ap't*, v. DAY, *Adm'r*.

An action on the common counts for labor and services and for money expended, when the specification contains several items of account, may be referred to an auditor; and the auditor's report is evidence on a trial by jury.

The reasonable value of labor and services performed and support furnished, under a parol agreement to convey land in payment for the services and support which had failed, may be recovered in assumpsit.

APPEAL, from the commissioner of insolvency on the estate represented by the defendant. The plaintiff and his wife lived with, took care of, and supported the deceased until his death, under a verbal agreement with him that he would devise or convey to the wife his homestead and personal estate, and to the plaintiff his wood-lot. He devised the homestead and personal estate to the wife, but did not devise or convey his wood-lot to the plaintiff. The declaration contained the common counts for labor and services, money paid, and goods sold, and a count for taking care of and boarding the deceased, under a special contract. The specification contained numerous items of charges for labor, money paid, and board furnished. The case was heard by an auditor; and the auditor's report was read in evidence at the trial, against the objection of the defendant that the case was not a proper one to be committed to an auditor. The defendant's motion for a nonsuit, on the ground that the plaintiff's claim was for unliquidated damages for the breach of a special verbal contract to convey land, was denied, and the defendant excepted. Verdict for the plaintiff, and motion by the defendant for a new trial.

Barnard, for the plaintiff.

Bartlett, for the defendant.

ALLEN, J. The items of the specification made an investigation of accounts necessary. The action was properly sent to an auditor, and

58	516
67	390
58	516
69	84

the auditor's report was evidence for a jury. *Doyle v. Doyle*, 56 N. H. 567.

No action at law could be maintained on the special contract to convey land, which was not in writing and was within the statute of frauds; but the plaintiff was entitled to recover for the money expended, and what the labor and services performed under the contract were reasonably worth. *Ham v. Goodrich*, 37 N. H. 185.

Judgment on the verdict.

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

SAWYER, *Adm'x*, v. CONCORD RAILROAD.

A cause of action for personal injuries does not survive.

In an action of trespass by an administrator to recover for injury to property of his intestate, happening in his lifetime from the gross negligence of the defendant, whereby the intestate was mortally injured, neither the personal injury to the deceased, nor the injury to his feelings, nor his death, can be considered on the question of damages.

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66	97.
58	517
68	194
58	517
70	185
70	186
58	517
72	164

TRESPASS, for that the plaintiff's intestate, on the 12th day of September, 1870, being in the employment of the defendants as a brakeman upon a train of passenger cars run by the defendants carelessly and recklessly, to the imminent danger of life, limb, and property of all on board, the defendants with force and arms, and by crushing the plaintiff's intestate between their cars, his clothing then and there worn upon his person did bespatter, injure, and destroy, and other wrongs then and there did, against the peace, and to the damage of her intestate, and of herself as his administratrix.

The plaintiff offered to prove the facts alleged in the declaration,—that her intestate died a few days afterwards from the effect of the injuries received; that his personal injuries, the damage to his clothes, and the destruction of his life were caused by the gross carelessness of the defendants in neglecting to fence the road properly at an exposed point, and in neglecting to attach a cow-catcher to the engine; that he was crushed in a collision of the train with cattle, which, by reason of the gross carelessness of the defendants, escaped from land adjoining the road, went upon the track, and being run over by the train threw it from the track. The question was reserved whether, on this evidence, the action of trespass could be maintained.

The plaintiff claimed that, upon the question of damages, if the jury should find there was gross carelessness in these particulars, the deceased not being in fault, they would not be restricted to the value