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CONVERTING NONPAYMENT TO HOLDOVER SUMMARY PROCEEDINGS: THE NEW YORK EXPERIENCE WITH CONDITIONAL LIMITATIONS BASED UPON NONPAYMENT OF RENT

*Stephen Ross**

I. Introduction

Tenant A fails to pay his rent. Landlord A commences an eviction proceeding based upon Tenant A's nonpayment.[1] An applicable statute provides that, after a judgment for Landlord A, Tenant A may cure his default and preserve his leasehold by paying promptly the overdue rent together with interest and the costs of the proceeding.[2]

Tenant B fails to pay his rent. Landlord B sends Tenant B a notice terminating the lease pursuant to a provision in the lease that allows the landlord to terminate the lease for a rent default. Landlord B thereafter commences an eviction proceeding alleging that Tenant B is continuing in possession after the expiration of his term—a so-called "holdover proceeding."[3] Immediately after a judgment for Landlord B, Tenant B tenders the overdue rent together with interest and costs. Landlord B rejects the tender and Tenant B loses possession pursuant to a subsequently issued warrant of eviction. This

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1. *See* N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979). A proceeding under this subparagraph is known as a "nonpayment proceeding." *See id.*

2. *See* N.Y. REAL PROP. ACTS. LAW § 751(1) (McKinney 1979). The statute permits the tenant to make payment at any time before a warrant of eviction issues. *See id.* Payment automatically stays issuance of the warrant. *See id.* The statutory stay resulting from the payment is permanent and constitutes a dismissal of the nonpayment proceeding. *See* Flewwellin v. Lent, 91 A.D. 430, 431-32, 86 N.Y.S. 919, 919-20 (2d Dep't 1904). When authorized by rule of the appropriate appellate division, a court may defer issuance of the warrant of eviction for up to five days following a decision rendered after trial and for up to ten days from the date of the service of process after a default. *See* N.Y. REAL PROP. ACTS. LAW § 732(2)-(3) (McKinney 1979). The landlord and tenant courts in New York City apply this rule. *See* Rules of the Civil Court of the City of New York § 208.42(d) (McKinney 1987). Since these courts customarily exercise this discretion, the net effect is to give the tenant an additional period after judgment within which to cure his default.

3. *See* N.Y. REAL PROP. ACTS. LAW § 711(1) (McKinney 1979).

eviction occurs because the statutory cure provision used by Tenant A applies, by its terms, only to eviction proceedings based on nonpayment of rent, taxes or assessments.[4]

Although the tenants' conduct was the same in both hypotheticals, the results were drastically different. In both cases, the tenants belatedly tendered rent after an eviction proceeding had been determined against them. In one instance, the tenant was able to cure his default and retain possession of the premises. In the other, he lost his estate. This difference is not the result of any distinction in the tenants' conduct; rather, the difference is the manner in which the landlords elected to proceed.[5]

The notion that a default by one party can give the nondefaulting party a choice of remedies is not new.[6] In the context of the previous discussion, however, it raises questions that this Article will address. Does the existence of a holdover as a ground for summary eviction give the landlord a choice, either to bring a nonpayment proceeding with the tenant's concomittant right to cure,[7] or to terminate the lease[8] and evict the tenant as a holdover, thereby defeating the tenant's right to cure? Or, does the right to cure that is appurtenant to nonpayment proceedings embody a general policy that favors giving tenants a last chance to protect their leases from termination,

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4. The legislature tempered the result of this hypothetical situation by its enactment of section 753(4) of the New York Real Property Actions & Proceedings Law. N.Y. REAL PROP. ACTS. LAW § 753(4) (McKinney Supp. 1987). This statute, which applies only to residential premises in New York City, requires the court to grant a ten-day stay of the issuance of the warrant of eviction if the proceeding is based upon a claim that the tenant breached a provision of the lease. *See id.* The failure to pay rent is an obvious tenant breach of a lease covenant, and thus falls squarely within the ambit of the statute. As with § 751, the stay effected by the tenant's cure is permanent and tantamount to a dismissal of the proceeding. *See* Post v. 120 East End Ave. Corp., 62 N.Y.2d 19, 27, 464 N.E.2d 125, 128, 475 N.Y.S.2d 821, 824 (1984). Unlike § 751, however, § 753(4) does not address whether the tenant must pay not only the overdue rent, but also interest and costs. *Compare* N.Y. REAL PROP. ACTS. LAW § 751 (McKinney 1979) *with* N.Y. REAL PROP. ACTS. LAW § 753(4) (McKinney Supp. 1987). The subsection simply provides that during the ten-day cure period "the [tenant] may correct such breach." N.Y. REAL PROP. ACTS. LAW § 753(4) (McKinney Supp. 1987).

In addition to these cure provisions, the court has discretion to stay the issuance of a warrant of eviction in a holdover proceeding in cases of "hardship" for up to six months in New York City, and up to four months outside of New York City. *See id.* §§ 751(4), 753(1)-(3) (McKinney 1979). These stays are not permanent and are not the equivalent of a dismissal of the proceeding. *See id.*

5. *See infra* notes 43-54 and accompanying text.

6. *See, e.g., infra* notes 23-31 and accompanying text.

7. *See infra* notes 23-64 and accompanying text.

8. The landlord can only terminate the lease if there is a provision permitting him to do so. *See infra* notes 29-31 and accompanying text.

thereby requiring landlords to bring nonpayment proceedings for nonpayment defaults? In other words, should a landlord be able to convert a nonpayment proceeding into a holdover proceeding by invoking a right to terminate the lease for a rent default? Should it make a difference if the amount of rent due is disputed?[9] Should the answer to these questions depend upon whether the tenancy is residential or commercial?

This Article examines the development in New York law of both the landlord's right to terminate a lease for a tenant default and the tenant's right to preserve his tenancy by curing a rent default. It finds that, despite some cases to the contrary,[10] case law in New York favors the landlord's reserved right to terminate over the tenant's historic right to cure, at least as to commercial tenancies.[11] It concludes that, in both residential and commercial tenancies, landlords should not have this termination right[12] and that the legislature should enact appropriate legislation to achieve that objective.

Part II of this Article will consider the development of the landlord's right to terminate a lease for a tenant default based on the nonpayment of rent, as well as on the nonperformance of certain other lease obligations.[13]

Part III will shift to the tenant's point of view, considering from a historical perspective the tenant's right to cure a rent default. It will trace the right to cure back to the seventeenth-century equity courts and follow its development from a discretionary judicial remedy to a statutory right.[14]

Part IV will examine the present state of New York law and will demonstrate that, at least in a commercial setting, courts have subordinated the tenant's ancient right to cure to the landlord's interest in strict enforcement of the lease termination provisions.[15]

Part V will urge the recognition and protection of the historic right to cure a rent default and recommend the adoption of ap-

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9. This situation occurs, for example, when the tenant disputes the landlord's calculation under a rent escalation clause.

10. *See infra* notes 117-40 and accompanying text.

11. *See infra* notes 141-44, 159-84 and accompanying text.

12. *See infra* notes 188-210 and accompanying text.

13. *See infra* notes 23-87 and accompanying text.

14. *See infra* notes 88-112 and accompanying text. The statute was first enacted during the reign of George II and later appeared in the early statutes of New York. *See infra* notes 99-112 and accompanying text.

15. *See infra* notes 113-85 and accompanying text.

propriate legislative action.[16] This Part includes the text of a suggested revision of the real property statute.[17]

II. The Landlord's Right to Terminate

This Part will review the evolution of remedies available to the landlord, from the slow and costly action in ejectment to the modern and more expeditious summary proceeding[18] and will discuss, along the way, the right to cure a nonpayment default that courts have permitted in each type of action.[19] It will then discuss how the limited grounds on which to base a summary proceeding led to the insertion in leases of "conditional limitations"[20]—that is, provisions calling for the automatic termination of a lease upon the occurrence of a specified event, such as a tenant default.[21] Finally, this Part will focus on the issues involved when landlords use conditional limitations to terminate residential and commercial leases for nonpayment of rent and thereby circumvent the tenant's right to cure.[22]

A. Ejectment Actions and the Basis of the Landlord's Right to Terminate

The common law regarded lease covenants as independent.[23] Independence of covenants meant that one covenant in a lease had nothing to do with any other.[24] For example, a landlord's failure

16. *See infra* notes 186-210 and accompanying text.
17. *See infra* notes 211-12 and accompanying text.
18. *See infra* notes 23-64 and accompanying text.
19. *See infra* notes 23-64 and accompanying text.
20. *See infra* notes 65-87 and accompanying text. The original purpose of these conditional limitations was to provide a landlord with a remedy for a tenant's breach of a nonmonetary obligation of the lease. The courts, however, later expanded these provisions to encompass rent defaults. *See infra* notes 82-84 and accompanying text.
21. *See infra* notes 68-70 and accompanying text.
22. *See infra* notes 78-87 and accompanying text.
23. *See* Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 322-23, 391 N.E.2d 1288, 1291, 418 N.Y.S.2d 310, 313, *cert. denied*, 444 U.S. 992 (1979); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 580-91 (3d ed. 1962) [hereinafter WILLISTON]. The historical basis of this rule was that landlord/tenant law evolved before contract law had developed the doctrine of dependent covenants. *See id.* § 890, at 587-89; Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U.L.Q. 1213, 1221 (1983) [hereinafter Humbach].
24. *See Park West*, 47 N.Y.2d at 322-23, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; *see also* 6 WILLISTON, *supra* note 23, at § 890, at 589-91. *See generally* Chase & Taylor, *Landlord and Tenant: A Study in Property and Contract*, 30

to supply heat or to make repairs[25] did not excuse the tenant from his covenant to pay rent.[26] Hence, the practical significance of this rule was to forbid the tenant from defaulting on a term of the lease even if the landlord had.

Although these principles may have surprised lay tenants or seemed inequitable to them, they were familiar to lawyers schooled in the conveyance theory of leases.[27] What was overlooked, however, was the other side of the coin. Independence of covenants also meant that, unless the landlord obtained an agreement to the contrary, the tenant's failure to pay rent (or to perform some other lease obligation) did not create an opportunity for the landlord to terminate the lease or to recover possession of the premises.[28] The landlord's only remedy rested in an action to recover the rent.[29]

VILL. L. REV. 571 (1985) (discussing various contract and property approaches to landlord/tenant relationship).

25. The common law landlord had no duty to furnish heat or to repair the premises unless he expressly covenanted to do so. *See Park West*, 47 N.Y.2d at 323-24, 391 N.E.2d at 1291-92, 418 N.Y.S.2d at 313-14. Having "conveyed" the premises to the tenant for a period of time, the landlord performed all obligations required by law. *See id.* Building codes and other statutory or implied obligations, imposing duties of repair and maintenance upon the landlord, post-dated common law. For example, the first housing code was the New York Tenement House Law, enacted in 1867. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 306-07 (1984). Housing codes did not become popular until 1954, when the Federal Housing Act of 1954 encouraged their enactment. *See id.* at 308.

26. *See Park West*, 47 N.Y.2d at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313. One exception to the rule occurred when the landlord actually or constructively breached the implied covenant of quiet enjoyment and the tenant was excused from paying rent. *See* Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 372-73, 117 N.E. 579, 580 (1917); Dyett v. Pendleton, 8 Cow. 727, 734 (N.Y. 1826).

27. This theory viewed the lease as a conveyance of real property for a specified period of time. *See* Humbach, *supra* note 23, at 1224. Hence, principles of property law rather than contract law governed the transaction. *See id.* One of these concepts was that by making the "conveyance," the landlord had fulfilled all of his obligations and completely executed the transaction on his part. *See Park West*, 47 N.Y.2d at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313.

28. *See* Van Rensselaer v. Jewett, 2 N.Y. 141, 148-49 (1849); De Lancey v. Ga Nun, 12 Barb. 120, 125 (N.Y. App. Div. 1851), *aff'd sub nom.* De Lancey v Ganong, 9 N.Y. 9 (1853); 1 D. MCADAM, LANDLORD AND TENANT § 187, at 692-95 (4th ed. 1910) [hereinafter MCADAM]; 2 H. TIFFANY, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 193, at 1358-59 (1912) [hereinafter TIFFANY]. Chancellor Kent noted that originally at feudal law, nonpayment of rent resulted in a forfeiture of the feud, permitting the lord to enter and resume possession of the tenant's lands. *See* 3 J. KENT, COMMENTARIES ON AMERICAN LAW 378 (Da Capa ed. 1971) [hereinafter KENT]. The harshness of this remedy led to its replacement by the right of distress, which allowed the landlord to seize and hold the chattels found on the land until the tenant paid the damages. *See id.* at 377-79. The legislature repealed the remedy of distress in 1846. *See* 1846 N.Y. Laws 274.

29. *See Van Rensselaer*, 2 N.Y. at 148-49; Horton v. New York Cent. & Hudson

Because this rule limited landlords to actions for rent only in the absence of a provision to the contrary, it was not surprising that landlords inserted such provisions in their leases. These provisions granted landlords the right to re-enter the property if the tenant failed to pay rent or perform other covenants he had agreed to perform.[30] A breach by the tenant gave the landlord the opportunity to exercise this right of re-entry and to recover possession of the demised premises by an action in ejectment.[31]

But even here, if the default consisted of a nonpayment of rent, the tenant possessed protections: (1) the landlord had to make a demand for the rent at a precise time and place as a prerequisite to any ejectment action;[32] and (2) the courts would not permit an action in ejectment if there were sufficient property on the premises to cover the value of all of the unpaid rent.[33]

B. The Creation of a More Expeditious Termination Procedure

The remedy of ejectment was tedious, expensive and ill-suited to the needs of landlords who incurred expenses while nonpaying tenants

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River R.R., 12 Abb. N. Cas. 30, 37-38 (N.Y. Sup. Ct. Erie County 1883), *aff'd*, 102 N.Y. 697 (1886); 2 TIFFANY, *supra* note 28, § 193, at 1358-59. Until its repeal, distress was the "more usual, prompt and effectual remedy" to recover arrears in rent. 3 KENT, *supra* note 28, at 377.

30. *See, e.g.*, Hill v. Barclay, 33 Eng. Rep. 1037 (1810) (repairs); Davis v. West, 33 Eng. Rep. 180 (1806) (rent); Bowen v. Whitmore, 22 Eng. Rep. 1155 (1693) (rent, waste and covenant against assignment).

31. *See* Van Rensselaer v. Jewett, 2 N.Y. 141, 143-44 (1849); *Horton*, 12 Abb. N. Cas. at 37.

32. *See* Jackson *ex dem.* Weldon v. Harrison, 17 Johns. 66, 70 (N.Y. Sup. Ct. Albany County 1819). Unless the lease otherwise provided, the landlord or his agent had to make the demand for the precise amount of rent due, on the very day the rent was due, at the most notorious place on the land, and at a convenient time before sunset. *See* 2 TIFFANY, *supra* note 28, § 194f(1), at 1377-80. A notorious place on land was usually the front door of the dwelling. *See id.* at 1379. If the landlord made the demand after sunset, the rent could not be counted. *See id.* at 1378. The demand had to be kept good until sunset. *See id.* The parties, however, could stipulate in the lease that the landlord could re-enter without demand. *See id.* at 1380. In 1731, Parliament eliminated the requirement of a formal demand in cases in which rent was six months in arrears. *See* An Act for the More Effectual Preventing Frauds Committed by Tenants, and for the More Easy Recovery of Rents, and Renewal of Leases, 4 Geo. 2, ch. 28, § 2 (1731). In 1788, the New York Legislature followed. *See* 1788 N.Y. Laws 36.

33. *See* An Act for the More Effectual Preventing Frauds Committed by Tenants, and for the More Easy Recovery of Rents, and Renewal of Leases, 4 Geo. 2, ch. 28, § 2 (1731); *see also* 1788 N.Y. Laws 36. This practice lasted at least until the abolition of distress. See *supra* note 110 for a discussion of distress.

occupied their premises.[34] Since the action in ejectment was a plenary action, defendants not only had sufficient time to answer the complaint, but also had the right to a bill of particulars and available discovery. Landlords needed a quicker and cheaper procedure for recovering possession. In 1820, the New York legislature enacted such a procedure, known as a "summary proceeding."[35] This act provided a speedy method by which a landlord could recover possession of the demised premises from his tenant.[36]

The original statute applied only to situations in which a landlord/tenant relationship existed[37] and afforded just four grounds upon which the landlord could proceed:[38] (1) when a tenant had continued in possession after the expiration of his term;[39] (2) when a tenant had defaulted in the payment of rent;[40] (3) when a tenant had taken

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34. *See* Reich v. Cochran, 201 N.Y. 450, 453-54, 94 N.E. 1080, 1081 (1911).

35. *See* 1820 N.Y. Laws 194. The statute describes a proceeding known as a summary proceeding to recover possession of real property. *See id. See generally* Reich v. Cochran, 201 N.Y. 450, 94 N.E. 1080 (1911) (discussing history and purpose of summary proceeding statute).

36. The statute provided that upon the receipt by a certain designated officer of the written oath of the landlord, the officer could issue a summons requiring the person in possession to remove from possession or to show cause "on the same day, or within such time, not exceeding five days after the service thereof" why the landlord should not regain possession. 1820 N.Y. Laws 194. If the tenant swore that the term of the lease had not expired, or that the rent was not in arrears, the officer could issue a precept commanding the sheriff to summon a jury "either on the day of issuing such precept, or on the day thereafter," to hear the proofs and determine the issue. *Id.*

37. With the passage of time, however, the scope of the proceeding expanded to include not only the existence of a landlord/tenant relationship, *see* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 1979), but also situations in which there was no such relationship. *See id.* § 713 (McKinney 1979 & Supp. 1987). At present, there are seventeen separate grounds, including nonpayment of taxes or assessments that the tenant has agreed to pay, and using or occupying the demised premises as a bawdy-house or for illegal trade or business. *See id.* §§ 711(3), 715(1) (McKinney 1979). Some of the nontenants currently entitled to bring a summary proceeding include the purchasers at an execution sale, a tax sale or a foreclosure sale. *See id.* § 713(1), (4), (5). Proceedings also can be maintained to evict a squatter, *see id.* § 713(3), a person who entered into possession by force or unlawful means, *see id.* § 713(10), a licensee whose license has expired, *see id.* § 713(7), and a person who entered into possession as a result of employment by the petitioner, but whose employment terminated. *See id.* § 713(11). Section 715 also provides grounds for eviction where the use or occupancy of the premises is illegal. *See id.* § 715.

38. The grounds set forth in the statute were jurisdictional, and the courts strictly construed its language. *See* Beach v. Nixon, 9 N.Y. 35, 37 (1853). Hence, if a landlord did not fit within the confines of the summary proceeding statute, he had to proceed with an action in ejectment.

39. *See* 1820 N.Y. Laws 194, § 1.

40. *See id.*

the benefit of an insolvency act;[41] or (4) when a tenant had absconded, leaving the premises vacant.[42] This Article, however, focuses on the first two grounds of this statute: when the tenant holds over after the *expiration* of his lease (holdover proceedings), and when the tenant has defaulted in the payment of rent (nonpayment proceedings).

C. Tenant Protection in Nonpayment Proceedings

The summary proceeding statute, like the ejectment statute,[43] accorded certain protection to the nonpaying tenant.[44] For instance, a landlord could not commence a summary proceeding without a prior demand for rent.[45] Nor, until the abolition of distress[46] could a landlord commence suit if distress satisfied the rent arrears.[47] Moreover, even if the tenant lost, he still possessed a grace period: he had the right to cure his rent default.[48]

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41. *See id.* § 9.
42. *See id.*
43. *See* 1788 N.Y. Laws 36, § 23.
44. *See infra* notes 45-49 and accompanying text.
45. Chapter 194 of the 1820 Session Laws provides:

> That in the case of a proceeding for non-payment of rent, as before mentioned, there shall have been a demand of such rent, or three days notice, in writing, by the person or persons entitled to such rent, to the person or persons owing the same, requiring the payment of the said rent, or the delivery of possession of the premises, to be served in the same manner as last provided.

1820 N.Y. Laws 194, § 1. The current version reads:

> The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and *a demand of the rent* has been made, or at least three days' notice in writing requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in section 735.

N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979) (emphasis added). This demand for rent is not the formal technical demand required by the common law, *see supra* note 32, but may be satisfied by a landlord's oral demand that the tenant pay the rent. *See* 2 J. RASCH, NEW YORK LANDLORD & TENANT § 1091, at 529 (2d ed. 1971) [hereinafter RASCH].

46. *See infra* note 110.

47. Chapter 194 of the 1820 Session Laws, section 3 provides, in relevant part: "That no proceeding for non-payment of rent shall take place under this act, in any case where it shall appear that satisfaction for such rent might have been obtained by distress." 1820 N.Y. Laws 194, § 3. There is no modern counterpart to this provision. *See* 1846 N.Y. Laws 274.

48. Chapter 194 of the 1820 Session Laws provides:

> That in the case of a proceeding under this act for the non-payment of rent, if the decision of the magistrate or the verdict of the jury, as the case may be, shall be against the person or persons of whom such rent is claimed, the contract or agreement, and the relation of landlord and

The legislature kept this grace period despite subsequent amendments to and revisions of the statute.[49] It can be found today in the present summary proceeding statute in the following language:

> The respondent [tenant] may, at any time before a warrant is issued, stay the issuing thereof and also stay an execution to collect the costs, as follows:
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> 1. Where the lessee or tenant holds over after a default in the payment of rent, or of taxes or assessments, he may effect a stay by depositing the amount of rent due or of such taxes or assessments, and interest and penalty, if any thereon due, and the costs of the special proceeding, with the clerk of the court . . . or by delivering to the court or clerk his undertaking to the petitioner in such sum as the court approves to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs within ten days, at the expiration of which time a warrant may issue, unless he produces to the court satisfactory evidence of the payment.[50]

This warrant is the court's direction to the sheriff or marshall to remove the tenant and to put the landlord into possession.[51] The warrant has, however, additional significance since the statute provides that its issuance "cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant . . . ."[52] Nonetheless, while the statute speaks in terms of payment "staying" the issuance of the warrant, actually the payment results in the dismissal of the proceeding, not merely a stay.[53] Furthermore, the customary practice, at least in the New York City landlord/tenant courts, is to grant a five-day stay of the issuance of the warrant when the tenant has lost in a non-payment proceeding. As a result, the practical effect is to give the tenant an extra five days to pay and preserve his tenancy.[54]

> tenant between the parties shall be thereafter cancelled and annulled, unless the person or persons owing such rent shall forthwith pay the said rent, and the costs of proceeding under this act, or give such security to the person or persons entitled to the said rent, for the payment thereof, with costs, in ten days thereafter, as shall be satisfactory to the said magistrate . . . .

1820 N.Y. Laws 194, § 3.

49. *See* N.Y. REAL PROP. ACTS. LAW § 751(1) (McKinney 1979).

50. *See id.*

51. *See id.* § 749(1) (McKinney 1979).

52. *Id.* § 749(3).

53. *See* Flewwellin v. Lent, 91 A.D. 430, 433, 86 N.Y.S. 919, 920-21 (2d Dep't 1904).

54. In New York City, the first and second departments have adopted rules

D. The Interaction Between Ejectment and Summary Proceedings

While the enactment of the summary proceeding statute left the doctrine of independence of covenants unchanged, it did alter some of the results that flowed from it.[55] Thus, while the common law ejectment action required a landlord to retain a right of re-entry to recover possession for the nonpayment of rent,[56] the summary proceeding statute entitled the landlord to dispossess the tenant for nonpayment without a retained right of re-entry.[57] This modification, however, applied only to summary proceedings.[58] If the landlord wanted to recover possession of the premises in ejectment, he still had to retain a right of re-entry for breach of the covenant, including the covenant to pay rent.[59]

Moreover, the right of re-entry that the common law landlord might have reserved in case of a breach of the tenant's covenant, other than nonpayment of rent, proved unavailing as a predicate for a summary proceeding.[60] The courts adopted this rule because

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pursuant to section 732 of the New York Real Property Actions and Proceedings Law, making nonpayment proceedings returnable before the clerk rather than before the court. *See* Rules of the Civil Court of the City of New York § 208.42(d) (McKinney 1987). As a result, a tenant in a nonpayment summary proceeding must answer before the clerk of the court within five days of his service. *See* N.Y. REAL PROP. ACTS. LAW § 732(2) (McKinney 1979). If he answers, the clerk arranges for a hearing between three and eight days thereafter, and notifies the parties of the hearing date by mail. *See id.* If the tenant fails to answer, the landlord's attorney requests that the papers be sent to the judge for the entry of a judgment. *See id.* § 732(3). When the judge signs the judgment, he may stay issuance of the warrant for up to ten days from the date of the service of process. *See id.* In both procedures, the delay attendant upon the paperwork invariably gives the tenant an additional cure period.

55. *Cf.* 6 WILLISTON, *supra* note 23, § 890, at 585-89; Niles, *Conditional Limitations in Leases in New York*, 11 N.Y.U. L. REV. 15, 16-17 (1933) [hereinafter Niles].

56. *See supra* note 31 and accompanying text.

57. The other original grounds for a summary proceeding, absconding or insolvency, also gave the landlord the right to dispossess the tenant. *See* 1820 N.Y. Laws 194, § 9. Invoking the benefit of an insolvency statute or being adjudicated a bankrupt remains a present ground for a summary proceeding. *See* N.Y. REAL PROP. ACTS. LAW § 711(4) (McKinney 1979). Absconding has disappeared as a basis for dispossession. *See id.* § 711. These grounds, however, are outside the scope of this Article.

58. *See* Horton v. New York Cent. & Hudson River R.R., 12 Abb. N. Cas. 30 (N.Y. Sup. Ct. Erie County 1883).

59. *See id.*

60. *See, e.g.*, Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 205 N.Y.S.2d 303 (N.Y.C. Mun. Ct. Queens County 1960); Niles, *supra* note 55, at 16-17.

the traditional right of re-entry did not cause the tenant's lease to expire;[61] rather, it gave the landlord only an option to terminate the lease, an option exercised by the commencement of an action in ejectment.[62] On the other hand, a landlord could bring a holdover summary proceeding only if the tenant continued in possession "*after the expiration of his term.*"[63] Thus, the expiration of the tenant's term was a precondition to the commencement of the summary proceeding. Logically, if the landlord had to commence a proceeding to signify that he was exercising his option to cause the lease to expire, then the lease could not have expired *before* he commenced the proceeding. Accordingly, in the early development of the law, the courts uniformly held that a holdover summary proceeding could not be predicated upon the exercise of a right of re-entry for breach of a condition subsequent.[64] In short, a right of re-entry was necessary to an action in ejectment, but unnecessary, and not even helpful, in a summary proceeding.

E. The Use of Conditional Limitations to Terminate Leases

To take advantage of the expeditious procedure of the summary proceeding statute, landlords fell back upon an ancient distinction known to the common law—the difference between a condition subsequent and a conditional limitation.[65] Essentially, the distinction

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61. *See* Beach v. Nixon, 9 N.Y. 35 (1853).

62. *See supra* notes 27-31 and accompanying text.

63. N.Y. REAL PROP. ACTS. LAW § 711(1) (McKinney 1979) (emphasis added). The earlier statute was similar. *See* 1820 N.Y. Laws 194, § 1.

64. *See* Beach v. Nixon, 9 N.Y. 35 (1853); Oakley v. Schoonmaker, 5 Wend. 226 (N.Y. Sup. Ct. 1836); Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 205 N.Y.S.2d 303 (N.Y.C. Mun. Ct. Queens County 1960).

65. *See generally* Niles, *supra* note 55. Although easy to state in terms of its result, the difference has been characterized as "subtle," *see* Burnee Corp. v. Uneeda Pure Orange Drink Co., Inc., 132 Misc. 435, 438, 230 N.Y.S. 239, 246 (Sup. Ct. App. T. 1st Dep't 1928); 19 South Main St. Corp. v. Phalanx Motors, Inc., 36 Misc. 2d 114, 117, 232 N.Y.S.2d 431, 434 (Justice Ct. Rockland County 1962), and its application to specific lease language has been inconsistent. *See, e.g.,* Perrotta v. Western Regional Off-Track Betting Corp., 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep't 1983); Norman S. Riesenfeld, Inc. v. R-W Realty Co., 223 A.D. 140, 228 N.Y.S. 145 (1st Dep't 1928); *see also* Nathan's Famous, Inc. v. Frankorama, Inc., 70 Misc. 2d 452, 455, 333 N.Y.S.2d 708, 712 (N.Y.C. Civ. Ct. Richmond County 1972) (unless precise definition of conditional limitation applied, courts will hold that provisions are condition subsequent); *Jamaica Builders Supply Corp.*, 25 Misc. 2d at 328, 205 N.Y.S.2d at 306 (despite clear differences in definition between conditional limitation and condition subsequent, courts have found excuses to avoid effect of conditional limitation).

between a condition subsequent and a conditional limitation is that a conditional limitation terminates the lease automatically, while a condition subsequent gives the landlord an option to terminate which must be exercised by re-entry.[66] According to a leading case,[67] conditional limitations fell into three categories: (1) provisions for the automatic termination of a lease upon the occurrence of an objective event that was not within the control of either the landlord or the tenant;[68] (2) provisions that resulted in a forfeiture of the lease upon the occurrence of an event set in motion by the landlord;[69] and (3) breaches of covenants in the leases.[70] This Article focuses on this last category.

The tenant's breach of a lease covenant creates a conditional limitation as follows: following the default on a performance of a covenant, the ordinary lease typically permits the landlord to serve a notice of the termination of the lease a certain number of days after its service.[71] The tenant's lease terminates upon the running of the time specified in the notice *not* because the tenant defaulted or the landlord exercised an option to terminate it. Rather, by its terms, the lease automatically expires upon the occurrence of the last day of the term specified in the lease or the date specified in the notice, whichever is earlier. In other words, as one commentator has noted:

> [T]he volitional element is not one to terminate the lease, but merely to have the event, that is, the lapse of time fixed in the notice, occur which will without further action or option operate

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66. *See* Beach v. Nixon, 9 N.Y. 35 (1853). The practical effect of this distinction is that a landlord could institute an expeditious summary proceeding if the lease provision was construed as a conditional limitation, but was limited to a long form action in ejectment if the provision was a condition subsequent. *See* Reich v. Cochran, 201 N.Y. 450, 453-56, 94 N.E. 1080, 1081-82 (1911); Nathan's Famous, Inc. v. Frankorama, Inc., 70 Misc. 2d 452, 455, 333 N.Y.S.2d 708, 713 (N.Y.C. Civ. Ct. Richmond County 1972); Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 327-28, 205 N.Y.S.2d 303, 305-06 (N.Y.C. Mun. Ct. Queens County 1960).

67. *See* Burnee Corp. v. Uneeda Pure Orange Drink Co., 132 Misc. 435, 230 N.Y.S. 239 (Sup. Ct. App. T. 1st Dep't 1928). Professor Rasch, an authoritative New York scholar on real property law, relied on *Burnee*. *See* 2 RASCH, *supra* note 45, §§ 748-753, at 196-208.

68. *See id.* § 748, at 196. The standard example of this category is a lease to the tenant for as long as he is parson of Dale. *See id.*

69. *See id.* § 749, at 197-98. The prototypical illustration of the second category is a lease clause giving the landlord the right to terminate the lease if he sells the property. *See id.*

70. *See id.* § 751, at 201-03.

71. *See Burnee Corp.*, 132 Misc. at 442, 230 N.Y.S. at 250; 2 RASCH, *supra* note 45, § 751, at 201-03; Niles, *supra* note 55, at 23.

> on the lease to cause it to expire on its occurrence. The tenant's breach is only an event antecedent to, and not the direct cause of, the expiration.[72]

Although the distinction drawn between the third category of conditional limitation and a provision for re-entry on breach of a condition subsequent appears more metaphysical than real, it has received approbation from both the lower and intermediate appellate courts in New York.[73] New York courts allow termination of leases on notice after the breach of a tenant's obligation to insure the premises;[74] to restrict the use of the premises;[75] or to comply with other obligations.[76] Although occasionally a court will give the language of the lease a "hard look" and construe the provision as creating a condition subsequent rather than a conditional limitation,[77] these aberrational decisions have failed to create a body of law that has rejected the third type of conditional limitation. On the contrary, these decisions can be overcome merely by using greater precision in the drafting of lease provisions.

F. The Advantages of Conditional Limitations

Conditional limitations served a vital landlord interest. They enabled landlords to use the speedy, cost-efficient summary proceedings to regain possession of leased premises when tenants breached substantial nonmonetary obligations of their leases, such as the failure to comply with governmental orders[78] or the failure to insure ade-

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72. 2 RASCH, *supra* note 45, § 751, at 203. Both Professor Rasch and Dean Niles noted that the third category was similar to a re-entry or breach of condition subsequent, which could not be the basis for a summary proceeding. *See id.* § 752, at 205-07; Niles, *supra* note 55, at 24. Both commentators also noted that the New York Court of Appeals had not ruled on the efficacy and propriety of this category. *See* 2 RASCH, *supra* note 45, § 751, at 203; Niles, *supra* note 55, at 16.

73. *See infra* notes 74-76 and accompanying text.

74. *See* Brainerd Mfg. Co. v. Dewey Garden Lanes, Inc., 78 A.D.2d 365, 367-68, 435 N.Y.S.2d 417, 418-19 (4th Dep't 1981).

75. *See* Finley v. Park Ten Assocs., 83 A.D.2d 537, 538, 441 N.Y.S.2d 475, 476 (1st Dep't 1981) (*Yellowstone* injunction granted to prevent threatened termination of the lease).

76. *See* Murray Realty v. Regal Shoe Co., 265 N.Y. 332, 193 N.E. 164 (1934) (solvency).

77. *See, e.g.*, Nathan's Famous, Inc. v. Frankorama, Inc., 70 Misc. 2d 452, 454-55, 333 N.Y.S.2d 708, 712 (N.Y.C. Civ. Ct. Richmond County 1972); Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 328-30, 205 N.Y.S.2d 303, 307-08 (N.Y.C. Mun. Ct. Queens County 1960).

78. *See* First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968).

quately.[79] Since the landlord could initiate a summary proceeding only in limited situations and, thus, could not utilize the proceeding to redress a tenant's breach of a lease covenant to do or refrain from doing specified acts,[80] the absence of a conditional limitation in the lease required the landlord to remedy such nonmonetary breaches by an action in ejectment.[81] By inserting an appropriate conditional limitation in the lease, the landlord could terminate the lease if the tenant breached a nonmonetary obligation and then remove the tenant in summary proceedings as a holdover tenant.[82] The lease, of course, had to give the landlord the right to terminate the lease for the breach of a particular covenant. To assure that the language of the conditional limitation was not underinclusive, landlords drafted clauses permitting termination for the default of any lease covenant.[83]

It is not surprising that landlords inserted clauses purporting to create conditional limitations in numerous printed forms.[84] These clauses, however, extended the grounds for invoking a conditional limitation beyond the reason for its creation, by including the tenant's nonpayment of rent—a default that fell squarely within the ambit of the summary proceedings statute.

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79. *See* Brainerd Mfg. Co. v. Dewey Garden Lanes, Inc., 78 A.D.2d 365, 435 N.Y.S.2d 417 (4th Dep't 1981).

80. *See* Niles, *supra* note 55, at 16-17.

81. *See id.*

82. *See id.* at 18.

83. For an example of these draft clauses, one lease form provides, in pertinent part:

> 17th. It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, or if default be made in the payment of rent or any part thereof as herein specified, or if, without the consent of the Landlord, the Tenant shall sell, assign, or mortgage this lease or if default be made in the performance of any of the covenants and agreements in this lease contained on the part of the Tenant to be kept and performed, or if the Tenant shall fail to comply with any of the statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and Local Governments or of any and all their Departments and Bureaus, applicable to said premises . . . the Landlord may, if the Landlord so elects, at any time thereafter, terminate this lease and the term hereof, on giving to the Tenant five days' notice in writing of the Landlord's intention so to do, *and this lease and the term hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration hereof*. . . .

Form Lease A-185 (Blumberg) (emphasis added). At least one appellate court has held that this clause creates a conditional limitation. *See* Perrotta v. Western Regional Off-Track Betting Corp., 98 A.D.2d 1, 7, 469 N.Y.S.2d 504, 508 (4th Dep't 1983).

84. *See supra* note 83.

G. The Consequences of Using Conditional Limitations for Nonpayment of Rent

The use of a conditional limitation to terminate a lease for a rent default had one significant advantage for landlords. It circumvented the tenant's statutory right to cure such a default by paying the overdue rent plus interest and costs.[85] If such conditional limitations were valid, they would present a serious threat to residential tenants who were not otherwise protected by the provisions of rent control statutes.[86] The seemingly reasonable expectation of the tenant that he might pay late and preserve his home could be defeated by the invocation of a conditional limitation based upon nonpayment of rent.

The plight of a commercial tenant could be just as serious or even more so. Since the good will of a retail business often rests in its location, the loss of the location could have a materially adverse impact upon the business. Moreover, a great many retail businesses are sold on an installment sale basis, and the sales are structured as follows: the seller executes but does not deliver an assignment of the lease to the business premises. Meanwhile, the lease and the assignment are in escrow with the seller's attorney until full payment has been made of the deferred portion of the purchase price—an event that may occur several years later. To give the buyer a present right of possession and to serve as security for the payment of the balance of the purchase price, the seller subleases the business premises to the buyer. The sublease provides, among other things: (1) that payment of the installments with respect to the purchase price constitutes additional rent under the sublease; and (2) that the buyer is to pay rent and additional rent reserved under the overlease directly to the overlandlord, as agent for the seller.

If the buyer defaults in paying the installments of the purchase price, the seller can commence a nonpayment summary proceeding and thereby protect the unpaid balance of the purchase price by taking back its store. But what if the buyer defaults in the timely payment of rent to the overlandlord, and the overlandlord then

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85. *See supra* note 4 and accompanying text.

86. Landlords can only evict rent control tenants upon grounds provided by the statute. The statute permits a landlord to pursue a nonpayment proceeding against a rent control tenant, but does not make nonpayment of rent into a conditional limitation. *See* N.Y. UNCONSOL. LAW § 8585 (McKinney Supp. 1987). In contrast, a landlord is not limited in the manner he can dispossess a tenant who is not protected by the rent control laws.

invokes a conditional limitation and terminates the lease? Had the overlandlord commenced a nonpayment proceeding, the seller (tenant) could have cured the buyer's default and protected the unpaid balance of the purchase price. When the overlandlord terminates the lease by exercising a conditional limitation, however, the seller has no opportunity to cure and will have lost the value of its business.[87]

III. The Tenant's Right to Cure a Nonpayment Default

Although now endangered, the tenant's historical right to cure a default in rent payments has had a long history, originating in the English equity courts, and continuing its development later in New York.

A. Development in England

As earlier noted, the doctrine that lease covenants were independent required the landlord to retain a right of re-entry if he wanted to

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87. Although the seller can try to protect itself, there is no satisfactory remedy. For instance, the seller can obtain a clause in the overlease requiring the overlandlord to give the seller notice and an opportunity to cure the buyer's rent default. This clause, however, is difficult to procure, since landlords are reluctant to bind themselves to providing notice of a rent default and waive the options of proceeding against the tenant. In addition, this arrangement will not help the buyer who re-sells the store under the same type of arrangement, since the overlandlord would only be obligated to give notice of a rent default to the original tenant (the first seller) and not to the buyer (the second seller). Although the seller can insist that the buyer pay the rent due under the overlease directly to him every month, this method is awkward, particularly if the rent check has to be mailed every month by the buyer to the seller, deposited and cleared, and then a new check drawn and forwarded to the overlandlord. If the store is resold several times, it becomes not only awkward but unworkable.

Other ways to solve the problem also have drawbacks. For example, the buyer can agree to put up a certain amount of money in escrow as security that he will pay the rent to the overlandlord. Without a requirement of notice from the overlandlord, however, the escrowee must make monthly telephone calls to the landlord to ascertain if the rent has been paid. Since the escrowee usually is an attorney who is handling numerous similar transactions, the attorney bears a heavy burden, and faces potential liability. As a result, the attorney may discourage this approach.

The amount of the rent due the overlandlord can also be added to the promissory notes which the buyer executes to evidence the installments of the balance of the purchase price due. This method, however, cannot take into account rent increases attributable to escalation clauses, such as cost of living or tax increases, which are unascertainable at the time the business is sold and the promissory notes are executed.

The most effective protection for the seller of a retail business occurs if the seller ensures that the landlord's exclusive remedy for a rent default is a nonpayment proceeding, including the concomitant protection afforded by the right to cure the

terminate the lease for a tenant breach.[88] By the sixteenth century, leases often gave the landlord the right to re-enter because of nonpayment of rent or the tenant's failure to perform other lease covenants.[89] The method that landlords used to gain re-entry was an action in ejectment.[90] By the late seventeenth century, equity courts often protected against a forfeiture that had its genesis in the nonpayment of rent:[91] they required the landlord to deliver, upon paying the arrears, a new lease to the tenant despite the forfeiture and termination.[92]

Equity proceeded on the theory that the provision for re-entry on nonpayment of rent was intended only to secure the payment of the rent and that upon payment of the back rent, together with interest and costs, the landlord had received all that he was entitled to receive.[93] The tenant did not have to demonstrate fraud, mistake,

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default. While the parties can agree to this arrangement in the overlease, the tenant may have to make substantial concessions to obtain such a clause. Hence, the tenant would be in a better position if the law guaranteed him this result.

88. *See supra* note 28 and accompanying text.

89. *See* 7 W. HOLDSWORTH, HISTORY OF THE ENGLISH LAW 292-93 (2d ed. 1937).

90. *See supra* note 31 and accompanying text.

91. Originally, equity also provided redress for forfeitures that had their origin in breaches other than the nonpayment of rent. *See* Sanders v. Pope, 33 Eng. Rep. 108 (1806) (failure to repair); Bowen v. Whitmore, 22 Eng. Rep. 1155 (1693) (waste). Later, however, when it could not make full compensation to the landlord, equity denied such relief. *See* White v. Warner, 35 Eng. Rep. 1016 (1817) (failure to insure); Hill v. Barclay, 33 Eng. Rep. 1037 (1810) (failure to repair); 3 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1737, at 357 (14th ed. Lyon 1918) [hereinafter STORY].

92. *See* 6 WILLISTON, *supra* note 23, § 775, at 656. Indeed, the language of the cases and commentators suggests that equity relieved the tenants from the forfeiture of their leases and their nonpayment of rent with the same liberality as it granted *Yellowstone* injunctions to tenants threatened with forfeiture. *See* Bowen v. Whitmore, 22 Eng. Rep. 1155 (1693) ("upon an entry for non-payment of rent, this court did ordinarily relieve, because it could put the lessor in the same condition he was in, by ordering the payment of the rent and his charges"); Anonymous, 22 Eng. Rep. 1095, 1095 (1690) ("it is a usual equity for this court to decree, upon payment of arrears, that the lessor shall make a new lease with like covenants"); 5 WILLISTON, *supra* note 23, § 775, at 656 (quoting Lloyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117, 125 (1915) (" '[s]o, also, it became the common course to relieve against forfeitures for non-payment of rent, and upon payment of arrears to compel the landlord to make a new lease' ")).

Yellowstone injunctions are preliminary injunctions that restrain a landlord from terminating a lease pursuant to a conditional limitation. *See infra* notes 146-54 and accompanying text.

93. *See* Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891); Giles v. Austin, 62 N.Y. 486 (1875); Horton v. New York Cent. & Hudson River R.R., 12 Abb. N. Cas. 30 (N.Y. Sup. Ct. Erie County 1883); Sanders v. Pope, 33 Eng. Rep. 108 (1806); 3 STORY, *supra* note 91, §§ 726-728, at 342-45.

or inequitable conduct by the landlord to be entitled to the relief.[94] As one early English court noted:

> [I]t is not necessary, that the failure in paying the rent should arise from accident, the miscarriage of a letter with a remittance, insolvency, or disease: but even against negligence, the tenant being solvent, and not prevented by any accidental circumstance, equity interferes; and upon payment of the rent and all expences will not permit the tenant to be turned out of possession; considering, that in the one case frequently great hardship might be the consequence; in the other, the party being placed in the same situation, there is in general no hardship.[95]

While the beneficence of equity did not extend to willful defaults,[96] equity did not distinguish between relief from forfeiture attendant upon a re-entry for breach of a condition subsequent and relief from termination of a lease resulting from the invocation of a conditional limitation.[97] In each situation, equity upheld the right to cure, reasoning that, in each instance, the lease already had been terminated when the landlord sought relief.[98]

As a result, in 1731, Parliament enacted the statute of 4 George

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94. *See infra* note 95 and accompanying text.

95. Sanders v. Pope, 33 Eng. Rep. 108, 110 (1806).

96. *See* Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891); 1 MCADAM, *supra* note 28, § 197, at 717-18.

97. *See* Bowser v. Colby, 66 Eng. Rep. 969, 977 (1841); 3 STORY, *supra* note 91, § 1736, at 355-56.

98. *See Bowser*, 66 Eng. Rep. at 977 (dicta); 3 STORY, *supra* note 91, § 1736, at 354. In *Bowser* the court wrote:

> If it could have been shewn that a Court of Equity gave relief only before the landlord had entered the argument might have been well founded, but, inasmuch as in most of the cases relief has been given upon bills filed after the landlord had entered, the argument must be fallacious; for when the landlord has entered the lease is equally at an end in a Court of law, whether there is a proviso for re-entry simply, or a proviso that it is to be void on non-payment of rent. It is said, however, that the contract of the parties is different—that where it is declared that the lease shall become absolutely void on non-payment of the rent the true construction is that the parties mean the lease shall in fact be at an end, and no relief shall be given against that consequence of the non-payment of rent. I can by no means accede to this construction. The legal effect in one case is that, if the landlord re-enters, the lease is determined—in the other case it is determined without his re-entry. The contract of the parties is that, in one case, the lease shall not be at an end by the mere non-payment of rent, unless the landlord shall re-enter, and then that it shall be at an end; and, in the other case, that the non-payment of rent alone shall determine the lease. In both cases the same consequence is to follow, though from different acts.

Bowser, 66 Eng. Rep. at 977.

2, chapter 28,[99] in part to redress the frequency with which equity directed landlords to issue new leases to tenants whose former leases had been forfeited for nonpayment of rent.[100] Although the statute was landlord-oriented,[101] it did create a formal right at law to cure a tenant's nonpayment, by the payment or tender of all unpaid rent, together with costs.[102] Such payment or tender discontinued the ejectment action,[103] and the tenant could hold under his original lease, without the execution of the new lease.[104] This statute constituted the first statutory recognition that the tenant had a right to cure a nonpayment default at law without seeking the discretion of the equity court.

B. Development in New York

The earliest statute in New York that accorded a right to cure a nonpayment default was part of comprehensive legislation governing distress and ejectment.[105] The statutes governing ejectment further

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99. *See* An Act for the More Effectual Preventing Frauds Committed by Tenants, and for the More Easy Recovery of Rents, and Renewal of Leases, 4 Geo. 2, ch. 28 (1731).

100. *See supra* note 92 and accompanying text.

101. The statute eliminated the requirement of a formal demand for rent if six months rent were in arrears, and created what in effect was a six-month statute of limitations to move for equitable relief from a forfeiture. *See* An Act for the More Effectual Preventing Frauds Committed by Tenants, and for the More Easy Recovery of Rents, and Renewal of Leases, 4 Geo. 2, ch. 28, § 4 (1731).

102. *See id.*

103. *See id.* The statute required the tenant to make or tender payments of overdue rent and costs before the trial of the ejectment action. Tiffany states that even before the enactment of the statute, the law courts granted tenants relief from a nonpayment forfeiture upon payment of the rent at any time before execution of the judgment in ejectment. *See* 2 TIFFANY, *supra* note 28, § 194, at 1413. Therefore, the result of the statute was to move the time for payment back to before the trial. *See id.*

104. *See* An Act for the More Effectual Preventing Frauds Committed by Tenants, and for the More Easy Recovery of Rents, and Renewal of Leases, 4 Geo. 2, ch. 28, § 4 (1731). If the tenants:

> [D]o or shall at any time before the trial in such ejectment, pay or tender to the . . . landlord [or their attorney] or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case, all further proceedings on the said ejectment shall cease and be discontinued; and if such . . . [tenant], upon such bill filed as aforesaid, be relieved in equity, he . . . shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease to be thereof made to him . . . .

Id.

105. *See* 1788 N.Y. Laws 36.

> That if the tenant or tenants, his, her or their assignee or assignees,

refined the tenant's right to cure, extending it to cases arising both before[106] and after[107] ejectment.

The right to cure a nonpayment default was carried into the summary proceeding statute of 1820.[108] It should come as no surprise, however, that the right addressed only nonpayment defaults: the right to cure emerged from the power of equity to relieve tenants

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shall, at any time before the trial in such ejectment, pay, or tender to the lessor or landlord, his executors or administrators, or his, her or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then, and in such case, all further proceedings on the said ejectment, shall cease and be discontinued; and if such lessee or lessees, his, her or their executors, administrators or assigns, shall, upon such bill, filed as aforesaid, be relieved in equity, he[,] she or they shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease to be thereof made to him, her or them.

Id. § 25.

106. *See* 3 N.Y. Rev. Stat. part III, ch. VIII, tit. 9, art. 2, § 3 (5th ed. 1859).

At any time before judgment in such cause, the defendant may either tender to the landlord, or bring into the court where the suit shall be pending, all the rent in arrears at the time of such payment, and all costs and charges incurred by the lessor; and in such case, all further proceedings in the said cause shall cease.

Id.

107. *See* 3 N.Y. Rev. Stat. part III, ch. VIII., tit. 9, art. 2, § 4 (5th ed. 1859).

At any time within six months after possession of the demised premises shall have been taken by the landlord, under any execution issued upon a judgment obtained by him, in any such action of ejectment, the lessee of such demised premises, his assigns or personal representatives, may pay or tender to the lessor, his personal representatives or attorney, or into the court where the suit shall be pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the lessor; and in such case, all further proceedings in the said cause shall cease, and such premises shall be restored to the lessee, who shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise.

Id.

108. *See* 1820 N.Y. Laws 194, § 3.

That in the case of a proceeding under this act for the non-payment of rent, if the decision of the magistrate or the verdict of the jury, as the case may be, shall be against the person or persons of whom such rent is claimed, the contract or agreement, and the relation of landlord and tenant between the parties shall be thereafter cancelled and annulled, unless the person or persons owing such rent shall forthwith pay the said rent, and the costs of proceeding under this act, or give such security to the person or persons entitled to the said rent, for the payment thereof, with costs, in ten days thereafter, as shall be satisfactory to the said magistrate: *And further*, that no proceeding for non-payment of rent shall take place under this act, in any case where it shall appear that satisfaction for such rent might have been obtained by distress.

Id. (emphasis in original).

from nonpayment forfeitures, and landlords had not yet begun to take advantage of the procedure to include language in their leases to permit termination upon default. Thus, since it was the enactment of the summary proceeding statute that gave impetus to the creation of the conditional limitations,[109] it is fair to assume that by confining the cure provision to nonpayment proceedings, the legislature did not deliberately intend to deny tenants the right to cure after the invocation of a conditional limitation. Rather, the legislature merely failed to focus on what was not then one of its concerns.

Indeed, the legislative concern was to protect a tenant's possession as long as the tenant had money or goods available to pay the rent. Thus, both the ejectment and summary proceeding provisions prohibited actions against the tenant if sufficient property subject to distress was on the premises to satisfy the rent.[110] While the landlord could wield the remedy of distress as a cudgel,[111] the cumulative weight of the legislation reflects an obvious purpose to preserve the tenant's leasehold as long as he could in some way pay the landlord.

The right to cure, first fashioned by equity, then made statutory

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109. *See* Niles, *supra* note 55, at 16. Dean Niles believed that the use of conditional limitations based upon nonpayment of rent would defeat the statutory safeguards provided to the tenant. *See id.* at 26.

110. *See* 1820 N.Y. Laws 194, § 3; 3 N.Y. Rev. Stat. part III, ch. VIII, tit. 9, art. 2, § 1 (5th ed. 1859). In 1846, the legislature repealed distress for rent, *see* 1846 N.Y. Laws 274, and, in 1849, repealed the provisions respecting the absence of sufficient distress on the premises as a precondition for the commencement of a summary proceeding. *See* Peabody v. Long Acre Square Bldg. Co., 188 N.Y. 103, 80 N.E. 657 (1907); 2 RASCH, *supra* note 45, § 993, at 437. In 1840, the legislature provided that a nonpayment summary proceeding could not be commenced if the unexpired term of the lease was more than five years. *See* 1840 N.Y. Laws 162. Two years later, the legislature repealed this provision and substituted a right to redeem by payment within one year after the landlord received possession if the unexpired term of the lease was greater than five years. *See* 1842 N.Y. Laws 240. This right of redemption, which is independent of the right to cure, is current law. *See* N.Y. REAL PROP. ACTS. LAW §§ 761, 763 (McKinney 1979). The statute, however, expressly permits the parties to waive this right. *See id.* Not surprisingly the form leases in general use in New York City contain a waiver of the right of redemption. For example, the Improved Gilsey form lease (Blumberg form A185) provides in paragraph 24th that "[t]he Tenant waives all rights to redeem under any law of the State of New York." Blumberg's Improved Gilsey Form Lease 12-78. The Real Estate Board form of store lease provides that:

> Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of Tenant being evicted or dispossessed for any cause, or in the event of Landlord obtaining possession of the demised premises, by reason of the violation by Tenant of any of the covenants and conditions of this lease, or otherwise.

N.Y. Real Estate Board Standard Form of Store Lease 5-6/73.

111. *See* 3 KENT, *supra* note 28, at 379.

by King George II, and later imported into landlord and tenant statutes when New York became a fledgling state, has survived, albeit with some modernizing and tinkering with its language, to its present version in the New York Real Property Actions and Proceedings Law.[112] This historical right, however, now stands endangered, if not defeated, by decisions that permit a landlord to circumvent the right to cure by the use of appropriate lease language.

IV. The Treatment by the New York Courts of Termination Clauses Based Upon Nonpayment of Rent

Despite the availability of the nonpayment of rent as an independent ground for eviction proceedings, New York courts routinely enforced conditional limitations based upon nonpayment of rent.[113] Only occasionally did a court deny such relief, characterizing the clause in issue as a condition subsequent rather than a conditional limitation.[114] Nevertheless, these latter courts did not relegate the landlord to a costly and lengthy ejectment action as his only alternative. Since the gravamen of the landlord's complaint was that the tenant had failed to pay his rent, these courts forced the landlord merely to switch from a holdover to a nonpayment proceeding.[115] One perhaps unintended result of these decisions was to give the tenant an opportunity to cure his default.[116] They focused, however, upon a technical analysis of the lease language rather than upon the broader issues of: (1) whether public policy favored giving a nonpaying tenant a final opportunity to cure his default; and (2) whether enforcement of a conditional limitation based upon the nonpayment of rent was in derogation of that policy. Moreover, in

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112. *See* N.Y. REAL PROP. ACTS. LAW § 751(1) (McKinney 1979).

113. *See* Birnbaum v. Yankee Whaler, Inc., 75 A.D.2d 708, 427 N.Y.S.2d 129 (4th Dep't), *aff'd*, 51 N.Y.2d 935, 415 N.E.2d 982, 434 N.Y.S.2d 994 (1980); Tehan v. Thomas C. Peters Printing Co., 71 A.D.2d 101, 421 N.Y.S.2d 465 (4th Dep't 1979); Rockefeller Center, Inc. v. La Parfumerie Marco Corp., N.Y.L.J., July 6, 1981, at 5, col. 1 (Sup. Ct. App. T. 1st Dep't 1981); Kazis v. Tab-Tex, Inc., N.Y.L.J., Nov. 1, 1979, at 6, col. 5 (Sup. Ct. App. T. 1st Dep't 1979); Louis J. Ehret Holding Corp. v. Anderson Galleries, Inc., 138 Misc. 722, 247 N.Y.S. 235 (N.Y.C. Mun. Ct. N.Y. County 1930).

114. *See In Re* Guaranty Bldg. Co., 52 A.D. 140, 64 N.Y.S. 1056 (4th Dep't 1900); Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 205 N.Y.S.2d 303 (N.Y.C. Mun. Ct. Queens County 1960).

115. *See* Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 205 N.Y.S.2d 303 (N.Y.C. Mun. Ct. Queens County 1960).

116. The result appears to be unintended since the language of the decisions suggests that the courts were concerned less with protecting the tenant's right to cure a rent default than with avoiding an automatic forfeiture.

those decisions that enforced conditional limitations, the parties apparently had not advanced the policy arguments, and thus the courts did not even consider them.

A. Early Lower Court Decisions Favoring the Right to Cure Over the Right to Terminate

One of the first cases to address the policy issues of the tenant's right to cure expressly is *950 Third Ave. Co. v. Eastland Industries, Inc.*[117] In this case the landlord instituted a commercial holdover proceeding after he had invoked a conditional limitation based upon a rent default.[118] Judge Saxe held the conditional limitation void for public policy reasons: (1) it conflicted with the tenant's statutory right to cure a nonpayment default;[119] (2) the legislature intended that the statutory right to cure be nonwaivable;[120] (3) the conditional limitation constituted an impermissible prospective waiver of a statutory right conferred upon a private party affecting a public interest;[121] and (4) while any waiver of a statutory benefit must be express, not implied, the language[122] of the conditional limitation involved was insufficient since it did not expressly waive the right to cure.[123]

In addition, the court refused to distinguish between residential and commercial leases. Moreover, it regarded as irrelevant that counsel

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117. 119 Misc. 2d 19, 463 N.Y.S.2d 367 (N.Y.C. Civ. Ct. N.Y. County 1983).

118. The tenant's default consisted in failing to pay additional rent for the months of January through September 1982, and the fixed rent for the months of October and November, 1982. *See id.* at 20, 463 N.Y.S.2d at 369.

119. *See id.* at 21-22, 463 N.Y.S.2d at 370.

120. *See id.* at 22-23, 463 N.Y.S.2d at 370-71.

121. *See id.* at 23-26, 463 N.Y.S.2d at 371-73.

122. The terms of the conditional limitations were:

> This Lease and the term and estate hereby granted are subject to the limitation that: . . . (e) in case Tenant shall default in the payment of any fixed rent or additional rent or any other charge payable hereunder by Tenant to Landlord on any date upon which the same becomes due and such default shall continue for 5 days after Landlord shall have given to Tenant a written notice specifying such default, . . . then in any of said cases Landlord may give to Tenant a notice of intention to end the term of this Lease at the expiration of 3 days from the date of the giving of such notice, and, in the event such notice is given, this Lease and the term and estate hereby granted (whether or not the term shall theretofore have commenced) shall expire and terminate upon the expiration of said 3 days with the same effect as if that day were the date hereinbefore set for the expiration of the term of the lease . . . .

Id. at 20, 463 N.Y.S.2d at 369.

123. *See id.* at 27, 463 N.Y.S.2d at 373.

represented experienced businessmen during negotiations[124] and that the negotiations were free from bad faith, duress or unconscionability.[125] Finally, the court denied that its holding precluded landlords from ever bringing holdover proceedings against nonpaying tenants. It held instead that the foundation for such a proceeding required the landlord to demonstrate "a pattern of nonpayment by the tenant continuing over a substantial period of time and the institution of several nonpayment proceedings as a result."[126]

While *950 Third Ave.* was the first decision fully to discuss the policy implications involved when invoking conditional limitations for nonpayment of rent, *57 E. 54th Realty Corp. v. Gay Nineties Realty Corp.*[127] had presaged the *950 Third Ave.* decision. There, a commerical tenant under a fifteen-year lease had habitually paid its rent late for five and one-half years.[128] During this time, the landlord accepted the late payments.[129] When the tenant defaulted for the months of April and May, 1981, the landlord asked the tenant for payment without referring to the conditional limitation provision contained in the lease.[130] When the tenant continued in arrears, the landlord served a three-day notice terminating the lease pursuant to the conditional limitation.[131]

The Appellate Term, First Department, affirmed a dismissal of

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124. *See id.* at 27-28, 463 N.Y.S.2d at 373.

125. *See id.* at 28, 463 N.Y.S.2d at 373.

126. *Id.* at 28, 463 N.Y.S.2d at 374. The court's dicta constituted a borrowing from well-recognized rent control doctrine—under the rent control law, one of the grounds for eviction is a tenant's violation of a substantial obligation of his tenancy. *See* N.Y. UNCONSOL. LAW § 8585(1)(a) (McKinney Supp. 1985). Courts have consistently held that repeated failures to pay rent, which in effect requires a landlord to bring multiple nonpayment proceedings, constitute a violation of a substantial obligation of the tenancy. As a result, the landlord can evict the tenant, even though each nonpayment separately is curable and was cured. *See, e.g.*, Zalaznick v. Imbembo, 35 Misc. 2d 164, 232 N.Y.S.2d 442 (Sup. Ct. App. T. 1st Dep't 1962); 2564 Company v. D'Addario, 35 Misc. 2d 176, 232 N.Y.S.2d 294 (Sup. Ct. App. T. 1st Dep't 1961); Stern v. Harrold, 12 Misc. 2d 73, 174 N.Y.S.2d 484 (Sup. Ct. App. T. 1st Dep't 1958); 974 Realty Corp. v. Ledford, 9 Misc. 2d 240, 171 N.Y.S.2d 908 (Sup. Ct. App. T. 1st Dep't 1957). *But see* Weil v. Chandler, 38 Misc. 2d 58, 239 N.Y.S.2d 514 (Sup. Ct. App. T. 1st Dep't 1962) (two dishonored checks, four nonpayment proceedings, and five months of rent payments paid two weeks late due to financial embarrassment and not to studied purpose to harass the landlord, held not so aggravated and long continued as to establish pattern of nonpayment which violated substantial obligation of tenancy).

127. 71 Misc. 2d 353, 335 N.Y.S.2d 872 (Sup. Ct. App. T. 1st Dep't 1972).

128. *See id.* at 355, 335 N.Y.S.2d at 874 (Lupiano, J., concurring).

129. *See id.*

130. *See id.* at 355-56, 335 N.Y.S.2d at 874-75.

131. *See id.*

the landlord's holdover proceeding.[132] It concluded that: (1) the landlord had breached his implied obligation of good faith, and that the "[l]andlord's effort to bring [the] tenant's lease to an end by subtle device [had] verge[d] on the unconscionable";[133] (2) even if the tenant was in default and late in curing it, equity had long granted relief from leasehold forfeitures resulting from nonpayment of rent;[134] (3) the landlord's failure to tie the forfeiture provision of the lease into its demand for payment precluded it from invoking the conditional limitation;[135] and (4) a breach must be substantial to authorize termination of the lease, and this tenant's delay in paying the rent was not such a material breach as to authorize termination.[136] In conclusion, the court wrote:

> Touching bottom, what did [the] landlord actually lose by the delay in the payment of [the] tenant's rent? A given amount of interest. It could have compelled payment of the rent and of [the] interest by non-payment proceedings. It chose not to. Instead, it chose surreptitiously to reacquire the space by failing to alert the tenant to the consequences of its acts.
>
> [The] [t]enant's delay in paying its rent was not such a material breach of the lease as to authorize [the] landlord to abort this 15-year lease nine years before its normal expiration date . . . .[137]

The *Gay Nineties* decision lent considerable support for the view that a landlord could not turn a nonpayment proceeding into a holdover proceeding by the simple expedient of invoking a conditional limitation based in whole or in part upon nonpayment of rent. First, borrowing from the law of contracts, the court required the breach to be material before the lease could be terminated.[138] Furthermore,

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132. *See id.* at 355, 335 N.Y.S.2d at 874.

133. *Id.* at 354, 335 N.Y.S.2d at 873.

134. *See id.*

135. *See id.* at 355, 335 N.Y.S.2d at 873.

136. *See id.* at 355, 335 N.Y.S.2d at 873-74. Judge Lupiano concurred with the second and third grounds, and also with the theory that since the landlord's consistent acceptance of late payments of rent was a waiver of timely payment, the landlord had to do more than request the payment of rent to re-establish the tenant's obligation to pay rent promptly. *See id.*

137. *Id.* at 355, 335 N.Y.S.2d at 874 (citation omitted).

138. There is, of course, a distinction between a material breach of a covenant and a breach of a material covenant. The *Gay Nineties* court required the breach to be material. *See id.* at 355, 335 N.Y.S.2d at 873-74. This holding is important since the covenant to pay rent is a material, if not the most material, covenant as far as the landlord is concerned. *See* Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 578, 389 N.E.2d 113, 116, 415 N.Y.S.2d 800, 803 (1979).

the court concluded that lateness in the payment of two month's rent was not a material breach—a determination at odds with the normal formulation of conditional limitations, which gives a landlord the right to terminate the lease for any nonpayment of rent.[139] Second, the court considered the landlord's conduct to be on the verge of the unconscionable since he had sought to terminate the lease by "subtle device."[140] Hence, even if the *Gay Nineties* decision were not an outright condemnation of the use of conditional limitations based upon the nonpayment of rent, it did serve notice that such provisions were not favored and would be scrutinized with suspicion and care.

B. Appellate Rejection of a Policy Favoring the Right to Cure Over the Right to Terminate

Following the *950 Third Ave. Co.* decision, the issue of whether to favor the tenant's right to cure over the landlord's right to terminate received increased attention.[141] In *Grande Liberte Cooperative, Inc. v. Bilhaud*,[142] the Appellate Term, First Department, decided that a conditional limitation based on nonpayment of rent in a commercial lease is enforceable in the absence of fraud, exploitative overreaching or other unconscionable conduct on the part

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139. *See supra* note 82 and accompanying text.

140. Professor Berger, in his excellent article, concluded that the subtle device was the "landlord's failure to give [the] tenant stiff warning that continued lateness in paying rent would result automatically in eviction." Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 792, 807 (1974). Another reading suggests the "subtle device" refers to the landlord's attempt to convert nonpayment into a holdover proceeding by invoking a conditional limitation based upon the nonpayment of rent. Certainly there is nothing novel about the rule that the parties may, by their course of conduct, waive timely payment of rent, and that the waiver will continue until the landlord notifies the tenant that the custom may not be pursued in the future. *See* 1 RASCH, *supra* note 45, § 375, at 472-73. Hence, the landlord's failure to advise the tenant that the practice must stop means that the waiver of timely payment continues. Although his failure to notify the tenant would not normally be thought of as a "subtle device," the landlord's conduct in bypassing the normal nonpayment proceeding, with its appurtenant right to cure, and in terminating the lease by invoking a conditional limitation lends itself more to characterization as a "subtle device." *See id.* § 375, at 473-75.

141. Judge Saxe adhered to his decision in Mostazafan Found. of N.Y. v. American Center for Life Assistance, Inc., N.Y.L.J., Sept. 19, 1983, at 16, col. 5 (N.Y.C. Civ. Ct. N.Y. County 1983). In Carmania Corp. v. Kalati, 122 Misc. 2d 334, 470 N.Y.S.2d 316 (N.Y.C. Civ. Ct. N.Y. County 1983), the court mentioned the question but did not address it since the lease provision in issue was not a conditional limitation based upon nonpayment of rent. *See Carmania*, 122 Misc. 2d at 335, 470 N.Y.S.2d at 318.

142. 126 Misc. 2d 961, 487 N.Y.S.2d 250 (Sup. Ct. App. T. 1st Dep't 1984).

of the landlord.[143] Thus, the appellate term came full circle from *Gay Nineties Realty*, to hold that, at least in a commercial setting, conditional limitations based upon nonpayment of rent were perfectly legitimate devices as long as they did not result from fraud or other actionable misconduct. Most important, the *Grande Liberte* court squarely addressed and rejected the argument that such conditional limitations violated the policy embraced in the cure provision of section 751 of the Real Property Actions and Proceedings Law. The court wrote:

> The fact that [the] landlord could, at its option, have brought a nonpayment proceeding . . . in which event the tenant would have had the right to deposit the amount of the final judgment into court prior to the issuance of a warrant . . . did not preclude the landlord from terminating the lease in accordance with its terms and maintaining a holdover proceeding . . . . Nor was the tenant wholly without a remedy in the circumstances. He could have followed the routine practice of obtaining a stay in [s]upreme [c]ourt to toll the running of the cure period and the expiration of the lease, so that the tenancy would remain intact until the merits of the dispute were litigated . . . . This remains the standard procedure in *commercial* disputes, and injunctive relief is as readily available where the subject of the conditional limitation is nonpayment of rent as where any other substantial breach is alleged.[144]

1. Termination of Leases Pursuant to Lease Provisions as Beyond Judicial Cure

The "standard procedure" in commercial disputes[145] for the tenant was a motion for a *Yellowstone* injunction, a procedural device named after the leading case of *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*[146] That case involved a dispute between a shopping center landlord and tenant over who was obligated to comply with a fire department order to install an automatic sprinkler system.[147] A unanimous appellate division determined that

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143. *See id.* at 963, 487 N.Y.S.2d at 251-52.

144. *Id.* at 963-64, 487 N.Y.S.2d at 252 (Sup. Ct. App. T. 1st Dep't 1984) (emphasis in original).

145. *See id.*

146. 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968).

147. *See id.* at 634, 237 N.E.2d at 869, 290 N.Y.S.2d at 722. The lease provided that the landlord could terminate the lease if a tenant default continued for ten days after he received written notice of the default. The clause stated:

> In case lessee shall default in the performance of any covenant or agreement herein contained, and such default shall continue for ten (10)

the lease obligated the tenant to make the installation.[148] A majority of that court, however, refused to terminate the lease, on the ground that the tenant had acted in good faith in seeking a judicial determination of its rights.[149] The court gave the tenant an additional twenty days to install the sprinkler system or to pay for its installation.[150]

The New York Court of Appeals agreed that the tenant was obligated to install the sprinkler system. It disagreed, however, that the lease could be revived, stressing that "the lease had been terminated in strict accordance with its terms"[151] and that the court was powerless to revive it by reading additional language into the lease without some showing of fraud, mutual mistake or other basis of reformation.[152] Stressing that judicial sympathy should not undermine stability of contractual obligations, the court concluded that a provision allowing a landlord to terminate a lease on notice, following a tenant default, is commonplace and neither harsh nor inequitable.[153]

The decision in *Yellowstone* had at least two substantial effects. First, whenever a landlord claimed a breach of the lease, tenants and their attorneys scurried to court for temporary restraining orders and preliminary injunctions designed to stay the running of cure periods and the termination of leases during the pendency of actions for declaratory judgments.[154] Second, because of the volume of

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> days after receipt by the lessee of written notice thereof given by lessor, then lessor, at the option of lessor, may declare said term ended, and may re-enter upon the leased premises either with or without process of law, and remove all persons therefrom.

Id. at 634-35, 237 N.E.2d at 869, 290 N.Y.S.2d at 722-23. The landlord served the tenant with a ten-day notice to cure. *See id.* at 635, 237 N.E.2d at 869, 290 N.Y.S.2d at 723. The tenant responded by the service of a summons commencing an action for a judgment declaring that it was the landlord's obligation to make the installation. *See id.* The tenant thereafter moved for a preliminary injunction, but did not obtain a stay of the running of the cure period. *See id.* As a result, when the ten days expired, the landlord sent a notice terminating the lease. *See id.*

148. *See id.*

149. *See id.* at 637, 237 N.E.2d at 870, 290 N.Y.S.2d at 724.

150. *See id.* at 637, 237 N.E.2d at 870, 290 N.Y.S.2d at 724.

151. *Id.* at 637, 237 N.E.2d at 870, 290 N.Y.S.2d at 725.

152. *See id.* at 637, 237 N.E.2d at 870-71, 290 N.Y.S.2d at 725.

153. *See id.* at 637-38, 237 N.E.2d at 871, 290 N.Y.S.2d at 725.

154. These injunctions are commonly known as *Yellowstone* injunctions. Because of the risk involved to a tenant who failed to obtain such a stay, courts granted such injunctions routinely without requiring a showing by the tenant of reasonable likelihood of success, irreparable injury, and a balancing of the equities. *See* Post v. 120 East End Ave. Corp., 62 N.Y.2d 19, 464 N.E.2d 125, 475 N.Y.S.2d 821

residential *Yellowstone* injunctions arising in New York City, in 1982, the legislature enacted a measure that granted residential tenants in New York City an additional ten-day period to cure their defaults if they lost a holdover summary proceeding based upon termination of the lease occasioned by a tenant default.[155]

This statute effectively limited the application of the *Yellowstone* holding by authorizing a statutory revivification of a lease that otherwise, under *Yellowstone*, would have been terminated forever.[156] Since a default in the payment of rent generally breaches a lease covenant, the effect of the statute is to give a New York City residential tenant an additional ten-day cure period if he lost a holdover proceeding instituted after termination of the lease under a conditional limitation based upon nonpayment of rent.[157] Tenants who either live outside New York City or who use the premises for commercial purposes do not enjoy this additional statutory cushion.

The *Yellowstone* holding is important to this discussion because it recognized that lease termination clauses[158] were commonplace and enforceable in accordance with their terms. Nevertheless, *Yellowstone* addressed a lease termination clause that did not involve the breach

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(1984); *see also* Ameurasia Int'l Corp. v. Finch Realty Co., 90 A.D.2d 760, 455 N.Y.S.2d 900 (1st Dep't 1982); Finley v. Park Ten Assocs., 83 A.D.2d 537, 441 N.Y.S.2d 475 (1st Dep't 1981); Podolsky v. Hoffman, 82 A.D.2d 763, 441 N.Y.S.2d 238 (1st Dep't 1981).

155. Section 753 of the Real Property Actions and Proceedings Law provides:

> 4. In the event that such proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a ten day stay of the issuance of the warrant, during which time the respondent may correct such breach.

N.Y. REAL PROP. ACTS. LAW § 753 (McKinney 1979 & Supp. 1987). While the statute refers to a stay of the issuance of a warrant of eviction, a cure during the applicable period results in the imposition of a permanent injunction barring forfeiture of the lease. *See* Post v. 120 East End Ave. Corp., 62 N.Y.2d 19, 464 N.E.2d 125, 475 N.Y.S.2d 821 (1984); *see also* Flewwellin v. Lent, 91 A.D. 430, 86 N.Y.S. 919 (2d Dep't 1904) (payment of rent prior to issuance of warrant under § 751(1) requires dismissal of proceeding).

156. *See Post*, 62 N.Y.2d at 27, 464 N.E.2d at 129, 475 N.Y.S.2d at 825.

157. If the landlord commenced a nonpayment summary proceeding, the New York City residential tenant would have the protection of the cure provision in § 751(1). *See* N.Y. REAL PROP. ACTS. LAW § 751(1) (McKinney 1979).

158. The *Yellowstone* opinion never characterized the termination clause in issue as a conditional limitation, simply referring to it as the "applicable provisions for terminating the lease," *Yellowstone*, 21 N.Y.2d at 637, 237 N.E.2d at 870, 290 N.Y.S.2d at 724, or "a landlord's right to terminate a lease based upon a tenant's breach of his covenant." *Id.* at 637-38, 237 N.E.2d at 871, 290 N.Y.S.2d at 725. To determine whether this language was a matter of writing style or of substance is purely conjectural.

of a covenant to pay rent. As such, the termination clause served the traditional purpose of conditional limitations—that is, to provide a landlord with a means of evicting a tenant by summary proceedings for a nonmonetary tenant default. And, while the language of the opinion does not waver in its support for the validity of termination clauses generally, the court did not address whether a conditional limitation may be predicated upon a default in the payment of rent, or whether such a clause would run afoul of the policy embodied in the statutory cure provision appended to a nonpayment proceeding.

2. *Decisions Refusing Equitable Relief from Lease Provisions that Specified the Consequences of Nonpayment of Rent*

Grande Liberte also relied upon *Birnbaum v. Yankee Whaler, Inc.*,[159] to support its conclusion that a conditional limitation based upon nonpayment of rent is enforceable in a commercial lease. In *Birnbaum*, a restaurant tenant consistently paid rent late without objection from the landlord.[160] After the landlord's death, the tenant and the landlord's estate entered into a new lease which contained a conditional limitation based upon nonpayment of rent.[161] When the tenant continued to pay rent late, the estate immediately served a notice terminating the lease.[162] The tenant argued that the parties had established a course of conduct that had waived strict compliance with the terms of the lease regarding timely payment of rent[163] and that equitable considerations, chiefly the landlord's failure to repair, activated the equitable maxim that the courts should be reluctant to enforce a forfeiture.[164] The court rejected the first contention, reasoning that while a waiver might have been found against the prior landlord, no waiver existed under the new lease.[165] The court rejected the second contention, stating:

> Where a lease between commercial parties is terminated in strict accordance with its terms, equitable relief should not be granted in the absence of a showing of fraud, exploitive overreaching or

159. 75 A.D.2d 708, 427 N.Y.S.2d 129 (4th Dep't), *aff'd*, 51 N.Y.2d 935, 415 N.E.2d 982, 434 N.Y.S.2d 994 (1980).

160. *See Grande Liberte*, 126 Misc. 2d at 963, 487 N.Y.S.2d at 251.

161. The lease provided that if the tenant defaulted in the payment of rent for thirty days, the landlord could serve a ten-day notice to cure. If the rent remained unpaid during that period, the landlord could terminate the lease and re-enter the premises. *See Birnbaum*, 75 A.D.2d at 708, 427 N.Y.S.2d at 130.

162. *See id.*

163. *See id.*; *see also supra* note 139 and accompanying text.

164. *See Birnbaum*, 75 A.D.2d at 708, 427 N.Y.S.2d at 130.

165. *See id.* at 708, 427 N.Y.S.2d at 130-31.

> some other type of unconscionable conduct on the part of the landlord . . . . This is particularly so where the termination provision relates to payment of rent, since this is such a central part of the bargain between the landlord and tenant . . . .[166]

Another case cited in *Grande Liberte* and *Birnbaum* was *Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*,[167] which upheld a provision in a commercial lease accelerating the rent for the entire balance of the term upon a default in the timely payment of one installment of rent. In its holding, the court emphasized that the "covenant to pay rent at a specified time . . . is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord."[168] The court also stressed that the default at issue was intentional rather than inadvertent[169] and found no forfeiture since the tenant was entitled to possession of the premises for the balance of the term upon payment of the accelerated rent.[170] The court concluded in somewhat ringing terms that "[a]bsent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties."[171]

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166. *Id.* at 708-09, 427 N.Y.S.2d at 131 (citation omitted).

167. 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979).

168. *Id.* at 578, 389 N.E.2d at 116, 415 N.Y.S.2d at 803. The court reasoned that the landlord relied on the tenant's timely payment of rent to discharge his own obligations. *See id.*

169. The tenant's default resulted initially from an inadvertent clerical error: the envelope which contained the rent check had the wrong address. *See id.* at 576, 389 N.E.2d at 115, 415 N.Y.S.2d at 802. The tenant, however, not only failed to cure that default when it was called to his attention, but also exacerbated the situation by defaulting, without explanation, in paying the next month's rent. *See id.* The court strongly hinted that equitable relief from the default would have been appropriate if the tenant had promptly cured its initial inadvertent default. *See id.* at 578-79, 389 N.E.2d at 117, 415 N.Y.S.2d at 803-04.

170. *See id.* at 578, 389 N.E.2d at 116, 415 N.Y.S.2d at 803. The court also held that no forfeiture resulted from the tenant's loss of interest on the almost twenty years' rent it was required to pay in advance, since the amount paid was no greater than the amount the tenant would have had to pay if it fully performed. *See id.* at 578, 389 N.E.2d at 117, 415 N.Y.S.2d at 803. An economic critique of the court's conclusion is beyond the scope of this Article, but the holding can be compared to the determination reached in 57 East 54th Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (Sup. Ct. App. T. 1st Dep't 1972). *Gay Nineties* held that the landlord would be compensated if the tenant paid interest on only the unpaid installment of rent. *See Gay Nineties*, 71 Misc. 2d at 355, 335 N.Y.S.2d at 874.

171. *Fifty States Management Corp.*, 46 N.Y.2d at 577, 389 N.E.2d at 116, 415 N.Y.S.2d at 803.

Fifty States can be distinguished from cases enforcing conditional limitations based upon nonpayment of rent in that it is not technically a forfeiture or eviction case. Nevertheless the court's evident hostility to intentional rent defaults,[172] and the limitation it placed upon its ability to provide relief from a rent default, are important, reflecting an attitude that is decidedly less solicitous toward nonpaying tenants than the attitude of the legislature that created the unfettered right to cure embodied in the Real Property Actions and Proceedings Law.[173] It is true that the parties had expressly agreed on the penalty for nonpayment, and that equity's rejection of the tenant's request for equitable relief revolved around the parties' bargain rather than statutory rights.[174] This situation occurs, however, in all cases involving conditional limitations based upon nonpayment of rent.

Both *Birnbaum* and *Grande Liberte* relied upon *Tehan v. Thomas C. Peters Printing Co.*,[175] a decision that, at the very least, should have warned tenants about the dangers of including conditional limitations based upon nonpayment of rent in leases. In *Tehan*, the tenant entered into a lease with Landlord A in 1973 for a four-year term with a four-year renewal option which the tenant exercised.[176] Although the lease required the tenant to pay rent in advance on the first day of each month, the tenant had lapsed into the habit of paying rent late.[177]

On December 5, 1978, Landlord A sold the leased premises to the plaintiffs. Ten days later, one of the new landlords visited the tenant at the demised premises and offered to purchase the remaining term of the tenant's lease. The tenant refused. The new landlords then wrote to the tenant on December 19, 1978, advising him of their purchase and concluding, "I am writing this letter to let you know that beginning January 1979, the monthly rental which is due on the 1st of each month should now be paid to the undersigned at the above address, instead of [Landlord A]."[178] The next rent payment was due January 2, 1979, the first business day of the

172. The court did not delineate the differences between an intentional and an inadvertent breach. *See id.*

173. *See* N.Y. REAL PROP. ACTS. LAW § 751(1) (McKinney 1979).

174. *See Fifty States Management Corp.*, 46 N.Y.2d at 579, 389 N.E.2d at 117, 415 N.Y.S.2d at 804.

175. 71 A.D.2d 101, 421 N.Y.S.2d 465 (4th Dep't 1979).

176. *See id.* at 102-03, 421 N.Y.S.2d at 466.

177. *See id.* Indeed, in 1978, there never was a month when the tenant paid rent on the first, and rent was paid by the tenant to Landlord A from 25 to 40 days late. *See id.* at 103, 421 N.Y.S.2d at 466.

178. *Id.*

next month. The tenant again failed to pay the rent on the day it was due. As a result, the next day the new landlord, acting pursuant to the conditional limitation, served a notice terminating the lease. Immediately upon receipt of the notice, the tenant tendered the rent, which the new landlords refused. The landlord then instituted a holdover proceeding, which resulted in a judgment of possession in favor of the landlord.

In the Appellate Division, Fourth Department, the tenant first argued that Landlord A's waiver of the timely rent payment established a course of conduct to accept late rent payments and bound the new landlords.[179] The court rejected the argument, holding that the tenant's possession put the new landlords on notice of only those conditions that an inspection of the premises reasonably would reveal, and that any such inspection could not reveal a prior landlord's waiver of timely payment of rent.[180] The tenant's second argument was that the law abhors a leasehold forfeiture, particularly for nonpayment of rent.[181] The court rejected this argument as well, stating that the lease was neither unconscionable nor made between parties of unequal bargaining power. Further, the court stated that the tenant was on notice that the new landlords wanted strict enforcement of the lease provisions regarding nonpayment of rent.[182] Referring to *Fifty States*, the court stated:

> [I]t may be exploitive or even perhaps unconscionable for a landlord to refuse to accept an effort to cure a late rent payment and instead seek to enforce a lease acceleration clause. Nonetheless,

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179. *See id.* at 104, 421 N.Y.S.2d at 467.

180. *See id.* at 104-06, 421 N.Y.S.2d at 467-68. The court's rationale was that no waiver of a contractual right exists without notice, and that the public policy is to preserve the certainty of unencumbered alienability of real estate. *See id.* The court expressed little sympathy for the tenant, stating that, "[t]o intervene in the circumstances here would undermine the stability and certainty of a commercial real estate transaction for the unacceptable reason of judicial sympathy." *Id.* at 106, 421 N.Y.S.2d at 468. The court agreed that a successor landlord had constructive notice of, and hence took subject to, the provisions of the lease and the actual uses of the premises. *See id.*

181. While it is not entirely clear from the opinion, it appears that the tenant relied upon its tender of rent after receipt of the notice of termination. *See id. But see* Lewis v. Clothes Shack, Inc., 67 Misc. 2d 621, 322 N.Y.S.2d 738 (Sup. Ct. App. T. 1st Dep't 1971) (holding that tenant had right to cure nonpayment of rent at any time prior to expiration date specified in notice of termination).

182. *See Tehan*, 71 A.D.2d at 106-07, 421 N.Y.S.2d at 468. The court apparently relied upon the December 19, 1978 letter from the new landlords to the tenant. *See id.* While the letter mentioned that rent was due on the first day of the month, it did not state that the new landlords were insisting on prompt payment on those dates. *See id.*

> the [*Fifty States*] [c]ourt went on to hold that this was a routine commercial lease and absent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord, equitable intervention was not justified . . . .[183]

The decision in *Tehan* appears harsh from a tenant's viewpoint. The landlord had established a pattern of acceptance of late rent. The tenant was only one day in arrears when the new landlords served the notice of termination, and the tenant promptly attempted to cure its default. The landlord had unsuccessfully sought to buy back the balance of the term before seizing on the default. Nonetheless, the court looked to *Fifty States*, a nonforfeiture case, as requiring a showing of fraud, overreaching or some other traditional basis for invoking equity before relief would be granted.[184]

If one frames the question to be whether section 751(1) of the Real Property Actions and Proceedings Law contains a policy to preclude a landlord from converting a nonpayment to a holdover proceeding by terminating a lease for nonpayment of rent, *Birnbaum* and *Tehan* may be distinguished since the tenant's claims were limited to waiver and equitable relief. Furthermore, neither tenant argued that enforcement of the lease provision would contravene such a policy.

On the other hand, while all the cases discussed in this section are distinguishable from one another, taken as a whole they leave the distinct impression that the courts, at least in a commercial setting,[185] do not shrink from enforcing lease termination provisions in accordance with their terms. Additionally, the *Grande Liberte*

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183. *Id.* at 106, 421 N.Y.S.2d at 468.

184. *See id.*

185. There are other statutory policies for refusing to enforce a conditional limitation based upon nonpayment of rent against residential tenants. In refusing to follow *Grande Liberte* for residential tenants and upholding the tenant's right to cure, Judge Saxe addressed these policies in dicta. *See* 520 East 86th St., Inc. v. Leventritt, 127 Misc. 2d 566, 486 N.Y.S.2d 854 (N.Y.C. Civ. Ct. N.Y. County 1985); *see also* 950 Third Ave. Co. v. Eastland Indus., Inc., 119 Misc. 2d 19, 25-29, 463 N.Y.S.2d 367, 372-74 (N.Y.C. Civ. Ct. N.Y. County 1983) (lease provision void because it improperly waives special tenant protection provided under § 751(1) of Real Property Actions & Proceedings Law). Judge Saxe reasoned that enforcement of a conditional limitation based upon nonpayment would severely limit a tenant's right to assert a breach of the warranty of habitability implied in every residential lease by § 235-b of the Real Property Actions and Proceedings Law. *See Leventritt*, 127 Misc. 2d at 570, 486 N.Y.S.2d at 857. Since withholding rent is one of the tenant's most effective weapons to compel landlord compliance with § 235-b, a tenant would only be able to invoke this remedy at the peril of forfeiting his lease. *See id.* Moreover, New York City residential tenants are given additional protection under § 753(4). *See supra* note 155 and accompanying text.

holding that the cure provision of section 751(1) of the Real Property Actions and Proceedings Law did not limit a landlord to a nonpayment proceeding for a rent default was not without support. Certainly the number of decisions enforcing conditional limitations for nonpayment of rent did not offer strong evidence that an existing, accepted public policy was against such provisions.

Nevertheless, after examining the history and development of the right to cure in a nonpayment proceeding, independent of the authorities discussed in this Section, one gets the decided impression that there is also a strong policy to protect tenants from the loss of their tenancies because of nonpayment.

V. Recommendations

Two threads of authority encircle the nonpaying tenant's right to cure. The first, which appears to be in ascendancy at present, permits the landlord to circumvent the right to cure by terminating the lease pursuant to a conditional limitation. This doctrine holds the tenant to the literal language of his bargain, and views the summary proceeding statute as providing the landlord with an option either to commence a nonpayment proceeding or to terminate the lease and evict the tenant as a holdover.[186] The second view, which inheres implicitly if not explicitly in the older cases and statutes, construes the tenant's default more solicitously and, gives the tenant a final opportunity to preserve his estate, as long as the landlord can be made whole by the payment of arrears, interest and costs.[187]

While the opinions avow no connection, it may be that the current eclipse of the right to cure is only one facet of the prevailing tendency to regard leases as contracts rather than conveyances. After all, if a lease is to be treated as a contract, there is no reason why a tenant, and particularly a commercial tenant, should not be held to the letter of his agreement. And if the lease provides that the landlord may terminate it if the tenant fails to pay the rent, so be it. The court is doing no more than what the parties agreed to do.

There is much to commend the view that parties should be bound by the terms of their freely bargained agreements, and that interference by the courts constitutes unwarranted judicial paternalism. There is something psychologically and philosophically satisfying about holding a party to his agreement. Moreover, it adds the virtue

186. *See Grande Liberte*, 126 Misc. 2d at 963-64, 487 N.Y.S.2d at 251-52; *see also supra* notes 141-44, 159-84 and accompanying text.

187. *See supra* notes 47-48, 117-40 and accompanying text.

of certainty to transactions. This view, however, assumes that the agreement is one in which the law should permit free bargaining and surrender of rights—in other words, that the policy of freedom of contract enjoys supremacy over that of protecting tenants from their own improvidence. Certainly, the same virtue of certainty exists if the parties understand that under the law the tenant must be given a final and finite right to cure. And if the law prohibits tampering with that right, enforcement of the law is not unwarranted judicial interference.

A. Policy Reasons for Denying Use of Conditional Limitations to Landlords

This Article suggests that the better policy is to follow the tradition of providing tenants with a final opportunity to cure a monetary default. In accordance with this policy, a landlord should be confined to the use of a nonpayment proceeding for a monetary default. The right to use a conditional limitation to terminate the lease for occasional monetary defaults should be unavailable to the landlord.[188] Several reasons support this suggestion.

First, nonpayment of rent was not the type of default that initially required the use of a conditional limitation.[189] Although the landlords created the conditional limitation to enable them to bring a tenant default within the summary proceeding statute,[190] a landlord always had the right to utilize summary proceedings for nonpayment of rent.[191] Thus, it is unlikely that conditional limitations were created specifically to redress a default in the payment of rent. Although a device created for one purpose may be used for another, the historical basis for the creation of the device is relevant in determining whether courts should adhere to a policy of limiting its use.

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188. Persistent or continued rent defaults which require the landlord to commence multiple nonpayment proceedings are placed in a different category in the rent control laws. Rent control laws view these rent defaults as a substantial violation of the tenancy and, therefore, permit termination thereof. *See supra* note 126. It is suggested that this dichotomy be preserved and that such persistent or continued rent defaults constitute an exception to the right to cure. *See* National Shoes, Inc. v. Annex Camera & Electronics, Inc., 114 Misc. 2d 751, 452 N.Y.S.2d 537 (N.Y.C. Civ. Ct. N.Y. County 1982). No valid policy justifies assisting a tenant who is harassing his landlord or preserving the estate of a clearly economically unviable tenant.

189. *See supra* notes 83-85 and accompanying text.

190. *See supra* note 78 and accompanying text.

191. *See supra* notes 40, 57 and accompanying text.

Second, the English cases that forged the policy of relieving the tenant from the consequences of a rent default focused on the *nature of the default* rather than on the *remedy selected* by the landlord.[192] The English courts granted relief from forfeiture for nonpayment of rent, but refused to grant such relief when the default consisted of the failure to insure or to perform lease covenants, at least when the breach of these covenants was not quantifiable.[193] The use of a conditional limitation to eliminate the tenant's right to cure contravenes this approach by focusing on the remedy selected by the landlord rather than on the nature of the tenant's default.[194]

Third, when the legislature created the summary proceeding statute, it does not appear that it intended to give a landlord a choice of remedies for a tenant's default in the payment of rent. Indeed, permitting a landlord to terminate a lease automatically for nonpayment, by the simple expedient of inserting appropriate language in the lease, was inconsistent with the tenant protections the legislature included in the nonpayment proceeding.[195] It is difficult to conceive that the legislature intended to permit a landlord to use a holdover proceeding to recover possession for nonpayment of rent when there was sufficient property subject to distress on the premises to satisfy such arrears. It is more logical to conclude that the legislature intended that the landlord be limited to a nonpayment proceeding for defaults arising out of the nonpayment of rent. The subsequent abolition of distress[196] does not affect this conclusion since that repeal was merely a reflection of legislative concern that the remedy was capable of being used to abuse tenants.[197] Legislation that bespeaks a concern with tenant abuse does not reflect a desire to do away with tenant protection.

Fourth, the issue under consideration is what is commonly called a zero sum game—that is, any benefit to the landlord is counterbalanced by an equal detriment to the tenant. Giving the landlord the additional weapon of an option to terminate a tenant's lease for nonpayment of rent automatically deprives the tenant of the

192. *See supra* notes 93-98 and accompanying text.

193. *See supra* note 91 and accompanying text.

194. *See supra* notes 65-77 and accompanying text.

195. These tenant protections were both voluntary and involuntary. Not only did a tenant have a post-judgment right to cure (voluntary protection), but also the landlord could not initiate a proceeding if there was sufficient property subject to distress upon the demised premises to satisfy the rent arrearages (involuntary protection). *See supra* notes 75-76 and accompanying text.

196. *See supra* note 110 and accompanying text.

197. *See* 3 KENT, *supra* note 28, at 379.

protection of his statutory right to cure. This result is neither necessary nor socially justified. A landlord is not significantly prejudiced by being required to bring a nonpayment proceeding for a nonpayment default. If the landlord acts expeditiously, he can bring the proceeding to court within a reasonable time.[198] The court can minimize dilatory tenant tactics by conditioning a tenant-requested adjournment upon the deposit of rent with the court or an escrow agent. In addition, if the tenant loses and fails to cure before the warrant is issued, the landlord will recover possession. Even if a nonpayment proceeding adds a few days to the procedure, a result that is by no means certain, it may offer to landlords the advantage of not having to appear in court for an inquest should the tenant default.

In addition, confining a landlord to a nonpayment proceeding for a nonpayment default gives a tenant the certainty and security that are lacking if the landlord has an option to commence either a nonpayment or a holdover proceeding.[199] Moreover, in many circumstances it will avoid the coercive effect of the potential invocation of a conditional limitation.

Let us assume, for example, that a commercial tenant has a lease that provides not only for the payment of a fixed rent but also: (1) for the payment of additional rents based upon a percentage of the tenant's sales; or (2) for rent escalation based upon other complex formulas, such as increased maintenance charges. Assume further that the tenant and the landlord legitimately dispute whether certain items, such as returns and allowances, are proper adjustments to gross sales, or whether to include a particular item of administrative expense in the increased maintenance charges. The landlord threatens to invoke a conditional limitation and to terminate the lease if the tenant fails to pay the disputed additional rent.

The existence of the conditional limitation has tilted the balance in favor of the landlord. If the tenant is wrong, his lease will be terminated forever.[200] In contrast, if the landlord must commence a nonpayment proceeding, the tenant will have the opportunity to cure after an adverse decision.[201] Thus, a policy of fostering impartial

198. *See* N.Y. REAL PROP. ACTS. LAW § 732 (McKinney 1979).

199. A landlord is more likely to attempt to terminate a lease in a rising market when the fair rental value of the premises has outstripped the rent reserved in the lease.

200. *See* First Nat'l Stores, Inc. v. Yellowstone Shopping Center Inc., 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968).

201. *See supra* notes 23-64 and accompanying text.

judicial determination of civil disputes is impaired if the landlord has the additional coercive weapon of a conditional limitation. Although the tenant can seek a *Yellowstone* injunction,[202] this action would needlessly remove a landlord and tenant proceeding to the supreme court, where the policy is to concentrate such matters in an inferior court.[203] Furthermore, turning a summary proceeding into a plenary action would delay the determination and the subsequent payment of rent that may be due the landlord. Nor does this procedure assist the honest tenant who would like to know the scope of his obligation as soon as possible.

Fifth, cases upholding the landlord's choice of remedies generally have proceeded upon the theory that absent fraud, mistake or some other ground for equitable interference, the tenant should be held to his bargain.[204] The decisions of the English chancery court, however, which created equitable relief from rent defaults, do not support this approach. On the contrary, these courts held that a tenant need not demonstrate equitable grounds for relief, but only show that the default was not willful.[205]

No distinction should be drawn between residential and commercial tenancies. Indeed, as discussed above, the commercial tenant is equally if not more likely to be adversely affected in as a substantial and material way by the termination of his lease as is a residential tenant.[206] Many small business transactions are structured to put the seller at risk for a rent default by his purchaser,[207] and many commercial tenants have legitimate disputes concerning the amount of rent that they owe the landlord.[208]

The cases that single out the commercial tenant for less favorable treatment emphasize that the lease was between sophisticated or experienced businessmen, or parties represented by counsel, or parties

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202. *See supra* notes 145-58 and accompanying text.

203. *See* Lun Far Co. v. Aylesbury Assocs., 40 A.D.2d 794, 338 N.Y.S.2d 84 (1st Dep't 1972).

204. *See* Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979); Grande Liberte Co-op., Inc. v. Bilhaud, 126 Misc. 2d 961, 487 N.Y.S.2d 250 (Sup. Ct. App. T. 1st Dep't 1984); *see also* Tehan v. Thomas C. Peters Printing Co., 71 A.D.2d 101, 421 N.Y.S.2d 465 (4th Dep't 1979).

205. *See supra* notes 95-96 and accompanying text. Since § 751(1) gives a nonpaying tenant a right to cure irrespective of the reason for his default, even a tenant whose default is intentional will be entitled to an opportunity to cure. *See* N.Y. REAL PROP. ACTS. LAW § 751(1) (McKinney 1979).

206. *See supra* notes 86-87 and accompanying text.

207. *See supra* note 87 and accompanying text.

208. *See supra* note 200 and accompanying text.

of equal bargaining strength.[209] These notions, however, are legal fictions. The very presence of a conditional limitation based upon nonpayment of rent in a lease belies the notion that the parties are of equal bargaining power or sophistication. The tenant's sophistication more often than not lies in a different discipline. While the landlord's experience is in the leasing business, the tenant's expertise is in the pizza or ready-to-wear or hardware business. Nor does a tenant's representation by counsel, in itself, make a significant difference, since the truly experienced counsel would recognize the dangers of a conditional limitation based upon nonpayment of rent and object to its inclusion in a lease if he had any bargaining power.

The point is that courts make pronouncements of sophistication, experience and equality of bargaining power without taking any evidence on the issue. None of the reported cases relying on these factors based their conclusions upon any testimony concerning the actual experience or sophistication of the parties or their counsel in negotiating, drafting or litigating leases. Their conclusions, rather, pronounce that courts should treat parties to a commercial lease as experienced businessmen and therefore bind them to the terms of the agreement. This view neglects the plight of the small businessman, who stands to lose his business if a landlord invokes a conditional limitation based upon an occasional or short-lived rent default. This businessman is entitled to as much protection as his entrepreneurial ancestor, the tenant farmer, whose estate equity in the seventeenth century protected against forfeiture for nonpayment of rent.[210]

B. Suggested Revision of the Real Property Statute

This Section sets forth a proposed amendment to section 711 of the New York Real Property Actions and Proceedings Law. The amendment precludes a landlord from maintaining a holdover proceeding when he has terminated a lease for a nonpayment default, unless the tenant has been guilty of similar, repeated defaults.

The proposed amendment incorporates the existing language of the statute into a subdivision A and adds a new subdivision B to the statute. Subdivision B, in turn, has three parts.

The first part contains a set of definitions.[211] Part 2 of the statute is straightforward, forbidding a landlord from bringing a holdover

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209. *See supra* notes 124-25, 181-82 and accompanying text.

210. *See supra* notes 125-39 and accompanying text.

211. The first term, Nonpayment Default, is defined as a default in the payment of rent, additional rent, taxes or assessments, or any combination thereof. This definition focuses on monetary obligations that are generally the initial responsibility of the tenant to pay. The definition excludes nonmonetary obligations, since a

proceeding if the sole reason for terminating the lease is a Nonpayment Default. Part 3 contains two exceptions to the general rule of Part 2. The first exception applies when the tenant has been ten days late in paying the stated monetary obligations in four of the previous twelve months. The second exception applies when the landlord, in good faith and for valid cause, commenced a nonpayment of rent or nonpayment of taxes proceeding against the tenant within the previous twelve months. Unless the landlord has waived such previous defaults, the landlord may invoke a conditional limitation, terminate the lease and institute a holdover proceeding under section 711(A)(1).

Proposed Amended Statute

The text of the proposed amended statute follows. The brackets indicate deleted material; the italics, new.

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default in nonmonetary obligations would still constitute a ground for invoking a conditional limitation. In some leases a tenant agrees to perform an obligation, such as making repairs or procuring insurance. If the tenant fails to make the repairs, these leases allow the landlord to make the repairs or purchase the insurance and then charge the tenant the cost as additional rent. These types of omissions constitute an independent nonmonetary default, not covered by the the definition of Nonpayment Default and hence a landlord may still use them as the basis for invoking a conditional limitation.

Leases often contain a grace period for the payment of a monetary obligation (such as "if rent is not paid within five days after the due date thereof"), or a provision for notice of default or nonpayment, or a combination of both ("if rent is not paid within five days after notice of default in the payment thereof has been given to the tenant"). Although some scholars may contend that the Nonpayment Default occurred on the date the lease designated for the payment of rent, this Article recommends that the date of the default be after the receipt of required notice and after the expiration of any applicable grace period.

The second definition is "Limiting Provision," which is a provision that gives the landlord a right to terminate the lease upon a tenant's default. The definition is intended for simplicity, and does not seek to enlarge the jurisdiction of the court by eliminating the substantive distinction between a conditional limitation and a condition subsequent. Unlike the last sentence of the present section 711(1), the provision permitting termination need not be in the lease, and can be in an extrinsic document. This change is to prevent landlords from circumventing the purposes of the statute by requiring tenants to execute a separate document containing a conditional limitation or by inserting a conditional limitation in a separate agreement containing cross default provisions.

Under the last definition, "tenant" includes a predecessor tenant. The purpose of this definition is to clarify that the present tenant will be responsible for late payments by or summary proceedings against a predecessor tenant within the twelve-month period. As a result, the statute minimizes the potential for harassment of the landlord by multiple defaults committed by successive tenants. Since the provision is for the benefit of the landlord, assignees can obtain either waivers or an agreement from landlords not to count their assignors' defaults within the twelve-month period.

§ 711. Grounds for showing a landlord-tenant relationship exists.

A tenant shall include an occupant of one or more rooms in a rooming house or a resident, not including a transient occupant, of one or more rooms in a hotel who has been in possession for thirty consecutive days or longer[;]

A. A special proceeding may be maintained under this article upon the following grounds:

1. The tenant continues in possession of any portion of the premises after the expiration of his term, without the permission of the landlord or, in a case where a new lessee is entitled to possession, without the permission of the new lessee. Acceptance of rent after commencement of the special proceeding upon this ground shall not terminate such proceeding nor effect any award of possession to the landlord or the new lessee, as the case may be. A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deem the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable.

2. The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a demand of the rent has been made, or at least three days' notice in writing requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in section 735. The landlord may waive his right to proceed upon this ground only by an express consent in writing to permit the tenant to continue in possession, which consent shall be revocable at will, in which event the landlord shall be deemed to have waived his right to summary [sic] dispossess for nonpayment of rent accruing during the time said consent remains unrevoked. Any person succeeding to the landlord's interest in the premises may proceed under this subdivision for rent due his predecessor in interest if he has a right thereto. Where a tenant dies during the term of the lease and rent due has not been paid and no representative or person has taken possession of the premises and no administrator or executor has been appointed, the proceeding may be commenced after three months from the date of death of the tenant by joining the surviving spouse or if there is none, then one of the surviving issue or if there is none, then any one of the distributees.

3. The tenant, in a city defaults in the payment [sic], for sixty days after the same shall be payable, of any taxes or assessments

levied on the premises which he has agreed in writing to pay pursuant to the agreement under which the premises are held, and a demand for payment has been made, or at least three days' notice in writing, requiring in the alternative the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served upon him, as prescribed in section 735. An acceptance of any rent shall not be construed as a waiver of the agreement to pay taxes or assessments.

4. The tenant, under a lease for a term of three years or less, has during the term taken the benefit of an insolvency statute or has been adjudicated a bankrupt.

5. The premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.

6. The tenant, in a city having a population of one million or more, removes the batteries or otherwise disconnects or makes inoperable an installed smoke or fire detector which the tenant has not requested be moved from its location so as not to interfere with the reasonable use of kitchen facilities provided that the court, upon complaint thereof, has previously issued an order of violation of the provisions heretofore stated and, subsequent to the thirtieth day after service of such order upon the tenant, an official inspection report by the appropriate department of housing preservation and development is presented, in writing, indicating non-compliance herewith; provided further, that the tenant shall have the additional ten day period to cure such violation in accordance with the provisions of subdivision four of section seven hundred fifty-three of this chapter.

B. 1. For the purposes of this subdivision B:

(a) the term "Nonpayment Default" means a default in the payment of rent, additional rent, taxes or assessments, or any combination thereof. If the lease or other rental agreement gives the tenant a grace period, or requires the landlord to give the tenant notice of a failure timely to pay any or all of such items, or provides for both notice and a grace period, then the Nonpayment Default shall be considered to have occurred only after the required notice has been given and the applicable grace period has expired.

(b) A "Limiting Provision" means a provision, contained in the lease or elsewhere, giving the landlord the right to terminate the lease or the term thereof upon a default by the tenant.

(c) The term "Tenant" includes any predecessor tenant.

2. No holdover proceeding may be commenced or maintained

pursuant to subdivision A.1. upon the ground that the lease was terminated pursuant to a Limiting Provision if the sole default relied upon by the landlord for the termination of the lease consisted of a Nonpayment Default.

3. A Nonpayment Default shall not be considered to be the sole default relied upon by the landlord for termination of the lease if, within the twelve-month period immediately preceding such Nonpayment Default, either (a) the tenant has been more than ten days late in the payment of rent, additional rent, taxes or assessments in each of four or more months (counting each such ten-day period only from the time that all required notices have been given and all applicable grace periods have expired), or (b) the landlord, in good faith and with valid cause, has commenced two or more summary proceedings against the tenant upon a ground specified in subdivisions A.2 or A.3 of this section.

VI. Conclusion

The inclusion in leases of conditional limitations based upon nonpayment of rent has defeated the historical policy of relieving a tenant from a default in the payment of rent and affording him a final and finite opportunity to cure his default by payment. Recently, courts have overlooked or rejected this policy in favor of a policy of holding a tenant to the letter of his bargain. This Article has traced both lines of authority and suggested that the better policy is to confine a landlord to the use of nonpayment proceedings for a nonpayment default. Although no opinion of the court of appeals has directly addressed the issue of whether the statutory policy precludes the use of a conditional limitation to terminate a lease for nonpayment of rent, the lower courts have not found such a preclusion. If it is true that no such preclusion exists, the legislature must address this question and protect a tenant's right to cure a monetary default in both residential and commercial tenancies. To accomplish this goal, the legislature should amend the summary proceeding statute to provide that, when the sole default consists of the nonpayment of rent, additional rent or taxes, the exclusive remedy is through the use of a nonpayment summary proceeding.[212]

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212. To avoid tenant abuse of this protection, an exception should allow the landlord to terminate a lease for persistent or continued nonpayment. The statute should include specific guidelines that provide: (1) that the tenant has been more than ten days late in the payment of rent in four or more of the preceding twelve months; or (2) that the landlord commenced at least two prior nonpayment proceedings within the preceding twelve months.

Such an amendment will preclude a landlord from converting a nonpayment proceeding into a holdover proceeding and will preserve and protect a tenant's historical right to cure.