RANJIT KUMAR BISWAS, Appellant, v**. PEARL ETHNA BURNETTE-BAKER**, Co-Lessor, Heir and Administratrix of the Intestate Estate of the late SAMUEL N. BURNETTE, SR., by and thru her husband, J. NYEMA BAKER, and SAMUEL N. BURNETTE, JR., Co-Lessor, Heir and Co-Administrator of the Intestate Estate of the late SAMUEL N. BURNETTE, Sr., Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: April 14, 1983. Decided: July 6, 1983.

1. A clause in a lease agreement granting an option to renew the agreement on terms and conditions to be agreed upon is an executory or conditional contract, the condition precedent of which must be performed before rights under the contract can legally attach.

2. An executory contract is one in which the party binds himself to do a particular thing in the future, and conveys a chose in action as appeared to an executed contract which conveys a chose in possession.

3. In a written contract, the rights and liabilities of the parties, in the absence of ambiguities, fraud, duress or mutual mistake, are to be determined by the terms of the agreement and not by the supposed intention of the parties.

4. Courts of law cannot make contracts for parties; they are therefore to refrain from the impairment of contractual obligations unless where they are in conflict with statute or public policy.

5. In order for a contract to be valid and enforceable, there must be a valid "offer", a valid corresponding "acceptance", and a valid "consideration". Of these basic elements of a valid contract, "acceptance", actual or constructive, is the most important.

6. A contract is an agreement which creates an obligation; its essential elements are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligations.

Appellant, plaintiff below, entered an agreement of lease for a certain period of twenty (20) years, with a right of option to renew for an additional fifteen (15) years under terms and conditions to be agreed upon except that the rental payment cannot be increased more than two hundred percent. Upon the expiration of the 20 years certain, appellant express his desire to exercise the option clause. The heirs of the deceased lessor requested the construction of an additional storey over the demised premises as a condition precedent for extending the lease. There being no agreement on this condition, appellant/sublessee instituted an action of specific performance. The Sixth Judicial Circuit Court dismissed the action in favour of the lessor on the ground of uncertainty of the fifteen year clause. On

appeal, the Supreme Court affirmed the judgment, stating that the lease agreement in question was an executory one and was subject to renewal on terms and conditions to be agreed upon, which made the same unenforceable. The Court noted that courts could not assume the duty of making contracts for the parties, and that where the contracts are not definite as to their terms, the courts cannot enforce them.

Julius Adighibe & William Nelson Broderick appeared for the appellant. Daniel S. P. Draper and Roger C. H Steele appeared for the appellees.

MR. CHIEF JUSTICE GBALAZEH delivered the Opinion of the Court.

The appellant, Dr. Ranj it Biswas, plaintiff in the court below, filed an action for specific performance in the People's Civil Law Court for the Sixth Judicial Circuit, Montserrado County, sitting in its December Term, A.D. 1981, against the appellees, Pearl Ethna Burnette-Baker, et al., defendants. In his action for specific performance, the appellant alleged, inter alia, that on September 12, 1961 he entered into a contract of lease with the appellees through their father, one Samuel N. Burnette, Sr., now deceased, for premises situated on Lot No. 185 at Benson Street in the City of Monrovia. The lease agreement was to cover a period of twenty (20) years certain with an option of a further period of fifteen (15) years. The appellant claimed further that during the twenty (20) year period he lived up to the letter of the agreement and that at the expiration of the twenty (20) year period he the appellant indicated his wish to avail himself of the fifteen (15) years option and pay the rental accordingly. However, despite this good gesture on his part, the appellees refused to renew the agreement and as a result the appellant filed an action for specific performance in the Civil Law Court where his action was dismissed in favour of the appellees for what the trial judge termed uncertainty of the terms of the fifteen (15) year option clause. The appellant excepted to the judgment of the trial court and appealed to this Court for a review and final determination of the case. Hence, this appeal to this Honourable Court.

A review of the records submitted to us along with the bill of exceptions disclosed only one issue for the determination of this controversy and that issue is: Do the facts and circumstances of this case disclose a contract valid enough to be enforced? Before this question is answered, let us have a quick look at the terms of the lease agreement. Right from the outset we must mention that there is no dispute over the facts of this matter. The only problem featuring in this case is the interpretation of clause 4 of the lease agreement by the parties. Clause 4, which is the bone of contention in these proceedings, reads as follows:

"4. It is hereby mutually agreed that the Lessee shall have the right of an option for the renewal of this indenture for the further period of fifteen (15) years immediately after the expiration of the first period of twenty (20) years certain on terms and conditions to be agreed upon; the rent, however, shall not exceed two hundred per centum (200%) the rent due payable for the last five (5) years of the period certain herein granted".

In count three of his bill of exceptions and in his brief, the appellant interprets the provisions of clause number four (4), as meaning that once he pays rental dues at the rate of 200% of the original rental charged his legal obligations under the contract are discharged and his rights under the clause inure. The appellees, on the other hand, interpret the provisions of clause 4 to mean that until such time that the conditions and terms of the new lease agreement, which include the 200% rental charges, are properly negotiated and agreed upon, there is no contract between the parties. We are thus sandwiched in between and have to make up our minds as whom to agree with in the premises.

In deciding as to whom to agree with, let us first of all define a valid contract:

"A contract is an agreement which creates an obligation, its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligations". 17 C.J.S., Contracts, §1(a).

The agreement of lease as alleged in this case appears capable of meeting all the legal essentials as enumerated in section 1(a) of 17 C.J.S., Contracts, except for "mutuality of agreement" and consequently mutuality of obligations. It is a general rule that contract is not complete until there is a consensus ad idem (meeting of the minds) variously known as "mutuality of agreement". In other words, parties to a contract must agree on one and the same thing and intention at the same time of contracting -Ibid., § 1(c). It is also a rule of general application that in a written contract the rights and liabilities of the parties in the absence of an ambiguity, fraud, duress, or mutual mistake, are to be determined by the terms of the agreement irrespective of the intent of the parties at the time the agreement was executed Ibid., § 295; Sherman v. Republic, 1 LLR145 (1881); and Collins v. Elias Brothers, 11 LLR 258 (1952).

With these legal principles in mind, let us again have a glance at the provisions of clause 4 of the lease agreement. It is clear from the provisions that the new agreement based on the fifteen (15) year option will not be enforceable unless and until the new terms and conditions thereof are mutually agreed upon personally through mutual negotiations. There is no ambiguity whatsoever on this issue. The appellant, at counts .4 and 6 of his brief and bill of exceptions, accepts the authority of clause 4 of the lease agreement. It is observed from the appellees' brief that upon receiving appellant's letter of intention to renew the contract under the option clause (clause number 4), the appellees in unequivocal terms gave conditions precedent to the appellant, one of which was the construction of a third story on the existing premises for the free use of the appellees. Surprisingly enough, the appellant, who acknowledged receiving these conditions, decided to "renew" the contract by sending in a cheque for $6,000.00 (six thousand dollars) as consideration for the new contract.

It is important also to note here that the terms of clause 4 clearly constitute an "executory" or "conditional contract", the conditions precedent of which must be performed before

rights under the contract legally attach to the appellant. 17 C.J.S, Contracts, § 17 defines an executory contract as being "one the obligation of which relates to the future". An executory contract as defined here is thus one in which a party binds himself to do or not to do a particular thing in the future. An executory contract thus conveys a chose in action as opposed to an executed contract which conveys a chose in possession. To execute a contract means to perform the contract as mutually stipulated therein. Harris et al, v. Kaidbey, 8 LLR 444(1944).

After this brief discussion of the legal authorities and implications, we feel it is now safe and appropriate to answer our question posed as a pointer to the determination of this case. It is our considered opinion that as disclosed by the facts and circumstances surrounding this case, there is no contract valid enough to warrant enforceability for want of certainty. Mirza v. Crusoe et a, 14 LLR 95 (1960); King-Gibson v. Carter, 20 LLR 618 (1972). What we have here is an agreement to agree and as such we only see an offer being given but no corresponding acceptance without which the contract cannot be valid for lack of completion. This Court has often held that in order for a contract to be valid and thus enforceable, there must be a valid "offer", a valid corresponding "acceptance" and a valid "consideration". Of these basic elements of a valid contract "acceptance", actual or constructive, is the most important.

Now to go back to the facts of this case, in clause 4 of the lease agreement, the parties had agreed to extend the period by another 15 years. The parties also agreed that before the period is extended the terms and conditions must be agreed upon. At the end of the lease agreement we also see a communication from the appellees (lessors) to the appellant (lessee) indicating as to what conditions he would have to fulfill before the contract was finally executed.

If these terms were not acceptable to the appellant, why did he decide to hide away from the appellees rather than meeting them face to face or through written communications so as to iron out their differences? The new terms and conditions imposed by the appellees did not "conflict" with those previously mutually agreed upon in clause 4 of the said indenture of lease as alleged by the appellant in his brief for the simple reason that there were no previous conditions and clause 4 did not impose any specific terms and conditions over the requirement that "the terms and conditions of the fifteen (15) year option will have to be agreed on" as a condition precedent.

In view of the foregoing legal and factual grounds, we regret that we will have to sustain the contentions of the appellees in toto and ipso facto dismiss the appellant's arguments. A court of law cannot make contracts for parties; it has to refrain from the impairment of contractual obligations which obligations are discerned from the face value of such terms and conditions unless of course they conflict with our statutory laws or public policy. There is nothing illegal

or unlawful about the provisions of clause 4 or the terms and conditions imposed by the appellees. The judgment of the lower court is, therefore, affirmed with costs and the clerk of this Court is hereby ordered to send a mandate to the court below to resume jurisdiction over the matter and enforce its judgment, with costs against appellant. And it is hereby so ordered.

Judgment affirmed.