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Wills—No Election Between Legacy and Quantum Meruit

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in order to allow a prosecutor who has been incompetent, or casual, or even ineffective to see if he cannot do better a second time." *Brock v. State of North Carolina*, *supra* at 351.

Irwin N. Davis.

WILLS—NO ELECTION BETWEEN LEGACY AND QUANTUM MERUIT

Decedent orally promised to leave his five hundred acre farm to the plaintiffs if they would stay with him until he died. Plaintiffs devoted thirty-six years to the development of decedent's property. Decedent failed to devise the property but left the plaintiffs a \$30,000 legacy, which they accepted. *Held*: Although recovery for the breach of an oral contract was barred by the Statute of Frauds, recovery was possible in quantum meruit for the value of plaintiffs' services. *Turner v. White*, — Mass. —, 109 N. E. 2d 155 (1952).

The enforceability of agreements to make wills is governed by the law of contracts. *Emery v. Darling*, 50 Ohio 160, 33 N. E. 715 (1893). Promises to devise realty are within the section of the Statute of Frauds relating to the transfer of interests in land. In re *Sheldon's Estate*, 120 Wis. 26, 97 N. W. 524 (1903). Ordinarily a contract to will property is breached by the failure of the promisor to execute any will, *Mills v. Smith*, 193 Mass. 11, 78 N. E. 765 (1906), or by leaving a will with terms contrary to the contract. *Phalen v. U. S. Trust Co.*, 186 N. Y. 178, 78 N. E. 943 (1906). The breach occurs upon the testator's death, *Warden v. Hinds*, 163 Fed. 201 (4th Cir. 1908), unless he repudiates the contract during his lifetime. *Carter v. Witherspoon*, 156 Miss. 597, 126 So. 388 (1930). Upon the breach of an enforceable contract to make a will, the promisee can recover damages measured by the value of the property. *Roy v. Pos*, 183 Cal. 359, 191 Pac. 542 (1920). Where the oral contract is unenforceable, barring recovery of damages on the contract, the promisee may still recover for the reasonable value of services rendered to the deceased. *Robinson v. Raynor*, 28 N. Y. 494 (1864); *Hensley v. Hilton*, 191 Ind. 309, 131 N. E. 38 (1921). In the instant case the Massachusetts court allowed a recovery in quantum meruit to prevent the Statute of Frauds from being used to allow a defendant to receive valuable services without paying compensation. *Downey v. Union Trust Co.*, 312 Mass. 405, 45 N. E. 2d 373 (1942).

Granting the right to recover in quantum meruit, defendant claimed that the acceptance of the legacy barred the action. The defense relied on the principle that a person cannot take a benefit

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under the will and at the same time undertake to defeat the will or prevent its full operation. Sometimes this principle is based on the doctrine of election, *Hyde v. Baldwin*, 17 Pick. 303 (Mass. 1818); *Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 75 N. E. 2d 3 (1947); *Burns v. First National Bank*, 304 Ill. 292, 136 N. E. 695 (1922), and sometimes on estoppel. *Keys v. Wright*, 156 Ind. 521, 60 N. E. 309 (1901); *Utermehle v. Norment*, 197 U. S. 40 (1905); *Hardeman v. Ellis*, 162 Ga. 664, 135 S. E. 195 (1926). If the legacy and the claim for service are not inconsistent there need be no election. *McNaughton v. McClure*, 169 Wis. 288, 171 N. W. 936 (1919). In the instant case the court found no inconsistency between acceptance of the legacy and the claim for services, relying on *Hollister v. Old Colony Trust Co.*, 328 Mass. 225, 102 N. E. 2d 770 (1952), where the court held that a will is not defeated by merely diminishing the amount received by the residuary legatees. A different result might be indicated if plaintiff desired specific performance, for then the testator's intention regarding the distribution of property would not be given full effect. *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. 44 (1887).

One who renders service to the deceased under a contract is treated as a creditor of the estate. *Collier v. Rutledge*, 136 N. Y. 621, 32 N. E. 626 (1892). In New York a legacy is not deemed to be in satisfaction of a debt unless the testator so intended. *In re Card's Estate*, 145 Misc. 686, 260 N. Y. Supp. 764 (Surr. Ct. 1932); *Sheldon v. Sheldon*, 133 N. Y. 1, 30 N. E. 730 (1892); *Reynolds v. Robinson*, 82 N. Y. 103 (1880). Where the testator agreed to compensate for plaintiff's services, the New York court, in absence of an indication that the testator meant the legacy as a gift, allowed the promisee a recovery in quantum meruit only for the difference between the legacy and the value of the services. *Reynolds v. Robinson*, 64 N. Y. 589 (1876); *In re Mason's Will*, 134 Misc. 902, 236 N. Y. Supp. 720 (Surr. Ct. 1929); *accord*, *Bumcrots v. Alberti*, 132 F. 2d 757 (10th Cir. 1943). The Massachusetts court, on the other hand, decided that the legacy which the plaintiff received was not even in partial satisfaction of the debt, because no such intention was expressed in the will. *Hollister v. Old Colony Trust Co.*, *supra*.

A Connecticut court distinguished between an oral contract to leave compensation in the form of money, for the breach of which damages can be recovered, and a devise of real property, for which no damages can be recovered. In the former the quantum meruit recovery will be reduced by the amount of the legacy, while in the latter the legacy will be considered a gift. *Appeal of Spurr*, 116 Conn. 108, 163 Atl. 608 (1933). In the instant case the court assumes the legacy to be a gift.

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The present decision reflects the modern trend requiring the testator to state explicitly any election he may intend in his will. However, it appears quite possible that a different decision might be reached in other jurisdictions by allowing recovery in quantum meruit only for the difference between the legacy and the value of plaintiff's services.

Frank J. Laski

CONFLICT OF LAWS—FOREIGN MARRIAGE INCESTUOUS BY LEX DOMICILII HELD VALID

An uncle and niece, at all times domiciled in New York, were married in Rhode Island, where such a marriage is valid. By New York Dom. Rel. Law § 5 (3) a marriage between uncle and niece is incestuous and void. The niece died, and her husband sought letters of administration. *Held*: Letters granted. In re *May's Estate*, — App. Div. —, 117 N. Y. S. 2d 345 (3d Dep't 1952).

The English courts hold that a marriage involving an English domiciliary, forbidden by English law, although valid where performed, is void and the children illegitimate. *Brook v. Brook*, 9 H. L. Cas. 193 (1861); In re *Paine* [1940] 1 Ch. 46. It is generally said by American courts that a marriage valid by the law of the place of celebration is valid everywhere. *Van Voorhis v. Brintnall*, 86 N. Y. 18 (1881); *Fensterwald v. Maryland*, 129 Md. 131, 93 Atl. 358, 3 A. L. R. 1562 (1916); GOODRICH, CONFLICT OF LAWS 116 (3d ed. 1949). The marital status is of primary concern to the domiciliary state. Accordingly, this general rule has been limited on grounds of policy, and marriages otherwise valid have not been respected where forbidden by the *lex domicilii* on grounds of polygamy, *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 317 (1st Dep't 1910); miscegenation, *Green v. State*, 58 Ala. 190 (1877); bigamy, *Bennett v. Smith*, 21 Barb. 439 (N. Y. 1856); nonage, *Ross v. Bryant*, 90 Okl. 300, 217 Pac. 364 (1923); incest, *United States v. Rodgers*, 109 Fed. 886 (E. D. Pa. 1901).

By the common consent of Christian nations, marriages between persons in the direct line of ascent and descent and between brother and sister are incestuous. *Wightman v. Wightman*, 4 Johns. Ch. 343 (N. Y. 1820); *Commonwealth v. Lane*, 113 Mass. 458 (1873); In re *Miller's Estate*, 239 Mich. 455, 214 N. W. 428 (1927). However, there is no general agreement as to the incestuous character of marriages between aunt and nephew, *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120 (1903); *Incuria v. Incuria*, 155 Misc. 755, 280 N. Y. Supp. 716 (Dom. Rel. Ct. 1935);