1947
Oct. 14, 15.

Lord Merriman P. and Wallington J.

PEEK *v.* PEEK.

Divorce—Practice—Application to the Divisional Court for re-hearing—Cause heard by judge alone—" Error," or otherwise, of the court—Matrimonial Causes Rules, 1947 (*St. R. & O.*, 523/*L.*9), *r.* 36.

It cannot be said that a court is " in error " merely because the judge did not conduct more exhaustive inquiries. An appellate court must decide, as a matter of substance and not of mere form, whether on the one hand a decision is being impeached on the ground that the court below erred on the materials before it, or whether on the other hand it is being impeached on the ground that the court below went wrong, not because of error in its proceedings, but because evidence on a vital matter was concealed from it. It is immaterial whether such a question falls to be decided in an undefended or defended suit.

One of the objects of r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1947, is to enable the Divisional Court to secure as far as possible that there shall be a trial of the real issue between the parties, before permitting an appeal to the Court of Appeal.

At the hearing of a husband's undefended petition for divorce on the ground that his wife had deserted him in 1922 the court had before it (1.) a letter to the court from the respondent, who lived in Australia, in which it was stated that she had been unable to instruct solicitors but that the petitioner had, in fact, deserted her, and (2.) a letter from the respondent written in 1926 showing her resentment at the petitioner's association with a woman and a letter written by the petitioner to his wife in 1945 in which he asked her to divorce him. This correspondence having been considered, the court granted a decree nisi in the exercise of the court's discretion in respect of the petitioner's adultery since 1924. Subsequently to the hearing, further correspondence became available including letters written about the time at which desertion was alleged, namely, 1922, which contained an admission of adultery by the petitioner and indications that he did not wish the respondent to join him. On an application to the Divisional Court made under r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1947 (1) for a re-hearing :—

Held that on the foregoing facts this was a case in which evidence on a vital point had been concealed from the court by the petitioner;

(1) The Matrimonial Causes Rules, 1947, r. 36 :

(1.) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division. The application shall be by notice of motion, stating the grounds on which it is based, filed in the Divorce Registry and served upon the opposite parties within six weeks after judgment. The notice shall be a fourteen days' notice and may be amended at any time by leave of the judge.

(2.) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.

that there was in consequence no "error of the court at the "hearing"; and that the Divisional Court, having accordingly jurisdiction to deal with the matter, would order a re-hearing.

APPLICATION for the re-hearing of a cause heard by Barnard J. alone.

By his petition, dated December, 1946, the husband pleaded that his wife had deserted him in 1922, having refused to leave the marital home in Australia when he had obtained employment which would bring him to this country. The petition was served on the respondent in Australia in January, 1947, and the respondent wrote to the Divorce Registry in London a letter in which she stated that she had been unable to instruct solicitors, and that the petitioner had deserted her. In April, 1947, she applied for legal assistance as a poor person, which was finally granted after inquiry on July 2, 1947.

In the meantime, however, the cause was heard as an undefended suit by Barnard J. on June 17, 1947, and taking into consideration the matters within his knowledge that are referred to in the headnote, Barnard J. granted a decree nisi in the exercise of his discretion.

After the respondent had been granted legal aid certain correspondence became available which was later laid before the Divisional Court, the existence of such correspondence not being previously known to the petitioner's counsel or to those advising him. Amongst this correspondence was a telegram to the respondent in 1922, saying "Imperative stay Australia," three hotel bills sent to the respondent by the petitioner in 1922 with a suggestion that she should divorce him on the ground of adultery, a letter from the petitioner to his mother written in 1923 referring to his wife's refusal to take divorce proceedings and to his being compelled to disappear, and other correspondence of a later date indicating an unwillingness on the part of the petitioner to take his wife back.

J. Montgomerie for the wife.
D. Armstead Fairweather for the husband.

LORD MERRIMAN P. This is an application by a wife for a re-hearing of the husband's divorce petition on which Barnard J. pronounced a decree nisi on June 18, 1947. The application is made under r. 36. I must say at the outset that I adhere to what I said at the beginning of my judgment on the

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same topic in *Petty* v. *Petty* (1). I shall have to refer to that case later, when dealing with the merits. For the moment, I am repeating the determination of this court to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal. It is only if this court is satisfied that the particular case comes within the rule that it is justified in entertaining an application of this character, though, if it is so satisfied, it ceases to be a matter of discretion, and the court is bound to deal with it, because no other court can deal with it.

In my opinion this is an extremely difficult case. It has troubled me a great deal, and I am much obliged to counsel on both sides for their assistance. Manifestly, on any such application, there are two primary issues: first, should there be a new trial at all, and secondly, if any question of a new trial arises, and this is the point which concerns us, by what court should it be ordered? It will be remembered that the rule speaks of "no error" being "alleged." In my opinion those words must be interpreted in the broad sense. The matter must be considered in the light of the implications involved in what is being asserted, and not of a mere formal disclaimer of attributing any error to the court below. It is a matter of substance and essence, and not of form.

This was, from any point of view, a difficult case for the husband. By his own admission, he had been living in adultery with a woman since 1924. He disclosed that fact in his discretion statement, which also contained the positive assertion that he had not committed any other adultery; but it goes without saying that that admission of adultery not merely raises the question whether discretion should be exercised in his favour: it is a vital fact in connexion with the determination of the question whether his charge of desertion is or is not proved. He started with the burden that it was for him to prove affirmatively, on the lines laid down in *Herod* v. *Herod* (2), and approved by higher authorities since, that in spite of the facts disclosed in his discretion statement he could assert that during the material three years his wife deserted him, and it was for him to show, incidentally, that her attitude to the whole matter had been such that he could prove his assertion; and then, and only then, does the question of the exercise of the discretion by the court arise. In other words, the facts connected with his own adultery are at least equally material on the main issue as they are on the issue of discretion.

(1) [1943] P. 102. (2) [1939] P. 11.

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One can put it another way. The question of proof of desertion and the exercise of discretion are separate issues, but in a case like this, if no desertion is proved, by reason, amongst other things, of his own misconduct, then the question of discretion falls to the ground, whereas; on the other hand, if, notwithstanding the history of his own adultery, the court holds that the desertion is proved, it would be extremely unlikely, having so held, that it would refuse to exercise its discretion in respect of the same adultery which it had already held was no bar to the finding of desertion.

This case from its inception was presented by Mr. Fairweather to the court as a case of extreme difficulty. We have read and considered with great care, and with Mr. Fairweather's assistance, every word of the transcript of the case before Barnard J., and I wish to say here and now that that transcript provides a model of the way in which such a case should be presented. It was not merely that every possible fact was brought to the knowledge of the court, but, incidentally, it was an excellent example of advocacy, for the difficulties were faced as fully and frankly as they could be and were overcome. It is true, now, that we know that all the material available was not put before the court, but that was not the fault of counsel or those advising him. I should, of course, in any case accept, without any hesitation, Mr. Fairweather's statement that the material of which we are now aware was not available to him, but, as it happens, it does not depend only on Mr. Fairweather's statement, for we have correspondence between the wife and the senior registrar which shows conclusively that some of this additional material was sent to the court, with a covering statement to which I shall have to allude in a moment, and was returned, with a perfectly proper and correct letter by the senior registrar to the wife, with advice as to the way in which she should proceed, while, in accordance with the invariable practice, the wife's own letter was retained and placed before the learned judge at the trial. It is shown conclusively by that very circumstance that the papers were in the wife's custody, and not in the custody of those instructing the husband's counsel.

I shall have to deal with those papers and what they show later, but I wish to say something first about the wife's own letter, because it raises a question which, speaking for myself, has troubled me in connexion with this submission that no error is alleged. Having said what I have said about the

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presentation of the case by counsel, I need scarcely say that it is plain from the shorthand note that the most careful inquiry was made into this matter by the learned judge, who was quite obviously fully alive, as one would naturally expect, to all the possible implications of what was being put before him. My only criticism is in connexion with this letter. At first, Mr. Fairweather was inclined to object to the learned judge reading the letter, because he did not wish it to be treated as evidence; but he not merely withdrew that objection, he ultimately invited the learned judge to read it. I want to say a word about this, because it is material in this particular case, and may possibly be helpful in others. Of course ex parte statements in a letter written by an absent spouse, or, for that matter, by anybody else, cannot possibly be evidence in the case. No one would for a moment suppose that they could be, but it must always be remembered that the court has a duty to inquire for itself into the truth of the allegations made in the petition; and although ex parte statements by an absent spouse are no sort of evidence on which to come to a decision, they may be and should be recognized for what they are, namely, pointers to the sort of inquiry which the judge should make. Speaking for myself, I have always adopted the practice of handing such a communication to counsel, and, if necessary, of giving him the opportunity of an adjournment, short or long, to enable him to become fully instructed about the matter; but in most cases I find that counsel has already become apprised of the nature of the communication, either in the course of earlier correspondence between those instructing him and the other spouse or otherwise; but he may be taken by surprise, and in that case an adjournment may be necessary. Then one of two things happens: either the petitioner himself disposes to the satisfaction of the judge of the matters raised and the court can proceed without more ado to pronounce a decree, or things are left in doubt, and some further investigation is called for. The case may, in certain events, be properly sent to the King's Proctor for his assistance in investigating the facts. In my opinion, that is the proper practice in connexion with the consideration of communications of this sort.

My only criticism of the way in which this particular letter was dealt with, is that it seems to me, from an observation of the learned judge, that the full implications, or, at any rate, the possible implications of what was said in that letter were somewhat under-rated. To deal with the point satisfactorily and

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to deal with the case as a whole, I must now see what are the real gaps in the case which was presented to Barnard J. I would like first to make this general observation: I think I may say that it is indisputable that there is all the difference in the world, in a desertion case where the petitioner is admitting adultery (and in particular a long course of adultery), between the case in which he has—to use a neutral word—left his wife for another woman or a series of women, and the case in which, having been left or thrown over by his wife, he has taken up an association or formed a connexion with another woman or women. In the case of the man who has left his wife for another woman, and lived in adultery with her ever since, it is sufficient to say that the distinct question of the exercise of discretion is unlikely to arise at all; whereas in the case of the man who has been left or thrown over by his wife, speaking for myself, I have known many instances in which, being satisfied that the wife was the original deserter, I have held that a proper case for the exercise of the discretion is shown. It is precisely in this connexion (although, as I have already said, without the slightest possibility of reproach to counsel presenting the case or his advisers), that the court was not merely not informed, but, in my opinion, was positively deceived. I am prepared to assume in the husband's favour that at the moment when he left Australia what he was contemplating and wishing was that, being himself compelled to make England his headquarters, and particularly his headquarters for the purposes of leave, his wife and children should leave Australia and come to England. It is quite clear that this matter was considered, in the first instance, from the point of view of domicile, and the learned judge was quite satisfied that the husband had assumed an English domicile of choice. But when the petitioner went on to assert, as he did, that that remained his hope and intention from 1920 until her persistent refusal to come to this country finally broke his heart and he was driven to form this other liaison in 1924, which, be it remembered, he swore was the only adultery which he had ever committed, one sees why it was that on that material, thus presented to him, the learned judge, though plainly after a certain amount of hesitation, was prepared to exercise his discretion.

That brings me to a consideration of the new material, and the implications of the letter to the court, and I must consider how far, if at all, the learned judge was put on his guard by such

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a letter. The material which is now before us, some of which was sent to the registrar and returned to the wife before the hearing, is exhibited to her affidavit. I only propose to read a few short passages, all bearing on the suggestion that this man had deserted her, made up his mind to desert her, and made it quite clear to her that he had done so, long before there was any question of his association with the woman named in his discretion statement. I am not going to read the affidavit itself, which makes the point even clearer; I prefer to rely on the documents, about which there is no dispute. But let me say at once that I am not engaged in deciding whether her case is right. All that I am examining is what was the evidence which was withheld from the learned judge, in her absence, by the petitioner himself. I begin with a letter which is clearly written in 1922 by the husband. In this letter he gives an address in London for her reply, and the first words on the second page, which is the earliest page we have, are these: "Providing I am left alone neither you nor the children will "want while I am above ground"—"Providing I am left "alone." This is the man who says that his wife had deserted him before he formed this association in 1924. Then he goes on to discuss his future, and his prospects of being able to maintain a particular allowance, and then there occurs, on the same page, this sentence: "Simply ridiculous your saying if "I return to you that you will never refer to the past. Not "human nature. I could not do it, and no use saying so. "I could not be so two-faced." Then he reverts again to the question of money, and continues: "I have been back here "six months or more, and have given the matter very serious "thought, and no use denying the whole fact, I cannot ever "return to you as before. What is the use of playing a "double life any longer? Whilst I respect you in every way "I do not love you as I should. The children, yes, I do, and "I know they are absolutely safe with you." The next letter is dated December 12, 1922, and is written from the office of his firm in London "Enclosed find bills from two hotels, where "I have stayed with a lady." Incidentally, I am quite prepared to accept the assurance that it is not the lady mentioned in the discretion statement. "Should you wish to take "proceedings you can get information from these addresses. "I again repeat I shall never return to you. Yours, F. J. "Peek." The bills enclosed were in respect of visits to one London hotel in March, 1922, a visit which lasted a full week,

and shows that the parties were really in residence at the hotel, and the other two to two visits to another hotel in November and December, 1922; and the first hotel bill, incidentally, helps to fix, or to suggest, the date at which the first undated letter was written, because it will be remembered that he said he had been here (by which I understand he means this country) for about six months, so the letter was probably written about October, 1922. In April, 1923, still a whole year at least before this association with the woman mentioned had started at all, he wrote to his mother a letter which has somehow come into the possession of the wife, in which he says that he had received a letter from the wife saying that on no account would she give the husband his freedom, on account of the mother's sake and the children's sake, and then this sentence follows: "I have "therefore decided that since she refuses to take divorce "proceedings, that being the only freedom I want, I am "compelled, much against my wish, to carry out my intentions, "namely, cease sending remittances and disappear." He then goes on: "Should she change her mind a cable to me"—at such and such an address—"will find me, and I will im- "mediately give instructions to renew payments." I am not expressing any opinion about the facts; but it is only fair to say that so far as I know he never carried out that threat, in the sense that he did not disappear, and, on the contrary, I gather that he did renew payments, although I am not sure about that.

The point is, that the attitude of mind described in this letter, and not described as having been come to at the moment but as being the carrying out of intentions already formed, is completely and absolutely contradictory of, or at least inconsistent with the case which he was presenting to Barnard J. I will discuss presently the implications and bearing of that documentary evidence upon the question with which we are engaged, but before doing so I feel bound to see, on the other hand, what material the learned judge had before him to induce or oblige him to inquire deeper into the case which the petitioner was putting forward, for one of Mr. Fairweather's arguments, and one which requires serious consideration, is that "error" may, amongst other things, include a failure on the part of the court to prosecute its statutory inquiries far enough. The point having been taken, must be dealt with, and dealt with frankly.

Barnard J. had before him the statement, the letter to the court, and two letters, one by the husband and one by the wife. I propose to look first at the statement to the court, without

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reading it all. After saying, as she did, that if this case was allowed to go through the court it would be on perjury, and that the evidence she was enclosing (namely, a bundle of correspondence, including the letters to which I have just referred) would explain better than she could, as she was no good at letter-writing, she proceeds: "I was thirty-five years "old when deserted, and have devoted my life to the welfare "of the children." I pause there to observe that the age given in the marriage certificate in 1905 shows that she is asserting that she was deserted in 1922, a fact which, I think, had not been brought out anywhere until I called attention to it in the course of the argument. After explaining that she was not able to instruct solicitors, and so forth, she says "Mr. Peek "was the guilty one, and is using the High Court to get his "freedom, so as to get back to Australia with this woman, "who has ruined my life. She has used my name for twenty-"five years." I need not read the rest of it except that she reiterates at the end that it was her husband who was the deserter—in those very words—"Mr. Peek was the deserter."

I am bound to say that although it is quite true that the husband had sworn that he had asked her to come to England, or at least that that was the understanding on which they parted I should not myself have been content, in dealing with this letter to the court (again repeating that I am not dealing with it from the point of view of evidence, but only of the indication it gives as to the line of inquiry to be followed), to dismiss it in these words addressed to counsel: "The only thing that really "affects you, and that is at all material, is that she says "Mr. Peek never at any time definitely said 'Come to "'England',"" which is what the learned judge said about it. She said a great deal more than that which was very material, and I say that because I agree, as I have already said, that one of the points which we have to consider is whether the case now disclosed was so sufficiently indicated as to put the learned judge on his guard, and to make it an error on his part not to have discovered it.

From that I turn to the concrete evidence that was put before him, two letters, one by the wife and one by the husband. In August, 1926, the wife wrote a letter which begins: "I am "just out of hospital after four months and . . . . I may be a "cripple for life, and it is *you* I have to thank, for nothing but "worry has caused it; and then to get an insulting letter from "that woman, and also to send back a photo of our children

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" with a child of shame with it, that is more than I can stand. " I thought you were more of a man than that, to allow her to " do it. But never mind, there will come a time when you " both will have to pay. I do not want a divorce, but you are " making me get one, and I will only do it on two conditions " —and then she lays down the money terms on which she will be prepared to do it, which I need not go into. But there is a sentence at the end of the letter which shows once more her resentment about this woman, who is, of course, the woman mentioned in the discretion statement: " I will give this letter " time to get to you, and the reply by cable, before I do so. " Remember, never come to Brisbane with that woman, because " she will never leave here again, I can promise you that. Some- " body must pay, and why not her? " Then there is a postscript: " I am still willing to forgive and forget." It would, of course, be quite ridiculous to pretend that a letter like that does not require very serious consideration when the question of desertion or no desertion by the writer is in issue, and more particularly when read in conjunction with the husband's own letter, the correctness of the copy of which he admitted, written in January, 1945: " Dear Jennie, Some years ago you wrote me " that you would not divorce me so long as my mother was " alive. As she has now been dead for some years there is no " reason why, if you feel so disposed, you should not now do so. " You can, I understand, divorce me in Queensland on the " ground of desertion. We have now been separated for " twenty-five years, and you have known for a great portion " of that time that I have no intention of returning to live with " you." Both those letters are quite plainly susceptible of the interpretation that both are written in light of the known association with the woman mentioned in the discretion statement, but there is nothing that I can see in either of those two letters which necessarily dates any intention of his to keep away from his wife earlier than 1924, the year in which that connexion was formed. It is only from the letters which were not disclosed, to which I have already referred, that that information appears.

As I think I have now dealt with all the material facts necessary to raise the issue, I must now deal with the submissions that have been made at the Bar on the dividing line between this court and the Court of Appeal, in particular as disclosed by the reported cases. There are three of them. The first is *Manners* v. *Manners* (1), to which I need not refer in detail,

(1) [1936] P. 117.

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but which was a very clear case where, through no fault at all of the absent spouse, there had been miscarriage over the service and she was not, in fact, aware of the hearing. That is a plain case about which there cannot be any doubt. The two cases which do need careful consideration, and which have been used in opposite senses by counsel on either side, are *Winter* v. *Winter* (1) and *Petty* v. *Petty* (2). As I have already ventured to say in the case of *Petty* v. *Petty* (2), it is obvious that if a party comes to the court for a re-hearing of a case which has been decided against him or her, he or she does so because it is being asserted that the decision was wrong and that a decision in the opposite sense should be given; but it is equally obvious that that fact alone cannot determine that there has been error on the part of the court or even that error is being alleged on the part of the court, for otherwise it would make complete nonsense of the rule, and, so far as one can judge, apart from some purely academic argument, there never could be any case which could come within the rule at all, if that consideration is to exclude the jurisdiction of this court. But, founding himself upon these two cases, Mr. Montgomerie argued that the real test was whether the case was defended or undefended. It does undoubtedly happen that *Winter* v. *Winter* (1) where the court, composed of the late Langton J. and Henn Collins J., decided to grant a re-hearing, was an undefended case. Equally, it happens that the court over which I presided in *Petty* v. *Petty* (2) was dealing with a case in which there had been a contest. In my opinion those are accidental, and not decisive, circumstances, for it seems to me that the argument in this case shows plainly that there may arise an undefended case in which the court has been in error, and, although it is not necessary to pursue the topic, I can well imagine that there may be defended cases in which it can be shown very well that the court was not in error. I can remember one such case, though it would not be covered by this rule because there was a jury, in which, precisely for that reason, there was no fault on the part of the court, but there was the discovery of some evidence which could not possibly have been discovered in any way before the trial. The Court of Appeal ordered a new trial, and the whole decision was reversed. But I need not pursue that topic further.

Winter v. *Winter* (1) raised two distinct points. First of all, unlike *Manners* v. *Manners* (3), there was deliberate abstention

(1) [1942] P. 151.
(2) [1943] P. 102.
(3) [1936] P. 117.

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on the part of the applicant for a re-hearing, and the first question was whether, on a very well-known line of authorities, which bind ordinary litigants in appellate tribunals, the applicant could be heard to put forward the motion at all. About that, without repeating what I said in *Petty* v. *Petty* (1) or reading the judgment on this part of the case in *Winter* v. *Winter* (2), the court, if I may say so, was clearly right in coming to the view that the public interest in these matters transcended any technical rules about shutting out litigants who had deliberately stood by, and impelled the court to allow full investigation of the alleged new case. The other question raised this point which Mr. Fairweather has put forward, whether insufficient investigation by the court was of itself error. The point is dealt with in the following sentence of Henn Collins J.'s judgment (3): "As the wife swore that the "husband had left her on a named date it could not be said "that there was no evidence on which the learned judge who "tried the case could find that he had deserted her, but to find "that one party left the other without saying more about the "circumstances of the parting is not a satisfactory way of "disposing of a case." I have before me the transcript, and the question to which that comment alluded reads as follows: "I think he had some trouble with a motor-car in rather "unpleasant circumstances, and he left you just after that?— "(A.) Yes." That is the evidence and the whole of the evidence about the parting between those people. It is uncertain, and, so far as I can see, the uncertainty will never be resolved, whether the affirmative answer to this compendium of three or four questions related to the existence of trouble about the motor-car, or the fact that the trouble arose in unpleasant circumstances, or the fact that the husband had left the wife, or that if he had left her it was just after the trouble referred to; and it was plainly to that circumstance that Henn Collins J. directed the observation that I have just read.

I ventured in the course of the argument to put what I will assume is an entirely hypothetical case so as to test the matter. Supposing that there was, in the petition, the usual paragraph making the charge of desertion, with a certain amount of particulars, and supposing that the witness, having given the formal evidence about marriage and the rest of it, was asked this question and this question only, (having the petition put into

(1) [1943] P. 102.
(2) [1942] P. 151.
(3) [1943] P. 102, 105.

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his or her hands): " (Q.) Is paragraph so-and-so true?— " (A.) Yes "; it would be possible on that to use precisely the words used by Henn Collins J. The point underlying the observation is this, that where the court has been satisfied by the evidence given, and—(I do not say that what follows applies literally to the court here, because there was some other evidence)—there being no other evidence before the court below and nothing whatever to qualify the evidence given in support of the charge, it is impossible to say that the court was in error merely because the judge had not conducted some more exhaustive inquiries. That is the real point on that part of the decision in *Winter* v. *Winter* (1).

It is said that *Petty* v. *Petty* (2) shows that this rule can never be applied except in an undefended case, where there is no information at all from the other spouse, or, putting it more accurately, Mr. Montgomerie's submission goes as far as this, that it cannot arise at all when the other spouse is not there, even if there is some material relevant to his or her case. That argument was founded on a passage in my judgment in *Petty* v. *Petty* (3), where, after dealing with the point of public interest, and so forth, on the authority of *Harriman* v. *Harriman* (4), I continue as follows: " Those two cases, which, " so far as I know, are the only two cases in which a decision " of this court on this point has been reported, are, as I see it, " clearly on the right side of the line. Equally, however, it " seems to me impossible to assert that a case in which a judge, " having seen both spouses and their respective teams of " witnesses, has deliberately attached credibility to one side " and not to the other, and in which this court is asked to say " that the production of further evidence will induce some other " tribunal to say that the judge believed the wrong set of " witnesses, is on the same side of the line, so that it can be " asserted of such a case that ' no error of the court at the " ' hearing is alleged ' "; and Henn Collins J. said (5) the same thing, if I may be permitted to say so, very much better: " One thing, however, seems to me to be clear, and that is that, " if it is alleged that, on the materials before it, the court has " arrived at a wrong conclusion, that is an error of the court." Note the words " on the materials before it." " What exactly " is meant by the materials before the court," Henn Collins J.

(1) [1942] P. 151.
(2) [1943] P. 102.
(3) Ibid. 104.
(4) [1909] P. 123.
(5) [1943] P. 102, 105.

continued, " is another matter. In the present case the material " before the court was the evidence of witnesses on one side and " the other. The judge accepted the credibility of one set of " witnesses and rejected that of the other. It is now said that " he believed the wrong set of witnesses, and that, if he had " known some further facts which it is proposed to adduce, " he would have discredited those whom he believed and " believed those whom he discredited." It is said because these things were so, and it was emphasized that there were two sets of witnesses, that these observations can only apply to a defended case. I do not agree, and I would venture to recall another passage a little lower down in my own judgment, where, after calling attention to the fact that even in a case where the party was not there at all, because a false affidavit of service had been sworn, the judge would, so to speak, have believed the wrong witnesses, I went on (1): " Again, it may be mistaken " identity, or it may be deliberate perjury," (that is about the swearing of the service of the petition) " but, although it is " true that what is being asked is that it shall be held that the " judge believed a witness wrongly, and although at the re- " hearing, the court is to be invited to believe witnesses who " will swear exactly the opposite, still, in those circumstances, " unless there was something which made the story self- " condemnatory, the judge had no option but to believe the " witness." Mr. Montgomerie says that is this case, and that it clearly comes within the rule. It was not a defended case, that is true. In that sense it is the same thing. But to assert of this case that any judge had no option but to come to the conclusion he did is, and must be, nonsense. I say that for this reason, that the very request for the exercise of the discretion of the court itself implies, whether it is a defended or an undefended case, that the judge has an option; otherwise, the discretion is meaningless. Of course he had an option. The real point, as I see it, is in those words with which the phrase " no option " is prefaced—" unless there was something which " made the story self-condemnatory "—for if ever there was a case, undefended though it be, and not merely because the discretion was asked for but because there was, on the face of the case as it was presented to the judge, and avowedly and openly presented, the gravest possible doubt whether any court could hold that desertion had been proved, in which there was the plainest possible option to the judge to decide the case otherwise, it is this case.

(1) [1943] P. 102, 104.

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It seems to me that the real point is this (bearing in mind that the question whether error is alleged is a question of substance and not a question of form, as I said earlier in this judgment) : is the allegation which is made against the decision an allegation that the court went wrong on the materials before it, or is it an allegation that the court went wrong because evidence on a vital matter was concealed from the court ? To my mind it cannot make the slightest difference, logically, whether that question or those questions fall to be decided in an undefended or a defended case. Just to bring the thing to a point, can there be any true distinction between cases, both of them undefended, in the first of which the petitioner says " I assert desertion but I ask for the discretion of the court," and a case in which the petitioner presents a case of desertion without confessing any adultery at all ? To enlarge on that, in the case in which he gives evidence in support of a charge of desertion while concealing any act of adultery on his part, you have a plain case where the court is quite helpless unless there is something on the face of it which is self-condemnatory. In the half-way case, where you have desertion proved, and a candid admission of the whole of the misconduct of which the petitioner is guilty, though it is quite impossible to say that the court has no option in the matter, nevertheless (again, subject to the decision as to how the discretion shall be exercised) there is no material before the court to divert it from the sole issue " Shall I or shall I not exercise my discretion ? " But, in the third case, where the petitioner not only gives evidence in support of the charge of desertion and discloses adultery, but discloses it in such a way as to conceal that part of his misconduct and all the other evidence which bears, for example, on such a vital factor as the inception of the separation, I ask myself what logical difference can there be between that kind of case and the plain undefended case where there is no disclosure of adultery at all ?

I reject the argument that this matter depends solely on the question whether the case is defended or undefended, and I come back to what I said just now, for, in my opinion, this case is an illustration, not of a case in which the court went wrong on the materials before it, but rather of a case in which it is alleged that the court went wrong (if it did—that remains to be determined) because evidence on a vital point was concealed from it.

I repeat and desire to emphasize that every case coming

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within this rule must be considered on its own merits, and, in my opinion, when one analyses this case, the only thing which can be said to be error on the learned judge's part is a failure to appreciate, in the light of the documents which were not produced before him, the full possible implications of those which were produced before him. But, when one has said that, it still remains that it was the petitioner's concealment of those documents, of the existence of which we are now aware, which may induce some other tribunal to come to a different conclusion.

In my opinion, using the metaphor of the line once again, this case is as near the line as it is possible for any case to be, at any rate, any case that I have hitherto heard of or am able to imagine at this moment. But having said that, I have come to the conclusion that it is just on the right side of the provisions of r. 36, and having arrived at that conclusion it means that we are the court who have to make the decision. There then arises the first essential question which I propounded: whether it is a case in which a re-hearing ought to be ordered. About that I have no doubt whatever. For these reasons, in my opinion, this application should succeed.

WALLINGTON J. I agree, and desire to add a very few words. It seems to me that one of the objects of r. 36 is to enable this court to secure, as far as possible, that there shall be a trial of the real issue between the parties, before permitting an appeal to the Court of Appeal. It matters not, as my Lord has said (and I entirely agree with what he has said) whether the question arises in a defended or an undefended case. The only difference between the two probably is that undefended cases of this kind will be more numerous than defended cases, but there is no difference in the application of the principle. The effect of the rule, as I understand it, is this: if a party to a motion comes to this court and, either expressly or by necessary implication, alleges that the judge who heard the case to which the motion relates made such a mistake or error as resulted in a wrong conclusion, then the matter is not one for this court but is one that must go to the Court of Appeal in the ordinary way. On the other hand, in a case where the applicant on the motion comes to this court and says, in effect, e.g., "There was no "error on the part of the court below in dealing with the "material then before it, or any other error of the court, but "I was not able to attend at the trial, I had much material in

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" my hands that I would have put before the court, and I desire " an opportunity of having the real case tried," and if, added to that, as in this case, it is plain that the petitioner has concealed from the judge who tried the case very material—indeed vital—facts affecting the real case between the parties, it seems to me to be plain that this court has both the jurisdiction and the duty to deal with it.

It cannot properly be said that the learned judge came to a wrong conclusion (or was otherwise in error) in dealing with the materials before him, but the real case between these parties has never been tried, and it could not be tried for two reasons : (1.) because it was impracticable, without any fault on her part, for the respondent to be present at the hearing of the suit and to place vital facts before the court, and (2.) because at the hearing of the suit the petitioner gave to the court information that, to his knowledge, must have omitted vital facts that would if disclosed, have enabled the learned judge to try the real case.

In those circumstances, as I have said, in my opinion there is no answer to this application, and I agree with the order that my Lord has indicated.

Application allowed.
Leave to appeal.

Solicitors : *G. Parry Jones, the Law Society Services Divorce Department (Civil Section) ; C. R. Enever, Freeman & Co.*

J. B. G.

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Oct. 15, 16.

Lord Merriman P. and Wallington J.

WARD *v.* WARD.

Justices — Maintenance — Amount to be awarded — Discretion of justices unfettered by fixed standard—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict., c.* 39), *ss.* 5 (*c*), 7—*Money Payments (Justices Procedure) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 46), *s.* 9.

It is the duty of justices in making an award for maintenance to discover what is a reasonable award to make in all the circumstances of a particular case, and not to apply automatically any formula based on a fixed proportion of the joint incomes of the parties.

The standard laid down in *Cobb* v. *Cobb* [1900] P. 294 is not applicable to modern conditions.

Jones v. *Jones* (1930) 142 L. T. 167 approved.