1924

Return to Service After Departure

Floyd R. Mechem

ment, returned to work after two days' absence, and more than a year later brought his proceedings before the Industrial Commission for compensation. He excused his failure to make demand for compensation within six months, as provided by law, by claiming to come within the provision which permits one who returns to work after the injury to file his claim within eighteen months after such return, and the court sustained him in this position, distinguishing the cases of *Swift & Co.* v. *Indust. Com.*[2] and *American Glyco Metal Co.* v. *Indust. Com.*[3] with the observation that in those cases there was really no absence from work at all and so no "return" to work within the meaning of the law, the few minutes' absence in the physician's office being too inconsequential to constitute such "absence" as the law contemplated.

The court might also have distinguished the later case of *Inland Rubber Co.* v. *Indust. Com.*,[4] where the employee was not away from work except that during a period of four and one-half months after the accident he lost six or seven days at intervals on account of the effect of the injury sustained in that accident, and the court said that he was not within the eighteen months' provision because he was not temporarily totally incapacitated at the time of the injury and did not cease employment at that time, thus indicating it to be the view of the court that such is necessary to bring one within this provision. Thus, given an injury within the course of and arising out of the employment and a real and not an inconsequential temporary total disability, no matter what the length of it, if the employee returns to work he is within the provision.

E. M. LEESMAN.

OTHER JURISDICTIONS

CONNECTICUT

MASTER AND SERVANT—RETURN TO SERVICE AFTER DEPARTURE. —In *Mastrelli* v. *Herz*[1] it appeared that the defendant had given his chauffeur permission to take the car to go upon an errand of his own. When this was completed, the chauffeur was to return to the defendant's garage in order to be ready to drive for the defendant. After going to the place at which his errand was to be done, the chauffeur was driving back to the garage, and, while doing so, negligently ran down the plaintiff. The court conceded that if the injury had happened upon the outward journey, the defendant would not have been liable,[2] but held that he was in the service of the defendant upon the return journey, following *McKiernan* v. *Lehmaier*.[3] The court said:

2. 299 Ill. 587.
3. 306 Ill. 421.
4. 309 Ill. 43, 50.

1. Connecticut (1924) 124 Atl. 835.
2. *Adomitis* v. *Hopkins* 95 Conn. 239, 111 Atl. 178, 22 A. L. R. 1400.
3. 85 Conn. 111, 81 Atl. 969.

"The fact that an automobile is a dangerous instrumentality, and that the permitting an employee to use it for his own purposes is in the nature of a use for family purposes, has influenced the courts, for reasons of public policy, to construe strictly the extent of the license involved in such permissive use of an automobile by an employee."

An automobile is doubtless a more or less dangerous thing, but it has frequently been held not to be a "dangerous instrumentality" within the rule upon that subject. The "family purpose" doctrine, to which the court refers, is one by no means generally adopted. The cases cited as analogous, of liability for the negligence of servants returning from a departure, are by no means everywhere approved. If the injury, in this case, had been committed by someone, not a servant, to whom the automobile had been loaned, it would not have been held that the owner was liable. Why should he be held liable where he loans it to his servant for the latter's sole purposes? The duty to return it seems to be the same in both cases.

FLOYD R. MECHEM.

GEORGIA

CRIMINAL LAW — EVIDENCE — WIFE'S TESTIMONY AGAINST HUSBAND.—The opinion in *Grier* v. *State*[1] exhibits the shocking state of paralysis in which our criminal law may be placed by the preservation of outworn rules of evidence.

Shortly stated, the ruling is that on a charge against a husband of killing his baby-child in its mother's arms by a pistol shot aimed at the mother, the three being alone in the room, the wife-mother cannot testify to the shooting. Such a rule of evidence seems to belong in some limbo of mythology and superstition. But it is found today in the State of Georgia; and rules quite as bad are found in other states, and will continue to incumber the law until legislatures awake and are willing to let their judiciary committees be controlled by other than the hornbook-learned and unprogressive element in the bar.

In this case the court's ruling merely enforced the letter of the law. By the Penal Code of that state the wife in a criminal case may testify against her husband only for an offense "committed or attempted to have been committed *upon her person.*" The charge here was of murder of another person—the child in her arms; hence the statutory exception did not apply.

Almost the same facts had been presented in 1905 in a West Virginia case,[2] and there the ruling had been the same. Conversely, in Illinois is enforced the equally harsh and irrational rule[3] that a wife may not testify in favor of a husband on a charge of murder, this rule being enforced in a case where the wife was virtually the only witness. And in Georgia the situation is even worse when the husband's turn comes: for the same Penal Code forbids his testimony against the wife without even making the exception for an

1. Georgia 123 S. E. 210.
2. *State* v. *Woodrow* 58 W. Va. 527, 52 S. E. 545.
3. *People* v. *Holtz* (1920) 294 Ill. 143, 128 N. E. 341.