ARIF GHOUSSALNY, Petitioner, *v.* P. EDWARD NELSON, Sheriff for Montserrado County, and SWEDISH TELEPHONE COMPANY, Respondents.

APPLICATION FOR WRIT OF MANDAMUS.

Argued January 17, 1972. Decided February 18, 1972.

1. Although the Constitution establishes the absolute separation of powers among the three branches of Government, in effect, as well as in practice, such separation is not immutable, except that its design is to prevent absorption of all powers of a government by one branch.
2. When statute imposes a duty upon an executive officer of Government, judicial process may issue against him for a violation of such duty, but when such executive officer is merely acting as an agent of the Chief Executive exercising his political or constitutional functions, the acts of the confidential agent are not reviewable.
3. In any event, when the nature of the Chief Executive's unauthorized action would require service of mandamus upon the Chief Executive, issuance of a writ will be declared an exercise in futility.

An action in damages for injuries to the person was instituted in 1964. In the December Term, 1969, a verdict for $31,045.00 was returned by a jury for the plaintiff. An appeal was taken by the defendant from the judgment entered against it. Prior to the March Term, 1971, a stipulation to withdraw the appeal was submitted by the parties to the Justice in chambers for approval. Based thereon, at the March Term, 1971, the Court granted the application to withdraw the appeal, and a mandate was sent to the lower court on March 22, to enforce the judgment entered. Upon learning of the mandate, counsel for the Company moved in the Supreme Court, objecting to the mandate, alleging an understanding between the parties that the plaintiff was to accept a lesser sum in full settlement of the judgment and was to have discontinued his action in the lower court, as part of the settlement. The motion was opposed and argu-

ment was entertained on April 20, 1971. The Court denied the motion and upon its minutes the same day ordered a mandate sent to the lower court to resume jurisdiction and enforce the judgment, as ordered by the mandate first sent on March 22, 1971. Before the Sheriff, an executive officer of government, could enforce the judgment, as ordered by the lower court, a letter was received by him on April 22, 1971, from the President, commanding him not to serve a writ of execution or "other relevant document emanating from the Civil Law Court" in the action giving rise to the judgment. On November 11, 1971, an application for a writ of mandamus to compel the Sheriff to carry out the mandate of the Supreme Court was made by the plaintiff in the action for damages. The Chief Justice in chambers, after ordering issuance of an alternative writ, referred the application for final determination to the full court, in view of the constitutional issues involved. The Supreme Court declared, primarily, that the Chief Executive had exceeded his constitutional authority by intervening in the judicial process, but that were the Court to order the writ of mandamus served on the Sheriff, it would, in effect, be ordering mandamus to the Chief Executive, since he, not the Sheriff, had inhibited the judicial process. Since the Chief Executive is not amenable to mandamus, the alternative writ was *quashed* and the peremptory *writ denied*.

Samuel E. H. Pelham and *Joseph Williamson* for petitioner. *Joseph F. Dennis, Toye Barnard,* and *Moses K. Yangbe* for respondents.

MR. JUSTICE HORACE delivered the opinion of the Court.

These mandamus proceedings are the outgrowth of an action of damages for injury to the person which was

heard and determined in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. In order to get a clear understanding for the Court's position in this matter, we will give a brief history of the case.

In March 1963, Arif Ghoussalny, a Lebanese national doing mercantile business in Liberia, was hit and injured by a vehicle owned by L. M. Ericsson, employed by the Swedish Telephone Company of Stockholm, Sweden, operating in Liberia. Although L. M. Ericsson apparently assumed some degree of responsibility for the injury suffered by Arif Ghoussalny, because the records show that he sent the injured to hospital for treatment and referred the matter to his insurers, it would appear that the parties could not arrive at an understanding as to compensation in damages. As a result of this situation Ghoussalny instituted an action of damages for injury to the person in the June Term, 1964, of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County.

After some delay, because counsel for L. M. Ericsson had to resort to this Court two times in certiorari, the case finally came up for trial at the December Term, 1969, of the Civil Law Court, at which time a verdict was brought in by the jury in favor of Ghoussalny for the amount of $31,045.00. Judgment was entered by the trial judge, affirming the verdict of the jury after denying a motion for a new trial. An appeal was taken by the defendant which, after delay, was docketed for the March Term, 1971, of Court.

In the interim between the closing of the October Term, 1970, for which the appeal had been docketed and the opening of the March Term, 1971, of this Court, counsel for the parties to the action filed with the Clerk of the Supreme Court, stipulations for withdrawal on February 22, 1971, duly approved by Mr. Justice Clarence L. Simpson, Jr., Justice presiding in chambers at the time.

As permitted under our rules, the parties stipulated for withdrawal of the appeal, subject to the approval of a Justice of this Court, costs to be paid by appellant.

It is interesting that the parties adopted this method of withdrawal instead of the usual practice of the appellant simply withdrawing his appeal. The withdrawal of his appeal case by appellant constitutes a waiver of his right to appeal. *New York* v. *Seabreeze,* 2 LLR 26 (1904). An appellant may waive right to an appeal by withdrawal thereof. *Hill* v. *Republic,* 13 LLR 381 (1959). The right to appeal may be irrevocably waived by appellant through a motion voluntarily withdrawing the appeal. *Tarpeh* v. *Republic,* 13 LLR 383 (1959).

Though the method for withdrawal used herein has been upheld by this Court in *International Trust Company of Liberia* v. *Weah,* 15 LLR 568 (1964), it seems to us that when a withdrawal is made by stipulation there must be some understanding between the parties which led to the stipulation, otherwise the usual form would have been followed.

Be that as it may, we find in the record that when the Court met in its March Term, 1971, and the stipulation was brought to its attention, a mandate was sent to the trial court on March 22, 1971, to enforce the judgment of that court. Immediately upon hearing of the mandate, counsel for defendant filed a submission before the Supreme Court on March 27, 1971, in which they stated that the stipulation for withdrawal was based on an understanding between counsellors Joseph F. Dennis, for appellant, and P. Amos George, for appellee, that instead of satisfying the entire judgment appellee was to accept $10,000.00 as a compromise in full settlement, and that after the withdrawal by stipulation of the appeal before the Supreme Court, appellee would withdraw his cause from the Civil Law Court; that counsel for appellant was appalled at the reneging by appellee on the understanding they had arrived at which, according to coun-

sellor P. Amos George, was due to the intervention of his associate counsel in the case. Appellant's counsel asked for an investigation into the matter by the Supreme Court. Along with the submission, counsel for appellant made profert of correspondence between counsellor Joseph F. Dennis and counsellor P. Amos George on the one hand, and counsellor Joseph F. Dennis and the International Trust Company, the insurers of appellant, on the other hand, to substantiate the allegations made in the submission.

The submission was opposed by counsellors Philip Brumskine and Lawrence A. Morgan, for appellee. They stated: (1) that the appeal having been withdrawn the Supreme Court had lost jurisdiction in the matter. (2) That the proferting of the letters which appellant's counsel claimed formed the basis of his submission, would require the Supreme Court to hear evidence to determine the validity of the trial and, therefore, the Court would have to assume original jurisdiction, contrary to the Constitution. (3) That there was variance between the allegations set forth in the stipulation and those recounted in the submission.

On April 20, 1971, the submission and the resistance thereto were argued before the Supreme Court *en banc*. After reviewing the background, and citing the lack of authority for the argument before the Court advanced by appellants, the minutes of April 20 concluded:

> "Under the circumstances, the Court denies the submission because it is wanting *ab initio* and completely without legal merits. And the Clerk of this Court is hereby ordered immediately to send a mandate to the lower court to resume jurisdiction and enforce its judgment in said case, since there is nothing further pending before the Supreme Court against it in so doing. And it is hereby so ordered. Matter suspended."

Based thereupon the Clerk of this Court sent a man-

date to the court below on the same day, April 20, 1971, ordering it to enforce the Supreme Court's mandate of March 22, 1971. Before the sheriff, upon instructions of the judge presiding over the Civil Law Court, could enforce the judgment, however, on April 22, 1971, he received a letter from the President of Liberia.

"The Executive Mansion
"Monrovia

"Sir:

"You are hereby commanded *not* to serve any Writ of Execution or other relevant document emanating from the Civil Law Court in an Action between the L. M. Ericsson Telephone Company and Mr. Arif Ghoussanly, until otherwise ordered by the Chief Executive.

"Fair not at your peril.

"Given under my hand this 22nd Day of April, 1971
"WILLIAM V. S. TUBMAN,
President of Liberia.

"The Sheriff,
First Judicial Circuit,
Montserrado County,
Monrovia."

We have before us an application for a writ of mandamus to compel the sheriff of Montserrado County to carry out the mandate of the Supreme Court, which we now proceed to consider and pass upon.

On November 11, 1971, Arif Ghoussalny filed a petition for a writ of mandamus against respondents, P. Edward Nelson, sheriff for Montserrado County, and L. M. Ericsson, Swedish Telephone Company of Stockholm, Sweden, operating in Monrovia, Liberia, to compel the sheriff to enforce a judgment against the company. The gist of the petition has been extracted.

(1) That petitioner is the appellee in an action of damages for injury to the person against L. M. Ericsson,

Swedish Telephone Company, appellant, one of the respondants; that the appeal was terminated by the Supreme Court at its March Term, 1971, on the 20th day of April, 1971, and that a mandate was sent by the Supreme Court to the trial court to resume jurisdiction and enforce its judgment.

(2) That the court below, upon receiving the Supreme Court mandate, immediately ordered its enforcement, but the sheriff has failed and neglected to enforce collection of the judgment as directed by the Court.

(3) That the statutes unequivocally impose on the sheriff the duty to execute a writ of execution and his failure to carry out this duty in the instant case amounts to a wanton and willful neglect of duty, to the prejudice of petitioner, for which the sheriff is personally liable for neglect in the exercise of the duty imposed upon him by law.

Mr. Chief Justice Pierre, presiding in chambers ordered the alternative writ issued.. Separate returns were filed by the sheriff for Montserrado County, and L. M. Ericsson, Swedish Telephone Company, respectively. In the sheriff's answer, after attacking the status of petitioner's counsel because he was not counsel of record and no notice of change of counsel had been served on him, he stated that while it was true that he had not collected the judgment, he was prevented from doing so by a directive from the President of Liberia and, therefore, he was not at fault, because he could not disobey the President. He made profert of the letter.

L. M. Ericsson, Swedish Telephone Company, filed a return and an amended return, raising the same issue of the status of petitioner's counsel and other arguments.

> "(a) Mandamus will not lie against an inferior officer who in the performance of his official duties is subject to the orders of his superior officer; since the sheriff is an inferior officer serving in the capacity of a ministerial officer to the Civil Law Court,

mandamus should more properly be brought against the Circuit Judge, who is the link between the Supreme Court and the sheriff.

"(b) That while it is true that the sheriff for Montserrado County did receive orders for the collection of the judgment, before he could perform such duty he received a directive from the President of Liberia, Dr. William V. S. Tubman, commanding him not to; since he is a member of the Executive Branch of Government serving as such in the courts, he is bound in such service by the Executive Branch of the Government and under our system of checks and balances, by lawful orders issued to him in the performance of his official duties in operation of the legal principles of check and balance in our democratic form of Government reinforced by the separation of powers provision of the Constitution of Liberia, and since the sheriff was directed by the Chief Executive not to serve the writ of execution, no court has the right to interfere. Consequently, mandamus will not lie.

"(c) That the action of the President in issuing the directive hereinabove referred to was by an exercise of the police powers of the State vested in him, and this power extends beyond regulations necessary for the preservation of good order or public health and safety; the prevention of fraud and deceit and cheating and imposition are equally within the power; in short, the promotion of fair dealing is a legitimate exercise of the police power, which the police are authorized to carry out; therefore, mandamus will not lie.

"(d) That under existing law and the application of the doctrine of separation of powers, the sheriff having acted upon the directive of the Chief Executive, the Judicial branch of Government cannot interfere in any way to set aside, revoke or cancel the

President's directive. Therefore, mandamus will not lie."

To these returns of the respondent, petitioner filed separate answering affidavits. Because both answering affidavits embrace practically the same points, they will be summarized together.

(1) That by notice duly given of change of counsel, the Mississippi law firm had every right to represent petitioner. Copy of notice of change of counsel, with a certificate from the Clerk of the Supreme Court that the notice was filed in his office, were made profert with the answering affidavits.

(2) That the sheriff is by statute authorized and required by law to perform the duties of serving writs of execution and other judicial process and he can only be relieved of the duty by an act of the Legislature and not by any directive from the Chief Executive.

(3) That the directive of the Chief Executive was in controvention of the Constitution and statutes and was a violation of his oath of office and, therefore, *ultra vires.*

(4) That under Article I, Section 14th, of the Constitution the powers and functions of Government are divided into three distinct branches and no person belonging to one branch shall interfere with or perform the duties and/or functions of another branch, and that the Chief Executive's letter was to all intents and purposes interfering with the administration of justice, which is within the province of the judiciary branch and, therefore, violated the Constitution and his oath of office.

(5) That under the Constitution the President is authorized to grant pardons, reprieves and remit public forfeitures in matters affecting the public interest, but the instant case not being within the category of the permissible Executive intervention, renders the act of the late President *ultra vires,* void and unconstitutional.

(6) That the Constitution which the President swore

to defend and protect, provides that every person injured shall have remedy by due process of law and petitioner having been injured and having obtained his remedy by due process, the late President's letter sought to deprive him of a constitutional guarantee and, therefore, should be declared unconstitutional.

(7) That petitioner denies that the late President's letter was in exercise of the "police power" vested in him.

(8) That the appeal bond in the case constitutes a contractual obligation on the part of the respondent company and under the Constitution not even the Legislature may enact a law to impair the obligation of a contract.

When the case came up for hearing in the chambers of Mr. Chief Justice Pierre, he felt that the constitutional issues raised were so important that they should be resolved by the full bench, in keeping with *Fazzah* v. *National Economy Committee,* 8 LLR 85 (1943), which held that cases involving constitutional issues are to be decided by the Court *en banc,* and instructed the clerk to docket the matter for this term of Court.

Even though it is not usual in applications for remedial writs, both parties in this controversy thought the issues of sufficient importance to prepare comprehensive briefs, mostly embracing the issues raised in the petition, returns and answering affidavits, with some elaboration, of course.

From what has been stated it can easily be observed that we are being requested to pass upon several important issues, constitutional and otherwise.

(1) What is actually meant by the "separation of powers" clause in the Constitution?

(2) Are the ministerial duties of the sheriff, or any other officer of the Executive branch of Government for that matter, specifically imposed by statute subject to review by the courts?

(3) Did the circumstances of this case warrant the intervention of the Chief Executive?

(4) Can the directive of the late President to the sheriff come under the umbrella of the "police power" of the state?

(5) What is the effect of mandamus issuing to the sheriff in respect to the constitutional implications involved, and is such a remedy available to the petitioner?

Undoubtedly other issues are involved in this case, but a careful consideration of these points would go a long way to resolving what we think are the more salient issues.

Both parties in these proceedings, for reasons of their own, have emphasized and stressed the "separation of powers" clause in the Constitution. Petitioner declares that under this principle when the late President undertook to stop the sheriff from executing a mandate of the Supreme Court, he usurped judicial functions which, under the separate powers clause of the Constitution, he could not do. Respondents on the other hand contend that the sheriff being an officer in the Executive branch of government was bound under the same separate powers clause of the Constitution to obey the directive of the President, and that his action in this respect cannot be reviewed by the Court.

> "The power of this government shall be divided into three distinct departments: Legislative, Executive, and Judicial; and no person belonging to one of these departments, shall exercise any of the powers belonging to either of the others. This section is not to be construed to include Justices of the Peace." Article I, Section 14th.

There are several reported cases on this issue, but most, if not all of them, simply restate the principle with respect to particular cases where an officer in one branch of Government attempted to, or did, encroach on the functions of another branch of Government, either by legislation or otherwise. Legal authorities, however, have offered us a deeper insight into the real meaning of

this principle, and the weight of authority is that separation of powers is not complete and often overlaps.

This is found to be true from even a cursory consideration of the matter: the Chief Executive's right to veto legislation, the Senate's right to confirm appointments of the Executive, the judiciary's invalidating unconstitutional enactments, the impeachment powers of the Legislature, which is essentially a judicial function, to mention only a few examples illustrating that the separation of powers is never a fixed and unmovable principle of constitutional law. This is borne out by writers on the subject.

> "Although the rule concerning the absolute separation of powers of government has been held to prevail without qualification, in practice the departments of government are not required to be kept entirely distinct without any connection with, or dependence on, each other, and each of the three departments normally exercises powers which are not strictly within its province.
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> "Although the theory of American constitutional government, concerning the absolute separation of the powers of government has been declared to be the prevailing rule, without qualification, it has never been entirely true in practice, and is no longer an accepted canon among political scientists. The courts recognize that the separation of the powers is far from complete, and that the line of demarcation between them is often indefinite. Moreover, it has been held not the purpose of the constitution to make a total separation of these three powers, but that the division of powers is abstract and general, and intended for practical purposes, and a constitutional provision prohibiting the exercise by one department of another's powers does not include all governmental functions or powers. Hence, in practice the departments are not required to be kept entirely distinct

without any connection with, or dependence on, each other, and each of the three departments normally exercises powers which are not strictly within its province, or which could also be given to another department. So encroachment of a prohibited nature is not necessarily shown by the nature of the power exercised or the duty performed." 16 C.J.S., *Constitutional Law,* § 105.

And the cases cited thereunder support the argument.

"The distinctions between the three powers of government cannot be carried out with mathematical precision and there may be a certain degree of blending of such powers." *Bailey* v. *State Board,* 153 P. 2d 235.

"The constitution contemplates no absolute fixation and rigidity of powers between the three departments of government." *Ferretti* v. *Jackson,* 188 A. 44.

"The constitutional provision that the legislative, executive and judiciary departments shall be separate and distinct does not require a rigid analytical classification in which every conceivable activity of government is assigned once and for all exclusively to one of the three departments." *Trybulski* v. *Bellows Fall Hydro-Elec. Corp.,* 20 A.2d 117.

"The constitutional provision requiring the powers of government set forth in the constitution to be divided into three separate departments, legislative, executive and judicial, each confined to a separate magistracy, means that the general functions of government fall into the three departments mentioned." *State* v. *Kirby* 163 S.W. 2d 990.

A prominent writer, in his work on constitutional law, spoke of separation of powers of government.

"While, as has been said, the principle of the separation of powers has generally been accepted as binding in our system of constitutional jurisprudence . . . the practical necessities of efficient government have

prevented its complete application. From the beginning it has been necessary to vest in each of the three departments of government certain powers which, in their essential nature, have not belonged to it. Thus, to mention only a few of the more evident examples, the courts have been given the essentially legislative power to establish rules of practice and procedure, and the executive power to appoint certain officials—sheriffs, criers, bailiffs, clerks, etc.; the executive has been granted the legislative veto power, and the judicial right of pardoning; the legislature has been given the judicial powers of impeachment, and of judging of the qualifications of its own members, and the Senate, the essentially executive power of participating in the appointment of civil officials.

"Not only this, but as we shall later see, the principle of the separation of powers does not prevent the legislative delegation to executive officers of both a considerable ordinance-making power, and of authority to pass, with or without an appeal to the courts, upon questions of fact. Essentially, the promulgation of administrative orders of ordinances is legislative in character, and the determination of facts after a hearing is judicial. In both cases, however these functions are performed in pursuance of statutory authority, and as incidental to the execution of law. In like manner, the legislature is conceded to have, as incidental to its law-making power, the essentially judicial function of punishing for contempt or disobedience to its orders. . . .

"Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts, which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been

delegated to it, but that it may not exercise powers not so constitutionally granted, which from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.

"From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is excutive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given." Westel Woodbury Willoughby, *The Constitutional Law of the United States* (1910), §§ 742,3.

Law review articles have considered the problem.

"At the bottom of our problem lies the doctrine of the separation of powers. That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind 'the separation of powers' is fear of the absorption of one of the three branches of government by another. As a principle of statesmanship the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became the great Chief Justice. A distinguished student of comparative constitutional law, one of Montesquieu's countrymen, has summed up the significance of his doctrine:

" 'The separation of powers is merely a formula, and formulas are not working principles of government. Montesquieu had chiefly aimed to indicate by his formula the aspirations of his times and country. He could not and did not wish to propose a definite and permanent solution of all the questions brought up by the government of men and their long-felt longings for fairness and justice.'

"In a word, we are dealing with what Sir Henry Maine, following Madison, calls a 'political doctrine,' and not a technical rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction. Duties have been cast on Courts as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated factors, instead of insisting on self-defining legislation; even though 'the distinction between amnesty and pardon is of no practical importance' the specific power of the President to grant pardons does not invalidate congressional acts of amnesty, nor does the President's power to pardon offenses preclude Congress from giving the Secreary of the Treasury the authority to remit fines and forfeitures. Even more significant than the decisions themselves are the considerations which induced them, and the insistence on an abstract doctrine of separation of powers which they rejected. 'The necessities of the case,' to stop the wheels of 'government,' 'practical exposition' are the variations in the motif of the decisions. The dominant note is respect for the action of that branch of the government upon which is cast the primary responsibility for adjusting

public affairs. The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. They are vast stretches of ambiguous territory. Certainly in the first instance Congress must mark metes and bounds. Therefore, the courts will not judge what is fundamentally a political problem by technical considerations. On the contrary, the Supreme Court has consistently sustained congressional discretion when moving in the general legislative field not bound by specific limitations even though the particular field may border on territory dominantly in control of another department of the government."

We can see, therefore, when we talk about separation of powers of a government, we are not dealing with a principle that has rigid application, but that it is a principle intended to prevent absorption of all the powers of government by one branch of the government.

Let us now consider the second point, that is, are the ministerial duties of the sheriff, or any officer of the Executive branch of Government for that matter, imposed by statute subject to court process? The weight of authority holds that when a duty is imposed by statute upon one in the Executive branch of Government, he is subject to court process and it is wrong for anyone to interfere with the process of court in such a case.

"Where a question has been decided by the courts, executive officers are bound thereby and may not change or modify such decision, or require the court to do so. Judgments, within the powers vested in the courts by constitutional provisions may not lawfully be revised, overturned, or refused faith and credit by the executive department of government." 16 C.J.S. *Constitutional Law,* § 171.

Our Supreme Court has more than once reaffirmed our adherence to this principle. In both *Wiles* v. *Simpson,* 8 LLR 365, 369–73 (1944), and *Porte* v. *Dennis,* 9 LLR 213 (1947), Mr. Chief Justice Grimes speaking for this Court stated in no uncertain terms our position on this point. In the *Wiles* case, at the pages cited, he spoke at length.

> "The famous case of *Marbury* v. *Madison,* 1 Cranch 137, 2 L.Ed. 50 (1803), cited in the briefs of both appellant and appellee, seems to be the leading case on this subject.
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> "In that case the mandamus was prayed for to compel the Secretary of State of the United States to deliver to the said William Marbury a commission which the President had duly signed and had sent to the Secretary of State to be sealed with the great seal and turned over to Marbury and to others who like him had been appointed to similar offices. The points argued in that case seemed to have been raised for the first time in judicial history, and Chief Justice Marshall who delivered the opinion of the Supreme Court of the United States made such a complete survey of the law bearing upon the principles at issue that said opinion has since then been considered a buoy light to guide the progress of lawyers and of judges in the study of the issues then involved, which issues will be considered and disposed of in this opinion.
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> "First of all, in what instances the Secretary of State is amenable to judicial process and in what instances he is not is settled in *Marbury* v. *Madison* by Chief Justice Marshall, speaking for the Supreme Court of the United States as aforesaid:
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> " 'By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his

political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

" 'In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

" 'But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and *cannot at his discretion sport away the vested rights of others.*

" 'The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers

himself injured, has a right to resort to the laws of his country for a remedy.' *Id.*, 1 Cranch 137, 165–66, 2 L.Ed. 60 (1803). (Emphasis added.)

"Hence it is that only when acting as the agent of the President in a matter in which discretion is by the Constitution or by law lodged in the President and in him alone, is the Secretary of State or other cabinet officer not subject to the ordinary process of the courts. For were it otherwise, the act of the agent might involve the principal, and were that action adjudged a violation of law the legal consequences that might flow therefrom might, as a logical sequence, end in the detention of the President, which would be in violation of the Constitution both in fact as well as in spirit. But in all other matters, especially in performing a duty specifically imposed upon the Secretary of State or upon other cabinet officials by the Constitution or by law, the Secretary is fully amenable to the ordinary process of the courts."

This is the general rule which we agree cannot and should not be ignored. Later on in this opinion we will endeavor to apply this rule in the general context of the proceedings now under review.

We come now to the point of considering whether or not the Chief Executive was right to intervene and, if so, in the manner in which he did. We do not know and perhaps will never know what motivated the late President's directive to the sheriff. We cannot ignore, however, the facts stated in the submission of respondents in these proceedings regarding the stipulation of withdrawal. It is true that the stipulation did not also provide for withdrawal by petitioner of his cause in the lower court, but considering that the usual form of withdrawal was not followed, we feel safe to assume that the stipulation must have been based upon some understanding between the parties in litigation. We wonder why the Court did not handle the application to with-

draw in the usual manner, by ordering a mandate to the lower court at the end of the term for enforcement of that court's judgment, but did so as soon as the stipulation of withdrawal was brought to its attention at the beginning of the term.

We also wonder why after hearing argument on April 20, 1971, the Court entered its ruling on the record and in the absence of respondents' counsel, as stated in their brief, and ordered the Clerk of Court to immediately send down a mandate for enforcement, thus denying respondents, as also stated in the brief, the right to apply for reargument if so desired. We feel that it was wrong and unconstitutional for the late President to have intervened in the manner he did to stop the execution of the mandate of the Supreme Court and thus prevent the sheriff from performing a duty mandatorily enjoined upon him by statute. But we also feel that the manner of disposing of the cause by the Court left much to be desired. It is the duty of courts to so handle and dispose of matters that no room will be left for such an eventuality as occurred in this case. In the brief and in argument, petitioner's counsel stressed the point that the late President's action was in contravention of his oath of office to *enforce* the laws of the Republic. That may be true, but it must not be forgotten that the oath to faithfully execute the office of President does not deprive the President of the right to exercise his discretion in the proper circumstances to determine what constitutes proper execution of all laws. We are compelled to remark here that each branch of Government has its own special obligation to society and these obligations must be scrupulously fulfilled if the rights of all are to be preserved.

Our next point is, can the directive of the late President come under the umbrella of the "police power" of the state? Respondents averred that he acted under the police powers vested in him. In order to resolve this

question we need first determine what actually is meant by "police power" and in whom it vests.

> "The powers of government inherent in every sovereignty. The Power vested in the legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects. . . . The power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. The authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest. Police Power extends to what is for the greatest welfare of the state, and is not confined merely to the supression of what is offensive, disorderly or unsanitary. This right must be clearly distinguished from the administration of criminal law and from police regulations and police authority, nor should it be confused with eminent domain, as has sometimes been done, or with the power of taxation." BOUVIER'S LAW DICTIONARY.

Our understanding of the term is that it is that power reserved to and inherent in the legislature by virtue of their representing the sovereign people, to make laws for the purpose of protecting the lives, limbs, health, comfort and quiet of all persons and the protection of their property, as well as to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest. In other words, it is the power inherent in the whole sovereign people of a nation and reserved to their legal representatives to make laws and regulations which are not repugnant to the constitution. As such, any exercise of police power by the executive must first of all have legislative sanction, because police power does not automatically vest in the executive. We cannot, therefore, agree with the contention of counsel for respondent that the sending of a directive to the sheriff for Montserrado County by the Chief Executive not to en-

force a mandate of the Supreme Court is an exercise of police power vested in the Chief Executive. In contemplation of constitutional law there is no legal foundation for this theory.

We now come to the last point of consideration, that is, what would be the effect of mandamus to the sheriff in the instant case in respect to the constitutional implications involved, and how availing is such a remedy to the petitioner in these proceedings?

Aside from what we have said earlier in this opinion about separation of powers, we must now consider the very important point of whether the Chief Executive can be made subject to court process while he is Chief Executive. Constitutional law writers all agree that this cannot be done.

In this case, which is peculiar in nature, it is not that the sheriff neglected or refused to perform legal duties imposed upon him but that he was directed *"at his peril"* by the Chief Executive, not to enforce a court's mandate.

In the reported cases we have referred to, as well as *Marbury* v. *Madison, supra* the President had not specifically instructed his Secretary of State to do or refrain from doing an act, but the official had acted in his own right contrary to settled constitutional principles. In passing on the issues in this case, we must take into consideration that were we to order the issuance of a writ of mandamus directing the sheriff to enforce the Court's mandate, in spite of the President's directive to him, we would, in effect, be issuing a writ of mandamus to the Chief Executive. In other words, the petitioner is asking us to do the very thing he is condemning, that is, to interfere with a directive of the Chief Executive because he interfered with a mandate of this Court. It is easy to see that should we adopt this course we would be bringing the judiciary into conflict with the executive branch, causing confusion that could possibly bring about disruption in the smooth operation of Government.

But besides all that has been said in this connection, how availing a remedy would our ordering mandamus be to the petitioner? We could not compel the Chief Executive to obey a mandate that he directed should not be enforced. Our writ of mandamus would not bring the Chief Executive under the jurisdiction of the Court, nor could process lie against him for disobedience of our mandate. This was recognized in 1931, when Attorney General Louis Arthur Grimes, who later became Chief Justice, in an opinion advised President King not to appear before the International Commission of Inquiry that was investigating grave charges against the Country:

> "The President is not responsible to the courts, civil or criminal; nor are his acts reviewable by them to the extent of bringing them into conflict with him; except that they may declare void an order or regulation in excess of his powers; but with respect to all of his political functions growing out of the foreign relations, the control of military officers, and his relations with congress, it is settled that courts have no control whatever. So, as a necessary incident of the power to perform his executive duties, must be included freedom from any obstruction or impediments; accordingly, the President cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

Westel Woodbury Willoughby, in the text above referred to, has dealt with the problem in section 763.

> "For the performance of a purely ministerial act, a mandamus will lie to the heads of the great departments of the Federal Government, and *a fortiori,* to their subordinates. We have now to inquire whether the President, the chief executive of the nation, is, with reference to the performance of a purely ministerial act, similarly subject to compulsory judicial

process. This question has several times been before the courts, and though not often directly passed upon, a negative answer has been uniformly indicated.

"In *Marbury* vs. *Madison* the question was as to the issuance of a mandamus not to the President but to the Secretary of State. It was argued, however, that the Secretary acted as the agent of the President, and that the President, as Chief Executive, was not amenable to the writ. The court, in its opinion, held that the Secretary was, as to the action prayed for, subject to the writ, but conceded that in cases in which the Secretary was but carrying out the political or discretionary will of the President, the writ would not issue. In this case it will be remembered that the court finally refused to issue the mandamus to the Secretary on the ground that the provision of the act of Congress giving the original jurisdiction under which the suit had been brought was unconstitutional. President Jefferson, however, declared that had the mandamus been awarded, he would have considered it an infringement upon his executive right and as such would have resisted its enforcement with all the power of government.

"In *Marbury* v. *Madison* the court did not intimate what its position would be in case the performance directly by the President of merely ministerial dutes was prayed.

"In the trial of Aaron Burr for treason the amenability of the President to a judicial process was brought directly into issue. Marshall, who was conducting the examination, issued, at the request of the defense, a *subpoena duces tecum* directing President Jefferson to appear and bring with him a certain letter to himself from General Wilkinson. Jefferson refused to appear or to bring the letter. That a compulsory process should be thereupon issued to the President does not appear to have been even con-

sidered but upon a discussion as to whether the Attorney General should permit the defense to have the examination of a copy of the letter which had been put into his, the Attorney General's possession, Marshall said: 'I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the court in consequence of his not having attended; notwithstanding the subpoena was awarded agreeably to the demand of the defendant, the court would, indeed, not be asked to proceed as in the case of an ordinary individual.'

"In another account of the same trial, the Chief Justice is reported to have said: 'In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . .' In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by him, not by another for him. Of the weight of reasons for and against producing it he himself is the judge."

It should be crystal clear, therefore, that mandamus in these proceedings would be an unavailing remedy in the circumstances prevailing.

In view of what has been stated herein, it is our holding (1) that the action of the late President in directing the sheriff for Montserrado County not to enforce a mandate, which was a ministerial duty enjoined by law upon him, was an encroachment on judicial functions and, therefore, would seem to be in conflict with the Constitution; (2) that the remedy sought by petitioner would be ineffectual in view of the circumstances surrounding the case as a whole and, therefore, to grant the relief sought would simply be an exercise in futility.

Predicated upon the foregoing, the alternative writ is hereby quashed and the peremptory writ sought denied.