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Master and Servant--Scope of Authority of Employment-- Prosecution of Master's Business

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limit, so far as its entry into interstate commerce is concerned. *United Fuel Gas Company v. Hallanan*, 257 U. S. 277, 42 Sup. Ct. Rep. 105. The holding which allows a state to prevent the exportation of water from its important streams is thought to be consistent with this distinction on the basis of property, for the public has a general right in navigable streams, while the riparian owners are to be protected in their rights in others. *Hudson Water Company v. McCarter*, 209 U. S. 349, 28 Sup. Ct. Rep. 529. This decision was expressly held inapplicable in cases of natural gas. *West v. Kansas Gas Co.*, 221 U. S. 229, 31 Sup. Ct. Rep. 564.

In view of these cases, it would seem that the power of the state over natural resources which are not subject to the "trust" in favor of the general public is limited to that which will not operate to burden commerce between the states. The power over resources wherein the public has this "trust" interest extends to a conservation for the people as a whole, but not to a regulation or restriction which will burden such articles *after* they are permitted by the state to enter general commerce, or which will operate for the benefit of one class as against the whole body of the people. For an expression of other views on a somewhat similar topic, see Thomas Porter Hardman's articles in 26 W. VA. L. QUAR. 1, 224.

—R. PAUL HOLLAND.

MASTER AND SERVANT—SCOPE OF AUTHORITY OR EMPLOYMENT—PROSECUTION OF MASTER'S BUSINESS.—An employee of defendant company requested decedent, age eleven, to help transport powder. The decedent, while so engaged, took some of the powder. While later playing with the powder, he threw it on a fire and was so severely burned that he died. The plaintiff brought action for wrongful death. *Held*, for D. The Supreme Court of Appeals, in affirming a judgment for D, stated that the test of a master's responsibility for the conduct of his servant is not whether the servant deviated from, or exceeded, his authority but whether the negligence occurred in the prosecution of the master's responsibility for the conduct of his servant is not whether the negligence occurred in the prosecution of the master's business. *Wellman v. Fordson Coal Co.*, 143 S. E. 160 (W. Va. 1927).

The scope of this note is confined to the test above given. It

appears from an examination of other cases that our court in the past has used the same test. *Gregory's Admr. v. Ohio River Railway Company*, 37 W. Va. 606, 16 S. E. 819; *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087; *Vana v. Frantz*, 83 W. Va. 671, 99 S. E. 12; *Christie v. Mitchell*, 93 W. Va. 200, 116 S. E. 715; *Mosely v. McCrory Company*, 101 W. Va. 480, 133 S. E. 73. Notwithstanding the citation by the COURT OF LABATT, MASTER AND SERVANT, we do not understand that authority to give countenance to such a test. "In order to affect a master with liability, something more must be proved than that the wrongful act was in some way connected with the servant's authorized functions, or that he committed it at a time when he was occupied with the discharge of those functions", LABATT, MASTER AND SERVANT, §2274. To the same effect see MECHEM, AGENCY, §§1879, 1898. The courts, generally, give as the proper test that it is not whether the act was done while the servant was on duty or engaged in his duties, but was it done within the scope of his employment, and in the prosecution and furtherance of the business which he was employed to do. *Roberts v. Southern Railway Company*, 143 N. C. 176, 55 S. E. 509; *Bowler v. O'Connel*, 162 Mass. 319, 38 N. E. 498; *Rounds v. Delaware L. T. W. R. Company*, 64 N. Y. 129, 21 Am. Rep. 597; *McFarlan v. Pennsylvania Railroad Company*, 199 Pa. 408, 49 Atl. 270; *Pittsburgh, etc., Railroad Company v. Adams*, 25 Ind. App. 164, 56 N. E. 101; *Stephenson v. Southern Pacific Railroad Company*, 93 Cal. 558, 29 Pac. 234; *Morier v. St. Paul, etc., Railroad Company*, 31 Minn. 351, 47 Am. Rep. 793; 8 L. R. A. (N. S.) 798.

Doubtless the court reached the proper result in this present case. It may be justified on the doctrine of dangerous instrumentalities. It is submitted, nevertheless, that the employment by the court of such a test as therein laid down tends to create an absolute liability upon the master for the torts of his servant, regardless of the nature of the act done or its relation to that particular work which the servant was employed to do. Such a result would be palpably unsound and unjust. Under conditions of modern industry, where men must work much by servants or agents, the master's liability should be strictly limited, both in word and in effect.

—JOHN D. PHILLIPS.