

NAOMI GOODING (Deceased), Manager, MIM'S PIG
PARTS, substituted by EMMET A. GOODING,
Appellant, *v.* THE INTESTATE ESTATE of the late
THOMAS T. TOOMEY, Appellee.

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

Heard: December 4, 1997. Decided: January 22, 1998.

1. Consideration is the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract; the reason or material cause of a contract; some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.
2. Consideration are of two kinds: executed and executory.
3. Equity will not relieve a party because of an unfortunate or improvident bargain where there has been no fraud or imposition.
4. The act of a court in setting aside contracts which are lawful would be deemed to invade personal rights and disturb and destroy the safety of business transactions if such act is based solely on improvidence of the contracts.
5. Inadequate consideration is not a ground for a bill in equity to cancel a contract on charges of fraud.
6. Equity denotes the spirit and habit of fairness, justness and right dealing which regulate the intercourse of men; it is a system of jurisprudence collateral to, and in some respects, independent of law.
7. A court of equity possesses the inherent power to grant

relief, in the rescission of a contract and as a usual and necessary coincident to that relief to grant the cancellation or reformation of the instrument as written.

8. The rescission of a contract will usually be allowed where there has been some fraud entering into the inception of the agreement, or where there has been undue influence exerted, or where the mind of the stronger has overreached and controlled the powers of assent in the weaker. Equitable relief will not however be granted merely because it has been prayed for.
9. Generally, when a court of equity has assumed jurisdiction for one purpose, it may retain jurisdiction and determine all equities between the parties connected with the main subject of the suit raised in the pleadings.
10. In order for a court to retain jurisdiction to grant legal relief, (1) there must have existed an equitable cause of action growing out of the transaction prior to the commencement of the action which must be both alleged and proved; (2) the legal matters adjudicated must be germane to, or grow out of, the matter of equitable jurisdiction and not be distinct legal rights not affected by the adjudication of the equitable question involved; and (3) the court must have acquired jurisdiction of the parties or res necessary to the exercise of its actual jurisdiction to grant at least some of the relief proper under the allegations of the bill.
11. The rule which authorizes a court to retain jurisdiction does not extend to a case where an incidental matter is cognizable in equity and by this enable the court to draw in a main subject of controversy which has a separate, distinct and appropriate remedy at law.
12. The sole ground of equitable jurisdiction is that a remedy merely ancillary to the legal remedy may be afforded to hold the *status quo* until the main suit can be

ended.

13. In a proper case, a court of equity, upon obtaining jurisdiction, can retain such jurisdiction to administer or afford full or complete relief, both legal and equitable, so far as it pertains to the same transaction or the same subject matter, including the matter of dispute over which courts of law and courts of equity have concurrent jurisdiction; and it may decree delivery of the possession of real or personal property.
14. Where the right of occupancy, possession, or enjoyment is the only issue involved and the instrument (lease or addendum) conferring such right of occupancy, possession, or enjoyment is cancelled by a court of equity, said court may in the same decree order the redelivery of the demised premises to the landlord or true owner.
15. To perfect a right of possession, occupancy, and/or enjoyment of a demised premises under a lease agreement requires a special proceeding entitled summary proceeding to recover possession of real property.
16. A special proceeding is tried by a judge alone without a jury, just as the trial to cancel an agreement.

Appellant Naomi Gooding, for Mim's Pig Parts, assignee of the sub-lessee of a leased parcel of land, appealed from a judgment entered by the trial court cancelling the lease agreement and the addendum thereto in proceedings in equity brought by appellee, one of the administrators and an heir of the lessor, on the ground of fraud. The basis upon which the appellee commenced the proceedings in equity and alleged fraud were that the consideration paid by the lessee to the lessor, being an agreement by the lessee to assume responsibility for

payment of the real estate tax, which was previously the responsibility of the lessor, was inadequate, and that the appellee, assignee of the leased property, had refused to renegotiate the terms of the addendum to the lease agreement.

The trial court judge had ruled the appellant to a bare denial and, following a trial, had entered judgment in favor of the appellee, after denying appellants motion for judgment on the ground of insufficiency of evidence. In addition, although an appeal was announced from the judgment by the appellant, the trial court had ordered that the property, subject of the cancellation proceedings, be placed in the hands of the appellee.

On appeal, the Supreme Court reversed the judgment of the trial court, holding that no where in the evidence presented by the appellee had it been shown that fraud had been perpetrated by the lessee against the lessor in the execution of the addendum. The Court noted that due consideration had been given by the lessee for execution of the addendum by the lessor, said consideration being the agreement by the lessee to assume responsibility for payment of the real estate taxes to the government, a responsibility which was previously that of the lessor. The Court opined that under the circumstances, and in the absence of any evidence of perpetration of fraud by the lessee, the mere inadequacy of the consideration did not constitute a basis for cancellation of the lease agreement or the addendum thereto. The Court therefore ruled that the trial judge was in error in entering judgment in favour of the appellee.

As to whether the trial judge could, after cancelling the agreement, and in the same judgment, place the appellee in possession of the demised premises, the Court said that if the judge had properly, on the basis of adequate evidence,

cancelled the lease agreement and the addendum thereto, he could in the same judgment order that the owner be placed in possession of the demised premises. However, as there was not adequate evidence to cancel the agreement, the judge could not place the appellee in possession of the premises. The Court therefore adjudged that as the lease agreement and the addendum were duly executed, with proper consideration, the same remained in full force and effect, and that therefore the appellant was entitled to possession of the premises for the duration of the said agreement. It accordingly *reversed* the judgment of the trial court.

Oswald N. Tweb of Brumskine & Associates Law Firm appeared for the appellants *Felicia Coleman* of Sherman and Sherman Law Firm appeared for the appellee

MADAM CHIEF JUSTICE SCOTT delivered the opinion of the Court.

The late Thomas T. Toomey entered into a lease agreement with Mounir Nahra, a Lebanese National, on the 26th day of March, A. D. 1968, for a twenty (20) year period, commencing from the 1st day of April, A. D. 1968, up to and including the 31st day of March, A. D. 1988, for an annual rental of \$1,000.00 (One Thousand Dollars). This lease agreement was duly probated. On January 10, 1973, an addendum to the lease agreement was executed between the late Thomas T. Toomey, lessor, and Mounir Nahra, lessee, granting an additional period of fifteen (15) years, commencing immediately upon the expiration of the 20 years granted in the April 1, 1968 lease agreement.

The lessee, Mounir Nahra, exercising his right to sublease and/or assign the leased premises, on October 5, 1973, assigned his rights under the said lease agreement

and the addendum thereto, to Hage Brothers Supermarket. This assignment was confirmed by the lessor, Thomas T. Toomey. On January 31, 1977, the Hage Brothers Supermarket partnership was dissolved and all assets of the partnership, including the assignment of the lease agreement and its addendum, were turned over to Hage Brothers Supermarket, Inc.

The lessor, the late Thomas T. Toomey, and the assignee, Hage Brothers Supermarket, Inc., on February 2, 1977 executed a second addendum transferring the tax burden from the lessor to the lessee and granting an additional two years for the optional period, commencing 1988, the date stipulated in the addendum of January 1, 1973, meaning thereby that the lease would end in the year 2005, A. D. instead of 2003, A. D., and that the lessee would have the obligation to pay all government taxes on the demised premises.

Hage Brothers Supermarket, Inc., on December 8, 1983, assigned its leasehold rights in the demised premises to Mim's Pig Parts (subsequently Mim's Supermarket). On March 3, 1984, a lease agreement was executed between Mim's Super-market, Inc., represented by its manager, Emmett Gooding, and A-Z Corporation, represented by its general manager, Kamal Merhi, for a period of 5(five) years. An addendum to this lease agreement was executed between Mim's Supermarket, represented by its managing director, Naomi A. C. Gooding, and the A-Z Corporation, granting the A-Z Corporation an additional five (5) years optional period, thereby extending the optional period such that instead of ending in 1989, it would now expire in 1994.

The original lessor, Thomas T. Toomey, died and appellee herein, one of the administrators appointed by the probate court, approached the managing director of Mim's Super-market, Inc. to renegotiate the addendum of 1973

and 1977. The negotiations broke down and appellee herein, in 1990, instituted in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, a bill in equity for the cancellation of the addendum to the lease agreement, stating fraud as the ground therefor.

The law issues in the case was heard during the March, A. D. 1992 Term of the Civil Law Court, Sixth Judicial Circuit. The judge, His Honour M. Wilkins Wright, ruled respondents to a bare denial of the allegations contained in the complaint. Thereafter, the trial of the case was proceeded with. During the trial, appellee presented oral testimony and moved the court to admit into evidence, in addition to the oral testimony, the addendum to the lease agreement of February 2, 1977, signed between Thomas T. Toomey and the Hage Brothers Super-market, Inc., and the addendum to agreement of lease of May 10, 1989, signed by appellee but not signed by Appellant Naomi Gooding. Appellant did not object to the admission into evidence of the documents requested by appellee. In addition, appellant waived evidence and moved the court for dismissal of the petition for insufficiency of the evidence. The motion was denied and the judge proceeded to render judgment in favor of petitioner, granting the petition. From this judgment, appellant announced an appeal to this Court, which was granted.

Notwithstanding the granting of the appeal, the judgment was ordered enforced, with the judge instructing that appellee be placed in possession of the demised premises. Appellant and A-Z Supermarket thereupon filed before the Chambers Justice a petition for a writ of prohibition to stay the execution of the final judgment, as well as a bill of information. The Chambers Justice heard both the prohibition petition and the bill of information and ruled on both in favor of appellee. Appellant then took

an appeal to this Court *en banc*, which reversed the decision of the Chambers Justice and ruled in favor of appellant during the October A. D. 1992 Term of this Court. In its judgment, the Court ordered that the premises be placed under the control of the court pending the determination of the appeal. See *Gooding and A-Z Supermarket v. Wright and The Intestate Estate of Thomas T. Toomey et al.*, 37 LLR 15 (1992).

The matter now before us for consideration is the appeal announced from the judgment in the bill in equity for the cancellation of the addendum to lease agreement for fraud. In pursuance of her appeal, the appellant filed a two-count bill of exceptions, stating:

- 1) Because pleadings having rested, Your Honour, in disposing of the law issues, ruled respondent to a bare denial of the facts stated in petitioner's petition on the 3rd day of March, 1992, thereby overruling and dismissing respondent's answer; to which ruling of this Honourable Court, respondent excepted.
- 2) And also because respondent says that after hearing the facts in the case, respondent moved this Honourable Court to deny the relief sought by petitioner and dismiss the case, but Your Honour reserved final judgment and on the 12th day of March, A. D. 1992 aforesaid, gave your final judgment that the petition had been sufficiently established in law and fact and granted same, stating that the addendum of February 2, 1997 between Thomas T. Toomey and Hage Brothers be and the same is hereby cancelled, set aside and declared null and void to all intents and purposes. In consequence of the cancellation, the court ordered the respondent evicted and ousted from the subject premises and the petitioner repossessed of his property, and the clerk of court was thereupon

ordered to issue a writ of possession and place same in the hands of the sheriff to be served on respondent, and placing petitioner in possession... To this final judgment respondent excepted and announced an appeal to the Honourable Supreme Court...

At the call of the appeal before this Court, Associate Justice M. Wilkins Wright, who was trial judge in the court below, and Associate Justice Jangaba, who was one of counsel for respondents herein, recused themselves from final determination of the case.

Having reviewed the records and listened to the arguments, this Court has determined that the salient issues to be considered for resolution of case are:

- 2) Whether or not appellee substantiated and proved his case by a preponderance of the evidence?
- 3) Whether or not in an action for cancellation of a lease agreement, the successful plaintiff is entitled to possession of the property as a matter of course?

As noted earlier, the records revealed that the appellant was ruled by the trial court to a bare denial. Therefore, the appellee only had to substantiate his petition. Thus, in discussing the first issue, we shall revert to the petition to see if the appellee met the burden of proof imposed by law. Count 2 of the petition read as follows:

“Petitioner further petitioning says in court 2. . . that prior to the demise of his late father, an addendum to the lease agreement was executed by and between his said late father, Thomas T. Toomey, and the Hage Brothers Super-market, Inc., in which it was stated that immediately upon the expiration of the twenty (20) years term of the original lease agreement, lessee would be granted an additional period of fifteen (15) years; that is to say, after the 15th day of April, A. D. 1988; but the said clause is void of any consideration

in the payment of rent to lessor.... Petitioner profferts copy of the addendum to the lease agreement, marked exhibit "B".

An inspection of exhibit "B" revealed that the parties thereto agreed substantially, as follows:

- 1) Lessor Thomas T. Toomey agreed and re-affirmed his desire to further lease and honor his signature under the addendum dated January 10, 1973.
- 2) Effective April 15, 1988, lessee will be responsible for the payment of all government taxes on the demised premises. Further, an amount of two thousand (\$2,000.) was paid to the lessor as a balance and final payment for rental up to and including April 14, 1988.
- 4) That with the exception of count five (5) of the original lease agreement which placed the tax burden on the lessor, all other terms and conditions contained in the original lease agreement, dated April 15, 1968, shall remain the same and the same is hereby incorporated into this addendum and covers the entire new terms as per addendum dated January 10, 1973". Paragraph five (5) of exhibit "B", of February 2, 1977.

It is our view that exhibit "B" is evidence that the lessor, now deceased, intended to continue to lease his property to Hage Brothers Supermarket, Inc. beyond the original lease period of twenty (20) years. Further, that it was mutually agreed between the parties to the addendum, exhibit "B" to the cancellation petition, that effective April 14, 1988, Lessee Hage Brothers Supermarket, Inc., instead of Lessor Thomas T. Toomey, would become liable for all government taxes, rather than as was previously stipulated in the lease agreement of April 15, 1968. In other words, the lessee assumed liability for payment of all government

taxes, which liability was pre-viously that of the lessor, as stipulated and agreed to in the lease agreement of April 14, 1968.

We further say that exhibit "B", at paragraph five (5) thereof, quoted above, clearly states that with the exception of the referenced clause five (5) of the original lease agreement, which placed the tax burden on the lessor, all of the other terms and conditions of the April 14, 1968 original lease agreement were to remain the same and become incorporated into the addendum, and that it covered the new terms granted in the said addendum dated January 10, 1973. By that clause, the terms and conditions of the original lease, with the exception of responsibility for the tax liability, became the terms and conditions of the addendum of February 2, 1977, for the optional period of seventeen (17) years.

Appellee argued that there was no consideration for the mentioned addendum. This prompts the question whether the lease agreement of March 26, 1968 contained a consideration? We inspected the lease agreement and found the following:

"To have and to hold the above granted described pre-mises unto the lessee together with all and singular the easements, outlets, privileges, hereditaments and appurte-nances thereto belonging, for and during the full and com-plete period of twenty (20) calendar years, commencing from the 1st day of April, up to and including the 31st day of March, A. D. 1988, yielding and paying therefor unto lessor a yearly rental of \$1,000.00".

Black's Law Dictionary (6th ed.) defines consideration as: "The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a

contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Restatement Second, Contracts, section 17(1), 71; Richman v. Brook Haves Services Corporation, 80 Misc. 2d 563, 363 S.N.Y. 2d 732, 733.... Considerations are either executed or executory; expressed or implied, good or valuable”.

After our examination and inspection of appellee’s exhibit “B” and the lease agreement entered into between Thomas T. Toomey, lessor, and Mounir Nahra, lessee, on March 26, 1968, both of which were admitted into evidence by the trial court, we find that the addendum of February 2, 1977 executed between Thomas T. Toomey and Hage Brothers Supermarket, Inc. contains consideration. The consideration was the assumption of the tax burden by the lessee, which was previously the responsibility and obligation of the lessor, and the rental of \$1,000.00 per annum for the optional period of 17 (seventeen) years, commencing April 1988, up to and including April, 2005.

We shall now turn to count 4 of the cancellation petition. That count stated:

“That because of *inadequate consideration* meted out to petitioner over the years, in so far as the same relates to the payment of rents, the respondent hereinabove did agree to increase the annual rental of the aforesaid demised premises to the sum of \$8,000.00 (EIGHT THOUSAND DOLLARS) for which an addendum to the lease agreement was prepared for execution between petitioner and respondent herein; but after same was signed by the petitioner and Co-administratrix Lucy Gibson-Toomey, the respondent herein failed, refused and neglected to sign the same. . . . Petitioner profferts a copy of said addendum to the lease agreement, marked exhibit "C".

The bold characters of the words “inadequate consideration” is contained in the petition filed by appellee, petitioner in the trial court. Appellee, one of several administrators of the intestate estate of the late Thomas T. Toomey, and one of the heirs to benefit from the demised premises under the lease agreement, is of the opinion that the rental is inadequate. This was further buttressed by appellee when testifying in his own behalf. He said:

“... I met Mrs. Gooding in the year 1988 and I was in charge of the building which houses the A-Z Supermarket. She told me that she was prepared to work along with me in making a new understanding to the addendum because I told her the rental or rent which was paid to my father could not still stand for the addendum because we were already in the second Republic and no more U.S. dollars but Liberian coin...” See sheet two of the sixth day’s chambers session, Sixth Judicial Circuit Court, March Term, A. D. 1992, Wednesday, March 4, 1992.

From the above statement, the question posed is whether inadequate consideration constitutes a ground for cancellation of a contract? This Court has said that “. . . equity will not relieve against an unfortunate or improvident bargain where there has been no fraud or imposition . . . Should courts under-take, because of improvidence, to set aside contracts which are lawful, they would invade personal rights and disturb and destroy the safety of business transaction...” *Nasser and Saleby v. Elias Brothers*, 5 LLR 108 (1936), text at 114.

A close scrutiny of the petition and the entire records in this case has not revealed any allegation that the signature of Lessor Thomas T. Toomey was forged or that the said lessor was declared judicially incompetent. This Court finds that the addendum of February 2, 1977 was a legal and

lawful contract, duly executed between the late Thomas T. Toomey and Hage Brothers Supermarket, Inc. The reality is that under the law, the administrators of the late Thomas T. Toomey are legally bound by the addendum of February 2, 1977. Administrators and executors are required by law to honor and uphold legal contracts entered into by the deceased person whose estate they are entrusted to administer.

In count five (5) of his petition for cancellation, the appellee averred “that instead of the respondent performing by signing the said addendum, she proceeded, even prior to that time, to erect an additional storey to the building on the demised premises (A-Z Supermarket Building), without the agreement, consent, or any understanding with petitioner, any consideration of the annual rents or otherwise, for the sole purpose of unjust enrichment, to the detriment, loss and disadvantage of petitioner . . .”

The question which arises then is: Did the appellant have any right or authority to construct another storey on the demised premises? If yes, was there a pre-requisite that appellee had to consent and agree to the said construction? To answer these questions, we take recourse to the April 1968 lease agreement, the terms and conditions of which were incorporated into the February 1977 addendum. Paragraph three (3) of the said addendum reads:

“It is hereby mutually understood and agreed upon that at all times during the life of this agreement, lessee shall have the right to make use of said demised premises for warehouse purposes and shall also have the exclusive right to construct and/or erect a building as he may desire containing as many stores of concrete and steel to suit his own business and at his own proper cost and expense and not to be deducted from the rental herein.”

The foregoing paragraph clearly gives Mim's Supermarket, who has now become assignee under the said lease agreement, the right to construct a building on the demised premises at its own expense. The lease agreement of 1968 and all of the ad-dendum thereto, including the addendum of February 2, 1977, do not provide that the lessor's approval and consent must be obtained prior to the construction by lessee or his assignee of a building on the demised premises.

Appellee's count five (5) says that the construction commenced prior to the time he approached the appellant to recon-sider the annual rental. We do not believe that the act of construction complained of in the said count can be considered as an act of fraud. Moreover, appellee was unable to substantiate any act of fraud, even in count one (1) of his petition, in which he averred: "Petitioner says he is the only surviving lineal heir of the late Thomas T. Toomey to whom letters of administration has been issued."

During the trial, the following question was put to the appellee on cross-examination:

Q. Are you sure Mr. Thomas T. Toomey that you are in fact the only lineal heir of the late Thomas T. Toomey as alleged in count one (1) of your petition?

A. Yes, because the others are minors.

It is an elementary principle of decedent estate law that off-springs of a deceased are lineal heirs, whether they are minors or not. All lineal heirs, irrespective of age, have equal rights to benefit under the deceased parent's intestate estate. Appellee's count one (1) was therefore false and misleading. Accordingly, this Court is of the opinion that from the foregoing discussion appellee did not present any evidence to prove the fraud which he alleged was committed by the appellant. Exhibit "B" of the appellee's

petition contains therein authority of a valid addendum executed between the late Thomas T. Toomey and Hage Brothers Supermarket, Inc., which addendum was properly and legally assigned to Mim's Pig Parts (now Mim's Supermarket). Inadequate consideration is not a ground for a bill in equity for cancellation of an addendum to a lease agreement on the ground of fraud.

We now turn to the second issue, viz: Can a successful plaintiff in a bill in equity for the cancellation of a lease agreement (or addendum to lease) for fraud be awarded possession as a matter of course? Equity is defined in the sixth edition of the Black's Law Dictionary, on page 540, as follows:

“Justice is administered according to fairness as contrasted with the strictly formulated rules of common law ... The term ‘equity’ denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men. [It is] a system of juris-prudence collateral to, and in some respect independent of ‘law’; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it or to give it with more effect...”

BLACK'S LAW DICTIONARY 540 (6th ed.)

This Court has said that: “A court of equity possesses the inherent power to grant relief in the rescission of a contract, and as a usual and necessary coincidence to this relief granting of the relief of cancellation or reformation of the instrument as written. The right of rescission will be allowed usually where there has been some fraud entering into the inception of the agreement; or where there has been an undue power of assent in the weaker...” *Nassre and Saleeby v. Elias Brothers*, 5 LLR 108 (1936), text at 113. It must be understood however that this equitable relief will

not be granted merely because it has been prayed for.

Courts of equity seek to render complete justice. Indeed, it has been said that equity delights to do complete justice and not by halves. Generally, when a court of equity has assumed jurisdiction for one purpose, the court may retain jurisdiction and determine all equities between the parties connected with the main subject of the suit raised in the pleadings. This general rule is not without limitations. The principles have been set forth by legal authorities as follows:

“In order to justify retention of jurisdiction to grant legal relief, (1) there must have existed an equitable cause of action, growing out of the transaction prior to the commencement of the action which must be both alleged and proved; (2) the legal matters adjudicated are germane to, or grow out of the matter of equitable jurisdiction and are not distinct legal rights not affected by the adjudication of the equitable question involved; (3) that the court has acquired jurisdiction of the parties or *res* necessary to the exercise of its actual jurisdiction to grant at least some of the equitable relief proper under the allegations of the bill.

The rule which authorizes a court of equity to retain jurisdiction does not extend to a case where an incidental matter is cognizable in equity and by this enable the court to draw in a main subject of controversy which has a separate, distinct and appropriate remedy at law.

...the sole ground of equity jurisdiction is that a remedy merely ancillary to the legal remedy may be afforded, for example, to hold matters in *status quo* until the lawsuit can be ended then a chancellor (judge) may with propriety give the aid of his court to that extent, and leave the parties otherwise untrammelled in

their lawsuit, especially so where the court has jurisdiction both in law and equity, and also the ancillary relief may be obtained by a special proceeding.

In a proper case a court in equity can retain jurisdiction to afford complete relief and may decree delivery of the possession of real or personal property.” See 30 C.J.S., *Equity*, §§ 68, 69, 70, pages 421-424.

This Court has confirmed the forgoing principles and held in the case *Benson v. Johnson*, 23 LLR 290 (1974), that a court of equity, upon obtaining jurisdiction of an action, will retain it and can administer full relief both legal and equitable, so far as it pertains to the same transaction or the same subject matter, including the matter of dispute over which courts of law and courts of equity have concurrent jurisdiction. This Court has further said:

“...where the right of occupancy, possession or enjoyment is the only issue involved and the instrument (lease or addendum) conferring said right of occupancy, possession or enjoyment is canceled by a court of equity, said court of equity may in same decree order the re-delivering of the demised premises to the landlord.

... To perfect a right of possession, occupancy and/or enjoyment, a demised promises under a lease agreement would require a special proceeding entitled summary proceedings to recover possession of real property. This special proceeding is tried by a judge alone without a jury just as the trial of the cancellation of agreement which confers original right of possession, occupancy, and enjoyment only. Civil Procedure Law, Rev. Code 1: 62.23 and 62.24. Therefore, there is no rationale for requiring two

separate and distinct action-- a suit in equity to cancel the lease agreement and a special proceeding in law to recover possession of the real property demised under the lease agreement which has been cancelled.” *Id.*

In view of the foregoing, and because this Court has decided this issue in previous opinions, we hold that as a matter of course, a judge may also deliver possession of real property to the true owner in a decree granting cancellation of a lease agreement or addendum to a lease agreement. Therefore, if the appellee’s petition for cancellation of the addendum to the lease agreement on the ground of fraud had been proven and substantiated, the judge would have been correct in his decree granting possession of the real property.

Wherefore, and in view of the foregoing, the final judgment of the trial court is hereby ordered reversed, the addendum of February 2, 1977 remains in full force and effect, and appellant is hereby ordered to be placed in possession of the demised premises and to pay all rentals due appellee under the February 2, 1977 addendum. Costs of these proceedings are disallowed. And it is hereby so ordered.

Judgment

reversed.

