strength to this view. It reads: "For further direction to Trustees of any trust that **may** be established . . . ." If the testatrix had intended her wish for the establishment of an educational foundation to be imperative, she would not have used the word "may" here. Rather, she would have said, "any of the trusts that are established", or some such phraseology.

The whole question might have been resolved by a consideration of the effect of the opening sentence of clause 10: "All the rest, residue and remainder of my Estate I do direct shall be given and applied for charitable, religious, educational or philanthropic purposes." This direction is obviously void for uncertainty, which means that **all** the residue must fall to be distributed as on intestacy. Any consideration of the further provisions, dealing with the administration of this trust, cannot affect the overriding intention of the testatrix as evidenced in the above-quoted passage. The result of this view would be that all the residue would go to the next-of-kin, notwithstanding the true intention of Mrs. Loggie to have the bulk of her property devoted to charity. It is submitted, however, that the rules which guide the courts in cases of this nature have been formulated for a purpose, and much mischief could result from a relaxation of them.

T. B. Drummie, III Law U. N. B.

MUNICIPALITY OF THE CITY AND COUNTY OF SAINT JOHN v. TAYLOR[1]

Landlord and Tenant Act — Summary Proceedings for Non-Payment of Rent — Receipt of Rent After Demand Served on Tenant — Effect on Proceedings

The Municipality of the City and County of Saint John let premises to a tenant who failed to pay the monthly rental of $37 required by the lease. He did make sporadic payments. Landlord commenced summary proceedings for non-payment of rent under s. 65 of the Landlord and Tenant Act[2] by serving upon the tenant a demand for payment of the rent amounting to $588 or delivery of possession. The Court found that the landlord had met all the requirements of s. 65(1).

1. Saint John County Court (Keirstead Co. Ct. J.) Unreported. August 24, 1953.
2. R.S.N.B., 1952, c. 126. In 1937 the twentieth annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada approved a revised Landlord and Tenant Act. (Report, Proceedings of the Twentieth Annual Meeting, p. 16. The revised draft appears at pp. 72-101.) The statute was passed by the Legislative Assembly of New Brunswick in 1938 with certain modifications in s. 35 respecting property liable to distress. (Stats. of N. B., 1938, c. 42) Parts II and III of the Uniform Act received only minor alterations before enactment in this Province and appear in the latest revision. (Report, Proceedings of the Twentieth Annual Meeting, at pp. 94-98) Parts II and III respectively of the Landlord and Tenant Act provide summary methods for a landlord to obtain redress against an overholding tenant and one whose rent is in arrears. Part III of the Uniform Act is substantially the same as ss. 65 to 67 of the New Brunswick Act (**Ibid.**, at p. 97; R.S.N.B., 1952, c. 126) and its source was ss. 78 and 79 of the Manitoba Landlord and Tenant Act of 1931 (Report, Proceedings of the Seventeenth Annual Meeting, p. 64. See R.S.M., 1940, c. 112, ss. 78-79. Similar procedure enacted in British Columbia by the Overholding Tenants Act, 1895, c. 53, s. 13. See R.S.B.C., 1948, c. 174, ss. 29-30).

The evidence adduced showed that after the demand had been served upon the tenant, two payments of $20 each had been made on the rent in arrears as set out in the demand. Held, by Keirstead Co. Ct. J., that once the demand is made on the tenant, the landlord should not accept payments on the arrears demanded; that if he does accept payments he nullifies his demand and cannot continue proceedings for possession.

Part III of the Landlord and Tenant Act[3] designates a procedure which the landlord may follow should his tenant fall in arrears. Under s. 65 an order for possession may be obtained once the rent is in arrear for seven days, but before proceedings can be commenced in the County Court a demand must be served calling upon the tenant "to pay the rent or deliver up the premises demised". The Order itself grants possession and orders the sheriff "to make the rent in arrears".[4] The effect of this decision is that the acceptance of rent on the demand amounts to a waiver by the landlord of his right to pursue proceedings for possession under Part III.

At common law, forfeiture for non-payment of rent cannot be enforced unless a formal demand has been made of the rent. The rules governing the demand are strict.[5] Moreover, the landlord, without a formal demand for rent, is not only barred from re-entering, he also cannot bring an action to recover possession: the failure to demand rent is fatal to an action for recovery of possession.[6] These stringencies can be obviated by a proviso in the lease dispensing with a formal demand. In New Brunswick, the landlord has a statutory right of re-entry without a formal demand.[7] Forfeiture may be waived or the right to forfeit exercised by the landlord by the performance of an unequivocal act. The landlord's right of re-entry for non-payment of rent does not terminate the lease; rather, there is a subsisting landlord-tenant relationship until the former indicates by his action an intention to end it. The ways in which election to forfeit may be made were noted by Robertson C.J.O. in **Prudential Insurance Co. of America v. McLean:**[8]

> The right that a landlord has under s. 17 of the Landlord and Tenant Act[9] is a right to re-enter. This right can be exercised only by an actual re-entry, or by the issue of a writ, or taking such a proceeding as the present to recover possession.

3. R.S.N.B., 1952, c. 126, ss. 65 to 67.
4. Order for Possession: Form D.
5. **Hill v. Kempshall** (1849), 7 CB. 975; 137 E.R. 386. The conditions are set out in Foa, **The General Law of Landlord and Tenant**, 7th Ed., s. 1037, p. 659 et seq.
6. **Tom v. Shofer** [1953] 1 D.L.R. 357, per Illsley C.J. at p. 362. This case held that there was nothing in the Overholding Tenants' Act, 1930, (N.S.), c. 8, as amended, to oust the common law requirement of a formal demand for rent as a prerequisite of proceedings for possession thereunder.
7. Landlord and Tenant Act, R.S.N.B., 1952, c. 126, s. 8: In every lease in writing, unless it is otherwise agreed, and in every lease by parol, there shall be implied an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand thereof shall have been made, the landlord may, at any time thereafter, into and upon the demised premises, or any part thereof in the name of the whole, re-enter and the same have again, re-possess and enjoy as of his former estate.

Assuming that the landlord exercises his right of re-entry in one of these ways, a situation can arise where rent is accepted from his tenant after an election has been made. A distinction must be made between the receipt of rent due before the right of forfeiture accrues and that due after. In the latter case the landlord waives the right of forfeiture and cannot re-enter,[10] while in the former, the receipt of rent does not operate as a waiver of the right of re-entry.[11] In the **Bagshaw** case[12] Mulock C. J. Ex. said:

> When the rent remained overdue for fifteen days [landlord] was entitled to two rights: one to recover the arrears of rent and the other to re-enter if he elected to exercise it. Acceptance of rent is not, like distraining, an affirmance of the continuance of the relation of landlord and tenant. The two rights are not alternative but independent rights. The satisfaction of one does not satisfy the other.

An example will illustrate the point: Rent is due on June 1st. On and after June 16th L is entitled to re-enter for non-payment of rent. On June 25th T tenders and L accepts the rent which was due on June 1st. On July 10th L commences proceedings for possession by virtue of his statutory right of re-entry. This is an election by him and the forfeiture was not waived by the acceptance of the rent, due before the forfeiture arose.

In the instant case the amount paid by the tenant constituted a small portion of the rent in arrears and counsel for the landlord contended that it should not deprive the Municipality of its right to possession;[13] however, the result of the decision is that the landlord waives his right of forfeiture by the acceptance of rent on the demand which right accrued on the expiration of seven days from default in rent payment. This judgment invites comparison of proceedings under this Part with that at common law and under other statutory provisions. Under s. 65 the demand is revived, for should the landlord elect to proceed under this section his hand is stayed unless and until he makes a demand for rent upon the tenant. From the terms of the statute it would appear that the demand need not be phrased in the terms of the formal one at common law with regard to time and amount. But the demand here is coupled with an alternative, "to pay up the rent or to deliver up the premises demised", whereas at common law he only impliedly sought possession, although this was the object behind the demand.

8. [1943] 3 D.L.R. 307, at p. 310. See also **Re Bagshaw and O'Connor** (1918) 42 O.L.R. 466, where it was held that the institution of summary proceedings was an unequivocal exercise of the lessor's option to determine the lease, exercising his right of re-entry for non-payment of rent overdue for 15 days.
9. R.S.O., 1937, c. 219, s. 17(1). Substantially similar to s. 8 of the New Brunswick Act.
10. **Price v. Worwood** (1859), 4 H & N 512; 157 E.R. 941.
11. **Re Bagshaw and O'Connor** (1918) 42 O.L.R. 466; **Ramsay v. Hildred** [1930] 2 W.W.R. 692; **Prudential Insurance Co. of America v. McLean** [1943] 3 D.L.R. 307.
12. 42 O.L.R. at p. 475.
13. It is worth remarking that the landlord had the right to commence proceedings under this section seven days after the first monthly rental fell due and went unpaid. When the municipality did institute proceedings nearly sixteen months' rent was due.

The proceedings under this Part may be looked upon as primarily for rent or for possession. A summary procedure akin to that in s. 65 was judicially considered in **Sherwood v. Lewis.**[14] The question there, however, was whether certain facts constituted a set-off when the landlord in his affidavit stated that the tenant had no such right, and, if so, did this nullify the proceedings. Lennox Co. Ct. J. was of opinion that the procedure outlined by the statute was for the purpose of getting delivery up of possession of the premises to the landlord and not primarily for the payment of rent, for "providing means to assist a landlord in certain circumstances in obtaining possession of his premises from defaulting tenants . . . . it is not an action for rent nor is it a procedure by way of distress".[15] If the proceedings are primarily for possession it should be noted that the landlord has an alternative course under Part II, for, as Williams states: "under the later Acts, it has been held that the remedy [summary proceedings against overholding tenants–Part II] is available in cases of forfeiture" (and not only where the term has expired by lapse of time).[16] Under Part II a demand to go out of possession must be made by the landlord before he can proceed against the tenant, but he does not alternatively claim the rent then due.

If the landlord can exercise his statutory right of re-entry for non-payment of rent by proceeding under Part II what was the legislative intention in having another procedure? Admittedly, under Part II the landlord is not seeking alternative remedies: he can only get possession;[17] he cannot claim rent. There is this distinction between Parts II and III for under the latter the Order for Possession which the Judge grants orders the sheriff to "make the rent in arrears for said premises".[18] It is submitted that Part III was meant to deal with the case of a defaulting tenant who, if one or two rental payments went unpaid, would pay the arrears if prodded with a demand and a court summons,[19] or this failing, the landlord could swiftly recover possession.

It is submitted that the landlord can accept rent on the demand in certain circumstances and not destroy his right to proceed under Part III. When the landlord commences proceedings under Part III, he does not end the tenancy, for if the tenant pays the rent as demanded the relationship will continue. Assuming that the tenant ignores the demand, then the landlord applies to the Court for an Order for Possession (Form D). By applying to the Court he elects to end the lease, for apparently a new right of forfeiture arises (to be distinguished from the right under s. 8) when the rent remains unpaid for seven days. If the landlord accepts rent on the demand which became

14. [1939] 2 W.W.R. 49 (B.C. County Court). The statute under review was the Landlord and Tenant Act, R.S.B.C., 1936, c. 143, ss. 29 and 30.
15. **Ibid.**, at pp. 50-51.
16. Williams, **Canadian Law of Landlord and Tenant**, 2nd Ed., 1934, p. 568.
17. **Re Bagshaw and O'Connor** (1918) 42 O.L.R. 466, at p. 473.
18. Keirstead Co. Ct. J., in the instant case, was uncertain as to the meaning of "do make" and expressed the opinion that it was not a judgment of the court since the Act made no such provision.
19. It is to be noted that Part III provides for the relief against forfeiture if the tenant pays the rent in arrears and all the costs before the execution of an order for possession. See s. 65(5).

due after the forfeiture arose, he thereby waives the forfeiture, recognizes the continuance of the tenancy and cannot maintain his proceedings for possession; he cannot affirm the lease and at the same time seek possession. But in the **Bagshaw** case[20] it was stated that each time the rent reserved by the lease remained unpaid for fifteen days after it should have been paid a **new** right of forfeiture arose. Thus, there can be several rights of forfeiture upon which the landlord can rely, and the acceptance of rent by him might not affect all or any of them, and so long as he has one right to forfeit he can act on it and accept any rent due **before** the last right arose.

It is submitted that the position is the same with regard to the 7-day period if the proceedings under Part III are to be looked upon as proceedings for possession. So, in the present case, where the rent was $37 per month and the landlord accepted two payments of $20 each, if it is assumed that these payments were in satisfaction of the first month's rent which fell in arrears and part of the second, the landlord did not waive the forfeiture because a new right to forfeit arose seven days after the third month's rent fell due. In any event, a new right of forfeiture accrued fifteen days after the due date of the third month's rent and this for the landlord's benefit unless the position is taken that by proceeding under Part III the landlord waives any right he at law would acquire by the operation of s. 8.

Franklin O. Leger, III Law U.N.B.

20. 42 O.L.R. 466.

NICOLENE, LTD. v. SIMMONDS [1953] I All E. R. 822.

Contract – Enforceable Contract – Meaningless Clause – Rejection

In delivering his judgment in the case of **Hillas and Co. Ltd. v. Arcos Ltd.**[1] Lord Wright declared:

> Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.

In the case presently under discussion, three judges of the English Court of Appeal were faced with just such a problem. The plaintiffs wrote a letter to defendant offering to buy from him three thousand tons of steel reinforcing bars. A few days later the defendant replied by letter, accepting the offer. The seller broke his contract and the

1. (1932), 147 L.T. 503.