provision (Ohio Gen. Code Sec. 11247), which is common in most states, providing that the action of an insane person must be brought by his guardian. That this section is mandatory has been expressly held in *Reno* v. *Love*, 25 Ohio C.C. (N.S.) 129, 26 Ohio C.D. 296, 60 Bull. 497, affirmed without opinion in 88 Ohio St. 623 (1916). The provision is only applicable, however, where the party has been adjudged insane by proceedings instituted for that purpose, and where there has been a guardian appointed at the time the suit is brought. 22 Ohio Jur., "Insane Persons," sec. 40. By section 11249 of the General Code, it is provided that, where the plaintiff becomes insane or his insanity is discovered after the action is brought, it shall be prosecuted by his guardian or trustee appointed by the court. Section 11251 provides that where the insanity is not manifest to the court, the question may be tried by the court or a jury impaneled for that purpose.

As a result of the foregoing statutory provisions, the fact that the accused is the party plaintiff, and the fact that the action is a civil proceeding, would not appear to be sufficient reasons for saying that the insanity of the accused in an extradition proceeding is immaterial. If these provisions are to be construed liberally, it would seem that, upon the suggestion of insanity, it would be incumbent upon the court to investigate the charge, and, if found to be true, appoint a trustee whose duty it would be to aid the accused in the preparation and conduct of his case.

CHARLES A. REYNARD

DOMESTIC RELATIONS

CONTRACTS AND QUASI-CONTRACTS OF PARENT AND CHILD

The plaintiff filed an action against the defendant, executor of his mother's will, to recover for personal services rendered by him during the six years immediately preceding her death. The decedent had lived at the Hotel Alms and the plaintiff lived with his family about one mile therefrom. The services consisted in personal attention to the mother and in assisting her in the management of her property consisting of about eighty thousand dollars worth of securities. The court of appeals held (1) that the plaintiff could not recover on a quasi-contractual theory for work and labor performed because of the close family relationship of the parties; (2) that the evidence was not of a sufficiently high degree to warrant recovery on a contractual basis. *Woods* v. *Fifth-Third Union Trust Co.*, 54 Ohio App. 303, 6 N.E. (2d) 987 (1936).

Ordinarily, evidence that the defendant has acquiesced in the plaintiff's conferring a substantial benefit upon him will lead to the inference that the plaintiff expected payment and thought the defendant knew that he expected it, thus giving rise to a contract implied in law. Such inference or presumption, as some courts call it) disappears, however, when the recipient of the services is a member of the server's family. Woodward, *Quasi-Contracts*, secs. 50, 51 (1913); *Lovet* v. *Price*, Wright (Ohio) 89 (1832); *Willis* v. *Dun, Admr.*, Wright (Ohio) 133 (1832). It would seem that with this broad principle in mind, the courts should have little difficulty in cases involving a parent and child where the family relationship is seen at its strongest. Even in this situation, however, although all recognize the general rule, there are certain classes of cases which have bothered the courts.

In the simplest situation, that of the minor child living at home, there seems to be complete unanimity in refusing to recognize the possibility of a contract implied in law under any circumstances. *Farley* v. *Stacy*, 177 Ky. 109, 197 S.W. 636, 1 A.L.R. 1181 (1917). Again in the case of the adult child living at home, the courts, as a whole, seem to have no trouble in ruling out any presumption of expectation of payment for services rendered. *Lovet* v. *Price, supra; Willis* v. *Dun, supra; Ambler* v. *Chapman*, 22 Ohio C.C. (N.S.) 458, 33 Ohio C.D. 664 (1915); *Wainwright Trust Co.* v. *Kinder*, 69 Ind. App. 88, 120 N.E. 419 (1918); *Parmenter* v. *Parmenter*, 157 Iowa 195, 138 N.W. 438 (1912). However, if there has been a severance of the household relationship and then a return at the request of the defendant, some courts are inclined to view this situation as an ordinary person to person relationship despite the fact that the parties are parent and child. *In re Chafee's Est.*, 204 N.Y. Supp. 765, 122 Misc. 768 (1924); *Carrell* v. *McDonnell*, 139 Mo. App. 450, 122 S.W. 1129 (1909); *Contra, Butler* v. *Kent*, 152 Ala. 594, 44 So. 863 (1907). Ohio, however, refuses to recognize this distinction and still maintains that the blood tie of the parties raises at least an inference of gratuity even though there has been a parting from the family and then a return. *Schaible, Admx.* v. *Schoot*, 3 Ohio L. Abs. 750 (1925).

The most difficult problem arises, however, in the situation where there has been an actual physical severance of the household relationship. The majority view would seem to be that the inference of gratuity which arises when services are rendered a parent by the child, or *vice versa*, is based upon the fact that the parties are living together under one roof rather than upon the consanguinity of the parent and child, and thus the inference disappears with the severance of the household relationship.

Woodward, *Quasi-Contracts*, sec. 51; Keener, *Quasi-Contracts*, p. 317 (1923); *Page* v. *Page*, 73 N.H. 305, 61 Atl. 356 (1905); *Disbrow* v. *Durand*, 54 N.J.L. 343, 24 Atl. 545 (1892); *Parker's Heirs* v. *Parker's Admr.*, 33 Ala. 459 (1859).

Ohio, however, has never drawn the above distinction, and in this state the conclusion of non-liability is based on the ground of the moral obligation which a parent and child owe to each other rather than on any theory of the cooperation engendered by parties living together in the same household. For similar language, see *Bolsinger* v. *Halliday*, 22 Ohio C.C. (N.S.) 289 (1915); *Woods* v. *Fifth-Third Union Trust Co.*, *supra*.

Viewing it in this light the court sees no reason to feel that there is any lessening of this moral obligation merely because the parent and child no longer live together in the same house. Most Ohio cases, therefore, settle the matter as did the principal case simply by ignoring the majority view and are seemingly unaware that they are in the minority by holding this way. The court itself summarizes this philosophy in the principal case when it says: "The common experience of mankind is that a son in rendering such service does it because of the moral duty which he owes to his mother." *Woods* v. *Fifth-Third Union Trust Co.*, *supra*, at p. 988.

It is submitted, that if one finds the basis for this presumption of gratuity in the moral obligations which are mutually owed by the parent and child, then the Ohio court is probably correct in refusing to recognize that there is any lessening of these bonds by the mere fact that the parties no longer reside under the same roof.

Since a quasi-contractual theory is usually unavailable in a parent-child situation, what are the possibilities for recovery in contract? The answer to this question would seem largely to depend on the force which the various courts give to the inference of gratuity arising from the family relationship. To some courts it is merely strong enough to put the burden of proof on the defendant to show by a preponderance of the evidence circumstances which will at least give rise to a contract implied in fact. *Hartley* v. *Bohrer*, 52 Idaho 72, 11 Pac. (2d) 616 (1932); *Butler* v. *Kent*, 152 Ala. 594, 44 So. 863 (1907). In other jurisdictions a contract implied in fact will be sufficient to overcome the force of the inference of gratuity. But such an implied contract must be established by more than a mere preponderance of the evidence; it must be established by the highest degree of civil proof, whether that be called "clear and convincing," or "clear and indubitable," or "direct, positive and unequivocal." *Baugh* v. *Baugh's Admr.*, 33 Ky. 148, 109 S.W.

345 (1908); *Gardner* v. *Gardner*, 112 W.Va. 583, 166 S.E. 112 (1932). Finally, there are some states which say that this presumption of gratuity may only be overcome by proof of an express contract. *Ellis* v. *Cox*, 176 N.C. 616, 97 S.E. 468 (1918); *Hialey* v. *Hialey's Est.*, 157 Mich. 45, 121 N.W. 465 (1902); *McNemar* v. *McNemar*, 137 Ill. App. 504 (1907).

To which of these views does Ohio subscribe? To answer such a question is no easy problem. The language in the Ohio cases makes it difficult to tell exactly whether a contract implied in fact is possible in such a situation, or whether an express contract is required. Since the cases of *Hinkle* v. *Sage*, 67 Ohio St. 256, 65 N.E. 999 (1903) and *Merrick* v. *Ditzler*, 91 Ohio St. 256, 110 N.E. 493 (1915), there is no doubt that whatever kind of contract is required, whether it be implied in fact or express, it must be established by "clear and unequivocal" or "clear and convincing" proof. But is it possible by such evidence to establish circumstances and facts from which a contract will be implied, or is it necessary to have an express contract upon which to predicate recovery? There is language in many cases which would seem to indicate that the former is the Ohio law. *In re Skelton*, 20 Ohio C.C. 704, 11 Ohio C.D. 372 (1900); *In re Ward*, 21 Ohio C.C. 753, 12 Ohio C.D. 44 (1901); *Hawthorne* v. *McClure*, 4 Ohio C.C. 11, 2 Ohio C.D. 390 (1889). Other cases, however, including the leading case on the point, lay down as the requirement an express contract established by clear and unequivocal language. *Hinkle* v. *Sage*, *supra*; *Merrick* v. *Ditzler*, *supra*; *Schaible, Admx.* v. *Schoot*, *supra*. Perhaps the explanation, if explanation there is, of this seemingly irreconcilable difference is contained in a quotation from the leading Ohio case of *Hinkle* v. *Sage*, *supra*, at page 263 where the court says: "Although an actual contract, one capable of enforcement as such, must be clearly and unequivocably proved, it may be proved by either direct or indirect evidence. Express contracts which are proved by the declarations and conduct of the parties and other circumstances, all of which are explainable only upon the theory of a mutual agreement, are often called, although not with entire accuracy, implied contracts, and this distinction will explain the ambiguity of some authorities and the apparent contrariety of others." In view of this statement, a possible explanation of the conflict in the Ohio decisions is that what some courts would regard as a contract implied in fact, proved by "clear and convincing" evidence, the Ohio court would regard as an express contract.

In conclusion then, the Ohio law as to the possibilities for recovery for services rendered between parent and child may be summarized as:

(1) No possibility for recovery on a quasi-contractual theory. (2) If the circumstances show by clear and convincing evidence that the parties intended compensation for the services, then possibly there may be a recovery on a contract implied in fact. (3) But according to the language in some cases (unless it can be explained on the basis of a misunderstanding of the true meaning of "express contract") recovery is only possible upon proof of an express contract between the parties.

JAMES A. GORRELL

EQUITY

EXCUSE FOR NON-PERFORMANCE OF CONDITIONS IN SPECIFIC PERFORMANCE

Plaintiff owned land on which the defendant held a first mortgage of $10,348.00 and on which there was a second mortgage of $27752.00. At the suggestion of the defendant, the plaintiff arranged to get a loan of $9500.00 from the Federal Land Bank. The defendant and the other creditors were to accept a scale down so that this could be used to completely liquidate all indebtedness. On December 4th, 1934, the defendant's authorized agent signed an agreement whereby the defendant was to accept $8100.00 in full satisfaction, "if payment was made within 90 days after the date of this commitment." On January 1st, 1935, the defendant notified the land bank that it would not abide by the agreement, and the evidence clearly showed that, because of this, the plaintiff was delayed in securing the loan and did not tender the amount due the defendant until April 25th, 1935, or 52 days after the date set. The defendant then refused to carry out the contract, and the plaintiff asks specific performance. The court held that time had been made of the essence of the contract because it was specifically carried into the proposal and circumstances of the agreement; but that the delay of the plaintiff in making tender was caused by the conduct of the defendant, and that this amounted to an excuse for the delay of the plaintiff in tendering the amount due. Specific performance was granted. *Bretz* v. *Union Central Life Insurance Co.*, 25 Ohio L. Abs. 333 (1937).

Judge Barnes dissented from the decision of the court on the ground that this was really a case of an option so the condition precedent should be strictly enforced.

The holding of both the majority and dissent that time was of the essence of the contract seems to be well justified. Ohio cases have held