LAMCO J. V. OPERATING COMPANY, represented by its General Manager, JOHN PERVOLA, Appellant, v. **TOUFFIC AZZAM** and **SOHA AZZAM,** Appellees.

PETITION FOR REARGUMENT

Heard: November 30 & December 1 & 2, 1983. Decided: December 22, 1983.

1. For good cause shown to the Court by petitioner, a re-argument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking a material fact or point of law.

2. A petition for rehearing is a request to the Court to reverse its own action by correcting errors and modifying or setting aside its own judgment. Its object is to point out material mistakes of the law or fact, or both, which it is claimed the Court made in reaching its conclusion.

3. Granting of a petition for re-argument or rehearing is not a matter of right, but is rather a question addressed to the sound discretion of the Court.

4. Re-argument may be granted on a showing of patent and prejudicial error or oversight by the Supreme Court or its officers.

5. Re-argument will be granted when an issue which has been overlooked by the Supreme Court involves an important principle and a serious doubt exists as to the correctness of the Court's decision.

6. If the Court still retain jurisdiction over the case so that it has power to modify its former opinion, it may, where it feels that it is as fully conversant with the records as it would be after a re-argument, instead of granting a rehearing withdraw its former opinion and render a different judgment.

7. There is no law which precludes a justice of the Supreme Court of Liberia from participating in a rehearing because he dissented in the original decision.

8. In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other conditions of the mind of a person may be averred generally.

9. One who knowingly accepts the benefits of a contract or conveyance is estopped from denying the validity or binding effect on him of such contract or conveyance.

10. Estoppel by deed is a bar which precludes any party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed or denying the truth of any material fact asserted therein.

11. Courts of justice cannot do for litigants that which they ought to do for themselves, otherwise they will cease to exist as the blind goddess of justice and the pillar of neutrality.

12. When no ambiguity is present in the wordings of a document then no exposition opposed to the expressed words should be made.

13. The pure language and wordings of the release and its intend being clear and having no ambiguity should have been accepted by the trial and appellate Courts as a plead in bar of any further claims by the appellees against the appellant.

14. Estoppel being the plead invoked by the appellant when the legal ground was properly set for said plead, it was an inadvertence for the opinion under review not to have given a favourable judicial credence and consideration to this legal contention of the appellant.

15. A dissenting opinion is a separate opinion in which a particular Judge announces his dissent from the conclusion held by a majority of the court, and expounds his own views.

On July 6, 1983, the Supreme Court handed down a majority opinion in an action of damages for personal injuries. In that opinion, the Supreme Court confirmed, with some modifications, the judgment of the trial court and awarded the appellees the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) as general damages for personal injury resulting from an automobile accident. Prior to instituting the action, the appellees had received compensation from the appellant in the amount of $11,000.00 as a compromise for which the appellees executed a release in favour of the appellant. The appellant, within the time allowed by the rule of Court, and taking advantage of said rule, filed a sixteen count petition praying the Supreme Court to grant it re-argument on the ground that fraud, the basis upon which the Court had rendered its prior decision, was neither pleaded by the appellees nor had the appellees set forth any particular facts and circumstances which constituting fraud by the appellant, as required by law. The appellant therefore contended that the Supreme Court thereby committed palpable mistakes in its prior decision. In the prior decision, two out of the five Justices of the Court dissented. Upon receipt of the petition for re-argument, one of the concurring Justices thereafter ordered the case re-docketed for re-argument.

On re-argument, the Court held that it had a further examination of the complaint filed by the appellees had shown that there was no allegations of fraud mentioned therein, and none was proved at the trial of the case, both of which are required by law. Hence, the Court said, fraud could not constitute the basis upon which the Court could have affirmed the judgment of the trial court. The Court noted the error made was not a mere "technical error" but a major error on an issue of law in the trial court and a palpable mistake and inadvertence by the Supreme Court. It accordingly granted the petition, overturned its previous judgment and opinion, and reversed the judgment of the lower court.

Victor D. Hne, S. Edward Carlor, J. D. Gordon, and John T. Teewia of the Carlor, Gordon, Hne and Teewia Law Offices appeared for the appellant. M Fahnbulleh Jones of the Wakolo Law Firm appeared for the appellees.

MR. JUSTICE KOROMA delivered the opinion of the Court.

On July 6, 1983, this Court handed down a majority opinion in an action of damages for personal injuries in which it confirmed, with modification, the judgement of the trial court and awarded the appellees the sum of $350.000.00 as general damages. Within the time allowed by the Rule of Court and taking advantage of said rule, the appellant filed a sixteen (16) count petition praying this Court to grant a re-argument. In substance, the contentions advanced in the petition for re-argument are:

1. That fraud was not pleaded by the appellee, setting forth the particular facts and circumstances constituting fraud as required by law and directly proven at the trial so as to warrant setting aside the release duly executed and signed by the parties. That the Court, by palpable mistakes, oversight and inadvertence, did not pass on the issue as raised in the bill of exceptions and argued in the brief.

2. That in reaching its decision, the Court overlooked the important point of law that the Release executed by the Appellees is a general release and manifestly shows the intention of the parties to release the appellant from any and all manner of claim, including property damages and personal injuries, present and future, and further manifestly shows their intention that the only matter excluded was that which related to the lost profits, pursuant to the principle of law that if the parties to a release intend to exclude any matter, they should make such intention manifestly known.

3. That in reaching its decision, the Court inadvertently overlooked the issue that no fraud was committed in the execution of the release and that no fraud was directly proven at the trial and consequently the release should have been upheld in keeping with the legal authority on the point cited by the Appellant.

4. That there was no show of ignorance or misapprehension on the part of the appellees because they had the participation and assistance of their legal counsel from the beginning up to the conclusion of the negotiation, the said counsel having prepared and submitted the claim of $18,000.00 which constituted the basis of the negotiation, resulting in a compromise settlement of $11,000.00 and for which the release was issued. That the Court inadvertently overlooked this salient point in reaching its decision.

5. That the injuries ascribed to the appellees in the decision of the Court are not the same as revealed by the medical reports and the records as a whole. That the Court overlooked this cogent point of fact.

6. That the appellant raised the issue of estoppel but never raised the issue of res judicata since no previous action was determined between the parties. However, the Court inadvertently overlooked this cogent point of fact in reaching its decision.

7. That the original copy of the release does not show any alteration, the question of alteration being a mere allegation of the appellees, the Court in reaching its decision, inadvertently overlooked the law that Courts of Justice do not decide issues on mere allegation.

8. That the Court having determined that the verdict was exorbitant or excessive, the law controlling is that a new trial should have been awarded instead of modification of the verdict from $450.000.00 to $350,000.00. This cogent point of law was inadvertently overlooked by the Court in reaching its decision.

Against these averments in the petition for re-argument, the appellees filed a six (6) count returns, resisting the contention of the appellant to the effect that:

1. The entire petition does not present issues which were overlooked in the majority opinion for which re-argument should be granted because appellees in their reply stated that the appellant fraudulently interpreted the release and the complaint and this is evidenced by the fact that the release issued, even though general in nature, but attached thereto were specific amounts which total the amounts stated in the documents attached to the said release and the checks stub together with the request itemizing what the amount in the release was paid for. This was brought into evidence by appellant. According to 45 AM JUR, 2d., Release, §§ 22 and 28, in such case the release cannot be considered a complete and total release. Hence, the majority opinion was correct when it disregarded the said release.

2. Appellees say that the issue of fraud as raised in the petition was not one of the issues raised in the pleadings so as to require that it be pleaded with particularity and proven at the trial.

3. Appellees say that the Supreme Court had a right under the law to confirm, reverse, modify a judgement of a lower court or remand the case either for new trial or for the parties to replead. In the instant case, the majority opinion in exercising such right modified the general damages in keeping with law and this is not a ground for re-argument.

4. Appellees say that the injuries complained of were confirmed by the Doctor of appellant, medical report submitted and admitted into evidence. In said medical report, it was stated that appellee, Soha Azzam took 100 stitches on her face and 854 cosmetic scars in the face and that she was unable to work because of the physical injury from November 22, 1981 to December 12, 1981 and would be partially disabled from December 13, through December 31, 1981. Appellee .Touffic Azzam suffered knee injury and right wrist injury and rib

fracture. All these were not included in the injuries in keeping with the request for the check to cover the general release.

5. Appellees say that while it is true that there were several conferences held before the amount of eleven thousand dollars ($11,000.00) was agreed upon and he, together with his counsel, read the release, the fact that the release was signed does not ipso facto relinquish their rights to institute the action of damages for personal injuries since indeed and in truth they were eyewitnesses to the request made which stipulated expressly for what the amount of eleven thousand dollars ($11,000.00) was being paid.

For good cause shown to the Court by petition, a re-argument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking a material fact or point of law. Rule of Court, Rule IX Part 1, page 43. At common law, a petition for rehearing is a request to the court to revise its own action by correcting errors and modifying or setting aside its own judgement. Its object is to point out mistakes of the law or fact or both, which it is claimed the court made in reaching its conclusion. 3 AM. JUR., Appeal and Error, § 795.

From the view point of these legal authorities hereinabove cited, a petition for re-argument or rehearing is not a matter of right on the part of the petitioner, but rather it is a question addressed to the sound discretion of the court. Under this discretion, the majority of this Court has decided to permit this re-argument so as to revise their own action by correcting the errors and modifying or setting aside their own judgement previously arrived at in the instant case. In this undertaking, our judicial task lies in our prudent and careful review of the opinion of this Court handed down on July 6, 1983 with the sole objective of pointing out mistakes of the law or fact or both law and fact which the petitioner claimed the Court made in reaching its conclusion.

In count one of the petition for re-argument, the appellant has strongly contended that fraud was not pleaded by the appellees in their complaint of damages for personal injuries, setting forth the particular facts and circumstances constituting fraud as required by law and directly proven at the trial so as to warrant setting aside the release duly executed and signed by the parties. Appellees have conceded this contention of the appellant in count two (2) of their returns when they said "that the issue of fraud as raised in the petition was not one of the issues raised in the pleadings so as to plead it with particularity and prove it at the trial."

Recourse to the two count complaint of the appellees, filed by their counsel, Counsellor Jacob Nma on January 19, 1982, shows that the said complaint is void of a speck of the plead of fraud. Hence, count one of the answer prayed for the dismissal of the entire action on the legal principle of estoppel since a complete and full settlement had been made by the appellant's insurer and the appellees had received compensation for the bodily injuries sustained by them on November 22, 1981 as a result of the motor accident and the appellees having executed a release in favour of the appellant, discharging them (appellant) from any

and all future claims whatsoever, they, the appellees were forever barred from instituting this action. This contention of the appellant as to the principle of estoppel and the absence of the plead of fraud in the complaint is also advanced and submitted in counts 2, 26, 27, 28 and 29 of the thirty-one count bill of exceptions which was approved by the trial judge without reservation. These identical issues where duly presented in the brief and argued before this Bench.

Recourse to the opinion of this Court under review shows that count (2) along with count 31 of the bill of exceptions were the only counts which the court felt "deserve comments in deciding this case" and that the rest dealt with issues that were "trivial in substance, besides being irrelevant and repetitious."

In passing on the said count two of the bill of exceptions, this is what the Court said then:

"The general rule of law is that a valid release conclusively estops the parties to revive the claims released and that the release completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release. 76 C.J.S., Release, § 41, at 674.

The rationale behind this legal principle is that the release is a compromise agreement and as long as there is a consensus ad idem, the release placed a firm clamp on all the rights of the releasor. There is good common sense behind this legal proposition as regards the court's practice in avoiding impairment of contractual obligations. Hence looking at this case purely from this angle, the appellant would appear to be correct in its contention that the execution of the release operated as an estoppel against the appellees as regards future claims. The trial judge therefore could be said to have committed a technical error in entertaining this action under such circumstances."

This view, we submit, is a very narrow one as it tends to import technicalities to defeat a meritorious cause. Courts of England, America and those of this jurisdiction, as judged from our holding in the case of Murdoch v. United States Trading Company, 3 LLR 288, text at pp. 295 and 296 (1932), have generally entertained releases and pleas of estoppel with great caution to protect the weaker parties who in most cases execute releases as a necessary evil to get their rights in time. In nine cases out of ten, releases are executed under conditions of "take it or leave it", and the execution of the releases becomes thus a necessity as the less evil. Releases issued under such conditions cannot be said to be voluntary. Economic duress may motivate the execution of a release, couple with the inability to argue at arms length with the stronger party. It is common sense that a starving man does not choose the quality of food he gets, in the same way a beggar accepts any coin given him.

Therefor in arbitrating disputes involving releases, or stipulations for that matter, the courts must be on their guard to detect those ugly motives that may have worked on the ignorance

or misapprehensions of the parties issuing such releases. Banks v. Hayes, 10 LLR 98 (1949). Thus, a release that pricks the conscience of public policy or that takes advantage of the situation should not be condoned.

"Further, the release in question, which relies on the presentation of an income tax receipt to pay the remaining $3,500.00 of appellees' claim; must be examined in its entirety as to whether or not it totally released the appellant in fact and indeed from all liabilities. In our opinion, once the release depended upon certain future event to occur before it was completed, it imports the idea that the release was in fact a conditional one and hence cannot automatically defeat all the rights of the appellees. Similarly, a release that augurs craftiness and disregards for moral conscience should not be condoned. 76 C.J.S., Release, § 27, condemns such release in the following words:

`A release may be avoided for fraud or fraudulent representations made by the releasee or his agent and relied on by the releasor to his injury; and silence may constitute fraud where there is a confidential relation or duty to speak.'

We have proceeded to quote this portion of the opinion under review which treated the contention of the appellant on the issues of fraud and estoppel in length because it is from this treatment of the said issues in the face of the appellant's legal and factual argument in the answer to the complaint, the bill of exceptions and the brief that the majority of this Bench is legally and judicially convinced that the petition should be granted. It is in the treatment of these issues that palpable mistakes were committed by inadvertence which we shall point out as we progress in this opinion. It is in this treatment that the opinion was headless and failed to pay careful and prudent attention to the legal and factual contention of the appellant by which its rights were affected.

The appellant, who was defendant in the lower court, argued strongly before this Bench that no fraud was pleaded in the complaint and proven at the trial as required by law and therefore the final judgement of the trial court on the issue of fraud was inconsistent and contradictory, in that, the trial judge ruled that "even though this is not a suit in equity but fraud is apparent and therefore must be ruled on especially our statutes abolish all forms of actions and includes all in law." The appellant maintained that if the trial court held this as a premise, it means that the fraud alleged cannot be presumed but must be directly and positively proven. This argument, in the judicial consideration of the majority members of this Bench is a sound legal argument advanced by the defendant, now appellant and should have received the due judicial consideration in the opinion now under review. On the contrary, the opinion confirmed the position taken by the trial judge and called it a "technical error" and that such technicalities should not be employed "to defeat a meritorious cause." The argument advanced by appellant regarding the appellees' failure to plead fraud is a sound legal argument and the headlessness on part of the opinion under review to give

judicial credence and cognizance to the said argument is an advertence curable by re-argument. The statutes on fraud states that "In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other conditions of mind of a person may be averred generally." Civil Procedure Law, Rev. Code 1:9.5 (2).

This Court is on record on the point of fraud at law being pleaded with particularity and specifically proved at the trial.

In 1941 while speaking for this Court, Mr. Chief Justice Grimes said that "In equity, fraud may be presumed from circumstances, but in law it must be proved." John v. Republic, 7 LLR 261 (1941). The common law is even more vocal on the point and we quote therefrom:

"When relied on as a cause of action or a defense, fraud must be specifically alleged, and the mere pleading of a conclusion is insufficient. The rules of pleadings in civil actions generally apply. In alleging fraud, it is well settled that a mere general averment, without setting out the facts on which the charge is predicated, is insufficient, as it must be made to appear by the facts alleged, independent or mere conclusions, that, if the allegations are true, a fraud has been committed. It is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer, and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, on the charge of fraud." 37 C.J.S., Fraud, § 78, p. 370.

The practice and procedure in this jurisdiction have been consistent with the legal authorities herein cited and any departure therefrom constitutes not a "technical error" but a major error on an issue of law on the trial level and a palpable mistake and inadvertence on the appellate level.

Fraud not having been pleaded by the appellees and proven at the trial as required by law, it was a palpable mistake and inadvertence for the opinion under review to have gone at length to include holdings such as these herein below quoted:

"1. In nine cases out of ten, releases are executed under conditions of "take it or leave it", and the execution of the releases becomes thus a necessity as the less evil."

2. Economic duress may motivate the execution of a release coupled with the inability to argue at arms length with the stronger party."

3. It is common sense that a starving man does not choose the quality of food he gets; in the same way a beggar accepts any coin given him."

4. Therefore, in arbitrating disputes involving releases or stipulations, for that matter, the courts must be on their guard to detect these ugly motives that may have worked on the ignorance or misapprehension of the parties issuing such releases."

5. Thus a release that pricks the conscience of public policy or that takes advantage of this situation should not be condoned."

The expression of these sentiments or holdings would have been well taken if the appellees had met the legal requirement and pleaded fraud as a foundation of their action and proven same at the trial. As these sentiments adversely penetrated into the contention and argument of the appellant whereby its rights were adversely affected, there should have been a basis or ground for their pronouncement and inclusion in the opinion under review. An opinion being a judicial "statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgement is based", should only contain such pronouncements as they relate to the facts and laws presented and controlling the case as argued by each side. BLACK'S LAW DICTIONARY 1243,1244 (4 th ed.).

In the instant case while the appellees had not presented any fact and law on fraud as the foundation of their cause of action, yet the opinion expounded upon the legal principle of fraud in their favour and to the disadvantage and disfavor of the appellant who had squarely raised this issue of law as a defense. This is a palpable mistake.

The opinions of this Court being court made laws and thereby constituting a link in the chain of our laws, should not only be in complete harmony with the statutory laws of Liberia, but should also synchronize with the common laws of England and America which have been incorporated in our laws. Where the contrary is done, our posterity on this Bench and in this Bar will find it difficult to harmonize the situation.

While it is true that the appellees' legal counsel, Counsellor James G. Johnson, upon question put to him by the trial court, attested to the appellees' claims to the effect that the release he saw on the day when the check was prepared was not the same as the one his clients, the appellees, had shown him a few days later because of the fact that the former release did not carry the phraseology of "full settlement for all injuries sustained everything else"; yet, we hold that this parol evidence, brought to light only upon the initiative of the trial court itself, constituted no basis for the opinion under review to have declared the release fraudulent. For, it is held by this Court that: "Although parol evidence is admissible to defeat a written instrument on the ground of some fraud therein, it is improper to admit evidence tending thereto when the issue has not been raised in the pleadings." Holder v. Teoh, 2 LLR 391 (1920). Hence, this parol evidence of Counsellor James G. Johnson, who was legally carrying the interest of the appellees, along with similar parol evidence of the appellees themselves had no adverse effect on the validity of the release in view of the fact that fraud was never

raised in the complaint as the law herein above quoted requires. Therefore, there was no factual and legal foundation upon which the opinion under review made the declaration herein below quoted:

"We, therefore, hold that while it is true an execution of a release ordinarily discharges the releasee from further obligations, notwithstanding, the condition and circumstances under which this release was executed shows fraudulent motive on the part of the appellant and consequently fraud will vitiate such contractual obligations ab initio". Nassre & Saleby v. Elias Bros., 5 LLR 108 (1936). This declaration and conclusion made in the opinion under review is a palpable mistake made by inadvertence, especially so when the law relied upon in 5 LLR in support of this holding is strictly speaking about relief in equity and not relief at law, as in the instant case.

We will now proceed to the second important legal contention of the appellant, in consideration of which the majority of this Bench holds that a re-argument should be granted. That contention is pivoted upon the principle of estoppel or what Black's Law Dictionary paraphrases as "a man's own acts or acceptance stops or closes his mouth to allege or plead the truth." It goes further to say that "An estoppel arises when one is concluded and forbidden by law to speak against his own act or deed. Estoppel is a bar or impediment which precludes allegation or denial of a certain fact or state of facts in consequence of previous allegations or denial or conduct of admission or in consequence of a final adjudication of the matter in a court of law." BLACK'S LAW DICTIONARY 648 (4th ed.1951). "Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the fact, of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions, and it has been said that such cases are referable, when no fraud either actual or constructive is involved, to the principles of election or ratification, rather that to those of equitable estoppel. The result produced, however, is clearly the same, and the distinction is not usually made. Such estoppel operates to prevent the party thus benefitted from questioning the validity and effectiveness of the matter or transaction insofar as it imposed a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation. And the principle of estoppel by the acceptance of benefits may operate to prevent a party from profiting by his own wrong."

"Estoppel by the acceptance of benefits finds application in many different fields and under a wide variety of circumstances, many of which are discussed in detail elsewhere in this work. One of its most important applications is to prevent a party from establishing a right or title in himself, under one provision or implication of a deed or other instrument, by ignoring or contradicting, another provision or implication which is destructive or fatally repugnant. Similarly, as a general thing, one who knowingly accepts the benefits of a contract or

conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance."

"Estoppels, according to American Jurisprudence, are said to be of three kings, by record, by deed, and by matter in pais. Estoppel by deed, being the kind applicable in the instant case, is a bar which precludes one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed, or denying the truth of any material fact asserted in it. Estoppel by deed is technical in nature, and such an estoppel may conclude a party without any reference to the moral qualities of his conduct." 28 AM JUR.2d., Estoppel, §§ 2 & 4, at pp. 600 & 602, and § 59, at pp. 677-679.

Having already passed upon the validity of the release and settled upon the fact that it is not fraudulent, we shall now proceed to show why the majority of this Bench feels that the opinion under review should have considered it a plead in bar from the assertion of any further rights by any of the parties and their privies against the other party and their privies.

Following a motor accident on November 22, 1981 involving the vehicles owned by the appellant and appellees, respectively, the appellant was charged with responsibility for the bodily injuries sustained by the appellees and other occupants of the appellees' car as well as responsibility for property damage. Upon their discharge from the appellants' hospital where they had received treatment, the appellees addressed the below quoted letter and attached it to a bill with particulars to the appellant for its attention and settlement. The letter and bill of particular read thus:

"Lower Buchanan December 30th 1981

Mr. John Pervolar General Manager Lamco J. V. Operating Company Dear Mr. Pervola: I beg leave to refer you to a motor accident which took place on November 22thl, 1981 involving your company's (Lamco J. V. Operating Company) vehicle No 561-BB driven by Charles Branch of PPF Department, and my vehicle No. A-499, driven by me, in which I sustained injury and property damage. I submit the attached bill of particular covering the injury sustained and properties lost and damaged; as you will observe from the police accident report. I shall appreciate the company remit to me the undersigned the necessary check covering the amount of $18,625.00 (eighteen thousand, six hundred twenty five dollars) for damages and losses sustained. Very truly yours, Sgd. Touffic Azzam"

BILL OF PARTICULAR ATTACHED TO LETTER

"Republic of Liberia)
Grand Bassa County)

BILL

Lamco J. V. Operating Company by and thru its General Manager, John Pervola, owner of vehicle No. 561-BB, and Charles Branch, an Employee and driver of vehicle 561-BB owned by Lamco Operating Company, charged for reckless, driving, misuse of lane resulting into injury and property damage, Grand Bassa County, Liberia ……Dr.

To: Touffic Azzam et al., driver and owner of vehicle No. A-499, of Lower Buchanan, Grand Bassa County
Liberia Cr...)

PARTICULARS:
Growing out of the accident involving vehicle No. 561-BB owned by Lamco J. V. Operating Company and vehicle No. A.499 owned by Touffic Azzam, the following are the injuries and damage sustained.

Touffic Azzam 7 natural teeth and five artificial teeth damaged	$ 3,500.00
Touffic Azzam car damaged	$ 7,300.00
Amount in cash lost from the damaged car No. A.-499	$ 300.00
Business Operation was affected for 15 days from November 22 to December 7, 1981....	$ 3,500.00
Soha Azzam (wife of Touffic Azzam lost 2 natural teeth	$ 600.00
Soha Azzam lost her eye glasses value	$ 400.00
Soha Azzam had to undergo stitches for lacerations all over the face	$ 700.00
Oldman Azzam lost of eye glasses value	$ 550.00
Oldman Azzam because of accident injury was absent from business service for 5 days,	$ 250.00
Hafed Baky because of accident injury was absent from business service for 9 days	$ 450.00
Hafed Baky sustained injury on leg, knee cap damaged,	$ 250.00
Mohoud Kateeb being a victim also sustained injury ankle sprain and was absent from business service for 11 days	$ 350.00
Taxi charter for 16 days from the 28 Dec. 1981 at the rate of $ 50.00 A day; Total …… …	$ 800.00
Taxi chartered for 2 days to and from Monrovia to Buchanan at the rate of $ 75.00; total ……	$ 150.00
$ 18,625.00	

Submitted by:

Sgd/ Touffic Azzam"

Upon the receipt of these documents, the appellant referred the appellees to its insurer who decided to negotiate with the appellees for a compromise settlement of appellees' claims as laid in the bill of particular. The amount of $11,000.00 was settled upon and paid by the appellant to the appellees as a consequence of the negotiation. This payment excluded the amount of $3,500.00, a claim by the appellees for lost of profit for 15 days during which they could not carry out their business. It was agreed upon during the negotiation that this amount would be paid by the appellant to the appellees upon presentation to the appellant of the appellees' income tax return for the quarter before the accident. Also excluded from the compromise settlement negotiated and paid by the appellant to the appellees, was a claim of third parties in the amount of $1,850.00. The negotiator for the appellant maintained that the appellees were not legally clothed with authority to sign a release on behalf of a third party and release the appellant from this claim. Hence, it was agreed upon by the negotiating parties that the amount of $1,850.00 be excluded from the bill of particular and treated separately with the third party. Upon the conclusion of these negotiations, a contractual agreement was concluded and reduced into writing, signed, sealed and delivered in the presence of witnesses. That document is herein quoted below for the benefit of this opinion:

"RELEASE OF ALL CLAIMS KNOW ALL MEN BY THESE PRESENTS

That the undersigned, being of lawful age, for the sole consideration of Eleven thousand & 00/100 dollars ($11,000.00) to the undersigned in hand paid, receipt whereof is hereby acknowledged, do/does hereby and for my/our/its heirs, executors, administrators, successors and assigns release, acquit and forever discharge Lamco J. V. Operating Company/Insurance Company of North America/Intrusco Corporation and his, her, their or its agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations, associations or partnerships of and from any and all claims, demands, actions, causes of action, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or 'which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequence thereof resulting or to result from the accident, casualty or event which occurred on or about the 22' day of November, 1981, at or near Block Factory Beach, Bassa where Touffic and Soha Azzam were hit in a motor accident causing injuries and bodily injuries to both.

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and that said releasee deny liability therefor and intend merely to avoid litigation and buy their peace.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this release contains the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

"THE UNDERSIGNED HAS READ THE FORE-GOING RELEASE AND FULLY UNDERSTANDS IT.
Signed, sealed and delivered this 13 th day of January, 1982.
Sgd. Signature not legible Sgd. Touffic Azzam
Witness
Sgd. Touffic Azzam for
Sgd. Emmanuel Herron SOHA AZZAM
Witness
"REPUBLIC OF LIBERIA)
COUNTY OF MONTSERRADO

On the 13th day of January, 1982, before me personally appeared Touffic & Soha Azzam to me known to be the person(s) named herein and who executed the foregoing release and they acknowledged to me that they voluntarily executed the same.

My term expires December 31, 1983.

Sgd. H. R. Bryant
NOTARY PUBLIC
MONT. COUNTY, REPUBLIC OF LIBERIA
$2.50 REVENUE STAMPS
AFFIXED TO THE ORIGINAL."
So as to leave nothing open in this release and to meet the provision of law controlling, the below quoted sentence was written on this side of the release to cover an important contention of both parties:

"Compensation for lost of profit will be made when complainant submits statement of tax returns for quarter before accident."

There is a legal maxim that says: INDEX ANIMI SERMO: words are the index or meaning of the mind. Once this meaning of the mind is translated and reduced into writing, they become indelible fact or event; and facts, according to Justice David, speaking for this Court, are stubborn things. Whatever may be our wishes, our inclinations, or the dictates of our passions, they can not alter the state of facts and the evidence. Jones et al. v. Dennis, 8 LLR 342 (1944), text at page 347. And so are the facts, in this case as presented by: (1) the appellees' letter of December 30, 1981, addressed to the appellant demanding the remittance of a check to cover the appellees' claims totaling $18,625.00; (2) the bill of particular attached

to appellees' letter itemizing appellees' claims without reservation; (3) the fact of the many conferences held with the appellant's insurer at which the appellees were represented by both themselves and their counsel; (4) the "RELEASE OF ALL CLAIMS" prepared and signed by the releasee and releasor (appellant and appellees) in the presence of witnesses who also signed; (5) the two (2) count complaint in which there is no plead of fraud as a ground for the action of damages.

All of these facts put together stubbornly stand against any further claims against the appellant in this case, and hence, the appellant's plead of estoppel which is legally sound in law and conclusively supported by the facts in the case should have gained the judicial consideration or this Court and, by that, the judgment of the lower court should have been reversed. On the contrary, the opinion under review was almost entirely predicated upon fraud that (the opinion) said was allegedly perpetrated against the appellees by the appellant when the facts and laws in the case did not support such a conclusion. Further, although the law provides for the position taken by the parties in which they agreed upon the settlement of the lost of profit when the appellees submitted statement of income tax returns for the quarter before the accident, yet, the opinion concluded that because of this fact, the release was conditional and did not absolve the appellant or bar the appellees from further claims. This conclusion in the opinion is a palpable mistake made by inadvertence, because the record in the instant case is void of any contention on the part of the appellees that the release was conditional so as to warrant the conclusion reached at in the opinion under review.

It is our holding therefore that the appellees having totally failed and neglected to raise in their pleadings the contention that the release was fraudulent and conditional so as to give due notice to their adversary as to what it is called upon to answer, and to place the Court in a judicial position to pass upon said issues, it was a palpable mistake by advertence for these issues to have been unilaterally raised by the Court and passed upon in the opinion under review. Courts of justice can not do for litigants that which they ought to do for themselves, otherwise they will cease to exist as the blind goddess of justice and the pillar of neutrality. The appellees in this case neither raised the issue of fraud as a foundation for their action of damages nor pleaded that the release was conditional. Consequently, any judgements embracing these issues and settling upon them in favour of the appellees commit reversible error on the trial level and palpable mistake on the appellate level. When no ambiguity is present in the words of a document, as in the case of the release in question, then no exposition opposed to the express words should be made. In the instant case, the release in question is captioned "RELEASE FROM ALL CLAIMS" and the wordings in the body of the release carry no ambiguity in themselves. No exposition opposed in meaning and intent should have been made against these express words of the release to the advantage or disadvantage of any of the parties. The pure language and wordings of the release and its

intent being clear and having no ambiguity should have been accepted by the trial and appellate Courts as a plead in bar of any further claims by the appellees against the appellant. Estoppel being the plead invoked by the appellant when the legal ground was properly set for said plead, it was an inadvertence for the opinion under review not to have given favourable judicial credence and consideration to this legal contention of the appellant.

The third important issue of contention raised in count seven (7) of the appellant's petition for re-argument is that the injuries ascribed to the appellees in the decision are not the same as revealed by the medical reports and the records as a whole.; that the Court inadvertently overlooked this cogent point of fact. In the settlement of this contention, we shall take recourse to the following records in the case as certified to this Court: (1) The medical reports on Touffic and Soha Azzam, respectively; (2) the bill of particulars attached to the letter sent to the appellant demanding settlement of the appellees' claims for damages suffered; and (3) the trial records.

The medical reports on Touffic and Soha Azzam that were introduced into evidence by both parties, as a basis for the action for the appellees and as a defense for the appellant, gave the following diagnoses and current conditions on Touffic Azzam from the traffic accident: (1) right rib fracture; (2) right knee injury; (3) right wrist injury; and (4) teeth injuries with possible teeth problem. Touffic Azzam's own testimony describing his condition as culled from sheet nine of the 40 th day's session, Monday, March 29, 1982, spoke in these words:

"After I explained to him he told me to still continue taking my tablets. I told him the tablets that had been given me, I still have enough but the pains wouldn't stop. He said to me that he the doctor was very sorry because I have a fracture on my right ribs. I asked the doctor about my right knee and my right hand, he said my right hand would get better because it was sprained, but my knee would take over a year before becoming very normal. I asked him about my teeth and he told me to go to Lamco dentist."

On sheet twelve of the same 40t h day's session, March 29, 1982, Mr. Touffic Azzam had this to say.

"He therefore called another dentist who this time is a Lebanese doctor on Randall Street and spoke with him over the phone; after the short conversation, Mr. Ananaba and I drove over to Doctor Ali's Clinic. Dr. Ali, the dentist, explained to Mr. Ananaba that it would cost at least $11,000.00 to put breaches in my mouth, and to do that, he would have to grind my teeth before fitting the breaches in. Doctor Ali wrote his findings and presented it to Mr. Ananaba."

The medical report on Soha Azzam and her testimony describing her injuries and condition are as follows: (1) several cuts in the face, cosmetic 854 scars in the face; (2) teeth injuries;

possible teeth problem. Her testimony describing her injuries as found on sheet three of the 5th day's chambers session, Tuesday, April 6, 1982 is herein quoted:

"When I came to myself, I was in the hospital and my entire face had spoiled. That is to say, seriously cut. As a result of the accident and injuries sustained, the doctor gave me one hundred stitches. And you can see it from my face. You can see that I am young lady, yet, I have an injured face. You can tell or in other words you can see how badly I look, anyone can see and observe how badly my face appears and looks. The doctor informed me that the condition of my face can not be fixed here. I have to go abroad to take plastic surgery if I wanted to have almost my same natural looks."

Bringing these facts in the medical reports and the testimonies of the appellees to bear upon the description of the injuries ascribed to the appellees in the opinion under review, we find that the opinion used the word "broke" whereas the medical reports used the words "fracture and injury" to describe the harm or hurt that was done to the bodies of the appellees. However, we have found it difficult, if not impossible, to find any evidence in the records of this case which describes Mr. Touffic Azzam's face as being "grotesquely disfigured with hundred stitches and losing twelve "fresh" teeth, his wife, Soha Azzam "damaged her two jaws", her face "awfully distorted almost beyond recognition with a hundred stitches." To this end, we hold that it is a palpable mistake in the opinion in ascribing the injuries to the appellees that are not supported by the records in the case.

Inadvertence is used in statutory enumerations of the grounds on which a judgement or decree may be vacated or set aside; a mistake, surprise or excusable neglect. BLACK'S LAW DICTIONARY 903 (4 th ed.1951). Re-argument may be granted on a showing of patent and prejudicial error or oversight by the Supreme Court or its officers. Freeman et al. v. Webster, 14 LLR 493 (1961), text at p. 502. Re-argument will be granted when an issue which has been overlooked by the Supreme Court involves an important principle and a serious doubt exists as to the correctness of the court's decision. Union National Bank v. MC.C., 22 LLR 32 (1973).

Wherefore and in view of all the facts, legal principles expounded and circumstances surrounding this case, it is our prudent, legal and judicial holding that in the previous opinion of the Court, palpable mistakes were committed by oversight, neglect and inadvertence on principle issues of law and material facts which adversely affected the legitimate interest of the appellant and thereby created a serious doubt in the minds of the majority of this Bench as to the correctness of the said decision.

The petition for re-argument is therefore granted. And since the granting of a re-argument or rehearing has the effect of withdrawing the opinion previously filed, and it then is of no force or authority, unless subsequently adopted by the court, 3 AM JUR., Appeal and Error, § 811, we hereby declare that the previous opinion in the case:

Lamco J. V. Operating Company, represented by its Manager, John Pervola of Buchanan, Grand Bassa County, Liberia, Appellant versus (ACTION OF DAMAGES) Touffic Azzam and Soha Azzam of Lower Buchanan, Grand Bassa County, Liberia Appellees

as filed on July 6, 1983 is hereby withdrawn and it is of no legal and judicial effect and the judgement of the lower court which the said opinion confirmed with modification is hereby reversed with cost against the Appellees.

To this conclusion, our distinguished Colleagues, Mr. Chief Justice Emmanuel N. Gbalazeh and Mr. Justice Frank W. Smith have refrained from affixing their signatures, being in disagreement with us and holding that:

1. No petition for re-argument is legally before this Court and therefore the hearing we had on the application for re-argument was a fruitless exercise.

2. The two Justices who dissented in the original decision of the bare majority were not entitled to sit and participate in the hearing of the application for re-argument and to discuss as to whether or not there was mistake made in the original decision.

3. For the Court to alter or change its opinion and judgement originally given, there must be a re-argument of the cause allowed on the hearing of the application for re-argument upon re-submission before reaching a different decision, but not to set aside or change or alter the original decision merely upon holding of the dissenters, who were not entitled to sit on the application asking for re-argument.

4. The petition of the appellant for re-argument fails to point out those issues which were presented to the Court in the brief for consideration by the Court but which the Court inadvertently overlooked, or the points of law or facts which the Court allegedly overlooked and failed to pass upon.

Our dissenting colleagues maintained that no order was given by the concurring Justice before whom the petition for re-argument was filed as contemplated by law. In that they argued that no order for the docketing of the petition for rehearing was made as contemplated by rules of court; that is, that no written direction was given the Clerk of the Supreme Court to have the petition docketed for hearing. They predicate this feeling upon the definition of the word "order" as given by Black's Law Dictionary in which it is stated that "every direction of a court or judge made or enter in writing and not included in the judgment" is defined as order. The same legal authority (Black's Law Dictionary) also defines order as a mandate. A mandate, by definition, is a command, order, or direction, written or oral, which court is authorized to give and person is bound to obey. BLACK'S LAW DICTIONARY 1114 (4t h ed.). In 37 AM. JUR., Motions, § 27, p. 512, an order of court is not always required to be in writing. This is true in some cases even in the face of a statutory definition of an order as a direction of a court in writing. Although by statute, the terms

"court orders" and `judge's orders"may often be employed interchangeably, a distinction is sometimes made between them. A "court order" is one made by a judge or justice while he is actually sitting as a court. Orders thus made are formal and are entered in the files of the clerk and made a matter of record. A judge or justice, however, may do many things in his judicial capacity in his chambers, at his home, or on the street, for that matter, and any such orders may be "judge's orders," but are not court orders. Ibid, § 24, p. 511.

From these legal authorities, we failed to accept the contention of our dissenting colleagues that there is no order to the Clerk of this Court to have the case docketed for re-argument when in fact and in truth Mr. Justice Koroma, one of the concurring Justices gave order that the petition be docketed and by virtue of this order, the said petition was docketed, duly assigned for hearing, heard and ruling reserved without either party contesting Justice Koroma's authority for ordering the re-hearing.

With reference to count two of their contention that the two Justices who dissented in the original judgement are not qualified to participate in the hearing and determination of the petition for rehearing, we categorically disagreed with them. We shall rely on their own quotation as found on page 5 of their dissenting opinion which states "All the members of the Court who participated in the decision will ordinarily pass on the petition for rehearing although it may be provided that petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case. The granting of a rehearing obviously requires the concurrence of some members of the Court who joined in the original judgement. If the original decision was by a bare majority, it has been held that a new member of the Court should not participate in the consideration of the petition for rehearing since he might be required to consider the case on the merits "It has been held that a petition for rehearing should be heard and acted upon only by the members of the Court participating in the original judgement." The first sentence of the above quotation plainly provides that all members of the Court who participated in the decision will ordinarily pass on the petition for rehearing. Our dissenting colleagues did participate in the hearing and determination of the decision for which re-argument is sought but they only disagreed with the conclusion.

A Justice who takes part in the hearing and determination of the case but differs with his colleagues on the conclusion cannot be said not to have participated in the decision. The condition under which a Justice may be said not to have participated in the decision of the Court of which he is a member are: (1) the Justice was absent when the case was heard; or (2) at the call of the case, the Justice recused himself from hearing and determination of the case. Under these circumstances, it can be said that a Justice did not participate in the decision. Hence, he has no ground even to dissent on. Therefore, the Justices who dissented in the original decision are all members of the Court who participated in the decision for which re-argument is sought as in keeping with the authority cited above. There is no law

which precludes a Justice of the Supreme Court of Liberia from participating in a rehearing because he dissented in the original decision. It is our opinion that Mr. Justice M. Kron Yangbe and Mr. Justice Boima K. Morris who dissented in the original judgment are not "new members of the Court" and therefore, they cannot be precluded from participating in the hearing and determination of the re-argument.

With reference to the third contention of our dissenting colleagues that for the Court to alter or change its opinion and judgement originally given, there must be a re-argument of the cause allowed on the hearing on the application for re-argument, upon re-submission before reaching a different decision but not to set aside or change or alter the original decision merely upon the holding of the dissenters, we shall again refer to their quotation as found on page 6 of the dissenting opinion as quoted from 4 C.J.S., Appeal and Error, § 1441 which provided the exception to the rule which we quote thus "....moreover, if the court still retains jurisdiction of the case so that it has power to withdraw or modify its former opinion, it may, where it feels that it is as fully conversant with the record as it would be after a re-argument, instead of granting a rehearing, withdraw its former opinion and render a different judgement...." In the light of the above quotation, it is our holding that the opinion of the majority in withdrawing the former decision of this Court and reversing the judgment of the lower court which the original opinion affirmed and confirmed is legal and supported by law.

Dissenting Justices are participants in the original decision of the Court in which a petition for re-argument is filed. The holding that because of the dissenting opinions of the dissenters, they have made up their minds and will not be willing to change their positions, is not a logical argument. Because a petition for re-argument is not intended for the majority alone to reconsider their majority position, but also for a dissenter or minority to reconsider his dissenting or minority position and under no parity of reasoning, the other side is disqualified or precluded from doing so.

The grounds for disqualification of a judge is the same as the reason for him to recuse himself sua sponte or upon the request of a party. As we have stated above, there is no ground for the dissenting Justices in the original opinion not to participate in the re-argument in this case, and no such issue was raised by either party during the argument of this case. The question of disqualification of the two dissenting Justices to sit on the re-argument crept into this case for the first time from a dissenting opinion. Such a proposition not having been presented during the argument of this case by either party, and no jurisdictional issue over the subject matter and territory having been raised, the contention is not a ground for disqualification.

Referable to count four of their contention that the petition of the appellant for re-argument fails to point out these issues which were presented to the Court in their brief for consideration by the court for which the Court inadvertently overlooked, or the points of

law or facts which the court allegedly overlooked and failed to pass upon, this issue has been elaborated upon in this majority opinion and is well supported by the records in this case. That is, the sixteen-count petition itemized the points and issues of law and fact wherein the previous opinion committed palpable mistakes by inadvertence, neglect and oversight to pass upon. These issues of fact and law are pointed out in this opinion and show how the previous opinion overlooked passing upon them.

In concluding this dissenting opinion, our distinguished colleagues hold that there is no basis for the majority opinion because there was no concurrence of the Justices who participated in the majority decision and therefore the application for re-argument is denied and the judgement rendered on July 6, 1983 should not be disturbed. Again, we wish to reiterate that all judges or Justices who participated in the former decision whether or not they concurred in the judgement or dissented are legally qualified to sit on the rehearing of the case. The above point is clearly stated in the first sentence of the very law quoted by our colleagues from 4 C.J.S., Appeal and Error, § 1441, p. 2041 as found on page 5 of the dissenting opinion. Therefore our colleagues who dissented having participated in the former decision are qualified and eligible to sit on the petition for re-argument. The rationale behind this very simple fact is that the possibility exists that any of the judges or Justices who participated in the decision may change his views, including those who dissented or those who concurred in the judgement.

With regard to the former judgment being undisturbed, it would have only stood undisturbed if the Court was equally divided on the re-argument. To the contrary, there is a majority opinion which is the opinion of this Court. Hence, the former judgement has been withdrawn and set aside and, therefore, has no legal effect. 4 C.J.S., Appeal and Error, § 1441, last paragraph on page 2041 and last sentence in the first quotation on page 6 of the dissenting opinion.

Finally, the dissenting opinion cannot under any law set aside a majority opinion or adopt an original judgement of a court. It is very elementary for all practitioners to know the difference between a dissenting opinion and a majority opinion and their force and effect on the holding of a court. However, we shall for the benefit of this opinion define a dissenting opinion and a majority opinion;

A dissenting opinion is a separate opinion in which a particular judge announces his dissent from the conclusion held by a majority of the court, and expounds his own views. An opinion is the statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgement is made. BLACK'S LAW DICTIONARY 1243, 1244 (4th ed.). Consequently, a majority opinion is the holding of the court which prevails over the dissenting opinion and is signed by the majority of the members of the Bench. The

contention of our dissenting colleagues to the effect that the majority opinion on the re-argument has no effect on the enforcement of the previous judgement is a judicial novelty and has no support in law and this Bench cannot be the first by which such a procedure can ever be adopted.

The Clerk of this Court is hereby ordered to send a mandate to the trial court commanding it to resume jurisdiction over this case and give effect to this decision. And it is hereby so ordered.

Petition granted; judgment reversed.

MR. JUSTICE SMITH with whom CHIEF JUSTICE GBALAZEH concurs, dissents.

To begin with, the opinion just read on the application for a re-argument is not the opinion of this Court to alter or change the majority opinion and judgment of this Court given on July 6, 1983, and, therefore, cannot affect the enforcement of that judgment because of the four basic reasons set forth hereunder, for which I disagree with my distinguished colleagues and, in concurrence with Mr. Chief Justice Gbalazeh, refused to append my signature to any such unenforceable judgment. My reasons are:

1. There is no petition for re-argument legally before the Court and therefore the hearing we had on the application for re-argument was a fruitless exercise—an exercise which, perhaps, may settle legally issues never before raised and decided in our jurisdiction;

2. Our two distinguished colleagues who dissented in the original decision of the bare majority were not entitled to sit and participate in the hearing of the application for re-argument and to discuss as to whether or not there was mistake made in the original decision by inadvertently overlooking any points of law or fact. It is only the Justices who participated and concurred in the original decision who were entitled to sit and decide whether or not there is ground sufficient to grant a re-argument of the cause. And on hearing of the petition for re-argument legally before the Court, the fact that one of the current Justices changed his position, his one vote against two is insufficient to grant the re-argument;

3. For the Court to alter or change its opinion and judgment originally given, there must be a re-argument of the cause allowed on the hearing of the application for re-argument, upon re-submission before reaching a different decision, but not to set aside or change or alter the original decision merely upon the holding of the dissenters, who were not entitled to sit on the application asking for re-argument; and

4. The petition of the appellant for re-argument fails to point out those issues which were presented to the Court in the brief for consideration by the Court but which the Court inadvertently overlooked, or the points of law or fact which the Court allegedly overlooked and failed to pass upon.

I strongly hold that this Court cannot grant a re-argument in this case since its decision was based on the evidence found in the records; neither can the Court grant a rehearing because the language of the decision is not favorable to the choice and expectation of the appellant, nor because it is alleged that the Court raised the issue of fraud that was not pleaded in the face of the clear evidence of fraudulent acts of the appellant apparent on the records.

I will now proceed to discuss these four basic reasons of my disagreement in the order I have them listed hereinabove. The Rules of the Supreme Court provide for re-argument, and at Rule 9, parts 1-3, we find the following:

"Part 1. Permission for—For good cause shown to the Court by petition, a re-argument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking some fact, or point of law.

Part 2. Time of—A petition for rehearing shall be presented within three days after the filing of the opinion, unless in cases of special leave granted by the Court.

Part 3. Contents of petition—The petition shall contain a brief and distinct statement of the grounds upon which it is based, and shall not be heard unless a Justice concurring in the judgment shall order it. The moving party shall serve a copy thereof upon the adverse party as provided by the rules relating to motions."

By the phrase "and shall not be heard unless a Justice concurring in the judgment order it", it would seem to me that this rule contemplates for the concurring Justice to peruse the petition and compare it with the opinion to be satisfied as to the points of law or fact to which the Court's attention is being called as having been inadvertently overlooked, and thereafter make or cause to be entered, an order to have the Clerk of Court docket the petition for hearing by the Court. In the case in point, it was not so. The concurrent Justice only noted on the petition, and I quote: "E S Koroma, Associate Justice, July 8, 1983". There is nothing else stated on the face of the petition tending as giving order for the docketing of the petition or ordering the hearing of the petition for re-argument.

What the rule of this Court contemplates is for the Justice concurring in the opinion to give an "order" for the docketing of the petition for hearing so that it may be heard and decided whether there was a palpable mistake made by the Court, by inadvertently overlooking any points of law or fact. The word "ORDER", in practice, as defined by Black's Law Dictionary, page 1247, is: "Every direction of a court or judge made or entered in writing and not included in a judgment ...." In my opinion, the notation made by Mr. Justice Koroma is insufficient and does not constitute an order of the Supreme Court, or the concurrent Justice ordering a hearing of the petition to have warranted the hearing conducted by us, for it is provided that:

"…The principal parts of an order are the caption, therecitals, the directions, and the signature. The caption or heading contains the title of the action, and in the case of a court order, gives the time and place where the court is sitting as well as the name of the presiding judge . . . ." 37 AM. JUR., Motions, § 27, p.512.

It is my opinion also that the moving party should have guided its interest with the safeguard of the law by seeing to it that the legal requirements to have its petition properly placed before the Court were fully complied with. This not having been done, the petition for re-argument is not legally before us; therefore, the judgment and opinion of this Court given during the March Term, 1983, should not be disturbed. A mere application for hearing not ordered docketed does not put the cause before the Supreme Court so as to give it jurisdiction of a motion for new trial. For reliance, see 4 C.J., p. 635, Smith v. Moore, 150 NC 158, 63 SE 735.

My next point of disagreement as stated is, the participation of the two dissenting Justices in the hearing of the petition for re-argument, they not having participated in the majority decision sought to be set aside. If the dissenters are to participate in the hearing of a petition for re-argument, then what is the rationale of confining the order for rehearing to a concurrent Justice?

I strongly hold that only the Justices who participated and concurred in the majority decision of the Court, alleged to have inadvertently overlooked some points of law or fact, were legally entitled to pass upon the question as to whether or not they in fact inadvertently overlooked any point of law or fact in their sound opinion and judgment, but not those Justices who did not participate in the decision. Common reason dictates, and our distinguished colleagues who dissented from the decision of the Court now under attack, are aware that only one of the concurrent Justices in the majority decision can order a rehearing and only the Justices who participated in the decision are entitled to pass upon the question of the decision to which their attention is called, and decide whether or not they in fact inadvertently overlooked any points of law or fact; and where there is disagreement among the concurrent Justices, by any one of them changing his position, then and in that case there is no concurrence and the motion for re-argument is denied. The rule in some jurisdictions is that the concurrent judgment of a majority of the members constituting the court is necessary for a decision; if the court is divided, the motion fails. 37 AM. JUR, Motions, § 16, at p. 508. Another authority, provided in 4 C.J.S., Appeal and Error, § 1441—Judges who may act on application, p. 2041, is that:

"All the members of the court who participated in the decision will ordinarily pass on the petition for rehearing although it may be provided that petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case. The grant of a rehearing obviously requires the concurrence of some members of the court who joined in

the original judgment. If the original decision was by a bare majority, it has been held that a new member of the court should not participate in the consideration of the petition for rehearing since he might be required to consider the case on the merits.. It has been held that a petition for rehearing should be heard and acted upon only by the members of the court participating in the original judgment."

I quote also another authority in support of my position:

"A petition for rehearing which does not present any proposition or question not fully considered by the court in reaching its decision after first hearing, or anything to change the opinion of any member of the court participating in the decision, will be overruled." 24 ALR, Motions for Rehearing 294.

"Petitions for rehearing are always scheduled on the calendar by the clerk of court, as a part of the business of the day for the mutual consideration of the Justices participating in the decision, and for discussion in conference between them; such petitions are not disposed of until after such full consideration . . . ." 47 ALR 1108, Scott v. Shock

My third point of contention is, the attempt to change or alter the original opinion and judgment in this case by only one of the concurrent Justices who now joins our two distinguished dissenters, who I hold have no authority whatsoever to pass on the validity of the original decision of the majority on application for rehearing, they not having participated therein. Our distinguished colleagues who dissented from the majority opinion could only participate in the re-argument of the cause after it had been allowed upon the concurrence of the Justices who participated in the original decision upon re-docketing the cause for re-argument on the merits and upon re-submission. Here is my authority for so holding.

"As a general rule, the appellate court cannot make a final disposition of the cause on an application for rehearing, and material alterations in the original judgment must ordinarily be reserved for the rehearing proper and cannot be allowed on the hearing of the petition. If, however, the errors relied on as grounds for a rehearing are such that they can be corrected without a rehearing, the court may proceed to correct them and deny the rehearing. This has been held with respect to verbal errors or ambiguity, failure of the judgment to conform to the pleadings, errors in calculation of the amount allowed by the judgment, and errors in the taxation of the costs in the appellate court. Moreover, if the court still retains jurisdiction of the case so that it has power to modify or withdraw or modify its former opinion, it may, where it feels that it is as fully conversant with the record as it would be after a re-argument, instead of granting a rehearing with-draw its former opinion and render a different judgement. An equal division of the court on a motion of rehearing constitutes a denial thereof and leaves the original judgment in force." 4 C.J.S., Appeal and Error, § 1441, at p. 2041.

Our distinguished concurrent Justice holds the view that there were manifest and material errors in the majority opinion to warrant alteration of the opinion. I say this can only be done where the Justice concurring in the original decision had concurrently granted a rehearing at which time the Full Bench, including our two dissenters, would participate in the re-argument of the cause as allowed. I again quote another authority on the point:

"Ordinarily, material alteration in the original judgment must be reserved for the rehearing proper, and cannot be allowed on the hearing of the petition but verbal errors may be corrected at that time, although a formal rehearing is denied; and in like manner the judgement may be corrected so as to conform to the pleadings, errors in calculation of the amount allowed by the judgement may be remedied, further directions may be given as to the payment of costs taxed in the supreme court, and various other alterations may be made. As a general rule, the appellate court cannot make a final disposition of the cause on an application for rehearing." 4 C.J.S., Appeal and Error, § 2513 (4), at pp. 639-640.

When a rehearing is granted, it means what the term "rehearing" indicates; that is, that the case is for re-argument and re-submission before judgement can be entered therein. For reliance, see Granite Bitumiuso Co. v. Perkuiwe Reality & Improv. Co., 270 Mo. 698 SW 1442. See also 5 AM. JUR. 2d., Appeal and Error, p. 410.

"The determination of an application or petition for a rehearing in favour of the petitioner ordinarily results in an order granting a rehearing which entitles the petitioner to a re-argument and re-submission with respect to the errors for which the rehearing was granted...." 4 C.J.S., Appeal and Error, § 1445, at p. 2043.

"...Where a rehearing is granted generally the cause is before the court for examination and decision as though it had never been considered and decided, and all points and questions that might have been presented on the original hearing may be presented on the rehearing, and an argument on the merits is then allowed..." 4 C .J., Appeal and Error, § 2530, p. 642.

"Where a rehearing is granted generally the entire cause is before the court for examination and decision as though it has never been considered and decided and all points and questions that might have been presented on the original hearing may be presented or considered on the rehearing, even though the result is unfavourable to the party applying for the rehearing." 4 C.J.S., Appeal and Error, § 1447, p. 2044.

In view of the legal authorities cited on this third point of my contention, the opinion just read altering the original opinion, without re-argument and re-submission, is of no effect, especially when it is signed by the dissenting Justices who are not entitled to pass on the validity of the original decision in which they did not participate.

I come now to the fourth and last ground of my disagreement, that is, the absence of any legal ground in the petition to warrant the granting of the rehearing. But first of all, let me

quote word for word the nine issues which appellant presented for consideration by the court in its brief based upon its bill of exceptions when the case was previously called for argument. They read as follows:

"1. Whether or not the trial judge correctly denied the appellant's motion for a change of venue in the light of the fear and belief expressed by the appellant that it would not obtain fair and impartial trial in Grand Bassa County?

2. Whether or not there was a difference in identity of the claim sued for and the subject of the release executed by the appellees to warrant the trial judge's ruling of the case to trial?

3. Whether or not there was any fraud proved to warrant the setting aside of the release executed by the appellees?

4. Whether estoppel does not operate against the appellees to bring the present suit against the appellant after receiving the compromise settlement of $11,000.00 of the claim which they submitted to the appellant and executed a released discharging the appellant from all claims?

5. Whether there was any unforeseability in respect to the subject sued for at the time the appellees executed the releases in favour of the appellant to warrant the institution of the present suit at the time it was filed?

6. Whether the trial judge's act as set forth in counts five to eleven, inclusive, of the bill of exceptions where not such acts as tended to improperly influence the minds of the jury against the appellant's side of the case and thus materially prejudicial to the appellant?

7. Whether the verdict of the jury was not manifestly contrary to the weight of the evidence adduced at the trial?

8. Whether it was not inconsistent and illegal for the trial judge to affirm and confirm the verdict of the jury and at the same time modify the verdict by deducting from the amount of the verdict the sum of $11,000.00 received by the appellees under the release executed by them?

9. Whether the trial judge correctly and legally denied the appellant's motion for new trial?"

It is necessary to mention here at this juncture that in this case, it is not disputed that there was automobile accident involving the appellant's vehicle and that of the appellees in which appellees sustained multiple bodily injuries and property loss as a result of the recklessness and negligence of appellant's driver. It is also not disputed that as a result of the accident appellant's insurers paid to appellees $11,000.00 out of court upon a compromise now in dispute; that a release was executed by the appellees in favour of the appellant. But the issue which resulted in the institution of the action of damages for personal injuries is that, the amount of $11,000.00 only covered certain items of their property lost in the accident, but

does not include damages for the personal injuries sustained by them; that after signing the release, the insurer of the appellant kept the copy thereof and did not deliver the check to appellees until the next day when they returned, although appellees requested for the copy; that the copy of the release appellant's insurer handed to appellees the following day, to their surprise, carried on its face the statement that appellant was relieved from all further claims, which statement was not borne by the release signed by the appellees the previous day in the presence of their counsel who also read the release. This contention, as aforesaid, led to the institution of the suit of damages for personal injuries, it having been understood at the compromise that the amount they received was a partial payment covering only loss of their property.

The contention of the appellant is that a claim was presented and it resulted in a compromise at which the appellees agreed to receive only, and did receive, the amount of $11,000.00 for which they issued a general release relieving the appellant from all further claims resulting in the automobile accident, and that in the phase of this release the appellees are estopped to assert any further claim whatsoever under the doctrine of estoppel.

With the contentions by each side, the only issue which the Court saw was decisive of the controversy was, the genuineness of the subject release under the circumstances it was issued, and as a contract whether there were causes and circumstances to disregard it. This issue was left with the Court to decide and to do so the entire evidence in the records, including the release, was subject to review.

Counts 2, 4 and 5 of the issues as presented in appellant's brief quoted above are, substantially, in connection with the release, and the Court in the majority opinion delivered on July 6, 1983, dealt lengthily on the release (see pages 4-13 of the opinion). I shall say more on this later in this opinion.

The first issue as raised in the appellant's brief, which is the denial by the trial judge of appellant's motion for change of venue, was passed upon on sheets 3-4 of the opinion. However, appellant did not raise it again in its application for re-argument; hence, it must be considered as having submitted to the decision of the Court on the point.

In count 3 of the issues presented in appellant's brief, appellant desired to know whether fraud was properly pleaded by appellees by setting forth the particular facts and circumstances constituting the alleged fraud. This was an issue presented for our consideration and therefore was not raised by the Court itself as was advanced by the dissenters with whom our distinguished concurrent colleague now joins. Based upon the fact that this Court was asked to decide the question, it cannot be correctly said that the majority opinion raised an issue which was not pleaded by the party plaintiff. The said issue 3 of the brief was fully discussed on pages 13 and 14 of the opinion and, among other legal holdings, the Court concluded that; with the coming of the Judicature Act of 1873 and 1875, the rules

of equity and those of law were merged so that it was possible for a court of law to administer both rules of equity and rules of law jointly or severally. The Court then held that the trial judge committed no reversible error on the point. The dissenting opinion as delivered by Mr. Justice Morris also lengthily discussed the issue of fraud as not having been pleaded. The fact that this issue was not decided in favour of the appellant does not mean that it was overlooked, nor did counsel for appellant cite any authority which was overlooked. The authority on this point is, and I quote:

"The fact that the appellate court did not in its opinion detail the evidence and circumstances thus showing the process by which it reached its conclusion, is not ground for a rehearing." 4. C.J., Appeal and Error, § 1414.

Also quoting another authority:

"The failure of the supreme court in an opinion to discuss an alleged decisive question duly submitted by counsel, where such question was referred to in the dissenting opinion, does not show that the court overlooked the question so as to warrant the granting of a motion for the rehearing." Chatteron v. Chattertin. 34 App. Div. 245, 54, NYS 515; 32 App. Div. 633 Mem. 53 NYS 329 (see 4 C.J., p. 633)."

In the opinion delivered by this Court in the case American International Underwriters (AIU) v. Fares ImportExport, 30 LLR (1982), petition for re-argument, Mr. Justice Koroma, speaking

"A petition for re-argument is not intended to challenge the opinion and judgement of the Supreme Court on points of —ng for this Court, eloquently said, and I quote: 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. Re-argument 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..."

After citing the case Caranda v. Richards, reported in 14 LLR 294 (1961), in support of its position, the Court held, in denying the petition for re-argument, that:

"The 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 laws controlling the case. As the determination and interpretation of the law is for the Court, to permit a party to a case before the Court 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."

In my opinion, the trial court having ruled on the question of fraud, which appellant contended was not pleaded, but which this Court took into consideration, and the said question having also been discussed in length in the dissenting opinion, it cannot be

concluded that this point was overlooked or that the Court applied erroneous legal principle to warrant the granting of re-argument.

Count 6 of the issues presented in appellant's brief for our consideration alluded to questions, objections, exceptions and rulings of the trial judge, from counts 5-11 of the bill of exceptions. The Court did not consider this issue as being germane to the fair and impartial determination of the cause. However, on pages 15-17 of the majority opinion, the Court reviewed counts 6-11 of the bill of exceptions and upheld the rulings of the trial judge, and so it cannot be said that this issue was overlooked. This issue was not, however, stressed during the hearing of the application for re-argument, and hence it must be deemed waived.

From sheets 16-17 of the majority opinion, the Court discussed and pointed out appropriate legal principles justifying the position of the trial judge to reduce the general damages awarded to conform to the intention of the jury. Anyway, this contention in brief was not also urged in the application for re-argument and argued, and therefore must have been waived. Appellant could not correctly and convincingly contend that the deduction of $11,000.00 from the amount of general damages awarded by the jury in its favour constitutes a ground for re-argument as contended in count 8 of the issues in its brief.

The confirmation and affirmation of the judgement of the trial court constitute a clear decision of this Court, after examining the evidence, that it was convinced that the trial judge was correct in denying the motion for new trial and in rendering judgement on the verdict. Counts 7 and 9 of the issues as presented in appellant's brief and argued before us, were not therefore overlooked.

I have shown here the issues which appellant presented and argued in its brief and have pointed out where they were discussed in the opinion. What issues of law or fact then that were overlooked as contended by the appellant? The answer to this question is that nothing was overlooked; but rather, appellant's contention is that our opinion is erroneous because it is in favour of the appellees.

Rehearings are not granted as a matter of right, and not allowed merely for the purpose of re-argument, unless there is a reasonable probability that the Court had arrived at the erroneous conclusion or overlooked some important question or matter necessary to a correct decision. 5 AM. JUR. 2d, Appeal and Error, § 988, p. 414. The petition of the appellant for re-argument does not show any legal ground therefor; it does not show any point of law or fact which was duly presented and argued for our consideration during the original hearing of the case but which was inadvertently overlooked. Instead, the petition is only qualified as a bill of exceptions to the opinion merely to vilify the Court. Generally, rehearing will be granted only for manifest errors or omissions which are so material that, if they are correct they should result in a substantial alteration or change in the original

decision. This means that a rehearing will usually be refused if no material fact or principle of law has been overlooked or disregarded. I quote this authority:

"If no omissions or new authorities or points of law or fact are shown, the appellate court will seldom permit a rehearing simply for the purpose of obtaining a re-argument on, and a reconsideration of, points, authorities, and matters which have already been fully considered by the court, on the assertion of counsel that, notwithstanding the court fully considered everything wished to be urged on the rehearing, it reached the wrong conclusion..." 4 C.J.S., Appeal and Error, § 1411--Grounds for Rehearing, pp. 2027-2029.

I have observed from a careful perusal of the sixteen-count petition for re-argument and from the argument of counsel for appellant that the major contention of the appellant, and which detracts from the original holding of our concurring Justice to change his position, is that fraud, which forms the basis of the Court's conclusion in its decision, was not pleaded and proved at the trial and hence by reason of the general release issued by appellees, relieving appellant from all further claims in connection with the accident, the doctrine of estoppel operates against the said appellees from asserting any further claim against the appellant. In this connection, they are saying that this Court which is the highest in the land from whose judgement there can be no appeal, should close its eye at a clear evidence of fraud which has been shown in the course of the trial by testimonies of witnesses apparent in the records before us for review on the ground that it was not pleaded.

As I stated earlier, and quoted the authority on the point, this issue was fully considered in the majority opinion and also in the dissenting opinion and hence the said issue cannot form the basis for the granting of re-argument. As a further legal authority on the point, I quote the following:

"Where an appeal has been heard and determined on a certain theory, rehearing cannot be had on grounds inconsistent with the theory. The same is true of grounds which are contradictory of admissions made on the original hearing, and a rehearing will not be granted for the purpose of admitting evidence which the petitioner has previously treated as inadmissible, nor to consider certain evidence in a light different from that in which it was considered before...." (Emphasis mine). 4 C.J.S., Appeal and Error, § 142 (b), p. 2035

Another legal authority is:

"A motion for re-argument should be denied where the points of the motion are either an elaboration of issues fully briefed and argued, or while dealing with a subject not completely briefed, bring to the court's attention new matters to which consideration was not given before reaching a decision." Owens v. Hagenbech Wallace Shows Co. 58 RJ 162, 19 ALR 113, reh den 58 RJ 268, 192 A 464, see 122 ALR 124.

The motion for rehearing should not renew contentions previously argued and submitted and expressly disposed of, but the motion may renew any contention deemed controlling and not expressly passed upon. Pitek v. McGuire, 61 NM 364, 184, pr. 47. ALR 2d, 830.

The scope of appellate review is generally limited to matters complained of, or, points raised in the appeal, although the appellate court may sometimes take up a point of law on its own motion, and may sustain the decision appealed from by any argument for which there is a basis in the record...." 5 AM. JUR. 2d, Appeal and Error, § 723, p. 166.

And so, under the legal authorities cited, this question of the general release and estoppel as well as the manner in which the release was obtained were all fully discussed in both the majority and the dissenting opinions and passed upon, and, therefore, there is no legal basis for granting a re-argument with out violating those internationally accepted legal principles controlling an application for re-argument of a decided case.

For the benefit of this opinion, however, I quote the testimonies of the witnesses for the appellees at the trial which were not rebutted, and also the testimony of one of the witnesses for the appellant. These testimonies not having been rebutted, gave rise to our conclusion that, there was a fraudulent design on part of the appellant, which must violate the release.

Touffic Azzam, one of the Appellees, answering a question on the cross-examination, stated, as follows:

" Your Honour, the day I signed the release was January 13, 1982, in the presence of my Counsellor James G. Johnson. After conversation with the manager concerning my claim, he advised me to proceed to the claims manager's office and sign the release. He promised however that the $11,000.00 was portion of my claim and the balance would be paid after I submit to him my total claim, including government taxes; my proof that the check was received on the 14th of January, 1982, after I signed the release on January 13, 1982, is the check stub I now have in my possession. I should like to mention also that I insisted on receiving back the release I signed since the check was not delivered to me on that day, but the claims manager argued that it would be no problem..." Minutes of Court, 42' days's session, February Term, Wednesday, March 31, 1982.

My question in this regard is, why is it that after the signing of the release by Mr. Touffic Azzam on the 13 th day of January, 1982, the check of $11,000.00 was not delivered to him along with copy of the release he had signed in the presence of his counsel, but had to be kept by the appellant until the next day, January 14, 1982?

Counsellor James G. Johnson, counsel for the appellees, who participated in the negotiation answered a court's question on the witness stand while testifying for the appellees at the trial, as follow: "...In my presence as well as in the presence of the plaintiff, the check was prepared, an accompanying release for the $11,000.00 also prepared. Mr. Charles Ananaba

sent his messenger and/or officer of the office to the manger for it to be approved. The release I saw that day when the check was prepared and sent upstairs for the manger's approval did not carry the phraseology full settlement for all injuries sustained everything else (sic). To my greatest surprise few days later, I read from a copy from Mr. Touffic Azzam in full settlement of injuries sustained, which is an act of fraud.

My next question is, why is it that the release could not be prepared by appellees and their counsel and delivered to appellant upon delivery of the check, but instead its preparation had to be undertaken by appellant who, after the release was read by appellees and their counsel, took it back and kept it until the next day when it was delivered in the absence of appellees' counsel? The check and the release having been prepared on that day (January 13, 1982), why were they not delivered to the appellees in the presence of their counsel?

Mrs. Soha Azzam, one of the appellees, also testified on the witness stand and her testimony remained unrebutted; this is what she said:

"When we arrived there, my husband left me in the car and went upstairs to see the insurance company. When he returned I observed frowns on his face. Then I asked him what was the trouble; he informed me that the paper he signed had been slightly changed and some words were added which relieved the company of all and any financial responsibility and that the phrases added on the paper were that the $11,000.00 covered all bodily injuries and other damages sustained; he said to me that those phrases were not written in the release when he signed it the day before, but when he went in the building and in that particular office to receive his check a copy of that paper given to him mentioned what I have just said. That disturbed him a lot. That's all I can now remember."

The claims manager, Mr. Charles Ananaba, testifying for appellant on the witness stand under oath said, among other things, and I quote:

"...Mr. Azzam asked to read the release. I handed him the release which he read and handed over to his counsel. His counsel read the release and said O.K., but what about the question of loss of use. I said to him that we could add a conception to the release to cover Mr. Azzam's loss of profit when his tax returns are submitted. He said he would like to see us add the conception at that moment. I then instructed the secretary to add the conception to the document. The conception was added and I handed the document back to Mr. Azzam and his lawyer. At this time

I told Mr. Azzam and his counsel that they would both have to return the next day to sign the release and take delivery of the check. His counsel informed me that since everything on the release document met his approval, he would not return with Mr. Azzam the following day; that Mr. Azzam would return alone to take delivery of his check and sign the document-

-the release. The next day Mr. Azzam returned and I handed him the release document. He read the document, signed it and took delivery of the check..."

Now, this statement of appellant's witness brings to mind the following questions:

1. What was Mr. Azzam referring to when he raised the question of "loss of use" and without any hesitation the claims manager expressly consented to insert in the release what he termed to be a "conception" to cover Mr. Azzam' s loss of profit when his tax returns are submitted? Could loss of use mean loss of profit?

2. With this additional clause inserted by the claims manager in the release, can we legally say that a general release was issued, relieving appellant from all further claims or that the release was conditional?

3. The general release being thus prepared by the appellant and read by Mr. Azzam and his lawyer, according to Mr. Ananaba, the claims manager, what was then the rationale behind his telling them to go and return the next day to sign the release and take delivery of the check, instead of making delivery of the same on that very day January 13, 1982?

4. Since appellees were represented by counsel at the negotiation, why did the appellant prepare the release instead of the appellees, and why did the appellant consent and elect to make final settlement in the absence of appellees' counsel?

I am left with puzzles, and cannot erase from my mind that the appellant handled this matter with a fraudulent design aimed at tempering with the release after appellees and their lawyer had left Monrovia for Lower Buchanan, to the disadvantage and detriment of the appellees. Under what circumstances can I close my eyes at this kind of ugly act and gross injustice? I am also seriously concerned and worried in mind as to the confidence of the public if our Court of last resort would see very clearly the glaring fraudulent act of a party litigant in the evidence which forms the basis of the contention between the parties and we sit here on these thrones as priests of justice and say because fraud was not pleaded we will ignore the evidence and facts apparent on the records.

In view of the reasons given and the legal authorities cited in support thereof, we strongly hold that there is no basis or foundation for the opinion just read, and that there being no concurrence of the Justices who participated in the majority decision, the application for re-argument is denied and, under the law, the judgement as rendered on July 6, 1983, should not be disturbed.

MR. CHIEF JUSTICE GBALAZEH, who concurs with JUSTICE SMITH, dissents.

This Court handed down a decision in the above action of damages for personal injuries by confirming with modification, the judgement of the trial court on the 6 th of July 1983 in favour of appellees. In keeping with Rule IX of this Court, appellant filed a petition for re-

argument, contending that the Court in its Judgment of July 6, 1983, inadvertently overlooked certain points of law and fact material to the cause. It is interesting to mention that the judgment for which this petition is filed had two dissenting opinions against it, separately written and delivered by the two senior Justices of this Court in the persons of Messrs. Justices Moses K. Yangbe and Boima K. Morris.

In spite of the above, when the petition was called for hearing on November 30, 1983, instead of the dissenting Justices refraining from sitting on the petition because of their position taken prior to the filing of this petition, they inconsistently sat during the hearing of the petition and actively participated and as a result they have come out with what was prepared and read by Mr. Justice E. S. Koroma with whom Messrs. Justice Yangbe and Morris who, originally dissented from the judgment out of which this petition for re-argument grew, concurred, I, through this medium, register my disagreement with their participation, reasoning and conclusion because:

1. There has been no point of law or fact inadvertently overlooked in arriving at the majority decision affirming and confirming the judgement rendered on the 6 th of July, A. D. 1983;

2. Justices Yangbe and Morris who dissented from the original majority decision are legally incompetent to sit and take part in the hearing of the petition for re-argument, as same was just a mere request calling the attention of the concurring Justices to compare the issues that were raised and presented by appellant and passed upon by the concurring Justices which constituted the judgement in order to determine whether or not any point of law or fact was ever inadvertently overlooked in their decision.

3. The petition for re-argument is not per se a re-argument of the case on its merits as our learned colleagues have done here in this case by erroneously granting the petition and simultaneously reversing the judgement of the trial court without re-docketing the case for re-argument in keeping with the petition.

For these and many more reasons, I have not been able to agree with the majority of my colleagues in their reasoning to grant this petition.

Let me here remark that this is the first time in our legal history that this issue has arisen; that is, whether or not a dissenting Justice had any right to participate in the hearing of a petition which questioned the correctness of the judgement from which he had previously dissented? In an attempt to answer this question, another issue of vital importance presents itself and that is, what is the rationale behind Rule IX of this Court which says that:

"The petition shall contain a brief and distinct statement of the grounds upon which it is based, and shall not be heard unless a Justice concurring in the judgement shall order it."

The logical rationale for this rule is to obviate a dissenting Justice from pursuing a course diametrically opposed to his previous position. A dissenting Justice having stated and

documented his reasons against the majority opinion is estopped from changing that position and joining the majority as it would not only be perverting justice, but would also indicate a want of professionalism and judicial integrity on the part of the dissenting Justice. As a matter of public policy, the answer to our main question is in the negative. The rationale being that the dissenting Justice cannot be for both appellant and appellee, for in so doing, he will be making mockery of justice and the rule of law which is sacrosanct. Therefore, a dissenting Justice is precluded from sitting with the majority to determine a petition for re-argument, since he must maintain one position throughout.

I agree with the juridical conclusion of Mr. Justice Frank W. Smith, that the procedure adopted by the so-called majority in granting the petition for re-argument and then simultaneously reversing the judgement of the trial court as affirmed by the majority without re-docketing it for the Full Bench to hear the case anew is to all intents and purposes contrary to law, thus the legal principles involved and the legal authorities cited are not properly applicable in the instant case. Therefore, the petition for re-argument must be dismissed, and accordingly the judgement rendered on July 6, 1983, must be confirmed and affirmed in accordance with the sequence of events, the evidence, the practice and procedure of the Court, and the laws cited herein.

In consideration of all these circumstances and the law as I understand it, I do hereby concur with Mr. Justice Smith in dissenting. I have therefore withheld my signature from the judgement of the majority.