1-1-1931

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Claims for Services, Attendance and Support Against Decedents' Estates

In the February, 1924, Number of the Dickinson Law Review appears an excellent article by Professor Reese on a timely topic: "Quasi Contractual Recovery for Work and Labor; Effect of Family Relation".

The present discussion basically covers the same ground but is devoted particularly to a discussion of that rather numerous class of cases in the Pennsylvania Reports involving the administration of the estates of the dead. In most cases the questions arise in the distribution of such estates through decrees of our Orphans' Courts but occasionally the same problems are presented in actions in assumpsit in the Common Pleas brought by plaintiffs against administrators or executors of decedents.

In Hertzog v. Hertzog, 29 Pa. 465, 1857, assumpsit was brought by a son against the estate of his father for compensation for services rendered the latter in his lifetime. After the plaintiff had attained his majority he continued to reside with his father on the home farm and to labor for him; which arrangement, with the exception of one year of absence in Virginia, continued for a period of seventeen years, when the plaintiff married and brought his wife to his father's home where they all continued to reside. Later the father put the son on another farm which he owned and sometime afterwards the father and mother moved into these same premises with the son and continued to reside there until the death of the father. The labor of the son was extended over a period, continuous, with the exception of one year, for twenty-four years. The jury having found a verdict for the plaintiff upon which judgment was entered, the case came to the Supreme Court on a writ of error. The question was whether the law would presume a contract of hiring in the absence of express evidence. Lowrie, J., discusses the different classes of contracts. Referring to the language of Blackstone in 2 Comm. 443, and
characterizing the language as indicating "some looseness of thought", the learned Justice declares:

“All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills”.

Recurring to the Blackstonian law, later on the learned Justice says:

“But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit. It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.

We have, therefore, in law, three classes of relations called contracts.
1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts, already sufficiently distinguished.

In the present case there is no pretence of a constructive contract, but only as a proper one, either express or implied. And it is scarcely insisted that the law would imply one in such a case as this; yet we may present the principle of the case the more clearly, by showing why it is not one of implied contract.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbours for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not."

Further on in the Opinion the reasoning is as follows:

"Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as
ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and very seldom because their father desires to use them as hired servants. Customarily no charges are made for boarding and clothing and pocket-money on one side, or for work on the other; but all is placed to the account of filial and parental duty and relationship.

In reversing the judgment and granting a new trial the learned Justice concludes:

"The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. But this is a despotic power, and is lodged with no portion of this government.

Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connexions on their own terms and to be judged accord-
ingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen."

In a rather obscure case, Prizer's Appeal, 3 Walker 487, 1882, there is a well considered opinion by Ross, P. J., of the Orphans' Court of Montgomery County in which an attempt is made to classify the various cases of service as presented against the estate of decedent. The learned Court remarks:

"That there is confusion, and, to some extent, contradiction in the reported cases, grows out, not so much from the law upon the subject, as it does from the findings of fact in the various cases where that law was expounded by the Court of last resort. * * * * Now the conclusions reached by the Court, and which it reduces to the form of propositions are those by which it means to be guided in reaching the conclusions about to be expressed upon the facts here.

FIRST. That in general, if one performs services for another at his request, no designated compensation being named, the person performing the services may recover their value upon the implied promise to pay, unless there be any fact or rules of law existing which repel the presumption that the services were rendered in expectation of compensation.

SECOND. That among those circumstances of fact and rules of law, which operate to repel the presumption thus stated, are the want, as a matter of fact, of a contract, either express or implied, and the relationship of the parties in a degree which either bars or tends to repel such presumption, under the law as declared in Pennsylvania.

THIRD. That where services are rendered between parent and child, or those standing in loco parentis, there can be no recovery for services rendered by either to the other, unless there be proof, direct and
positive, of a contract to pay for such services, or direct and positive proof of promise to pay. All other degrees of consanguinity or affinity are circumstances which tend to rebut the presumption, but such relationship does not, of itself, in the absence of direct and positive evidence to the contrary, constitute an absolute bar.

FOURTH. A family relation subsisting between those of kindred blood, with services rendered by those occupying that relation to each other, does not constitute, in itself, an absolute bar to the recovery of compensation for those services, if there be anything in the attitude or relationship of the parties, or in the declaration of the party receiving the benefits, which rebuts the idea that the family relationship was the consideration for the services solely, with no expectation of other remuneration.

FIFTH. Where, under such circumstances as those last mentioned, services are rendered under the expectation and belief that they will be rewarded by testamentary benefits alone, there can be no recovery where the decedent fails to meet such expectation, either by devise or bequest. But if services are accepted by one holding a family relationship, who, while receiving promises to pay for them without specifying how, when or where, even although one performing the service expected to be thus rewarded, no matter what the relationship may have been (less than parent and child, and possibly even then), a recovery may be had upon such promise or promises as upon a quantum meruit."

The general attitude toward claims of this character against the estate of a decedent is definitely expressed in a number of our Supreme Court cases.

In Harrington v. Hickman, 148 Pa. 401, 1892, Williams, J. said:

"The frequency and facility with which unjust
claims have been presented and pressed against estates, and the unequal character of the controversy, in which one party is living and the other dead, have led the courts to scrutinize the testimony in support of claims against estates with great care."

In Gross's Estate, 284 Pa. 73, 1925, with thoughts upon the same subject, Kephart, J., observed:

"The matter, as it thus presents itself, is resolved into a contest against an estate by one who was in a position to assert his rights long before the death of the other party, at a time when there was sufficient money on hand to pay it, and when the other party, the one most interested, was in being to defend his rights. To successfully assert a claim against a dead man's estate is being steadily made more difficult. To establish such claim by parol evidence requires proof direct and positive. The terms of the liability must be certain and definite: Caldwell v. Taylor, 276 Pa. 398, 404; Goodhart's Est., 278 Pa. 381; Hirst's Est., 274 Pa. 286, 288; Reynolds v. Williams, 282 Pa. 148. As we have often said, 'These claims are always looked on with suspicion', the burden of proof lies on the claimant: Heffner's Est., 134 Pa. 436, 444."

All of these cases necessarily fall into one or the other of two classes, (a) where the claim is based upon an express contract with the decedent, (b) where the claim is based upon an implication of law or quantum meruit.

**EXPRESS CONTRACT**

In Harrington v. Hickman, 148 Pa. 401, 1892, Plaintiff brought assumpsit against defendants as Executors of Joseph Pratt, deceased, to recover services at the rate of $5.00 per week for nursing and taking care of defendants’ testator. The essential facts quoted from the record are as follows:

"Joseph Pratt was an old man over eighty years of age at the time of his death, and very feeble."
addition to the general infirmities of his age he suffered from disease of the bladder and kidneys, and in addition to this was very intemperate, and, as his physician testified, hard to manage and care for. The plaintiff was not related to him either by blood or marriage, but was engaged by him as his housekeeper and nurse, serving in this double capacity from July 15, 1883, to December 1, 1886, when, her health becoming impaired, she was obliged to leave, and Pratt employed two persons, a housekeeper and a nurse, to perform the services which she had formerly rendered. It was shown that by a contract between them she was to receive $1.00 per week. This she claimed was for her services as housekeeper merely, and that by a distinct understanding she was to receive compensation for her services as nurse from the executors of Pratt after his decease. The testimony in support of plaintiff's contention appears by the opinion of the Supreme Court.

At the conclusion of plaintiff's case, the court on motion of defendants, entered a compulsory nonsuit, and subsequently refused to take it off. Plaintiff appealed."

Plaintiff in support of her position, proved by a disinterested witness the declaration of decedent "Betsy is very kind to me. I have promised her that she shall be paid by my executors when I am gone for waiting on me." There was no question about the worth of the services. The Supreme Court held that the above declaration was competent evidence upon the question of the existence of the contract sued on, and was clear, direct and sufficient if believed, to justify a verdict in favor of the plaintiff.

In this case the plaintiff relied upon an express contract and the decision of the Court was, that with the evidence submitted, a prima facie case had been established. The motion for non-suit should not have been granted and the burden of coming forward with evidence and dislodging the prima facie case was upon the defendants and ultimately the entire question would have gone to the jury for its determination on the facts.
In Mack's Estate, 278 Pa. 426, 1924, a claim was made by a daughter against her deceased father's estate for services as nurse and housekeeper, founded upon the express promise of the father to pay her a sum equal to that paid a skilled nurse if she would take care of the home, her father, and the minor children living therein. In passing upon the case Sadler, J., said:

"It is necessary to consider whether the testimony here offered justified the findings made. The daughter, Julia, had been a student in a hospital, preparing herself as a professional nurse, and was so engaged for two and one-half years prior to the death of her mother. She abandoned this vocation at the request of her father, under an alleged promise of payment of a sum equal that paid a skilled nurse, if she would return to the family home and take care of it, her father, and the minor children living therein. That she was competent to perform the work for which she had been trained, and was frequently requested to assist others professionally while with her father, appears by the testimony of several disinterested witnesses. Such services were in demand during the period covered by the present claim at a minimum rate of twenty-five dollars per week, a higher sum being named by several. Sister Seton and Doctor Jackson both testified as to endeavoring to secure the aid of Julia as a trained nurse, and of being told by the decedent that he would not permit her to undertake any outside work since 'he would pay her as much or more than she could earn, and under no circumstances would he permit her to go', and that 'she should remain at home and he would pay her the equal to what she would receive nursing'.

"Other witnesses were called who told of statements made by the father, disclosing the existence of an understanding on his part to pay at the rate which could have been earned by the daughter had she followed her profession. These declarations were made
on numerous occasions in the presence of the various members of the family, including the claimant. Frank Mack and Fred P. Mack, her brothers, Sarah Hicks, a sister, and Mrs. Barbara Hicks, apparently a disinterested third party, all testified as to the promise made by the decedent, and no opposing evidence was offered on behalf of the residuary legatee. After a careful reading of the record, we are convinced that the claimant met the quantum of proof required in such cases; that she did perform the services at the request of her father, under an express promise to pay therefore the sum customarily paid for a trained nurse in the community, and that this amount was not less than twenty-five dollars per week. The auditor, as found by the court below, correctly so held."

In Brose's Estate, 155 Pa. 619, 1893, a claim was presented against the estate for boarding and washing and for nursing decedent based upon evidence showing an express contract by which claimant agreed to furnish board and washing for $50.00 per year. The Court made an allowance for nursing and for funeral expenses but disallowed an additional amount claimed for boarding and washing and taking care of the decedent over and above the amount of $50.00 per year as expressly agreed upon. In affirming the decree and dismissing the appeal the Supreme Court, per Curiam, said:

"We have no doubt the appellant has been inadequately compensated for the boarding, washing and taking care of the deceased, but that is the result of his own improvident contract. That contract appears to have been clearly established; and, of course, it stood in the way of such additional allowance as he otherwise would have been entitled to."

IMPLIED CONTRACT

All liability enforced under our system of law by actions in assumpsit is based upon promises made or supposed to have been made in contract. The promise may be clear
by the evidence, in which case it is called express, or it may be shown by circumstances, when it is called implied in fact. The usual doctrine is that one is not bound unless he has made a valid promise either expressly or by fair implication. In *Anderson v. Hamilton Township*, 25 Pa. 75, 1855, Knox, J., explains the lack of liability in these words:

"A voluntary act, although beneficial to another, performed without request, affords no legal cause of action for compensation."

On the other hand the law frequently implies a promise where there never was one and permits a recovery for services rendered. However, such a claimant must show three facts, (1) a request of the plaintiff by the defendant for the services, (2) a rendition by the plaintiff of beneficial services to the defendant, and (3) acceptance by the defendant of such services.

In *Miller's Appeal*, 100 Pa. 568, 1882, Trunkey, J. declares:

"Implied contracts are such as reason and justice dictate, and which the law presumes from the relations and circumstances of the parties. Nothing is better settled than that the performance and receipt of services, or the furnishing of board, raises an implied assumpsit by the one who receives to compensate the other, yet this implication may be rebutted by proof of facts which repel the idea of a contract."

The facts which may be submitted in proof to repel the idea of a contract are numerous but, assuming that services were actually performed, they all depend upon whether a request was made or there was an acceptance of the services under circumstances which would justify an expectation on the part of the claimant that he was to be paid.

Certain situations have occurred so frequently in the cases that the Courts have laid down certain strict inferences or presumptions concerning them.
It has been repeatedly held that services performed by a child for a parent or a parent for a child are presumed to be gratuitous and *prima facie* there can be no recovery unless an express contract or promise to pay be shown or circumstances so direct and strong, direct and positive, clear and distinct be shown. In *Miller's Appeal*, *supra*, Trunkey, J., thus explained:

"Between parent and child the rule is, that there can be no recovery for service, boarding, or the like, in the absence of an express contract to pay therefore. The degree of proof to establish it cannot be the same in all cases. Nor is a contract for the payment of money for services or goods, subject to the same rules respecting its proof as are applied to oral contracts for the conveyance or devise of land by a father to his son, as was the case in *Harris v. Richey*, 56 Pa. St. 395. When a son continues in his father's family and service after his majority, as before, he cannot recover wages, unless there be direct, clear and positive proof of an express contract. But there it has not been held essential that a witness was present with the parties face to face and heard their bargain. However, the circumstances require much stronger proof to establish a contract, than when the son had left his father's home, had done business for himself for years, and the father requested his return, care and service. In one case the circumstances are opposed to the idea of a contract; in the other they are corroborative of the father's declarations to third persons that he promised his son to pay him.

"The question always is, whether the parties contemplated payment and dealt with each other as debtor and creditor. A son who takes his decrepit parents into his house and supports them, is presumed to do so from the promptings of natural affection; no contract is implied. But if the father, before they go and afterward, repeatedly declares that he was to pay for their board such declarations are evidence, and with the cir-
cumstances may be so direct and strong as to compel belief that he expressly agreed to pay for it. Loose declarations made to the son or others will not answer. That which may be only the expression of an intention to compensate is not evidence of an agreement to compensate. If he intended to pay and often said so to others, he was not bound. It must appear that he purposed to assume a legal obligation, capable of being enforced against him.”

On the other hand in Gibb’s Estate, 266 Pa. 485, 1920, Frazer, J. observed:

“Relationship alone, however, is sufficient to overcome the presumption only in the case of parent and child: Smith v. Milligan, 43 Pa. 107; Miller’s App., supra. In other cases the burden is on the person denying liability to show no debt was, in fact, intended. It has been held that no presumption of family relationship existed where the claim was by a son-in-law against his father-in-law for board; Perkins v. Hashrouck, Admr., 155 Pa. 494; or by a son-in-law against his mother-in-law’s estate; Gerz’s Exr. v. Demarra’s Exr., 162 Pa. 530; or by a niece of a decedent’s wife; Ranninger’s App., 118 Pa. 120; or where the relationship is that of brother-in-law and sister-in-law; Caskey v. Kineavy, 60 Pa. Superior Ct. 87. The closer the relationship the less expectation of payment, and greater strictness of proof to overcome the presumption is required: Miller’s App., supra.”

However, the family relationship may be established and shown between parties who are not related by ties of blood and if as a fact claimant and decedent maintained a common household the presumption against an expectation of compensation for services rendered arises. This was the situation in Brown v. McCurdy, 278 Pa. 19, 1923, wherein Sadler, J. commented:

“Claimant came to the home of her mother-in-law at the solicitation of her husband, and remained there
as a member of the family until his death in 1903. As already stated, there is no suggestion she was to be paid for any service to be rendered during that period; on the contrary, she was treated as a part of the household, and this relationship existed until the death of Mrs. Brown. A presumption arises that the association, which began in 1902, continued, and unless it could be found from the testimony offered that there had been a change, we must assume that it was unaltered. It has been said, an intention to pay for work done will be assumed, except in the case of parent and child. Where, however, it is apparent that the parties, though not so related by blood, in reality bore like connection to each other, the implication does not arise. Under such circumstances it is necessary before a judgment can be had, that there be proof of an express contract, which must be clearly shown: Ulrich v. Arnold, 120 Pa. 170; Zimmerman v. Zimmerman, 129 Pa. 229. The mere fact that the claimant was a daughter-in-law of the decedent raises no presumption of gratuitous service (Schoch v. Garrett, 69 Pa. 144; Gerz v. Demarra's Exrs., 162 Pa. 530; Gibb's Est. 266 Pa. 485) but if, as here, the claimant has become a part of the family, the contrary is true."

In Collin's Estate, 83 Pa. Super. Ct. 31, 1924, the claimant was the wife of a nephew of the decedent. Claimant and her husband went to live with the decedent and together a home was established for herself, her husband, her daughter, and the decedent. The latter was nursed and taken good care of by the claimant. These facts were deemed sufficient to establish the family relationship and preclude a recovery by claimant for services rendered decedent as housekeeper and nurse during the last seventeen and one-half months of the life of decedent. Under such circumstances it is necessary for recovery that there be proof of an express contract to pay.

On the other hand in Kerr v. Wilson, 284 Pa. 541, 1925, a claimant who was a nephew of the decedent was allowed
to recover for services where it was shown that the uncle sought a home in the house of his nephew so that he might have someone to care for him in his old age. Frazer, J. placed the case in the same category with Gibb's Estate, holding that the uncle was the sole beneficiary of the arrangement and furthermore finding that there was evidence sufficient from which the jury could properly find an express promise to pay for the services.

It is noteworthy that in both the latter case and its predecessor, Gibb's Estate, supra, the Court found sufficient evidence of an express contract.

It has been held several times that a son-in-law cannot recover for care, nursing and personal services rendered a mother-in-law where the latter lived in the family of the former without paying or agreeing to pay for her board and keep and without any demand upon her therefor: Young's Estate, 148 Pa. 573, 1892; Gerz v. Weber, 151 Pa. 396, 1892.

The term family relationship as used in discussing the legal rights as claimants of children against parents or parents against children denotes primarily the near kinship and not necessarily the habitation together in a dwelling or under one head as a common household. However, in discussing the respective rights and liabilities of all other persons actually related by affinity or consanguinity or not the test is the actual living together as one family or common household. As already indicated where a family relationship is already established the nearer the actual relationship by blood or marriage the weaker is the inference that compensation for services was expected.

A lived with her sister B at intervals, for years. The evidence went to show that A's position in the household was that of a member of the family. During all the time of occupancy no board was asked for or paid. A assisted in the family work, and occasionally advanced B small sums, of which no account was kept. A died, and B filed a claim against her estate for board. The claim was disallowed, and B appealed. Decree affirmed—Culp's Appeal, 28 L.J. 60, 1871, Thompson, C. J.
In the article referred to, by Professor Reese, the learned writer observed:

“A careful distinction must also be made between expectation of pay and disappointed expectations. In the former case the plaintiff performs services beneficial to the defendant and expects compensation therefor in some form or other. In the latter case the plaintiff does not expect pay for his services but expects that because of his services gratuitously rendered, his donee will reciprocate his generosity or indirectly reward him. In such cases there can be no recovery.”

In *Gilbraith's Estate, 270 Pa. 288, 1921*, Simpson, J. closes an opinion with these words:

“So far as any conclusion can be drawn from the statements quoted, it would be the witnesses thought claimant's services were to be recompensed by a legacy, and not otherwise; and the case, in this aspect, is within the rule that where services are rendered in expectation of a legacy to be given, there can be no recovery against a decedent's estate, for this excludes the idea of a contractual relation between the parties: *Miller's Est., 136 Pa. 239, 250; Cummiskey's Est., 224 Pa. 509, 513.*”

However, where a contract was made by a decedent in her life time to devise a house to the claimant in consideration of services to be performed for decedent until the latter's death a recovery was allowed—*Conkle v. Byers' Exr., 282 Pa. 375, 1925*. Said Walling, J.:

“The testimony of Mrs. Crawford, however, if credited, and that was for the jury (*Eichelberger's Est., 170 Pa. 242; Gers's Exrs. v. Demarra's Exr., 162 Pa. 530; McDonald v. Eiler, 81 Pa. Superior Ct. 172*), established the existence of such a contract as entitled plaintiff to recover the value of her services rendered on the faith thereof, the house not having been given her; and it is immaterial whether the contract was made before
or while the services were being performed: *Currey's Est., 26 Pa. Superior Ct. 479.*

A legacy may be left by a testatrix with the intention to fulfill some declarations made relative to compensation for services. In *Hughes v. Keichline, 168 Pa. 115, 1895,* an action in assumpsit was brought against a decedent's estate for services wherein the plaintiff relied upon declarations of the deceased that the services were to be paid for. It was held that the will of testatrix showing a legacy to the plaintiff was admissible in evidence and it was for the jury to determine what effect should be given it.

**PERIODICAL PAYMENTS**

The doctrine of periodical payments affects a great number of the cases now under consideration. It has been shown heretofore that in the case of parent and child any services performed one for the other are presumed to have been done out of kindness and family affection and not for a monetary consideration.

A presumption is said to be in inference as to the existence of one fact not certainly known from the existence of some other fact known or proved founded on a previous experience of their connection. Ordinary observance discloses that parents and children usually act from motives of filial affection and love and hence the presumption. This throws the burden upon a claimant to dislodge the presumption by direct evidence.

In the case of periodical payments there is encountered another presumption which again throws the burden of dislodging it upon the claimant. In *McConnell's Appeal, 97 Pa. 31, 1881,* Paxson, J. explained:

"It was held, in *Gough v. Findon, 7 Exch. 49,* that 'where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is, either that the wages have been paid, or that the service was perform-
ed on the footing that no payment was to be made.' Again in *Sellen v. Norman*, 4 C. & P. 80, it was said by Gazalee, J.: 'In the regular course, if the servant has left a considerable time, the presumption is, that all the wages have been paid.' 

"The presumption referred to in the cases cited rests upon the known fact, that in England servants' wages, as a general rule, are paid at stated periods, and it is entirely immaterial whether such periods are weekly, monthly or yearly, and upon the further fact that a servant rarely leaves the service of an employer, and remains away for months or years, without a settlement of some sort with his or her employer, or at least a demand for payment. The same facts exist in this country, and there is, therefore, the same presumption. In either case it is a presumption which the law raises from a known state of facts, and a known course of dealing. It is, however, a presumption of fact merely, and liable to be rebutted."

In *Mack's Estate*, 278 Pa. 426, 1924, Sadler, J. points out the application of this presumption to the line of cases now under consideration. Said the learned Justice:

"One other objection is made to the award in the present case. Where labor of a domestic character or nursing has been rendered, there is a presumption that payment for it was given at stated periods (*Gilbraith's Est.*, 270 Pa. 288; *Cummiskey's Est.*, 224 Pa. 509; *Flaccus v. Wood*, 260 Pa. 161) a rule not applying to services of a different kind; *Gibb's Est.*, 266 Pa. 485. Here the claimant came within the class to which the presumption is applicable, and the burden was upon her to overcome the legal conclusion which follows. It was for the court to say, under the circumstances, whether this had been done: *Richards v. Walp*, 221 Pa. 412. Sarah Hicks, a daughter, residing in the same house, testified positively that no payment on behalf of the services was ever made by the decedent, and, though appellant reserved the right to cross-examine, counsel failed to
take advantage of the opportunity to do so. Further questioning might have weakened the strength of this statement, as was true of the testimony of Frank Mack, but no effort was made to show that compensation could have been given without the knowledge of the witness. It is also to be noticed that in the evidence of all who repeated declarations of the decedent, the time of payment is indicated as in the future and not the present.”

In the case just referred to the claim was by a daughter against her deceased father's estate for services as nurse and housekeeper.

In Gilbraith’s Estate, 270 Pa. 288, 1921, the claim was for boarding and nursing decedent. One of the questions was as to the application of the presumption of periodical payments. Said Simpson, J.:

“Moreover, in Cummiskey's Est., 224 Pa. 509, this exact question was in issue, was argued at length and we there said, ‘It is the habit and usage of people to pay their board bills as well as for services for nursing, at stated periods. This is so well understood in this country that, as in the case of servants’ wages, a presumption arises that they are periodically paid’; and this conclusion is not overruled by Gibb's Est., 266 Pa. 485, but, on the contrary, is expressly recognized, for there the rule was held not to apply solely because ‘the relations between aunt and nephew were of such peculiar and exceptional character (he being treated as a member of the family) that the presumption of payment arising in the ordinary case of services rendered is not applicable.’ In the present instance, however, there was no relationship, and hence the usual rule obtains. Moreover, the applicability of the custom is expressly recognized here, for appellant claims to be paid at such much a week; and the witnesses, as to the value of her services, testified they are usually recompensed at a given rate each week.”
In *Collins' Estate*, 83 Pa. Super. Ct. 31, 1924, the claimant was the wife of a nephew of decedent and the claim was for services rendered decedent as housekeeper and nurse during the last seventeen and one-half months of the life of decedent. In reversing the decree of the lower Court allowing the claim, Porter J. reasoned that if a family relationship was maintained between claimant and decedent then it was incumbent upon claimant to establish an express contract to pay for the services and there was no evidence adduced warranting a finding that there was such a contract. Said the learned Judge:

"If, on the other hand, the family relation did not exist, a presumption arose that the compensation, even if any was contemplated, had been turned over at stated periods, and this presumption cannot be overcome by vague and uncertain testimony, concerning loose declarations of a decedent of an intention to generously reward those about him: *Brown v. McCurdy*, *supra*; *Gilbraith's Estate*, 270 Pa. 288; *Flaccus v. Wood*, 260 Pa. 161; *Cummiskey's Est.*, 224 Pa. 509; *Wise v. Martin*, 232 Pa. 159. This presumption is in the present case strengthened by the fact that the decedent was a woman who had cash available for her needs."

In *Gibb's Estate*, 266 Pa. 485, 1920, a claim for board, lodging and washing was allowed an aunt against the estate of her deceased nephew. A family relationship was shown, the nephew making his home with his aunt for eight or nine years prior to his death and was treated as a member of the family. However, evidence was submitted from which a recognition of obligation by the decedent might be inferred and there was also proof of a credit on account. Said Frazer, J.:

"While the testimony is meager, it is not denied that the services were rendered, and we cannot say that the court below erred in concluding the proof offered on the part of the estate was insufficient to rebut the presumption of intention to pay for such services."
“Appellant further contended that if a contract to pay board existed, the law presumes payment at regular intervals and claimant failed to produce sufficient proof to overcome this presumption of periodical payments as in cases of claims for domestic services. The claimant did not occupy the position of a servant; on the contrary, the relations between aunt and nephew were of such peculiar and exceptional character that the presumption of payment arising in the ordinary case of services rendered is not applicable: Ranninger's App., supra; Lewis's Est., 156 Pa. 337. There is evidence that deceased, during the last year of his life, admitted he had not paid board and we fail to find any evidence on the part of the estate to prove a payment of any portion of the claim, with the exception of the small sum admitted by claimant.”

In Kerr v. Wilson, 284 Pa. 541, 1925, an action in assumpsit for services against the estate of a decedent was brought by plaintiffs who were husband and wife against the estate of a deceased uncle of the husband. The facts were that eleven years before the decedent's death at a time when he was past 75 years of age he went to reside with his nephew and continued to make his home there until his death. Eight years before his death he suffered a stroke which resulted in partial paralysis and from which he never fully recovered, his physical condition thereafter making it necessary for him to receive constant attention. His condition grew gradually worse and three months before his death he became entirely helpless requiring attention both day and night. These services were performed entirely by the plaintiffs. The claim was for board and nursing during the period of 6 years immediately preceding decedent's death. In affirming the judgment for the plaintiff by the lower Court, Frazer, J. pointed out that the decedent sought a home and someone to take care of him in his old age and was the sole beneficiary under the mutual arrangements between him and his nephew and further that there was evidence from which the jury could
properly find an express promise to pay for the services. Consequently, the presumption of periodical payments would not apply to such facts and the case was similar to that of Gibb's Estate, supra.

It will be observed that both the Gibb's case and that of Kerr v. Wilson are clearly distinguishable from others discussed by the fact that the presumptions of gratuity and periodical payment were rebutted by satisfactory evidence of the express recognition by decedent of the obligation to pay thus justifying the expectation of payment upon the part of claimants.

See also Schleich's Estate, 286 Pa. 578, 1926, per Frazer, J.

In Witten v. Stout, 284 Pa. 410, 1925, the widow of a nephew of decedent brought assumpsit against the estate for services rendered. There was a non-suit and an appeal from the refusal by the lower court to take off the non-suit. Relative to periodical payments Moschzisker, C. J. said:

"Plaintiff also failed to surmount another obstacle to recovery; services of the character performed by her, domestic labor and nursing, are customarily compensated for at stated periods, as rendered, and, when a claim of the nature of the one before us is presented, there is a strong presumption that the services were so paid for. Taylor v. Beatty, 202 Pa. 120; Cummiskey's Est., 224 Pa. 509; Winfield v. Beaver Trust Co., 229 Pa. 530, 532; Peiffer's Estate, 261 Pa. 209; Gilbraith's Est., 270 Pa. 288. The burden is on the claimant to overcome the presumption of payment; Winfield v. Beaver Trust Co., supra; Cummiskey's Est., supra. Here, no direct proof was offered to rebut the presumption of payment; the loose declarations of decedent, depended on by plaintiff for that purpose, were insufficient,—affirmative proof was necessary; Winfield v. Beaver Trust Co., supra; Gilbraith's Est., supra. Whether the proofs measure up to the required standard is primarily a question for the Court; Richards v. Walp, 221 Pa. 412;
in the present instance, the evidence relied on by plain-
tiff was inadequate from every point of view."

In *Cummiskey's Est.*, 224 Pa. 509, 1909, Mestrezat, J. observed:

“It is the habit and usage of people to pay their board bills as well as for services for nursing at stated periods. This is so well understood in this country, that, as in the case of servants' wages, a presumption arises that they are periodically paid. Especially does this rule obtain when a claim for boarding and nursing for years is presented against the estate of a decedent. The protection of the estates of the dead requires its rigid enforcement.”

In *Lewis's Estate*, 156 Pa. 337, 1893, in order to avoid the presumption as to periodic payments a distinction is drawn between services rendered by a married woman to a boarder in cleaning his room and administering medicine to him when sick from that of the services of an ordinary house servant. In *Gibb's Estate*, supra, there is a similar attempted distinction and it is likewise adverted to in *Mack's Estate*, 278 Pa. 426, 1924. However, the general trend of the decisions appears to be on this point in accord with the quotation just made from *Cummiskey's Estate*, and the distinction as made in the other cases was a minor one and not essential to the determination of the issue.

However, in *Beaver's Estate*, 76 Pa. Super. Ct. 354, 1926 it is held that services performed by one who had attended the decedent during his last illness were not those of an ordinary house servant and, therefore, did not come within the rule that such services are presumed to be paid for within fixed periods. This simply means, apparently, that the periodic payment rule obviously could not apply to services performed to a decedent in the last illness and it is submitted that the reason should not be any distinction between ordinary house servants and others who render the same service.
FORM OF ACTION

Under our procedure one who holds a claim against a decedent may elect either to bring assumpsit in Common Pleas against the executors or administrators of the decedent or the claim may be presented in the Orphans' Court and acted upon by an auditing Judge or an Auditor specially appointed by the Orphans' Court to adjudicate claims against the estate of the decedent. Many illustrations of actions in assumpsit are found in the reports, i.e., Harrington v. Hickman, 148 Pa. 401, 1892 and Conkel v. Byers' Exr., 282 Pa. 375, 1925.

On the other hand illustrations of procedure in the Orphans' Courts are found in Gibb's Estate, 266 Pa. 485, 1920; Gilbraith's Estate, 270 Pa. 288, 1921 and Mack's Estate, 279 Pa. 426, 1924.

If a claimant files an action in the Common Pleas and thereafter, without bringing the case to trial, presents his claim to an Auditor appointed by the Orphans' Court, he cannot, after the Auditor has disallowed his claim, ask to have an issue framed so that his case may be tried before a jury.

In Schwoyer's Estate, 288 Pa. 541, 1927, Walling, J. opined:

"After the auditor had filed his report, claimant asked to have an issue framed so his case might be tried before a jury. This was properly denied; having had his day in court before the auditor he was not entitled to another before a jury. The application came too late. A creditor whose claim has been passed upon, is concluded: Sergeant's Executors v. Ewing, 30 Pa. 75; Reading Tr. Co. v. Penna. Tr. Co., 26 Pa. Superior Ct. 599."

If a claimant declares in assumpsit against the estate of a decedent upon an express contract for compensation for services rendered he cannot, without amending the statement, recover on a quantum meruit basis. Said Moschzisker, C. J. in Witten v. Stout, 284 Pa. 410, 1925:
“Unless by amendment or otherwise, there is a clear averment in the statement of claim showing a plain intention to plant plaintiff’s case on a pure quantum meruit basis, the rule (correctly set forth by Judge Landis in *Wolf v. Yeager’s Exrs.*, 20 Lancaster L. Rev. 67) controls, that, where one claims on an express contract to pay a fixed compensation, he cannot on failure to prove the contract, entitle himself to recover by proving simply the value of services rendered, without showing an actual promise to pay.”

**EVIDENCE ACT OF 1887, P. L. 158**


“The Evidence Act of May 23, P. L. 158, section 5, clause (e), provides ‘Nor where any party to a thing or contract in action is dead * * * * and his right thereto or therein has passed either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract * * * * be a competent witness to any matters occurring before the death of said party’. This section of the act applies not only to transactions with a deceased party to the thing or contract in action, but to testimony as to any fact occurring before his death: *Sutherland v. Ross*, 140 Pa. 379. That an interested party is generally incompetent for all purposes is accepted without discussion in *Crothers v. Crothers*, 149 Pa. 201; *Baldwin v. Stier*, 191 Pa. 432; *Reap v. Dougher*, 261 Pa. 23; *Sheaffer v. Brown*, 281 Pa. 114. Notwithstanding this provision of the statute, plaintiff was permitted to testify over appellant’s objection as to the servants her uncle employed during the time she worked for him, and what they did and did not do, to the lack of servants, to services she rendered to the children, to services performed for her uncle in connection with his medical practice, to the purchases she made
for the household and for the children, to the money she received from the decedent to pay for them, to account books she kept and that she showed to her uncle, that she gave the account books to him, to the cooking she did, the laundry work, sewing and scrubbing, to her care of the children and of her uncle when sick, to her management of some of his business, the length of her hours of employment and the expenditures she made from the moneys he gave her, the latter to negative the idea that she received any of it for herself. All of these things were 'matters occurring before the death' of her uncle. About them she was forbidden to testify by the express terms of the act; to permit her to so testify was manifest error: Phillips' Est., 271 Pa. 129; Campbell's Est., 274 Pa. 546, 551, and cases cited. Plaintiff was not only a surviving and remaining party to the contract in action, but she had an interest adverse to the right of the decedent: Edmundson's Est., 259 Pa. 429, 436.”

If, however, the witness has a pecuniary interest in the estate he is not thereby rendered incompetent to testify against a claim presented. His interest is not adverse but is in favor of the estate. Gura v. Weber, 151 Pa. 396, 1892.

Further cases in support of the latter proposition are: Brose's Estate, 155 Pa. 619, 1893; Taylor's Estate, 12 Phila. 137, 1878; Crosetti's Estate, 211 Pa. 490, 1905. See generally Title 28, Purdon's Pennsylvania Statutes Annotated.

In Munson v. Crookston, 219 Pa. 419, 1908, there was an ejectment suit wherein the plaintiffs claimed under the will of a decedent whereas the defendant, the husband of the deceased, claimed possession as tenant by curtesy, having elected to take against his wife's will, it was said:

“The husband here claimed by devolution of law, that is, as tenant by the curtesy, an estate by descent, Cooke v. Doron, 215 Pa. 393, while the plaintiff claimed under the wife's will, that is, by purchase. He therefore stood in her place, and the husband's claim was adverse to her title which the plaintiff represented. Had
the plaintiff claimed as heir or next of kin he would have been a competent witness under the exception quoted. But as the case stands, their claims are of different classes, and they are not within the exception of the statute: *Rine v. Hall*, 187 Pa. 264, 276; *King v. Humphreys*, 138 Pa. 310; *Crothers v. Crothers*, 149 Pa. 201; *Baldwin v. Stier*, 191 Pa. 432; *Myers v. Little*, 195 Pa. 595; *Shroyer v. Smith*, 204 Pa. 310."

In reference to the incompetency of witnesses whose interest is adverse to that of a decedent, Trickett on Pennsylvania Law of Witnesses at page 173 says:

"The persons mentioned as incompetent, by clause (e) of the 5th section of the act of 1887 are described as 'any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party.' There are then, two classes of incompetents: (a) surviving or remaining parties to the thing or contract, whose interest shall be adverse to the deceased or lunatic party; (b) any other person whose interest shall be thus adverse. Better, there is only one class of persons who are incompetent, those whose interest is adverse to the right of the deceased or lunatic party, and this class may be composed either of the surviving or remaining party to the thing or contract, or of persons not party thereto."

In *Roach's Estate*, 30 D. R. 57, 1921, Gest, J. of the Orphans' Court of Philadelphia County, referring to the incompetency of a claimant to testify against the estate of the decedent said:

"It was conceded that the claimant could not testify as to her transactions with the decedent, but she was virtually offered as an expert to testify to the value of services performed. The Evidence Act of May 23, 1887, Sec. 5, P. L. 158, Purd. 1497-98, however rendered the claimant incompetent to testify as to 'any matter occurring before the death' of the deceased party, not merely as to transactions with her. The
question is ruled by the plain language of the act of assembly and does not merit discussion.”

As has been noted, the Act in addition to specifying a surviving party “to such thing or contract” also follows with this description:

“Or any other person whose interest shall be adverse to the said right of such deceased or lunatic party.”

Suppose A dies and B and C present claims for services alleged to have been rendered A at about the same time and under similar circumstances and conditions. Will B be competent to testify as to the facts and circumstances concerning C’s claim and on the other hand will C be competent to testify to the facts and circumstances concerning B’s claim?

No case as reported has been found or called to the writer’s attention covering this precise question but in the Estate of Annie E. Doyle in Volume T, Auditors Reports, page 50 of the Orphans’ Court Records of Franklin County, and under date of July 3, 1929, Judge Davidson ruled that the two witnesses would be competent, not to testify in respect to his own claim but in support of the claims of each other, it being the duty of the Auditor hearing the testimony to eliminate from such testimony all facts which would support the particular witness's claim when that matter was being considered but admitting the testimony, as has been stated, in support of the claimant for whom the witness was testifying.

BURDEN OF PROOF

Burden of proof is a phrase used by the Courts in a dual sense and frequently without explanation. The primary meaning of this expression is the burden of establishing the issue. This burden is always upon a plaintiff or claimant and never shifts. A secondary meaning, however, is the burden of coming forward with evidence. In the latter sense the burden of proof frequently shifts. At the outstart of a case both burdens are upon the plaintiff or
claimant but upon the establishment of a *prima facie* case by evidence and the aid of certain presumptions, the burden of dislodging the *prima facie* case will shift from a plaintiff or claimant to the defendant or those defending the estate in an Orphans' Court proceeding.

On the contrary we have seen that a claimant may fail because of his inability to dislodge by proper evidence the presumptions arising from family relationship and the rule of periodical payments.

Furthermore, there runs through all these cases quite a marked trend indicating upon the part of our courts an unsympathetic attitude toward the class of claims now under consideration. In the citations and quotations already made it is said that the Courts scrutinize the testimony in support of claims against estates with great care, especially in view of the fact that the one most interested is no longer in being to defend his rights. If there is no relationship by affinity or consanguinity between the claimant and the decedent the ban of suspicion on the part of the Courts is not so pronounced but with relationship the suspicion is intensified and increases in the degree of intensity with the nearness of relationship, until we come to the point of parent and child when the Courts insist upon evidence of an express contract.

As already indicated every claimant must show three facts. (1) a request for the services, (2) a rendition of beneficial services, and (3) acceptance of the services. In cases of strangers as claimants, slight actual evidence of the first and third requirements will suffice provided there is reasonably strong evidence of the second requirement. In the case of parent and child the three requirements may sufficiently appear by evidence and yet the claimant will fail because he has not shown an express contract. Between these two extreme cases the decisions vary according to the particular circumstances, no express contract being required but the facts of request and acceptance established by evidence sufficiently clear to lift the ban of suspicion as maintained by the Courts.

Chambersburg, Pa. 

A. J. WHITE HUTTON