JOSEPH F. DENNIS, Petitioner, *v.* REPUBLIC OF LIBERIA, Respondent.

PETITION FOR REARGUMENT.

Argued January 6, 1942. Decided February 6, 1942.

1. To disqualify a judge who had previously been of counsel for a party, it must be shown that he had previously been consulted on the identical point in controversy or very closely connected therewith.
2. A rehearing of a cause in an appellate court differs essentially from a new trial in a trial court. In the appellate court the onus is thrown upon the party applying for review of a judgment to satisfactorily prove that some important point of law or fact stressed during the former hearing had been overlooked.

On petition to Supreme Court for reargument of petitioner's appeal before that Court, *petition denied.*

Joseph F. Dennis for himself. *The Attorney General* and *M. Dukuly,* County Attorney for Montserrado County, for respondent.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

As soon as the above-entitled petition for reargument was reached on the motion calendar and the parties called at the bar, Mr. Justice Barclay requested his colleagues to advise him as to whether or not he should disqualify himself and refrain from sitting during the argument. The facts which led to his making this request now follow:

Joseph F. Dennis, whose petition for reargument is now under consideration, was indicted for embezzlement at the November term, 1937, of the Circuit Court of the First Judicial Circuit, Montserrado County, and, after a hearing before His Honor Nete-Sie Brownell, then a circuit court judge and now Attorney General of the Republic, and a jury of twelve men, he was convicted of the offense

charged and duly sentenced. From said conviction and sentence he, through his counsel Anthony Barclay, now Mr. Justice Barclay, prosecuted an appeal to this Court which ended in the reversal of the judgment and a remand of the cause with orders to grant a new trial. The prosecution profited by that opportunity to amend the indictment, the new trial was regularly had at the August term of the said court for the year 1939, His Honor Edward J. Summerville, another circuit court judge, presiding, and defendant was the second time convicted of said offense, from which second conviction he prosecuted a second appeal to this Court that was docketed for trial at our April term, 1941. But it must be observed that during the second trial defendant was represented by Counsellor S. David Coleman and that at no time during said second trial did Counsellor Barclay, now Mr. Justice Barclay, appear on behalf of his former client, the said Joseph F. Dennis, the present petitioner, as he did at the appeal to this Court from the second trial, *Dennis* v. *Republic,* 6 L.L.R. 269 (1938).

Before the second appeal could be reached upon the trial docket, however, the Republic of Liberia, appellee, filed a motion to dismiss for want of jurisdiction on two grounds: (1) Because the notice of appeal had not been given within the time and in the manner prescribed by a then newly enacted statute, and (2) Because the appeal bond had not been approved by the trial judge. The Court unanimously denied the motion on the former ground; but by majority decision, the Chief Justice dissenting, upheld the motion on the latter ground. *Dennis* v. *Republic,* 7 L.L.R. 232 (1941).

Although Mr. Justice Barclay was not of counsel for appellant during the second trial, yet the facts upon which the second trial was prosecuted having admittedly been substantially the same as those adduced at the former trial, this Court would have felt itself bound in view of its previous position taken in several cases, particularly

those of *Ware* v. *Republic,* 5 L.L.R. 50 (1935), and *Republic* v. *Harmon,* 5 L.L.R. 300 (1936), to advise Mr. Justice Barclay to excuse himself and have nothing to do with the case. But the foregoing résumé shows that it was not upon any of the facts originally in litigation that the case was disposed of when a second time on appeal to this Court, but rather on issues which arose in the course of perfecting the appeal and which did not arise and could not have been contemplated during the whole time that Mr. Justice Barclay, while at the bar, was of counsel for the petitioner in this matter. In order to disqualify a judge who had previously been of counsel to a party it must be shown that he had previously been consulted on the identical point in controversy or very closely connected therewith. Consequently the Court, after having invited expressions from the counsel in the case and having received no objections from said counsel, advised the Justice to sit and promised in due course to give its considered opinion on the point, as we are now doing.

Blackstone recited that, according to the laws of England in the days of Bracton and Fleta, a judge might be refused (i.e., recused) for good cause, but in later years the pendulum of judicial opinion swung so far to the opposite side that judges and justices could not be challenged. 3 Blackstone, Commentaries *361; Annot., 25 L.R.A. 117 (1894).

Thus it was that:

> "In England, as late as 1859 the House of Lords held that having been of counsel did not necessarily disqualify a judge. He was privileged to retire from the bench because of such relation, but was not bound to do so, especially when he was the only judge of the court. However, the practice of eminent judges to recuse themselves voluntarily when they had been of counsel created precedents which gradually rooted themselves into the common law of England, and became a part of it (though not technically acknowl-

edged as such), and made the prior relation of counsel in the matter absolute ground for the disqualification of the judge. In many of the states, however, there are statutory provisions disqualifying a judge where he has been counsel in the case, and the disqualification has been held to exist even in the absence of statutory provision. It extends to the adjudication not only of all matters arising in that identical case, but also to all supplemental matters or proceedings had or taken to enforce, or to resist the enforcement of, any judgment or decree rendered in such case. The rule is but an evolution of the elementary maxim that no man should be a judge in his own lawsuit. The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. The great principle should not have a narrow or technical construction, but should be applied to all classes of cases where a judicial officer is called upon to decide controversies between the people. . . ." 15 R.C.L. *Judges* § 22, at 534–35 (1917).

The growing tendency towards the absolute disqualification of a judge to sit in matters in which he had previously acted as counsel for one of the parties gradually began to be circumscribed by certain limitations, one of which, relevant to the case now under review, has been expressed in the following language:

> "A judge is not disqualified by having been counsel of a person who is interested, or whose estate is involved, where he was never consulted relative to the particular matters which are the subject of the cause or proceeding before him." 23 Cyc. of Law & Proc. *Judges* 588 (1906).

Towards the close of the nineteenth century, Chief Justice Raney, delivering the opinion of the Florida Supreme Court in the case of *Tampa Street Ry. & Power Co.* v. *Tampa Suburban Ry. Co.*, 30 Fla. 595, 17 L.R.A.

681 (1892), took the pains to differentiate between two different classes of cases, citing one in which a judge was legally disqualified to sit and another in which the disqualification claimed could not be applied. The relevant part of said opinion is as follows:

> "The decision of the Supreme Court of New Hampshire in Moses vs. Julian, 45 N.H., 52, was that a judge of probate who has written a will is disqualified to sit upon the probate of it; and in Whicher vs. Whicher, 11 *Id.*, 348, that a justice of the peace who at the request of the counsel for the plaintiff appeared on behalf of the plaintiff at the taking of a deposition to be used in the cause, and examined the witness, is incompetent afterwards to take, as magistrate, a deposition for the plaintiff to be used in the same case. See also Smith vs. Smith, 2 Greenleaf, 408. In McLaren vs. Charrier, 5 Paige, 530, it was held where a master in chancery has in the character of a solicitor or counselor given advice or prepared any pleadings or proceedings in a cause or matter pending in or brought before the court, or made or proposed motions or petitions in such cause or matter, or where his law partner has been thus employed or consulted, although not the solicitor or counselor on record, such master or judicial officer can not act as master or do any judicial act requiring the exercise of judgment or discretion, which is in any way connected with such cause or matter, and consequently can not approve an appeal bond." *Id.* at 601–02.

This is one view, the one which should lead to a judge's disqualification; the other, indicating when a judge should not be disqualified, now follows:

> "In Cleghorn vs. Cleghorn, 66 Cal., 309, the conclusion reached was that a judge is not disqualified from sitting in a cause by the fact that he had been an attorney for one of the parties in another action involving one of the issues in the case on trial. The

opinion of the court in Bryan vs. Justices of Austin, 10 La. Ann., 612, was that a district judge was not rendered incompetent to sit in the trial of a cause before him, by the fact that he had formerly been counsel for an original defendant therein who prior to such trial had been discharged therefrom by a judgment of the Supreme Court rendered in his favor; and in Stewart vs. Mix, 30 *Id.,* 1036, the fact that a justice of the appellate court was of counsel for certain parties in two former suits was held to be no ground for his recusation in a subsequent suit in which the same parties were litigants, it appearing that the validity of none of the proceedings and the decision of none of the questions involved in the previous suits were put in issue in the third suit." *Id.* at 602.

It will readily be seen that upon said motion to dismiss for want of jurisdiction, Mr. Justice Barclay would not have been disqualified, although he might, in his discretion, have refused to sit even in such a case. But the question now before us is even more remote, and it is the one and only question: whether or not in the decision of the motion to dismiss decided on May 3, 1941, any important question of law or fact argued at the time was overlooked. Referring to the petition for rehearing now before us, we find that every point upon which petitioner contends that a rehearing would be beneficial to him was duly considered and passed upon both in the majority and in the minority opinions filed on May 3, 1941. It has also been further discovered that the irreconcilable difference in opinion between the majority members of the Bench and the minority far antedated the case of *Dennis* v. *Republic,* 7 L.L.R. 232 (1941), as the minority opinion filed by the Chief Justice was, to all intents and purposes, an amplified restatement of the position which he recorded in another minority opinion, that which he filed in the case of *Morris* v. *Republic,* 4 L.L.R. 125 (1934). The majority members of the Bench seem still disposed to fol-

low the rule laid down in *Johnson* v. *Roberts,* 1 L.L.R. 8 (1861). The Chief Justice, on the other hand, maintains that if Baroma Morris, in the case decided in 1934, and Joseph F. Dennis, in that decided in 1941, were defeated in any of the steps necessary to complete their appeals by the action or non-action of the trial judges, no blame should be attached to appellant. That these differences of opinion should persist after a lapse of seven years, the interval between which the two cases were tried, would seem to indicate the impossibility of reconciliation in the event a reargument were ordered, barring the fact that Mr. Justice Barclay, whose advent to the Bench post-dated the decision in both of the cases, has not yet been able to indicate with which of the two conflicting opinions he would identify himself. The next question is, can he do so now? That brings us to the following reflection:

A rehearing of a case in an appellate court differs essentially from a new trial in a trial court. If a new trial be granted, the decisions reached as well as the entire record up to the time of the granting of such trial are entirely abrogated and set aside, either party may bring new witnesses and/or new documentary evidence, and the court proceeds as though no former trial had been held. On the other hand, upon a petition for a rehearing, especially before an appellate court, every presumption is in favor of the correctness of the decision reached and the onus is thrown upon the party applying therefor to satisfactorily prove that some important point of law or fact stressed during the former hearing had been overlooked in the decision handed down in the case. That being so, the fact that the Court was divided in reaching its conclusion does not help him for, says the law:

> "Where the judges of the appellate court are divided in opinion a reargument of the case is usually allowed, especially in cases where the judgment is affirmed by operation of law, and the decision is final in its nature, and other methods of review are not open

to the petitioner, or where the division of the court results from the absence of one or more of the judges. But where a case has been twice deliberately heard and considered, and the same result has been reached at both hearings, and the judgment has been entered of record, a rehearing will not be granted merely because some members of the court have since changed their opinion on the law of the case." 18 Encyc. Plead. & Prac. *Rehearing* 49 (1900).

That brings us to the question of what is meant by the terms "division of opinion" and "affirmation by operation of law." The question is answered in the following quotation:

"It was formerly the practice at common law that when there was an equal division of the judges upon a question of law, no judgment should be given. This, however, has been changed, and it is now the general rule that where a cause comes up from a lower court on a question of law, either by exception or by appeal, and there is an equal division of the judges, the judgment of the lower court is, as a rule, affirmed. It has been argued, in at least one case, that while the effect of an equal division of opinion upon a motion to set aside a judgment or discharge a rule is as has been stated, it should not be so in the case of an appeal or writ of error. This contention, however, has met with no general support." 7 Encyc. Plead. & Prac. *Division of Opinion* 44–46 (1897).

In the case at bar there was a three to one decision, and that is not affected by the fact that a change in the membership of the Court has occurred. For, in such event, the rule is:

"That a change in the membership of the court is about to take place, or has already occurred, is not in itself sufficient reason for granting a rehearing." 18 Encyc. Plead. & Prac. *Rehearing* 50 (1900).

Twenty-three days after the argument, petitioner sub-

mitted a request to be permitted to stress an argument, lightly touched upon when the petition for a reargument was being heard at this bar, that he had filed an application in the chambers of Mr. Justice Tubman for a mandamus to compel Judge Summerville to approve his appeal bond, before the motion to dismiss for want of properly approved appeal bond had been filed; that Justice Tubman had denied the said application, and he had appealed against said ruling to the full Bench; but that the appeal had not been considered up to the time when the motion to dismiss was heard by us last April. Whatever merit there may be in that point, it does not appear from our inspection of the record that that point was one of those submitted to us when the motion to dismiss was pending, nor was it couched in the original petition for a rehearing.

The rule that a reargument may be allowed whenever some important point of law or fact was overlooked in the opinion presupposes that said point was argued at the time. As the record does not show that that was done at that time, it is late to raise the point even in a reargument, much less at the stage petitioner did when the application for a reargument had been heard twenty-three days before and was only awaiting the publication of our decision. For,

> "**Where All of the Facts Presented Have in Fact Been Duly Considered** by the court, and where the application presents no new facts, but simply reiterates the arguments made on the hearing, and is in effect an appeal to the court to review its decision on points and authorities already determined, a rehearing will be refused.
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> "As a general rule a rehearing will not be granted on grounds which were not urged or considered on the

hearing, and this rule will be departed from only in cases where the refusal of the application would work manifest injustice." 18 Encyc. Plead. & Prac. *Rehearing* 36–40 (1900).

In view of the foregoing, it is the opinion of this Court that the application of petitioner for reargument has to be denied and the original judgment ordered enforced; and it is hereby so ordered.

Petition denied.