Moral Obligation as Consideration for a Promise in Washington

Robert L. Palmer

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Law and Philosophy Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol10/iss4/2

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
MORAL OBLIGATION AS CONSIDERATION FOR A PROMISE IN WASHINGTON

ROBERT L. PALMER*

Moral obligation has been defined as a duty which one owes and which he ought to perform, but which he is not legally bound to fulfill. In order better to understand this doctrine as applied specifically to the Washington cases and law, let us consider the history and a brief statement of the principle.

HISTORY AND STATEMENT OF THE DOCTRINE

The doctrine that a moral obligation may be a sufficient consideration for a promise seems to have been first enunciated in early English cases by Lord Mansfield. In the case of Atkins v. Hill where it was held that assumpsit would lie against an executor personally upon his promise to pay a legacy in consideration of there being sufficient assets, he remarked "It is the case of a promise made upon a good and valuable consideration which in all cases is a sufficient ground to support an action. It is so in cases of obligations, which would otherwise only bind a man's conscience, and which without such a promise he could not be compelled to pay." In the similar case of Hawkes v. Saunders Lord Mansfield again said, "Where a man is under a legal or equitable obligation to pay, the law implies a promise though none was actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promises to pay a just debt, the recovery of which is barred by the statute of limitations, or if a man after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessaries, or if a bankrupt, in affluent circumstances, after his certificate, promises to pay the whole of his debts, or if a man promise to perform a secret trust, or a trust void for want of writing, by the statute of frauds—in such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or

*Of the Seattle Bar.

1 Bouvier, Law Dictionary.
2 1 Comp. 284 (1775).
3 1 Comp. 290 (1782).
equity, yet, as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind is a sufficient consideration."

As thus used the term "moral obligation" seems to have originally been understood as being synonymous with ethical obligation, being broad enough to cover even those promises unconnected with any antecedent obligation whatsoever. But it is interesting to notice that although the language is that way, the actual cases decided by Lord Mansfield are those in which there was some kind of a former legal obligation, and, query, therefore, whether they are authority for the broad proposition that moral obligation is sufficient regardless of a previous legal consideration.

For almost fifty years the sufficiency of a moral obligation to support a promise was recognized in England. The rule was applied in early cases to a promise by the overseers of the poor to pay for expenses incurred in administering to a pauper, a promise by an executor to pay a pecuniary legacy out of assets sufficient for the purpose, and a promise by a widow to reimburse one who had paid money to a third person at her request during her coverture. However, the doctrine as such proved too broad and elusive to endure for any length of time and was challenged and practically overthrown by a note to the case of Wennall v. Adney, where the writer points out that in the instances adduced by Lord Mansfield as illustrative of the rule of law announced by him the party bound by the promise had received a benefit previous to the promise, and, after discussing some of the other cases, lays down the doctrine or rule, which has been very generally approved and adopted by the courts as follows. "An express promise, therefore, as it should seem, can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

This early restriction upon Lord Mansfield's broad view has likewise been approved in the majority of American jurisdictions, and at the present day there can be no doubt that the doctrine of moral consideration in the broad form originally announced is wholly discredited in England and most of the United States. In Leake on Contracts the author says "A doctrine formerly pre-

---

4 Watson v. Turner Bell N. P 129 (1767).
5 Atkins v. Hul, 1 Comp. 234 (1775).
6 Lee v. Muggeridge, 5 Taunt. 36 (1813).
7 3 Bos. & P. 249 (1802).
8 6th Ed., p. 443.
vailed that an express promise moved by a previously existing moral obligation furnished sufficient consideration to create a valid contract. But it is obvious that a promise moved by a sense of moral obligation only is simply voluntary, and it is now settled, in accordance with the general rule, that no valid contract arises from it."

These courts recognize, it is true, the validity of various promises that are based on obligations which are merely moral in the sense that at the time of the promise there is no enforceable liability. But such moral obligations are distinguishable from purely ethical obligations since there exists an antecedent barred or unenforceable obligation. Hence it would seem that moral obligation has no place in the doctrine of consideration, for if morality was to be the guide, every promise would be enforced, because there is a moral obligation to perform every promise, and if the existence of a past moral obligation is to be the test, every promise which merely repeats a prior gratuitous promise would be enforceable.

Nevertheless the doctrine still survives in a few states today. In Georgia the Code provides that either a "natural duty and affection" or a "strong moral obligation" is a good consideration, but the courts tend to construe the statute rather strictly, and to restrict its application to cases in which there is an antecedent obligation. A Louisiana statute provides that a "natural obligation" shall be sufficient to support a promise, and, although it prescribes that such "natural obligations" are of four kinds, a recent federal decision has construed this statute to be merely illustrative and not conclusive. And this decision would appear to be in accord with the tendency in Louisiana to enlarge the field of moral obligations rather than to restrict the application of the doctrine to the generally established exceptions. In Illinois, Maryland, Michigan, and especially in Pennsylvania the doctrine still persists to a limited extent.

---

7. Lawrence v. Oglesby, 178 Ill. 122, 52 N. E. 945 (1899).
8. Pool v. Horner, 64 Md. 131, 20 Atl. 1036 (1885). An original contract void because of the statute of frauds is sufficient consideration when performed to uphold a subsequent valid promise made by the defendant.
10. Anderson v. Best, 176 Pa. 498, 35 Atl. 194 (1896). A subsequent written promise by defendant to perform an originally unenforceable promise is supported by sufficient moral consideration and is enforceable.
11. 1 Williston, Contracts, § 149, p. 331, 1 Elliott, Contracts, § 211, p. 346.
The cases presenting the problem of whether a moral obligation will sustain an express promise may best be divided into four classes. (1) Cases in which the moral obligation arose wholly from ethical considerations, unconnected with any legal obligation, and without the receipt of actual pecuniary or material benefit by the promisor, though there may have been actual pecuniary detriment to the promisee, (2) cases in which the moral obligation arose out of or was connected with a previous request or promise creating originally an enforceable legal liability, which, however, at the time of the subsequent express promise, had become discharged or barred by operation of a positive rule of law, so that at that time there was no enforceable legal liability, (3) cases in which the moral obligation arose from or was connected with a previous request or promise, but which never created any legal liability, because of a rule of law which rendered the original contract void or unenforceable, (4) cases in which the moral obligation arose out of or was connected with the receipt of actual material or pecuniary benefit by the promisor, without, however, any previous request or promise on his part, express or implied, and, therefore, of course, without any original legal liability.

I. MORAL OBLIGATION UNCONNECTED WITH ANY MATERIAL OR PECUNIARY BENEFIT TO THE PROMISOR

Moral obligations of this class, which can be referred to as pure moral obligations, represent the doctrine in its broadest sense, and it is settled under the authorities that such obligations create no consideration for a subsequent promise. A particularly good illustration of this point is furnished by the early Massachusetts case of Mills v. Wyman wherein it was held that a promise by a father to pay the expense previously incurred by a stranger in caring for his son who was of majority and had ceased to be a member of his father's family, he having suddenly been taken sick and being poor, was unenforceable for want of consideration. In the course of the opinion the court said "The general position that moral obligation is a sufficient consideration for an express promise is to be limited in its application to cases where at some time or other a good or valuable consideration has existed." The

---

20 This classification is taken from a note in 26 L. R. A. (N. S.) 520.
21 1 Williston, Contracts, § 148, p. 329; 1 Elliott, Contracts, § 211, p. 346.
22 3 Pick. (Mass.) 207 (1825).
23 In Freeman v. Dodge, 98 Me. 536, 57 Atl. 834, 66 L. R. A. 395 (1904) the court in holding that the moral obligation resting upon a son to reimburse a town for past expenses incurred for the relief of his pauperized mother is not a sufficient consideration for his promise to pay the same said: "A mere moral obligation, or, as it is sometimes rather loosely stated, a moral obligation not founded upon an antecedent legal liability, is not sufficient consideration for a promise."
MORAL CONSIDERATION

reason for the rule announced by the Massachusetts court seems to be sound, for, since the test of such obligations would vary with the morals of every individual, the uncertainties to which such a doctrine might lead necessarily preclude its application.

No cases have been discovered in this jurisdiction falling within this class, and although the Washington court gives to the doctrine a wider application than some jurisdictions, as will subsequently appear, it is the writer's opinion that the court would not extend the doctrine so as to include cases within this classification.

There is, however, at least one jurisdiction recognizing that ethical motives, unconnected with a legal liability, or the receipt of actual pecuniary or material benefit are valid consideration, for the Pennsylvania court in the case of Hemphill v. McClimons in support of the doctrine used these emphatic words: "There is no authority anywhere which requires us to mar the simplicity of the plain rule which says that a moral obligation is a sufficient consideration for a direct promise, and we affirm this to be a moral obligation, because the common sense of all mankind affirms that it cannot be violated without moral guilt." And in the later case of Bentley v. Lamb the court reached the extreme conclusion that when a promisor makes one promise, and has thus created the duty to do the act promised, while this promise may be unenforceable as without consideration, yet if in pursuance of this now existing moral duty, he makes a second promise to do the act formerly promised, an action may be brought on this second promise, and the moral obligation will serve as a sufficient consideration.

II. MORAL OBLIGATION ARISING FROM A FORMER LEGAL LIABILITY NO LONGER ENFORCEABLE

Some of the cases hold that it is only where there was at one time a legal liability which, by operation of law, has become unenforceable, that a moral obligation is sufficient to sustain a subsequent express promise. However that may be, it is now well settled that a promise to pay a debt barred by the statute of limitations or one discharged in bankruptcy is binding, without additional consideration on the side of the promisee being necessary.

A few of the courts reach this result by saying that the moral obligation to pay the indebtedness after the bar of the statute, or after the discharge in bankruptcy, is sufficient to support the express promise to do so. Thus, in the case of Brown v. Akenson the
moral obligation of a debtor to pay a judgment which had become
dormant was held to be a valid consideration to support a new
promise, it being a moral duty based upon an antecedent legal
obligation which had been extinguished, but never performed. The
New Jersey court in the case of Stewart v. Reckless29 followed this
theory and in explanation thereof said "A discharge in bank-
ruptcy extinguishes a debt, and nothing remains of legal liability,
but as the debt has been discharged, not by payment or act of the
creditor, but by the operation of law, there remains a moral obliga-
tion sufficient to support a new promise to pay, but the new con-
tact is the foundation of the act, and not the former indebted-
ness."

Other courts take the view that the validity of the new promise
is not based upon the ground of moral obligation, but upon the
right of a party to waive the protection of a statute relieving him
from indebtedness, in other words, that the discharge merely barred
the remedy and did not extinguish the debt. But under either
theory the obligation is a moral one in the broad sense in which
that phrase is here used, and this type of case, therefore, falls
within the proper scope of this article.

In Washington, when there has been a new promise by the
debtor to pay after a discharge in bankruptcy, the cases consistently
hold that the new promise merely revives the old obligation, since
the discharge in bankruptcy did not destroy the debt but only
deprived the creditor of his legal remedy. In the early case of Coe
v. Rosene30 the bankrupt wrote a letter to the creditor, after the
petition had been filed, in which he stated that he had paid some
and expected to pay more of his discharged debts, and specified the
obligation that he intended to next take up. In a second letter to
the creditor he indicated that he would hold the promise good, but
was uncertain when he could make the payments. The creditor
subsequently brought suit alleging that such letters contained a
sufficient promise to revive the debt. The court in holding that
the new promise was not sufficiently clear, distinct and unequivocal
to revive the debt said "The authorities all agree upon two propo-
sitions (1) In order to revive a debt31 discharged in bankruptcy
proceedings, the new promise must be clear, distinct and unequivocal
as well as certain and unambiguous. Our own cases, in discus-
sing the nature of the promise necessary to defeat the bar of the
statute of limitations, establish this rule." The court again incidentally touched upon this point in the latter case of Vashon v.

29 24 N.J.L. 427 (1854).
30 66 Wash. 73, 118 Pac. 881 (1911).
31 Author's italics.
MORAL CONSIDERATION

and reaffirmed the rule of the Coe case that the new promise merely revives the old debt. Finally in the case of Parker v. Smith the court was forced to pass squarely upon this question as to the effect of the new promise after the discharge in bankruptcy and again the result reached was that the new promise revived the old debt. Judge Fullerton speaking for the court said "The question whether the court erred in its allowance of an attorney's fee depends upon the legal effect that is to be given to a promise to pay a debt discharged in bankruptcy. The courts are not in accord on the question. Some maintain that the promise creates a new obligation, which finds its consideration in the old debt, and that the cause of action rests upon the new promise and not on the old debt, while others maintain that the new promise but revives the old obligation, and that the action rests upon the old obligation. Insofar as we have spoken on the question, we have adopted the latter view, and we are content to accept the conclusion as final. Since, therefore, the new promise revived the old obligation, it revived it as a whole." And this question similarly came before the upper court in the case of Brennen v. Bolen with approval.

But the theory upon which the Washington court bases its decision in those cases where the debtor promises to pay after the statute of limitations has barred the claim is not so clear, and an examination of the cases shows a conflict in the reasoning employed. Quaker City National Bank of Philadelphia v. The City of Tacoma was one of the earliest cases raising the question in this jurisdiction. The plaintiff was the holder of a warrant issued by the City of Tacoma and payable only out of a special improvement fund. He sought a writ of mandate against the city and its treasurer to enforce the payment of the warrant, and the defense alleged, among others, was that the claim was barred by the statute of limitations. The court readily reached the sound conclusion that a subsequent promise to pay removes the bar of the statute of limitations, but gave no definite theory upon which this result was based. How-

114 Wash. 11, 194 Pac. 545 (1921).
144 Wash. 24, 255 Pac. 1026 (1927).
148 Wash. 263, 268 Pac. 418 (1923).
27 Wash. 253, 67 Pac. 719 (1902).
31 Id. at 264, 67 Pac. at 711. Judge Fullerton said: "While it is true there was no legal obligation to pay the warrant on the part of the city
ever, several months later in the same year the court in "Liberman v. Guernsky" definitely held that the acknowledgment or promise made after the bar of the statute created a new contract, the creditor suing thereon having the burden of establishing the particular debt to which the acknowledgment or promise referred to. In adopting this theory the court quoted from the earlier case of "Stubblefield v. McAuliff" in which the court had said that part payment was equivalent to the making of a new contract based upon an old consideration. And the "Stubblefield" case has subsequently been cited by the Washington court with approval in the cases of "Bassett v. Thrall," "Farmers and Mechanics Bank v. San Poil Consolidated Company," "Catlin v. Mils," and "Hoddard v. Chapin."

In the case of "Arthur and Company v. Burke" this question was thoroughly considered by the court and the conclusion there reached was that the subsequent acknowledgment of the debt raised a new implied promise to pay, supported by the original consideration. In "Eureka Cedar Lumber & Shingle Company v. Knock" the court used the following language in its discussion of the common law rules of part payment as codified in this jurisdiction: "It is elementary that the statute does not affect the legal existence of the contract but only the remedy, hence it is plain that a payment upon such contract is a payment upon a legally existing contract, and, therefore, extends the running, or removes the bar, of the statute, regardless of the time of payment." In "Belcher v. Tacoma"

which the law would enforce at the time the subsequent promise was made, yet it cannot be said there was no consideration for the subsequent promise, or that it was a mere gratuity. It is a general principle that whoever is capable of entering into a contract to compensate another for a service performed or an advancement made may, by a promise made subsequent to the performance of the service, or the making of the advancement, bind himself to make such compensation. The power to make the contract is at the basis of the liability, and the performance of the act furnishes the consideration."

"27 Wash. 410, 67 Pac. 998 (1902).
"20 Wash. 442, 55 Pac. 637 (1898).
"21 Wash. 231, 57 Pac. 806 (1899). (Action against a surety upon a promissory note).
126 Wash. 137, 217 Pac. 707 (1923). (Payment made by one of two joint makers on a promissory note).
140 Wash. 1, 247 Pac. 1013 (1926) (Payment of interest by the husband upon a community note after the statute of limitations has run).
153 Wash. 163, 579 Pac. 583 (1929) (Payment on a joint debt by one of two joint debtors).
83 Wash. 690, 145 Pac. 974 (1915).
Id. at 694, 145 Pac. at 976. "The payment must be made under such circumstances as to show an intentional acknowledgement by the debtor of his liability for the whole debt as of the date of the payment, from which arises a new implied promise, supported by the original consideration, to pay the residue."
95 Wash. 339, 163 Pac. 753 (1917).
Author's italics.
MORAL CONSIDERATION

Eastern Railroad Co. the defendant railroad received the aid of the public service commission to cancel switching charges which were admitted to be unjust and discriminatory. The railroad thereafter sought to invoke the statute of limitations requiring all claims for overcharges to be filed with the commission within two years from the time the cause of action accrued. Judge Webster in reading the opinion of the court made this pertinent statement: "The petition therefore amounted to a new promise supported by the moral obligation to pay, and revived the claims." To the writer's knowledge this is the first direct reference made to moral consideration in the bankruptcy or statute of limitation cases, and in so doing the court cited the famous case of Muir v. Kane.

But in a little over a year the court had reverted to its former position originally set out in the Stubblefield case, and reached the conclusion in the case of Zuhn v. Horst that the subsequent promise created a new contract upon which the debtor would be bound. In the concluding part of the opinion this expressive language appears: "When the new promise was made, it created a new contract upon which, and upon which only the action can be maintained." That new contract, like every other contract, must have the essential elements of a contract before it can be enforced.

The essential element of such a contract, under our statute, is that the promise must be in writing. Respondent seeks to avoid the rule by contending that, notwithstanding the bar of the statute upon the first promise, the original claim and cause of action furnished a sufficient consideration for the new promise. The trouble with this contention is that it is not lack of consideration but lack of contract, that bars the respondent's right of recovery. So with respondent's contention that the case falls within the rule of Muir v. Kane that a moral obligation is sufficient to support a new promise. When correctly applied the rule announced in Muir v. Kane is admitted, but it has no application here for reasons given.

In the more recent decisions the court seems to have adopted the theory set out in the above quotation of the Zuhn case, for in Griffin v. Lear it was held that the acknowledgment made after the statute of limitations had run gave rise to a new cause of action, for which the old debt was the consideration. And the latest ex-

---

99 Wash. 34, 168 Pac. 782 (1917).
6b 100 Wash. 359, 170 Pac. 1033 (1918).
56 Author's italics.
6c 123 Wash. 191, 212 Pac. 271 (1923).
pression of the court on this question is found in the case of *Tucker v. Guerrier*\(^5\) in which the court quoted the following passage from the *Griffin* case with approval. "But where the acknowledgement is made after the statute has already run, the action must be upon the new agreement, consequently it is in the nature of an original obligation and should be strictly construed."

The Washington court, as previously pointed out, has used conflicting reasoning in sustaining and enforcing the subsequent promise to pay after the debt has been barred by the statute of limitations. Numerically speaking, however, the theory that the subsequent promise or acknowledgment gives rise to a new cause of action (contract) prevails, and seems to have more often met with the court's approval, especially in the later decisions.

### III. Moral Obligation Arising From Receipt of Material or Financial Benefit, Without Any Original Legal Liability

As will appear the authorities are not in harmony upon the question whether the moral obligation arising from or connected with, a contract void *ab initio*, will constitute a consideration for an executory promise. A distinction is to be observed between a contract originally void, and one not originally void, though voidable or unenforceable. The cases are agreed, in the absence of a statute to the contrary, that an infant's contract, being voidable only, may be effectively ratified after majority without a new consideration.\(^5\) And since it is entirely within one's power upon attaining majority to avoid contracts made during minority, the new promise or other act upon which a ratification is predicted does in a sense rest upon a moral obligation, and the rule exemplifies the principle which admits the sufficiency of some kinds of moral obligation to support a contract. Although the courts have occasionally used that element in its support the rule is generally declared and applied without explicit reference to moral obligation. On the other hand there is a conflict of authority as regards a new promise after the removal of disqualification of coverture, based upon a void contract during coverture.\(^5\) So also is there a conflict as regards the sufficiency of the moral obligation arising from or connected with, an original promise within the statute of frauds, to support a new promise.\(^5\)

The view that the moral obligation resting upon one who has

---

\(^5\) 170 Wash. 165, 15 Pac. (2d) 936 (1932).
\(^6\) 1 WILLISTON, CONTRACTS, § 151, p. 335, RESTATEMENT, CONTRACTS, § 89, p. 110.
\(^7\) 1 WILLISTON, CONTRACTS, § 156, cases collected in 17 A. L. R. 1341.
\(^8\) 1 ELLIOTT, CONTRACTS, § 212.
made a void contract, because not in writing as required by the statute of frauds, would not furnish consideration for a new promise in writing was adopted in the often cited and leading New Jersey case of Stout v. Humphrey, wherein it was held that a subsequent promise to pay for services of a broker in procuring a sale was without consideration, when the original contract was not in writing, as required by the statute. It is interesting to notice that this court made a distinction between contracts formerly good, but on which the right of recovery has been barred by the statute, and those contracts that are barred in the first instance because of some legal defect in their execution, holding that the former will furnish a consideration for a subsequent promise to perform, while the latter will not. Other jurisdictions clearly following the rule of the New Jersey Court are the federal courts, Alabama, Connecticut, Illinois, Maine, Michigan, New York, and Wisconsin.

Six years after the Stout case the Washington court was called upon to decide a case, the pertinent facts of which were identical

---

67 69 N. J. L. 436, 55 Atl. 281 (1903).
68 Ibid. In the course of its opinion the court said: “It is clear that if a contract between two parties be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract. Yet, according to the commonly conceived notion respecting moral obligations, and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.”
69 Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363 (1876).
70 Agee v. Steele, 8 Ala. 948 (1846).
71 North v. Forest, 15 Conn. 400 (1843). The court remarked: “But, it is said, the defendant was under a moral obligation to fulfill the contract, and that a discharge from such obligation is a sufficient consideration. It is true there are certain cases where a moral obligation has been held a sufficient consideration to support an express promise; as, where there has been an antecedent liability which has been removed by some subsequent events or proceedings, such as a debt barred by the statute of limitations, or discharged by a certificate of bankruptcy a subsequent promise by the debtor may be enforced. Now, in the case under consideration, there never was any legal liability resting upon the defendant to fulfill his contract for the purchase of the stock. Nor has he ever received any of the property of the plaintiff. The case, therefore, does not fall within principles recognized in the cases cited, where the moral obligation has been held sufficient.”
73 Farnham v. O'Brien, 22 Me. 475 (1843).
75 Allen v. Searff, 1 Hint. 209 (1856).
76 Nichols v. Mitchell, 39 Wis. 329 (1872).
The action in *Muir v. Kane* was likewise brought by a broker to recover his commission. He had originally entered into an oral agreement to sell property for the defendant, but after completing the sale, a written contract was executed whereby the defendant agreed to pay two hundred dollars as compensation for the complete services. The defendant contended that because the statute declares such an agreement void unless in writing, the subsequent services furnished no consideration for the written promise, relying strongly upon the Stout case. Judge Fullerton in delivering the forceful opinion of the court conclusively placed Washington in that class of jurisdictions recognizing moral consideration. He said, referring to the case of *Stout v. Humphrey*

"That court makes a distinction between contracts formerly good but on which the right of recovery has been barred by the statute, and those contracts which are barred in the first instance because of some legal defect in their execution, holding that the former will furnish a consideration for a subsequent promise to perform, while the latter will not. It has seemed to us that this distinction is not sound. The moral obligation to pay for services rendered as a broker in selling real estate, under an oral contract where the statute requires such contracts to be in writing, is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations, and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing; not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries, and to accomplish that purpose, it is required that the evidence of the contract be in writing, but it is not conducive to either fraud or perjury to say that the services rendered under the void contract, or voluntarily, will support a subsequent written promise to pay for such service. Nor is it a valid objection to say there was no antecedent legal consideration. The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obli-

---

*55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180 (1909).*

*Rem. Rev. Stat. § 5825. "In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: * * * (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."*
MORAL CONSIDERATION

There is no legal obligation to pay such a debt, if there were there would be no need for the new promise. The obligation is moral solely, and since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not."

It is interesting to note that the Washington statute of frauds declares such promises absolutely void (and not merely voidable) unless they are in writing. Yet Judge Fullerton in the course of his opinion overcomes the express effect of the statute and nevertheless allows a recovery, basing his decision chiefly upon the existence of a moral obligation to pay. However, this case settled once and for all the law in Washington as to this particular problem, but a search through the reports reveals that the court, with few exceptions, confines itself in its discussion of moral obligation and consideration to this one factual set-up. In the case of Henneberg v. Cook, the court reasserted the doctrine of the Muir case where the identical facts were involved, and when the later case of Grant v. Ten Hope arose presenting a similar problem the court recognized as undisputed law in this state the rule of the Muir case. The latest expression of the court on this question is found in the case of Realty Mart Corp. v. Standing, in which Judge Beals dismissed the problem with this curt language "Recovery upon such a contract was first upheld by this court in the case of Muir v. Kane, in which case the court held that an oral contract to pay a commission, void under the statute of frauds, amounted to a moral obligation and was a sufficient consideration, the services having been rendered to support a subsequent written agreement to pay therefor. In the recent case of Sams v. Olympia Holding Co., 153 Wash. 254, 279 Pac. 575, the cases cited and other decisions of this court were referred to and the rule reaffirmed, although a recovery was not allowed in that instance."

Other jurisdictions which have definitely held that a consideration which will support a subsequent executory promise may arise from an agreement that, prior to that promise, was unenforceable because of the statute of frauds, or from the antecedent receipt of

---

2 103 Wash. 685, 175 Pac. 313 (1918).
3 217 Wash. 531, 201 Pac. 750 (1921).
4 165 Wash. 21, 4 Pac. (2d) 1101 (1931).
material benefit by the promisor thereunder are California, Indiana, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Pennsylvania, and South Dakota.

IV Where the Promisor Received Material or Pecuniary Benefit Without Any Antecedent Promise

It is clear, if, as held in the Stout case, moral obligations of the third class are not sufficient to sustain the subsequent express promise to pay, that moral obligations of the fourth class are likewise insufficient for that purpose. The statement often made as to the insufficiency of a past consideration to support a present executory promise is probably true in many cases such as where, though there was a benefit to the promisor, it was conferred under such circumstances as to show that it was to be rendered gratuitously. There is a conflict as to whether the voluntary payment of another's debt without his request is sufficient to uphold a subsequent express promise to reimburse the person making the payment. Such a promise has been enforced in some cases where the payment, when made, was not intended to be gratuitous. It is well settled that money paid by one person for the use of another does not necessarily impose a liability upon the latter. Where, however, the consideration is beneficial to the party sought to be held, and is accepted by him, that person can be said to become the promisor's agent by the adoption of his act by the latter, and this fact of ratification warrants the implication of a previous request.

Although many cases hold that past services are insufficient to support a subsequent executory promise, some being authority against the rule that the moral obligation arising from the benefit

---

74 Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279 (1881).
77 Poole v. Horner 64 Md. 131, 20 Atl. 1036 (1885).
78 Rogers v. Stevenson, 16 Minn. 68 (1870).
82 Rankin v. Mathieson, 10 S. D. 628, 75 N. W. 196 (1898).
83 See note and cases in 17 A. L. R. 1359.
84 See Price v. Towsey, 3 Litt. (Ky.) 423, 14 Am. Dec. 81 (1823), where it was held that the voluntary payment of another's debt does not of itself give the person paying the same a right of action against a debtor, but constitutes a sufficient consideration to uphold a subsequent agreement by the latter to repay the former, the subsequent promise being equivalent to a previous request.
85 1 Elliott, Contracts, §§ 213, 214 and cases collected therein.
86 1 Elliott, Contracts, §§ 213, 214.
87 17 A. L. R. 1386 and cases cited, 1 Elliott, Contracts, § 213, p. 359. 1 Williston, Contracts, § 144, p. 323.
MORAL CONSIDERATION

conferred upon the promisor by the past services, will furnish consideration for a later executory promise, other cases take the contrary view that a moral obligation arises on the promisor to pay therefor, which will support a subsequent executory promise to do so, although there was no legal liability previous to such promise. But the effect of many of these cases given to illustrate the view that past services will not support an executory promise is often nullified by the circumstances, especially by the fact that the services were intended to be gratuitous.

In the case of Olsen v. Hagan the Washington Supreme Court held that a promise by a wife to her dying husband to pay a certain sum to a third person who had lived in their household and rendered services to them, even though one incapable of being enforced, created a moral obligation which sustained a subsequent promise by her to such third person, thereby flatly recognizing the sufficiency of moral consideration in this type of case. Judge Fuller-ton again wrote the opinion for the court and by the language used left no doubt as to the conclusion reached or the reasoning used. He said, "There is no proof of an express contract by Mrs. Wharton to pay Hooker for his services, other than her statement to him, at the time of delivering the notes for $10,000, that it was in accordance with a promise to her husband to compensate him for his past services, nor is there anything in the evidence showing an implied contract by Mrs. Wharton to remunerate Hooker upon which an action of quantum meruit could be based. Her promise to her dying husband in 1908 to pay the sum named to Hooker, even if one incapable of enforcement by Hooker, was a moral obligation on her part to carry out. Such obligation constituted a consideration for her promise to Hooker to give him that sum. We think this promise of Mrs. Wharton to pay Hooker $10,000 unquestionably, under the circumstances, constituted a debt for which she was liable." Six months later the case came up for a rehearing and was at that time reaffirmed. Since then (as near as the writer can determine) no analagous case has been passed upon by our court. Whether the court, if called upon to decide a case involving similar facts, would reach the same result is a matter of conjecture.

However, a very recent case in this jurisdiction indicates the present attitude of the court concerning the question of moral obligation. In that case the plaintiff, as agent of the defendant, effected

---

the sub-leasing of a piece of property and in consideration of said services the defendant signed an instrument in which he recognized as due and owing the plaintiff the sum of $1500.00, payable upon the happening of a further contingency. Thereafter the plaintiff demanded payment of the sum and the demand was refused. It is important to notice that the services rendered by plaintiff were performed prior to the execution of this written instrument, and prior to the time that plaintiff's license to act as a real estate broker was obtained.

The plaintiff, in order to recover, had to explain his non-compliance with the real estate brokers' act, and hence argued that the services were performed without any promise of compensation, but simply as a gratuitous favor. The court, in discussing the case, adopted the plaintiff's contention, but allowed no recovery, since there was no consideration for the subsequent promise. The court said: "We have, then a subsequent written agreement to pay for services rendered gratuitously. But there was no consideration for such agreement. It could not be contended that there was any legal obligation resting on respondent to pay for the services, in the absence of any promise, express or implied, to pay for them. Nor, under the circumstances, was there any moral obligation to pay therefor. A past consideration, even though of benefit to the promisor, is insufficient when the services rendered are intended and expected to be gratuitous. * * * To say that there is a moral obligation to pay for services intended as a gratuity, is in itself inconsistent and contradictory.

"It is true that this court has adopted the rule that, under certain circumstances, a moral obligation will support a subsequent promise to perform. Quaker City National Bank v. Tacoma, 27 Wash. 259, 67 Pac. 710, Mur v. Kane, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, Olsen v. Hagan, 102 Wash. 321, 172 Pac. 1173, affirmed on rehearing in 105 Wash. 698, 178 Pac. 451, Henneberg v. Cook, 103 Wash. 685, 175 Pac. 313, White v. Panama Lbr & Shingle Co., 129 Wash. 189, 224 Pac. 563, Sams v. Olympia Holding Co., 153 Wash. 254, 279 Pac. 575, Palmer v. Stanwood Land Co., 158 Wash. 487, 291 Pac. 342. But in each of those cases it was established that there was indeed an antecedent moral obligation on the part of the promisor to do the thing that he subsequently agreed in writing to do."

The language used in this case seems to indicate that the court has now adopted the view that before a moral obligation will be sufficient consideration to support a subsequent promise to perform, it is necessary that there be an antecedent moral obligation on the part of the promisor to do the act that he subsequently
agrees to perform. Therefore, if the services originally rendered were intended as a gratuity, a subsequent promise to pay therefor will not in itself be enforceable, and in such cases the mere moral obligation to perform will not be sufficient consideration.

CONCLUSION

While it is impossible to reconcile all of the cases decided in this field, the general tendency is to deny the validity of a promise, the only consideration for which is the moral obligation to perform, and, therefore, the courts in most of the United States, as in England, have rejected the principle of moral consideration. However, this doctrine is still employed by some courts in upholding and explaining certain rules of law, and, as we have seen, the Washington court is one of those which refuses entirely to discard Lord Mansfield's theory, for when the proper factual situation arises our court does not hesitate to rest its disposition of the case upon that doctrine.