

or the loss of a reasonable probability of pecuniary benefit.

Per ARMOUR, J.—The loss to be compensated is the loss of some benefit or advantage capable of being estimated in money, so distinguished from a *solatium* for wounded feelings and loss of companionship, and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education, and both are losses which can be estimated by a jury.

Per ARMOUR, J.—The jury were rightly directed under the facts stated below, that the defendants had laid down the track on which the accident happened, in the City of Ottawa, without authority, it being a third track or switch for use in connection with their railway, for purposes of shunting, etc. And if illegally laid down, no acquiescence, except by by-law, would make it rightful as against the public.

Per HAGARTY, C. J.—Having been there for many years with the knowledge and acquiescence of the Corporation, its existence could not alone make defendants liable; but it was very properly brought as a circumstance to be considered by the jury.

A judge is not bound, under the Judicature Act, to submit questions in writing to the jury.

The train was backing at the time.

Per ARMOUR, J.—The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing, and having regard to the fact that they had without authority increased the number of tracks there. It was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precaution.

McCarthy, Q.C., for plaintiff.

Bethune, Q.C., contra.

CHANCERY DIVISION.

[Feb. 14.]

RE KIRKPATRICK; KIRKPATRICK v.
STEVENSON.

Executors—Statute of Limitations.

Appeal from the Master. John Kirkpatrick

died June 18th, 1860. This was a claim by one of two residuary legatees under his will, who were also his executors, against his co-executor, for half the residue of the estate of the said John Kirkpatrick. It appeared that the residue was ascertained, or could have been ascertained, within a year from the testator's death. By arrangement between the executors, the one now in default got in all the outstanding assets, under an agreement, as it was said, by which he was to divide with the other, and remit a moiety when the sums collected amounted to a certain aggregate.

Held, for what was so collected antecedent to ten years before the presentation of the claim, the bar of the Statute (R. S. O., c. 108, sect. 23) applied; but as to all sums got in by the acting executor, within ten years from the making of the present claim, the claimant was entitled to recover. And the objection that the residue was not precisely, and for all purposes ascertained, because the fund in the hands of the acting executor had been from time to time drawn upon to make good deficiencies in the general legacies, did not operate to exempt the claimant from the bar of the Statute; neither was it correct to say that the acting executor was a trustee of the moiety of the moneys collected by him, and that the Statute was no bar in such a case. *Quoad* the money collected the acting executor had no duty to perform as trustee for the other executor, neither had he any such duty as owner in common of the residuary estate. His receipt of the whole made him a debtor to the other, and the alleged arrangement between them did not carry the matter any higher. *Crawford v. Crawford*, 16 W.R., 412, per Christian, L.J., approved of and followed. *Burdick v. Garrick*, L. R. 5, Ch. 233, distinguished.

The authorities show, notwithstanding a contrary opinion expressed by Romilly, M.R., in *Reed v. Fen*, 35 L.J., Ch., N.S., 464, that the Statute applies, not only to assets distributed by the personal representative, but also to assets retained by him.

D. McCarthy, Q.C., and T. S. Plumb, for the claimant, (appellant).

J. MacLennan, Q.C., contra.

Referred to
the Kirk-
patrick
10 p. 14.

Boyd, C.]