

waived the right to cancel the contract, and were estopped from denying that B. was insured.

Appeal dismissed with costs.

*Aylesworth, Q. C.*, for the appellant.

*Cameron* for the respondent.

9 December, 1895.

Ontario.]

CANADA ATLANTIC RAILWAY V. HURDMAN.

*Railway company—Loan of cars—Reasonable care—Breach of duty—Negligence—Risk voluntarily incurred—"Volenti non fit injuria"—"Kicking" cars on switch.*

A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard, and bringing away the cars to be despatched from their depot as directed by the bills of lading.

*Held*, affirming the decision of the Court of Appeal for Ontario (22 Ont. App. R. 292), and of the Queen's Bench Divisional Court (25 O. R. 209), that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars. That where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using the utmost skill and care in moving the car with them in it, so as to avoid all risk of injury to them. *Heaven v. Pender* (L. R., 11 Q. B. 503) followed.

In the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risks of shunting," and that the death of the deceased was caused by defendant's negligence in the shunting, in giving the car too strong a push.

*Held*, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful