EDMONDSON *v.* BOURLAND.

Opinion delivered July 8, 1929.

1. MANDAMUS—ADEQUACY OF OTHER REMEDY.—While a writ of mandamus will not be allowed to control the judicial discretion of a trial court, or to require a judicial tribunal to act in a particular way, it may sometimes be employed to prevent irreparable injury, as where the remedy by appeal is inadequate.
2. MANDAMUS—RIGHT TO APPEAR BY COUNSEL.—Where a party to a suit to construe a will and to terminate a trust, who had been adjudged insane, and for whom a guardian *ad litem* was appointed, alleged that the order adjudging her to be insane was invalid, and that she was not insane, mandamus lies to compel the lower

court to permit her to appear and file an answer by attorneys of her own selection, since otherwise she would not be able to appeal from an adverse judgment.

3. INSANE PERSONS—RIGHT TO APPEAR BY COUNSEL.—Where a party to a suit to construe a will and terminate a trust, who had been adjudged insane, and for whom a guardian *ad litem* had been appointed, sought to appear by attorneys of her own selection, alleging that the order adjudging her to be insane was invalid, the court should allow her to appear by her counsel, since the court can still protect her rights if she is found to be insane.

Mandamus to Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; mandamus awarded.

Joseph R. Brown, James B. McDonough, and *Robert M. Zeppenfeld,* for petitioner.

PER CURIAM: This is an original petition for mandamus by Margaret Agnes Edmondson against Hon. J. V. Bourland, as judge of the Sebastian Chancery Court for the Fort Smith District, to compel him, as such chancellor, to allow her to file an answer and cross-complaint in an action pending in said court, and to file a motion to set aside an appointment of a guardian *ad litem* for her as an insane person.

The record shows that Francis A. Vaughan, as executrix and trustee of the will of Thomas W. Edmondson, deceased, brought suit in said chancery court to construe said will and to terminate the trust. It was ordered by the chancery court that Margaret Agnes Edmondson, widow of said decedent, be made a party to the suit, to the end that her interest, if any, in said estate be adjudicated. It was claimed that she had elected to take dower in said estate, and had filed her renunciation under the will when it was admitted to probate. She had been judicially declared insane, and a guardian had been appointed for her by the probate court of Sebastian County for the Fort Smith District. A guardian *ad litem* was appointed for her in the suit to construe the will. Margaret Agnes Edmondson, who is now a resident of St. Louis, Mo., through attorneys of her own selection, filed a motion in said chancery court to set aside the ap-

pointment of a guardian *ad litem* for her as an insane person. The court refused to let her attorneys file said motion, and also struck from the files of the court an answer and cross-complaint of said Margaret Agnes Edmondson, which had been filed a few days before by her said attorneys, on the ground that her defense to the action could only be made by the guardian *ad litem* appointed by the court. The court refused to let the attorneys selected by said petitioner file an answer or cross-complaint for her. Said petitioner alleges that the order adjudging her to be an insane person is not a valid order; that she is not now an insane person.

Under these circumstances mandamus is a proper remedy. While it is well settled that a writ of mandamus will not be allowed to control the judicial discretion of a trial court, or to require a judicial tribunal to act in a particular way, there are limitations to the rule, and it may sometimes be employed to prevent irreparable injury, as where the remedy by appeal is inadequate. 38 C. J., pp. 608-609.

It is plain that the propriety of the writ must be determined for each case upon its own peculiar merits. In the application of the principle in *Ex parte Watters,* 180 Ala. 523, 61 So. 904, the Supreme Court of Alabama held that the erroneous refusal of the trial court to allow an amendment to the complaint may be corrected by mandamus, but that the erroneous allowance of an amendment cannot be reviewed by such proceeding. The court said that the basis for the distinction must be found in the varying degrees of injury from the respective errors, each being equally redressible on appeal. See also *Ex parte Uppercu,* 239 U. S. 435, 36 S. Ct. 140.

In re Conoway, 178 U. S. 421, 20 S. Ct. 951, the court had under consideration a petition for a writ of mandamus to the judges of a circuit court of the United States. The petition for a writ of mandamus alleged that the circuit court had set aside the service of summons on a defendant because the action had abated by his

death before the service of process upon him, and because the circuit court acquire none over his executor. In the Supreme Court it was objected that mandamus was not the proper remedy, because it was not a case in which the court refused to entertain jurisdiction. It was claimed that the action was still pending in the circuit court, and would doubtless proceed to final judgment. The Supreme Court said that there could be no final judgment against the original defendant, for he was deceased, and none against the executor, as to the estate he represented, because he had not been made a party to the action. Consequently the Supreme Court said that, if the ruling of the circuit court was erroneous, its judgment could not be redressed by appeal, because there was no one to appeal.

So here the petitioner alleges that the order of the probate court adjudging her to be an insane person was not a valid order, and that she is not now insane. She is claiming an interest in the property embraced in the will, and would not be able to appeal from an adverse judgment if she is not allowed to appear by counsel of her own selection.

The court should allow her to appear by counsel of her own selection, and can still protect her interest by appropriate orders if it shall deem her to be insane. The proceeding is not to control the chancery court in its exercise of a judicial discretion, nor to compel it to rule in a particular way in the trial of the cause, but to prevent an abuse of the discretion of the court. Under the facts stated, the action of the court, so far as the rights of petitioner are concerned, amounted to a refusal to proceed with the case, through an erroneous determination of a preliminary question of practice or procedure. In other words, the action of the court amounted to such an abuse of discretion as that it may be said to have been arbitrary. *State* v. *District Court, etc.*, 38 Mont. 166, 99 Pac. 291, 35 L. R. A. (N. S.) 1098; and High on Extraordinary Legal Remedies, § 151.

We think mandamus was the proper remedy, and direct a writ to issue commanding said chancery court to proceed in accordance with the views herein stated. It is so ordered.