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.

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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.

buyer claimed damages. The seller set up the defence that a sentence in the defendant's letter of acceptance had the effect of preventing the formation of a contract. The words in question were: "I assume that we are in agreement that the usual conditions of acceptance will apply". There were no "usual conditions" in operation between the parties and defendant contended that there was nothing to which those words could apply and that they were thus meaningless, and that, therefore, there had never been a contract. The Court, however, thought differently and declared that the clause being meaningless it ought to be ignored and the contract upheld. Lord Justice Denning went even further and made a distinction between a **meaningless clause** and a **clause which has yet to be agreed.**

The vexatious problem of uncertainty and meaningless terms in contracts has long plagued the courts. Nearly all text book writers state the general principle that the parties must make their own contract . . . . "the law requires the parties to make their own contract; it will not make a contract for them out of terms which are indefinite or illusory".[2]

Thus in **May and Butcher Ltd. v. The King,**[3] Viscount Dunedin said:

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.[4]

So, too, in **Bishop and Baxter, Ltd. v. Anglo-Eastern Trading and Industrial Co. Ltd.**[5] which involved the phrase "subject to . . . war clause", the Court of Appeal held that as there was no evidence that the parties had any particular war clause in mind and as the war clause took many forms the parties were not **ad idem** and there was no binding contract.

In the case of **Scammell v. Ouston**[6] the traditional attitude of the Courts was reiterated. It was held that when the purchaser of a motor van traded in an old vehicle and agreed to pay the "balance of purchase price . . . . on hire purchases terms over a period of 2 years", the alleged agreement was unenforceable for uncertainty.

At the same time there is authority for the view that the presence of an unintelligible clause does not of itself render a contract unenforceable. **Re. Vince. Ex parte Baxter**[7] is an example. A loan agreement was held to be valid while one of its clauses "being unintelligible must be treated as void".

The case of **Hillas and Co. Ltd. v. Arcos Ltd.**[8] analysed carefully the whole problem and resulted in Lord Wright's now well known

2. **Anson, Principles of the English Law of Contract,** 20th Ed., p. 21.
3. [1934] 2 K.B. 17.
4. Ibid, at p. 21.
5. [1943] 2 All. E.R. 598.
6. [1941] 1 All. E.R. 14.
7. [1892] 2 Q.B. 478.
8. (1932), 147 L.T. 503.

declaration cited in the opening paragraph of this comment. The case involved an agreement for the sale of Russian softwood timber, the agreement containing an option clause for the further sale of timber. The objection had been that the option clause contained no details as to size, quality or shipping terms of the timber. As has already been noted, Lord Wright felt that an agreement is enforceable when the contractual intention is clear but the contract is silent on some detail.

Canadian decisions on this problem have not been too numerous. **Kelly v. Watson**[9] involves a land sale, and uncertainty as to the terms of payment. Sir Louis Davies C.J. felt the courts should, if possible, without creating a new agreement, spell out one which they conclude from the evidence represents the real intention of the parties.

> It is quite another thing, however, to make a new agreement for the parties as to which they themselves were never *ad idem*.[10]

It was held no such agreement could be made.

Two more recent Canadian cases are **DeLaval v. Bloomfield** [11] and **Thomson Groceries Ltd. v. Scott**[12], both of which were heard in the Ontario Court of Appeal. The latter was concerned with a sale of land for cash and a mortgage. There was uncertainty regarding the terms and duration of the mortgage, yet the contract was held to be valid. **DeLaval v. Bloomfield**[11] was a case in which the Court held that it could enforce a contract for the sale of goods at the price of $400.00, payable: "$200.00 on November 1st, 1937, bal. to be arranged".

Writing in 1939,[13], D. W. Gordon criticized this decision on the ground that such an attitude threatened to "loosen all principles that govern contract". Dr. C. A. Wright appended an incisive editorial note to this argument.[14] Dr. Wright begins by stating

> The view of the commentator, to the effect that the parties are themselves masters of their own contractual obligations and that anything which the parties have not expressed cannot be enforced is probably the orthodox view. On the other hand, a sense of fair dealing, of common business morality, if you like, seems more and more to play a part in the law of contracts and render less important so-called principles based on abstract conceptions of contractual liability.

Viscount Dunedin in **May and Butcher Ltd. v. The King**[15] is cited to the effect that it is the "essentials" which have to be determined by the parties and Dr. Wright adds that the Sale of Goods Act makes stipulations as to time of payment not being of the essence of a contract of sale. "This would seem in itself to support the decision of the Ontario Court of Appeal since there was undoubtedly a bargain in the sense of a contemplated sale of goods at a fixed price with merely

9. (1921), 61 S.C.R. 482.
10. Ibid, at p. 483.
11. [1938] 3 D.L.R. 405.
12. [1943] 3 D.L.R. 25.
13. (1939), 17 Can. Bar Rev. 205.
14. Ibid, at p. 208.
15. [1934] 2 K.B. 17.

the time of payment, that is a non-essential, left uncertain." Dr. Wright goes on to state that **Hillas and Co. Ltd. v. Arcos Ltd.**[8] "indicates the tendency of modern cases to support commercial transactions even though there is theoretical uncertainty in some part."

In **Pollock On Contracts**[16] the learned author, after a discussion of many of the above cases, states concisely:

> No doubt the principles that (i) if parties leave essential terms in an agreement to be determined in a subsequent contract, the agreement is not a contract, but (ii) the Court must give effect to details unstated in a genuine contract,. must occasionally be in close competition in their application to particular cases; but to press for any statement of these principles more exact than Lord Wright's[17] is perilously near a demand for mechanization of all business contracts.

A perusal of the judgments in **Nicolene Ltd. v. Simmonds**[18] and especially that of Lord Justice Denning, would seem to indicate that a neater distinction has been made without undesirable stereotyping.

To return to the case which forms the basis of this commentary, we have seen that the clause in question was "I assume that we are in agreement that the usual conditions of acceptance apply". As for the judgments themselves, Singleton L. J. stated:

> The words: 'I assume we are in agreement that the usual conditions of acceptance apply' are, to my mind, meaningless, and ought to be ignored. Counsel for the defendant further submitted that we must give a meaning to all the words in the documents, but when parties are writing letters which are sometimes long it is not easy to give a meaning to all that they write.[19]

Hodson L.J. agreed and stated that there was an unqualified acceptance, the clause in question being meaningless.

It is when we read the judgment of Denning L. J. that we see that new light has been thrown upon the problem of uncertainty in contracts. After briefly stating the facts Lord Justice Denning declares:

> In my opinion a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is *meaningless* can often be ignored, while still leaving the contract good, whereas a clause which has *yet to be agreed* may mean that there is no contract at all, because the parties have not agreed on all the essential terms. [20]

The learned Lord Justice goes on to demonstrate, by reference to many of the cases cited in this comment, that his approach can be the explanation of them.

> As I read it, *Re Vince. Ex parte Baxter*[7] is an authority in support of what I have said. The contract of loan itself was good, but the vague and unintelligible claim was rejected. The other cases which were relied on go on to be explained on the ground that there was a clause yet to be

16. 13th Ed. p. 38.
17. 147 L.T. 503.
18. [1953] 1 All E.R. 822.
19. Ibid., at p. 824.
20. Ibid., at p. 825.

> agreed. In *Love & Stewart, Ltd. v. S. Instone & Co.*[21], where there was a strike clause yet to be agreed Lord Sumner said at page 477, that the case was 'one of continuing negotiations broken off in medio'; in *G. Scammell & Nephew Ltd. v. Ouston*, where there were hire-purchase terms yet to be agreed, Lord Wright said [22] the 'agreement was inchoate and never got beyond negotiations'. In *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co. Ltd.*[3], where there was a war clause yet to be agreed, this Court held that, until the parties agreed upon a particular form of war clause, there could be no consensus ad idem. As I read them, those were all cases where there was a clause yet to be agreed, the matter was still in negotiations, and there was no concluded contract.[23]

At this point Lord Justice Denning pauses to say a word about another recent decision reported in the same volume of the All England Lay Reports. He cites the case of **British Electrical & Associated Industries (Cardiff), Ltd. v. Patley Pressings Ltd.**[24] In that case a contract note contained the clause "subject to force majeure conditions". McNair J. declared that it was "so vague and uncertain as to be incapable of any precise meaning", and further that there was no enforceable agreement upon which the plaintiff could rely. Lord Justice Denning's comment on this case was:

> I should have thought that it could be ignored without impairing the validity of the contract. It was clearly severable from the rest of the contract, whereas the term in *G. Scammell & Nephew v. Ouston* [25] was not. [26]

What Lord Justice Denning would appear to be saying is that if there is a meaningless clause the contract will be enforceable if the clause can be severed from the contract. Of course, if there is an essential clause yet to be agreed then the contract will be unenforceable. Lord Justice Denning concluded by finding that the clause in the present case is meaningless; however, it is clearly severable from the rest of the contract so that "the contract should be held to be good and the clause should be ignored."

Denning L. J. has produced an intelligent refinement of the question of uncertainty, which recognizes the needs of the commercial world.

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21. (1917), 33 T.L.R. 475.
22. [1941] 1 All E.R. 14, at p. 26.
23. [1953] 1 All E.R. 822, at p. 825.
24. [1953] 1 All E.R. 94.
25. [1941] 1 All E.R. 14.
26. [1953] 1 All E.R. 822, at p. 826.