REPUBLIC OF LIBERIA, Petitioner, *v.* H. LAFAYETTE HARMON and His Honor NETE-SIE BROWNELL, Circuit Judge, First Judicial Circuit, Respondents.

APPLICATION FOR WRIT OF PROHIBITION.

Decided December 22, 1936.

1. A writ of prohibition may be directed to the judge or judges of an inferior tribunal, or to the parties to a cause pending therein, or both conjointly. But the majority opinion is that the only necessary respondent is the tribunal whose proceedings are sought to be restrained.
2. The principle is generally gaining ground that the relationship of a trial judge to one of the parties to a cause, whether the relationship be by consanguinity or by affinity, will disqualify him to preside.
3. Disqualification because of kinship is not confined to parties of record, but includes all persons represented by such parties whether they actually appear or not.
4. And thus it is that even in jurisdictions where there is no statute prohibiting a judge from sitting in a cause in which he is interested, the authorities agree that if before judgment he be recused and a prohibition applied for, the prohibition will be granted even though the court over which he presides has jurisdiction of the subject matter.
5. The principles of impartiality, disinterestedness and fairness on the part of the judge are as old as the history of courts of justice, and it is those three cardinal principles supposed to exist which give credit and tolerance to the decrees of judicial tribunals.
6. The reason that financial interest or near relationship to a litigant is held to be sufficient to recuse a judge is the presumption that self interest or natural affection will unconsciously prejudice a judge and deprive the litigant of a fair trial.
7. The proceedings of a grand jury are secret; and hence no one should be allowed in their room during their deliberations, save themselves, the witness testifying, and the prosecuting attorney or his deputy.
8. Even the prosecuting attorney and the witnesses should be excluded when the vote is to be taken.
9. On the other hand an accused person has no right to enter the grand jury room, or to any hearing before them, or even to notice that they are investigating any charge against him.
10. When, however, the grand jury having finished its inquisitional duties, an indictment shall have been found, the accused then has vested and inalienable rights to (a) a public trial; (b) to be heard in person, by counsel, or both; (c) to be confronted by the witnesses against him; (d) to cross-examine such witnesses; and (e) to bring witnesses in rebuttal.
11. The law provides that no jury session shall continue longer than 21 days.

It is therefore improper for a judge to discharge a grand jury within 17 days while they have business pending before them.

12. Nor is it proper for a judge to pocket an indictment presented in open court, and take it outside of the court room with him, as the clerk of court is the only proper custodian of all indictments, and other records of court.
13. It is a serious breach of the judicial duty for a judge to refuse to allow record to be made of his decisions, or exceptions to be taken and noted thereto.
14. For every objection and exception is an effort on the part of counsel to have the propriety or impropriety of the decision to be reviewed by the appellate court, and parties must not be thwarted in their endeavor to have such decisions so reviewed.
15. Every litigant, including the State in criminal cases, is entitled to nothing less than the cool neutrality of an impartial judge.

Upon indictment for receiving stolen goods and smuggling, Respondent Harmon petitioned the Respondent Circuit Court Judge to quash the indictment and look into alleged improprieties committed by the Attorney General and the County Attorney in connection with the indictment. Respondent Judge opened an inquiry and ordered the Attorney General and the County Attorney to show cause why they should not be cited for contempt. The prosecuting officers thereupon sought a writ of prohibition from Mr. Justice Grigsby, and after a hearing by Mr. Justice Dixon acting on behalf of Mr. Justice Grigsby, a hearing was ordered before the Court sitting *en banc*. *Application granted* by the Court.

H. Lafayette Harmon for respondent Harmon, assisted by *P. Gbe Wolo* and *William V. S. Tubman*. *The Attorney General* and *R. F. D. Smallwood,* County Attorney, for petitioner.

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

On the 31st day of August, 1936, there were two indictments filed in the Circuit Court of the First Judicial Circuit against H. Lafayette Harmon, defendant, the one charging him with "receiving stolen goods," and the other with "smuggling." The said Harmon was imme-

diately thereafter arrested, and simultaneously presented bonds already fully executed in the sum of two thousand five hundred dollars to appear and answer each of the aforesaid charges.

On the 2nd of September, two days thereafter, the said defendant filed in the said court a petition addressed to His Honor Nete-Sie Brownell, the Circuit Judge who had presided over the August term by assignment, which petition was entitled:

> "In re: Indictments alleged to have been found by the Grand Jury of the Circuit Court, First Judicial Circuit Court, against H. Lafayette Harmon, petitioner."

In the petition he alleges, *inter alia,* that the charges against him were "clandestinely" presented to the grand jury "one day before the adjournment of their sitting, obviously for the purpose of rushing an accusation against petitioner without time for due deliberation and investigation." Sundry other recitals in said petition attack the sufficiency of the evidence upon which the indictments were founded; insinuate that although the grand jury, if they "believe that there is other evidence not presented, and within reach, which would qualify or explain away the charge under investigation and give clear light on the truth of the facts of the case, it is their right and duty to order such evidence to be produced," but that they had not done so; charged the Honorable Monroe Phelps, Attorney General of the Republic, with having entered the grand jury's room of deliberation unsolicited, and menaced them into the making of a presentment in each of the cases against him, the said H. Lafayette Harmon. He, in conclusion, protested against being put under arrest and on trial to answer a charge upon an indictment founded under such menacing, wicked, prejudiced and illegal influence of the State prosecutors, ". . . and prayed that the said Circuit Judge would inquire into the charges he had made, and act in accordance with justice and the policy of the law governing procedure before

Grand Juries." This is the gist of his petition covering four typewritten pages.

His Honor Judge Brownell, having received said petition on September 3rd, 1936, ordered a writ to issue, commanding the Honorable Attorney General, and R. F. D. Smallwood, Esq., County Attorney for Montserrado County, to appear before said court on the second Tuesday in September, the 8th day of the month, (1) to show cause why said petition should not be granted; and (2) to show cause why they should not be held in contempt of court.

On September 4th Mr. Harmon directed the clerk of court to issue subpoenas for nine witnesses to testify in support of his petition, seven of which persons so summoned as witnesses had been members of the grand jury by which he had been indicted, namely: James Boyce, John Lymas, Arthur B. Gant, Wallace Graham, T. Philip Bracewell, William Stepney and L. P. Miller, as appears by the record of the clerk of said court exhibited at the bar of this Court during the hearing of the prohibition.

On the following 7th day of September, the Attorney General of Liberia, and the County Attorney for Montserrado County, filed in the office of the Clerk of this Court an application, addressed to the chambers of Mr. Justice Grigsby, praying that a writ of prohibition might be ordered issued because of the facts which they therein related as follow:

(1) That one Henry Bell had been indicted, tried and convicted at the August term, 1935, of the Circuit Court of the First Judicial Circuit of grand larceny, in stealing a diamond from one Zachariah Jackson, His Honor Nete-Sie Brownell, Judge presiding by assignment, who had sentenced said defendant to make restitution of said diamond, and to imprisonment for fifteen years, and that throughout the trial where it was shown that said diamond had been received from Bell, and concealed by

some person unknown to the prosecution up to that point, the said H. Lafayette Harmon had been counsel for said Henry Bell.

(2) That the said Harmon, knowing that said diamond had been stolen by the said Henry Bell, had received it; and had on the 18th day of March, 1936, on board the *Apapa,* secretly, fraudulently and feloniously given same to one W. S. Murdoch to take out of the Republic; but the prosecution having obtained evidence of this unlawful exportation of the said diamond had interposed, and had the stone brought back from London by the said W. S. Murdoch, who had delivered same to the Attorney General with a written statement in the presence of the said H. Lafayette Harmon.

(3) That it was upon evidence of the foregoing allegations that the grand jury had returned indictments against the said H. Lafayette Harmon, charging him with the offenses of receiving stolen goods and smuggling respectively, and that it was for the purpose of screening himself, and nullifying the prosecution he had made the collateral attack upon the indictments by filing the petition the gist of which has been hereinbefore given.

(4) That His Honor Nete-Sie Brownell, the Circuit Judge to whom the said petition of the said Harmon's had been presented, was related to the said Harmon by affinity in that they were brothers-in-law, for which reason the said Judge had become biased and prejudiced against the prosecution in this case; and had shown said bias and prejudice by: (a) on the night of August 28th, the said H. Lafayette Harmon had visited the home of His Honor the Judge, informed him of the prosecution's having sent witnesses to the grand jury so as to secure indictments against him, and that the two of them had discussed the possibility of defeating the bringing of any presentment against him.

(b) That in consequence thereof when, on the following day, the 29th, the prosecution requested that W. S.

Murdoch be sworn to testify before the grand jury, the said Judge denied the application, ordered the said Murdoch discharged, and refused to permit the record to show the application, and the ruling of the Judge; and that this act of the Judge was designed to suppress evidence that might be damaging to the brother-in-law of the Judge, the said H. Lafayette Harmon.

(c) That although the statutory time limit for the sitting of the grand jury had not been reached, the Judge immediately thereafter sent for the foreman of the grand jury, and requested him to report as unfinished business all matters then pending before them, as it was his intention to adjourn the grand jury that day at noon; and that the object of his said action was to screen and assist his said brother-in-law, indictments against whom were then being considered by said grand jury, hoping thereby to frustrate the prosecution of his said relative.

(d) That when at noon the grand jurors appeared in Court to be discharged in accordance with the orders the Judge had given their foreman, the said grand jury before being disbanded handed in four "true bills," two of which were the indictments against his brother-in-law, the said H. Lafayette Harmon, defendant; but that the Judge refused to allow them to be entered on the minutes of the Court, or to order process issued as is usual but, on the contrary, in the presence of the officers of court, and members of the bar then present, pocketed said indictments, took them to his home in order to confer with his brother-in-law, the said H. Lafayette Harmon, which prevented the clerk from making the usual notation on the records of the Court, and two days later, on the 31st of August, took the indictments back to court, and had them deposited in the office of the clerk of court.

(5) That the process issued against the Attorney General and County Attorney by orders of the Judge, following the filing with him on September 2nd of the petition hereinbefore referred to of the said defendant Harmon,

commanding said law officers to appear and show cause (1) why the petition should not be granted; and (2) why said law officers of the government should not be attached for contempt of court, was done with intent to "weaken, intimidate and humiliate the law officers of the Republic, and to give assistance to the defendant."

Notice of the filing by the Honorable the Attorney General of said petition for a writ of prohibition on the 8th of September was, by the Marshal, the ministerial officer of this Court, served upon His Honor the Judge presiding, who was admonished by the Clerk of our Court, acting upon standing orders he had previously received from this Bench, to refrain from proceeding further until a member of this Court should otherwise direct.

The Clerk of this Court immediately thereafter sent the application to Mr. Justice Grigsby, then in charge of chambers, for what orders he might see fit to give in the premises. The said Justice thereupon requested Mr. Justice Dixon, another member of our Court, and incidentally the Associate Justice whose home is nearest the seat of the Circuit Court of the First Judicial Circuit, to act for him in the premises, by having a preliminary hearing, and deciding whether or not, in his opinion, the prohibition prayed for should be granted.

His Honor Mr. Justice Dixon thereupon had all parties cited to appear on October 1st, to show cause why said application should not be granted; and after having considered the returns to be hereinafter dealt with filed severally by His Honor Judge Brownell, and H. Lafayette Harmon respectively, and hearing arguments thereon, on October 2nd, decided:

> "That because of the importance of the principles submitted in the returns filed to the alternative writ, the whole question should be sent forward to the full Bench to be adjudicated and finally settled."

This is a brief synopsis of the case we have now before

us, and of the steps taken before it was sent forward for our consideration.

When the case was first reached on our motion calendar during this term, it was brought to our notice that His Honor Judge Brownell was away on circuit.

The cause was, therefore, continued. On his return to Monrovia, when the case was again reached, and the counsel appearing for the other respondent, H. Lafayette Harmon, refused to take the responsibility of arguing in support of the Judge's returns already on file, he was again notified so as to give him the privilege of appearing in person or by counsel to defend his said returns, as well as to refute the very grave charges made against him in the petition for the writ of prohibition filed by the law officers of this Republic.

On December 10th he replied thanking the Court for the information given, challenged the correctness of being made other than a mere nominal party; and relying on the soundness of the principles of law raised in his returns said he felt quite easy in leaving the determination of the issues raised "to the usually sound judgment of the Honourable the Supreme Court."

Sincerely regretting that we have thereby been denied the privilege of listening to Judge Brownell's exposition of the principles of law raised in his returns, we have addressed ourselves to a consideration of the issues involved with all the impartiality, ability and calmness we have been able to command.

But first we cannot refrain from observing, that inasmuch as His Honor Judge Brownell had had served upon him since September 30th a copy of the petition for the writ of prohibition extracts from which have been hereinbefore extensively quoted to which he made returns on October 1st, if he could still seriously contend, on December 10th as in sub-section (a) of count 3 of his returns filed on October 1st, that the attacks therein made upon him were not so vital in character as to make him

more than a merely nominal party, we cannot but express surprise at his apathetic attitude towards the charges of breaches of proprieties that should be observed by one elevated to the judgeship, so pointedly, and in some instances venomously made by the Attorney General. However, in order not to be accused of substituting any *ipse dixit* of ours for legal authority we now quote the following:

> "The common-law writ may be directed to the judges of the inferior tribunal, or the parties to a cause pending therein, or both conjointly. It has been held, however, that the only necessary defendant is the tribunal whose proceedings are sought to be restrained." 32 Cyc. 625, par. 2b.

In sub-section (c) of count 3 of his returns His Honor Judge Brownell contends that inasmuch as he was duly and regularly assigned to preside over the August term of the Circuit Court of the First Judicial Circuit, and that the indictments, the subject of these proceedings, were found while he was so sitting, he had jurisdiction over the person and subject matters arising in the circuit at that term. He contends then that inasmuch as there is no allegation in the petition that he had no jurisdiction, or that he was exceeding his jurisdiction at any time during the holding of the said session, the writ of prohibition did not lie; and said count of his returns proceeds in conclusion to charge that the law officers of the Republic had never "looked into" any law books on the subject. Whether said law officers consulted any law books on the subject or not, we have; and our conclusions on that submission of his based upon the authorities we have consulted are: that although ordinarily the contention of His Honor the Judge might be correct there are reasons why his contention cannot obtain in the peculiar circumstances of this case.

It has been conceded by all the parties who have appeared in these proceedings that between August, 1935,

when the said Judge presided at the trial of Henry Bell and sentenced him to fifteen years' imprisonment and August, 1936, when H. Lafayette Harmon was, as aforesaid, indicted for receiving stolen goods and smuggling, he the said Judge had married a sister of the said defendant, Harmon.

According to 23 *Cyclopedia of Law and Procedure,* page 583, under "relationship to a party to the cause" we find:

> "While under the common law a judge was not disqualified by relationship to a party to a cause, being merely privileged to decline jurisdiction, it is now generally provided by constitution or statute that relationship by consanguinity or affinity between him and a party litigant, within specified degrees, to be variously computed according to the canon, civil, or common law, or statutory rule, will disqualify him. It is immaterial whether the litigant is suing in his own right or in a representative capacity. And the rule operates to disqualify a judge to try one charged with the murder of a person related to him within the disqualifying degree. The disqualification on account of kinship is not confined to parties of records, but includes all persons represented by such parties, and is not affected by the failure of the related party to appear to make defense or by the fact that such party is indemnified against loss. The relationship must be a subsisting one at the time of the trial to afford grounds for disqualification."

Under the head of "disqualification of judge by interest" it is provided that:

> "In jurisdictions where there are no statutes prohibiting judges from sitting in causes in which they are interested as well as in jurisdictions where such statutes exist, the authorities uniformly hold that when a judge of an inferior court is recused before judgment in a cause in which he has an interest, such as

disqualifies him, and a prohibition is applied for to restrain him from sitting in the cause, it will be granted, although the court over which he presides has jurisdiction." 32 Cyc. 607, par. 7.

In the case *Washington* ex rel. *Barnard* v. *Board of Education of Seattle School District No. 1:*

". . . F. J. Barnard . . . superintendent of the public schools of the city of Seattle . . . [was charged with] misfeasance and malfeasance in office . . . [and ordered] to appear before the board of directors to answer the charges. The appellant objected to A. J. Wells, one of the board of directors, sitting as a member of the tribunal to hear and determine the charges, on the ground that said Wells was disqualified by reason of bias, prejudice and personal enmity towards the appellant . . . [On December 17, 1897, the superior court issued an alternative writ of prohibition staying the proceedings.] On the return of said writ the superior court sustained a demurrer thereto quashing the writ, and entering judgment in favor of the defendant for their costs . . . upon the ground that no facts were stated sufficient to authorize the issuance of the writ. The appellant forthwith gave notice of appeal, and asked the court to fix the amount of the supersedeas bond. . . . But [the court] announced to the council [*sic*] for respondents in open court that the bond would operate only to stay execution for costs, because the judgment appealed from was not such a judgment as could be superseded. The appellant forthwith filed his appeal bond on appeal in the amount fixed by the court, and conditioned as a supersedeas bond. The board of education, and Mr. Wells, sitting as a member thereof, proceeded with the hearing of the charges against the appellant. The appellant then applied to this court for an order of supersedeas, on which an

alternative writ was granted, and the case is here now for final determination.

"We are inclined to think that the bond upon appeal conditioned as supersedeas under our statutes did not operate to suspend and supersede the judgment quashing the alternative writ. But we think that this court, in the exercise of its discretion, by virtue of its inherent powers as an appellate tribunal, can issue an order of supersedeas to preserve the *status quo* of the parties, pending the determination of the appeal upon its merits. . . . It is conceded that an appeal lies from the judgment of the court in quashing the writ, and, under the provision just read, for the purpose of making that appeal effective, and to insure the complete exercise of this court over that appeal, it becomes necessary and proper to supersede the judgment, otherwise the right to appeal which the statute has given would be of no avail to the appellant, for if the board of directors in the meantime were to proceed to remove him, when the case finally reached this court on appeal it would have to be dismissed for want of merit, because the trial on merit would already have terminated. . . . We think this is exactly the kind of a case which is contemplated by the Constitution, and that the only way that this court could maintain the complete exercise of its appellate jurisdiction would be by issuing the writ prayed for. There would be no meaning to the provision of the Constitution, and no necessity for it, if it could only be held to apply to cases where supersedeas was provided for by the law. . . .

"The principles of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running

through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Cæsar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson . . . 'next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.' The reason that financial interest or near relationship to a litigant is held to be sufficient to recuse a judge is that it is to be presumed that self-interest or natural affection will unconsciously prejudice a judge, and deprive the litigant of a fair trial. This presumption in certain cases may or may not be justified by the truth, but so solicitous is the law to maintain inviolate the principle that every litigant shall be secure in his right to a fair trial that he is accorded the benefit of the presumption." 40 L.R.A., 317 *et seq.* esp. 320.

On the second page of Mr. Harmon's petition it is complained that while the indictments preferred against him

were pending before said grand jury "the Attorney General of the Republic of Liberia in the person of Monroe Phelps being the highest prosecuting official of the State, contrary to all legal propriety, entered the grand jury room unsolicited and menaced them to make a true bill against your said petitioner," etc.

According to the records of the Clerk of the Court, on the 28th day of August the said Monroe Phelps was sworn in open court as a witness to testify before the grand jury, and sent to them with the compliments of His Honor Judge Brownell to testify before them. This record, it appears to us, contradicts the allegation of Mr. Harmon, that the Attorney General entered the grand jury room unsolicited.

But suppose we hadn't had such a record, and suppose the Attorney General, admittedly the highest prosecuting official of the State, had unsolicitedly entered the grand jury room, would that have been contrary to legal propriety?

The general principle is that "the proceedings of the grand jury are secret," as pointed out by Beale in his book on *Criminal Pleading and Practice;* and in section 53, he says also:

> "No one should be allowed in the grand jury room during their deliberations except the necessary persons. The witnesses testifying and the prosecuting attorney are of course admissible at the proper stage of the proceedings. If an attorney is specially employed to prosecute, in case of disqualification of the prosecuting attorney, he may attend the sessions of the grand jury in place of the latter. And a deputy of the prosecuting attorney may in his place attend the grand jury. By the better view a stenographer may by employment of the prosecuting attorney be present in the grand jury room to assist him.
>
> "No one, whether prosecuting attorney, bailiff, or

any other, must be present while the grand jury is voting; though his presence does not vitiate the indictment unless it prejudiced the defendant."

In 20 *Cyclopedia of Law and Procedure*, page 1337, we have in two paragraphs, the one succeeding the other, the contrary relations of the accused and the prosecution to the grand jury stated as follows:

"(A) Presence of Accused. In the absence of statute to the contrary, the general rule is that an accused person is not entitled as a matter of right to notice that the grand jury is investigating a charge against him, or to be brought before the grand jury, or to be heard, or to have witnesses sworn in his behalf. Indeed in the absence of statute to the contrary it is held that a grand jury has no authority to allow the accused to come before it, or to swear and examine witnesses on behalf of the accused. But while as a general rule grand juries should hear no other evidence than that adduced by the prosecution, they are sworn 'to inquire and true presentment make,' and if in the course of their inquiries they have reason to believe that there is other evidence not presented and within reach which would qualify or explain away the charge under investigation, it is their duty to order such evidence to be produced."

"(B) Presence of Attorney for Prosecution—1. In General. Although in some jurisdictions the prosecuting attorney is not allowed in the grand jury room, the general rule is that he may be present before the grand jury to assist in the examination of witnesses, to advise it as to the admissibility of evidence and the proper mode of procedure, and to give general advice on questions of law. But he cannot par-

ticipate in the deliberations or express opinions on questions of fact or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding. While it seems to be very generally regarded as the better practice, and the grand jury has a right to require that the prosecuting attorney shall retire from the room during its deliberations, and in some jurisdictions his presence is expressly forbidden by statute, the mere fact that, with the consent of the grand jury, he is present while the jurors are deliberating or voting on a charge, will not constitute such an irregularity as, in the absence of a showing of injury or prejudice to the accused, will invalidate an indictment.

"2. Assistant Attorney or Special Counsel. In some jurisdictions it is held that a duly authorized assistant prosecuting attorney or counsel specially appointed for the state is invested with the same rights before the grand jury as the regular prosecuting attorney, and this, it has been held, although the appointment was not authorized by law.

"3. Private Prosecutor. It has been held that an attorney employed as a private prosecutor may on the invitation of the prosecuting attorney attend upon the grand jury for the purpose of examining witnesses. But it is generally considered to be improper for a private prosecutor to use his influence before the grand jury to secure an indictment, and an indictment thus obtained is invalid."

Thus it seems to us clear that the grand jury is an inquisitorial body whose duty is admittedly to inquire *ex parte* in behalf of the prosecution, and with the assistance of the prosecuting attorney and any others he may desig-

nate, without any corresponding right on the part of the defendant to have his side of the case considered by the grand jury.

True it is, as has been shown, that neither the prosecuting attorney nor any person he may permit to be present should menace, or otherwise attempt to coerce the grand jury to make a finding; but inasmuch as the inquisition is made in secret, a grand jury is subject to all the abuses of a tribunal permitted to operate in secret. Defendants, therefore, have but two guarantees against any such abuses; the first, which is not the more satisfactory, is the obligation that rests in the appointing power of selecting to fill the position of prosecuting attorney persons of probity, whose high character, sense of moral rectitude, and adherence to the ethics of the noble profession of the law, will not permit them to stoop to the doing of anything that would bring reproach and disgrace upon their exalted positions.

The second, and far more satisfactory, guarantee is the right of the accused thus presented to (1) a public trial; (2) to be heard in person, by counsel or both; (3) to be confronted by the witnesses against him; (4) by cross-examination to test the interest, motives, inclinations and prejudices, of a witness, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means; and (5) the right to rebut, explain or modify by witnesses he may have himself produced the testimony adduced against him.

Had Mr. Harmon waited until the time had come for him to have what is technically known as *his* * "day in court," and, at that time, had raised the several issues contained in his petition filed on the 2nd day of September, 1936, then, and then only, would have been the proper time for the trial court to have decided whether or not the facts alleged were true, and, if so, if upon such facts

* Italics added by His Honor the Chief Justice.

the indictments could have been thus collaterally attacked.

It is, therefore, our opinion that Mr. Harmon moved prematurely, and was therefore out of order. And, moreover, that in so doing he has placed himself on record as prying into matters pending before a grand jury whose proceedings are secret, and into which he had no right to intrude.

Nor can we avoid expressing the conclusion we have reached, much as we would have preferred to have passed same over, that His Honor Judge Brownell appears to us to have aided and abetted Mr. Harmon in the illegal and improper practices above referred to.

True it is that the Honorable the Attorney General did not file his affidavits at the proper time, nor in time to give respondents the opportunity to study them and file answering affidavits as is required by our practice; but even were we to ignore them all, and confine ourselves to the facts on record otherwise brought to our attention, what irregularities has the trial judge been shown to have committed?

First of all, from the subpoena submitted by the clerk of the Circuit Court of the First Judicial Circuit, W. S. Murdoch was one of those returned as having been summoned to testify before the grand jury, but the records show that he was never so sent to the grand jury after having appeared in court. In Mr. Harmon's petition to Judge Brownell on the 2nd of September as aforesaid he states that the grand jury "explained to the Attorney General that they had not completed the investigation, that witness Murdoch and other important witnesses had not deposed before them, and this was the last day of their sitting under the law," etc.

Referring now to an affidavit of Mr. P. J. Bracewell, sheriff of Montserrado County, which seems to us to dovetail into the facts above found, we find that when the said W. S. Murdoch appeared in the Circuit Court of the First Judicial Circuit on Saturday August 29, His Honor Judge

Brownell summarily ordered Mr. Murdoch discharged, stating that he would send no further witnesses to the grand jury, and that he intended discharging said body that day, and that he refused to allow any record of said decision of his to be made.

Mr. Carney Johnson, clerk of the Circuit Court of the First Judicial Circuit, testified here that the grand jury at said August session, 1936, was discharged on the 17th day of the term, although at the August term, 1935, said Judge Brownell had kept the grand jury functioning until the 23rd day of the term. The law on the subject is:

> "That from and immediately after the passage of this Act the aforesaid section 3 of the Act passed and approved October 22nd 1914 be so amended as to read 'that the grand jury shall remain in session as long as there is business pending before them, provided however that no Jury session shall continue for a period longer than (21) twenty-one days.' " Act of the Legislature, 1924–25, ch. VII, sec. 1.

The second irregularity we will now notice is this: In the sixth count of the petition for a writ of prohibition the Attorney General complains that when the presentment against Mr. Harmon had been returned His Honor Judge Brownell did not file said indictments in the clerk's office, but pocketed them until two days later before filing them with the clerk.

Rule XXXVI for the government of the Circuit Courts prescribes that:

> "When Presentments are made and Indictments found upon them, the Grand Jury shall present same in open court in a body and not otherwise; on their arrival in the court the Sheriff shall announce same, and the Clerk shall make a query as to whether they have Presentments or Indictments."

According to the record produced here by Mr. Carney Johnson, clerk of the Circuit Court of the First Judicial Circuit, the grand jury was adjourned on the 29th

day of August, but on said day neither of the two indictments against H. Lafayette Harmon was filed with him; nor did said indictments come into his possession until August 31st, having been handed him by His Honor Judge Brownell two days after the grand jury had been disbanded.

In sub-section (c) of the 3rd count of Judge Brownell's returns, he appears to admit that the said indictments were found by the said grand jury. Where then were the indictments between the 29th and 31st of August when, according to law and practice, as soon as they had been found the proper custodian of them was the clerk of Court, and him alone? Even if we ignore the allegation of the Attorney General in his petition that His Honor the Judge pocketed said indictments, and took them to his private home for the purpose of conferring with the defendant, his brother-in-law, because his affidavits were late coming in, can we conscientiously close our eyes to the fact that is patent from the clerk's record that His Honor Judge Brownell, on receiving said indictments from the grand jury on the 29th, did not deposit them with the clerk of Court in whose custody they should have been for two whole days? What legitimate inference can we draw from such an irregular course of procedure on the part of the said Judge?

Not only that, but it has been shown more than once during the hearing that he refused to have record made, and exceptions noted to the rulings as follow: (1) He refused to allow witness W. S. Murdoch and other witnesses to be qualified and sent to the grand jury; (2) To allow the objections of the County Attorney to be noted to the acceptance of members of the Legislature as sureties for said H. Lafayette Harmon, and his exceptions to his ruling adverse to the contention of the County Attorney in these two instances to be noted.

What a gross irregularity! How dare a trial Judge refuse to allow objections by a party to be made, and his

exceptions on a ruling adverse to a dissatisfied party to be noted!

Judges must learn to keep so far out of the cases they hear as to be able to view them wholly objectively. They must learn to realize that they are but part of a great institution, and to welcome a review of any decision of theirs by a tribunal constitutionally higher than their own. And we may remark here that any failure or apparent reluctance on the part of a judge to make record of his actions, or allow any objection or exception to be noted, will by us be regarded as *prima facie* evidence of his interest and bias, and consequent unfitness to preside over the said cause. Compare in this connection *Gartargar* v. *Republic,* 4 L.L.R. 70, 1 New Ann. Ser., 73 *et seq.,* esp. 81, where Mr. Justice Dossen speaking for the Court said:

> "The Court will remark in passing that it will look with great disfavor upon any effort upon the part of a trial judge to prevent objections from being made to what a counsel might consider improper questions propounded by the judge or a member of the jury; or to prevent exceptions taken to his ruling to such classes of questions from being noted upon the record. Every such objection and exception is an effort on the part of counsel to have the propriety or impropriety of the question reviewed by this Court, and this Court will not allow counsel to be thwarted in his effort to save such a point for our review."

According to the records of the clerk of the Circuit Court of the First Judicial Circuit the grand jury and all petit jurors not impanelled, were discharged on August 29th; it was not until the 2nd of September that Mr. Harmon filed the petition before Judge Brownell, which he assigned for hearing on the 8th, which was suspended by these prohibition proceedings.

According to the Act supplementary to an Act establish-

ing the Circuit Courts, passed and approved January 30, 1912, it is provided that:

"Sec. 1. That the Judges of the Circuit Court shall hold the regular Jury Session thereof under assignment of the Chief Justice of the Supreme Court as now provided for by law, together with all other matters falling within the Jurisdiction of the said Circuit Court, which shall have been legally entered for trial upon the Calendar before the meeting of each regular session; provided however, that all other matters not requiring a Jury or which shall not have been entered for trial as aforesaid shall be disposed of by the resident Judge in the Circuit where the matter is pending; whenever said matter require [*sic*] a hearing upon the application of either party thereto.

"Sec. 2. Ten days after adjournment of any regular session of the Circuit Court shall commence the next session of said Court and all matters not requiring a Jury may be heard and disposed of upon application as provided for in section One of this Act before the meeting of the regular Jury Session. . . ." Acts 1911–12, 47.

This is, as we understand, an extension of section 2 of the enactment of 1887 printed on page 9 of the Acts of 1886–1887 which reads:

"The first two weeks of each Session of said Court shall be used for the trial of Jury cases, civil and criminal, and on the second Saturday of each session all Jurors not then empannelled [*sic*] shall be dismissed, and no Jury shall be empannelled [*sic*] after that day of that Session, the remainder of the Session shall be used in the trial of such cases, as can be tried without a Jury, the hearing of reports and the hearing of arguments on motion in cases to be tried, at a subsequent term, and such other business as the Court may have to attend to at that time."

Ever since said year 1887 that law has been so interpreted by the successive judges, and legal men of this country, as to mean that the jury session for the term having been closed, all new indictments should be laid over untouched until the next term. Hence, this is the first time within the knowledge of any member of this Bench that any attack either direct or indirect has been made upon an indictment after the trial term had ended.

Hence now, if even we concede for the sake of argument that the two last cited enactments could admit of any different construction it appears to us that His Honor Judge Brownell, in view of his relationship to Mr. Harmon, should have been even more careful than under ordinary circumstances to avoid any act that might by any possibility be construed as giving to said statute a construction different to that previously universally understood.

When it comes to the question of the sufficiency or insufficiency of the bond, this Court cannot properly make any expression at this stage, as that is a question which should first be settled by the trial court. Nor are we able to believe that the Honorable the Attorney General, the principal prosecuting officer of this Republic, nor the County Attorney for Montserrado County, would be willing to allow themselves to be placed on record as having refused to obey a summons to show cause why they should not be attached for contempt. Our impression on the other hand is, that although they would have welcomed the opportunity to show such cause before any impartial tribunal, because of the facts which had come to their knowledge, in the truthfulness of which they believed, they believed that Judge Brownell was biased because of relationship, and, therefore, psychologically incompetent to render an impartial judgment.

Summing up now, let us try to imagine what in all probability could have been expected had this Court not intervened, and the petition of Mr. Harmon's been taken

up for hearing on September 8th before His Honor Judge Nete-Sie Brownell.

First of all there would have been the law officers of the Republic firm in their contention that Mr. Lafayette Harmon, while attorney for Henry Bell, had received the stolen diamond, knowing it had been stolen, and had proceeded to appropriate said diamond to his own use; that in his anxiety to avoid prosecution for the crime they believe he had committed, he had insinuated himself into the confidence of his brother-in-law, the trial judge, and seduced him into the commission of sundry impropriety contrary to law, practice and procedure, and that it was before the said judge with their confidence in his impartiality so shaken that they were cited to appear and show cause why they should not be attached for contempt. On the other hand there was the judge worked up to a veritable passion because of his having allowed his brother-in-law to take advantage of the relationship existing between them, to whisper the most scandalous reports against the law officers of the Republic and induce said judge to believe that they had abused their respective positions to start an unfounded prosecution against his brother-in-law. Hence it was before a Judge who, because of the whispering of his brother-in-law, had evidently lost his poise, and instead of proceeding to hear the issue in the calm, cool, dispassionate and objective manner that should characterize a judge, had become infected by his brother-in-law with all the ill will, venom and malevolence with which the indicted brother-in-law had been affected that they were summoned to appear.

What sort of a court's session could there have been in such an unjudicial atmosphere? Would not pandemonium have reigned? Only at our last November term this Court quoted with approval in *Ware* v. *Republic,* the principle found in paragraph 27 on page 539 of volume 15 of *Ruling Case Law* that:

" 'Every litigant, including the state in criminal cases,

> is entitled to nothing less than the cold neutrality of an impartial judge, and therefore if the judge before whom a cause is to be tried is prejudiced or otherwise disqualified, he may be challenged, and if the challenge is sustained the cause may be moved to another court or tried before another judge. . . .'" *Ware* v. *Republic,* 5 L.L.R. 50, 53, 3 New Ann. Ser. 36 (1935).

So long as no appeal for intervention was made to us by either party, this Court would not have been responsible for any consequences no matter how dire they may have been. But inasmuch as an appeal was made to us for the exercise of our extraordinary powers, had we turned a deaf ear and the proceedings had resulted in disgrace, scandal and reproach upon our judiciary, how great would have been our moral responsibility, and how could we have escaped from the opprobrium that would have justly been fixed upon us in such circumstances!

It is our opinion, therefore, that the temporary prohibition awarded by Mr. Justice Dixon should be confirmed, and made permanent; that His Honor the Chief Justice should proceed to make such special assignments as will prevent His Honor Judge Nete-Sie Brownell from functioning in the First Judicial Circuit either as an assigned Judge, or as the resident Judge of the Circuit, as long as either of the indictments against H. Lafayette Harmon, his brother-in-law, is pending in said Circuit; and it is hereby so ordered.

Application granted.