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CONTRACTS — CONSIDERATION — MORAL OBLIGATION TO PAY FOR SERVICES RENDERED IN PAST — After decedent's wife died, claimants, her mother and sister, at the request of the decedent, broke up their home and came to live with him, to keep house for him and to care for his children. These services continued for ten years, at which time the decedent gave claimants his promissory notes aggregating $2,000. They entered these notes as claims against his estate. *Held*, the claimants' services, even if rendered gratuitously, were performed at the decedent's request and raised a moral obligation which was sufficient consideration for the notes. *In re Schoenkerman's Estate*, (Wis. 1940) 294 N. W. 810.

Wisconsin is one of the states following the "more liberal view" of the

doctrine of moral consideration.[1] Under this view, a promise to pay for past services rendered by the promisee to the promisor at the latter's request is enforceable even though there was never a pre-existing legal obligation to pay for the services.[2] The merits of the view have been debated,[3] but there appears to be a tendency toward its wider acceptance.[4] The court in the principal case, however, holds that the promise is enforceable even though the services were presumably performed by the promisees without any intention of receiving compensation therefor.[5] In so holding it goes a step beyond the usual rule,[6] as well as beyond the implications of its own earlier decisions.[7] The court cites no authority for abandoning the proposition that the promisee's expectation of payment is essential to a finding of good consideration, and the great weight of authority is contrary to this holding.[8] But the Supreme Court of Pennsylvania [9]

[1] Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N. W. 516 (1932); Estate of Smith, 226 Wis. 556, 277 N. W. 141 (1938). Annotations, 17 A. L. R. 1296 at 1299 (1922); 79 A. L. R. 1339 at 1346 (1932).

[2] Annotations, 17 A. L. R. 1296 at 1299 (1922); 79 A. L. R. 1339 at 1346 (1932).

[3] Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782 (1893); Muir v. Kane, 55 Wash. 131, 104 P. 153 (1909); 16 MINN. L. REV. 808 (1932); 36 MICH. L. REV. 1010 (1938).

[4] Annotation, 79 A. L. R. 1339 at 1346 (1932); 36 MICH. L. REV. 1010 (1938).

[5] "If it be true that under the circumstances of this case the presumption arises that the services were gratuitous, a fact we need not and therefore do not decide, it does not follow that there must have been a legal obligation to compensate in order to constitute a moral obligation a good consideration." Principal case, 294 N. W. at 811.

When services are rendered by a member of the family, a relative, or the like, they are usually presumed to be gratuitous. Cox v. Davis, 85 W. Va. 604, 102 S. E. 236 (1920); Shugart v. Shugart, 111 Tenn. 179, 76 S. W. 821 (1903). See annotation, Ann. Cas. 1913A 861 at 865 (1913); 16 MINN. L. REV. 808 at 815 (1932).

[6] Lanfier v. Lanfier, 227 Iowa 258, 288 N. W. 104 (1939); Irons Investment Co. v. Richardson, 184 Wash. 118, 50 P. (2d) 42 (1935); annotations cited in note 2, supra; 5 CORN. L. Q. 450 (1920); 31 ILL. L. REV. 390 (1936); 36 MICH. L. REV. 1010 (1938); 1 WILLISTON, CONTRACTS, rev. ed., § 146 (1936) (but see cases cited by Williston in note 4).

[7] "We believe that in none of the cases stating the rule so narrowly [requiring a prior legal obligation] did the promisor originally receive from the promisee a thing of value for which the promisee expected payment and was given to understand he would be paid. . . ." Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N. W. 516 (1932).

[8] Annotations cited in note 2, supra; 29 YALE L. J. 800 (1920); ANSON, CONTRACTS, 5th Am. ed. (Corbin), §§ 146, 147 (1930); 1 WILLISTON, CONTRACTS, rev. ed., § 146 (1936).

[9] In re Sutch's Estate, 201 Pa. 305, 50 A. 943 (1902), in which the notes involved were accepted in lieu of inheritance which promisees expected to receive. The following cases also have been cited for the proposition, but do not appear to decide it squarely: Boothe v. Fitzpatrick, 36 Vt. 681 (1864); Brickell v. Hendricks, 121 Miss. 356, 83 So. 609 (1919); Olsen v. Hagan, 102 Wash. 321, 172 P. 1173 (1918). The last case is distinguished in Irons Investment Co. v. Richardson, 184 Wash. 118, 50 P. (2d) 42 (1935).

and a few intermediate courts [10] are in accord with the principal case. Granting the validity of the "liberal view," this extension of it is not without merit. It has been said that this interpretation would raise a moral obligation to pay for every gratuity,[11] but the requirement that the promisor must have requested the services [12] should be a safeguard against any such unfortunate result. The extent to which the courts will go in making exceptions to the doctrine of consideration should be determined by considerations of policy and convenience in administration. The element of expectation of payment often is difficult to determine and generally is controlled by presumptions and rules to fit specific types of fact situations,[13] in which the moral obligation often is peculiarly strong. The rule in the principal case, on the other hand, should be easy to administer. As a further element, the obligation may be said to be strengthened by the promisor's recognition of it in making the promise, especially if it is in the form of a promissory note.[14] Although this reasoning can be called circular, it appears to have influenced the court in the principal case to some degree.[15] Since moral obligations stem from what the court thinks the promisor's ethical sensibilities should be, they should not be controlled by the intention or understanding of the promisee. The principal case recognizes this principle and considers the situation from the viewpoint of the promisor. This approach enables the court to base its conclusion on an objective analysis and is therefore to be commended.

[10] Wood v. Flanery, 89 Mo. App. 632 (1901); and a line of New York cases, including Oatfield v. Waring, 14 Johns. (N. Y.) 188 (1817); Yarwood v. Trusts & Guarantee Co., 94 App. Div. 47, 87 N. Y. S. 947 (1904); Matter of Simmons' Estate, 48 Misc. 484, 96 N. Y. S. 1103 (1905). But see Strevell v. Jones' Estate, 106 App. Div. 334, 94 N. Y. S. 627 (1905); Matter of Van Vranken's Estate, 120 Misc. 280, 198 N. Y. S. 445 (1923).

[11] Irons Investment Co. v. Richardson, 184 Wash. 118, 50 P. (2d) 42 (1935); ANSON, CONTRACTS, 5th Am. ed. (Corbin), § 127 (1930).

[12] In Holland v. Martinson, 119 Kan. 43, 237 P. 902 (1925), the services were not requested but were certainly not gratuitous. In this unusual situation the court held that the services constituted a good consideration for a later promise to pay for them.

[13] See annotations cited in note 2, supra; also Ann. Cas. 1913A 861 at 865 (1913).

[14] Wood v. Flanery, 89 Mo. App. 632 (1901). Request inferred where services not gratuitous, Jilson v. Gilbert, 26 Wis. 637 (1870); Wilson v. Edmonds, 24 N. H. 517 (1852).

[15] "In the instant case the decedent was manifestly under a moral obligation to pay the claimants. . . . In executing and delivering the notes to them he plainly recognized that obligation and from any point of view it afforded more than ample consideration for the notes." Principal case, 294 N. W. at 811-812. However, the amount of the notes, $2,000, is so grossly inadequate as compensation for the services, ten years of household work, that the decedent's intention was probably more donative than compensatory. So the quoted argument seems to have little force.