

Ex Parte Simons

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Court : US Supreme Court

Decided On : Dec-10-1917

Appeal No. : 247 U.S. 231

Appellant : Ex Parte Simons

Judgement :

Ex Parte Simons - 247 U.S. 231 (1918)

U.S. Supreme Court Ex Parte Simons, 247 U.S. 231 (1918)

Ex Parte Simons

No. 26, Original

Argued December 10, 1917

Rule absolute June 3, 1918

247 U.S. 231

PETITION FOR WRIT OF MANDAMUS

SYLLABUS

Plaintiff brought an action for damages in two counts against executors in the district court in New York, the first count alleging a promise of the testatrix to bequeath a certain sum in return for plaintiff's services and the second her promise to pay their reasonable value. On motion, the first count was ordered transferred to the equity docket upon the ground that, by the law of New York, it could not be entertained at law. *Held* that this was an error, depriving plaintiff of the right of trial by jury, and properly rectified by mandamus.

Rule absolute.

The case is stated in the opinion.

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MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for mandamus, or, if that is denied, for prohibition or certiorari, to the District court for the Southern District of New York upon the following facts: the petitioner brought an action in two counts against the executors of a widow named Frank Leslie. The first count alleged a promise by Mrs. Leslie that, if the plaintiff would perform certain personal services of attendance and care to her, she would bequeath to the plaintiff \$50,000. It set forth the performance of the services in great detail, alleged the death of Mrs. Leslie and probate of her will, the bequest to the plaintiff of not more than \$10,000, and claimed \$40,000 with interest from one year after the death of the testatrix, as damages. The second count repeats by reference the averments of the first count, but alleges a promise to pay the reasonable value of the plaintiff's services, set at \$50,000, of which \$10,000 have been satisfied by legacy, and claims damages as before. On motion of the defendants, the judge sitting to hear motions in the district court ordered the first cause of action to be transferred to the equity side of the court and docketed as an equity cause, and to be stricken out of the complaint in the action at law, but only for the purpose of transfer, allowing the plaintiff to amend, etc. The ground disclosed was that, by the law of New York, the

plaintiff could not sustain the first cause of action at law.

We do not find sufficient ground for the opinion of the judge in the New York decisions. No doubt alleged contracts to make a provision by will must be approached with great caution in the matter of proof, but there is no doubt that, if proved, they are valid so far as no statute intervenes. So much seems to be assumed by the order of the judge, and is the law, we believe, of New York as well as of other states and England. But, if valid, we see no reason why a contract to bequeath a certain sum should not give rise to an action for damages, if broken, as certainly as a contract to pay the same sum in the contractor's life, or at the moment of the contractor's death. *Parker v. Coburn*, 10 Allen 82. In cases of contracts to leave all the testator's property, including land, or a proportion of a residue requiring an account to ascertain it, equitable remedies have been thought proper, and in some such cases it has been assumed for the purposes of argument that an action would not lie at common law. See *Winne v. Winne*, 166 N.Y. 263; *Phalen v. United States Trust Co.*, 186 N.Y. 178. But we have seen nothing that suggests an arbitrary departure by the courts of New York from the common law in cases like the present. See *Farmers' Loan & Trust Co. v. Mortimer*, 219 N.Y. 290, 295; *De Cicco v. Schweizer*, 221 N.Y. 431; *Silvester's Case*, Popham 148, 2 Roll.R. 104; *Fenton v. Emblers*, 3 Burr. 1279; *Van Houten v. Van Houten*, 89 N.J.L. 301; *Krell v. Codman*, 154 Mass. 454.

If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not

matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first

count, mandamus may be adopted to require the district court to proceed and to give the plaintiff her right to a trial at common law. See *Brown v. Circuit Judge of Kalamazoo County*, 75 Mich. 274.

Rule absolute.

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