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Domestic Relations--Annulment of Marriage--Insanity--Who May Avoid (Hoadley v. Hoadley, 244 N.Y. 424 (1927))

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MANDAMUS—JUDICIAL OFFICERS—CONDEMNATION PROCEEDINGS.—The State of Oklahoma ex rel. Attorney General filed a petition in a district court praying for the appointment of commissioners to assess the damages which might result to owners of certain realty desired by the state highway commission for the construction of a county road. The district court dismissed the petition and denied the right of a state body to condemn lands for county highway purposes. An action was then brought in the Supreme Court for a peremptory writ of mandamus directing the district judge to reinstate the petition and to appoint commissioners. *Held,* that plaintiff was entitled to the writ (two judges dissenting). State ex rel. Dabney, Atty. Gen. *v.* Johnson, District Judge, 254 Pac. 61 (Sup. Ct. Okla., 1927).

Both opinions, prevailing and dissenting, quote excerpts from the statutes providing for the classification of highways and the division of regulatory powers between state and county highway commissions. Assuming that all the pertinent sections have been presented, the lack of authority in the state body to bring the proceeding is evident.

In issuing the writ, the majority of the court held that the act of a district judge in filing a petition and appointing commissioners was purely ministerial and the failure so to do would be a sufficient ground for the extraordinary remedy by mandamus. Though the statute, in terms, does not grant the district judge any discretionary power in such matters, it is difficult to believe that he would be bound to act where, apparently, conditions precedent to the acquiring of jurisdiction had not been met. It is generally accepted that a writ of mandamus will issue only when a clear legal right of the applicant will suffer through the inadequacy of other available remedies. The usual remedy for an erroneous decision is an appeal to a higher tribunal. Here the plaintiff has failed to show either the clear legal right or the inadequate remedy. Earlier Oklahoma decisions express the general rule, Determan *v.* State, 89 Okla. 242, 215 Pac. 423, (1923); Champlin *v.* Carter, 78 Okla. 300, 190 Pac. 679, (1920); Close Bros. *v.* Oklahoma City, 77 Okla. 104, 186 Pac. 931, (1920). A Michigan decision decided under a substantially similar form of procedure, and generally accepted as law, holds that mandamus will not issue to compel the appointment of commissioners where the petition does not disclose facts which will confer jurisdiction upon the court. Detroit, S. & D. Ry. Co. *v.* Gartner, Judge, 95 Mich. 318, 54 N. W. 946, (1893). Because of the apparent lack of original jurisdiction, the available and usual remedy by appeal and the general trend of authority to the contrary, the reasoning and conclusions of the dissenting opinion seem more convincing.

DOMESTIC RELATIONS—ANNULMENT OF MARRIAGE—INSANITY—WHO MAY AVOID—Plaintiff was married to Defendant in 1912. At that time she was a lunatic and wholly unable to understand the nature of the contract of marriage, he being ignorant of that fact. He lived with her for 10 years and in meantime two children were born of union. Defendant was adjudged a lunatic and is now and has been for some years an inmate of an asylum. Plaintiff starts suit demanding that nullity of marriage be judicially declared. From a judgment in favor of Defendant, Plaintiff appeals. *Held,* a marriage voidable for insanity may be annulled only by the lunatic and

those privileged to act in behalf of lunatic. It may not be annulled at the suit of the same spouse. If insane person is restored to her reason and cohabitation follows, she is deemed to have ratified her marriage relation and can not thereafter bring suit for annulment. Judgment affirmed. Hoadley *v.* Hoadley, 244 N. Y. 424, (1927).

This appeal decides the question whether a marriage voidable on grounds of insanity can be annulled at suit of sane spouse, Trenk *v.* Trenk, N. Y. L Jour., March 8, 1927. A marriage with a lunatic at common law was not merely voidable, but void. 1 Blackstone's Comm., 438; 2 Kent's Comm., 76; Pollock, Contracts (8th ed.) 95, 96; 19 Halsbury Laws of England, sec. 823; Wightman *v.* Wightman, 4 Johns Ch., 344, 345, (1819); Patterson *v.* Gaine, 6 How (U. S.) 550 553; 592, (1846); Winslow *v.* Troy, 97 Me. 130, 53 A. 1008, (1902); Rowdon *v.* Rowdon, 28 Ala. 565, (1856); Bell *v.* Bennett, 73 Ga. 784, (1884). It is well settled as law in the U. S. that until a court of competent jurisdiction annuls voidable marriages the marriage is valid. Jackson *v.* Jackson, 94 Cal. 446, 29 Pac. 957, (1892); Goshen *v.* Richmond, 4 Allen (Mass.) 458, (1862); Charles *v.* Charles, 41 Minn. 201, 42 N. W. 935, (1889); Jones *v.* Zoller, 32 Hun (N. Y.) 280, (1884); Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 101 (1889); Matter of Tyler, 80 Hun (N. Y.) 406, (1894); Stuckly *v.* Maths, 24 Hun (N. Y.) 461, (1881). Action to annul marriage is purely statutory. Stokes *v.* Stokes, 198 N. Y. 301, 91 N. E. 793, (1910). The right to avoid is for the personal protection of the one who is disabled. Carrier *v.* Sears, 86 Mass. (4 Allen) 336, 337, (1862); Atwell *v.* Jenkins, 163 Mass. 362, 40 N. E. 178 (1895). By present law in New York State marriages have been separated and characterized as void and voidable. Dom. Rel. Law secs. 5, 6, 7. It is further provided that a judgment may be had declaring null and void marriages or annulling voidable ones. Civil Practice Act sec. 1132. For the various voidable marriages sections were provided in statute as to who may bring action to annul a voidable marriage. Civil Practice Act, secs. 1133, 1134, 1136, 1137, 1138, 1139, 1141. Legislature expressly named the particular parties who might bring suit for annulment and those not named were intended to be excluded from bringing action. Reed *v.* Reed, 95 App. Div. 531, 186 N. Y. Supp. 897, (3rd Dept. 1921). We can not evade the conclusion that enumeration, though unaccompanied by mutual right, was intended to be final by legislature, when they enacted the statutes as to who might bring suit. Whoever wishes to maintain a suit must bring himself within one of the enumerated classes the statute to get relief. Before the principal case was decided the law was unsettled in New York. Marvis *v.* Marvis, 216 App. Div. 291, 215 N. Y. S. 43, 2nd Dept. (1926); Liske *v.* Liske, 135 N. Y. S. 176, (1912); Whitney *v.* Whitney, 121 Misc. 485, 201 N. Y. S. 227, (1923). In all these cases the learned judges decided, the fact legislature failed to mention that sane party to a marriage might institute proceedings for an annulment, it does not effect sane party as Supreme Court has jurisdiction over equity and law (Const. Art. 6, par. 1) and hence legislature can not limit or abridge its jurisdiction. But in the principal case and in Reed *v.* Reed, 195 App. Div. 531, the judges pointed out that legislation intended and made final who shall be a competent party Plaintiff in an action to have a marriage annulled. If the legislature intended to

give sane party a right they would have so enumerated in statute as statute is a large and complete set of laws in itself. Judge Cardozo in principal case stated: "Theory of annulment on the ground of insanity is not that the sane spouse has made a bad bargain in getting an insane partner. The theory is that the insane partner to the union has manifested a consent that is unreal for lack of a contracting mind." It is clearly for public good that such as principal case be the law. Otherwise a man knowingly may marry an insane woman and after having cohabitation dispose of her at will. The only way that the sane spouse can get relief is by an amendment of the statute that will extend the right of action. We are living in a period when public welfare and interest demand legislature to make strict regulations protecting the unprotected from such persons who would take advantage if law were not as in principal case. Fact that the law might work an undue hardship or an unjustice upon many sane persons is counterbalanced by the fact that it prevents the perpetration of many frauds.

MUNICIPAL CORPORATIONS—ULTRA VIRES ACTS; HIGHWAY LAW SEC. 282E AS AFFECTING LIABILITY FOR ULTRA VIRES ACTS—Plaintiff's intestate was killed through the negligence of defendant's employee engaged in the operation of a motor vehicle. The vehicle was being used by defendant's servants in the cleansing of sewer basins but at the time of the accident the driver had taken it on a personal errand. The foreman in charge of the sewer work testified that he had no authority to let the truck leave the task but had not objected when the driver said he would take the car and time off to buy a Christmas tree and carry it home. In fact it did appear that he told the driver to "go ahead." *Held*, that Sec 282e of the Highway Law (L. 1924, ch. 534 and amendments thereto) applied and a verdict was found for the plaintiff. Judgment reversed and complaint dismissed. The Appellate Division unanimously held that the Highway Law did not apply inasmuch as the negligence complained of did not occur within the scope of the corporate powers, was "ultra vires," and hence could not be made the basis of an action for damages. Downing *v.* City of New York, 219 App. Div. 444 (1927).

While a municipal corporation is liable to third persons resulting from the negligence of employees engaged in cleaning or maintaining public sewers, Lloyd *v.* Mayor, &c., 5 N. Y. 369 (1851); Seifert *v.* City of Brooklyn, 101 N. Y., 136, 4 N. E. 321 (1885); Munn *v.* City of Hudson, 61 App. Div. 343 (3rd Dept. 1901), it must be shown, as a condition precedent to recovery, that the act complained of was within the scope of the corporate powers conferred by statute. It is the policy of the law to limit municipal corporations strictly to the exercise of powers granted them by their respective charters (19 R. C. L. 1138), and if the act done was committed outside of the authority and power of a corporation as conferred by charter, the corporation was not liable whether its performance was directed by municipal officers, or it was done without any express direction or command. Smith *v.* City of Rochester, 76 N. Y. 506, 509 (1879); Mayor, &c., *v.* Cunliff, 2 N. Y. 165 (1849); Tilford *v.* Mayor, &c., 1 App. Div. 199 (1896) aff'd 153 N. Y. 671, 48 N. E. 1107 (1897); O'Donnell *v.* City of Syracuse, 184 N. Y. 1, 76 N. E. 738 (1906). Thus even though the persons causing