

1928.

*Present:* Dalton J.HERFT *v.* HERFT.

776—P. C. Kandy, 23,913.

*Maintenance—Jurisdiction—Desertion—Continuing offence.*

A wife is entitled to apply for an order of maintenance in the Court within whose jurisdiction she is living in a deserted condition, although that might not be the place where she was originally deserted.

**A** PPEAL from an order of the Police Magistrate of Kandy.

*Garvin*, for appellant.

January 18, 1928. DALTON J.—

The appellant sought to obtain from the respondent, her husband, maintenance for herself and her two children aged 16 months and 4 months, respectively, he having failed to maintain them. Respondent admitted the marriage and paternity. The Magistrate, however, held he had no jurisdiction, inasmuch as applicant admitted she lived at Anuradhapura with respondent, and had left him whilst they lived there. The reason alleged, it is stated, is cruelty on his part, for which reason she left him and went to Kandy, where she is now living. In coming to this conclusion the Magistrate says he follows the principle set out by *Wendt J.* in *Fernando v. Cassim*.<sup>1</sup>

There is no doubt that now her actual place of residence is Kandy, whereas the respondent resides at Anuradhapura. On the basis laid down in *In re Shaik Fakrudin* <sup>2</sup> referred to by *Wendt J.*, the Magistrate has apparently come to the conclusion that the husband was entitled to have his wife living with him and the Court regarded his offence or default (if any) as being committed at the place of his residence. It remains of course to be decided which of the parties was responsible for the separation, but, if the respondent was responsible, it is held that the wrongful act has been committed at Anuradhapura and not at Kandy.

On the question of default or failure to maintain, *Wendt J.* came to the conclusion that such a default was an offence within the meaning of the definition contained in section 4 of the Indian Criminal Procedure Code which has been adopted in section 3 of

<sup>1</sup> 11 N. L. R. 329.

<sup>2</sup> 9 Bombay 40.

our Code, and therefore the provisions of the Code as to jurisdiction are applicable in such a case. The Indian Court, in considering this question of jurisdiction, in the case referred to, recites the English statute law since the time of Queen Elizabeth, but it is to be noted that definite provision is made in that law as to the justices who have jurisdiction. It is suggested that the state of the law in England must have been familiar to the Indian legislature when the Code of Criminal Procedure was passed. It would be in my opinion somewhat unsafe to found any argument upon such a suggestion, but even admitting it may be correct, it is clearly the local law which has to be applied here. The Maintenance Ordinance is silent upon the point, but I am inclined to agree with Wéndt J. in his conclusion as regards the default to maintain being an offence within section 3 of the Criminal Procedure Code. Desertion, however, has been described as a continuing offence; it is a continuing course of conduct. Under *58 & 59 Vict. c. 39* (Summary Jurisdiction Married Women Act, 1895) which specifically provides that the complaint must be made where "the cause of the complaint has wholly or partially arisen," it has been held that a wife is entitled to apply for an order for maintenance and for other remedies under that statute in that Court within whose jurisdiction she was living in a deserted condition, although that might not be the place where she was originally deserted. (*Brown v. Brown*.<sup>1</sup>) Accepting therefore the application of section 3 of the Criminal Procedure Code to a default of the nature alleged by the applicant against the respondent, and having regard to the fact that this alleged default is a continuing default, and it is continued in Kandy where the applicant is now residing, the Magistrate was not correct in his conclusion that he had no jurisdiction. The appeal must therefore be allowed, and the order of the Magistrate set aside and the case sent back to him for adjudication.

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*Appeal allowed.*