THE LIBERIA TRADING AND DEVELOPMENT BANK (TRADEVCO), by and through its Chief Executive Officer, DR. STEFANO PELLEGRINO, Petitioner, v. **HIS HONOUR JOHN H. MATHIES**, Judge, Debt Court for Montserrado County, and **CAVALLA RUBBER CORPORATION**, by and through its Director, B. SPEEKEART, Respondents

PETITION FOR RE-ARGUMENT.

Heard: November 10, 1999. Decided: December 16, 1999.

1. The authority of a Justice of the Supreme Court of Liberia or a judge of a subordinate court to perform his or her judicial functions is limited to the performance of such acts within his or her jurisdiction. And judicial function performed outside of the jurisdiction of Liberia is null and void *ab initio* and of no effect whatsoever.

2. If a pleading is not properly verified or certified, or if it is verified or certified with intent to defeat the purpose of verification and certification provided by law, it may be stricken.

3. An attorney shall be appropriately disciplined for wilfully violating the requirement of law for the verification or certification of papers filed with courts when such papers are required to be verified or certified.

4. Under the last pleader rule, the party filing the last pleading is entitled to move the court first on any legal defects in his adversary's pleading.

5. In order to qualify as the last pleader for purposes of attacking an amended pleading, the party must withdraw and file a new pleading in response to the amended pleading.

6. A party will not be permitted to move the court on any legal defect in the pleading of his adversary to which the attention of the court had not previously been called by some regular pleading.

7. Reargument of a case before the Supreme Court will only be granted in special and exceptional cases when decisive issues were inadvertently overlooked in deciding the case, and which, if not overlooked, would have affected the outcome of a matter.

8. A petition for reargument is not intended 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 of the law and facts.

9. The Supreme Court will not grant reargument merely because the decision upon any particular issue did not satisfy the petitioning party

10. An answering affidavit is limited to traversing factual issues, not legal issues, raised in a motion; which factual issues are not admitted by the proponent of the answering affidavit.

11. An answering affidavit is not permitted in any proceeding other than a motion. It may not be used to traverse the returns of a party in special proceeding or remedial processes before the Supreme Court.

12. In the absence of statute or decisional laws on an issue, Liberian courts are permitted by the reception statute to refer to and apply the relevant authoritative treatises, digests and case law of either the United States or England in the determination of a case.

In a certiorari proceeding in which The Liberian Trading and Development Bank was petitioner and the Cavalla Rubber Corporation was the main respondent, the Supreme Court affirmed the ruling of the Chambers Justice denying the issuance of the writ of certiorari. The Liberian Trading and Development Bank therefore sought to obtain a rehearing of the matter on the grounds that the Supreme Court had inadvertently made certain palpable error by overlooking important points of law and facts in the determination of the certiorari proceeding.

The concurring justice signed and approved of the petition for reargument in the city of Abidjan, Republic of La Cote d'Ivoire, while he was en route to the United States. Respondents contended that the concurring justice could not exercise his judicial powers and authority to approve of a petition for reargument while outside of his jurisdiction (Liberia). The Supreme Court sustained this position, using as the basis therefor decisions of the United States Supreme Court and several state courts of the United States.

Also, in response to the returns filed by respondents in this reargument proceeding, petitioner filed an answering affidavit. The Supreme Court overruled the answering affidavit for reason that firstly the answering affidavit is a paper reserved by rules of court for a motion and not for a petition; and secondly, the purpose of the answering

affidavit is to traverse factual issues and not to raise legal issues, as the answering affidavit in this case did.

Finally, the Supreme Court ruled that the issue which petitioner claimed had been overlooked was not overlooked; it was passed upon in the ruling of the Chambers Justice and the previous opinion of the Supreme Court. Accordingly, the Supreme Court held that reargument would not be entertained in any event.

Finally, the Supreme Court found that the petition for reargument had not been properly verified as required by law; and for that default, the Supreme Court penalized counsel for the petitioner by the imposition of fines.

Based on the foregoing, the Supreme Court denied the petition for reargument and reaffirmed its previous ruling.

J. Emmanuel Wureh and *Stephen B. Dunbar* appeared for petitioner. *Oswald Tweh* and *James E. Pierre* appeared for respondents.

MR. JUSTICE MORRIS delivered the opinion of the Court.

On June 4, 1999, at the close of the March A. D. Term of this Court, in a unanimous opinion delivered by Her Honour Gloria M. Musu-Scott on behalf of this Honourable Court, we affirmed the ruling of our distinguished colleague, His Honour Elwood L. Jangaba, then Justice presiding in Chambers, denying the petition for certiorari.

Thereafter, on June 4, 1999, while Mr. Justice M. Wilkins Wright, one of the concurring Justices was in Abidjan, the Republic of La Cote d'Ivoire, en route to the United States of America, Counsellors Stephen B. Dunbar, Jr. and J. Emmanuel Wureh traveled to Abidjan, and there obtained the approval of a petition for reargument by His Honour Mr. Justice Wright.

Respondents filed their returns and subsequently withdrew same and filed amended returns. Petitioner in turn filed an answering affidavit.

The basis of the petition for re-argument is that this Court made a palpable mistake by inadvertently overlooking the permissive intent of section 9.10(3) of the Civil Procedure Law, Revised Code, when it reaffirmed the last pleader rule, which

requires that a regular pleading must be filed along with a motion to strike an amended answer.

Predicated upon these contentions and averments of the parties, as summarized from the certified records before us, the briefs filed and arguments had before this Honourable Court, we consider and deem the hereunder stated issues as salient and germane for the determination of this case, as follows:

1. Whether a concurring Supreme Court Justice can approve a petition for reargument outside his jurisdiction.

2. Whether any issues were inadvertently overlooked by the Court when it affirmed the ruling of the Chambers Justice denying the petition for certiorari.

3. Whether an answering affidavit is a valid and proper pleading to be filed in response to the filing of amended returns to a petition for certiorari.

With respect to the first issue, Rule IX, Parts 3 and 4 of the Revised Rules of the Supreme Court devolve upon any concurring Justice of the Supreme Court the right to approve a petition for reargument if presented within three days after the delivery of the opinion of the Supreme Court. Mr. Justice Wright, being one of the concurring justices would, therefore, clearly be legally authorized to approve the petition for re-argument.

The issue presented however does not go to His Honour Mr Justice Wright's unquestioned right to approve the petition for reargument; rather, it is whether he could do so while he was out of the bailiwick of the Court and the country.

Counsel for both petitioner and respondents are in agreement that this issue is one of first impression in this jurisdiction. We have conducted exhaustive research on this question and concur that this issue has never been raised or decided by this Court. We believe that this presents an important question and that there is a need to have a definitive ruling to guide future conduct and to prevent a recurrence.

Our statute, as found in Volume II, being section 40 of the General Construction Law, Liberian Code of Laws (1956), provides as follows:

"Except as modified by laws in force and those which may hereafter be enacted and by the Liberian Common Law, the following shall be, when applicable, Liberian law

... (b) the common law and usages of the courts of England and of the United States of America, as set forth in case law and in Blackstone and Kent Commentaries and in other authoritative treaties and digests."

Therefore in the absence of any prior statutes or decisional laws on this issue in this jurisdiction, we are permitted by our reception statute to refer to and apply the relevant authoritative treatises, digests and case law of either the United States of America or England in the determination of this case..

Our review revealed that the common law holds that "unless otherwise authorized by the Constitution or a statute, a judge generally has no authority to perform judicial duties or exercise judicial functions outside of the territorial limits of the county or district for which he or she was elected or appointed. Thus, any attempt by a judge to exercise jurisdiction outside the territorial limits of his or her jurisdiction is a nullity." For reliance, see 46 AM JUR 2d., *Judges* §25.

Our review of applicable United States federal and state case confirms that it is settled principle of law in the United States, and the authorities are uniform on this question, that a judicial officer can only exercise his judicial functions within his jurisdiction. Thus, in the case, *Lynde v. Counter,* 83 US 6, 21 L. Ed 272, the United States Supreme Court held that "Judicial power is necessarily local in its nature, and its exercise to be valid, must be local also."

All state courts of the United States follow this principle as can be seen from the following examples.

In *People v. Ruef* 114 Pacific Reporter 48, the Supreme Court of California ruled " . that a Justice of this Court can exercise no judicial function while absent from the State of California. The authorities agree upon the proposition that a judicial officer must exercise his judicial functions within the territorial limits of his jurisdiction."

Also in *Luther v. Luther,* 7 Division 425, the Supreme Court of Alabama ruled that "It has been held that a judicial officer can only perform judicial acts within the territorial limits within which he is authorized to act."

Finally, in *Philip v. Thralls,* 26 Kansas 780, the Supreme Court of Kansas ruled that "Unquestionably, a judicial officer must exercise his jurisdiction within the territorial limits of that jurisdiction. This, as a general proposition will not be questioned by

anyone... Every act of jurisdiction exercised by a judge without his territory is null and void."

We therefore hold, that in conformity with the long settled principle established in the cases cited above, the authority of a Justice of the Supreme Court of Liberia or a judge of a subordinate court to perform his or her judicial functions must be and is limited to the performance of such acts within his or her jurisdiction. Therefore, the approval of the petition for reargument in Abidjan, Republic of La Cote d'Ivoire by Mr. Justice Wright was null and void.

A collateral issue which was raised during the oral argument centered on the admission by petitioner's counsel that they predated the affidavit attached to the petition for reargument on June 4, 1999, but actually signed it in Monrovia on the 5th. Further questioning by the Court revealed that the petition for reargument which was presented in Abidjan to Mr. Justice Wright for approval on the 4th was unverified in violation of section 9.4(5) of our Civil Procedure Law, Revised Code 1, which reads as follows:

"If a pleading is not properly verified or certified, or if it is verified or certified with intent to defeat the purpose of this section, it may be stricken."

Section 9.4(6) of the same Civil Procedure Law provides for an attorney to be appropriately disciplined for a wilful violation of this provision of law.

In view of the flagrant disregard of this section of our Civil Procedure Law by Counsellors Dunbar and Wureh, who are senior counsellors of the Honourable Supreme Court Bar, we have no hesitation applying section 9.4(6) and hereby adjudge that Counsellors Dunbar and Wureh are penalized and fined in the amount of L$1,000.00 each, to be paid to the Ministry of Finance within forty-eight (48) hours after the rendition of the judgment in this case. Upon their failure to do so, they are hereby suspended from the practice of law for a period of five (5) consecutive months.

With regards to the second issue, petitioner's counsel strenuously argued that the Court inadvertently overlooked the permissive effect of section 9.10(3) of the Civil Procedure Law, Rev. Code 1, on the last pleader rule. We disagree and state categorically that this very issue was squarely presented and argued by petitioner's counsel before both the Chambers Justice and the Bench *en bane.* In both instances, petitioner's contention was not sustained.

In confirmation of this observation, we refer to this Court's opinion of June 4, 1999 during the March A. D. 1999 Term of the Honourable Supreme Court, delivered by the Chief Justice, and we recall the following:

"During argument before the Chambers Justice, petitioner argued that it was optional to file an amended reply. In other words, it was not mandatory that petitioner's reply be withdrawn and an amended reply filed as a mandatory requirement or precondition to the filing of a motion to strike. The Chambers Justice ruled, upholding the ruling of the judge of the Debt Court denying's petitioner's motion to strike on the basis of the last pleader rule" *The Liberian Trading and Development Bank v. Cavalla Rubber Corporation,* 39 LLR 578 (1999).

This Court takes judicial notice that the facts in the case *Cassell v. Campbell,* 24 LLR 239 (1975), are completely similar to the facts in the case at bar, which was conceded by the petitioner. In the *Cassell* case, the last pleader rule was upheld by this Court in the following words:

"As to the filing of a motion to dismiss the defendant amended answer upon alleged defects therein, we must state that under our practice, the party filing the last pleading is entitled to move the court first on any legal defects in his adversary's pleading. A party will not be permitted to move the court on any legal defect in the pleading of his adversary to which the attention of the court had not previously been called by some regular pleading."

The Court also takes judicial notice of the fact that the petitioners admitted and agreed that the *Cassell* case was decided after the enactment of our Civil Procedure Law, Revised Code. Contrary to the petitioner's contention, this Court, after the enactment of our revised Civil Procedure Law and being fully cognizant and aware of the permissive nature of section 9.10(3) of said law, has consistently reconfirmed and reaffirmed the last pleader rule, as evidenced by the *Cassell* case and other cases decided thereafter which dealt with the issue of the last pleader rule. For reliance, see *United States Trading Company (USTC) v. United States Trading Company Redundant Workers,* 38 LLR 436 (1997); *Tulay v. The Salvation Army,* 38 LLR 387 (1999).

This Court feels it is important to re-emphasize that reargument will only be granted in special and exceptional cases when decisive issues were inadvertently overlooked in deciding the case and which, if not overlooked, would have affected the outcome of

the matter, and will not be granted merely because the decision upon any particular issue did not satisfy the petitioning party.

In the case *United States Trading Company v. Williams and Wray,* 37 LLR 674 (1994), this Court said:

"A petition for reargument is not intended 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 of the law and facts. This Court would be setting a very ugly precedent detrimental to its dignity and repugnant to good society if it would permit parties to a suit before it to determine the relevancy of law controlling the case. As the determination and interpretation of the law is for the Court, to permit a party to the case to determine the relevancy of the law would amount to a surrender of this most important office of the Court to the whims and notions of such party."

Therefore, this Honourable Court holds that since it is clear that the issue presented in the petition for re-argument is totally devoid of any merit, it is hereby denied and not sustained.

Considering the third issue, which is whether an answering affidavit is a valid and proper pleading to be filed in response to the filing of amended returns to a petition for the writ of certiorari, we are of the opinion that the answering affidavit filed by petitioner as responsive pleading to respondents' amended returns is in violation of Part II of the Revised Rules of this Court, which clearly restricts the filing of an answering affidavit to motions. An answering affidavit is limited to traversing factual issues raised in a motion and not admitted by an opposing party. It may not traverse issues of law or the returns of opposing party in a petition in general or remedial proceedings before this Court.

The use of answering affidavit was first introduced into our legal practice in the Revised Rules of the Supreme Court of Liberia, January Term, A. D. 1915, under Rule II, Part I Motions. The first Rules and Regulations for Courts of the Republic of Liberia, edited by the late Chief Justice James A. Toliver in July 1912 did not provide for the use of answering affidavit. In fact, those Rules and Regulations of July, 1912 were limited to the circuit courts.

Today the rule on answering affidavits is Rule II Part I of the Revised Rules of the Supreme Court and it provides today as it did in 1915, eighty four (84) years ago, that

if the facts in a motion are not admitted, the opposing party shall file an answering affidavit, and there shall be a replying affidavit, if necessary. Revised Rules of the Supreme Court, January Term, A. D. 1915, 2 LLR 661; Revised Supreme Court Rules (1972).

We have not given any consideration to the answering affidavit filed by the petitioner in this petition for reargument of the certiorari proceeding for two reasons; first, because the proceeding in which answering affidavit is permitted to be filed is a motion and not a petition; and second, because the answering affidavit filed raises only issues of law.

In view of the facts, circumstances and the law controlling, it is our considered opinion that the petition for reargument, being totally unmeritorious, should be, and is hereby denied and the opinion of June 4, 1999 affirmed. Counsellors Stephen B. Dunbar and J. Emmanuel Wureh are penalized and fined in the amount of L$1,000.00 each to be paid within forty-eight (48) hours after the rendition of this judgment into the Ministry of Finance for their willful violation of section 9.4(6) of our revised Civil Procedure Law. Upon failure to do so, they are hereby suspended from practice of law directly or indirectly within this jurisdiction for the period of five (5) consecutive months. The Clerk of this Court is ordered to send a mandate to the judge of the Debt Court, commanding him to resume jurisdiction over the matter and dispose of same in accordance with law. In view of the numerous delays which have attended the trial of this case, this matter is to have priority over all matters on the docket of the trial court. Costs of these proceedings are assessed against the petitioner. And it is hereby so ordered.

Reargument denied.

MR. JUSTICE WRIGHT *dissents.*

Once again, I find myself unable to agree with my very distinguished and honourable Colleagues of the Majority and because of this I have prepared this dissenting opinion.

This case came to this Bench *en banc* on appeal from a ruling out of the chambers of Mr. Justice Jangaba, wherein he denied a petition for the writ of certiorari. The Full Bench affirmed the Chambers Justice and the petitioner filed an application for reargument, which was presented to and approved by me, Justice Wright, in Abidjan, Ivory Coast on June 4, 1999 while en route to the United States.

The subject matter of the petition for reargument and the only issue raised therein was the last pleader rule and its interpretation or application. In the petition, it was contended that this Court by inadvertence had overlooked some points of fact and law for which reargument should be granted.

Petitioner argued that in its petition for certiorari and brief filed in this Court, as well as the oral argument presented, its position was and still is that it is not a mandatory requirement that a regular pleading be first filed before the amended pleading may be attacked. It was further contended that the law which provides for amendment of pleadings is permissive in its allowing of pleading to be amended, by use of the word "may". Petitioner contended that this Court by mistake overlooked the intent of section 9.10(3) of the Civil Procedure Law, Rev. Code 1, which is, that the petitioner has the option to withdraw its reply and file an amended reply or petitioner may elect not to withdraw and refile; in which latter case, petitioner may leave its reply as the regular pleading and attack the amended answer by a motion to strike. Petitioner argued that it was a palpable mistake on the part of this Court to have ruled that petitioner is prohibited from attacking the amended answer because of the last pleader rule and, such a ruling of the Court amounted to the Court's denial of petitioner's statutory right to elect not to file any amended reply.

Respondents appeared and filed their returns, which they later amended, and which contains thirty-one (31) counts. Instead of going to the sole issue raised by petitioner as its basis for requesting a reargument, respondents, by and through their counsel, Counsellor James E. Pierre and Counsellor N. Oswald Tweh, used about seventeen (17) out of the thirty-one (31) counts (i.e. the first fifteen and two or more others) of their amended returns to launch a scathing and vicious attack orally on the person, and, in writing, on the character of Justice Wright. And during their oral argument before this Court, they persisted in their insults and insinuations against Justice Wright with the help and indirect participation of the other Justices of the Court through their questions from the Bench, which were leading, instructive and provocative.

Therefore, for the benefit of this dissent, we shall leave in abeyance the legal issue of the last pleader rule and first address the issue of Justice Wright's granting of the application for reargument in Abidjan and then revert to the real issue before the Court.

Counsellor James E. Pierre and Counsellor N. Oswald Tweh went to great lengths to create the impression that there was collusion and connivance, and that Justice Wright had acted immorally, unethically, and illegally. The presentation of respondents' counsel, with the acquiescence of the other Justices, placed Justice Wright on trial and condemnation, which they sought to veil with a plea to attach petitioners' counsel, in persons of Counsellors Stephen B. Dunbar and J. Emmanuel Wureh, in contempt for violating the "Judicial Canons" adopted as recently as January, 1999, by this very Bench of which Justice Wright is a member. Another reason to hold petitioner's counsel in contempt is for having "exposed the Judiciary to unwarranted public criticism, mockery and ridicule".

Finally, Counsellor Pierre and Counsellor Tweh did not just stop at asking that Counsellor Dunbar and Counsellor Wureh be held in contempt, but went so far as to call for taking of "appropriate and severe disciplinary actions" against them "for their illegal and grossly unethical actions, which are clearly in violation of the canons". Are the judicial canons intended to regulate the conduct of lawyers, or of judges (and Justices)?

My very distinguished and learned colleagues of the majority have granted the request of Counsellor Pierre and Counsellor Tweh by imposing fines of L$1,000.00 (One Thousand Liberian Dollars) each on Counsellor Dunbar and Counsellor Wureh, to be paid within forty-eight (48) hours or they be suspended from law practice for five (5) consecutive months.

It is interesting to note, however, that the fines were imposed on what the Majority have referred to as "a collateral issue" instead of on the main issue of violation of the rules on ethical conduct and judicial canons. But let us take a closer look at this collateral issue.

The majority opinion states:

"A collateral issue which was raised during the oral argument centered on the admission by petitioner's counsel that they predated the affidavit attached to the petition for reargument on June 4, 1999, but actually signed it in Monrovia on the 5th. Further questioning by the Court revealed that the petition for reargument, which was presented in Abidjan to Mr. Justice Wright for approval on the 4thwas unverified in violation of section 9.4(5) of our revised Civil Procedure Law." Emphasis mine.

This passage is a true account of what transpired; that is, none of the parties raised any issue of defective affidavit; certainly, the respondents did not, but rather, it was indeed raised by my colleagues of the majority, contrary to our canons of jurisprudence that courts shall not raise issues and that courts shall not do for party litigants what they should do for themselves. I submit the action to impose a fine on petitioner's counsel was a calculated attempt to get said counsel on a violation of a law because it was clear that no other law had been violated by the presentation and/or approval of the application for reargument. Even the majority concede that this case is a novelty in this jurisdiction for which there is no precedent.

It is clear that there was and still is anxiety by the majority of this Court of embarrassing, belittling and exposing to scorn Justice Wright, by using petitioner's counsel as scapegoats in the grand design orchestrated by Counsellor Pierre and Counsellor Tweh. For, why would petitioner's counsel be punished illegally for not having violated any law? To put it another way, why were petitioner's counsel not punished for what Counsellor Pierre and Counsellor Tweh called exposing the Judiciary to unwarranted public criticism, mockery and ridicule, and for illegal and grossly unethical action, but petitioner's counsel were instead punished .for presenting a petition without a valid affidavit to one of the concurring Justices, who did not raise the issue, and when respondents' counsel did not raise the issue in their returns?

Important to establishing that the imposition of fines on petitioner's counsel was the circuitous design to attack Justice Wright, it should be noted that our law provides that pleadings containing only issues of law do not need to be verified. Civil Law Procedure Law, Rev. Code 1:9.4(1). The petition for reargument had as its subject matter only one issue, which was the interpretation of and/or application of the last pleader rule. I am sure every lawyer knows that this is purely a question of law; but perhaps this may have been irrelevant to my Colleagues.

So assuming arguendo that petitioner's counsels presented an affidavit that was defective, of what legal effect is that defect vis-a-vis the pleading it sought to verify when in fact that pleading did not require verification? Even if petitioner had not attached any affidavit, the said petition would thereby be no less valid.

Petitioner's attachment of an affidavit to its petition, which raised only one legal issue, was a mere surplusage and even if it were an error, it was a harmless error because it did not or would not have added nor subtracted anything to or from the petition. In our jurisprudence, there is a maxim that "surplusage does not vitiate". The Latin

expression is "surplusagium non nocet", meaning "surplusage does no harm." Our statute also provides that "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties ". Civil Procedure Law, Rev. Code 1:1.5

Therefore, in my opinion, the action of my colleagues of the majority in imposing a fine on Counsellor Dunbar and Counsellor Wureh was grossly unfair, contrary to law, and glaringly prejudicial, as it was a, misapplication of section 1:9.4(6) of the Civil Procedure Law, Rev. Code 1, which provides for disciplinary action against a lawyer for wilful violation of a provision of law requiring verification of pleadings because section 1:9.4(1) of the Civil Procedure Law provides that the requirement for verification of pleading does not apply to a pleading containing only issues of law, as in the instant petition for reargument.

Respondents' counsel asked the Court to hold petitioner's counsel in contempt and impose severe punishment on them for exposing the judiciary to unwarranted public criticism, mockery and ridicule, and for their illegal and grossly unethical actions. But let us examine the actions of petitioner's counsel and respondents' counsel in this case.

What is illegal and unethical about a lawyer asking a court to reconsider its judgment, which is the same as the request for reargument, filed by petitioner's counsels? What was there in the act to bring the judiciary to ridicule and disrepute? Who is guilty of unethical and illegal conduct or whose conduct is more likely to subject this Court to ridicule and disrepute as between counsel for petitioner, who requested a concurring Justice to approve the application for reargument, and counsels for respondents who castigated, vilified, insulted and impugn the reputation of a Justice of this Court? They even tele-guided it in newspapers in Monrovia.

My colleagues of the majority have said that it is counsel for petitioner, but I say it is counsel for respondents. Of course, my colleagues did not see this issue in the light that I have seen it, because they acquiesced in and openly encouraged respondents' counsel in the counsel's organized move to vilify one of a Justice of this Bench, by virtue of the humorous and entertaining questions they propounded to counsel for respondents from the Bench, inciting, provoking, and encouraging them to persist in such vilification of Justice Wright. Consistent with a long line of opinions of this Court, it is Counsellor Pierre and Counsellor Tweh who should have been sanctioned and punished for publicly impugning the character of a Justice of the Supreme Court, instead of Counsellor Dunbar and Counsellor Wureh, whose only alleged offense was

to ask a concurring Justice to order reargument But that is all right. If the majority is saying (as they did) that it was a violation of the law for the order for reargument to have been signed in Abidjan, then it seems to me that it is the person who did the signing, and not the petitioner's counsel, who violated the law, because it is that person's act that led to the reargument.

Respondents' counsel called for the punishment of petitioner's counsel because petitioner's counsel were dissatisfied with the Court's interpretation and application of the last pleader rule, and who therefore concluded that this was a palpable mistake of this Court. Obviously, any party would be dissatisfied with a ruling adverse to his interest and would employ the means provided by law to have the ruling revisited. In all common law jurisdictions, it is provided that reargument of a case before an appellate court is an inherent power of that court; and in our own jurisdiction, the Rules of this Court, including its 1999 revision, provide a procedure for reargument of a case. If it were illegal or immoral or reprehensible for a party to seek review of a ruling even at the Supreme Court level, then why is there a rule of this Court providing for such procedure?

But not only was it counsel for petitioner who were dissatisfied with the Court's judgment, so also was Justice Wright, one of the concurring Justices. It must be noted that when this case was first argued before the Full Bench, and the Justices retired to consider the outcome in terms of the vote, Justice Wright voted to reverse the Chambers Justice because he did not agree, and still does not agree with the interpretation and application of the last leader rule as pronounced by the Chambers Justice and the majority in the first opinion and now reiterated in this present opinion.

After the voting, the other four (4) Justices convened a meeting in the office of the Chief Justice, to which Justice Wright was subsequently invited, and at which time Justice Wright was informed by his colleagues that the frequency and regularity with which he was publishing dissenting opinions portrays a lack of cohesion and unity within the Bench or tension and rivalry among the Justices. Justice Wright was thereupon requested to slow down dissenting from the views of his colleagues.

That was not all. Two of my colleagues averred that Justice Wright conducts himself as if he is teaching us as his students at the Louis Arthur Grimes School of Law. One of them went as far as informing me that each one of us here is a Justice in his or her own right and takes personal responsibility for every decision he or she makes, and so, Justice Wright should not threaten us. This last comment was contradictory to

their position, because my colleagues were expressing reservation and objection to my repeated dissent, but yet, claiming that each Justice is responsible for his own action/decision. I should have been left free to vote my conscience, since I would be responsible for my decision.

Following that meeting, in an attempt to cooperate with my colleagues and avoid this alleged portrayal of lack of cohesion and unity or portrayal of tension or rivalry , I acquiesced in the view adopted by the majority and thereafter signed the opinion, which made it unanimous. Had my colleagues not queried me for too many dissents, this case might not have come back on reargument because Justice Wright would have filed a simple dissenting opinion and this matter would have been laid to rest. So, with my conscience bothering me for acquiescing in a majority's opinion, which I am convinced was an error of law, this dissenting opinion was bound to come once my conscience is pricked by a petition for reargument on that issue of law, as was done by the petitioner's counsel.

The next thing which warrants discussion in this dissenting opinion is the propriety of a concurring Justice of this Court approving a petition for re-argument when said petition is presented to him in another country (Abidjan, The Ivory Coast, in this case).

Respondents, in their very lengthy treatise, set out three possibilities tending to show collusion, connivance, conspiracy and deception:

1. Justice Wright must have pre-signed a copy of the caption page of the petition prior to his departure from Liberia on the 3rd and also prior to the actual delivery of the opinion by the Chief Justice on Friday, the 4th; or

2. That Justice Wright did not leave for the United States as scheduled on the 3' d' as he had informed his colleagues; or

3. That Justice Wright's signature is a forgery.

Respondents further argued that assuming Justice Wright did not leave on Thursday night, it was still impossible for petitioner's counsel to have received the opinion from a Clerk between 3:00 to 3:30 p.m. on Friday, the 4th, prepare the petition for reargument, fly to Abidjan to locate Justice Wright in Abidjan, among more than three million people, submit the petition to Justice Wright, and obtain his approval.

Respondents' counsels also argued that if Justice Wright's signature is not a forgery, then Justice Wright must have pre-signed a copy of the caption page of the petition prior to the actual preparation of the petition' itself. Counsellor Pierre and Counsellor Tweh concluded that Justice Wright's signature was not forged; they also concluded that it was not possible for petitioner's counsels to have accomplished what they claim to have accomplished, considering the time factor. They had only one of their three concluding options remaining and that was, that Justice Weight must have pre-signed a copy of the caption page of the petition for reargument before his departure from Liberia.

If the action condemned is that of petitioner's counsel, as any reasonable person would conclude from the punishment for contempt, then why did Justice Wright's departure from Liberia become so important? I submit that my colleagues themselves must have believed the conclusion advanced by Counsellor Pierre and Counsellor Tweh on the circumstances of the approval of the petition because they took pleasure in advancing questions from the Bench, which encouraged and incited the Counsellors to remain relentless in their attacks on or castigation of Justice Wright. If this is not the case, I can't understand why my colleagues did not even care to consult with me to find out what had happened.

Let us revert to the baseless and unfounded allegation that the caption page of the petition for reargument was signed by Justice Wright before he left Liberia This allegation is very fundamental to the proceeding before this Court because all decision on cases before this Court are required both as a matter of law and custom to be secret until published from the Bench. What respondents' counsel had accused Justice Wright of, is that Justice Wright published the opinion of this Honorable Court to petitioner's counsel before the opinion was delivered from the Bench because there is no other way that petitioner's counsel could have known of the effect of that opinion and submitted a caption page of their petition for reargument or pre-signing by Justice Wright, as alleged by respondents' counsels. Yet, my colleagues of the majority did not care to inquire from me what transpired and they did not care to demand that respondents' counsel show proof of the allegations against Justice Wright; instead, my colleagues relied on the convoluted assumptions and suggestions of impropriety made against one of themselves. This conduct of my colleagues of the majority is inconsistent with a long line of opinions of this Court in contempt proceedings against both lawyers and parties litigant, who have made unwarranted and unsubstantiated allegations of impropriety against a member of this Bench. The most recent of such cases is the unsubstantiated and unwarranted allegations of judicial impropriety made by Counsellor R. Flaawgaa McFarland against His Honour

James G. Bull, former Chief Justice of this Court as reported in the case *In re: R. Flaawgaa McFarland, Contempt Proceedings,* 37 LLR 43 (1992).

I go on record to confirm, as petitioner's counsel argued, that there was no pre-signing of the petition for reargument by me prior to my departure from Liberia for Abidjan. Justice Wright admittedly has many limitations, imperfections and shortcomings; however, collusion, connivance and conspiracy are not part of them. Also, fear and timidity are not included. What I had pre-signed was the final judgment in that case and the final judgements in several other cases I had pre-signed those judgments with the agreement of my colleagues of the majority. I reiterate that I never pre-signed the caption page of the petition for reargument and would not have, under any circumstances, done so; it is not of my nature or character to do so; and my intellect is not as flawed, as respondents' counsel would seem to suggest that I would expose myself to the possibility of sanction of the most severe form by publishing an opinion and final judgment of this Court to the counsel for a party before it is rendered from the Bench.

It does not take a rocket scientist to determine that were Ito pre-sign the caption page of a petition for reargument, I would have violated a code of honor and secrecy about the opinion and final judgment of this Court before publication from the Bench and that such violation would be very obvious. So, if I had wanted to give any special assistance to petitioner's counsel, as respondents' counsel suggest in their returns and arguments before this Court, the most obvious thing to have done was to remain in Liberia, until after the opinion and final judgment were rendered, approve the petition for reargument, and then leave on the same day of the approval or the following day.

I confirm that I left Liberia on June 3rd, 1999, slept in Abidjan, Ivory Coast, and left for the United States on the night of June 4th. I was not going to the United States on a mission, which would have been aborted had I not left Liberia on June rand left Abidjan on the night of June 4th; there was certainly no "life-or-death" threat attached to my departure from Liberia. It might defy the reason and logic of respondents' counsel and my colleagues of the Bench, but given the modes of transportation at the end of the 20' h century, it is not impossible for any person to take an airplane from Monrovia, Liberia on the afternoon of June 4th, fly to Abidjan, Ivory Coast, locate the party he seeks before that party's departure for the United States the evening of June 4' on a flight that did not take off until after 11:00 p.m. that night. My colleagues of the majority might have wanted to satisfy themselves on whether petitioner's counsel accomplished such "feat" by demanding evidence to substantiate their submission

that they traveled to Abidjan by an airline on the afternoon of June 4th, found me at Hotel Sofitel, and presented their petition for reargument to me shortly before my departure for the Abidjan Airport to catch my flight to the United States; but they did not care to do so.

Any Liberian who frequently travels through Abidjan is aware that Liberians resident in Abidjan meet every flight from Liberia and give assistance to passengers in finding baggage, transportation, hotel and even checking-in at the next flight for their destinations. Any Liberian of substance, including a lowly justice of this Court, as I may be, will be recognized at the Abidjan airport and assistance would be offered to him. So to urge on this Court that petitioner's counsel could not have found me at my hotel room in Abidjan on June 4th among three million inhabitants of Abidjan is a fallacy. Petitioner's counsel needed only make a simple inquiry at the airport in Abidjan and several Liberians at the airport would be able to identify the passenger, the taxi he took to the city from the airport and the hotel or other place at which he may be situated pending his return to the airport that evening to catch his connecting flight out of Abidjan. And the truth of this matter is that both Counsellor Wureh and Counsellor Dunbar traveled to Abidjan on June 4th, presented the petition for reargument to me at my hotel room in Hotel Sofitel for approval; it was approved by me based on a single legal issue on the application of the last pleader rule. Counsellor Dunbar and I then went to Abidjan airport that evening; he was scheduled to go to South Africa and I was scheduled to go to the United States. I understand that Counsellor Wureh spent an extra day in Abidjan before returning to Liberia to file the petition for reargument.

I confirm that I left Liberia on June 3rd, slept in Abidjan and left for the United States on the night of June 4th. It is true, and perhaps might defy logic, reason and imagination that Counsellor Dunbar and Counsellor Wureh attended Court on the morning of June 4th, received the opinion and judgment by 3:30 p.m., flew to Abidjan, located me by coincidence in Hotel Sofitel, sat in my room, typed on their laptop their petition and I signed it in my hotel room and thereafter Counsellor Dunbar and I departed for the airport where I took off for New York, and he look off for South Africa, leaving Counsellor Wureh to attend the doctor the next day and return home. There is no further explanation than this because this is the truth.

I repeat that good sense and logic dictate that had I wanted to give any special assistance to petitioner's counsel, it would have been preferable to have remained in Liberia until the 4th, sign the order for reargument, fly to Abidjan and leave that same night. Certainly, no one would assume that I am lacking in good sense and logic.

Indeed, I was not under any pressure or neither was I running from anything that caused me to go to Abidjan on June 3rd and waited for the two lawyers there, as suggested by respondents' counsel. If there had been any prior arrangement between petitioner's counsel and me, I could have simply delayed my trip for one day and remained until the 4th . So what is so much talk being had about Justice Wright having left on June 3rd? If I were free to sign the order in Abidjan what would have prevented me from doing so here in Monrovia? My Colleagues and members of this Bar know very well I am not one who would entertain any fear of any of them in the discharge of my duties as I see fit or in doing anything that I would want to do.

There is another well-known maxim in Liberian jurisprudence that the "court is where the judge is". If I, Justice Wright, am in any part of the world, I continue to be a Justice of this Court and have the authority and power to perform a judicial function as simple as signing a petition for reargument in a case in which I am a concurring justice. Similarly, I am held to the same standards in that foreign country as if I were in Liberia. This reasoning was supported by this Court in the case *In re C. Abayomi Cassell, Counsellor-at-Law,* 14 LLR 391 (1961), in which this Court held that even though Counsellor Cassell was in the Federal Republic of Nigeria, not performing as a lawyer, he was still a lawyer and his conduct in making a speech and circulating it in Nigeria about the Liberian Judiciary, while a Chief Justice of Liberia was present at the same conference, was subject of contempt as though he was in Liberia. So, if a counsellor of this Court is still a counsellor of this Court even while in Nigeria, what about a justice of this Court? Does a Justice of this Court lose his judicial authority only because he has left the country temporarily? Or is his judicial authority suspended during the period of his absence from Liberia. I submit not to both questions.

Using the case *In re C. Abayomi Cassell, Counsellor-At-Law,* 14 LLR 391 in his dissenting opinion in a subsequent contempt case, *In re Contempt Proceeding Against Honourable J Laveli Supuwood, Minister of Justice,* 37 LLR 388 (1994), Mr. Chief Justice Bull said that Counsellor Cassell, "an eminent Counsellor-At-Law and one time Attorney General, was held in contempt of court and disbarred for unbecoming remarks made in the presence of the Chief Justice of the Republic of Liberia at an international conference of lawyers in Nigeria. The Supreme Court considered these remarks contemptuous. Counsellor Cassell was adjudged guilty of contempt of this Court and disbarred from the practice of law forever." (Emphasis mine) The relevance of this dissenting opinion of Chief Justice Bull to this case is that even though Chief Justice A. Dash Wilson was in Nigeria, his judicial authority and the respect to his judicial office had not been suspended and that remarks contemptuous of his high authority and office

in Nigeria by a Liberian lawyer in Nigeria was contemptuous as though the contempt had been committed in Liberia. This supports my view that a Justice of this Court does not lose his judicial power, authority or office only because he has temporarily left the bailiwick of Liberia; and accordingly, there is and was nothing irregular or improper about Justice Wright, as a concurring justice in a decided case, approving a petition for reargument within the time provided therefor, while he was in Abidjan en route to the United States.

With respect to the role, functions and responsibility of a justice of this Court and his relationship to his colleagues, Mr. Chief Justice Pierre had the following to say in his opening address for the October 1977 Term of the Supreme Court on October 1, 1977.

"That each Justice of the Supreme Court must always exercise absolute independence in his views in every position he takes in the decision of cases we hear... If independence of views was not intended, there would not be five equal votes on the Bench However, that independence of views in judicial matters should never mar nor disturb the fraternal camaraderie which is the basis of relations among the Justices. After we have differed in our views in the deliberations over a case, we leave the conference table still unchanged in our respect for each other, unmoved in our committed obligation to protect the interests of each other, and determined in our sworn duty to protect against the world the independence of the Judicial Branch of Government. Nothing must ever disturb the fraternal atmosphere necessary to the existence to a strong Supreme Court Bench". 26 LLR 519-520.

I am confident that I have conducted myself in relation to my Colleagues of the Majority on the basis of this opinion of one of the foremost jurists of our country. I wonder whether each of them is confident that in this proceeding, they have conducted themselves in relations to me in keeping with this address of Mr. Chief Justice Pierre?

Having said all of the above, let us come to the main issue involved in this re-argument, which is the interpretation or application of the last pleader rule.

All parties and the Justices are agreed that the last pleader rule is the governing factor in this case. The only point of divergence is what the rule says or how it is to be applied; but before going to that legal issue, let me give a short history of this case so that the public in general will appreciate the issue before this Court.

From the records in the case file, this case originated as an action of debt filed by TRADEVCO Bank, a Liberian bank, owned by Italian investors, against the Cavalla Rubber Corporation, whose shareholders are Belgians. In response to the complaint, the respondent, defendant in the court below, filed an answer and a motion to dismiss, which according to petitioner herein (plaintiff in the court below), was not based on any of the statutory grounds provided in section 1:11.2 of our revised Civil Procedure Law. After the motion to dismiss was assigned at the Debt Court for Montserrado County for hearing Judge Mathies was suspended from office by the Chief Justice and Judge Varnie Cooper was seconded to the Debt Court the day before the hearing. Judge Varnie Cooper entertained the argument of the motion to dismiss immediately after reading his mandate; he subsequently granted it and thereby dismissed the action of debt for a principal amount in excess of US$4.9 million, plus interests. TRADEVCO Bank announced an appeal and perfected its appeal to this Court; but here again, Cavalla Rubber Corporation filed a motion to dismiss the appeal, using the sole ground for this motion that a manager's check is not good as security for an appeal bond; only property valuation or an insurance company.

This Court, speaking in a unanimous opinion through Mr. Justice Smith, accepted the view of Cavalla Rubber Corporation to the effect that a manager's check is not good as security to an appeal bond but ruled that since the amount of the debt has been admitted and that the only issue was whether the debt should be repaid in United States dollars or Liberian dollars, it would not dismiss the case but would instead remand it. This ruling of this Court recalled several previous decisions which held that a manager's check was good security for appeal bond; and this ruling was also the subject of several re-arguments before this Court.

Be that as it may, it was this Court, presided over by Acting Chief Justice Badio, which ended the re-argument by reverting to the original opinion rendered by Mr. Justice Smith and ordered the remand of the case.

After reading the Supreme Court's mandate in the debt court, counsel for Cavalla Rubber Corporation requested the debt court to order counsel for TRADEVCO Bank to re-file the complaint and this request was resisted. Judge Mathies of the debt court ruled that the remand of the case was intended for the parties to continue with the case using the pleadings that were filed since only the motion to dismiss had been disposed of by Judge Varnie Cooper.

Having succeeded in the denial of Cavalla Rubber Corporation's request for an order for TRADEVCO Bank to file a new complaint and thereby commence the case

anew, counsel for TRADEVCO Bank then filed a motion for summary judgment, claiming that as a matter of law, as gathered from the opinions of this Court, the complaint, answer and reply, there was no genuine and material issue of fact to warrant presentation of evidence and that judgment should be rendered in its favor as a matter of law. To this motion for summary judgment, Cavalla Rubber Corporation filed a resistance; and after a hearing by Judge Mathies, the motion for summary judgment was denied. It was at this juncture that counsel for Cavalla Ruber Corporation withdrew its answer and filed an amended answer. Without withdrawing its reply, counsel for TRADEVCO Bank filed a motion to strike the amended answer in that it was not within the contemplation of the law on amended pleadings that a party, without court order, would amend a pleading that has been to the Supreme Court and back, and which had been the subject of a motion for summary judgment.

The motion to strike the amended answer is the paper that is under review in this proceeding and subject of an interpretation of the last pleader rule. That is, the Majority has held that TRADEVCO Bank was not the last pleader and so it is not entitled to make a motion to strike the amended answer.

My interpretation and application of the last pleader rule, when the application relates to amended pleadings, as in the instant case, is given herein below. The question is, is the last pleader the person who physically files a pleading or the person who is entitled to file a pleading? This question is important in light of the provision of section 1:9.10(3) of the Civil Procedure Law, Rev. Code 1, which gives the pleader responding to a prior pleading the option to withdraw his own pleading and substitute it with a new one.

The filing of an amended pleading is necessitated by new matter of the opposing party in a prior pleading. If the said prior pleading, even though amended, contains nothing new or is not worthy of specific traverse, then the responding pleader is not required to withdraw his pleading and file a new one, but rather the former pleading stands in the place of a response to such amended pleading. It does not take a genius to know that there is a difference between a reply to an amended answer and an amended reply.

I don't think the lawmakers or former Justices who elegantly graced this Bench intended that a pleader should withdraw and file an "amended" reply simply to qualify as the last pleader in order to file a motion in response to a defective amended answer, even though he did not have any reason to withdraw his reply; but this is the

impression my very distinguished colleagues of the majority have left me with. And with all due respect to them, I respectfully beg to disagree.

In my judgment, once the plaintiff files a reply and the answer is withdrawn and amended but raises no new issues worthy of specific traverse and so the plaintiff retains his reply, the plaintiff remains the last pleader by virtue of his reply earlier filed, and as such is legally able to do all things pursuant to that reply. And one of those things that he may do is that said plaintiff may file a motion challenging the amended answer, without being required to first withdraw his reply and then file an amended reply. By what parity of reasoning could it be legal for plaintiff's earlier reply to be considered valid and yet deny that he is the last pleader?

What then does plaintiff stand on to refute the contentions of the defendant in the amended answer if his reply, which he has not elected to withdraw, becomes invalid only because the defendant has elected to withdraw his answer and file an amended answer? Does this become a situation where the plaintiff is deemed to have admitted the allegation contained in the amended answer since he did not file an amended reply? If our answer is no, is it not then true that plaintiff is the last pleader?

If plaintiff is the last pleader for the purposes of having a reply, which is regarded as valid, then why is he not also the last pleader for purposes of filing a motion attacking the amended answer? Except respondents and my colleagues of the majority are saying that at the call of the case in the trial court, plaintiff will not be allowed to rely on its reply filed in response to the answer, and that plaintiff would be deemed at a trial to have admitted all the allegations of the amended answer or deny them generally. If this be true, in my judgment, that it is a misapplication of the last pleader rule.

The lawmakers were very wise when they provided for amendment of pleadings; in that, the amended pleading stands in the same place or position of the original pleading it amends. This is founded upon the doctrine known as "relation back." See Civil Procedure Law, Rev. Code 1:9.10 (4).

The "relation back" doctrine, as applicable to amended pleading, is stated clearly and distinctly in these words:

"Wherever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the

original pleading, the amended relates back to the date of the original pleading. BLACK'S LAW DICTIONARY 1289 (6th ed. 1990).

Since the amended answer in this case relates to the date of the answer (the original pleading), then one need not be a legal luminary to conclude that the reply is the last pleader as the reply was filed in response to the answer.

Let us put this theory into practical demonstration. In this case, plaintiff, petitioner herein, filed its complaint in September 1994. Defendant, co-respondent herein, filed its answer on January 18, 1995; and plaintiff filed its reply in February 1995. Defendant then withdrew its answer and filed its amended answer on April 30, 1997. Under the doctrine of "relation back," the new answer of April 30, 1997 takes the place, and stands in the stead, of the old answer of January 18, 1995 even though there is two years between them. Therefore, the plaintiff's reply of February 1995 remains valid because, by logic, the answer (now amended answer) takes the effective date of January 18, 1995 even though its actual date is April 30, 1997, and so plaintiff is still the last pleader by virtue of plaintiffs reply aforesaid, since it is after the effective date of the answer, though amended.

Respondents and my very distinguished colleagues of the majority, by this ruling today have decided that to be the last pleader, the plaintiff/petitioner herein ought to have withdrawn its reply, even though the amended answer did not warrant its withdrawal, and refile the identical reply, using the same words, just to qualify and become the last pleader. Reason is the soul of the law; but I submit that the opinion of the majority is inconsistent with law, logic and reasoning. Notwithstanding this, and this being a democracy, I must respect the views of the majority, and it is their view, though inconsistent with our statutory law and the law of other common law jurisdictions as cited from Black's Law Dictionary, that is now the law of our land. From now on, our laws have been changed to provide that in order to qualify as a last pleader for purposes of attacking an amended pleading, the party must of necessity physically withdraw his pleading and refile the same pleading even if the amended pleading has raised no new issue. We have to abide by and observe this law even though we respectfully disagree with it; hence this dissent.