

COMMENT.

It is an old proverb that law is an uncertain science, but it is not often that it has as striking an illustration as is afforded by a question, we could hardly call it a decision, which came from the Supreme Court of Missouri a few weeks since. As the point is an interesting and live one we give the case [*Berry v. Missouri Pacific Railroad Co.*, 25 S. W. Rep. 229 (Mo.)] somewhat in detail. It was an action against a railway company for negligently causing the death of plaintiff's husband. The deceased met with his accident while riding on a flat car attached to a construction train. He paid no fare, but was riding with the knowledge and assent of the conductor. The lower court ruled that he was a passenger. Three judges of the Supreme Court were of the opinion that he was a mere trespasser and that recovery could be had only on proof of gross negligence; two judges considered that, as he was on the train with the consent of the conductor, he was entitled to ordinary care, and favored affirming the judgment against the company; another was of the same opinion as to the liability of the company but favored reversing the judgment on the ground that the ruling that deceased was a passenger was an "undue advantage" to the plaintiff. Still another member of the court, in a well written and ingeniously argued opinion, favored the theory that deceased was a passenger, stating the settled propositions that payment of fare is not necessary to constitute one a passenger, and that a person becomes such when he is carried on a passenger train (or if the custom of the road permits, on a freight train,) with the consent of the conductor, attempted to bring this case within them. "The ultimate test by which all doubtful cases should be determined resolves itself into a question of good faith on the part of the person claiming to be a passenger, based on the acts, representations and appearances for which the carrier is responsible. If from these acts representations and appearances made or held forth by the carrier, a person riding with the express or implied consent of the conductor is justified in believing that this consent is in accord with his duty and authority as a conductor and not in

fraud of the regulations and rights of the carrier, then he should be recognized in the fullest sense as a passenger." The other opinions disapproved of the passenger theory on the ground that this was a construction train and not intended or permitted to be used in carrying passengers.

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The case of *Wright et al. v. Wright*, 58 N. W. Rep. 34, (Mich.) was an action of waste brought to restrain the defendant from committing waste by cutting and removing timber from land to which, as heirs, the plaintiffs laid claim. The manifest purpose of the suit was to ascertain the respective rights of the parties. The facts in the case were these: Phineas Wright in 1868 entered into an agreement in the form of an indenture with the superintendent of the poor of the county to receive the defendant, who at that time was under two years of age, into his family, until he became twenty-one years old. In 1875, acting under a statute then in force, he and his wife filed a petition in the probate court declaring their intention to make the defendant their heir at law and praying that his name be changed to theirs. The order was granted, and the defendant continued to live with him, being treated as his son, and never being informed that he was not, until, when he was twenty-two years old, Phineas Wright died. The statute under which the defendant was adopted was declared unconstitutional in *People v. Congdon*, 77 Mich. 357, and the heirs of decedent attempted to take advantage of this, and enforce their claim to his land. The court, after describing the relations of the parties, and the intentions of decedent and his wife, as appeared from the evidence, said: "We think there may be said to be a contract, impliedly at least, that defendant was to have this property and that there had been such a performance on the part of the defendant as to take the case out of the statute of frauds. If this arrangement, so solemnly made by Mr. and Mrs. Wright, cannot be carried out,—if strangers may now step in and take this inheritance, which the defendant has been led to believe would be his—the defendant would be most outrageously wronged. He has lived since his adoption upon this farm, in the full belief that he was under his own father's roof and in the full expectation and belief that, as a son and only child, he would inherit it. It would be technical, indeed, to say, from all these circumstances, no contract could be implied which a court of equity would enforce to save the rights of the defendant." Several cases are quoted to

sustain this opinion, from which two justices dissented, but it is evident that the court departed from the strict rules of positive law to prevent an injustice being done to the defendant, and stretched the meaning and effect of the facts to bring them within the protection of the law. The transactions of the parties, as is pointed out in the dissenting opinion, were insufficient to constitute a contract of any other kind than a mere *nudum pactum* which would be insufficient, notwithstanding the intentions of the decedent, to secure the rights of the defendant, as he expected under the statute which was adjudged unconstitutional.

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In the case of *Fisher, Brown & Co. v. Fielding*, recently decided in the Superior Court of Connecticut, the defendant, a citizen of Connecticut, while temporarily in England was served with process there, and in default of appearance a judgment was rendered against him. Suit was brought on this judgment in Connecticut and the point to be determined was whether the English court had jurisdiction over the defendant. To be more specific, would mere service of process upon a citizen of the United States while temporarily within a foreign country, confer upon the court jurisdiction to render a judgment which would be binding in the United States? It appears that in all former cases in which the courts have determined questions of jurisdiction over the parties with reference to the validity of a foreign judgment rendered against them, the defendant was not only served with process but actually appeared and litigated the cause. The court (G. W. Wheeler, Judge,) reviewed the authorities at great length and determined that jurisdiction having once attached by reason of service within the foreign country, the judgment rendered was a valid one and binding on the courts of Connecticut. The fact that it was taken by default did not effect the case. In concluding, Judge Wheeler says: "We have already shown that the courts of Connecticut have not determined directly this question, but they have often declared the principles which govern this case; that jurisdiction of the cause and person is the foundation of a conclusive judgment; that the decision of a court of competent jurisdiction is final upon the parties to the action; that a cause once tried by such a court cannot again be contested in the same court or any other. * * * What reasons can be deduced why these principles should not be of equal force whether the judgment be that of our State, our Sister States or a foreign country? * * * The defendant who has entered into contract relations with the plaintiff,

who has received notice of the action against him, who had the right to appear, who had the right to defend, who had the right to have the judgment set aside for irregularity, who had the right to appeal, escapes all liability under the judgment rendered by a court of competent jurisdiction. A litigant who had a fair opportunity to try his cause before a competent tribunal, should acquiesce in the result, and if he has reason to complain should pursue those means for correcting error provided by the jurisprudence of the tribunal, instead of resorting to another court. * *

* The court having once acquired jurisdiction of the cause cannot be deprived of this by the subsequent action of the defendant in refusing to litigate the cause." This reason is obviously sound and in accordance with the modern idea of giving validity to foreign judgments on account of justice and expediency.