the case was "crystal clear," convicted the applicant of murder and duly sentenced him to death.

In our opinion the statement alleged by the witness Posseh Siseh to have been made by the deceased while the crime was actually being committed was admissible as being part of the *res gestae*; and we are also of the opinion that the statement she is alleged by the Town Chief of Menis to have made—"My husband has killed me"—was admissible as a dying declaration.

In our view there is no merit in this application and it is accordingly refused.

Application dismissed.

JOHNSON *v.* ROBERTS

SUPREME COURT (Luke, Ag.J.): June 11th, 1953
(Civil Case No. 324/51)

[1] **Civil Procedure—discontinuance and dismissal—dismissal for want of prosecution—failure of plaintiff to give month's notice of intention to proceed fatal if year since last interlocutory proceeding:** Where a plaintiff serves his statement of claim on the defendant over a year after the last interlocutory proceeding was taken in the action, he must also give the defendant a month's notice of his intention to proceed against him or the action will be dismissed for want of prosecution under O.XXIII, r.1 of the Supreme Court Rules, 1947 (page 314, line 27—page 315, line 21).

[2] **Civil Procedure—interlocutory proceedings—notice of intention to proceed—plaintiff must give defendant month's notice if year since last interlocutory proceeding:** See [1] above.

[3] **Civil Procedure—parties—defendants—rectification of non-joinder—procedure to be followed by plaintiff:** Where a plaintiff moves the court under O.XII, r.13 of the Supreme Court Rules, 1947 to add another defendant, he must either follow the procedure laid down in that Order or, if the original writ has already been served, he must serve a defendant who has already entered an appearance with a copy of the amended writ and then file it in the writ office against a defendant who did not enter an appearance (page 313, line 33—page 314, line 26).

[4] **Jurisprudence—reception of English law—incorporation of English law—civil procedure—English procedure for rectification of non-joinder of defendants to be applied:** See [3] above.

The first defendant (now the applicant) applied to have an action brought against her by the plaintiff (now the respondent) dismissed for want of prosecution.

The plaintiff brought an action against the first defendant and then moved the court by *ex parte* application to add another defendant. The court granted his application and the second defendant was joined. The first defendant, who had already entered an appearance under the original writ, was neither served with a copy of the notice of motion nor with a copy of the amended writ. Over a year later the plaintiff served his statement of claim on the defendants without giving them notice of his intention to proceed against them. The first defendant applied for dismissal of the action for want of prosecution.

The Supreme Court considered what irregularities were apparent in the procedure followed by the plaintiff, and whether they were sufficient to justify dismissal of the action.

Cases referred to:

(1) *Houlston* v. *Woodall* (1884), 78 L.T. Jo. 113.

(2) *May* v. *Wooding* (1815), 3 M. & S. 500; 105 E.R. 698, *dictum* of Lord Ellenborough, C.J. applied.

(3) *Webster* v. *Myer* (1884), 14 Q.B.D. 231; 51 L.T. 560.

Legislation construed:

Supreme Court Rules, 1947 (P.N. No. 251 of 1947), O.XII, r.13:

> "Where a defendant is added or substituted the plaintiff shall, unless otherwise ordered by the court, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served."

O.XXIII, r.1: "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the court to dismiss the action . . . for want of prosecution; and on the hearing of such application the court may . . . make such . . . order on such terms as the court may think just."

O.L, r.2: "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

O.LII, r.3: "Where no other provision is made by these rules the procedure, practice and forms in force in the High Court of Justice in England on the 1st day of January, 1946, so far as they can be conveniently applied, shall be in force in the Supreme Court."

Rules of the Supreme Court (England), O.LXIV, r.13:
The relevant terms of this rule are set out at page 314, lines 30–35.

Mrs. S.J. Marke for the first defendant-applicant;
Dobbs for the second defendant-applicant;
Zizer for the plaintiff-respondent.

LUKE, Ag.J.:

This application of the first defendant is by motion to dismiss this action for want of prosecution on the grounds of irregularities. The application relies on two main grounds:

(i) that she was neither served with a copy of the notice of motion to add another defendant nor with a copy of the subsequent amended writ; and

(ii) that prior to service of the statement of claim on May 1st, 1953, which was over a year since she entered an appearance and any proceedings taken in connection with this action, she was not served with a month's notice of intention to proceed as required by O.LII, r.3 of the Supreme Court Rules, 1947, enlarged by O.LXIV, r.13 of the English Rules of the Supreme Court.

In answer to these submissions the plaintiff's solicitor relies on O.XII, r.13, which deals with the adding of parties, O.XXIII, r.1 and O.L, r.2.

As regards the last citation by the plaintiff's solicitor, I think there would have been some substance in it had the period which had elapsed not been so great as to have invoked O.LII, r.3, as explained and enlarged by the English O.LXIV, r.13, and also had there not been so many irregularities.

The plaintiff, when he moved the court to add another defendant, should have served the defendant who had entered an appearance with a copy of the necessary papers. As a matter of fact the proceedings should have been by summons and not by an *ex parte* motion application. The rule of court (O.XII, r.13) which the plaintiff's solicitor cited only states—"where a defendant is added." So far as the method of practice by which the application should be made is concerned it is one of those cases where O.LII, r.3 of our Supreme Court Rules should be invoked. If you turn to the *Annual*

Practice, 1949, at 282, the notes under O.XVI, r.12 show how the application to add or strike out or substitute a party may be made:

"Generally, in cases not within O.30, applications as to parties should be by summons (*Wilson* v. *Church* 9 C.D. 552 . . .), supported, as a rule, by affidavit . . . which should be served on all parties to the action (*Tildesley* v. *Harper*, 3 C.D. 277 . . .)."

Indermaur's Manual of Practice, 10th ed., at 34–35 (1919), has this to say on this same point:

"The non-joinder of defendants may also be rectified in the same way. In this latter case, the practice is for the plaintiff to file an amended copy of and sue out a writ of summons, and serve any such new defendants therewith; and if the original writ has been served, a copy of the amended writ is served on each defendant who has appeared, and is filed in the writ office under Order 67, rule 4, against a defendant who did not enter an appearance."

The learned author also shows (*ibid.*, at 37) how the application as to non-joinder is made: "The practice is to apply on the summons for directions, but if there is no such summons, then to apply on a separate summons supported by affidavit and not *ex parte*."

Therefore when the plaintiff's solicitor made his application for adding a party *ex parte* without serving the defendant who had already entered an appearance, and also did not serve these parties with the amended writ of summons, all these were irregularities in the proceedings.

The last point on which the first defendant's solicitor relies is the non-service of the month's notice under the English O.LXIV, r.13. The rule is imperative and states:

"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed *shall* give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial . . . shall be deemed a proceeding within this rule." [Emphasis supplied.]

In this case the last proceeding taken was this irreguar *ex parte* notice of motion to add a defendant for which an order was obtained on January 7th, 1951. After that nothing was done. Service of the statement of claim being an interlocutory proceeding, before service was effected the plaintiff should have served the defendants with a month's notice as required by the English Rules of the Supreme Court,

O.LXIV, r.13. My authority for this is the judgment of Lord Ellenborough, C.J. in the case of *May* v. *Wooding* (2), in which he says (3 M. & S. at 501; 105 E.R. at 698):

> "The reason of the rule is this, that while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he may prepare himself, but when the matter has passed in rem judicatam by the verdict, the same reason does not apply. The rule of this Court therefore relates merely to interlocutory stages of the cause. No instance is stated where it has been carried farther. and there is no analogy to aid this case."

I also refer to 26 *Halsbury's Laws of England*, 2nd ed., at 77, para. 130, and the cases of *Houlston* v. *Woodall* (1), which stated that the proceeding referred to in the rule means a proceeding before and not after judgment, and *Webster* v. *Myer* (3). Having failed to give this notice, the plaintiff has contravened the Supreme Court Rules as laid down, and the proceedings in this case since the first and second defendants put in their appearance being grossly irregular, these proceedings are set aside on the grounds of irregularities and the defendants are dismissed from this action for want of prosecution. The defendants are to have the costs of these proceedings.

Application granted.

TIMBO *v.* JALLOH

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Smith, C.J. (Sierra Leone) and Coussey, J.A.): June 18th, 1953
(W.A.C.A. Civil App. No. 15/52)

[1] Land Law—joint tenancy—words of severance—devise to several of testator's sons of property to be used as family property—devisees take as joint tenants to benefit whole of testator's family: Where a testator leaves land to several of his sons and instructs that "the property is to be used as family property," the will must be construed in a manner consistent with an intention on the part of the testator to benefit his whole family and not just the families of the devisees; and therefore the devisees take as joint tenants rather than tenants in common (page 317, lines 5–16).

[2] Succession—wills—construction—joint tenancy and tenancy in common—devise to several of testator's sons of property to be used as