

735.00 ACTION FOR SERVICES RENDERED A DECEDENT - ISSUE OF  
EXISTENCE OF CONTRACT.<sup>1</sup>

This issue reads:

"Did the plaintiff (*name plaintiff*) render services to (*name decedent*) pursuant to an agreement that *he* was to be compensated therefore?"

The burden of proof on this issue is on (*name plaintiff*) to satisfy you, by the greater weight of the evidence, that *he* rendered valuable services to (*name decedent*), and that at the time of rendering such services there was an agreement, express or implied, that the services were to be paid for.

A contract is express when its terms are stated by the parties, either orally or in writing. A contract is implied when the acts and conduct of the parties indicate a mutual assent to the same thing. There is not a contract unless the parties assent to the same thing in the same sense.

The plaintiff must show, by the greater weight of the evidence, that both *he* and (*name decedent*) at the time the services were rendered contemplated and intended that compensation was to be made for the services. It must be shown that at the time the services were rendered payment was intended<sup>2</sup> by the deceased and expected by the plaintiff.

Where a party has voluntarily done an act or rendered a service, and there was no intention at the time on *his* part that *he* should charge therefore, or there was no understanding on the part of the deceased that *he* should pay therefore, such person may not recover for that voluntary service. The law will not imply an agreement contrary to the

intent of the parties.<sup>3</sup>

*(At this point there may be inserted any of the following instructions justified by evidence:*

*Presumption that compensation is intended. . . N.C.P.I.-Civil 735.10;*

*Presumption of gratuity. . . N.C.P.I.-Civil 735.15;*

*Evidence of promise to compensate by will. . . N.C.P.I.-Civil 735.05.*

So I instruct you that if the plaintiff has satisfied you by the greater weight of the evidence that there was an [express] [implied] agreement between *him* and (*name decedent*) that plaintiff was to be compensated for services rendered to (*name decedent*), and that plaintiff performed services of value in reliance on such agreement, then it would be your duty to answer this issue "Yes." If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. This instruction is to be used, with the appropriate subsidiary instructions, where there is evidence of an oral agreement or an agreement implied by the conduct of the parties to compensate for services, or where there is evidence of an agreement to compensate for services by will, which agreement would be unenforceable by reason of the Statute of Frauds. It should not be used where the only claim is for pure *quantum meruit* on the theory of unjust enrichment or benefit to the deceased where there is no evidence of an express or implied agreement.

2. For an instruction on intent, see N.C.P.I.-Civil 101.46.

3. *Brown v. Hatcher*, 268 N.C. 57 (1966); *Twiford v. Waterfield*, 240 N.C. 582 (1954).