IN THE HONOURABLE SUPREME COURT OF REPUBLIC OF LIBERIA
SITTING IN ITS MARCH TERM, A. D. 2017

BEFORE HIS HONOR : FRANCIS S. KORKPOR, SR……CHIEF JUSTICE
BEFORE HIS HONOR : KABINEH M. JA'NEH……..……..ASSOCIATE JUSTICE
BEFORE HER HONOR: JAMESETTA H. WOLOKOLIE……..ASSOCIATE JUSTICE
BEFORE HIS HONOR : PHILIP A. Z. BANKS, III……..ASSOCIATE JUSTICE
BEFORE HER HONOR: SIE-A-NYENE G. YUOH……..ASSOCIATE JUSTICE

H. Varney G. Sherman and Sherman and Sherman, Inc., of the City of Monrovia, Liberia .....APPELLANTS

VERSUS

The Republic of Liberia .....APPELLEE

APPEAL

GROWING OUT OF THE CASE:

H. Varney G. Sherman and Sherman and Sherman, Inc., of the City of Monrovia, Liberia……MOVANTS

VERSUS

The Republic of Liberia……..RESPONDENT

MOTION TO DISMISS/QUASH SUBPOENA DUCES TECUM

GROWING OUT OF THE CASE:

The Republic of Liberia ……PLAINTIFF

VERSUS

H. Varney G. Sherman and Sherman and Sherman, Inc., of the City of Monrovia, Liberia…….DEFENDANTS

REQUEST FOR A WRIT OF SUBPOENA DUCES TECUM

Heard: December 2, 2016. Decided: September 23, 2017.

Counsellors G. Moses Paegar and Albert Sims of Sherman and Sherman, Inc., in association with Counsellors Frank Musa Dean, Jr., of Dean and Associates, Cyril Jones of Jones and Jones Law Firm, and Emmanuel B. James of the International Group of Legal Advocates and Consultants, appeared for the appellants. Counsellor James Daku Mulbah, County Attorney for Montserrado County, Ministry of Justice, in association with Counsellors Theophilus C. Gould and Othello S. Payman, I, appeared for the appellee.

MR. JUSTICE BANKS delivered the Opinion of the Court.

This appeal has it genesis in a motion filed by the appellants before the Circuit Court for the First Judicial Circuit, Criminal Assizes "C", Montserrado County, sitting in its May Term, A. D. 2016, wherein they prayed the court

to quash the writs of subpoena duces tecum issued by the court against a number of commercial banks commanding the banks to deliver to the court the accounts records held by the banks under the names of various persons and institutions for the period between January 1, 2010 and September 30, 2010. The requests for the writs of *subpoena duces tecum* against the commercial banks, made by the State through the Office of the County Attorney for Montserrado County, and contained in request communications to the judge presiding over the mentioned court, was said to be designed to aid the Government in its criminal investigation of allegations of bribery levied against certain persons and institutions named in a Report released by an international group under the name and style of Global Witness. In the Report, which was made a matter of the public record, and which under the law this Court, as well as the trial court, is under a legal obligation to take judicial notice of, especially as it formed the basis for the instant proceedings, Global Witness accused certain of the named persons and institutions of receiving an amount of money to the value of over Nine Hundred Thousand United States dollars ($900,000.00) which was said to have been intended to bribe members of the Liberian Legislature to amend certain provisions of the law governing concessionaire agreements for the exploration of mining activities in Liberia. The Global Witness Report also accused other officials of the Executive Government and some members of the Legislature of having received segments of the mentioned amount in order to pass into law the amendment aforementioned.

As a consequence of the Report, the President of Liberia set up a Special Task Force comprising the Ministry of State for Presidential Affairs, the Ministry of Justice, and the Liberia Anti-Corruption Commission (LACC), to probe into the allegations and to accordingly charge those whom the evidence revealed had spearheaded, facilitated or participated in the alleged criminal act. It was in the course of the conduct of the mentioned criminal investigation by the Special Task Force that the County Attorney for Montserrado County, a member of the Special Task Force and a prosecuting attorney of the Ministry of Justice, acting for the Ministry of Justice, the prosecuting arm of the Government of Liberia, communicated

with the Assigned Judge for the First Judicial Circuit Court, Criminal Assizes "C", Montserrado County, requesting for the issuance of the writs of *subpoena duces tecum* against the commercial banks named in the communications to have them produce and deliver to the court for onward transmission to the State Investigators the bank statements and United States dollar accounts of the persons named in the communications and who were implicated in the Global Witness Report. The records requested were said to cover the period January 1, 2010 to September 30, 2010. We recite herewith the full text of one of the form instruments filed with the criminal court seeking the issuance of the writs of subpoena duces tecum, to wit:

MINISTRY OF JUSTICE
MONROVIA, LIBERIA

OFFICE OF THE COUNTY ATTORNEY
MONTSERRADO COUNTY
May 19, 2016
His Honour
J. Boimah Kontoe
Assigned Circuit Judge
Criminal Assizes "A"
Temple of Justice Building
May it Please Your Honour:

I present my compliments and hereby respectfully request your Honor and this Honourable Court to order the management of International Bank Liberia, Ltd to produce bank statement (s) for the period January 1, 2010 to September 30, 2010 for United States Dollars account (s) in the names of the following entities and individuals:

1. **Sherman and Sherman, Inc.**
2. **Sable Mining**
3. **Western Clusters**
4. **Delta Mining Consolidated (Pty) Ltd.**
5. **West African Exploration**
6. **Varney G. Sherman**
7. **Morris Saytumah**
8. **Sumo Kupee**
9. **Cletus Wotorson**
10. **Alex Tyler**
11. **Henry Fahnbulleh**
12. **Richard Tolbert**
13. **Willie Belleh**

The purpose for this request is to assist the Ministry of Justice and the Liberia Anti-Corruption Commission (LACC) to complete an ongoing investigation.

Respectfully submitted by
The Ministry of Justice
Cllr. J. Daku Mulbah
COUNTY ATTORNEY/MONT. CO."

The records reveal that attached to each of the form instruments, as quoted above, in respect to each of the commercial banks believed to be

holding United States dollar accounts for each of the persons named in the communications, was an affidavit duly sworn to by the County Attorney for Montserrado County, attesting to the truthfulness of the allegations, of both law and fact, set forth in the said instruments. It was these communications that set the stage for the action taken by the trial court judge in issuing the writs of *subpoena duces tecum* prayed for by the State and formed the basis for the challenge by the appellants, both regarding the form adopted by the State in seeking the issuance of the writs of *subpoena duces tecum* and the action taken by the judge in response to the request of the State for the writs. The records show that the Assigned Circuit Judge for Criminal Assizes "C", First Judicial Circuit Court, His Honour J. Boima Kontoe, upon receipt of the request instruments from the County Attorney, acting for the Ministry of Justice and the State, ordered the issuance of the writs against each of the commercial banks whose names were submitted by the State. Our review of the records disclosed no evidence that any hearings were conducted by the trial judge prior to the issuance and service of the writs, either involving the banks or in regard to the customers whose records at the commercial banks were being sought by the State. Further, there are no indications from the records that any writs were requested directly against the customers, or that aby were issued against such customers, or that service of any precepts was made on any of the customers whose records were sought from the commercial banks. Here is how one form of the issued writs read:

IN RE: REPUBLIC OF LIBERIA……PETITIONER) REQUEST FOR
VERSUS) A WRIT OF
THE MANAGEMENT OF FIRST INTERNATIONAL BANK) SUBPOENA
) DUCES TECUM

WRIT OF SUBPOENA DUCES TECUM

REPUBLIC OF LIBERIA TO:
SHERIFF FOR MONTSERRADO COUNTY
OR HER DEPUTIES, GREETINGS:
YOU ARE HEREBY COMMANDED TO SUBPOENA THE MANAGEMENT OF THE FIRST INTERNATIONAL BANK TO APPEAR BEFORW THIS HONOURBLE COURT ON MONDAY, 23RD DAY OF MAY, A. D. 2016, AT THE PRECISE HOUR OF 12:00 P.M., THAT IS TO SAY:
TO PRODUCE BANK STATEMENT(S) FOR THE PERIOD JANUARY 1, 2010 TO SEPTEMBER 30, 2010 FOR UNITED STATES DOLLARS ACCOUNT(S) IN THE NAMES OF THE FOLLOWING ENTITIES AND INDIVIDUALS:

1. **Sherman and Sherman, Inc.**
2. **Sable Mining**
3. **Western Clusters**
4. **Delta Mining Consolidated (Pty) Ltd.**
5. **West African Exploration**
6. **Varney G. Sherman**

7. Morris Saytumah
8. Sumo Kupee
9. Cletus Wotorson
10. Alex Tyler
11. Henry Fahnbulleh
12. Richard Tolbert
13. Willie Belleh
YOU ARE FURTHER COMMANDED TO MAKE YOUR OFFICIAL RETURNS TO THE OFFICE OF THE CLERK OF THIS COURT, WITH YOUR SIGNATURE ENDORSED ON THE BACK OF THE ORIGINALS, STATING YOUR MANNER AND KIND OF SERVICE AND TO INFORM THE RESPONDENT THAT PON THEIR/IT FAILURE TO ADHERE TO THIS SUBPOENA DUCES TECUM.
AND HAVE YOU THERE THIS WRIT OF SUBPOENA.
GIVEN UNDER MY HAND AND SEAL OF THIS COURT
THIS 19TH DAY OF MAY, A. D. 2016.
J. GABRIEL T. SMITH
CLERK OF COURT"

We are informed additionally by the records certified to this Court that in response to service upon them of the writs, some of the commercial banks complied with the command contained in the writs and submitted to the court the statements of United States dollars accounts held by the individuals listed in the writs. Others seemingly decided to inform their customers of the writs and the commands contained therein and to await further actions by or instructions from the customers, either by way of legal challenge to the writs or approval by the customers that they, the banks, could comply with the commands of the writs. Three of such customers, Counsellor H. Varney G. Sherman, Sherman and Sherman, Inc. and Cletus S. Wotorson, decided to mount challenges to the writs, filing with the court two motions to dismiss or quash the writs of subpoena duces tecum issued by the court against the several commercial banks. We quote firstly the motion filed by Cletus S. Wotorson, as follows:

"MOTION TO DISMISS/QUASH

And now come movants herein above named, to this Honourable Court to most respectfully request that this Court will order the Clerk of this Court to recall, rescind and declare null and void, of no legal effect and value, the writ of subpoena duces tecum previously issued and served on banking institutions ordering the said institutions to produce the bank statements of Movants for reasons as follow to wit:
1. That Movant is a citizen of Liberia who is a holder of an account in a bank in the banking sector of the Republic of Liberia in exercise of his legal right to acquire, possess and protect real and personal properties as guaranteed and protected by the constitution and laws of the Liberia.
2. That movant bank, International Bank (Liberia) Limited, informed him, on Friday, May 20, 2016 that respondent herein named, through this court, had served the said bank a Writ of Subpoena Duces Tecum ordering the said Bank "...TO PRODUCE BANK STATEMENTS FOR THE PERIOD JANUARY 1, 2010 TO DECEMBER 31, 2010 FOR UNITED STATES

DOLLARS ACCOUNT{S) IN THE NAMES OF THE FOLLOWING ENTITIES AND INDIVIDUALS: 1. SHERMAN AND SHERMAN, INC.

2. **SABLE MINING**
3. **WESTER CLUSTERS**
4. **DELTA MINING CONSOLIDATIONS(PTY) LTD**
5. **WEST AFRICA EXPLORATION**
6. **VARNEY G. SHERMAN**
7. **MORRIS SAYTUMAH**
8. **SUMO KUPEE**
9. **CLETUS WOTORSON**
10. **ALEX TYLER**
11. **HENRY FAHNBULLEH**
12. **RICHARD TOLBERT**
13. **WILLIE BELLEH..."**

3. **That further to count (2) herein above, movant says, the said WRIT OF SUB POENA DUCES TECUM IS irregularly, unlawfully and illegally issued in complete violation of the law and procedures applicable and extant in this Republic, in that there is no on-going trial in Criminal Court "A" of the First Judicial Circuit of Montserrado County, in which Movants are parties and which could require bank(s) to appear as witness(es) to produce documents.**
4. **Movant says that in complete violation of the laws governing subpoenas, there is no record in this Honourable Court of the pendency of a trial in which movants are parties and during which trial an application was made openly and to the notice of movants, which would have caused this purported WRIT OF SUPOENA DUCES TECUM to be issued.**
5. **Movant says that the face of the purported Writ of SUBPOENA DUCES TECUM reveals how illegal, unlawful and irregular this court precept is and consequently a fit subject to be withdrawn and quashed. This illegal and unlawful precept issued by the Clerk of this Court does not state the title of the action in which Movant bank(s) will produce the bank statements, the names of the parties or the offense charged. Instead, this purported WRIT OF SUBPOENA DUCES TECUM, illegally and irregularly designates Movant bank as a Respondent.**
6. **Movant says that the intent and operation of the Subpoena DUCES TECUM is to secure the best documentary evidence in a trial and the documentary evidence produced in compliance with this subpoena, remains as part and parcel of the trial record in the possession and custody of the court where the trial is being held.**
7. **Movant says further to count (5) herein above, that the overt and manifest incurable legal deficiencies and omissions to comply with the elementary requirements of the laws that govern SUBPOENA DUCES TECUM render the actions and orders which culminated in the issuance and service of the said subpoena, unlawful, illegal and irregular; hence dismissible, void and a fit subject to be quashed.**

WHEREFORE and in view of the foregoing, movant most respectfully prays that your Honour grant this motion to quash the WRIT OF SUBPOENA DUCES TECUM, order the Clerk of this Honourable Court to issue the necessary orders declaring the said writ null and void and of no legal effect whatsoever and grant unto movants all that is legal and just."

As noted earlier, a second motion to dismiss or quash the writs of *subpoena duces tecum* issued against certain of the commercial banks was filed by Counsellor H. Varney G. Sherman and Sherman and Sherman, Inc. For

the purpose of addressing the contentions raised by the appellants and the analysis made hereinafter, we quote the said motion, as follows:

MOTION

Sherman & Sherman Inc. and H. Varney G. Sherman, movants, in this proceeding, move this Honorable Court to quash the writs of subpoena duces tecum, which were issued by this Honorable Court based on letters dated May 19, 2016 over the signature of Cllr. J. Daku Mulbah, County Attorney for Montserrado County, and addressed to International Bank (Liberia) Limited, Ecobank Liberia Limited, Guaranty Trust Bank Liberia Limited and Global Bank Liberia Limited, which commands each of them to present to this Honorable Court statements of the United States Dollar accounts from January 1, 2010 to September 30, 2010 for several persons and entities, including Sherman & Sherman Inc. and H. Varney G. Sherman. And for reasons, movants show the following, to wit:

1. That while a prosecution in criminal proceedings is entitled to a subpoena under the law it is required to be issued and served as provided in the Civil Procedure Law. *Criminal Procedure Law, section 17.3(1), ILCLR 371.* The Civil Procedure Law itself provides, among other things, that every subpoena shall state the title of the action, and shall command the person to whom it is directed to attend and give testimony or to produce the books, documents, or other things designated or to do both at a time and place therein specified. *Civil Procedure Law, section 14.1, 1LCLR 137-138.*

2. In the instant matter, the document which forms the basis for each the *subpoena duces tecum* is a mere letter to which is attached an affidavit totally unrelated to the letter. For example this letter *"respectfully requests your Honour and this Honourable Court to order the Management of International Bank Liberia, Ltd. to produce bank statement(s) for the period January 1, 2010 to September 30, 2010 for United States Dollars account(s) in the names of the following entities and individuals: ... "The* letter closes with the sentence: *"The purpose for this request is to assist the Ministry of Justice and the Liberia Anti-Corruption Commission (LACC) to complete an ongoing investigation".* Movants attaches a copy of one of said letter-request for the benefit of this Honorable Court and marks it Exhibit "WI".

3. Movants submit that the application for the writ of subpoena duces *tecum* is fatally defective in that it does not state the title of the action for which a *subpoena duces tecum* is needed by the prosecution. So, the *subpoena duces tecum* issued for each of the entities and individuals named in the letter of May 19, 2016 from the County Attorney to Your Honor names each bank as a *"RESPONDENT"* and the Republic of Liberia as the *'PETITIONER"* when there is no case between the Republic of Liberia and any of these banks. For the title of the action, the subpoena duces tecum states *"REQUEST FOR A WRIT OF SUBPOENA DUCES TECUM"* when this is not the title for any criminal case. For this defectiveness of all the writs of subpoena duces tecum, movants says that all of the writs of subpoena duces tecum are a fit subject to be dismissed and quashed. And Movants so

pray.

4. Movants say that it is important for the application for a subpoena to state the title of the action and when possible the application itself should be served on the defendant where it is the prosecution that has requested it. This gives the defendant the opportunity to concede or to challenge the request; it also gives the trial judge the opportunity to determine whether the application has merits. As it is, a cardinal principle of law in trial advocacy in Liberia is notice; that at every stage of the matter each party should be given notice of what requests are made of the court and what each party intends to prove. The letters of May 19, 2016 violates this fundamental principle of law. Accordingly, all of the Writs of Subpoena Duces Tecum, which rely on these letters, are a fit subject to be dismissed and quashed. And movants so pray.

5. Movants recalls that the letters submitted to Your Honor states that *"The purpose of this request is to assist the Ministry of Justice and the Liberia Anti-Corruption Commission (LACC) to complete an ongoing investigation".* This purpose, as stated in these letters, is so vague, ambiguous and uncertain that it does not form the basis for the issuance of a writ of *subpoena duces tecum*. And whatever the actual purpose of the request for the writ of subpoena duces tecum is, that actual purpose should have been stated so that Movants, as adversaries or opposite parties, would be fully informed and be given the opportunity to challenge or object to the issuance of the writs of subpoena duces tecum. Otherwise, the rights of movants under both the Constitution and the statutes have been flagrantly violated with the aid of the court. And for this reason, movants say that all of the writs of subpoena duces tecum are a fit subject to be dismissed and quashed. And movants so pray.

6. Movants say that the confidentiality of any individual's account at a bank and his transactions with a bank is one of the fundamental underlying basis for banking in Liberia and most parts of the world. The confidentiality of movants' United States Dollar accounts with International Bank (Liberia) Limited, Ecobank Bank Liberia Limited, Guaranty Trust Bank Liberia Limited and Global Bank Liberia Limited is so sacrosanct that the law provides that the *Central Bank of Liberia shall not, unless lawfully required to do so by law or court of law, reveal to any person information as to the affairs of any individual customer of a financial institution obtained in the exercise of its regulatory jurisdiction. New Financial Institutions Act of 1999, section 35(2).* In addition to this, each of the financial institutions listed in this paragraph has its own internal regulations and contract provisions with their customers, including movants, on the sanctity of confidentiality of the customer's account. It seems therefore that this confidentiality obligation should not be set aside or violated by this Honorable Court unless good cause is shown, unless the account holder has the opportunity to object to the application to this Honorable Court for disclosure of his account and the transactions of his account(s). And for this reason, movants say that all of the writs of subpoena duces tecum are a fit subject to be dismissed and quashed. And movants so pray.

7. Further to the confidentiality of a customer's account, Liberian law also provides that in publishing information obtained from commercial banks pursuant to its regulatory authority, *the Central Bank shall not published any information which would disclose the affairs of any*

> ***person who is a customer of a financial institution, unless the consent of such interested party has been obtained in writing. An Act to Authorize the Establishment of the Central Bank of Liberia 1999, section 37(2).*** **This is another statutory right of movants at the financial institutions named in the writs of subpoena duces tecum; and this statutory right is violated through the issuance of these writs of subpoena duces tecum without any notice to movants. Movants therefore says that all these Writs of Subpoena Duces Tecum are a fit subject to be dismissed and quashed. And movants so pray.**
>
> **WHEREFORE and in view of the foregoing, movants pray Your Honor to quash all of the Writs of subpoena duces tecum, relieve the financial institutions herein named from answering to these writs of subpoena duces tecum, and grant unto movants any other and further relief as in such matters is made and provided by law."**

It is important that we note at this point that none of the commercial banks against whom the writs were issued questioned or challenged the manner, form or process used by the State or the court, or the legality of the writs issued by the court. Instead, the challenges were made directly by the customers named above, whose information was sought from the commercial banks by virtue of the writs issued against the banks. We shall return to this point as we proceed into the analysis of the contentions raised by the parties.

It is also important that we take note of the fact that our examination of the records discloses that the State, for reasons which are unexplained, filed resistance only to the motion to dismiss or quash filed by H. Varney G. Sherman and Sherman and Sherman, Inc. No resistance was filed to the Cletus S. Wotorson's motion to dismiss or quash. In order that we fully capture the State's response to the Sherman motion and the issues presented to the lower court for disposition, we quote the seventeen (17) count resistance, as follows:

> **"RESPONDENTS' RESISTANCE**
>
> **Respondents, in the above entitled cause of action submit that the, motion to quash as filed by the movants should be ignored, denied and dismissed for the following legal and factual reasons to wit:**
>
> **1. Because as to count 1 of the motion to quash respondents say that the statutory laws of the Republic of Liberia are divided into two classes; the Civil Procedure and the Criminal Procedure, (Title 1 and Title 2).**
>
> **2. Further to count 1 above respondents say except for the provision of evidence and admission under chapter 25 of the Civil Procedure which are incorporated under title 21 of the Criminal Procedure law all other laws are applicable to their respective setting; i.e. Civil Procedure Law are distinct from Criminal Procedure Law.**
>
> **3. And also because as to 1 & 2 above, respondents say that the**

Criminal Procedure Law Chapter 17, section 17.3 requires that: "at the request of either the prosecuting attorney or the defendant, a subpoena commanding each person *to whom it is directed* to attend and give testimony at a specify time and place or to produce books, documents or other things designated therein or both, shall issue and may be served as provided in the Civil Procedure Law."

4. Respondents submit that those to whom the writs were directed to produce books, documents or other things designated therein were served as evidenced by the return of the Sheriff copies of which are attached and marked "R/1 in bulk".

5. And also because as to count 1 of the motion and in furtherance of counts 1 to 4 of the resistance therein respondents say that those to who service were made include the International Bank, the Ecobank Guaranty Trust Bank, the Global Bank and other banking institutions.

6. Respondents say that argument in count 1 of the motion can only be maintained by the institution named herein and not by the movants under the basic principles of law. Count 1 of the motion should therefore be denied, ignored and dismissed, so prays respondents.

7. And also because as to count 2 of the motion, respondents say that the law requires: "at the request of either the prosecuting attorney or the defendant..." Respondents submit that the letter referenced by the movants is a request from the prosecuting attorney as acknowledged by movants in their own motion and therefore is in full compliance of section 17.3 of the Criminal Procedure Law. Count 2 of the said motion therefore has no legal basis and should be denied and dismissed.

8. And also as to count 3 of the motion, respondents say that the movants are erroneously evoking chapter 14.1 of the Civil Procedure Law into matter relating to Criminal Procedure Law. Respondents submit that there' is no requirement under chapter 17, section 17.3 of the Criminal Procedure Law for inclusion of "title or action..." Respondents further submit that the Language "Action" is not used in the Criminal Procedure; instead, "Crimes" are used and hence to argue that title of an action must be inserted in a Criminal Proceeding constitutes an innovation in the law.

9. Further to Count 8 above and still in traversal to Count 3 of the motion, Respondents say that there need not be a pending case in a court before a subpoena duces tecum can be issued by a court. The law is that in criminal or administrative investigation subpoena can be prayed for by an authorized government authority. In that case, upon the service of a subpoena by a court based on request by an authorized government authority, as in the instant case, the person subpoenaed (the herein named commercial banks) are to comply to make disclosure under the exceptions to the general rules on privacy provisions. Accordingly, the privacy provisions do not apply to prohibit disclosure in said instance as the privacy of the individual will become subordinate and secondary to the interest of the state.

10. And also because as to count 4 of the motion respondents say that it is elementary that the movants will not be required to produce evidence against them and hence their argument of notice to them is intended to dissuade the cardinal principle of the Constitution against self-incrimination, respondents submit that the persons or entities to whom the subpoena was designated cannot and should not plea self-incrimination because they are not suspect or accused. The issue of

notice raised by the Movants is a sham and should be ignored. As in the case of a search and seizure warrant where notice to the affected party is not required prior to the granting of the request/issuance of the court's order once the magistrate, justice of the peace, or the judicial officer empowered to perform such function is satisfied that the grounds for said application exist or that there is probable cause to believe that they exist can issue the warrant, so also is the writ of subpoena duces tecum. No prior notice is required nor is there any hearing on the request. Also that the movants' motion should be ignored and dismissed because the movants fail to show which fundamental principle of law have been violated by the respondents; and also because of its vagueness Count 6 of the movants' motion is a fit subject for dismissal, respondents so pray.

11. And also because as to count 5 of the motion, respondents say that the request was addressed to the judge as provided for by law and it is only the Judge who can determine the ambiguity and uncertainty that attends to that request. The averments in count 5 of the movants are irrelevant and immaterial and should therefore be ignored.

12. Further to count 11 above, respondents argue that how does the movants claim that that which is ambiguous also affect rights. Respondents submit that that argument is inherently contradictory and constitute bad pleading. For which the motion should be dismissed.

13. And also because as to count 6 of the motion, respondent say that when a crime is committed or allegedly committed the claim of confidentiality cannot be used to protect the commission of a crime. Respondents submit and as rightfully admitted by the movants banking information can only be release when lawfully required. Respondents submit that the request to the judge, the subsequent grant of same, the issuance of the writ and the service on the therein named commercial banks constitute lawfully action and hence count 6 of the motion should be ignored and denied and the entire motion should be dismissed.

14. Further to count 13 above, respondents wonder why should movants not allow their bank account statements to be revealed to the investigation when an allegation which points and establishes, the probable cause for one to belief that a crime was committed and that the particular individual' and or institutions in the possession of the criminal agencies traceable to the accused should produce such instruments that certify the functional elements of potential criminal charges or crimes. Respondents believe that there exist a probable cause and it is that probable cause that a court is under the legal duty to issue the subpoena duces tecum and prayed for and contained in the request made to this Honorable Court under the signature of the County Attorney, Cllr J. Daku Mulbah.

15. And also because as to count 7 of the motion, respondents say that same is repetitive and only intended to mislead the court. Respondents submit and maintain that the request and subsequent issuance of the writ of subpoena duces tecum is consistent with law and that no right of the movants has been abridged by the respondents.

16. Further to count 15 of this resistance, respondents say that the intent of the statute quoted on disclosure which must require the consent of the interested party does not imply that confidentiality

> **protection extends to cover criminality, and therefore, count 7 of the movants' motion should be ignored and dismissed for its legal insufficiency.**
> **17. And also because respondents deny all and singular the averments contained in movants' motion not made subject of special traverse herein.**
> **Wherefore and in view of the foregoing facts and circumstances, respondents pray Your Honor and this Honorable Court to deny movants' motion, and cause movants to pay the costs of these proceedings and grant unto respondents any and all relief that this Court may deem just and equitable under the law."**

As noted before, we have found nothing in the records indicating that any resistance was filed by the State to the motion to quash filed by Cletus S. Wotorson. What the records do divulge is that the trial judge, considering that the two motions and the single resistance contained basically the same issues, ordered that the two motions and the single resistance be consolidated into a single action, that arguments would be entertained by the court in accordance with the consolidated action, and that a single ruling would be made thereon by the court. No exceptions were taken by the parties to the consolidation made by the judge or the ruling made in that respect or remedial process sought. Thus, the arguments having been had, the court, on May 30, 2016, entered its ruling wherein it denied both motions to quash or dismiss the writs. This is how the judge structured his rationale for denying the motions:

> **"RULING**
> **The motions to quash *subpoena duces tecum* filed by First, Second and Third Movants were countered by respondent/Republic of Liberia in a seventeen count resistance. In counts one and two of the resistance, Respondent asserts that the statutory laws of Liberia are divided into criminal and civil procedure (Title 1 & 2) and except for the provisions of chapter 25 of the civil procedure law which incorporated in chapter 21 of the criminal procedure law all other laws are applicable to their respective settings where civil procedure is distinct from criminal procedure. Respondent assert that Section 17.3 of the criminal pʳocedure law provides that "At the request of either the prosecuting attorneys or the defendant, the subpoena commanding each person to who it is directed attend and give testimony at a specified time and place or to produce documents or other things designated therein or both, shall issue and may be serve as provided in the civil procedure law". Respondent contents that those to whom the writs of subpoena was directed to produce books, documents or other things designated therein were served as evidenced by the court's copy bearing the sheriff returns which is attached to Respondent's resistance and marked R/1 in bulls.**
> **Respondent/Republic of Liberia asserts that those to whom the service was made included international bank, Ecobank, Guarantee**

Trust Bank, Global bank an*d* other banking institutions and contends that the argument in count 1 of first and second Movants motions that while prosecution in criminal proceedings is entitled to subpoena under the Law, the subpoena is required to be issued and served as provided in Section 14.1 of the Civil Procedure Law, that is every subpoena shall state the title of the action and shall command the person to whom it is directed to attend and give testimony or produce books, documents or other things designated or to do both at a time and place therein specified can only be maintained by the banking institutions to whom the subpoena was directed and not movants under the applicable principle of law.

Countering counts six of movants motion, respondent contends that when a crime is allegedly committed the claim of confidentiality cannot be used to protect the commission of the crime and as rightfully committed by movants, banking information can only be released when lawfully required and that the request to the judge, the subsequent issuance of the writ on the herein named commercial banks constitutes lawful action and hence, the motion to be dismissed.

Further traversing movants motions, Respondents asserts that it wonders why movants would not allow their bank account statements to be revealed to the investigation when an allegation which points and establishes the probable cause for one to believe that there exist a probable cause and it is that probable cause the court is under legal duty to issue a subpoena duces tecum prayed for and contained in the request made to the court under the signature of the County Attorney for Montserrado County, Cllr. J. Daku Mulbah.

Respondent further contends that the request and subsequent issuance of writ of subpoena duces tecum is consistent with law and no rights of the movants have been abridged.

Finally, Respondent contend that the intent of Chapter 17, Section 17.3 of the criminal procedure law contained in count three of its resistance which requires the consent of the interested party does not imply that confidentiality protection extents to cover criminality and therefore Movant's motions should be ignored and dismissed for legal insufficiency.

When the motion was called for hearing, the court discerning that the two motions filed, one by Sherman & Sherman, Inc. and H. Varney G. Sherman and the other filed by Cletus Wotorson, by and through his counsel, Cllr. Gloria Musu-Scott, contained common issue of law and facts, consolidated the two motions for the purpose of the hearing.(Revised Code 1:6.3)

At the call of the Motion for Hearing, First and Second Movants were represented by Cllrs. G. Moses Paegar, Albert Sims, Golda B. Elliot, James G. Innis, Attys. Ousman Feika, Miller B. Katakai and Luther Yorfee in association with Cllrs. Cyril Jones and Cllr. F. Musa Dean; and the Third Movant Cletus Wotorson was represented by Cllr. Gloria Musu- Scott of Law and Democracy Associates. While the Respondent, Republic of Liberia was represented by Cllrs. Wheatonia Barnes, Acting Minister of Justice, Betty Larmie-Blamo, Solicitor General, Augustine C. Fayiah, Assistant Minister for Litigation, J. Daku Mulbah, County Attorney for Montserrado County, Jerry D.K. Garlawolu, Legal Counsel for the Ministry of Justice, Attys. Kpoto K. Gizzie, P. Adelyn Cooper and Lafayette Gould, in association with

Cllr. Theophilus. C. Gould, Arthur Johnson, Kunkunyon N. Wleh Teh of the Ministry of State without Portfolio. Arguments were entertained and heard pro-et-con and the respective law citations were noted.

The issue which this court finds to be pivotal to the dispositive of motions and the resistance thereto (1) whether or not subpoena may issue out of a court of competent jurisdiction directing that documentary and other physical evidence or things designated therein be produced before said court at a time prior to trial and (2) whether or not the right to privacy of a person subject of criminal investigation is abridged by the issuance of a writ of subpoena duces tecum?

As to the issue of whether or not subpoena may issue out of a court of competent jurisdiction directing that documentary and other physical evidence or things designated therein be produced before court at a time prior to trial, the court answers in the affirmative. Section 17.2 of the criminal procedure law provides *"The court on motion may direct that books, papers, documents or other things designated in a subpoena duces tecum be produced before the court at a time prior to trial or prior to the time when they are to be offered in evidence and may upon their production permit such books, papers, documents or other things or portion or parts thereof to be examined and copies thereof to be made by the parties and their attorneys".* The time prior to trial may include that time period when there is no criminal proceedings pending before the court but a criminal investigation is ongoing as in the instant case when no indictment was pending before this court when the County Attorney for Montserrado county requested court for writ of subpoena duces tecum to be issued and served on several banking institutions operating in Liberia to appear and produce before this court account statements of movants and others to assist the Liberia Anti-Corruption Commission (LACC) and the Ministry of Justice complete an ongoing investigation. If the Liberia National Legislature had not intended for subpoena duces tecum to be issued by court of competent jurisdiction prior to the founding of indictment or issuance of writ of arrest in a criminal proceedings it would had crafted the above quoted Section of the criminal procedure provide for two different and distinct time period it is legally permissible for court to issue subpoena duces tecum: (I) Before to trial and (1) During trial when the documentary evidence designated in the subpoena are to be offered in evidence. This construction of Section 17.2 it is in harmony with statutes and other body of laws of the United States of America which under the reception statue of Liberia is legal authority in the event our laws do not *specifically and perhaps clearly provide for same. (Emphasis mine)*.

As to the issue of whether or not the right to privacy of a bank customer who is a subject of criminal investigation is abridged by the issuance of a writ of *subpoena duces tecum*, the court answers in the negative. The constitution of Liberia is the fundamental and supreme law of the Republic and guarantees the fundamental right of person, family, home and correspondence clearly makes exception to the exercise of such right to privacy when it in ARTICLE 16 "that no person shall be subjected to interference of privacy of person, family, home or correspondence except by order of court of competent jurisdiction. Here there is no ambiguity in this provision

of the constitution as regards the exception made and provided. In the instant case, competent authorities of the State (Ministry of Justice and the Liberian Anti-Corruption) requested for the issuance of subpoena daces tecum to be served on banking institutions to produce before Court the bank statements of Movants and others which was subsequently issued and served by order of court having had reason to believe in the existence of probable cause to issue the said writ of subpoena duces tecum.

The FEDERAL GRAMM LEACH BLILEY ACT 2009 of the United States of America provides that *"Financial Institutions are prohibited from disclosing consumer's financial information to any third party unless the Acts' consents of notice requirement are met or unless an exception applies. The Acts' exception states that the privacy provision do not apply to prohibit the following disclosures:*

1. ***Disclosures made to comply with a civil, criminal or regulatory investigation, subpoena or summons by Federal, State or local authorities; and***
2. ***Disclosures made to comply with Federal, State or local laws or other applicable legal requirements"***

In the instant case, Movants contend that the subpoena duces tecum commanding the banking institutions to produce the bank account statements of Movants violate their right to privacy and that there is no matter involving them is before court of law. Under the above quoted Article 16 of the Liberian Constitution extant and the statutes of the U.S., the contention of Movants cannot hold because it is legally permissible for court of competent jurisdiction to subpoena banks prior to trial and during civil, criminal or regulatory investigations to produce documentary evidence for the use of authorized government authorities.

Also, the Georgia's Bank Privacy Law (O.C.G.A) Section 7-1-360) provides that financial institutions are prohibited from disclosing a customer financial records except in the following instances: (1) Where the records are requested in conjunction with an ongoing criminal or tax investigation of a customer by a Grand Jury, taxing authority or Law Enforcement Agency (2) Where they are sought through a subpoena or administrative process issued by a Federal, State or Local Administrative agencies with jurisdiction over the customers".

The foregoing provisions of the Liberian Constitution and US statutes clearly show that disclosure is permissible during an ongoing criminal investigation and prior to trial. The request of the county attorney for Montserrado County and the LACC for subpoena duces tecum to be issued and served on banking institution mentioned above and service of same on them commanding them to produce account statements of movants to assist the Ministry of Justice and the LACC (Liberia Anti-Corruption Commission) complete an investigation is consistent with law and no right of privacy on the movants is abridged by the respondent as whatever documentary evidence subject of a subpoena duces tecum issued out of this court on May 19, 2016 commanding the banking institutions to produce the bank statement of Movants, said bank statements would be examined at the time they are about to be offered into evidence consistent with the provision of Section 17.2 of the Criminal Procedure Law and at that point the Movants can object if need be, to the documentary evidence to being offered.

WHEREFORE AND IN VIEW OF THE FOREGOING LAWS, FACTS AND CIRCUMSTANCES OF THESE MOTIONS and the resistance thereto, Movants' Motion as consolidated is hereby denied and the resistance thereto sustained. Consequently, the order contained in the notice of assignment for the hearing of these motions ordering a stay of compliance by the banking institutions mentioned above pending the hearing of the motions filed by the Movants is now dissolved and the. banking institutions served the writ of subpoena duces tecum as evidenced by the Sheriff's returns are hereby ordered to produce the documentary evidence subject the subpoena duces tecum served on them within 24hours since they have had prior notice to produce same before the stay order pending hearing and determination of these motions. And it is hereby so ordered.

GIVEN UNDER MY HANDS AND SEAL OF THIS COURT THIS 30th DAY OF MAY, A. D. 2016.

J. KONTOE BOIMA
ASSIGNED CIRCUIT JUDGE"

The two separate movants, not being satisfied with the ruling of the judge, excepted to same and announced an appeal therefrom to this Honour-able Court for its review. Pursuant to the lower court granting of the appeal, each of the two separate movants filed separate bills of exceptions. We quote the said bills of exceptions so that there is also a full grasp and appreciation of the contentions advanced and the issues raised by the separate party appellants for determination by the Supreme Court. We quote, firstly, the two-count bill of exceptions filed by movant/ appellant Cletus S. Wotorson, as follows:

"And now comes movant to most respectfully submit his bill of exceptions on the final ruling on movant's motion to quash/dismiss, for reasons as showeth to wit:

1. That movant/appellant excepted to and announced an appeal from your Honour's entire final ruling on movant's/appellant's motion to quash the subpoena duces tecum which was issued by this Honourable Court, solely upon the application of respondent, Republic of Liberia and then straight away, issued and served said subpoena on movant's/appellant's bank, International Bank.

2. That movant/appellant is not a defendant in any action filed in this Honorable Court and consequently the issuance of a subpoena duces tecum ordering a bank to produce the records of the accounts of movant/appellant, without due notice to movant/appellant violates, not only the fundamental legally guaranteed right of due process but the scope, nature and office of a writ for subpoena duces tecum and consequently, the rights of movant/appellant as guaranteed by the laws extant in this Republic; all of which acts were upheld in Your Honor's final ruling, erroneously ascribing the scope of police power and secrecy to the said subpoena duces tecum contrary to the spirit and intent of the statute applicable; to which final ruling movant/appellant excepted."

Wherefore and in view of the foregoing movant/appellant most

respectfully hereby submits and files this bill of exceptions."

For their part, appellants H. Varney G. Sherman and Sherman and Sherman, Inc. submitted an extensive eight (8) count bill of exceptions which we likewise herewith quote, as follows:.

> **Movants/appellants, having excepted to Your Honor's final ruling of May 30, 2016, and announced an appeal to the Honorable Supreme Court of the Republic of Liberia, sifting in its October Term, A. D. 2016, now file this bill of exceptions for Your Honor's approval in fulfillment of the second jurisdictional step for the perfection of their appeal as follows:**
>
> **1. That Your Honor committed a prejudicial error in the caption of the case in Your Honor's ruling which gives the impression that movants/appellants' motion to quash grew out of a pending cause of action between the movants/appellants, in which the movants/ appellants were the defendants and the respondent, Republic of Liberia, was the plaintiff. And for this error of Your Honor, movants/ appellants except.**
>
> **2. That in the motion to quash the writ of subpoena duces tecum issued by Your Honor, movants/appellants contended that the procedure adopted by the petitioner, Republic of Liberia and the Court, was irregular and inconsistent with Section 17.3 (1) of the Criminal Procedure Law and Section 14.1 of the Civil Procedure Law, 1 LCLR, Vol. 1, Titles 1 & 2, which set the basis for the issuance of said writ in criminal cases. A clear indication that "prosecuting attorney or defendant" as contained in the Section 17.3 of the Criminal Procedure Law refers to prosecuting attorney or defendant in a case pending before court, is found in the definition of prosecuting attorney contained in Section 1.5 of the Criminal Procedure Law which defines prosecuting attorney as (a) the Attorney General, or other attorney of the Department of Justice who assumes the duty of *prosecuting a particular case,* or the county, territorial, or district attorney in charge of *prosecution.* Notwithstanding, Your Honor completely ignored the clear and unambiguous language of the law and proceeded to deny movants/appellants' motion to quash on the basis that there need not be an action pending before court for the prosecuting attorney to request for a subpoena duces tecum. And for this error of Your Honor, movants/appellants except.**
>
> **3. Section 1.7 of the Criminal Procedure Law provides thus: "the form prescribed for papers in a civil action by Section 8.1 (ibid) is required for papers in a criminal action". Section 8.1 (3) (ibid) provides "each paper served or filed shall begin with a caption setting forth the name of the court, the venue, the title of the action, the nature of the paper and the file number of the action if one has been assigned. In a complaint or a judgment, the title of the action shall include the names of all the parties, but in all other papers it shall be sufficient to state the name of the *first Party on each* side with an appropriate indication of any omissions". Your Honor committed a reversible error when Your Honor ignored the law and movants/appellants' argument that the papers filed by the Republic were legally defective because they did not meet the requirements set forth in the sections of the law cited herein. And for this error of Your Honor, movants/**

appellants except.

4. That movants/appellants contended both in their motion to quash the writ of subpoena duces tecum and their oral arguments that the issuance of the writ of subpoena duces tecum violated their privacy rights and their right to due process under the law. Movants/ appellants contended that because the subject matter of the subpoena duces tecum was personal to them, they should have been given notice as required by law and the failure of the court to give such notice denied the movants/appellants due process. Your Honor, however, erroneously and prejudicially overruled movants/ appellants' contentions based upon a misinterpretation and misrepresentation of Article 16 of the 1986 Constitution of the Republic of Liberia.

5. Further to count four (4) above, Your Honor relied on Article 16 of the 1986 Constitution of the Republic of Liberia, which provides *"no person shall be subjected to interference of privacy of person, family, home or correspondence except by order of a court of competent jurisdiction" (emphasis ours),* without any consideration as to what constitutes a court having competent jurisdiction. movants/ appellants contended that competent jurisdiction consist of the court having jurisdiction over (i) subject matter (ii) the person and (iii) the thing. In the instant case, even though this court has jurisdiction over criminal matters, it had neither acquired jurisdiction over *any* matter in which the movants/appellants were a party, nor did the court have jurisdiction over the persons of movants/appellants. Accordingly, for Your Honor's misinterpretation of Article 16 of the 1986 Constitution of the Republic of Liberia, movants/appellants except.

6. That Your Honor committed a reversible and prejudicial error when Your Honor again misinterpreted Section 17.2 of the Criminal Procedure Law, in giving meaning to the term "any time before trial". Movants contends that there are numerous opinions of the Honorable Supreme Court which concludes that "before trial" indicates that an Action has already been filed in court but has not progress to the stage of trial. It is common knowledge in this jurisdiction that until all pre-trial motions and existing matters has been disposed of, a case is still at its "before trial" stage. Accordingly, Your Honor's interpretation that the time prior to trial may include the time when there are no criminal proceedings before the court and/or a time during Police investigation, or as in the instant case, a time during investigation by a Special Task Force, is erroneous and prejudicial. And for this error, movants/appellants except.

7. That the laws in our jurisdiction provides that *only* (emphasis ours) where Liberian laws are silent on any particular point or issue, shall the court take recourse to and apply "(a) the rules adopted for chancery proceedings in England, and (b) the common law and usages of the courts of England and of the United States of America, as set forth in case law and in Blackstone's and Kent's Commentaries and in other authoritative treatises ad digests." Section 40, Non-statutory law: derivation, General Construction Law, Title 15, LCLR. Movants/ appellants submit and say that our Liberian jurisprudence contains sufficient provisions on the basis, grounds, and procedures for obtaining a writ of subpoena duces tecum. Accordingly, Your Honor had no justification and legal basis in relying on the purported Federal Gramm Leach Bliley Act of 2009 and the Georgia's Bank Privacy Law -- neither of which is or partakes of the common law of America. And

> **for this error of Your Honor, movants/appellants except.**
> **8. That as to the entire Ruling of Your Honor, Movants/Appellants say that same is a gross misinterpretation and misapplication of the organic and statutory laws of the Republic of Liberia, and for which reasons, movants/appellants except.**
> **WHEREFORE AND IN VIEW of the foregoing, movants/appellants submit this bill of exceptions for Your Honor's approval."**

The foregoing gives the history of the controversy which the parties have laid before this Court. In their briefs filed with this Court, the appellants have identified the following four issues which they assert are dispositive of the controversy:

1. **Whether during a criminal investigation Appellee Republic has the right, through a mere letter to the judge of a court of competent jurisdiction, to the records of the accounts of a customer of a private financial institution to assist Appellee Republic with its investigation without any notice to the financial institution's customer?**
2. **Whether in requesting/applying for a writ of subpoena duces tecum appellants were a necessary party who should have been so named, the request/application should have been served on them and they be given a chance to respond to the request/application?**
3. **Whether the presiding judge erred when he used the Federal Gramm Leach Bliley Act 2009 of the United States as controlling law for the determination of the motion?**
4. **Whether the presiding judge erred when he adopted the laws of the State of Georgia, United States of America, as controlling law for the determination of the motion?**

The appellee, on the other hand, has itemized the following issues believed by it to be cogent to the resolution of the controversy:

1. **Whether or not the Ministry of Justice, through the Office of the County Attorney, can request for a writ of subpoena duces tecum to be issued on banking institution or any institution in the possession of information or documents that are relevant to an ongoing criminal investigation when there is no case pending before a court?**
2. **Whether or not the turning over by a bank of the records or documents of a customer's account at said bank by order of court of competent jurisdiction can be considered by the holder of the account as producing evidence against himself/self-incrimination and therefore unconstitutional?**
3. **Whether or not a lawyer whose account is used to receive money from his client for the client's business interest, which money's use comes under criminal investigation, the records of the lawyer's account in which the money was received is exempt from compulsory disclosure under the attorney-client privilege?**
4. **Whether or not the trial judge erred when he denied the appellants'/ movants' motion to dismiss/quash the writ for subpoena duces tecum?**

The issues, as structured by the parties, although similar in nature, are framed in a manner to reflect more positively to the positions taken by the respective parties rather than from a more objective perspective. The Court has therefore restructured the issues such that they present in a more objective and holistic viewpoint. In that connection, here is how the issues, as restructured, is perceived by this Court:

(a) Whether a mere letter addressed by the county attorney to the presiding judge of a court of competent jurisdiction, supported by an affidavit attesting to the truthfulness of the law and facts contained in the said letter meets the standard of an application for the issuance of a subpoena duces tecum?

(b) Whether a subpoena duces tecum may be requested for by the State and issued by a court of competent jurisdiction to aid the State in a criminal investigation even though there is no main suit pending before the court?

(c) Whether the trial judge erred in using a statute of the United States of America and the laws of the State of Georgia, a State of the United States of America, as controlling law in the resolution of a matter in the Liberian jurisdiction?

(d) Whether where a lawyer's or law firm's account at a commercial bank is alleged to have been used to facilitate the commission of a crime by the lawyer and his/its client, the attorney-client privilege exempts or prohibits the disclosure of such accounts or records?

In regard to the first issue, that is, whether a mere letter addressed by the county attorney to the presiding judge of a court of competent jurisdiction, supported by an affidavit attesting to the truthfulness of the law and facts contained in the said letter, meets the standard of an application for the issuance of a *subpoena duces tecum*, the appellants contend that it does not, and hence that the trial court was in error in ordering the issuance of the writs of *subpoena duces tecum* prayed for in the said letters. Seeking to substantiate their case, the appellants argued that as the Criminal Procedure Law, in speaking of motions in criminal proceedings, provides that the provisions of Chapter 10 of the Civil Procedure Law shall be the governing law and that as Section 10.1(2) of the Civil Procedure Law provides that every

application to a court for an order shall be made by motion, it follows that the State should have filed a motion with the criminal court, as opposed to "mere letters", in order for that court to grant the request and order the issuance of the writs of *subpoena duces tecum*.

This Court does not dispute that in regard to motions, Section 1.10 of the Criminal Procedure Law provides that "[t]he provisions of chapter 10 of the Civil Procedure Law are hereby incorporated into this title *in so far as they are applicable to criminal actions.*" Criminal Procedure Law, Rev. Code 2:1.10. [Emphasis supplied] This Court also does not dispute that the Civil Procedure Law, at Section 10.1(2) provides that "[e]very application to the court for an order shall be made by motion." Civil Procedure Law, Rev. Code 1:10.1(2). We concur further with the appellants that the Civil Procedure Law defines a motion as a written application. The law states thus:

> ***"1. Motion defined; when and how made.*** **A motion is an application for an order granting relief incidental to the main relief sought in the action or proceeding in which the motion is brought. A written motion is made when a notice of the motion is served. Unless made during a hearing or trial, a motion shall be in writing and shall state with particularity the grounds therefor and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."**

From our reading of the quoted provisions, the answer to the question of the application of Chapter 10 of the Civil Procedure Law begs the answer to the broader issue of whether in order for a court of competent jurisdiction to order the issuance of a writ of *subpoena duces tecum* for the production of documents or records relevant to an ongoing criminal investigation, the State must file a formal motion, as perceived by the appellants, have same served on the suspects, provide them with the opportunity to respond, have the court entertain arguments, make a ruling, from which an appeal may be taken, and that it is only after the final determination by the appellate court that the writ could be issued. This is the argument that the appellants have advanced, both in the trial court and on this appeal. They assert that the literal wording of the law mandates that unless a motion is filed, the court cannot order the issuance of the writ of subpoena duces tecum. Indeed, upon

being questioned by the court as to whether this has been the practice in this jurisdiction, the appellants acknowledged that such has not been the practice followed by the courts in this jurisdiction and that no challenge has been made previously in any case relative to the manner in which a request is made for the issuance of the writ of subpoena duces tecum. They admit that in past times, submissions have even been made on the records of the courts for the issuance of such writs and that applications made have not been in the nature of motions. They state, however, that the procedure followed previously, even by the legal counsels themselves now making the arguments before this Court, was clearly against the law and that this Court should now recognize the literal wording of the law. They impress upon us that the process previously followed deprived a person whose records were sought of the due process of law right and of the opportunity to challenge the request. In effect, they say, this Court should recognize that it has wrongly subscribed to the lower courts misinterpretation of the statutory law, and that in the face of that recognition, this Court should reverse the action of the lower court and direct that hereafter the statute be followed to the letter.

At first glance, the argument seems capable of great persuasion. The Constitution holds sacred and guarantees the right to due process of law; it clearly states that "no person shall be deprived of life, liberty, property, security of the person, property, privilege or any other right except as the outcome of a hearing judgment consistent with the provisions laid down in this Constitution and in accordance with due process of law." LIB. CONST., ART. 21(a)(1986). The Constitution also provides that no person shall be made to give evidence against himself and that evidence obtained under such circumstances shall be inadmissible in a court of law. LIB. CONST., ART. 21(h) (1986). The Supreme Court has scrupulously adhered to those provisions of the Constitution and has held in practically every instance in which a violation has occurred at the behest of the Executive Government, the Legislature and even the lower courts, that the act is unconstitutional, illegal, or otherwise void. *Dennis v. Republic*, 20 LLR 47 (1970); *Anderson v. Republic*, 27 LLR 67 (1978). This Court reiterates its continued commitment to those ideals laid in the Constitution and the statutory laws of Liberia.

In addition, this Court is also fully aware of the several provisions of the Financial Institution Act and the Central Bank Act, both of 1999, which protects customers of a banking institution against disclosure of information regarding the customer's account and transactions. Financial Institution Act, Section 32(2) (1999); Central Bank Act, Section 37(2) (1999).

But this Court is also mindful and conscious that both the Constitution and the statutory laws of Liberia have laid conditions in which, for the protection and survival of the State and the people as a whole, those rights may be subordinated to those of the State and the people. Indeed, the very Constitution and statutes that have granted those rights, the dictates of which the Supreme Court has meticulously adhered to, also, by the same or other provisions contained therein, recognize that the exercise of the rights are not without limitations. Thus, for example, the Constitution and the statutes, in recognizing the inviolability of the due process of law, also stipulate that under certain prevailing circumstances and conditions, the right can be suspended or cannot be exercised, at least not immediately. This is particularly true in the period of a formal declaration of a state of emergency. But a state of emergency need not exist before the right is deemed not exercisable. We refer, for example, to the right granted under Article 21(h) of the Constitution which vests in a defendant the right to confront his or her accusers and their witnesses. This Court, in the case Musa Solomon Fallah v. Republic, Supreme Court Opinion, March Term, 2011, while recognizing the existence of the right of an accused to confront his or her accuser(s), as provided for under Article 21(h) of the Constitution, also held that the Act establishing Criminal Court "E", which states that in the case of the rape of a minor, the victim (the minor accuser), may not be compelled to be physically exposed to the defendant but may provide testimony in camera, was not a violation of the defendant's constitutional right to confront his accusers. The confrontation, as contemplated by the Constitution, the Court said, did not mean that there had to be a face-to-face confrontation with the witness as argued by the defendant in that case, and that the standard set by the Constitution was met once the defendant was accorded the opportunity to cross-examine the witness even though the witness was not physically within his reach. The rationale behind the statute, the Court reasoned, was the

protection of minor children of the society from fear and intimidation, while at the same time ensuring that the defendant's right to confront the evidence was protected. Here is how the court characterized the rationale behind the statute:

> **"From the text of Section 25.3 (c), of the Act creating Criminal Court 'E', the court ought to make such a finding to justify a decision that a potential child victim witness would suffer 'serious emotional distress' and might just not be able to communicate within a reasonable fear free environment if put on the stand in the presence of the accused abuser to introduce courtroom testimony….**
>
> **We are, no doubt, guided by the principle enunciated in the *Craig* case. Consistent therewith, Appellant Fallah's contention that 'in camera' testimony of nine year-old sex abused child 'X.R.' violated his constitutional right of confrontation is hopelessly unfounded. We hold that the Appellant's constitutional right to confront his accuser was adequately preserved when he was accorded due opportunity to listen to testimony and allowed to vigorously cross examine the witness. In further protection of the constitutional right of Appellant, the trial jury was afforded the opportunity to see and observe the witness' demeanor and body gesticulations. As a critical part of the process, the jurors were allowed to quiz the witness as triers of fact. Under the circumstance, it would seem satisfactory to this Court that all of the critical factors of the Confrontation Clause were duly preserved." *Id.* The pronouncements made in that Opinion continues to be the view of this Court.**

Further, the appellants have ignored the very clear wording of Section 1.10 of the Criminal Procedure Law which does not make it mandatory that the provisions of Chapter 10 of the Civil Procedure Law be applied to every criminal proceeding. The Section 1.10 provision of the Criminal Procedure Law states unequivocally that the provisions of Chapter 10 of the Civil Procedure Law shall be applicable to criminal proceedings only <u>in so far as the Civil Procedure Law provisions are applicable to particular circumstances of specific criminal proceedings or actions</u>. The question then is whether the particular circumstances of the criminal proceeding or action or investigation is such that Chapter 10 of the Civil Procedure Law can be invoked as being applicable to the present criminal proceeding.

Thus, the application of Chapter 10 of the Civil Procedure Law to criminal proceedings is dependent both on the circumstances presented in particular criminal proceedings and/or how the court before whom the request is made is of the view that Chapter 10 of the Civil Procedure Law is applicable or not applicable as to the facts and circumstances before the court. Applied to the instant case, the question presented is whether the circumstances in the instant case are such that Chapter 10 of the Civil Procedure Law can be said to be applicable. Even more specifically, the instant case presents the question whether in the process of the ongoing criminal investigations undertaken by the State, and the State, believing that certain bank accounts or transactions were used as mediums for the commission of the crime, must have filed a formal written motion before Criminal Court "C" of the First Judicial Circuit, a court of competent jurisdiction, with service of the motion being made on the suspects and the banks, for the production of the bank account records or other documents of the suspect customers, before the court could order the issuance of a *subpoena duce tecum* for the requested documents or records relevant to the ongoing criminal investigation. We are of the opinion that the trial judge, using the discretion provided under Section 1.10 of the Criminal Procedure Law in determining whether Chapter 10 of the Civil Procedure Law was applicable to the criminal investigations presented to him, determined that it was not and, hence, he proceeded to order the writs issued.

We do not dispute that under certain circumstances, Chapter 10 of the Civil Procedure Law would be applicable. But we do not believe that the framers intended that the Chapter would be applicable in every criminal case; otherwise they would not have said "in so far as they are applicable to criminal actions". But we do not believe that the judge erred in making the determination that the circumstances presented removed from him the use of the discretion vested in him by Section 1.10 of the Criminal Procedure Law or that he was mandatorily required to confine himself to the technicality advocated by the appellants and stipulated under Chapter 10 of the Civil Procedure Law. Indeed, we do not believe that Chapter 10 is applicable to ongoing criminal investigations as the one in the instant case. To the contrary, we believe that it was with such circumstances in mind that the

framers of the Criminal Procedure Law were keen in stipulating that Chapter 10 of the Civil Procedure Law would only govern where found to be applicable to the circumstances presented in a criminal matter, inferring that the determination would be left to the court as to the applicability of the Civil Procedure Law to the criminal events.

Similarly, as in the instant case, if the only avenue available is the filing of a motion which the defendant may then contest, and a ruling made thereon, and which would then be subject to appeal to the Supreme Court or by some remedial process, the utility or the criminal justice process would be rendered of no essence. Such a course would mean that any and perhaps all persons suspected of the commission of a crime would have the opportunity to destroy, secret, or otherwise render access to the fruits of crime virtually impossible. This would not only encourage the commission of crimes with impunity, especially crimes such as corruption, bribery and the like, but it would render conviction of such crime almost impossible. We do not believe that this was the intent of the framers of either the Constitution or the statutes. We do not believe that by according the rights referenced by the appellants, the framers intended that a carte blanche course should be opened that would lead to the destruction of the society and its values and ideals by the perpetration of deliberate criminal conduct, or that an avenue should be opened for the cover up of suspected criminal activities, or that they should present an obvious threat to the security and stability of the nation.

But in addition to the above, if the argument of the appellants, that for a *subpoena duces tecum* to be issued there must be a main suit pending out of which the writ ought to be generated, then the Chapter of the Civil Procedure Law evoked by them would also not be applicable. This is because a motion is similarly ancillary to main suit and must also grow out of a suit pending before the court in which the motion is filed. How could the Civil Procedure Law provision be invoked if there is no such suit pending. This Court takes note of the obvious contradiction and is not prepared to pursue such a course, especially in view of what we have said herein.

Let us add also that the that the Constitution recognizes that in the case of searches and seizures, a writ need not necessarily be pursued in order

to carry out a search clearly reveal the thinking and mind set of the framers of the Constitution, for although the specific wording of Article 21 regarding searches and seizures are not stated in Article 16 relative to the release of information associated with an alleged criminal activity, under very similar circumstances, the argument cannot be made that in the mindset of the framers of the Constitution, the due process would apply in the one case but not in the other. The rationale for the provision is to guard against the destruction or alteration of the fruits of the crime. The same rationale would apply to the case where the possibility exists that the fruits of the crime could be destroyed, altered or falsified.

Let us also remind the appellants that the provisions of the Criminal Procedure Law title are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the unjustifiable expense and delay. Criminal Procedure Law, Rev. Code 2:1.2.

We hold the view therefore, contrary to the arguments made by the appellants, that in the circumstances presented in the instant case, it was not necessary that the application made by the State, which was in the form of letters attested to by affidavits as to the truthfulness of the allegations of law and facts made therein, be in the form of a formal motion, which would then be contested and ruled upon, and which would be subject to an appeal and a final decision by this Court. Such a course, advocated by the appellants, could have the effect of defeating the criminal justice process and render it impotent and ineffective. We do not believe that the framers of the Constitution or the Legislature intended that such should be the case.

The Supreme Court has held on manifold occasions that in the interpretation of the Constitution or a statute, both the wording and the intent must be taken into consideration, and that the interpretation given should be in the best interest of the society reflective of the intent of the framers. *Universal Printing Press v. Blue Cross Insurance Inc.,* Supreme Court Opinion, March Term, Special Session, A. D. 2011; *Beatrice Malaweh Goffa et al. v. Dr. Scorr Goffa,* Supreme Court Opinion, March term, A. D. 2011. In the instant case, the argument of the appellants that a motion should have been

filed defies logic and rationality, given all that we have said above. This Court therefore cannot endorse such position.

Moreover, the practice of this jurisdiction, which this Court holds to be consistent with the law, is that under certain circumstances, an application for the issuance of a writ of subpoena duces tecum need not necessarily be made by motion which must be served and is then open to contest by the adversary party, although that is an option that can be used. In fact, the practice has been that even in the course of a proceeding, a request can be made on the records of the trial court for the issuance of the writ of subpoena duces tecum depending on the circumstances of a case. In other instances, a party has been allowed in the pleading to give notice that at the trial of the case, request will be made of the court for the issuance of such a writ either on a party to the trial or on any person believed to be in possession of documents relevant to the allegations made by a party in the pleading. In none of those situations has it been deemed that a motion is necessary for the court to act on the request. This Court is not prepared to deviate from this practice, which as we stated, are consistent with the law, on account of a mere technicality relied on by the appellants. The holding of this Court therefore is that such request of the nature stated in the instant case may take any number of forms, and not necessarily by way of a motion. Accordingly, letters of request were sufficient to warrant the court acting on said letters, believing that sufficient probable cause was stated therein for action by the court. The wheels of justice cannot be stifled on a mere insignificant procedural technicality. The fact that letters were written to the court rather than a formal motion being filed is insufficient to overturn the act of the lower court judge.

In addition, we feel the need to take recourse to the recognized tenets of equity espoused in this jurisdiction, and especially by the Supreme Court. The principle basically sets out that "he who comes to equity must come with clean hands". *Ellis v. Johnson*, 40 LLR 478 (2001). We recognize that the principle espoused in the cited cases relates to equity; but we also believe that the logic and rationale behind it are also applicable to matters of law.

In the instant case, the appellants, customers of certain of the banks against whom the writs were issued, not the commercial banks themselves,

against whom the writs were issued and upon whom the writs were served, were the ones who filed the motions to squash/dismiss the writs, contending that the procedure followed by the State and entertained by the judge fell short of the requirement of the statute, in that letters addressed to the trial judge rather than a motion were filed praying the issuance of the writs. In acting on the letters rather than a motion, they argue, the trial judge was not only in error but acted illegally and irregularly in ordering the issuance of the writs.

We do not dispute that the Supreme Court has held that in the ordinary "a mere letter to the trial court was not sufficient to be characterized as a pleading or petition." But we recognized also that in the same Opinion, the Court held unambiguously that "the service of the citation and not the filing of a mere letter was sufficient to place the petitioners under the court's jurisdiction and that "once the writ or citation was served and the parties appeared without raising any contest as to the court's jurisdiction over their persons, but proceeded to actively participate in a full trial, they waived their right to raise such challenge, especially at the stage of the proceedings at which they did." *Barwror and Behquelleh v. Barchue and Flomo*, 40 LLR 288 (2000).

We emphasize, in respect of the holding of this Court in the *Barwror* case, quoted above, that although served with precepts none of the commercial banks against whom the writs were issued mounted any legal or other challenge to the issuance or legality of the writs, to the process or procedure pursued by the State, to the court in issuing and serving the writs upon them, to the jurisdiction of the court, or in not also including in the writs the names of the customers whose accounts information were being sought by the issuance of the writs. Indeed, many of the banks complied with the directive and mandate contained in the writs and supplied the information required under the writs. Instead, in the face of those developments, it was the customers, who were not parties to the precepts or action and upon whom not precepts had been served and who, without filing any instrument to intervene, as required by the Civil Procedure Law, that mounted the challenge against the writs, apparently in an attempt to protect

the rights of the banks not to disclose any information in regard to the accounts of their customers.

Section 5.61 of the Civil Procedure Law states that if persons not parties to any matter pending before the court feel that their interests are likely to be affected by a judgment of the court, they may intervene in the proceedings by filing a motion to intervene. The motion must set out reasons for seeking intervention and show how the interests of the parties will be affected by the judgment of the court. Civil Procedure Law, Rev. Code 1:5.63; *Al-Boley and Slaway v. The Proposed Unity Party*, 33 LLR 309 (1985); *The Augustus W. Cooper Heirs v. Swope and the Heirs of the late Jessie R. Cooper*, 39 LLR 220 (1998); 40 LLR 38 (2000); *Republic v. Kenneh*, 33 LLR 114 (1985); *Republic v. Yancy and Hill*, 31 LLR 209 (1983). Here is how the statute sets out the right to intervene and the procedure which must be followed in order to enjoy the right to intervene:

> **"*1. In general.* Upon timely application, any person shall be allowed to intervene in an action:**
> **(a) When a statute of the Republic of Liberia confers an unconditional right to intervene; or**
> **(b) When the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or**
> **(c)When the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or of an officer thereof." Civil Procedure Law, Rev. Code 1:5.61(1).**

Further, Section 5.63 sets out the procedure which must be followed by a person seeking to protect a vested interest in a proceeding or other action in which the person is not named or joined as a party to the proceedings:

> **"A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." *Id*., at 5.63.**

The Supreme Court has unwaveringly subscribed to the dictates of the provisions of the statute quoted above, recognizing that it actualizes the dictate of Article 20(a) of the Constitution. Indeed, the Supreme Court has held in practically all of those cases that persons who believe that their interests are or will be affected by the outcome of a judicial matter have the

right and should be allowed to intervene if they avail themselves of the opportunity provided by the statute, pursue the avenue laid out by the statute for the orderliness of the intervention, and show to the court, as required by law, how and the manner in which their interest will or could be affected by the outcome of the case or by the judgment rendered in such case. *Ramatrielle, S.A. v. Metzger et al*., 38 LLR 336 (1997); *Tulay v. Hall and Tarpeh,* 39 LLR 559 (1999). In all of the referenced cases, the Court has said in no uncertain terms that no person should be denied of that right except for good legal reasons sanctioned by law. *Tulay v. Hall and Tarpeh*, 39 LLR 559 (1999); *Cooper Harris et al. v. Swope et al*., 39 LLR 280 (1998). This Court continues to subscribe to those holdings.

However, as laid out by the statute itself, the provisions quoted above make it unmistakably clear that persons seeking to protect their interest, where they believe that the named parties to the proceedings are not positioned to adequately protect their interests, they should file with the court a motion to intervene, simultaneously with a response (an answer, returns or resistance), challenging the claims made in the action, the legitimacy or legality of the action (both as to manner and form), and asserting the right which is sought to be protected or defended. *Abi Jaoudi et al v. Monrovia Tobacco Corporation,* 36 LLR 156 (1989).

The legality of the statute is not questioned or challenged. Indeed, as the Supreme Court has articulated numerously, where rights granted are not self-executing, the Legislature has the onerous task of enacting laws that would give meaning and order to the exercise of the right. *Pioneer Construction Company v. Stubblefield*, Supreme Court Opinion, March term, A. D. 2015. The numerous sections in the Civil Procedure Law granting the right to intervene and setting out the procedure for such intervention were clearly designed to actualize the Article 20(a) provision of the Constitution. But more than just actualizing Article 20(a) of the Constitution, it also was designed to give orderliness to the process of that actualization and to avoid chaos in the exercise by parties of the right to protect interests, accorded by the Constitution. It was predicated upon this rationale that the Legislature deemed it fit to enact the provisions of the Civil Procedure Law which not

only set out the right to intervene but also provided the procedure for intervention.

Under the provisions of the statute referenced above, persons seeking to avail themselves of the right are required to file a motion wherein they set forth the basis why they seek intervention and the right they seek to protect. In the same statute, the court is given the discretion of deciding whether a good enough, legally unassailable and factually sound basis is made for intervention. The court is given this discretion so that there is assurance that the action or suit does not become overwhelmed with frivolous claims and interventions deliberately designed to delay the proceedings or to defeat the speedy, just and transparent administration of justice.

No such motions were filed in the instant case by the appellants; nor did the appellants exhibit any instruments showing that they were authorized by the affected commercial banks to act on their behalf or to represent in the proceedings even though the sought the protection not mainly of their interest but the interests of the commercial banks. The Supreme Court has held that intervention cannot be obtained or secured by a third party for the benefit of another party where the appropriate instrument vesting such authority is not exhibited. *Ramatrielle, S.A. v. Metzger et al*., 38 LLR 336 (1997).

The appellants, while admitting that they did not follow the law in that respect, nevertheless advanced the argument that their filing of the motions to quash/dismiss the writs was tantamount to subjecting themselves to the jurisdiction of the court and thereby recused them from filing a motion to intervene. They make the argument that the Supreme Court has stated on numerous occasions that although a party may not properly have been brought under the jurisdiction of the court, where the party choses to file instruments in which the party subjects itself to the jurisdiction of the court, the party may be deemed to be properly before the court and hence cannot raise the issue of jurisdiction. It is an acknowledged fact that the Supreme Court has held that while precept may not properly have been served upon a party and that sufficient grounds thereby exist for a challenge to the jurisdiction of the court over the party, the filing of an answer or other instruments contesting the legality of the claim against the party is

tantamount to making one a party to the case and that hence the issue of jurisdiction of the court over the person cannot be raised or is deemed waived. 25 LLR 371 (1976).

We do not question the right of the customers of the affected commercial banks to protect their accounts information; the right is granted by law and has always been subscribed to by the Supreme Court. Indeed, the Supreme Court has in past times recognized that both the Constitution and the statutes protect the right to privacy. Article 16 of the Constitution vests such right. LIB. CONST., ART 16 (1986). However, the same Article that vest the right also states that the right is subject to the intervention of the court where good and sufficient ground exist for the invasion of the privacy accorded by the Constitution. Here is how Article 16 of the Constitution state the right and how its exercise is subject to intervention by the court: "No person shall be subjected to interference with his privacy of person, family, home or correspondence *except by order of a court of competent jurisdiction."* [Emphasis ours]

Thus, while we reiterate and reaffirm the Supreme Court's recognition of the right to privacy, the Court also recognizes that both the Constitution and the statutory laws of Liberia clearly acknowledge that there are circumstances warranting or requiring that the privacy protection right be subordinated to the greater good of the society, where there is intervention by a court of competent jurisdiction.

The appellants do not dispute that under the process and the procedure laid down by the statute, the course available to them was the filing of a motion to intervene, accompanied by the motion to quash or dismiss. They admit that they ignored the requirements of the statute; that they did not file a motion to intervene in the matter; and that instead, they simply filed a motion challenging the right of the State to seek from the lower court orders for the issuance of writs of subpoena duces tecum against certain commercial banks, and doing so without exhibiting any evidence of authority from the commercial banks or justifying why they sought intervention. They admit further that had they followed the course laid down by the statute, that would have avoided any question or challenge to the legitimacy of the process followed or adopted by them. But they justify their

conduct by arguing before this Court that once they had filed the motion to quash or dismiss the indictment, the act was tantamount to submitting and subjecting themselves to the jurisdiction of the court, notwithstanding they had not sought intervention or follow the process for intervention as required by law. They viewed the course adopted by them as a mere legal technicality since by their action they were precluded from ever challenging the jurisdiction of the court over their persons. They cite the Court to the many decisions of the Supreme Court wherein this Court said that if parties who were not regularly cited appears voluntarily or files instruments before the court other than just challenging the jurisdiction of the court over their persons, those persons are deemed to have submitted themselves to the jurisdiction of the court. Sayeh v. Liberia telecommunications Authority, Supreme Court Opinion, March term, A. D. 2016;

It is true that the Supreme Court has articulated the broad principle as stated by the appellants regarding the voluntary submission to the jurisdiction of the court. *Boe et al. v. Republic*, 35 LLR 724 (1988); *Greaves v. Jantzen*, 24 LLR 420, 425 (1975). However, we have cautioned that in applying the principle, each case must be dealt with on the basis of its own merits or peculiar features. In the instant case, the State did not request the lower court or pray the court to issue the writ of subpoena duces tecum on the appellants; no instructions were given by the judge to have the writ of subpoena duces tecum issued against and served on the appellants, and hence no writ was issued against or served on the appellants; and the records do not reveal that the appellants were at any time otherwise cited to appear before the court.

Further, nowhere in the motions filed by the appellants do they alleged, as required by the intervention statute, that the basis for their seeking was to protect their interests, as opposed to the interest of the banks on whom the writs of subpoena duces tecum had been served but who had determined either to comply with the orders contained in the writs or not contest the legitimacy of the writs; nowhere did the appellants make the allegation that the commercial banks upon whom the writs had been issued and served were incapable of protecting their interest and that any judgment by the court could adversely affect those interests.

Thus, our difficulty with the position asserted and the argument made by the appellants is that it is alright and permissible for them, the appellants, to ignore and deviate from the process and the procedure laid down by the statute for injecting oneself into a matter in which they were not named as parties and not served with precepts or any other papers by the court, but that it is wrong for the State to adopt a similar posture or deviate from provisions, also said to be laid down by the statute. This is where the equity principle comes in. How can the appellants make the argument that they can violate the law or that they should be excused from the violations committed by them, but that others, including the State, is precluded from any violation and that their violations are not excusable. We do not believe that the framers of the law intended that there should be such discrimination. The very essence of the law is that all must be treated equally, meaning that if the appellants believe that it was not necessary that they should follow the law, then they should be precluded from contesting in the same matter other parties non-compliance with the law.

The argument, it seems to us, is that it is alright for the appellants not to follow the procedure set up by law for intervening in the matter, but that the State should be held to a different standard by virtue of which this Court should dismiss the writs issued by the lower court since the State did not conform to the procedure laid down in the statute. To make such a claim or take such a position, the appellants must demonstrate that they have come to the court with clean hands, but which the records show to be the contrary in the instant case.

Additionally, and of equal importance, is the fact that if the argument of the appellants became the order of the day, than there may be no need for the statute setting out the process by which one may intervene in a matter. Such a course would also have serious legal consequences for the legal process. It would mean that anyone, without any legal justification, could unilaterally inject themselves into matters in which they are affected in no way, form or manner and in which they have no interest or that persons could intrude into a case without any legal basis, possibly designed only to delay the administration of justice. How does one justify appearing out of nowhere and challenging a procedure or proceeding to which he or she is not

a party and to which he or she has not sought intervention which allows the kinds of challenge mounted against the appellee and the lower court.

And while the State could also have sought to join the appellants and to request similarly the issuance against and service upon them of writs of subpoena duces tecum against them, they being the focus of the criminal investigation being conducted by the Government, the State was not compelled to seek their joinder since they were not the keepers of the records being sought by the State to aid the criminal investigation. This is why the law not only provides for parties to be joined, either at the instance to other parties to litigation who believe that it is essential that they are made parties or by the court, acting without the request of any of the parties to the litigation but believing that the parties participation in the action is essential, but also accord to the party who is not joined but whose interest may be affected by the outcome of the action the right to intervene, by way of a motion filed before the court and served on the existing parties to the action. This is the mechanism by which a party is allowed to intrude into proceedings wherein the party is not named so that the party's interest can be adequately protected. The adoption of any avenues inconsistent with the process and the procedure provided by the law provides a sufficient basis, at the discretion of the court, to deny the intrusion into the proceedings. The appellants chose not to adhere to the process and procedure laid down by the statute and to follow a completely different course. As stated, this Court believes that in the interest of justice, and acknowledging that the appellants do have an interest that they need to protect, the Court is not disposed to deny the intrusion and the intervention merely on the strength of that technicality. But we must also reject the contention raised by the appellants that the Court should reverse the order authorizing the issuance and service of the writs on the commercial banks based on a rather similar failure by the State to adhere to the insignificant technicality advanced by the appellants. Equity will not support such a course. Hence, we deny and dismiss the said contention advanced by the appellants, same not being sufficiently tenable in law.

Similarly, this Court rejects the contention advanced by the appellants that the issuance of the writs against the commercial banks for records

pertaining to accounts held at those banks by the appellants was an invasion of the appellants' constitutional right against self-incrimination. This Court recognizes that a person suspected of the commission of a crime has the right not to give evidence against himself or herself, and that he or she cannot be forced to give such evidence. However, none of the commercial banks against whom the writs were issued were criminal defendants. As for customers of the banks, we do not believe that they can use their accounts at the banks to indulge in alleged criminal activities and make the arguments that the banks cannot release to the State, on orders of a court of competent jurisdiction, the accounts being used to facilitate those criminal activities. If one were to accept such argument, crimes of bribery, not only of the nature alleged in the instant case, but other crimes such a money laundering would become an uncheckable and uncontrolled menace beyond the reach of the State or the courts. Using that argument, the entire purpose of the law would be defeated, with grave consequences for the State and the people. This Court therefore also rejects the contention advanced in that regard.

However, while the above presents a technical legal basis for dismissing the motions to quash the writs of subpoena duces tecum issued by the lower court, but for the same reasons stated by this Court in dealing with the issue of the avenue pursued by the State in seeking to secure the writs of subpoena duces tecum, and in the interest of transparent justice as well as not giving credence to such insignificant procedural technicality, this Court has decided not to dismiss the motions filed by the appellants simply because the appellants did not first formally sought intervention by the filing of a motion to intervene. *Biggers v. Good-Wesley*, 23 LLR 285 (1974); *Citibank N.A. v, Jos Hansen and Soehne (Liberia) Ltd*., 35 LLR 69 (1988).

In regard to the second issue, that is whether a subpoena duces tecum may only be requested for by the State and issued by the court if there is pending a main suit, this Court holds that no such precondition exists for the issuance of such writ. Indeed, chapter 10 of the Civil Procedure Law, which the appellants rely on in challenging the lower court's issuance of the writs of subpoena duces tecum on the strength of letters as opposed to motions, clearly recognizes, at section 10.3(1), that a main suit need not be pending before a request cane be made or before the court can grant the prayer for

an order directing the issuance and service of the writ. This is what the sections states:

> **"A motion in an action or proceeding in the Circuit Court shall be made in the Circuit Court or before the resident or assigned judge of the judicial district where the action is pending or has been tried, *or in the case of an action not yet commenced, in any judicial district where venue is proper."* [Emphasis ours] Civil Procedure Law, Rev. Code 1:10.3(1).**

The emphasized part of the section quoted above states unequivocally that a motion may be filed or a request made even though no main action may be pending before a court. Indeed, the Constitution itself recognizes that a request for an order may be made in a criminal matter to aid the process of a criminal investigation without the pendency of a main suit. At Article 21(b) which, although relating to search and seizures, would similarly apply to *subpoena duces tecum* as the objective sought to be accomplished is the same, states:

> **(b) No person shall be subject to search or seizure of his person or property, whether on a criminal charge or for any other purpose, unless upon warrant lawfully issued upon probable cause supported by a solemn oath or affirmation, specifically identifying the person or place to be searched and stating the object of the search; provided, however, that a search or seizure shall be permissible without a search warrant where the arresting authorities act during the commission of a crime or in hot pursuit of a person who has committed a crime."**

As seen from the quoted Article, the objective is to accord and afford access to materials, whether records or other articles, which are suspected of being fruits of the crime which is alleged to have been committed. We recognize that the Article relates specifically to searches and seizures, yet we are cognizant that the basic objective of the Article and the rationale behind it are the same as in the case of a writ of *subpoena duces tecum,* the both seeking access to evidence in regard to the investigation of a suspected crime that was or is alleged to have been or is being carried out. Thus, given that the rationale behind Article 21(b) is identical or similar to that behind the law according the right to a *subpoena duces tecum* (i.e. in aid of the pursuit of a criminal investigation), the fact that law according a right to seek a *subpoena duces tecum* does not similarly specify the details surrounding the issuance of

the writ of *subpoena duces tecum* as Article 21(b) does regarding searches and seizures does not preclude the application of the rationale and details stipulated in Articles 21(b) to the writ of *subpoena duces tecum.* To draw a distinction between the two, or to assert that the standard outlined in Article 21(b) cannot be applied to the situation of a writ of *subpoena duces tecum* simply because the writ of subpoena duces tecum is not specifically also mentioned in the Constitution defies both law and logic. [CITATIONS] If such was not the case, the criminal justice process would be defeated in practically every instance where its success relied on access to the fruit of the crime. The result could be an unimaginable infestation of crimes and catastrophic to the society.

We do not state or infer that every criminal investigation must be successfully concluded. There are many factors that affect whether a criminal investigation is successfully concluded. All that we state is that it is not unlawful for a request to be made and for a writ to be issued for the production of documents which would aid a criminal investigation, especially as in the instant case where the law [The Financial Institutions Act and the Central Bank Act] provide that the information should not ordinarily be disclosed without the intervention of the court.

Moreover, if the condition for the issuance of the writ was that a main suit is pending, the opportunity for disposing of the documents or for their destruction or secreting could be so severely elevated that any meaningful investigation into whether a crime was in fact committed could evaporate or disappear, with the effect that the chances of any criminal prosecution would be severely diminished or rendered negligible. Indeed, this would mean that no intervention of the court could be sought to expose a crime until or unless a person suspected of the commission was actually charged and presented to the court. That could never have been the intent of the framers of the law and this Court cannot subscribe to such a misreading of the intent of the framers.

Having disposed of the first two issues presented to the Court, we now turn our attention to the third issue, which is whether the presiding judge erred when he used the Federal Gramm Leach Bliley Act 2009 of the United States and the Georgia Bank Privacy Law (O.C.G.A.) as controlling laws for the

determination of the motion. The appellants contend that the trial judge, in relying on a United States statute and the decision of a court of a State of the United States of America as he basis for his decision committed serious error, and that predicated thereupon his ruling denying the appellants motion to quash the writs of subpoena duces tecum should be reversed. More precisely, the appellants argue that the trial judge erred when he used the Federal Gramm Leach Bliley Act 2009 of the United States of America and adopted the Also the Georgia Bank Privacy Law (O.C.G.A.) as controlling law for the determination of the motions to quash filed by them. They assert that while the General Construction Law, commonly referred to as the "Reception Statute" allows for the use of US common law where there is no Liberian law covering the subject matter, the Liberian courts cannot resort to foreign laws where Liberian has laws governing the subject matter of the issue being dealt with by the court.

They emphasize further that even if the federal statute could have been used by the court, it should have used most recent federal statute, that is, the Right to Financial Privacy Act, which they say provides that a party to a criminal proceeding should be entitled to know if an opposition has subpoenaed his personal financial record. They insist, in that respect, that a defendant in a criminal proceeding should have the right to be heard when his personal financial records are sought; and they declare that the right granted under the Financial Privacy Act, which accords a defendant in a criminal proceeding the right to be heard when his personal financial records are sought conforms to the rights granted by Article 16 of the Liberian Constitution. Accordingly, they have asked this Court to adopt and apply the principles of the Financial Privacy Act, a Federal Act of the United States.

The State, appellee herein, on the other hand, sought to make the case that the judge acted legally in relying on the statutory laws of the United States of America and the State of Georgia, one of the states making up the United States of America. The State asserts that the authority of the trial judge has its foundation not only in the Constitution but also in Section 40 of the General Construction Law. Here is how the State rationalized its position on the issue, starting first with Article 16 of the Liberian Constitution which states that "no person shall be subjected to interference with his privacy of

person, family, home or correspondence except by order of a court of competent jurisdiction." The Article, the States says, is without any ambiguity "as regards the exception made and provided." But apparently not being satisfied with the point made as regards Article 16 of the Constitution, the State sought to make the further case that the judge acted properly in relying on the statutes of the United States of America and the State of Georgia, stating that there was stare decisis for the action of the judge. The argument is that the "Honourable Supreme Court of Liberia [has] held that where Liberian laws are silent or inadequate on a legal question of the first impression, Liberian courts can rely on the common laws and stare decisis of the appellate courts of both the United States and Great Britain. It then cites *Roberts v. Roberts*, 1 LLR 107 (1878) and *Payne et at v. R.L.*, 1 LLR 101 (1878) as being supportive of its position where the Supreme Court said: "[H]aving adopted the common law among others as a part of the laws of this Republic, with certain restriction, it becomes necessary, when our statute are not clear enough, to have recourse thereto, and to apply the analogy." Using that as the premise, the State then rationalize that as the Georgia Act provides that that financial institutions are prohibited from disclosing a customer financial record except in the following instances: 1. Where the records are requested in conjunction with an ongoing criminal or tax investigation of a customer by a grand jury, taxing authority or law enforcement agency, 2. Where they are sought through a subpoena or other administrative process issued by a federal, state or local administrative agencies with jurisdiction over the customers, and the fact that (a) the issues of disclosure presented in the case was one which the Liberian courts had not acted upon before and (b) the fact that the Liberian law was silent or inadequate on the issue, it follows that under the authority of Section 40 of the General Construction Law, the trial court could legally rely on the two statutes of the United States of America and of the State of Georgia, referenced above. The State adds further that as the above "provisions of the Liberian Constitution and US statutes clearly show that disclosure is permissible during an ongoing criminal investigation and prior to trial… the court's decision to issue the writ of subpoena duces tecum was legal."

We are in accord with the contention of the appellants in so far as it applies to the trial judge's misapplication of the Reception Statute and the tenets of the legal jurisprudence of this jurisdiction. The General Construction Law (i.e. the Reception Statute) does not vests in any courts in Liberia the authority to rely upon or accept as Liberian law the statute of the United States of America or the statute of any of the States of the United States of America. Section 40 of the General Construction Law, title 15, at *Chapter 3 (*NON-STATUTORY LAW) under the caption "non-statutory law: derivation", is very clear in its mandate to the courts of Liberia. The section states: "Except as modified by laws now in force and those which may hereafter be enacted and by the Liberian common law, the following shall be, when applicable, considered Liberian law: (a) the rules adopted for chancery proceedings in England, and (b) the common law and usages of the courts of England and of the United States of America, as set forth in case law and in Blackstone's and Kent's Commentaries and in other authoritative treatises and digests." General Construction Law, 1956 Lib. Code 15:40.

As clearly seen from the quoted section, the statute sets the conditions and limit to which the laws of the United States of America and of England can be considered Liberian law. Firstly, as far as England is concerned, it is only the rules adopted for chancery proceedings and the common law and usages of the courts of England that are and can be accepted in this jurisdiction as Liberia law. Secondly, with regards to the United States of America, it is only the common law and usages of that nation, the United States of America, and not of the several states of that nation, that are and can be accepted as Liberia law. But even more importantly, the statute is clear that even under those circumstances where the standards specified are met and the laws of those foreign jurisdictions can be regarded as Liberia law, the foreign laws must be as articulated in "Blackstone's and Kent's Commentaries and in other authoritative treatises and digests." The courts of Liberia are therefore not authorized under the Reception Statute to accept any laws of the foreign jurisdictions which do not fall within the ambits laid by the statute. Nowhere in the Reception Statute is authority vested in the Liberian courts to regard the statutory laws of England and the United States of America or any state of the United States of America as Liberian law.

Indeed, the only laws which the Liberian courts can adopt or regard as Liberian law are the common laws of those jurisdictions named in the statute, and their acceptance by the Liberian courts is further condition on the fact that there is no statutory or case laws in Liberia that are to the contrary.

We must emphasize that the authority of the Liberian courts to rely on specific laws of certain foreign jurisdictions and to regard such laws Liberia law is not one that is inherent in the courts or derived from case law; rather, the authority is expressly derived from and conferred by a statute enacted by the Liberian Legislature pursuant to powers bestowed upon that body by the Liberian Constitution. The Constitution is very explicit in its conferral of powers on the Legislature to create courts subordinate to the Supreme Court. It unequivocally sets out that the Legislature, in establishing courts of the Republic, has the authority to set the powers, authority and ambit within which the courts are to operate. LIB. CONST., ART 43(e) (1986); The courts are therefore confined to the limitations imposed upon them and contained in Acts enacted by the Legislature, except where such Acts are unconstitutional. *Scanship (Liberia) Inc./LMSC v Flomo*, 41 LLR 181 (2002); *Massaquoi v. Massaquoi*, 38 LLR 3 (1995). There is no such claim in the instant case that the Reception Statute or any aspect of said statute is unconstitutional. Hence, the reliance by the lower court on the Federal Gramm Leach Bliley Act 2009 of the United States of America and the Georgia Bank Privacy Law (O.C.G.A.) and their seeming adoption as Liberia law were misplaced and a misinterpretation of the Liberian General Constitution Law. Accordingly we are in full agreement with the appellants that the lower court was clearly in error in relying on the United States statute and the statute of a State of the United States of America and we reject the contention advanced by the appellee in that respect. The contention of the appellee is clearly misplaced and hence is rejected. Given the foregoing, we herewith declare that the foreign statutory laws relied upon by the lower court are not laws of Liberia, they are not to be regarded as laws of Liberia, and they are not to be relied upon by our courts to support their position either in interpreting Article 16 of the Liberian Constitution or provisions of the Financial Institution Act and the Central Bank Act. However, because we have stated that alternative sufficient reasons existed for the action of the lower court, we are not

disposed to accord the error made by the lower court in relying on foreign statutory laws to support the decision of the court as a reversible error or to reverse the decision of the lower court on that account.

By the same parity of reasoning, we disagree with and reject the contention advanced by the appellants that the lower court should have used the more recent statutory law of the United States of America as the basis for its decision to deny the motions to quash. Because we have stated that the lower court was without the statutory or other authority to resort to the statutory laws of the United States of America or the statutory law of one of the States of the United States of America as the basis for its decision when both the Liberia Constitution and statutory laws were quite clear on the issue, it is irrelevant whether that there exist an American statute subsequent to those relied upon by the lower court judge. The fact that there is a subsequent American statute does not distract or subject from the illegality of the use of American statutory law in resolving a Liberian constitutional or statutory issue, especially as in the instant case, where both the Constitution and the statute are clear on their face and where the Liberian statute clearly limits the power of the Liberian courts to resort to such reliance.

We now proceed to address the final issue of essence to this Court, which is whether where a lawyer's or law firm's account at a commercial bank is alleged to have been used to facilitate the commission of a crime, the attorney-client privilege exempts or prohibits the disclosure of such accounts information or records? In their brief filed before this Court, the appellants contends that the relationship which the Sherman and Sherman Law Firm had with the English corporation which allegedly transferred the funds to the account of the Sherman and Sherman Law Firm was that in the nature of a lawyer-client relationship and that as such the Law Firm and the client were protected against the disclosure of the information in that respect. The State rejects the argument, asserting to the contrary that in the circumstances presented in the case Sherman and Sherman Law Firm is not covered by the lawyer-client confidentiality privilege. Here is how the State, in its brief filed with this Court, articulated its position on the issue:

> **"A lawyer is under oath to protect the Constitution and laws of Liberia. The duties imposed on a lawyer are embodied in the Code of**

> **Moral and Professional Ethics to which all lawyers commit themselves to abide by. Liberian laws and rules of professional ethics prohibit lawyers and judges from engaging in any conduct that may tarnish and bring into disrepute the image of the legal profession. In Rule 35 of the Code of Moral and Professional Ethics captioned "Secrets and confidences of a client", there are two exceptions that permit a lawyer to disclose a client's confidences: 1. "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation." And 2. While "it is the duty of a lawyer to preserve his client's confidences.....the announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent a criminal act, or protect those against whom it is threatened". (Emphasis ours). The Appellants herein were informed by their client about the purpose of the over US$950,000.00 sent into their accounts. That is, they were told that the money was to be used to pay officials of Government to alter the Public Procurement and Concession Commission Act (PPCC) of 2005…. Also, Rule 36 provides that in the case of "a client's insistence on a course which the professional duty and integrity of the lawyer does not permit, he may be warranted in withdrawing from (sic), on due notice to him, the client, allowing him time to employ another lawyer." (Emphasis ours). Finally, Rule 39 states: "I DO SOLEMNLY SWEAR THAT I will support and uphold the Constitution, and uphold the laws of my country; and those governing the conduct of lawyers... I will maintain the confidence and preserve inviolate the secrets of my client, ... and will avoid connection or association with any shady, dishonest or dishonorable transaction; SO HELP ME GOD." Appellants should have been mindful of this solemn oath taken by all lawyers, including Co-Appellant H. Varney G. Sherman, void of which their argument of Attorney-Client Privilege should and ought to crumble."**

We are in agreement with the argument of the State quoted above, to the effect that while the Liberian nation-state recognizes the concept of the confidentiality privilege in regard to a lawyer-client relationship, we do not believe that the privilege is or was intended to be absolute or that it should obtain where the act of the client or the lawyer is deliberately intended to be in furtherance of the perpetration or commission of a crime. Certainly, the privilege was not designed to be a conduit to embolden the commission of crimes. Both the statutory and case law of the jurisdiction, as well as the Code of Ethics governing the conduct of lawyers, promulgated by the Supreme Court pursuant to its constitutional mandate, prohibit a lawyer using the lawyer-client privilege to participate in or conceal the perpetration

of a crime by the client. As stated in the Code of Ethics quoted above, the lawyer is not only legally bound to uphold the Constitution and other laws of the country, but he is also to avoid all shady and other dishonorable transactions but he also has the obligation to withdraw from any representation of or relationship with a client who insist upon conduct which of the nature as alleged in the instant case. Clearly, the intent of the framers in recognizing and upholding the lawyer-client privilege was not to have the privilege used to cover up crimes committed in the jurisdiction.

Indeed, in the instant case, the allegation is made that not only did the client transfer to the lawyer's account funds which were to be used to commit crimes in Liberia, but that the funds were actually used to that end. In such situation, a lawyer cannot invoke the privilege to cover up the crime perpetrated by the client with the assistance and participation of the lawyer. Thus, we hold that the lawyer-client privilege does not apply to the situation narrated in this case and the application to the court and issuance by the court of the writs of subpoena duces tecum for the production of the bank accounts information of the lawyer and law firm who were alleged to have participated in the perpetration of the alleged crime was not subject to the lawyer-client privilege and hence was not tainted with any semblance of error.

Accordingly, in view of all that we have said above, we hold that the trial court did not err in ordering the issuance of the writs of *subpoena duces tecum* on certain commercial banks for the bank accounts information of persons and institutions who were allegedly involved in the commission of the criminal offense stated in the application for the writs, said to have been in aid of the investigation by the State of the offenses stated therein. The ruling of the lower court is therefore confirmed and affirmed and the appeal denied.

Wherefore and in view of the foregoing, the Clerk of this Court is ordered to send a mandate to the lower court directing the judge presiding therein to resume jurisdiction over this case and to proceed therewith. Costs of these proceedings are to await the final determination of the case. AND IT IS HEREBY SO ORDERED.