whether it be a withdrawal upon a preliminary point or upon the merits of the case.

Mention must be made of the case of *Pickavance* v. *Pickavance* [1901] P. 60. This case appears to have been incorrectly interpreted to mean that after the withdrawal of a summons, no fresh summons can be issued upon the same cause or complaint. This case was explained and distinguished in both *Owens* v. *Minoprio* and *Land* v. *Land*. The statement in *Pickavance* v. *Pickavance* was obiter dictum and is no authority whatever for the proposition under consideration.

In the instant case, the appellant was never tried and no decision was given by the magistrate on the merits. The fact that the prosecuting officer informed the court that he could not proceed in the absence of a witness does not amount to evidence being taken. I therefore hold that the magistrate came to a correct determination in point of law in "discharging" the appellant and not in "acquitting and discharging" him. The effect of this, of course, is that the Commissioner of Police is entitled to prefer the same charge against the appellant and that a plea of autrefois acquit would not stand him in good stead.

Freetown
Aug. 18, 1961
Luke Ag.P.J.

[SUPREME COURT]

SHEKU KAMARA . . . . . *Respondent*

v.

T. H. A. GRAHAM . . . . . *Appellant*

[C. C. 88/61]

Practice—Appeal from judgment of magistrate's court—Appeal dismissed for non-compliance with procedural requirements—Application for extension of time limit for lodging appeal—Whether appellant should have appealed to Court of Appeal against order dismissing appeal—Whether order final or interlocutory.

Appellant was the defendant in a case in the Police Magistrate's Court, Freetown, in which decision was given for the plaintiff (respondent). Appellant appealed against this decision to the Supreme Court, but when the appeal came before the court a preliminary objection was raised that appellant had not complied with the requirements for lodging the appeal, and so the appeal was dismissed with costs. Appellant then applied by motion for an order that the time limit for lodging the appeal be extended and that in the meantime all further proceedings be stayed pending the determination of the appeal. In opposing this motion, respondent's solicitor argued that appellant should have appealed to the Court of Appeal against the order dismissing the appeal instead of applying to the Supreme Court.

Held, granting the application, that the order dismissing the appeal was interlocutory, and, therefore, appellant acted correctly in applying to the Supreme Court for an extension of time within which to appeal, rather than appealing against the order to the Court of Appeal.

Cases referred to: *Grimble & Co.* v. *Preston* [1914] 1 K.B. 270; *Salaman* v. *Warner* [1891] 1 Q.B. 734; *Vint* v. *Hudspith* (1885) 29 Ch.D. 322.

W. S. Marcus Jones for the appellant.
Gershon B. O. Collier for the respondent.

LUKE AG. P.J. This is an application by motion for an order that the time limit for lodging an appeal be extended and also that in the meantime all further proceedings be stayed pending the determination of the appeal by the Supreme Court.

This motion paper was listed for hearing on March 15 last but owing to several incidents did not come up before me for argument till June 14 last. Perhaps it may be of interest to state that this appeal was originally lodged on February 7 last but when it came before the court a preliminary objection was raised that the appellant had not complied with the requirements for lodging appeal and so it was dismissed with costs. When it was listed it did not come before me for some time.

At the hearing solicitor for the appellant argued that the case has not been argued on its merits as the dismissal was on a preliminary objection which is more or less a default to comply with procedure or practice and that the merits have not been gone into and determined as the appellant feels that he is aggrieved as the point he wishes to raise is of substance and cited the case of *Grimble & Co.* v. *Preston* [1914] 1 K.B. 270. He then went on to argue that decision was not final and referred to the case of *Salaman* v. *Warner* [1891] 1 Q.B. 734.

Solicitor for the respondent, in arguing against relisting the case, referred to the fact that the case having been dismissed, appellant's next step was to go to the Sierra Leone Court of Appeal and not before the same court of first instance. This point was resolved in the case of *Vint* v. *Hudspith* (1885) 29 Ch. 322. It was a case of practice where plaintiff failed to appear when the case came up for hearing and so his claim was dismissed with costs. The plaintiff appealed to the Court of Appeal, and, when the case came before that court, both judges held that although the Court of Appeal has power to entertain an appeal from a judgment given by default, it is bad practice for parties to go to the Court of Appeal without first going to the court of first instance which made the order.

It is clear that this appeal was not heard on its merits and therefore it cannot be said that a final order has been pronounced. The real test of what is a final order was defined by Lord Esher M.R. in the case of *Salaman* v. *Warner & ors.* [1891] 1 Q.B. 734, where he said at p. 735:

> "Taking into consideration all the consequences that would arise from deciding in one way and the other respectively, I think the better conclusion is that the definition which I gave in *Standard Discount Co.* v. *La Grange*, 3 C.P.D. 67 at 71, is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

In this matter before me, had I ruled against the preliminary objection the appeal would have gone on for argument. Such being the case the matter has not yet been finally decided and the application is in order and is granted.

Having decided to grant the application the only point is to extend the period for appellant to put down his appeal before court. I allow him 10 days within which he should lodge his appeal.

Freetown
Aug. 18,
1961

Luke Ag.P.J.

[SUPREME COURT]

FREDERICK B. WILLIAMS . . . . . *Petitioner*

v.

VIRGINIA WILLIAMS . . . . . *Respondent*

AND

ERNEST PYNE-BAILEY . . . . . *Co-Respondent*

[Divorce Case 13/60]

Divorce—Cruelty—Adultery—Burden of proof of adultery—Effect of confession—Condonation—Cancellation of condition.

Petitioner petitioned for the dissolution of his marriage with respondent. The main grounds for the petition were six alleged acts of cruelty on different dates and one act of adultery alleged to have been committed with the co-respondent. Respondent's answer denied that she was guilty of either adultery or cruelty, and co-respondent also denied having committed adultery.

During the trial, petitioner and a witness for petitioner testified that co-respondent had confessed that he had had sexual intercourse with respondent. Co-respondent denied that he had made such a confession, and respondent denied that she had committed adultery. There was also evidence that, after certain acts of cruelty by respondent, petitioner and respondent had cohabited, after which there had been further acts of cruelty.

Held, for the petitioner, but dismissing the case against the co-respondent. (1) There was ample proof of the acts of cruelty alleged by petitioner.

(2) Although petitioner condoned some of the acts of cruelty by subsequently cohabiting with respondent, this condonation was cancelled by later acts of cruelty by respondent.

(3) The burden of proof is on the person alleging adultery, there being a presumption of innocence and the same strict proof is required of adultery as is required in a criminal case.

(4) The alleged act of adultery was not proved beyond a reasonable doubt.

Cases referred to: *Ginesi* v. *Ginesi* [1948] P. 179; *Worsley* v. *Worsley* (1730) 2 Lee 572; 161 E.R. 444; *Durant* v. *Durant* (1825) 1 Hag.Ecc. 733; 162 E.R. 734.

Manilius R. O. Garber for the petitioner.
Cyrus Rogers-Wright for the respondent.
Solomon A. J. Pratt for the co-respondent.

LUKE AG. P.J. This is a petition by the petitioner for the dissolution of his marriage with respondent. Marriage between the parties took place sometime in July 1958 and in order that petitioner could be able to bring his petition within three years as required by the Matrimonial Causes Ordinance, 1949, petitioner obtained an Order dated June 24, 1960.