

accident, did the deceased Thomas Sharpe conform to the orders and direction of Fred Brinker? A. By his presence he was directed.

There was, in my opinion, no evidence to support these findings. The deceased's injury was not sustained in the course of his employment. When his work at Welland was done, his work for the day had come to an end, and he was no longer subject or bound to conform to the orders or directions of the foreman. Indeed there was no evidence that the foreman gave or assumed to give him any order or direction to proceed along the track to the sleeping-car. The case was simply this: the foreman and the men who had been working with him were proceeding homeward after their day's work was done, and they took what they apparently thought was, in the circumstances, the most convenient way to reach the sleeping-car.

It was argued by Mr. Kerr that it was the duty of the deceased to take to and leave at the sleeping-car the tools he had been using at Welland, and that until he had done that he was still under the direction of the foreman; but, granting that this was his duty, there was no evidence to support the conclusion that until that was done the deceased was still subject to the order or direction of the foreman.

[Reference to *Holmes v. Mackay & Davis*, [1899] 2 Q.B. 319; *Kelly v. Owners of the Ship Foam Queen* (1910), 3 B.W. C.C. 113; *Waltes v. Staveley Coal and Iron Co. Limited* (1910), 4 B.W.C.C. 89, 303; *Beckerton v. Canadian Pacific R.W. Co.* (1914), 6 O.W.N. 158.]

Having come to the conclusion that the deceased did not meet with his injury in the course of his employment, it is unnecessary for us to consider whether, if an opposite conclusion had been reached, and it had properly been found that the deceased met with his injury while conforming to an order of the foreman to which he was bound to conform, it could properly be found that his injury was the result of the negligent order and of the deceased having conformed to it—a finding which would be necessary to entitle the respondent to recover.

I would allow the appeal, reverse the judgment of the learned trial Judge, and substitute for it a judgment dismissing the action, the whole with costs if costs are asked.