

ASSUMPSIT. The question reserved was, whether this action could be maintained against the administrators for unskillful treatment of the plaintiff by the deceased.

*A. F. L. Norris*, for the plaintiff.

*Mugridge*, for the defendants.

STANLEY, J. The precise point here presented has been decided in *Vittum v. Gilman*, 48 N. H. 416, and we find no good reason to doubt the correctness of that decision.

It is conceded that if the action were in tort it could not be maintained; but the plaintiff claims that, being in contract, a different rule prevails.

The general doctrine, to which this case forms no exception, is, that actions for the redress of personal injuries only do not survive, and this without regard to the form. It is true, as a general proposition, that actions in form *ex contractu* survive, but this is due rather to the substance of the action than to its form. There are actions, such as arise from the negligence of an attorney, or of a coach proprietor, where the plaintiff seeks to recover damages, which survive, but in these the primary cause of complaint is the injury to property and rights of property, and the personal injury is incidental. The line of demarcation, separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental. This distinction is recognized in all the authorities. *Broom Max.* 702; *Com. Dig.*, "Administration," B. 15; *Hambly v. Trott*, *Cowp.* 375; *Chamberlain v. Williamson*, 2 M. & S. 408; *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408; *Wade v. Kalbfleisch*, 58 N. Y. 282, 285, 287; *Lattimore v. Simmons*, 13 S. & R. 183; *Chitty Pl.* 67, 90; *Bouv. Inst.* 2755, 2756.

In the present case, there is no suggestion of injury to the property or property rights of the plaintiff. Her only complaint is of her personal injuries by the unskillfulness of the deceased, and the action cannot be maintained.

*Case discharged.*

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

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WARNER BANK v. CLEMENT & Co.

Whether an action should be brought forward and the judgment vacated is a question of fact to be decided at the trial term.

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70	89
58	533
71	385
58	533
72	162

DEBT, on a judgment recovered in 1868. One of the defendants moves that the original action in which the judgment was rendered be brought forward, and the judgment vacated.

*Rolfe*, for the plaintiffs.

*Mugridge*, for the defendants.

STANLEY, J. There is no doubt of the power of the court in any case, for sufficient cause, to bring forward an action and vacate the judgment rendered therein. *Bellows v. Stone*, 14 N. H. 175; *Frink v. Frink*, 43 N. H. 508; *Hillsborough v. Nichols*, 46 N. H. 379; *Judge of Probate v. Webster*, 46 N. H. 518; *Stickney v. Davis*, 17 Pick. 170; *McClew v. Burt*, 5 Met. 200.

What is sufficient cause is a question of fact, depending upon the particular circumstances of each case. These should be established by evidence at the trial term.

*Case discharged.*

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

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CONNELL v. PUTNAM.

In case, for loss of service and expenses incurred in caring for and nursing the plaintiff's child, he may recover for his own time spent in taking care of the child.

Time spent by the plaintiff stands on the same ground as money paid by him for medical attendance or nursing.

CASE, against the defendant, for injuries to the plaintiff's son from the kick of the defendant's horse, by reason whereof the plaintiff lost the service of his son, and incurred great expense in nursing and care.

The defendant excepted to the instructions to the jury, that, if they found for the plaintiff, he might recover, in addition to the surgeon's bill, the fair value of his own time while engaged in nursing and taking care of his son. Verdict for the plaintiff, and motion for a new trial.

*Pike & Blodgett, Gould, and Rolfe*, for the defendant.

*S. B. Page, W. T. Norris, and Donovan*, for the plaintiff.

STANLEY, J. The expense in effecting a cure includes, in addition to what was paid the surgeon, the necessary attendance and nursing—