ARMAH KAMARA and **HENRY KOLLIE**, Appellants, v. **BINDU KINDI**, **TERM KINDI**, **et. al.**, Heirs of the late FAHN KINDI, Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard November 20, 1987. Decided February 25, 1988.

1. Words of perpetuity appearing in deeds signify an intention to create a fee simple conveyance; accordingly, they should be construed strongly against the makers or grantors, and most beneficially in favor of the other parties.

2. Fee simple is the highest possible interest which can be held in real property and it includes all interests, present and future. It is the largest estate in land and implies absolute dominion over the land.

3. The words "and his heirs" are prerequisites to creating an estate in fee simple; they are words of limitation and of inheritance.

4. Fee simple estates are held directly from the State. It is one in which the owner is entitled to the entire property with unconditional power of disposition during his life and descending to his heirs and legal representatives upon his death intestate.

5. Family, by designation, is the collective body of persons who live in one house; a father, mother and their children; the children of the same parents; a group of persons related by blood or marriage; those who descend from one common progenitor.

6. Heirs, by definition, is meant those persons appointed by law to succeed to the real estate of a decedent in case of intestacy; all persons who are called to the succession of property.

7. The Supreme Court will not uphold its judgment handed down in a previous term of court if the said judgment did not settle and afford the reliefs sought by the parties and resolve the uncertainties and insecurity of the parties with respect to their rights, status and other legal relations or terminate the controversy giving rise to the proceedings.

8. Nephew and nieces who are collateral relatives of a decedent cannot supersede the lineal heirs.

9. The words "to grantee and his families" refer to the grantee and his immediate family, and therefore under the law of descent only his lineal descendants are lawful owners of the decedent property.

Following a judgment of the Supreme Court interpreting the words "Chief Fahn Kendeh and families of Kindi Town, his heirs, executors, administrators and assigns" to mean all persons who lived in Kindi Town at the time of the conveyance, the petitioners, lineal heirs of Chief Fahn Kendeh, petitioned the Court for reargument.

The facts of the case revealed that in 1916, the Republic of Liberia, acting through President Daniel E. Howard, issued an Aborigine Land Grant Deed to "Fahn Kendeh and families of Kindi Town", conveying to them 204 acres of land. In 1981, after the death of Fahn Kendeh, the appellant commenced construction of a road through the land, of which Chief Fahn Kendeh had died seized. Thereupon a dispute developed between the appellants and the appellees, children of Fahn Kendeh who had been appointed administrators of his intestate estate. The appellees contended that the property was intended for Fahn Kendeh in fee simple, while that appellants, on the other hand, claimed that the property belonged to all those families who at the time of the conveyance, lived in Kindi Town. In order to have the dispute legally settled, the appellees filed in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, a petition for a declaratory judgment.

The Circuit Court ruled interpreting the words of the deed to mean that the property was conveyed to Fahn Kendeh in fee simple and not to the members or families of Kendeh Town. It therefore held that only the petitioners/appellees, lineal heirs of Fahn Kendeh, were entitled to inherit the said property. The appellants excepted to the said ruling and announced an appeal to the Supreme Court.

The Supreme Court ruled that the words of the deed "To Fahn Kendeh and Families of Kendeh Town" meant and were intended to make a conveyance to all families who at the time resided in Kendeh Town. It therefore reversed the judgment of the trial court and directed the Clerk of the Court to send a mandate to the trial court to the effect that the land was communal property and therefore belonged in common to the Kendeh Family in Kendeh Town and to the families who lived in Kendeh Town at the time of the conveyance in 1916; and that persons producing evidence showing that their families were residents of Kendeh Town in 1916 were entitled to share in the common undivided ownership of the said land.

The appellees, not being in agreement with the Court's decision, filed a petition for

reargument.

On reargument, the Court reversed itself, holding that in its previous ruling, it had failed to terminate or settle the controversy giving rise to the proceedings. The Court noted that by that failure, it had not afforded the reliefs sought by the parties from the uncertainties and insecurity they were experiencing with respect to their rights, status and other legal relations. The Court therefore proceeded to reinterpret the words "To Fahn Kendeh and Families of Kendeh Town" to mean a fee simple conveyance to Fahn Kendeh. The Court observed that under this new interpretation, only the lineal heirs of Fahn Kendeh were entitled to inherit from Fahn Kendeh's intestate estate, to the exclusion of any other collateral heirs or other persons who may have been in Kendeh Town at the time of the conveyance in 1916.

The Court accordingly *affirmed* the judgment of the trial court granting the petition for declaratory judgment.

M Fahnbulleh Jones appeared for respondents. *Toye C. Barnard*appeared for petitioners.

MR. JUSTICE AZANGO delivered the opinion of the Court.

On March 7, 1916, President Daniel E. Howard issued the below quoted ABORIGINE LAND GRANT TO FAHN KINDI AND FAMILIES Of THE COUNTY OF MONTSERRADO, REPUBLIC OF LIBERIA, which was recorded in Volume 94-B pages 108-109 of the records of Montserrado County, and filed in the archives of the Department of State, now the Ministry of Foreign Affairs:

"TO ALL TO WHOM THESE PRESENTS SHALL COME: Whereas, it is the policy of this government to induce the aborigines of this country to adopt civilization and become loyal citizens of the Republic; and whereas one of the best things thereto is to grant land in fee simple to all those to be entrusted with the rights and duties of the full citizenship as voters, Chief Fahn Kendeh and families of Kendeh Town, Settlement of Paynesville, Montserrado County, Republic of Liberia, have shown themselves fit to be entrusted with said rights and duties.

Now, therefore, know ye that I, Daniel E. Howard, for and in consideration of the various duties of President to grant, give and confirm unto said Chief Fahn Kendeh and families as aforesaid, his heirs, executors, administrators and assigns forever, the piece or parcel of land situated, lying, and being in the Settlement of Paynesville, Montserrado County, and of the Republic aforesaid, the number three (3), 1 st Range,

part of, and bearing in the authentic records of said settlement and bounded and described as follows:

Commencing at a point marked by a growing stick and a rock on a little hill North East off a point feet high water mark and running thence on magnetic bearings North 45 degrees West 25 chains, thence running North 45 degrees West 25 chains, North 45 degrees West 29 chains, thence running South 45 degrees West 60 chains, South 62 degrees East 46.5 chains North 45 degrees East 10 chains to the place of commencement and containing 204 acres of land and no more.

To have and to hold the above granted premises (farm land) together with all and singular the buildings, improvements and appurtenances thereto and thereof belonging to the said Chief Fahn Kendeh and families of Kendeh Town, his heirs, executors, administrators, and assigns as aforesaid forever. And I the said Daniel E. Howard, President as aforesaid, for myself and my successors in office, do covenant to and with the said Chief Fahn Kendeh, his heirs, executors, administrators and assigns that at the ensealing of hereof I, the said Daniel E. Howard, President as aforesaid, and my successors in office, will forever warrant and defend the said Chief Fahn Kendeh and families, legal heirs, executors, administrators and assigns against the lawful claims and demands of all persons to the above granted premises.

IN WITNESS WHEREOF I the said Daniel E. Howard, President as aforesaid, have hereto set my hand and cause the Seal of the Republic of Liberia to be affixed this 7th day of March, A. D. 1916 and of the Republic this 69th year.

Sgd. Daniel E. Howard, President"
ENDORSEMENT

ABORIGINE LAND GRANT from Republic of Liberia to Chief Fahn Kendeh and Families, lot no. three (3), 1st Range (Part of) situated at the rear of Paynesville, Montserrado County. Let this be registered. sgd. R. Johnson, Judge of Monthly and Probate Court, Montserrado County, pro-bated this 14th day of March A. D. 1916, .Sgd. R.H. Dennis, Clerk, Monthly and Probate Court, Montserrado County. Registered according to law, Vol. 94--B pages 108-109,' According to the records in the case, Fahn Kendeh was the father of seven children-five (5) girls and two (2) boys—all of whom are the appellees in this case. The issue surrounding the ancestry of the appellees and their father, Fahn Kendeh is fully discussed in an opinion of this Honourable Court in the case *Karpai, et al. v. Sarfloh et al,* 26 LLR 3 (1977). We shall treat this later on in this opinion.

Fahn Kendeh died intestate on the 14th day of November 1957, leaving personal as well as real properties in Paynesville, Montserrado County. Later on, two of his children, Bindu Kendeh and Tarni Kendeh were granted letters of administration by the Monthly and Probate Court for Montserrado County to administer the intestate estate of their father.

In 1981, Appellants Armah Kamara and Henry Kollie, commenced constructing a road across a portion of the 204 acres of land, of which the late Fahn Kendeh died seized. Armah Kamara, one of the appellants herein, was town chief of Kendeh Town at the time and took advantage of his position to construct the road for the purpose of doing commercial business with the sand on the beach. Co-appellant Kamara lost his port-folio as town chief as a result of this. Based upon the dispute between the appellants and the respondents, the appellees sought relief from the Sixth Judicial Circuit, Montserrado County, sitting in its December Term, A.D. 1981, praying for a DECLARATORY JUDGMENT, wherein they prayed the court to construe the land grant from the Republic of Liberia to Fahn Kendeh and families, and to remove any uncertainty as to who were the actual owners under the said land grant.

Appellants filed an answer which they subsequently withdrew after petitioners, now appellees, had filed a reply. The appellants subsequently filed an amended answer to which petitioners/appellees filed a reply.

In respondents/appellants' amended answer, they contended that "the land was held in common by Chief Fahn Kendeh and the respective families of Kindi Town". They also contended that Fahn Kendeh parted with the said property before his death. In support of this contention, they made profert of a deed which they said Fahn Kendeh had executed in 1958. They contended further that they were joint heirs of Fahn Kendeh, therefore coowners of the two hundred and four (204) acres with the appellees.

The appellees, on the other hand, contended that they, being the natural daughters and sons of Fahn Kendeh and therefore the lineal heirs of Fahn Kendeh, the property, after the death of Fahn Kendeh descended to them and their families. They maintained that the appellants who are not lineal heirs or even collateral relatives of Fahn Kendeh, could not inherit the property,

On August 22, 1983, the case was called and heard without a jury with His Honour

Eugene L. Hilton, presiding. Witnesses for both the petitioners/appellees and the respondents/appellants were qualified and they testified. The evidence on both sides having been submitted, counsels for both sides argued and submitted their case to the court. On the 21st day of October A. D. 1983, the trial judge, His Honour Eugene L. Hilton, rendered final judgment, to which exceptions were taken by respondents who also gave notice that they would "take advantage of the statutes controlling in such matters." The court noted the exception and ordered the matter suspended.

An appeal having been perfected, the case was heard and determined by this Court during the March A. D. 1986 Term, presided over by His Honour James N. Nagbe, Chief Justice of Liberia, with Elwood L. Jangaba, J. Patrick Biddle, Frederick K. Tulay and John A. Dennis, Associate Justices of the Supreme
Court of Liberia being present. After hearing the arguments in the case, the Court adjudged inter alia as follows:

"Considering what we have said herein, the judgment of the lower court is hereby reversed, and the Clerk is ordered to send a mandate below, to the effect that the land in question is communal property belonging in common to the Kendeh Family of Kindi Town and to the families in Kindi Town in 1916, Settlement of Paynesville and their heirs and successors; and that whoever produces evidence showing that his family was resident in Kindi Town in 1916 at the time of said grant is entitled to share in the common undivided ownership of said land in fee, until otherwise proper petition is made to government to have said communal tribal holding divided into individual family holdings in fee as is required by law. Costs ruled against appellees, " AND IT IS SO ORDERED."

After the above quoted judgment was given, counsel for petitioners/appellees filed a petition for re-argument and argued *inter alia* that:

1. On the 29th day of October A. D. 1973, the Republic of Liberia, by and thru the Ministry of Justice, issued a writ of arrest and subsequently prosecuted co-appellee/copetitioner Bindi Kindeh (Madam Benda Kai Kpale) for the crime of malicious mischief for having up-rooted a cotton tree from a portion of the 204 acres of land, the subject of the petition in the declaratory judgment case. That at that time, His Honour Elwood L. Jangaba was Assistant Minister of Justice. Under these circumstances, Justice Jangaba should have recused himself in the determination of the case, since he had something to do with the case and with the prosecution of oral of the petitioners/appellees, who was subsequently acquitted by the court. This salient fact was inadvertently overlooked by Your Honours. Therefore,

petitioners/appellees respectfully pray for re-argument. Copies of the writ of arrest as well as the minutes of the trial of the malicious mischief came before the Criminal Law Court for the First Judicial Circuit, Montserrado County, during its February 1974 Term, are hereto attached in bulk and marked exhibit "A", to form part of this petition.

2. That in keeping with page 2 of the opinion of this Honourable Court in the declaratory judgment case, the answer of the appellants has been referred to as saying that "the said piece of property was not only granted by the Republic of Liberia to Chief Fahn Kendeh and his lineal families of Kindi Town, but also to all other families that happened to have lived in Kindi Town, in order to allow them chance to vote and to contest elections under the law. Appellants maintained that had the grant been meant for the one family of Chief Fahn Kendeh, then it would not have exceeded twenty-five (25) acres to which a family plot was limited....

5. And to which argument counsel for petitioners/appellees objected and called the Court's attention thereto on the ground that these issues were not raised in the pleadings and in the bill of exceptions and, that therefore, they could not be legally raised by counsel for appellants for the first time in his argument before this Court. Reference to appellants' counsels argument before this Court which were never raised in the bill of exceptions or in the pleadings appeared in the opinion of this Honourable Court. Therefore, petitioners/appellees pray for re-argument.

6. That the petition for declaratory judgment was to determine the rights of the respondents/appellants and the petitioners/appellees to the 204 acres of land. This issue has been inadvertently overlooked in your Honour's judgment and opinion rendered on August 1, A. D. 1986. The purpose of the petition for declaratory judgment was to determine the rights of the respondents/ appellants and the petitioners/ appellees to the 204 acres of land. This issue was determined by the trial judge, for which the respondents/appellants appealed, but inadvertently Your Honours overlooked this salient point in your opinion.

7. That in the appellees' brief, they raised the issue as to whether the appellants established any evidence to the effect that they were even lineal heirs or even collateral heirs to the late Fahn Kendeh. This important issue was overlooked by your Honours and therefore petitioners/ appellees pray for re-argument.

8. That the respondents/appellants in the case *Karpai et al. v. Sarfloh et al.,* 26 LLR 3 (1977), disavowed any relationship to Chief Fahn Kendeh and to the

petitioners/appellees and, therefore, they could not claim family relationship or ties to the same parties in this case. This issue was raised in the petition for declaratory judgment as well as in appellees' brief and strenuously argued by petitioners/appellees' counsel before this Honourable Court. But this vital issue was inadvertently overlooked by Your Honours, for which petitioners/ appellees respectfully pray for re-argument.

9. That this Honourable Court's attention was called during arguments to the fact that only the issues that are tendered in the bill of exceptions should be argued on the merits of the case in keeping with appellate procedure and law, and that therefore, the question of the 25 acres of land and the conferring of voting rights, and that of community property should not be entertained, which points your Honours inadvertently did not pass upon in the opinion for which petitioners/appellees respectfully pray for re-argument.

Opposing these arguments, respondents/appellants seriously contended and forensically argued that:

1. It is appellants/respondents considered opinion that the only issue this Court was called upon to review is whether or not the Aborigine Land Grant Deed executed by the Government of Liberia was intended solely for Chief Fahn Kendeh, his lineal descendants and collateral relatives to the exclusion of the other families, their lineal descendants and collateral relatives or that Chief Fahn Kendeh and the other families and their lineal descendants and collateral relatives were entitled to the property. The trial judge ruled that the clause in the land grant deed to Chief Fahn Kendeh and families was intended and referred to Chief Fahn Kendeh and his immediate family and therefore the appellees/petitioners, being the lineal descendants, are lawful owners of the property, in keeping with the law governing descend and distribution of intestate estate. It is from this ruling that the appeal was taken and this Court interpreting the wordings of the deed concluded that the land in question is communal property belonging in common to the Kendeh families of Kindi Town and the families in Kindi Town in 1916, Settlement of Paynesville, and their heirs and successors.

2. The issue is whether or not this Court is compelled to pass upon all the issues raised in the bill of exceptions and the brief in arriving at a conclusion, and upon failure to do so, a re-hearing must be heard to pass upon the issues which were not passed upon in the opinion for which re-argument is sought. This Court has held that where all the facts presented have in fact being duly considered by the Court, and

where the application presents no new fact, but simply reiterate the arguments made on the hearing, and is in effect an appeal to the Court to review its decision or points and authorities already determined, a rehearing will be refused.

Further, a re-hearing will ordinarily be refused where the questions presented by the petition were fully argued and considered by the Court in a formal hearing; and lastly, it was held as to the contention that several issues were raised but not passed upon, it has been the practice of this Court to pass upon issues it deem meritorious or properly presented. It need not pass on every issue in the bill of exceptions or in the brief. . . . there is no need to cite the plethora of cases in which this practice has been followed. It goes without saying then that this Court was correct when it elected to take into consideration the issues which it deemed meritorious in deciding this case, in keeping with the statutes under Aborigines Land Grant and the wordings of the deed.

Having recourse to and reflection upon the opinion and judgment of the March A. D. 1986 Term, together with the subject deed in this action and the prayer in the petition for DECLARATORY JUDGMENT, one or two questions are hovering over our minds. (1) What was the intent of the State, Republic of Liberia, did it create a fee simple or absolute fee simple to Chief Fahn Kendeh communal property; (2) Have the judgment and opinion of the March Term, A. D. 1986 settled or declared the legal rights of the contending parties in keeping with the declaratory judgment statute of Liberia and the common law; (3) In order to deny or uphold the opinion and judgment of the 1986 March Term of this Court, is the judgment valid in keeping with law; i.e. what makes a declaratory judgment generally valid; (4) What is the definition of the word, "families", and its connotative and denotative application to the deed and the parties. (5) What are the words and phrases of the words, "heirs", and "assigns", "heirs at law", "heirship". "heirs by blood", "heirs of the body" as are reflected in the original land grant. (6) What is collateral consanguinity, and whether or not the heirship mentioned in the deed refers to only the biological heirship or were words describing the extent of quality of the estate conveyed and not words designating the persons who are to take it; (7) Has the 1986 March Term opinion and judgment placed full legal construction and interpretation on the 1916 deed; (8) What is the traditional chieftaincy concept and what did it involve regarding property acquired; (9) What was the policy and law of the Government of Liberia prior and up to 1916 when the subject land grant deed was issued.

We hold the opinion that in order to give some consideration to these issues or questions, it is proper and necessary to have some positive definitions of terms and

apply them to the construction and interpretation of the deed before us, so as to arrive at a just determination of the petition for a declaratory judgment and the motion for re-argument.

According to PROPERTY AND LAW (CHARLES M. HAAB, LOUIS D. BRANETS, AND LANCE LEIBRAN treatise) "Property and Law", page 153, estate in fee, an estate in fee is one which, at the death of its owner, if not otherwise. disposed of by him, descends to his heirs; that an estate in fee is the same thing as an estate of inheritance. Where it is created by deeds, the word HEIRS is indispensable, unless otherwise provided by statutes. This is an inflexible rule of the common law, and no words of perpetuity will supply the place of the word "HEIRS", except in the grant to corporations where the word successors, though not essential, is usually substituted. From our view, the words of perpetuity appearing in deeds signified an intention to create a fee. Therefore, it should be construed most strongly against the maker or grantor, and most beneficially for the other party, i.e. Daniel E. Howard, the grantor and most beneficially for the heirs of Fahn Kendeh. Accordingly, the majority opinion and judgment of the March Term, A. D. 1986, of this Court, should have closely inspected and looked at the wording of the deed and so interpret same as to whether or not President Daniel E. Howard intended to create a fee simple, or an absolute or fee conditional. Fee simple is the highest possible interest which man can have in real property, whether corporal or in corporal; it includes all interests, present and future; it forms a unit or whole of which all other estates are but fractions or parts, it comes to the owner with unlimited power of alienation during life, unless he does something to encumber it, and passes in the same absolute character to his heirs. In our opinion, it did not suit the genius of President Daniel E. Howard, or for that matter, Fahn Kendeh, to put the property in question under restrictions with regard to the disposition of the property. Fahn Kendeh preferred to be the absolute master of what he called his own. In other words, Fahn Kezdeh wanted a grant in fee simple absolute, which was of potentially infinite duration and freely alienable, and which could be inherited by any heir of his - a fee that was given without any conditions that might divest him or his heirs of the property later.

The words, "and his heirs" are prerequisite to creating an estate in fee simple. They are words of limitation. Fee simple could be made freely alienable, so long as it is done through substitution. Fee simple, as it was yesterday and today, is held directly from the State, the Republic of Liberia.

It is not likely that "CHIEF FAHN KENDEH" could have acquired property of 204 acres of land in his own name and include in the deed other additional families who

bore no relation to him. This does not make good sense, though the subject deed may have interlineations, ambiguities, contradictions, and inconsistency which are questionable. However, since the question of fraud has not been raised before us, we will refrain from commenting thereon. Nevertheless, we are not convinced that it was the intention of the State in 1916, having issued the aforesaid deed in favour of "CHIEF FAHN KENDEH", and families as aforesaid, and "his heirs, executors, administrators and assigns forever," etc. to omit "of their heirs". Could it prick the conscience of any body to believe that the Government of Liberia intended to create a fee simple in FAHN KENDEH and include other external families of Kindi Town who had not applied for land?

By means of implication, since it would appear that the deed was supported by points intended as compensation for Chief Fahn Kendeh to influence his people or families, as is here interpreted to mean to vote, this act did not confer the right on any other persons who may have been living in the town at the time or for that matter to their heirs. The deed was not intended to create communal land, joint tenancy or tenancy in common. It did not create a community comprising a town, a municipality, a district, or a neighborhood. This is an entity composed of a husband, a wife and children, which is quote distinct from that of a town, etc., considered separately and individually. As a community, they held property by a different title from that which they held to their separate property.

We hold that the fee was not intended to be communal and to include the number of heads of the various families who lived in the area at the time in 1916 and to inhabitants of Kindi Town and their heirs as tenants in common forever; otherwise, the Government of Liberia would have issued the deed to Chief Fahn Kendeh and a member of heads of the various families at the time, because this was the policy of Government and Law as far back as 1911 when Arthur Barclay was president. No succeeding president, including President Daniel E. Howard who succeeded him, would have had the legal authority to abrogate the same since it was the law passed at the time by the Legislature and entitled "An Act for the Government of a District in the Republic inhabited by aborigines approved January 25, 1895."

Here is a format of a similar deed:

"WHEREAS in a section of an Act of the Legislature of Liberia entitled, "An Act for the Government of a District in the Republic inhabited by Aborigines, approved January 25, 1895, it was provided that there should be granted to the inhabitants of such town or a district inhabited by aborigines, sufficient land around each town for

agricultural purposes; and WHEREAS KENDEH WORREL (in the instant case would have been Fahn Kendeh) Chief of Kindi Town in the county or district and the inhabitants of said town to the number of all heads of FAMILIES, have applied for a grant of land in accordance with the provisions of said Act, now therefore I, Arthur Barclay, President of the Republic of Liberia, for myself and my successors in office do give, grant and confirm unto the said KENDEH, CHIEF OF KINDI TOWN and to the inhabitants aforesaid, their heirs as tenants in common forever, all that piece or parcel of land situated lying and being in the rear of Paynesville in the County of Montserrado and bearing in the authentic records of raid Settlement the number... (DESCRIPTION HERE)

"TO HAVE AND TO HOLD THE ABOVE GRANTED PREMISES TOGETHER WITH all and singular the buildings, improvements and appurtenances thereof and thereto belonging to the said KENDEH, CHIEF OF IUNDI TOWN AND THE INHABITANTS THEREOF, AND THEIR HEIRS FOREVER, and I, the said Arthur Barclay, President aforesaid, for myself and my successors in office, do covenant to and with the said persons and their heirs, and that at the ensealing hereof, I the said Arthur Barclay, President aforesaid, by virtue of my office and by authority of said Act had good right and authority aforesaid, will forever warrant and defend the said Chief Fahn Kendeh and families, legal heirs, executors, administrators, and assigns against the lawful claims and demands of all persons above granted premises.

THE INHABITANTS THEREOF AS TENANTS IN COMMON; and I, the said Arthur Barclay, President as aforesaid and my successors in office, will forever warrant and defend the said lands to the said Chief Kendeh and INHABITANTS OF IUNDI TOWN, THEIR HEIRS, against the unlawful claim of all persons claiming any part of tile above granted premises."

THE ABOVE TRACT OF LAND CANNOT BE SOLD, TRANSFERRED, OR ALIENATED WITH-OUT CONSENT OF TIE GOVERNMENT OF THE REPUBLIC, IN WITNESS WHERE OF ……

Additionally, President Daniel E. Howard would have declared to all mankind that this parcel of land was not to descend to the lineal heirs of Fahn Kendeh, Chief of Kindi Town, and to collateral relations, according to the rules of descent, upon their death and according to the policy of Government at the time.

In the habendum clause, President Daniel E. Howard would have repeated the same

character of persons designated as inhabitants or tenants in common as grantees, as set forth in the premises, and described the estate conveyed to them and for what use, as was the intent and spirit of the law referred to *supra.* This practice never degenerated into a mere useless form. If the Deed now in question was issued in recent past, there would be no need for the practice because the premises would contain the names of parties and specifications of the land granted and the deed would be effectual without the habendum. 8 R.C.L. 922.

On the contrary, the very fact that the deed reads *inter alia:*

"And whereas one of the best things thereto is to grant land in FEE SIMPLE to all those, themselves to be entrusted with the rights and duties of the full citizenship as voters, Chief Fahn Kendeh and FAMILIES of Kindi Town, Settlement of Paynesville, Montserrado, Republic of Liberia . . . various duties of President to grant, give and confirm unto said Chief Fahn Kendeh and FAMILIES as aforesaid, his heirs executors, administrators and assigns forever that piece or parcel of land situated, lying and being in the rear Settlement of Paynesville, Montserrado County…To have and to hold the above granted premises (Farm Land) together with all and singular the buildings, improvements and appurtenances thereto and thereof belonging to the said Chief Fahn Kendeh and Families of Kindi Town, his heirs, executors, administrators and assigns as aforesaid forever"

clearly indicates that FAHN KENDEH was to possess and enjoy the premises without interruption and his descendants were to succeed to the enjoyment of this property.

The argument of counsel for respondent that the land -204 acres belong to all of them, the contending parties, it being of communal land cannot hold. Wordings of the deed could not be contradictory or inconsistent, especially so when there is nothing in the subject deed which indicates that FAHN KENDEH, CHIEF OF KINDI TOWN AND THE INHABITANTS THEREOF AND THEIR HEIRS, FOREVER, shall have and hold the premises together with all others belonging to Kindi Town. Nowhere is it indicated in the deed that the government of Liberia covenanted with Chief Fahn Kendeh and inhabitants of Kindi Town and "their heirs", as tenants in common, that it will forever warrant to defend the said Chief Fahn Kendeh and INHABITANTS OF KINDI TOWN, "their heirs", against the unlawful claim of all persons claiming any part of the above granted premises. Nowhere also in the subject deed is it indicated that "the above tract of land cannot be sold, transferred or alienated without consent of the Government of the Republic

of Liberia, it being communal property."

On the contrary, President Daniel E. Howard emphatically declared as follows:

"I, the said Daniel E. Howard, President as aforesaid, for myself and my successors in office, do covenant to and with the land."

Furthermore, nowhere from the face of the deed is it indicated, in words or by implication, that it was intended by the Republic of Liberia, in keeping with universal fundamental rules that one tenant in common or inhabitant could not maintain trespass against another, so long as both retain possession of the 204 acres of land; that the possession of one inhabitant was presumed not to be adverse to but was held to be for the benefit of other inhabitants; or that he could not convey his interest in any particular portion of the estate described by the metes and bounds, as such a conveyance would injure the rights of his cotenant or other inhabitants in case of partition; and that therefore, one of several tenant in common could not dedicate a portion of the land to the public.

Nowhere is it indicated from the face of the subject deed, in words or by implication, that all the inhabitants of the 204 acres were co-tenants and common holders or had entire possession of the whole property, and that there was a fiduciary relation among them which imposes on their mutual rights to protection, so that any act which any tenant or inhabitant did for the benefit of the property was presumed to be for the benefit of the property, and that no one inhabitant would be permitted to prejudice the rights of the other tenants. Nowhere on the face of the subject deed is it indicated, in words or by implication, that there was any fiduciary relation between the inhabitants such that one could not buy an outstanding encumbrance against the property for his own benefit, but that any purchase of whatsoever nature would inure to the benefit of all the inhabitants, although the purchaser may be entitled to receive contributions from the other inhabitants for their share of the purchase. Nowhere on the face of the subject deed are there words inserted to include any person making any portion of the 204 acres of land his principal seat of residence or business or intending to make it his or her home, or one who came to Kindi Town to contribute to the welfare of the people, or that it meant dwellers or householders, including holders in fee simple for life, years, or at will and those having interest in the land.

Apparently, the majority opinion and judgment in the March Term, 1986, seems to have been persuaded or influenced by the phrase "CHIEF FAHN KENDEH AND FAMILIES" or Kindi Town, when our distinguished colleagues then arrived at the

conclusion which they did. That conclusion did not fully consider the construction and interpretation of the deed and the ruling of His Honour Eugene Hilton, which was read out of context. Instead, the Court laid greater emphasis on the word "FAMILIES".

By definition, "families" is the plural of "family". It refers to servants in a household, household from the Latin word FAMILIA; it is the collective body of persons who live in one house; a father, mother and their children; the children of the same parents; one's husband or wife and children; a group of persons related by blood or marriage, relatives; those who descend from one common progenitor; descent, lineage; honorable descent; a collection or union of things having common source or similar features; family circle(s), a group consisting of the members of a family and intimate friends; family tree(s) chart showing the relationship of all the ancestors and descendants in a given family; all the ancestors and descendants in a given family. WEBSTER INTERNATIONAL DICTIONARY 82.

By further definition, a family, in its origin, is meant servants or slaves; but now it embraces a collective body of persons living together in one house, under the same management and head, subsisting in common and directing their attention to a common object; the promotion of their mutual interests and social happiness; a collective body of persons living together under one head or manager. All these persons who constitute the members of the same household. As used in statutes of descent, the word is usually construed to mean those who have the blood of the ancestors. BALLENTINE'S LAW DICTIONARY 456-457; 13 R. C. L. 552; 28 R. C. L. 256. And by other definition, the word "heir" is meant those persons appointed by law to succeed to the real estate of a decedent in case of intestacy. . . But in modern usage, the term as implied come in any manner to the ownership of any property by reason of the death of an owner, and may therefore include next-of-kin and legatees, as well as those who take by descent. By civil law, the term applies to all persons who are called to the succession. 9 R. C. L. 23.

The weight of authority holds that the word "HEIRS", when used in any instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and when not explained by the context, means those who would, under the statute of distribution be entitled to the personal estate of the persons of whom they are mentioned as heirs in the event of death and intestacy. But when used without explanatory context, the word should be understood in its legal and technical sense. It may, however, be construed to mean children, when it clearly appears from the other parts of the deed that it is not used by the grantor in its

technical meanings. 8 R. C. L. 1036. It means persons entitled by law to succeed to the real estate of a descendant, namely those persons who are related by blood and who would take his real estate if he died intestate. In civil law, the word applies to all those who succeed to such property, whether by will or by operation of law. 28 R. C. L. 287.

Now, reading the deed in its full context it is not difficult to concede that the Republic of Liberia, in granting FAHN KENDEH and families the 204 acres of land, did not intend to create a communal estate, it intended to create an estate in absolute fee simple to Fahn Kendeh, to be enjoyed by his families, heirs, executors and administrators forever, and not "TO THE FAMILIES IN KINDI TOWN IN 1916, SETTLEMENT OF PAYNESVILLE AND THEIR HEIRS AND SUCCESSORS: AND THAT WHOEVER PRODUCE evidence showing that his family was residence in Kindi Town in 1916 at the time of said grant is entitled to share in the common undivided ownership of said land in fee until otherwise proper petition is made to government to have said communal tribal holding divided into individual family holdings in fee as is required by law."

When used in a deed, the word "heirs" is a word of limitation and will be so taken in the absence of anything to indicate that it was used in a contrary sense; but it may be construed to mean children when it clearly appears from the other parts of the deed that it is not used by the grantor in its technical meanings. 8 R. C. L. 1036. It means persons entitled by law to succeed to the real estate of a decedent, namely those persons who are related by blood and who would take his real estate if he died intestate. In civil law, the word applies to all those who succeed to such property whether by will or by operation of law. 28 R. C. L. 287.

Further, according to authorities, the term "fee simple" defines the largest estate in land known to the law and necessarily implies absolute dominion over the land. There can be only one estate in fee simple to a particular tract of land. It is an estate of inheritance, unlimited in duration, descendible to all the heirs of the owner alike to the remotest generation, and aside from the fact that it may be created so as to be defensible and subject to executory limitations or granted or devised subject to a condition subsequent. . . . It has also been defined as an estate of perpetuity, conferring an unlimited power of alienation and which no person is capable of having a greater interest. An absolute or fee simple estate is one in which the owner is entitled to the entire property with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate. 28 AM. JUR. 2d., *Estate, § 10,* at 81.

Again, it is a well established common law rule that words of inheritance such as the word "heir" or its equivalent, were necessary in a deed in order to convey an estate in fee simple to the grantees. 28 AM. JUR. 2d., *Estate,* ∫ 14, p. 87.

The *habendum* CLAUSE IN A DEED, "to have and to hold", defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee. The office of the *habendum* is properly to determine what estate or interest is granted by the deed, though office may be performed by the premises, in which case the *habendum* may lessen, enlarge, explain or qualify but not totally contradict or be repugnant to estate granted in the premises. BLACKS LAW DICTIONARY 639 (5th ed.).

Because we are of the considered opinion that the opinion and judgment of the March Term of 1986 (1) did not settle and afford the reliefs sought by the parties from uncertainty and insecurity with respect to their rights, status and other legal relation, in that the judgment did not terminate the controversy or remove the uncertainty; did not liberally construe the deed of President Daniel E. Howard was not affirmative or negative in form and effect of a FINAL JUDGMENT; did not fully determine the question of the construction and validity of the DEED arising under the statutes, contract or franchise of the portion and obtain a declaration of the rights, statutes or other legal relation thereunder, did not adjudicate the rights of the executors, administrators, heirs, and next-of-kin who are all members of the Fahn Kendeh's families; did not ascertain and determine the class of heirs, and next-of-kin or other fiduciaries to the estate; did not determine question arising in the administration of the estate; failed to state that it had refused to render or entered a declaratory judgment where such judgment, if rendered, would not have terminated the controversy giving rise to the proceedings; did not review the judgment of His Honour Eugene Hilton in the same way as other judgments; did not reflect by evidence the relationship of the contending parties to FAHN KENDEH AND FAMILIES and to distinguish between FAHN KENDEH AND FAMILIES AND FAHN KENDEH; and the families; and did not reflect by evidence or otherwise the relationship of the contending parties to Fahn Kendeh, either as heir, heirs, collateral heirs, conventional heirs, heir legal, heir of provisions, heir and assigns, heir by blood, heir of the body, collateral consanguinity and collateral descent, so as to determine who is actually entitled to the parcel of land as grantees, thus rendering a declaratory judgment construing the land grant from the Republic of Liberia to Fahn Kendeh and families, and ascertaining and removing the uncertainties, we find it very difficult to uphold the opinion and judgment of the March Term, A. D. 1986.

Therefore, in view of all that we have observed both in term of law, facts and circumstances, as are brought out in the briefs and arguments of the parties, and because the A. D. 1986 March Term opinion and judgment of this Court had patently overlooked the enumerated decisive issues which were raised in the petition and prayer of the petitioner in the Civil Law Court for the Sixth Judicial Circuit, during its September Term 1983, and argued before this Bench, it is our considered opinion that the opinion and judgment of His Honour Eugene Hilton, quoted herein below word for word is correct:

"The petitioners who are lineal heirs of the late Fahn Kendeh as well as administratrix and administrator respectively, of his intestate estate, have prayed this Court to render a declaratory judgment construing the Aborigine Land Grant to Fahn Kendeh and families from the Republic of Liberia and thus ascertain and remove uncertainties as to who are the actual grantees under the said land grant.

The petitioners contend that they are daughters and sons of Chief Fahn Kendeh and that since the 204 acres of land was granted to their father "Chief Fahn Kendeh and families", the property after his death, descended to them and their families; and that the respondents, who are not lineal heirs of the late Fahn Kendeh, cannot have superior rights to the property.

The respondents alleged in essence that they are lineal heirs of the late Kema Kpendi, purported sister of Chief Fahn Kendeh; that the phrase "Chief Fahn Kendeh and families of Kindi Towns, in the deed does not refer to Chief Fahn Kendeh and his immediate family, but to the respective families of Kindi Town which, according to respondents, include petitioners, on the one side, and respondents on the other, thus making them joint owners of the property; that the late Chief Fahn Kendeh parted with the property before his death by executing a guaranty deed on January 10, 1958 in favour of Bindu Safrua, Kaial, Dongo, et. al.; that as joint owners of the property, they and petitioners sold a portion of the property to Rev. Lartey and others; and that the deed conveying the type land speaks for itself and therefore there was no uncertainty as to the ownership of the said property.

The evidence adduced at the trial shows that the late Fahn Kendeh died on November 14, 1957, leaving seven children: Bindu Kendeh, Treni Kendeh, Gama Kendeh, Gbessie Kendeh, Kula Kendeh, Lami Kendeh and Gboto Kendeh and that Fahn Kendeh was the only surviving child of the late Kendeh Worrel.

Co-respondent Armah Kamara produced two witnesses, his sister Saulla Kamara and

Mr. Bai T. Moore, who testified that Kema Kpeno, mother of Armah and Safula Kamara, were John Kendeh' s sister; but on cross examination, it was revealed that in an ejectment suit between Bindu Kendeh and Safula et. al., lineal heirs of Kema Kpene, decided by the Supreme Court on April 29, 1977, the same Safula testified that she did not know Fahn Kendeh and that she bore no relationship to Fahn Kendeh. The relevant part of that opinion, at page 14, is as follows:

"She also testified that she did not know anyone called by the name of Fahn Kendeh but she knew someone that Fahn Karpai and that was Bendu's's father. That Kahn Kendeh alias Fahn Karpai bore no relationship to Kindi Worrell. He was a Gbandi man who lived in Kindi Town like the others as Fahn Karpai and Bendu Karpai. When asked where did Fahn Karpai come from to be in Kindi Town, she replied that he came from Grand Cape Mount County, but firstly lived at Ziamah, but later migrated to Kindi Town under unpleasant circumstances.

She could not reconcile her testimony in this case with her testimony in the previous case, thus creating a doubt as to the relationship between her mother Kema Kpene and Fahn Kendeh. On the cross, Bai T. Moore admitted that he did not know the real relationship between Fahn Kendeh and Kema Kpena, but that he was testifying as to what was told to him.

Except that co-respondent Henry Kollie is an uncle of co-respondent Armah Kamara, his relationship to petitioner or to Fahn Kendeh was not established.

In the face of the evidence showing that Fahn Kendeh, died on November 14, 1957, a doubt is raised with respect to the deed, Kema Kpana and Jartu Kedeh whose names do not appear anywhere in the deed.

The deed presented by respondents evidencing a conveyance of land to Rev. Lartey does not show that the land was disposed of jointly, only that it was witnessed by respondents. But even if the deed were signed jointly, that in itself does not make respondents owners of the parcel of land.

It having been established from the evidence that petitioners are the lineal heirs of Chief Fahn Kendeh, the important issue is whether the grant is to Chief John Kendeh and the families of his lineal heir, of Kindi Town as petitioners contend, or whether it is to Chief Kendeh and the other families of Kindi Town as averred by respondent. We do not agree with respondents that there is no uncertainty as to ownership of the said property because if this were true, a dispute as to whom the

land was conveyed would not arise. Clearly, there is a need to declare the fights, status and other legal relations of the contending parties in the proceedings; equally so there is a need to have determined a question of construction arising under the land grant. *See* Civil Procedure Law, Rev. Code 1: 45.1- 43.3 and 43.10.

Among the rules for the construction of deeds, there is a requirement that deeds should be construed favorably and as near the intention of the parties as possible, consistent with the rules of the law. The construction ought to be put on the entire deed; and the whole deed ought to stand together, if practical."

In reviewing the aborigines land grant admitted into evidence, it is observed that the granting and habendum clearly reads as follows:

`Now therefore, know ye that I, Daniel E. Howard for and in consideration of the various duties of President to grant, give and confirm unto said Chief Fahn Kendeh and families as aforesaid, his heirs, executors, administrators and assigns forever that piece or parcel of land situated lying and being in the rear Settlement of Paynesville, Montserrado County, and of the Republic aforesaid. . . .

To hove and to hold the above granted premises (farm land) together with all and singular the buildings improvements and appurtenances thereto and thereof belonging to the said Chief Fahn Kendeh and families of Kindi Town, his heirs, executors, administrators and assigns as aforesaid forever. And I, the said Daniel E. Howard, President as aforesaid, for myself and my successors in office do covenant to and with the said Chief Fahn Kendeh, his heirs, executors, administrators and assigns that at the ensealing hereof, I, the said Daniel E. Howard, President as aforesaid, and my successors in office, will forever warrant and defend the said Chief Fahn Kendeh and families, legal heirs, executors, administrators and assigns against the lawful claims and demands of all persons above granted premises.'

It is our opinion that the intent of the grantor is that the property would be conveyed to Chief Kendeh, and there-after it would descend to his heirs and their families. If it were intended otherwise, then the word "their" instead of "his" would have been used in referring to heirs, administrators, etc.

This being so, the petitioners who are lineal heirs have a superior right to the property. Both Safula and respondent Armah Kamara admitted that petitioners are the children of Fahn Kendeh. The respondents, according to the evidence, bear no relationship to Chief Fahn Kendeh, and therefore, they are not entitled to inherit

from him. Even if they claim that they are nephews and nieces of Chief Kendeh, they would be morally collateral relatives who cannot supersede the lineal heirs. *See* Decedents' Estate Law, Rev. Code. 8:3.2 (b) which reads:

"If the decedent leaves surviving one or more lineal decadents but no spouse, the entire estate to the children and to the issue of any deceased child in accordance with the provisions of section 3.41." *See* also *Cole v. William,* 10 LLR 370 (1950).

Credence cannot be given to the deed allegedly executed by Frank Kendeh in 1958, in view of the evidence adduced showing that the said Fahn Kendeh died in 1957 - a fact which respondents have not denied.

We therefore rule that the clause in the land grant "to Chief Fahn Kendeh and families", refer to Chief Kendeh and his immediately family, and therefore the Petitioners, being lineal descendant of Chief Kendeh are the lawful owners of the property in keeping with tine law governing descent and distribution of the intestate estate.

Given under my signature and seal of court
this 21st day of October, A. D. 1958. Eugene L. Hilton
ASSIGNED CIRCUIT JUDGE PRESIDING"

The same is sound in law and therefore affirmed and confirmed to all intents and purposes. The Clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment, with instructions that it resumes jurisdiction of the cause of this action and enforce its judgment. And it is hereby so ordered.

Judgment affirmed.

MR. JUSTICE KPOMAKPOR *dissents.*

Although I agree with some of the conclusions reached today by the Court, I have found myself unable to harmonize my legal convictions with those of the rest of my colleagues in their opinion arrived at as regards the motion for reargument. Hence, I did not sign the opinion of the Court on said motion; and therefore this dissenting opinion on said motion.

The above entitled cause was disposed of during the March Term, A. D. 1986, of this Court, in which judgment was rendered in favour of the respondents/appellants,

referred to hereinafter as appellants. The essence of the Court's opinion, delivered through our former colleague, Mr. Justice Jangaba, was that the land grant was a special fee simple communal property which vested title in Chief Fahn Kendeh, his family and other families in Kendeh Town at the time the grant was made in 1916. I am convinced that this was the only possible result given the facts and circumstances and the deed involved.

The present petitioners/appellees, referred to hereinafter as appellees, were petitioners in proceedings for a declaratory judgment in the trial court. Feeling that some vital points of facts and law had been inadvertently overlooked by this Court in its 1986 opinion, the petitioners filed a nine-count petition in the office of the Clerk of this Court for a reargument of the case. Of the nine counts, count one was withdrawn by the appellees. The remaining points, stressed by them in their brief and argued before us, are these:

1. That this Court overlooked and failed to decide or determine the all-important issue regarding the rights of the parties to the 204 acres of land.

2. That the opinion of the court inadvertently referred to the answer and amended answer in the court below as having stated that had the grant been meant for Chief Fahn Kendeh and his immediate family, it would have been limited to 25 acres and not 204 acres; when indeed this issue was never pleaded by the appellants.

3. That this Court overlooked the issue of whether the appellants established any evidence as to their being either lineal or collateral heirs of Chief Fahn Kendeh.

4. That the Court overlooked the fact that in the case of *Karpai, et al v. Sartlor, et al,* 25 LLR 3 (1977), the appellants disavowed any relationship to either Chief Fahn Kendeh or the appellees; said issue having been raised in the petition and brief of petitioners and argued before this Court.

In resisting the petition for reargument, the appellants filed a three-count brief, in which the following points were emphasized:

1. That the Court did not overlook any important point; in that the Court decided the main issue raised by the pleadings; that is, the Court construed the instrument of grant to be communal property to chief Fahn Kendeh, his family and other families of Kendeh Town.

2. That. the Court was legally correct when it elected to consider only issues it deemed meritorious in determining the case, and that its failure to pass upon all issues raised by a party is not necessarily a ground for which reargument will be granted.

In my opinion, the issues raised by the motion for reargument and the resistance thereto are as follows:

1. Whether or not the allegation of the appellees that this Court inadvertently overlooked and failed to decide the central issue regarding the rights of the parties to the 204 acres of land is supported by the records and the 1986 opinion of this Court?

2. Whether or not this Court inadvertently overlooked the issue as to whether the appellants established any evidence to the effect that they are lineal or collateral heirs to the late chief Fahn Kendeh, which issue was raised in the appellees' brief.

3. Whether or not the contention of the appellees that the 1986 opinion of the Court inadvertently referred to the answer and amended answer in the court below as having stated that had the 204 acres grant been meant for Chief Fahn Kendeh and his immediate family, it would have been limited to only 25 acres?

4. Whether or not this Court inadvertently overlooked and failed to pass upon the issue of appellants disavowing any relationship to Chief Fahn Kendeh as reported in the case of *Karpai et. al. v. Sarfloh et. al.,* 26 LLR 3 (1977), which issue was raised in the court below as in appellees' brief and argued before this Court?

This briefly is the synopsis of the thrust of the arguments of the parties before this Court. I shall resolve these issues in the reverse order.

In Rule 9, Part 1, of the Supreme Court Rules, it is stated:

"Permission for - For good cause shown to the court by petition, a reargument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking some facts, or points of law."

The Liberian Law Reports are replete with opinions of this Court which hold that: "A petition for reargument is not granted to challenge the opinion and judgment of the Supreme Court on points of law and facts raised and already decided by the Court simply because the petitioner is of the opinion that the Court is wrong in its conclusion on the law and facts. Reargument is intended to call the Court's attention

to the points of law and fact previously raised in the argument and which the Court inadvertently overlooked to pass upon . . . ." *American Underwriters Inc. v. Fares Import-Export,* 30 LLR (1982); also cited was the *case; Intrusco Corp., et al v. Tulay, et al,* 32 LLR 35(1984).

Reargument is for the "purpose of demonstrating to the court that there is some decision or principle of law which would have controlling effect and which has been overlooked, or that there has been a misapprehension of facts." BLACK'S LAW DICTIONARY (4th ed.).

Since I am passing upon a motion for reargument, I am limited to the issues raised in the pleadings and argued before this Court, but which, according to the appellees, were inadvertently overlooked by this Court. Before going any further, I would like to point out that the Revised Civil Procedure Law mandates the courts to render declaratory judgments which will terminate the uncertainty or controversy giving rise to the proceeding. The courts are also commanded to construe and administer chapter 43, declaratory judgments, liberally. Civil Procedure Law, Rev. Code 1: 43.5 and 43.10.

With respect to the fourth issue, the appellees contended that they raised in their petition, their brief to this Court, and in the court below the fact that in an earlier *case Karpai, et. al. v. Sarfloh et. al.,* 26 LLR 3 (1977), the appellants had disavowed, when that case was being tried, having any relationship or ties to Chief Kahn Kendeh and to the appellees. This point, appellees argued, was overlooked by this Court in its March Term opinion, handed down during the 1986 Term. See count 8 of the petition for reargument.

In resisting the said point, the appellants contended in their amended answer, at count 7, that the issues in the case of *Karpai, et. al., supra,* was not relevant to the case at bar. They noted that the land referred to therein is not one and the same as that in the instant case. I am in accord with the appellants' position on this issue. While it is true that Justice Jangaba made no mention of the *Karpai, et. al.* case in the 1986 opinion of the Court, this Court held in *Lamco J. V Operating Company (LAMCO) v. Verdier,* 26 LLR 445 (1978), that the Court need not pass on every issue raised in the bill of exceptions or in the brief. The practice in this jurisdiction has been for the Court to pass upon those issues it deems meritorious and properly presented. Therefore, in my opinion, the failure of Justice Jangaba in not traversing this issue did not in any way prejudice the interest of the appellees so as to warrant a reargument. Argument need not be made in support of the fact that the instrument before the

Court for construction was the one under which the parties had based their claims and not the one in the case of *Karpai, et. aL case, supra.*

With respect to the third issue, the appellees have averred in count two of their petition for reargument that the Court, speaking through our former colleague, Mr. Justice Jangaba, had made a mistake in suggesting that the appellants had raised in their answer and amended answer the issues that the aborigines land grant in the case at bar was not limited to 25 acres of land for each family, as had been the case in the past, but that this particular grant was 204 acres because the intent of the grantor, the Republic of Liberia, was to create a community grant in exchange for the votes of the grantees, chief Fahn Kendeh and families of Kendeh Town. This contention of appellees, that is, that these issues were not mentioned in the answer and amended answer of the appellants is correct, even though the said issues were raised in the brief, at count 2, on page 2, and argued by the appellants in 1986. I do concede, therefore, that the Court inadvertently stated that the appellants had contended in the court below that the huge size of the grant, 204 acres, instead of the normal 25 acres for a family, was an indication that the grantor had intended to convey the land to other grantees than to only Chief Fahn Kendeh and his immediate family.

This brings us to the consideration of the point whether or not this inadvertency on the part of the Court was relevant and cogently in favour of the appellees to the extent that they should be awarded a reargument? Considering the facts and circumstances in the case at bar, I am not in accord with the view of the appellees that this inadvertence constitutes a palpable mistake for which reargument will lie. A careful reading of the Court's opinion of 1986 will reveal that the size of the grant involved was not the only overriding factor. There were other relevant factors which were obviously taken into consideration by the Court. For instance, Justice Jangaba said on page 2 of the Court's opinion: "As evidence of said community ownership, they proferted two warranty deeds showing how both parties had jointly issued the same as point owners over these years . . .." It is my opinion that rather than size, it has also the manner in which the parties have used the land over the years that influenced the opinion of the Court. I will say more about the effect of custom and usage on property of this kind by the grantees later in this dissenting opinion.

Although the size of the grant was not raised as an issue by the appellants, as the Court had inadvertently stated, the issue was, however, indirectly raised in count 2 of the amended answer;

"2. Respondents say that the allegation contained in counts 2 and 3 of petitioners'

petition that the subject property consisting of204 acres of land, petitioners' exhibit 'n', aborigines land grant from the Republic of Liberia, was executed in favour of the late Chief Fahn Kendeh and his immediate family, is false and misleading. The aborigines land grant was in fact executed in favour of 'Chief Farm Kendeh and the families of Kendeh Town, quoting the words of the deed, clearly showing that the land was to be held in common by Chief Fahn Kendeh and the respective families of Kendeh Town . . . .

As can be seen from this count of the amended answer, the issue of the size of the grant and the intended purpose or use was mentioned in the pleadings by the appellants, though not squarely raised. I will show later in this dissent that the basis of the 1986 opinion was the deed itself. In fact, both parties requested this Court, during the argument before us, to take keen judicial notice of the instrument, and I have done just that.

This brings us to the second issue raised by the appellees, stated in count 7 of the petition, wherein it was said that the Court overlooked the issue as to whether the appellants established any evidence to the effect that they were lineal heirs or even collateral heirs of the late Fahn Kendeh. This issue was also raised in the brief of the appellees, but I disagree with their contention that it was overlooked by the Court, especially since the Court held in 1986 that the grant was intended to and did vest title to the 204 acres in the families of Kendeh Town and not only the immediate family of Chief Palm Kendeh.

Rather than being overlooked, the Court dealt directly with the question of lineal and/or collateral heirs of the late Chief Palm Kendeh. On this issue, a construction of the land grant deed should not, in my opinion, permit the kind of interpretation urged upon this Court by the appellees. For instance, had the deed read, and could have so read, "to Chief Falm Kendeh and his family, an interpretation that ownership of the 204 acres were limited to Chief Fahn Kendeh and his immediate family alone, would have been plausible or reasonable. In my view, the words "to Chief Fahn Kendeh and families of Kendeh Town" conveys not only to Chief Fahn Kendeh and his immediate family, but also to other families of Kendeh Town in 1916.

I cannot join the opinion of the Court which holds that the appellants "bare no relationship to Chief Palm Kendeh and, therefore, they are not entitled to inherit from him. Even if they claim that they are nephews and nieces of Chief Fahn Kendeh, they would be morally collateral relatives who cannot supersede the lineal

heirs"

In the 1986 opinion of the Court, Justice Jangaba observed:

"In the promises of the said aborigines land grant deed cited *supra,* reference is made of the policy of the Liberian Government at the said time to induce the aborigines of this country to adopt civilization and become loyal citizens of the Republic . . . and it is pointed out that the government considered it best to grant all said aborigines land, who are to be entrusted with citizenship rights to allow them to exercise the franchise"

Justice Jangaba interpreted the grant as that of community holding in fee and as tenants in common, to allow each and every family in Kendeh Town the right to vote which was only conferred at that time, 1916, on an aborigine who held land in fee simple.

The majority held that the grant of 204 acres was a fee simple one to the grantees. The 1986 opinion of this Court also held that it was. However, Justice Jangaba, who spoke for the. Court, was rather ambivalent on this issue. For example, while holding that the grant vested fee simple title in the grantees, our former colleague also held that all families residing in Kendeh Town in 1916 were entitled to share in the common undivided ownership of said land in fee, until otherwise Drover petition is made to government to have said communal tribal holding divided into individual family holdings in fee as is required by law." Emphasis supplied.

With respect to the first and basic issue, the appellees have contended that this Court overlooked and failed to decide or determine the pivotal issue with respect to the rights of the parties to the 204 acres of land, even though said issue was determined by the trial judge. *(See* count three of the petition for reargument). A recourse to the opinion of the Court shows that Justice Jangaba did in fact address this issue, the basis of the suit. Stated briefly, the principal question before the Court is simply who were the intended grantees of the 1916 deed?

In the Court's opinion, Mr. Justice Jangaba had this to say regarding the ruling of Judge Hilton:

"It is the two clauses cited above that the learned judge referred to as conferring an absolute fee simple estate on Chief Fahn Kendeh and his lineal heirs alone, to the exclusion of any and all other families of Kendeh Town."

We, of this Bench, unanimously hold otherwise, and do hereby rule that the said instrument conferred a communal land grant on all the families that had settled in Kendeh Town at the time, including the family of Chief Fahn Kendeh who, in our opinion, was father and representative or agent of all the other families settled in Kendeh Town at that time. Hence, apparently there were no quarrels over said piece of property from 1916 when it was granted, and at that time when chiefs merely obtained such grants in order to acquire civil status for their followers, until 1918.

The question of reargument is not new in this jurisdiction. However, in *West African Trading Corporation v. Alrine (Liberia)Ltd.,* 25 LLR 3, 10 (1976), this Court said: "A rehearing will ordinarily be refused where the questions presented by the petition were argued and considered by the Court in the former hearing."

This Court has also held that a rehearing of a motion is not a matter of right; it is a question addressed to the sound discretion of the Court. *West African Trading Corporation, supra,* at p. 10.

The appellees have contended that several issues were raised in their petition, and which they say the Court failed to pass upon in its 1986 opinion. On this point, the majority is apparently in accord with the appellees. It is my opinion, however, that the appellees have not raised any pertinent issue or issues of fact and law which Justice Jangaba overlooked. However, even assuming that this allegation was true, this Court held in *Lamco J. V Operating Company v. Verdier,* 26 LLR 445 (1978), that the Court need not pass on every issue raised in the bill of exceptions or in the brief. The practice in this jurisdiction has been for the Court to pass upon those issues it deems meritorious or properly presented.

In *Nurse v. Republic,* 21 LLR 326 (1972), at page 327, it was held that reargument of a cause may be allowed by petition when some palpable mistake has been made by the Court inadvertently overlooking some fact or point of law. See also *Bracewell v. Coleman,* 6 LLR 206 (1938) and *Webster v. Freeman,* 16 LLR 209 (1965).

A reading of the Court's opinion of 1986 shows that the Court not only discussed lengthily the glaring irregularities committed by the trial judge in respect to the construction placed on the land grant deed executed in 1916, but in doing so, it condemned in the strongest possible terms the trial court's various interpretations of the premises and habendum clauses of the deed. In my view, there was nothing more that Justice Jangaba, who spoke for the Court, could have said, so as to leave no

doubt as to the ownership of the 204 acres of land. This issue, in my opinion, was the salient point in the court below and which was decided in 1986. The nub of the petition for reargument is that this issue was not determined by Justice Jangaba who spoke for the Court. I disagree.

This Court has held repeatedly that reargument is a legal right to which a party appearing before it is entitled, provided it appears that an important issue or issues had been inadvertently overlooked or omitted from the opinion when the appeal was first heard and determined. *Bryant v. Harmon,* 12 LLR 405 (1957). There are other opinions of this Court which we cannot afford to ignore. However, reargument is not an absolute right, but will only be granted where the appellant has fulfilled all the requirements incident to appellate review, and where he shows that the opinion omitted certain contentions raised by him, the omission of which has prejudiced his cause, and was detrimental to his interest. In this respect, appellees failed to sustain the burden. The rationale behind granting reargument is simple; judges being human, they are not infallible; mistakes are bound to be made now and then. However, this Court has observed over the years that petitions for re-argument have mushroomed, most of them without a scintilla of merit. The petition at bar is no exception.

This Court has held that: "It is the duty of litigants, for their own interest, to so surround their causes with the safeguards of the law as to secure them against any serious miscarriage and thereby pave the way to the securing of the great benefits which they seek to obtain under the law. Litigants must not expect courts to do for them that which it is their duty to do for themselves." *Gaiguae v. Jallah et. al.,* 20 LLR 163 (1971). In the case at bar, the cases cited by the appellees in apparent support of their claim are diametrically opposed to the results desired. In support of their petition for reargument, for example, appellees cited several cases, the first being, *King v. Cole, et al.,* 15 LLR 15,16 (1952), where a rehearing was refused because, as is true with the appellees herein, there were no new facts presented in the application, and all the facts shown had in fact been duly considered by the Court.

In *Richardson v. Gabbidon,* 16 LLR 282 (1965), which appellees also cited and relied upon, the petitioner filed an application requesting an interpretation and construction of a judgment previously rendered by the Supreme Court in *Richardson v. Gabbidon,* 15 LLR 434 (1963). This court refused to entertain the application and ordered the same denied.

Webster v. Freeman, 16 LLR 209 (1965), was the third case appellees relied upon in filing their petition for reargument. As in the first two cases, the Court also denied

the request for reargument in the *Freeman* case, noting as ground for the denial that the petitioner had failed to establish sufficiently that any issue of law or fact was omitted in the Court's consideration of the issues advanced at the trial and review of the ruling of the Chambers Justice.

Still another case cited by the appellees was *Mark-Reeves v. Republic, 15* LLR 343 (1963). Be it civil or criminal, the rule is consistent. In denying the motion for reargument in this case, the Court stated; "Reargument of a criminal appeal will be denied where no material point of fact or law is inadvertently overlooked on the original hearing."

I have reviewed these cases, cited and relied upon by the appellees, for the purpose of indicating in this dissenting opinion the paradox which revealed that the petition for reargument as filed by appellees is not supported by appellees own authorities. Of course, the cases are vocal on the issue involved; however, they are against the appellees. Consequently, a rehearing of the argument in this case is without justification. The only logical conclusion to be drawn as to why the petition for reargument was filed is that the appellees, like my colleagues, saw nothing basically wrong with the opinion of 1986 except that they did not like it.

Reargument should be granted where the Court has made a palpable mistake, or inadvertently overlooked an important point of law . . . and not because, as in the instant case, the petitioner is not successful, or is dissatisfied with the opinion of the Court.

In count 6 of the petition for reargument, the petitioners said therein:

"6. That the petition for declaratory judgment was to determine the rights of the respondents/appellants and the petitioners/appellees to the 204 acres of land. This issue has been inadvertently overlooked in your Honour's judgment and opinion rendered on August A. D. 1986. The purpose of the petition for declaratory judgment was to determine the rights of the respondents/appellants and the petitioners/appellees to the 204 acres of land. This issue was determined by the trial judge, for which the respondent/appellants appealed, but inadvertently your Honours overlooked this salient point in your opinion." Emphasis supplied

While I am in complete agreement with the contention of the appellees that this point was the salient issue, I hold the view that the said point was determined and not overlooked by Justice Jangaba.

Firstly, here is what the trial judge said on this point:

"It is our opinion that the intent of the grantor is that the property would be conveyed to Chief Kendeh, and thereafter it would decent to his heirs and their. families. If it were intended that the property would be granted to Chief Kendeh and the other families, the word 'their' instead of 'his' would have been used in referring to heirs, administrators, etc."

In concluding his ruling, Judge Eugene L. Hilton said:

"We therefore rule that the clause in land grant to Chief Fahn Kendeh and Families' refer to Chief Kendeh and his immediate family, and therefore the petitioners being lineal decedents of Chief Kendeh, are the lawful owners of the property in keeping with the law governing decent and distribution of intestate estate."

One does not have to be a legal scholar to formulate the correct theory as to why a declaratory judgment was sought by the appellees and not an action of ejectment. In an action of ejectment, "the plaintiff must recover upon the strength of his own title and not on the weakness of his adversary . . . ." *Salami Brothers v. Wahaab, 15* LLR 32, 39 (1962), and *Cooper-King v. Cooper-Scott, 15* LLR 390, 404 (1963). In an action of ejectment the essential issue is not ties of blood, but title. *See Cooper-King v. Cooper Scott, supra.* Under these circumstances, the question presented is why declaratory judgment and not ejectment? The answer to this question is clear and obvious.

Appellees are not sure of their claim and right to the 204 acres. Count 4 of appellees' amended reply supports my position:

"4. And also because further to count 2 and as to count 8, petitioners asserted that an uncertainty does exist as to who are the actual grantee that is to say whether that grant is to `Fahn Kendeh and his families' or to him and their families. Petitioners request this court to take particular judicial notice of the other portions of the deed, such as the habendum clause, where reference is made to Chief Fahn Kendeh and families of Kendeh Town, his heirs, executors . . . ." Emphases supplied.

Now, coming back to the specific question, whether or not Justice Jangaba overlooked the question as to whether the Land grant deed vested title to the 204

acres in only Chief Kahn Kendeh and his immediate family of Kendeh Town, or whether title vested in Chief Fahn Kendeh, his family and other families of Kendeh Town as well, I maintain that this question was not overlooked. Rather, it was determined by the Court in 1986. Apparently the appellees and the majority of my colleagues dislike the outcome of the result. Of course, reargument will not be granted simply because the petitioner was disappointed with the holding in the opinion.

On page 3 of the opinion, Justice Jangaba wrote for the Court:

"From what we gather from this matter, there is only one issue for our determination here; Whether or not the aborigines land grant deed issued by President Daniel E. Howard in 1916 to Chief Fahn Kendeh and Families of Kendeh Town, Settlement of Paynesville, was in fact a community grant in fee or a mere individual family grant to said chief and his family?

It is obvious that the contention that this issue was inadvertently overlooked by Justice Jangaba is not supported by the opinion and the pleadings. On page 3 of the opinion, Justice Jangaba also said that this issue was the "identical issue confronting the trial judge in the trial court, and he ruled that in fact the deed in question was an individual family plot to Chief Fahn Kendeh and his heirs . . . His Honour therefore ruled that the plot of 204 acres in Kendeh Town, the subject of this litigation, is properly the property of the lineal heirs and administrators of the intestate estate of the late Chief Fahn Kendeh of Kendeh Town." Justice Jangaba then went on: "Hence, this appeal on which appellants still maintain their position; that the said property in which all families of Kendeh Town equally shared."

Contrary to the conclusion reached by the appellees in the petition for reargument, that the opinion of Justice Jangaba overlooked and failed to determine this decisive issue regarding . the rights of the parties to the 204 acres of land, he did resolve said issue.

For their part, the appellants contended in their resistance to the petition for reargument, at count two, that the Court did decide the issue in 1986 when it construed the deed to confer a communal grant upon Chief Kahn Kendeh and the families of Kendeh Town.

On page 4 of the opinion, Justice Jangaba said: for the determination of this appeal and this issue is limited to the authority of the aborigines land grant issued by

president Daniel E. Howard in 1916, and we believe this authority will be further properly augmented by our notice of historical circumstances of the said land grant." The issue herein referred to is "whether or not the aborigines land grant deed issued . . . to Chief Fahn Kendeh and families of Kendeh Town . . . was in fact a community grant in fee or a mere individual family grant to the said Chief and his family?" In other words, our colleague saw the main issue on appeal before the court as being whether the land granted vested title in Chief Fahn Kendeh and his family only, or, in the alternative, whether, by the terms and language of the deed, title to the land was vested not only in Chief Fahn Kendeh and his immediate family, but in other families as well.

In answering this question, Justice Jangaba had recourse to the deed and what he referred to as "historical circumstances of the said land grant." During the argument of the motion for reargument, both parties requested this Court to take keen judicial notice of the aborigines land grant deed, the subject of these proceedings.

When it comes to the construction of deeds, one of the fundamental principles of law generally observed is that the intention of the parties is paramount when ascertainable.

The formal parts of a deed are the premises which designate the caption and embrace the recitals of the grantor's intention and motives; the description of the parties; and the consideration received in exchange for the property conveyed. The premises clause precedes the habendum clause. It is upon the premises of the deed that the property is really granted. The premises of the deed in question read as follows:

"TO ALL TO WHOM THESE PRESENTS SHALL COME: Whereas, it is the policy of this Government to induce the aborigines of this country to adopt civilization and become loyal citizens of the Republic, and whereas one of the best things thereto to grant land in fee simple to all those themselves to be entrusted with the rights and duties of full citizenship as voters, Chief Fahn Kendeh and families of Kendeh Town, Settlement of Paynesville, Montserrado County, Republic of Liberia, have shown themselves fit to be entrusted with said rights and duties."

From the premises clause just quoted, the grantor desired that the grantees adopt "civilization" and become loyal citizens of this country. The consideration for the grantees' loyalty to the state and their adoption of civilization was the granting to them of 204 acres of land in fee simple. This clause also shows, at least by

implication, that the grantor intended the grantees to exercise their right to vote, which they could not do without first owning real property in fee simple.

In the motion for reargument, the appellees argued that according to the deed, the Republic of Liberia, the grantor, intended to convey the parcel of land to Chief Fahn Kendeh and his immediate family, to the exclusion of other families living in Kendeh Town at the time, 1916. If we accept this line of argument and reasoning, then we must hold that the grantor was only interested in Chief Fahn Kendeh and his immediate family adopting civilization and voting, since it would be absurd to imagine that the chief had more than one family which excluded the appellants, although they were also part of a family residing in Kendeh Town. As to who the grantees are, the deed speaks for itself. In the premises clause, the grantor unequivocally identified the grantees as Chief Fahn Kendeh and Families of Kendeh Town. I repeat: Chief Fahn Kendeh and Families of Kendeh Town. How is it possible to interpret this phrase to mean Chief Fahn Kendeh and his immediate family? Since the land granted was for the purpose of inducing the grantees to adopt civilized ways of life and qualify them as voters, apparently for the benefit of the grantor, thereby making them eligible as full fledged citizens, the obvious question is whether or not this tract of land was intended for the benefit of Chief Fahn Kendeh and what the appellees and the majority have referred to as his immediate family? By what rule of grammar my colleagues have read the words immediate family into the deed in place of "families of Kendeh Town" remains a mystery to me.

The other main part of the deed is the habendum clause; it usually follows that of the premises and sets forth the estate and how it is to be held and enjoyed by the grantees. The habendum clause herein involved states:

"To have and to hold the above granted premises (farm land) together with all end singular the buildings, improvements and appurtenances thereto and thereof belonging to the said Chief Fahn Kendeh and families of Kendeh Town, his heirs, executors, administrators and assigns as aforesaid, forever. And I, the said Daniel E. Howard, President as aforesaid, for myself and my successors in office, do covenant to and with the said Chief Fahn Kendeh, his heirs, executors, administrators and assigns that at the ensealing hereof I, the said Daniel E. Howard, President as aforesaid, and my successors in office, will forever warrant and defend the said Chief Fahn Kendeh and families, legal heirs, executors, administrators and assigns against the lawful claims and demands of all persons above granted premises."

From the above quoted *habendum* clause, it is indicated that the parties intended that

the land be used for farming purposes, among others. This clause also stated that the grant was to Chief Fahn Kendeh and Families of Kendeh Town. The argument was advanced before us by the appellees that the addition of such words as "his heirs, executors, administrators and assigns" after the grantees, "Chief Fahn Kendeh and families", in the *habendum* clause, by the grantor, is an indication that the conveyance was to Chief Fahn Kendeh and his immediate family. My colleagues have also adopted this illogical interpretation. Incidentally, the words, "his heirs, executors", etc. are missing in the premises clause.

In the construction of deeds, the Court is often called upon to determine whether the deed passes or conveys or merely confers an easement on the grantee. I am in accord with the majority in their holding that the grant here is a fee simple one. In those cases in which this Court held that the grant was a "communal holding", such land was surveyed upon application made to the government, at the expense of the tribe, and that the holding is vested in the members of the tribal authority, as trustees for the tribe. In such cases, the tract of land cannot be sold, transferred or alienated without the consent of the Government of Liberia. *Karpai, et al. v. Sarfloh, et. aL,* 26 LLR 3, 5-7 (1977). As I have stated earlier, the Court held in 1986 that the 1916 conveyance was in fee but then concluded that it was necessary for a petition to be made to the government to have the communal holding divided into family holdings. Obviously, the Court was confused as to communal holding in the *Karpai case, supra,* where the fee remained with the grantor and where, as in the instant case, the fee is vested in the grantee upon the execution of the deed.

In the case at bar, the issue for determination was simply this; who are the grantees in the instrument involved? The appellees contended that from the language of the deed, the intended grantees were only Chief Fahn Kendeh and his immediate family, and that is all. This is the construction reached by the trial judge, Eugene L. Hilton, and, unfortunately, my colleagues. On the other hand, the appellants, for their part, strongly contended that the grantees intended were Chief Fahn Kendeh and other families of Kendeh Town. In order to determine the grantee or grantees in a deed, it is sometime necessary to resort to the rules of construction.

Specifically, the question at this stage is whether or not the meaning of the deed is clear or unambiguous as to who were the parties intended as grantees? I am of the opinion that the language of the deed could have certainly been clearer with respect to the intention of the parties regarding the grantees. The general rule is that the real intention of the parties, particularly that of the grantors, is to be sought and carried out whenever possible, when contrary to no settled rule of property which specifically

ingrafts a particular meaning upon certain language, or when not contrary to, or violative of settled principles of law or statutory provision. 23 AM. JUR. 2d., *Deeds,* ∫ 159. In doing so, the modern tendency is to disregard technicalities in a conveyance as ambiguities to be clarified by resort to the intention of the parties, gathered from the instrument itself, the circumstances attending and leading up to its execution, the subject matter and the situation of the parties at that time. As expressed by some courts, the "Polar Star" rule of construction is that the intent of the grantor, as gathered from the four corners of the deed shall prevail unless such intent conflicts with some statutory provision or is against public policy. Would it have been a sound public policy to grant 204 acres of land to Chief Fahn Kendeh and his immediate family for the consideration mentioned in the deed, to the exclusion of other families living in the same Kendeh Town? I say no.

Again, in the deed, the grantees designated are Chief Fahn Kendeh and families of Kendeh Town. In construing deeds, it is generally assumed that the parties to it intended each of its provisions to have some effect, from the very fact that they inserted it into the instrument. Hence, a deed will be construed as to make it operative and effective in all its provisions, if susceptible of such construction without violation of some positive rule of law. Every word, if possible, is to have effect, and a construction which requires rejection of some relevant portions is not to be admitted, except in cases of unavoidable necessity. Indeed, it has been said that the deed, as the contract between the parties, should speak the truth, the whole truth, and nothing but tune truth. 23 AM. JUR. 2d., *Deeds,* ∫ 163.

I feel that if these principles are applied in the instant case, the contention of the appellees, Judge Hilton, and now my colleagues, that the grantor of the 204 acres of land intended to vest title only to Chief Fahn Kendeh and his immediate family, cannot be sustained. Had the Republic of Liberia intended to convey this parcel of land to Fahn Kendeh and his immediate family, the deed would have been so worded. This is a simple expression which the grantor could have employed. Instead, the grantor chose to convey to "Chief Fahn Kendeh and Families", not family, "of Kendeh Town". Of course, the grantor used the additional words, "his heirs and assigns" in the *habendum* clause, but one of the rules of construction is that where certain words used in a deed are found to be repugnant to other portion thereof and the general intention of the parties, such words should be rejected. Also, the rule states that where subsequent words used in a deed are of doubtful import, such as "his heirs, assigns, executor," etc., as used in the Aborigines Land Grant involved in this case, they cannot and should not be used for the purpose of contradicting those which are certain and preceding them.

From the above analysis, I am of the opinion that there are two repugnant phrases which need to be construed so as to give effect to the intention of the grantor and grantees. These phrases are; "Chief Fahn Kendeh and families of Kendeh Town" and the subsequent one, "Chief Fahn Kendeh and Families, his heirs" added in the habendum clause. The word "and" preceding the word "families" in the habendum clause implies the conjunctive. It has been defined to mean "along with", "also", "as well as", "besides", etc. BLACK'S LAW DICTIONARY, Rev. 4th ed. Still another method used in construing instruments having two clauses or phrases which are totally repugnant to each other, is that the first shall be received and the second rejected.

Another rule of construction often resorted to by courts, when faced with a problem such as the one in the instant case, is called the practical construction of the instrument by the parties themselves. In other words, courts generally give great weight to the construction pit upon an ambiguous or uncertain deed by the parties, especially in the case of doubtful questions which must be presumed to be within their knowledge, and such practical interpretation of the parties themselves by their acts under the deed is entitled to great influence. 23 AM. JUR. 2d., *Deeds,* ∫ 171. Applying this principle to the instant case, I observe that the deed was executed as far back as 1916 to Chief Fahn Kendeh and Families of Kendeh Town, that the appellees and the appellants with all of their relatives (families), have continuously occupied and enjoyed the grant, 204 acres from 1916 up to 1985 or 1958, when Chief Fahn Kendeh apparently predeceased them. Both parties were born on this property, have houses on it and have always lived thereon. Another practical act of the parties worthy of note in this regard is the fact that at some time back, both parties, believing at the time that they were owners of the land, executed a warranty deed or deeds in favour of third parties. This custom and usage of the land in the past by both the appellants and the appellees, in my opinion, deserve great weight. After all, the custom or usage of the place where the property is located must be seriously considered in construing a deed such as the one before us.

The appellees strenuously contended that had the grantor intended to include families other than the immediate family of Chief Fahn Kendeh, the words "their heirs" and not "his heirs" would have been employed. The rule is that where "his heirs" or "her heirs" instead of "their heirs" are used in such a deed, it should be regarded as clerical errors or mistakes and the conveyance should be construed such as to permit the heirs of both grantees to take an equal share in the property, and this is my view. In applying this rule, grammatical sense is to be ignored where, as in the instant case, a

contrary intent is apparent. 23 AM. JUR. 2d, *Deeds,* ∫ 210.

I am convinced that all of the points raised in the petition were raised in the lower court and argued before this Court during its March Term, 1986, and therefore, the contention that this Court failed to pass upon them is not supported by the 1986 opinion.

While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with that portion of it which converted the phrase, Chief Fahn Kendeh and families of Kendeh Town" into "Chief Fahn Kendeh and his immediate family", for in so doing, this Court awarded the 204 acres of land to appellees and excluded the appellants who, like the appellees, have their dwelling houses on the premises and have lived there all their lives. I therefore dissent.