RAOUF SCAF, Attorney-In-Fact for ANTOINE A. NASSAH, JOSEPH CHOWIRI, and his assignee and occupants, et al., Appellants, *v.* **ESTHER G. RICKETTS**, sole heir and legal representative of her late husband, G. H. RICKETTS ESTATE, Appellee.

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

Heard: November 11, 1979. Decided: December 20, 1979.

1. Fraud is the employment of trick, artifice or duress by one person to influence another to enter into agreement or contract in which he would not have participated in the absence of the misrepresentation, concealment of material facts, or undue influence.
2. Proof of evidence that the defendant perpetrated the fraud complained of must be established at the trial or the action fails.
3. To make a lease agreement a contract, it is necessary that the lessee shall give in return for the premises exactly the consideration which the lessor requests.
4. Parties to a contract may safely enter into a subsequent contract before the expiration day of the prior one. The new contract may merge the terms of the old contract or be separate and distinct from the old contract; and in either event, it is enforceable.
5. Courts are required, except under stringent circumstances, to enforce contracts and not to aid parties to escape the performance of their obligations.
6. In an action in a court of justice, the plaintiff must have the capacity to sue as a prerequisite for bringing the action. Hence, a widow cannot sue under a power of attorney from her deceased husband as the agency expired upon the death of the husband. She cannot also sue as his representative without letters testamentary or letters of administration, as the case may be.

Appellee brought an action in equity for the cancellation of a lease agreement entered into by her husband as lessor, with appellant, as lessee, for a period of years, which incorporated the remaining period of a previous lease, under which the appellee was sub-lessee. The basis of the cancellation proceedings was that the new lease agreement was obtained by fraud and tricks since the previous agreement still had nearly four years to expire and that the deceased husband was of feeble mind when he executed the new agreement.

The trial court entered judgment for appellee and on appeal, the Supreme Court ruled that the mere execution of a new contract, which merged the terms of the old contract and superseded it, does not necessarily constitute fraud. Such a contract, the Court said, is valid and enforceable.

The Supreme Court also ruled that fraud, which is tricks and artifice, or duress to influence another to enter into an agreement he would not have otherwise participated in, must not only be alleged, but must also be proved. The Court noted that this was not done at the trial. The Court also found that the capacity of the appellee to sue, as well as the capacity of one of the appellants to stand in the place of the original lessor, was not clearly established at the trial. The Supreme Court therefore reversed the judgment and remanded the case with instructions that the parties replead.

Moses K. Yangbe and *Toye C. Barnard* for the appellants. *Herman Hopkins* and *Roosevelt T. Bortue* for the appellee.

MR. JUSTICE TULAY delivered the opinion of the Court.

On the 5th of March, A. D. 1959, a lease agreement, which empowered the lessee to sublease the demised premises, was entered into by Henry G. Ricketts, as lessor, and the Levant Mercantile Corporation, by and through its Manager Joseph G. Fazzah, as lessee. The subject premises contains one/half town lot; the contract which expressly revoked the 1956 contract previously entered into by the same parties became effective at once and it was to remain in full force and effect up to and including March 5, 1969, for an annual rental of $900.00; the rent for the first three years to be paid in advance with an option of another nine years at the rate of $1000.00. A little over seven months thereafter, that is, on the 31st of October, A. D. 1959, the Levant Mercantile Corporation, by and through its Manager Joseph G. Fazzah, sold, assigned, conveyed and transferred all its rights and interest in said half town lot tract of land with all the appurtenances thereon to sub-lessee or assignee, Raouf Scaf.

The years, 1960 through 1973, passed away without any event.

On the 31st day of July, A. D. 1974, however, Mr. Henry G. Ricketts, lessor in the 1959 lease agreement, entered into a subsequent contract of lease for the same premises with Raouf Scaf, sub-lessee under the original lease agreement; three years and seven months before the expiration by evolution of time of the prior contract.

The new contract was to take effect as of the 5th day of March, A. D. 1975, and to last up to the 4th of March, A. D. 1995, for an annual rental of $1,500.00. The contract authorized the lessee to sub-lease the premises. It is worthy of note that even though the 1959 lease contract still had three and one-half years to expire, the subsequent 1974 contract never revoked it. However, on the 1st of August, 1974, this money receipt was issued:

"Received from Raouf Scaf the full sum of One Thousand Five Hundred Dollars (1,500.00) against agreement dated July 31st, 1974.

This amount represents one year rent in advance commencing March 5, 1975, ending March 4, 1976.

Monrovia Henry G. Ricketts

August 1, 1974"

Two other similar receipts for the years March 5, 1976, through March 5, 1977, and March 5, 1977, through March 4, 1978, appear on the records certified to this Court. Appellee contended that she refused to accept the last check when she discovered what she terms as fraud, but she admits receiving at least one of the checks and converting the amount into her own use.

Count three of the complaint is the crux of the case and it reads thus:

"That prior to and before the expiration of and during the period of the lease the lessee did entice and take advantage of her feeble minded late husband in the year 1974, just to be exact, into a subsequent further, terms of years being twenty (20) in number, while the second optional period only contracted for ten (10) additional years."

We gather, with some difficulty, from this count of the com-plaint three grounds, which are the bases for this cancellation:

(a) Fraud-pleaded without enthusiasm perpetrated by the defendants on the lessor; defendants had him execute the 1974 lease agreement in the absence and without the consent and knowledge of his relatives and friends.

(b) Henry G. Ricketts, the lessor was feeble minded at the time he executed the 1974 agreement;

(c) The 1974 agreement was entered into while the prior agreement had yet three and a half years to run.

We take fraud to be the employment of trick, artifice or duress by one person to influence another to enter into agree-ment or contract in which he could not have participated in the absence of the misrepresentation, concealment of material facts or the undue influence; and this includes alteration of words, clauses and phrases in a written

instrument after its execution; in the case of an unlettered plaintiff, reciting different words to his hearing other than those actually written in the document; prevailing upon the plaintiff to sign a written instrument under a title when in fact it is a different instrument. *Kontar v. Mouwaffak*, 17 LLR 446 (1966); putting the plaintiff under fear or alcoholic intoxication.

In law, proof of evidence that the defendant perpetrated the fraud complained of must be established at the trial or the action fails. *Henricheen v. Moore,* 5 LLR 60 (1936). But the case in point is in equity and in Bouvier's Law Dictionary we read: "A court in chancery may grant relief for fraud presumed by circumstances."

Since none of the attributes of fraud enumerated above had been proved by at least presumed circumstances, we shall eliminate the question of fraud and concern ourselves with the lessor's feeble-mindedness at the time of the execution of the 1974 lease agreement and the legality or illegality of entering into a new and subsequent contract while a prior one, between the same parties and for the same subject, exists.

To make a contract valid the parties to it must possess the capacity to contract; the life time or the duration of the contract and cause or causes for earlier termination must be given. In the absence of restraints, and except the performance exclusively lie in the dexterity or the skill possessed by one of the parties, the contract binds the parties, their heirs, executors, administrators or assigns.

The contention of the plaintiff herein is that the lessor, Mr. Henry G. Ricketts, was feebleminded and, therefore, lacked the capacity to contract at the time he executed the 1974 lease agreement now sought to be canceled.

A person is incapacitated to contract because of advanced age especially so when the age is coupled with impairment of his mental faculties so that he is unable to protect his property rights. Under normal circumstances this would place plaintiff on firm ground except that there exists a converse argument.

According to Doctor Titus's testimony, lessor's feeble mindedness began in the early part of this decade and this mala-dy went in crescendo along the years. Accordingly, his mental impairment was bad enough in 1974 when he executed the lease agreement, subject of the cancellation suit before us, but it was, of course, worse in 1976 and in 1977 when he executed a power of attorney and his last will and testament respectively, two and three years later. If the 1974 lease agreement is invalid so also must the power of attorney and the will except it be admitted unconditionally that feeblemindedness, unlike idiocy, but like insanity, is recurrent and relapsing - and this requires proof - so that the spell was on the lessor when he executed the lease agreement in 1974 but he was quite lucid in 1976 and 1977 at the times

he executed the power of attorney and his last will and testament, respectively. Without this proposition to hold that the 1974 lease agreement is void because the lessor was feeble-minded, which illness advanced or worsened as the years rolled on, to accept the 1976 power of attorney and the 1977 last will and testament as valid, is as nonsense as saying "John Doe, the Professor, died an hour after he gave lecture." Without proper punctuation the sentence means one hour after Professor Doe died he gave lecture. What a fallacy.

To make a lease agreement a contract, it is necessary that the lessee shall give in return for the premises exactly the consideration which the lessor requests. The 1974 agreement of lease calls for an annual payment of $1,500.00 to be paid in advance and lessee paid the full amount in August 1974 for the year commencing August 1974 to August 1975 and the lessor received the amount in full.

The agreement then became contracts. Thereafter appellee received one more check for $1,500.00 but after she discovered that the payments were being made under the 1974 agreement she refused to accept any more payments. To properly plead equity appellee should have refunded $600.00 to appellants, this amount representing the difference between the $1,200.00 annual rental under the 1959 agreement and the $1,500.00 under the 1975 agreement and to have instituted this cancellation suit im-mediately thereafter. It is said that cancellation proceeding was instituted during the life time of the lessor but was later with-drawn. Why was this, we ask? "Equity helps the vigilant, not the slothful."

In the absence of an inhibiting statute - and ours are silent on the score - parties to a contract may safely enter into a subsequent contract before the expiration day of the prior one. Where the parties, before the expiration of the prior agreement or contract, enter into a subsequent agreement which covers all and more of the terms laid in the original agreement, it, the original agreement, merges into the subsequent contract and its terms cannot be enforced; but where the subsequent agreement is variant in parts, the two agreements operate parallel. The terms which are not the same must be recognized and performed as in the case of two statutes on the same subject, the subsequent statute obtains only with regard to issues on which the original statute is silent.

Additionally, where the subsequent contract covers the remaining time of the prior contract, as is the case before us and more beside the consideration or performance is wider and the parties, by their overt acts, ignore the original contract, there is novation.

Moreover, when the parties to a subsequent contract on the same subject, the terms of which are inconsistent with those of the prior one so that they cannot operate parallel, and neither of the parties exerts any claim under the prior contract, the latter discharges the

former.

Additionally, when the parties enter into a new and written agreement on the same subject matter and from which greater benefit accrues to both parties, as in the case before us an in-crease of $300.00 in the rental payment and an additional period of 16½ years, the prior contract is accordingly extinguished for it is merged into the subsequent contract.

The prior lease agreement of 1959 was entered into by and between Henry G. Ricketts, now deceased, as lessor and the Levant Mercantile Corporation by and through its general mana-ger, Joseph G. Fazzah. Soon after the execution of the agreement the Levant Mercantile Corporation sub-leased the entire premises to Raouf Scaf, one of the appellants herein. In 1974, three and half years before the expiration of the lease under which he become a sub-lessee, the sub-lessee entered into agreement of lease with the same lessor for a period of twenty years; a period which included the unexpired time of the 1959 agreement.

Raouf Scaf, being an assignee of the Levant Mercantile Corporation, was properly bound to perform under the 1959 agreement and as such he was qualified to contract with the lessor, Henry G. Ricketts, for the same premises when he still had three year interest remaining in it.

It was advanced, with some enthusiasm, that the contract is against public policy because it was entered into while the prior one was still extant and that because the consideration, $1,500.00, is to merge a sum for the premises; but we hold otherwise. Though the contract was executed almost four years before the original contract expired by its terms, the subsequent one, now sought to be canceled, includes the unexpired time in its twenty year term which is in conformity with our existing statute - the period must not exceed 20 years. Hear also what the common law say:

> "So the mutual agreement of parties to a bilateral executory contract, before a breach therefore, to abrogate and dis-charge it and to substitute in its stead a new contract conferring new advantages or imposing new burdens (as in the case at bar) or both constitutes a sufficient considera-tion to support the substituted contract." 17 AM. JUR 2d., *Contracts,* § 461.

Much that we now look upon the consideration, $1,500.00, to be a hook too small to catch such a leviathan, yet, without proof of fraud, what can we do? For, the right of contract falls within the liberty of the citizens which cannot be infringed upon. Courts are required, except under stringent circumstances, to enforce contracts and not to aid parties to escape the performance of their obligations. It is a good doctrine, accepted by majority of writers, that the primary duty of courts is to enforce contracts, not to abrogate them. When,

therefore, contract between two parties dealing with each other at arms length, if free from taints of fraud, and a consideration is given by the promisee or lessee, comes before a court of justice, it must be given a fair presumption of justice.

Having already agreed upon the validity of a subsequent lease agreement entered into by the same parties - in this case, the lessor, Henry G. Ricketts, and lessee, Raouf Scaf - while the original or prior one was still operative under the doctrine of "inference of conduct" as against "inference of word" it is only required of co-appellant Chowiri to prove that he stands in place of lessee Raouf Scaf who hitherto stood in place of the Levant Mercantile Corporation, by and through its general manager, Joseph G. Fazzah. This proves to be nothing less than the existence of assignment of lease agreement between him and Raouf Scaf or a partnership agreement between them.

As stated hereinabove, one of the qualifications of a valid contract is that the parties to it must possess the capacity to contract. This also holds true for an action in a court of justice; the plaintiff must have the capacity to sue. Appellee herein could not have sued by virtue of the power of attorney given her by her husband because it became void at the death of its executor. She could not have sued because of her position as widow of the lessor, unless she possessed letters of administration. She sued by virtue of her position as the sole executrix of the lessor. We wonder how the lower court entertained the naked complaint without profert of the will, plaintiff's authority to sue? It was, therefore, a reversible error for the court to have denied appellants' application for a *subpoena duces tecum* to make appellee produce the will before court. Appellants also assigned as error the court's failure to pass upon some of the issues of law raised in the pleadings.

For the conclusions arrived at, we remand this case to be repleaded and have every iota of issues of law raised properly passed upon before a regular trial is conducted in conformity with this opinion. Costs to abide final determination. The Clerk of this Court is hereby instructed to send a mandate to the trial court commanding the judge therein presiding to resume jurisdiction over this case and proceed in accordance with this opinion. And it is hereby so ordered.

Judgment reversed; case remanded.