MUSA SIRLEAF, Appellant, *v.* GEORGE N. AZAR and HALIM SABA, Appellees.

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

Argued May 8, 1972. Decided May 19, 1972.

1. It is incumbent upon the parties in litigation to present the best evidence available to them at the trial of the matter.
2. Fraud may be established not only directly but by inconclusive circumstances which by their weight and number jointly considered may constitute sufficient proof.
3. The Supreme Court will hesitate to affirm a decree denying cancellation for fraud when in such decree the trial judge states that fraud does seem to exist but is nebulous in dimension.

Appellant was the lessor of property, subsequently sublet by the lessee to the appellees. Prior to such subleasing, lessor and lessee agreed to change the lease with the view toward a more equitable division of taxes in favor of appellant, who retained a copy thereof with the changes indicated by the lessees. At the time appellant became aware the premises had been sublet, the sublessees deducted taxes paid by them from the rent due, claiming their original copy of the lease permitted them to do so. Appellant claimed fraud on the part of the sublessees or their assignors in having made the changes in the original copy never agreed to by him. He brought an action for cancellation of the lease based on the allegation of fraud. The evidence presented by both sides at the trial failed to address itself fully to the issues presented. In its decree denying the petition, the lower court nonetheless seemed to say that fraud had somewhere occurred. An appeal was taken from the judgment. *Judgment reversed, case remanded.*

C. Abayomi Cassell for appellant. The *Tubman law firm,* by *Hall Badio,* of counsel, for appellees.

MR. JUSTICE HENRIES delivered the opinion of the Court.

This action for the cancellation of a lease argeement for fraud originated in the Civil Law Court, Sixth Judicial Circuit, Montserrado County. From the record certified to us, a brief history of the case has been set forth.

A lease agreement was entered into in 1962 between Musa Sirleaf, who is the appellant, and Messrs. Henry Salim Holon and Joseph Malkoun, Lebanese nationals engaged in mercantile business in Monrovia, for the leasing of appellant's premises at a rental of $2,500.00 a year. The original of that document was retained by the lessees, and the duplicate copy by the lessor, who is the appellant herein. In that agreement, clause six reads: "It is further agreed and mutually understood that the lessor shall be responsible to the Government of Liberia for the payment of Coast Guard Tax, whatever nature, which are now levied, and any other which may hereafter be levied on the said devised premises, without any molestation to lessees." The appellant, who cannot read or write, testified that some time later he showed his copy of the lease agreement to Momolu Dukuly who pointed out certain inequities in clause six of the lease agreement, whereunder the appellant was responsible for all taxes. Appellant thereafter wrote Mr. Malkoun a note suggesting changes in clause six in order that the taxes might be shared. This testimony was corroborated by Mr. Dukuly.

According to the appellant, accompanied by another witness named Molley, he brought the note to Mr. Malkoun, one of the lessees. By this time Mr. Malkoun had bought the interest of his co-lessee Holon. Both the appellant and Molley testified that the note was presented to Mr. Malkoun who read it, took the appellant's copy of the lease agreement, put it in a typewriter, made certain changes and handed the copy back, and they left. In this copy which was entered into evidence, clause six reads:

"It is further agreed and understood that the lessor shall be responsible to the Government of Liberia for the payment of Coast Guard Tax whatever nature which are now levied on the said demised premises without any molestation to the lessees. The lessees hereby covenant to pay all Liberian Government taxes now levied and to be levied hereafter on the said leased demised premises, except the Coast Guard tax which shall be paid by lessor as prescribed hereinabove."

One day the appellant went to collect his rent from the lessees, and discovered that his premises had been sublet to the appellees, and that Mr. Malkoun, his lessee, had left Liberia. The appellant was shown a revenue receipt of $1,140.00 which had been paid on his behalf by the appellees, and which represented real estate taxes for the year ending 1969, and was given $1,360.00 representing the balance of his rent. The appellant contended that this was the first time that any deduction for taxes had been made from his rent, and that his rent had always been paid in full by Mr. Malkoun. It is this incident which led the appellant to seek cancellation of the lease agreement for fraud, complaining that clause six of the agreement had been tampered with either by the original lessee or by his assignees because the original copy of the agreement does not contain the changes made by Mr. Malkoun, insofar as the payment of taxes is concerned.

The appellees denied that the lease agreement was altered, and introduced into evidence their copy of the agreement, but they did not deny that Mr. Malkoun was approached to have clause six changed or that he did make the change on appellant's copy. One of the appellees, Mr. Azar, merely testified that he "never saw Mr. Malkoun typing and that no sensible person would type something against himself."

The lawyer who is supposed to have prepared the lease agreement was also a witness and he testified to several

alterations on appellant's copy. Appellant contended that when the lawyer was first asked about the agreement he could not remember having anything to do with it, but later on the witness stand he had vivid recollections of the agreement, and could point out several discrepancies in appellant's copy. The lawyer testified that the appellant was present in his office, along with the lessees, when the agreement was prepared and signed. The appellant denied this, and said he was never in the lawyer's office at any time, and that Mr. Malkoun prepared the agreement and brought it for his signature. After the evidence had been presented and arguments heard, the court rendered a final decree of which excerpts are set forth.

"As we have said before we cannot offhandedly say that fraud had not been practiced somewhere along the line, whether this fraud had been practiced by the lessee and/or assignee is the question now before this court.

"Surely, fraud does exist somewhere but who practiced it, whether it is the petitioner or the respondent, is what the court has not been able to say and as we have said before had someone applied to the Department of State for a certified copy of the lease agreement which was offered into probate on the 25th day of July, 1962, and that copy brought to be compared with two copies now before us, this question would have been easily answered. In the absence of such convincing proof this court is unable to go on record that the original copy of the lease agreement had been tampered with.

"In view of the foregoing it is the ruling of this court that having failed to discover any fraud in the facts of the lease agreement as offered to court by the respondent and there being no other proof that changes or erasures were made from said original copy of the lease agreement, this agreement needs not be disturbed. Petition denied with cost against the petitioner."

It is this decree that appellant took exception to and appealed from.

The final decree is interesting, for in one instance it declares that fraud does exist, and yet in another instance it states that fraud has not been demonstrated. It is unclear whether or not the judge determined that fraud had been committed. Perhaps this doubtfulness on the part of the judge might be due to the neglect of the parties to produce the best evidence that the case admits of. Both parties to the agreement had their respective copies of the lease agreement probated and registered, yet neither of them made any effort to obtain a certified copy from the Bureau of Archives of the State Department. The appellees claimed that the deduction of $1,140.00 from appellant's rent due was for unpaid taxes, but did not introduce into evidence the tax bill for the court to determine for which years the appellant owed taxes on the leased premises, and whether any taxes had been previously paid on the property. Since the appellees were not present when the lease agreement was entered into, or when the changes were allegedly made by Mr. Malkoun, their sublessor, it was incumbent upon them to produce him as their witness, yet they exerted no effort to ascertain his whereabouts and to have him give such evidence as might be necessary. Upon alleging that a party has committed fraud, every species of evidence tending to establish the allegation should be advanced at the trial. *Henrichsen* v. *Moore,* 5 LLR 60 (1936). In equity, fraud may be inferred from circumstances. *Kontar* v. *Mouwaffak,* 17 LLR 446 (1966). To establish fraud it is not necessary to prove it by direct and positive evidence; circumstances altogether inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof. *Watson* v. *Ware,* 10 LLR 158 (1949).

The last count of the bill of exceptions which objects to the final decree of the lower court is the most impor-

tant of the six-count bill of exceptions. The others complain of errors the judge made in either overruling appellant's objections or sustaining the objections of appellees. The appellees not having addressed themselves to these exceptions in their brief or argument, this Court does not find it necessary to pass upon them.

This Court will hesitate to affirm a decree denying the cancellation of an agreement for fraud when, in the decree, the judge declares that fraud does seem to exist. Under the circumstances, it is the opinion of this Court that the decree of the lower court be reversed and this case be remanded, with instructions that the parties be permitted to replead; costs to abide final determination to this case. It is so ordered.

Reversed and remanded.