229 Mass. 248
118 N.E. 331

BURRILL, Treasurer and Receiver General,
v.
SERMINI.

Supreme Judicial Court of Massachusetts, Suffolk.

Jan. 11, 1918.

Exceptions and Appeal from Superior Court, Suffolk County; Philip J. O'Connell, Judge.

Action by Charles L. Burrill, Treasurer and Receiver General, against Charles Sermini. There was a finding for plaintiff, and defendant excepted and appealed. Exceptions overruled.

Joyner & Joyner, of Great Barrington, for appellant.

Henry [229 Mass. 250]C. Attwill, Atty. Gen., and H. Ware Barnum, Asst. Atty. Gen., for appellee.

CROSBY, J.

This is an action at law brought by the plaintiff, in his official capacity, under St. 1909, c. 504, § 82, to recover for the commonwealth certain charges for the support of one Lena Morin, while she was an inmate of one of the state hospitals for the insane. A judge of the superior court has found certain facts, admitted by both parties at the trial, which are sufficient to establish liability, if, as matter of law, the defendant can be charged for the support so furnished.

The inmate died in the hospital on December 24, 1914. She was a daughter of the defendant, and on the date of her committal [229 Mass. 251]was more than 21 years old and was legally married to one Eugene W. Morin, who was living in this commonwealth at the time of her committal and has ever since resided here. It is agreed that the defendant is of sufficient ability to pay for the support furnished at the rate charged, and that due demand was made upon him therefor before the bringing of this action. It is his contention that he is not liable for the support of his adult married daughter either at common law or by virtue of any statute.

Whatever the rule of the common law in England may be, it is settled in this commonwealth that, in the absence of any statute, a father if of sufficient ability is bound to support his minor children. Dennis v. Clark, 2 Cush. 347, 352,48 Am. Dec. 671;Gleason v. Boston, 144 Mass. 25, 26, 10 N. E. 476. It is also true that at common law no

[118 N.E. 332]

obligation rested upon a father to support his adult married daughter or adult son; but nearly a century and a quarter ago a statute was enacted in this commonwealth which greatly enlarged and extended the commonlaw liability for the support of poor and indigent persons. This statute, enacted in 1793, by chapter 59 provided, in part, that the kindred of any poor person 'in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity living within this commonwealth, of sufficient ability, shall be holden to support such pauper in proportion to such ability.' This statute in all material respects has remained unchanged and is now to be found in R. L. c. 81, § 10. Gleason v. Boston, 144 Mass. 25, 10 N. E. 476. Under Gen. St. c. 70, § 4, of which R. L. c. 81, § 10, is a substantial re-enactment, a father was held liable for the support of his adult pauper daughter, if of sufficient ability to contribute to such support. Templeton v. Stratton, 128 Mass. 137.

In the course of time, as the number of the insane and of persons otherwise deficient increased and it became necessary that they should be cared for in institutions established and maintained by the commonwealth, statutes were enacted under which the commonwealth was

allowed to recover from cities and towns for the support so furnished, with a right on the part of such cities and towns to recover the amount so paid from the 'kindred obligated by law to maintain' such persons, if of sufficient ability. Gen. St. c. 73, §§ 24, 25. By St. 1862, c. 223, § 11, the wording of the statute was changed with reference to the commonwealth to its [229 Mass. 252]present phrase, 'any person or kindred.' Pub. St. c. 87, § 34; R. L. c. 87, § 80.

Under R. L. c. 87, § 79, cities and towns were released from the support of the poor insane and that expense was assumed by the commonwealth, after January 1, 1904. The question then is, Who are 'the persons or kindred bound by law to maintain' insane persons so supported? We cannot doubt that they are the relatives specified in R. L. c. 81, § 10.

Inhabs. of Brookfield v. Allen, 6 Allen, 585, was an action brought against the defendant to recover for the support of his wife in a state insane asylum. When she was committed her residence was in Spencer; that town by Gen. St. c. 73, § 23, was obliged to pay and did pay, for her support in the asylum; as her settlement was in Brookfield, that town by section 25 of the same chapter, was obliged to reimburse the town of Spencer, and having done so sought indemnity from the defendant. It was held that, while the action could not be maintained under Gen. St. c. 73, § 25 (which makes the insane person's 'kindred obligated by law to maintain him liable for any expense paid by a city or town') because the word 'kindred' includes only blood relatives, yet the defendant was liable at common law for the support of his wife. It was also held that:

'The 'kindred obligated by law' are manifestly those only who, by Gen. St. c. 70, § 4, are made chargeable for the support of poor persons, namely, the 'kindred * * * in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity.''

Accordingly it would seem that the defendant in the case at bar comes within the literal terms of the statute, as it is plain that the phrase 'kindred obligated by law to maintain' in Gen. St. c. 73, § 25, refers to the same persons as 'any person or kindred bound by law to maintain' found in St. 1909, c. 504, § 82. If so, the kindred bound by law to maintain are those persons specified in R. L. c. 81, § 10.

The fact that the insane person was married and that her husband was lawfully bound to support her cannot exempt the defendant from liability. There is no provision under R. L. c. 81, § 10, which excepts a father from liability for the support of his daughter as a pauper if she is of full age or is married, nor can such an exception be read into the statute, which was intended greatly to enlarge and extend the common-law liability of relatives of paupers for their support. As the plaintiff argues, it is not probable[229 Mass. 253]that the Legislature intended the liability of parents should terminate on the marriage of their children when they are made liable for the support of the grandchildren-the offspring of such marriage. In Fairhaven v. Howland, 216 Mass. 149, at page 151, 103 N. E. 302, at page 303, which was an action to recover against a grandparent for the support of his grandchild as a pauper, under R. L. c. 81, §§ 10, 11, this court said:

'If the child's parents had been living, and the need had arisen, the defendant still would have been liable.'

The contention of the defendant that the plaintiff cannot maintain an action at law but is limited to a suit in equity under R. L. c. 81, § 11, cannot be sustained, as the remedy under which the plaintiff seeks to recover is not under R. L. c. 81, § 11, but is under St. 1909, c. 504, § 82. Arlington v. Lyons, 131 Mass. 328, 330, 331.

The evidence, admitted subject to the defendant's exception, tending to show that the husband of the insane person was not of sufficient ability to pay for the support of his wife, becomes immaterial in view of the conclusion which we have reached; the defendant was not harmed by the evidence as he would have been liable in this case even if it had appeared that the husband was of sufficient ability to support his wife. The

plaintiff was not bound to seek his remedy against the husband, although he was at liberty to do so. Fairhaven v. Howland, supra.

[118 N.E. 333]

The defendant also argues that the action was improperly brought in Suffolk county and should have been brought in the county of Berkshire where the defendant lives. Ordinarily, a defendant can take advantage of a wrong venue only by plea or answer in abatement, or by motion to dismiss if the error appears on the record, and the question is raised before a trial is had on the merits. Murphy v. Merrill, 12 Cush. 284;Brown v. Webber, 6 Cush. 560, 563. However, failure on the part of the defendant to plead in abatement or move to dismiss did not harm him, as R. L. c. 167, § 4, provides:

'A civil action in which the commonwealth is plaintiff or in which money due to the commonwealth is sought to be recovered may be brought in the county in which the defendant lives or has his usual place of business, or in the county of Suffolk.'

As the defendant's requests for rulings could not properly have been granted, the entry must be:

Exceptions overruled.