

The Court of Appeal, in England, seems to have solved the Maybrick insurance difficulty in an eminently satisfactory manner. Mrs. Maybrick murdered her husband, and assigned her interest in the insurance on his life to her solicitor. It was contrary to public policy that Mrs. Maybrick or her assignee should profit by her crime. But that reason does not apply to others entitled to a share in the estate. The Court of Appeal has accordingly reversed the judgment of the Queen's Bench Division, which held that the insurance company was not liable to pay the money (see *ante*, p. 379), and while excluding the wife's assignee from any benefit in the insurance, has ordered the amount to be paid to the executors of the estate.

SUPERIOR COURT—DISTRICT OF ST. FRANCIS.

SHERBROOKE, Dec. 9, 1891.

Before BROOKS, J.

McKENZIE V. CANADIAN PACIFIC RAILWAY CO.

*Railway Act—51 Vict. c. 29, sect. 194—53 Vict. c. 28, sect. 2—Animals killed on track while straying.*

**Held:**—*That cattle are not properly on a highway unless they are in charge of some one; and where cattle escape from the land of their owner, which is situated at a distance from the railway track, and while straying upon the highway, get upon the railway owing to the absence of cattle guards at the point of intersection, and are killed on the track without any negligence on the part of the company, the owner is not entitled to recover damages.*

BROOKS, J.—This is an action for cattle killed upon the railway, half a mile from a crossing where there are no cattle guards. Plaintiff says that defendants by their fault in not having cattle guards were the cause of this accident. It is a peculiar case. The plaintiff lives three quarters of a mile from the railway. It is in evidence that he had not good fences. His cattle got upon the highway, and went down to the railway

crossing, and then owing to the want of cattle guards got upon the railway track and were killed. This happened at night. It is not proved that there was any negligence on the part of drivers or engineers. The plaintiff relies upon the case of *Pontiac Railway Co. v. Brady*, M. L. R., 4 Q. B. 346, in which, under somewhat similar circumstances, a judgment was given condemning the defendants to pay. This case of the Canadian Pacific Railway Company is under different circumstances however. As a reference to the judgment will show, it was brought under the provisions of the 42nd Vict., the Railway Act of 1879. The first Act says that until such cattle guards and fences are made the Company are responsible for damages done by their trains to cattle and horses on the railway, and the amendment, until this is done they are liable to the occupant of the land etc. But this does not refer to highway crossings. The law now in force is the Railway Act, 51 Vict. c. 29, sec. 194. This is amended by the 53 Vict. cap. 28, sec. 2.

That is the law here, and the cattle are improperly upon the highway unless they are in charge of some person. But, it is said by plaintiff, if they are killed at the point of intersection the Company is liable. I cannot read the law in that way. Our Code says that any person may impound any animals found straying. I do not think the Court could hold, under the law as it now stands, that where an animal strays along the highway, and gets on to the track, the Company are to pay. It does seem to me that in the matter of straying animals the proprietors are responsible. Am I or any private individual to allow my cattle to stray upon the railway track? It seems to me that passengers, the travelling public, have some rights. While Railway Companies have great powers given to them, should the whole responsibility for anything that happens through the negligence of others be thrown upon them? As this is the first case of this kind that has come up, I think it should be dismissed without costs, and the judgment will go accordingly.

H. B. Brown, Q. C., for plaintiff.

R. T. Heneker, for defendant.