Annual Survey of Massachusetts Law

Volume 1967

1-1-1967

Chapter 1: Property and Conveyancing

William Schwartz

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Property Law and Real Estate Commons

Recommended Citation

§1.1. Covenants running with the land: Non-competition covenants. It is a well known fact of commercial life that many business investors are concerned about insulating their investments from the adverse effects of competition. The problem is a particularly poignant one for the purchaser or lessee of space in a shopping center, where he is desirous of being the exclusive distributor of certain products or services in the center. One obvious device for attaining this end would be the insertion in the deed or lease of a covenant restraining the grantor or lessor (and their heirs, successors, and assigns) from engaging in competing activities. Unfortunately, however, the Supreme Judicial Court has placed a number of barriers in the path of the full and efficacious use of this tool.

In the early case of *Norcross v. James*,¹ one K had conveyed to one F a quarry of six acres in Longmeadow bounded by land of K. The deed contained a covenant by K to the effect that, "I . . . for myself, my heirs, executors, and administrators covenant with . . . F, his heirs and assigns . . . that I will not open or work, or allow any person or persons to open or work, any quarry on my farm or premises in . . . Longmeadow." N and another acquired F's quarry. J and another became the owners of K's surrounding land and began to quarry stone on that land. N sought to enjoin this activity. The Supreme Judicial Court dismissed the bill. Mr. Justice Holmes, speaking for the Court, held that the covenant did not meet the "touch and concern" test.² He in-

¹ *Norcross v. James*, 140 Mass. 188 (1885).
² Id. at 192.
dicated that before a covenant could run with the land so as to be enforceable by a grantee of the original grantee against a grantee of the original grantor, it must be demonstrated that the covenant "touch or concern" or "extend to the support of the thing" conveyed.

The covenant under consideration . . . falls outside the limits of this rule. . . . In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. ³

In addition, Mr. Justice Holmes referred to the covenant against competition as being a "new and unusual incident" which should not be enforced.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly, — an easement not to be competed with, — and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. ⁴

In Shell Oil Company v. Ouellette, ⁵ decided in the 1967 Survey year, the Court had the opportunity to reconsider the rule in Norcross. It acknowledged that the doctrine of that case has been the subject of substantial adverse comment. ⁶ It further conceded ⁷ that "outside of Massachusetts, there is strong disinclination to be bound (a) by technical rules for the creation and enforcement of the type of equitable servitude discussed in Tulk v. Moxhay, 2 Phil. Ch. 774 . . . ; ⁸ and (b) by any such narrow view of what constitutes a covenant or restriction 'touching' the land as that laid down in Norcross v. James." ⁹ In addition, the Court recognized the cogency and persuasiveness of the position advanced by one of the amici curiae ¹⁰ that it is not "unreasonable to approve covenants . . . which protect . . . [business] investments — very large in most instances — against competition close by," in cir-

---

³ Id.
⁴ Id.
¹⁰ Professor W. Barton Leach, Story Professor of Law, Harvard Law School.
cumstances where the covenant would not constitute an unreasonable restraint of trade. Nevertheless, the Court then proceeded to refuse to overrule the Norcross rule, retrospectively or prospectively, since "in this case, as in probably numerous other past transactions, there may reasonably have been reliance upon Norcross v. James. . . . Our decisions have not heretofore expressed any uncertainty about the soundness of those cases under modern conditions."12

It is true that the fact of reliance by the bar should be given considerable weight where a rule affecting real estate is involved. It would appear to this writer, however, that the reliance factor becomes relevant only to the extent that parties have actually relied on a given rule to their detriment. As applied in the context of non-competition covenants, it would seem to be necessary for those contending for a retention of the Norcross doctrine to show that they actually thought that the covenant was not enforceable at the time they pursued a critical course of conduct in reliance thereon.13 With respect to the original grantor or lessor who has explicitly covenanted in behalf of himself, his heirs, successors and assigns (which covenant runs in favor of the grantee or lessee, and his heirs, successors and assigns), one has considerable difficulty in assuming that he reasonably thought that the covenant was not enforceable against himself by a successor to the original grantee or lessee. Reliance should not bar a retrospective overruling of precedent unless such reliance was justified. The grantor's (or lessor's) own choice of language should preclude him from asserting that the reliance, in those circumstances, was justified. As far as successors in interest to the original grantor or lessor are concerned, it should be necessary for them to prove that their decision to subsequently acquire an interest in the nearby locus was affected by their belief (or their counsel's) that Norcross was still law. Conceivably, this standard might require them to show that they either would not have acquired the interest or would have paid less for it. The approach suggested would make reliance a triable issue. The writer concedes, however, that this approach generally has not been used by courts.14

Furthermore, even if reliance is presumed or could have been demonstrated, it is submitted that if the Norcross rule is undesirable, that the Court had an alternative approach available to it. It could have announced a new rule for the future, without applying it to any case (including Shell Oil) whose facts occurred prior to the date of this decision. With somewhat greater frequency than ever before, courts are engaging in the process of prospective overruling.15 In fact, this ap-

12 Id. at 1068, 227 N.E.2d at 513.
14 For a discussion of the possible rationale for this reluctance, see Nishkin and Morris, note 13 supra.
15 See Leach, Property Law Indicted 14-31 (1967); Nishkin, Foreword to the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L.
proach was suggested to the Court by one of the amici curiae.\textsuperscript{16} The Court responded to this suggestion in the following fashion: "We do not now overrule Norcross v. James . . . prospectively or otherwise. . . . We can consider whether to do so when there is before us a case arising upon a covenant made in the future. In the meantime, application of the pertinent legal principles may have been affected by legislation."\textsuperscript{17}

The Court's reluctance to prospectively overrule Norcross may be explicable on a number of grounds. It may be an application of the "Declaratory Theory of Law" enunciated by Blackstone, who stated that the duty of the court is not to "pronounce a new law, but to maintain and expound the old one."\textsuperscript{18} Another rationale for a court's reluctance to engage extensively in prospective overruling is the institutional consideration that prospective overruling may destroy the incentive of parties to take an appeal.\textsuperscript{19}

Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances, issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or — what may be even more troublesome — if reached by the courts, may be decided upon inadequate argument and consideration.\textsuperscript{20}

In addition, the "Declaratory Theory of Law" plays an important symbolic role in our society.\textsuperscript{21} The ability of the courts to secure respect for and obedience to their decisions may be predicated (partially, at least) on their image of being judges who are bound by fixed rules and who do not create their own rules.

In the course of its decision, the Court indicated that (what it itself called) the "restrictive" view of Norcross had not been adopted even in Massachusetts with respect to leasehold estates,\textsuperscript{22} citing Sheff v. Candy Box, Inc.\textsuperscript{23} Yet, it is interesting to note that this writer has previously questioned the extent to which Norcross has been repudiated in the leasehold area:

The reported cases in Massachusetts have thus far dealt only with

\begin{footnotes}
\footnote{Rev. 56 (1965); Nishkin and Morris, note 13 supra, at 297-317; Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962).}
\footnote{\textsuperscript{16} Note 10 supra.}
\footnote{\textsuperscript{17} 1967 Mass. Adv. Sh. at 1069 n.8, 227 N.E.2d at 513 n.8.}
\footnote{\textsuperscript{18} 1 Blackstone, Commentaries 69 (1769).}
\footnote{\textsuperscript{19} von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 426-427 (1924).}
\footnote{\textsuperscript{20} Nishkin, note 13 supra, at 61.}
\footnote{\textsuperscript{21} On the significance of symbols, see Arnold, Symbols of Government (1935); Whitehead, Symbolism: Its Meaning and Effect (1927).}
\footnote{\textsuperscript{22} 1967 Mass. Adv. Sh. at 1067, 227 N.E.2d at 512.}
\footnote{\textsuperscript{23} 274 Mass. 402, 406-407, 174 N.E. 466, 468 (1931).}
\end{footnotes}
leases of other premises in the same building and have left open the question as to whether the equitable restriction would be enforced against such use of property of the lessor not part of the same building. Thus in *Sheff v. Candy Box, Inc.*, the Court, in distinguishing *Shade v. M. O'Keefe, Inc.*, used the following language: "Here leases of stores for business purposes are in question; and provisions in recorded leases in regard to the use of the various stores, designed for the mutual benefit by restraining competing businesses in a group of seven stores in one building, come well within the reasons which have led courts to hold that certain restrictions run with the land, even though the notice be that constructive notice created by record in the registry of deeds," citing *Parker v. Nightingale*, which involved equitable restrictions on residential lots sold by a land developer. It is to be noted that the land development cases involve lots carved out of one tract and that the doctrine of equitable servitudes applicable thereto has not been extended to include parcels not originally part of a single tract. By analogy, it would seem clear that the court will not enforce the restriction with respect to buildings owned by the lessor in the neighborhood at the time of the execution of the lease, and it is doubtful whether it will do so with respect to buildings on contiguous land.24

Another stricture on the enforceability of non-competition covenants are the rules relating to restraints on trade. The Court has progressed considerably from Holmes' earlier, somewhat absolutist condemnation of them, in *Norcross*, as being an "easement of monopoly." Reasonable restraints on trade are generally sustained.25 In determining whether a given restraint is reasonable, the Court will weigh such factors as: (1) whether the covenant is broader than is necessary for the protection of the promises; (2) the effect of the covenant upon the promisor, and (3) the effect upon the public.26 The rules pertaining to restraints on trade should not prove to be insuperable barriers to the enforceability of non-competition covenants whose operative scope is restricted to a definite time and area.27

§1.2. Easements by implication: Easements created by reference to plans. *Labounty v. Vickers*3 is noteworthy because of its treatment of a wide spectrum of property issues and because the Supreme Judicial Court interpreted, for the first time, a number of the recently enacted statutes, General Laws, Chapter 184, Section 25, which are popularly referred to as Marketable Title Acts. In order to fully grasp the sig-

27 See Stickells, note 25 supra.

nificance of the relevant problems posed in this case, it is necessary to present an extensive description of the factual background of the decision.

In 1879, Patience Gardner acquired a 25.5 acre tract of land. The tract was bounded on the west by Gardner's Neck Road, a public way. The parcel was bounded on the east by Lee's River, a tidal stream. In 1887, an engineer drew a plan of the whole 25.5 acre tract for Patience Gardner. The northeast corner of the tract appearing on the plan was conveyed out to Stephen S. Manchester in 1888. In the deed to Manchester, Patience Gardner expressly reserved a right of way over this parcel for the purpose of bathing at Lee's River.

From this original plan, in 1899 a subsequent plan was drawn up which subdivided the tract into forty-two lots. This plan was recorded in the Registry of Deeds. In addition to its subdivision into lots, the plan showed a forty-foot way, Riverview Avenue, extending easterly from Gardner's Neck Road to the high water mark of Lee's River. Riverview Avenue was laid out and accepted, in part, by the town in 1942. The town did not accept the part of Riverview Road which extended from approximately 160 feet west of Lee's River to the river. The section not accepted, located in front of the defendants' property, was one of the areas in dispute. This section is cleared to the width of the street and is passable, although not macadamized, for both vehicles and foot passengers. It extends to a point around twenty feet from the high water mark, at which point there is about a three-foot drop to the shore. The plan itself indicates nothing concerning the waterfront other than the name "Lee's River."

The first conveyances from the 1899 subdivision were made to the defendants' predecessors in title in the period spanning the years 1900-1902. The lots conveyed to the defendants' predecessors in title are located on the north and south sides of Riverview Avenue, and are the lots closest to Lee's River. References were made in these deeds to the 1887 and 1899 plans, and all of these deeds employed the language "by said Riverview Avenue." In order to insure the defendants' predecessors in title access to these lots, these deeds explicitly provided that Riverview Avenue was forever to be kept open as a right of way to these lots. The grantor did not expressly reserve an easement in the lots so conveyed and there was no reference in these deeds to any other rights or encumbrances on the premises. It was conceded that the defendants' predecessors in title acquired the fee to the portion of Riverview Avenue which is located in front of these lots, but there was disagreement as to whether the fee was burdened with an easement.

Patience Gardner died at some time between 1901 and 1913. Commencing in 1913, her heirs conveyed out all of the remaining lots on the subdivision. The lots conveyed to the plaintiffs' predecessors in interest were on the north and south of Riverview Road, but were removed from the river. The lots of the defendants' predecessors in interest were interposed between those of the plaintiffs' predecessors in
interest and the river. The deeds out made reference to their lot numbers, but made no reference to any rights to and from Gardner's Neck Road or the river.

Since the town had not accepted Riverview Avenue from 160 feet west of the river to the river, there was no public way from the plaintiffs' property to the river. The plaintiffs instituted suit in equity to restrain the defendants from obstructing or interfering with the plaintiffs' access to the river, and to restrain the defendants from obstructing or interfering with the plaintiffs' use of a beach area, the width of Riverview Road, along the river bank. The plaintiffs alleged that they had rights to access and use of the beach by virtue of an easement over the defendants' land which the original grantor had impliedly reserved in her favor and which was impliedly granted to each of the plaintiffs. The plaintiffs further alleged that they, "together with the general public," had acquired an easement by prescription to the use of this area. The cause was referred to a master.

The master permitted the plaintiffs to introduce into evidence a probate petition filed in 1903 by the grantor's guardian. In this petition the guardian sought a license to release his ward's right of way over the Manchester parcel, stating in his petition that the reason for reserving that right of way "no longer exists, a new right of way having been laid out by the petitioner." The defendants duly objected and excepted to the admission of this evidence.

The master concluded that the plaintiffs, except L, had acquired an easement appurtenant to their lots to use the ways shown on the plan as a means of access to the forty-foot section of beach at the end of Riverview Avenue. The conclusion was based on the theory that the deeds out to the defendants' predecessors in title described the lots as bounded by the ways shown and made specific reference to the recorded plan. The master further concluded that the plaintiffs had acquired an easement by prescription to use the forty-foot section at the end of Riverview Avenue for beach and bathing purposes.

With respect to subsequent use, the master found that, although almost all of the homes originally constructed on the lots were summer cottages, a number have now become year-round homes. There is also a public beach located about a mile and a half away from the subject area. The master found that, "at various times" since 1926, "different lot owners moored, launched and beached small boats" in a forty-foot section of beach located at the end of Riverview Avenue, and "did all those things customarily associated with beach use." The trial court adopted the master's report, and on appeal, this decree was affirmed by the Supreme Judicial Court.

In concluding that the plaintiffs had an implied easement to use the forty-foot strip at the end of Riverview Avenue, the Supreme Judicial Court premised its conclusion on the theory that the deeds out made specific reference to Riverview Avenue and the recorded plan. It has been held, in some cases, that an easement arises by implication when
a conveyance of land refers to a map on which spaces for streets or ways are shown. Although some of the Massachusetts opinions speak of this easement as being created by an "estoppel," Professor Powell has suggested that it is more accurate to ascribe its existence to the "combined effect of a peg-phrase in the conveyance and of the circumstances of the conveyance." 3

In fairness to subsequent purchasers, a mere reference to a recorded plan in an earlier deed should not subject the conveyed land to an implied easement unless the plan designates the intended use or easement with reasonable clarity and specificity. 4 Otherwise, subsequent innocent purchasers of the land would not receive their justifiable expectations and would be unable to rely upon the records in seeking to attain that end. The Supreme Judicial Court has recognized that in cases of this nature, the integrity of the recording system is at stake, and has refused to sanction the implication of an easement unless the intended use was clearly delineated on a recorded plan. Thus, in Pearson v. Allen, 5 it was claimed that there was an easement by implication to cross over a triangular area for the purpose of viewing the sea. On the plan, the triangular area in dispute appeared bounded by dotted lines. In rejecting this contention, the Court stated that "the dotted lines on the plan are not a sufficient indication that it was to be kept open." 6 Likewise, in Light v. Goddard, 7 land on a part of a plan was marked as "Ornamental Grounds" and "Play Ground." The Court, holding that there was no implied covenant that the land was to be appropriated for any such purposes, stated:

Nor, in seeking for the intention of the parties, is it to be overlooked that the words on the plan from which the plaintiff seeks to derive an implied covenant are of a very vague and indeterminate character, and that they leave wholly uncertain not only the limits or extent of the land in which a right or privilege is claimed ... but also the particular portion which is to be appropriated for each of the two purposes designated on the plan. It cannot be reasonably supposed that it was the intent of the parties to convey a right or enter into a covenant for the enjoyment of a privilege or easement which was left wholly undefined, and without any means of ascertaining, by reference to the terms of the grant, the extent of enjoyment to which the grantee and those claiming under him might be entitled. 8

Consistent with this approach, the various cases in which easements were implied involved plans which clearly delineated the intended

3 3 Powell, Real Property §409, at 426 (1952).
4 But see Ralph v. Clifford, 224 Mass. 58, 61, 112 N.E. 482, 483 (1916).
5 151 Mass. 79, 23 N.E. 731 (1890).
6 Id. at 82, 23 N.E. at 731.
7 93 Mass. 5 (1865).
8 Id. at 9.
easement or use.\textsuperscript{9} The requisite that the intended use or easement be designated on the plan with reasonable specificity embodies the desirable policy of effectuating a workable and just accommodation of the interests of all of the purchasers of lots in a development. Where the intended use is clearly delineated on the plan, it is fair and equitable to imply an easement. The other lot owners have purchased their parcels in reliance on the representation made in the plan that the area would be developed in accordance with the plan and the purchaser of the burdened lot has been put on notice, by the plan, of the easement. As the Court said in Bacon v. Onset Bay Grove Association:\textsuperscript{10} “It is reasonable to infer that the designations were made as an inducement to buy lands situated like that of the plaintiff.”\textsuperscript{11}

On the other hand, where the standard of reasonable specificity is not satisfied, a subsequent purchaser of the lot sought to be burdened with the easement could not discover, with any degree of certainty, the implied easement by analyzing the plan. Nor could the subsequent purchasers of the allegedly favored lots have relied on any clearly delineated easement when they purchased their parcels. Thus, the implication of an easement, in these circumstances, would be inequitable. This position appears to be supported by the statements of the Court made from time to time, that, when such easements are implied, “it will usually appear that the way referred to is in use or actually staked out on the land.”\textsuperscript{12}

In the instant case, the Court implicitly did take cognizance of the rule that the intended easement be described with reasonable specificity on the plan, in stating:

The conclusion of the master is reinforced by the fact that Riverview Avenue is shown on the plan as extending all the way to the high water mark of Lee's River. . . . It seems obvious that there would be no need to extend the way to the high water mark if the only purpose for the way was to give the defendants' predecessors in title access to their lots from Gardner's Neck Road. . . . It was not necessary, as the defendants contend, that the plan indicate in so many words that the shore was to be used for beach purposes.\textsuperscript{13}

\textsuperscript{9} See, e.g., Carroll v. Hinchley, 316 Mass. 724, 56 N.E.2d 608 (1944) (area designated as a “park” on the plan); Bacon v. Onset Bay Grove Association, 241 Mass. 417, 136 N.E. 813 (1922) (area in dispute was designated on the plan as “Pavilion Park”; speakers' stands, shade areas and trees were also depicted on the plan); Oliver v. Kalick, 223 Mass. 252, 111 N.E. 879 (1916) (plan clearly indicated a setback restriction of 15 feet; line appeared on the plan across all the lots 15 feet back from the street designated “Building Line”); Kaatz v. Curtis, 215 Mass. 311, 102 N.E. 424 (1913) (way defined on plan as running through the defendant's property); Fox v. Union Sugar Refinery, 109 Mass. 292 (1872) (areas designated as passageways).

\textsuperscript{10} 241 Mass. 417, 136 N.E. 813 (1922).

\textsuperscript{11} Id. at 424, 136 N.E. at 816.


There is a division of authority among the jurisdictions as to whether the reference to a plan gives rise to a right to use all ways and spaces clearly delineated on the plan, or whether an easement is implied only where there is also a necessity for such use. Massachusetts has been characterized as adhering to the view, sometimes referred to as the "necessary rule," that "the private right of user accruing to a grantee to whom a conveyance is made by reference to a map or plat on which streets and alleys are laid is limited to the abutting street and such others as are necessary to give the grantee access to a public highway."  

Interestingly enough, in *Regan v. Boston Gas Light Co.*, the Court refused to imply an easement because there was no necessity for such use even though the plan did refer to the "Neponset River" and "Channel." Likewise, in *Pearson v. Allen*, the Court concluded that there was no necessity to imply an easement for the purpose of viewing the ocean. In addition, the Court, in *Wellwood v. Havrah Mishna Anshi Sphard Cemetery Corp.*, stated that "the only necessity contemplated in ordinary cases is that of access to public highways."  

Although one authority indicates that Massachusetts would require only a showing of "reasonable necessity" with respect to parks and other open areas, as distinguished from ways, the dispensation with the requirement of absolute necessity appears to be limited to cases where "parks or other open areas are delineated" upon the plan. In addition, *Bacon v. Onset Bay Grove Association* and *Carroll v. Hinchley*, which have been cited as recognizing the requirement of a showing of "reasonable necessity," involved situations which disclosed an extensive and systematic plan of development of a summer and vacation resort, including the designation of areas as parks, open wooded spaces, groves and recreational sites. Although the Court could arguably have found some degree of "necessity" in the instant case, on the basis that almost all of the homes originally constructed were intended to be summer homes and the nearest public beach being one and one-half miles from the area in dispute, the Court did not explicitly deal with this issue.

If the Court, however, decides to choose between the standards of "necessity" or "specificity" in future cases, it is submitted that a stan-

---

16 151 Mass. 79, 23 N.E. 731 (1890).
17 151 Mass. 79, 23 N.E. 731 (1890).
20 Id.
§1.2 PROPERTY AND CONVEYANCING

The standard of "absolute necessity" is warranted in this type of case. Unlike most of the prior cases, Labounty involves an implied easement by reservation, rather than an easement by grant. Since the grantor is attempting to derogate from the terms of his own conveyance, a showing of "absolute necessity" should be required before an easement is implied in the grantor's favor. In Labounty, the Court's opinion does not refer to this distinction between easements by reservation and easements by grant. Rather, the Court attempted to ascertain the original grantor's intent by relying heavily, once again, on evidence of subsequent use of the disputed area.

Another issue, which was raised by the defendants, was whether the release, of one of the lots in a common scheme of development, from the burdens of an easement constitutes a waiver of the easement with respect to other lots in the development. In 1903, the guardian had petitioned the Probate Court for a license to release the right of way over the Manchester parcel, stating in his petition that the reason for reserving that right of way "no longer exists, a new right of way having been laid out by the petitioner." It was contended that the express release of the right of way on the Manchester lot resulted in a waiver of any implied easement over the defendants' property.

It has been held that an express waiver by the grantors of rights on some lots in a development prevents them from proceeding in a discriminatory and selective manner against the owners of other lots in the development and enforcing similar rights against the other lot owners on a selective and individual basis. In Patrone v. Falcone, the Supreme Judicial Court pointed out that in other jurisdictions "it has been held that a reservation by a common grantor of a general power to release the restrictions on particular lots negatives the intention to establish a common scheme." Although the Court did not find it necessary to consider the effect of such a reservation in that case, it is submitted that, if a mere reservation of a power of release negatives the intention to establish a common scheme, then, a fortiori, the actual exercise of the power of release should either negate the existence of the scheme or constitute a waiver of the power to enforce implied easements as against other lot owners selectively and individually. The Court, however, did not find it necessary to resolve

23 It should be noted that "the rule that a deed is to be construed most strongly against the grantor may render it more difficult to imply an easement by reservation for the grantor's benefit than an easement by grant for the grantee's benefit." Dale v. Bedal, 305 Mass. 102, 103, 25 N.E.2d 175, 176 (1940).
26 See Brief for Defendant at 21-22.
27 See Wedum-Adahm Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937);
29 Id. at 662, 189 N.E.2d at 230.
30 Id. at 663, 189 N.E.2d at 230-231.
the issue in the instant case since it held that "this is not a case in which the plaintiffs must rely on such a common scheme."31

In ascertaining the grantor's intent, the Court relied upon evidence of subsequent use of the area. Although evidence of subsequent use and development of the area may shed some light on what the grantor intended when he made a prior conveyance, this should not obscure the basic issue to be resolved, which is whether the grantor intended to reserve an easement at the time of the earlier conveyance. If no such intent was present at that time, the grantee would have received an unencumbered fee simple absolute. Thus, the property could not subsequently be burdened with easements in favor of other grantees unless the prior grantee was a party to those subsequent conveyances.

In concluding that the grantor intended to impliedly reserve an easement the Court did not spell out the weight, if any, to be accorded certain documentary evidence in the case. The deeds to the defendants' predecessors in title explicitly granted an easement to the defendants' predecessors in title by providing that "Riverview Avenue was forever to be kept open as a right of way to said parcel." The grantor did not expressly reserve any easement over the roadway and there was no reference in the deeds to the plaintiffs of any rights of way. On the other hand, when the grantor intended to reserve a right of way when conveying property, he did so by express language in the deed. Thus, when the grantor conveyed to Manchester, there was an express reservation of a right of way. It may be contended that these deeds indicate that the grantor knew how to create and reserve easements and that he manifested his intent to create or reserve easements by the express terms of the instruments of transfer, and left nothing to conjecture.32

Another interesting evidentiary question was the admissibility of the probate petition to release the right of way over the Manchester parcel. The Court did not feel compelled to decide this question since it felt that the master's conclusions were "supported by the other evidence."33 Although the Court, in Commonwealth v. Fatalo,34 dispelled the notion that there was a separate and sweeping rule of exclusion for self-serving declarations, it clearly recognized that it is the hearsay rule which operates to exclude such declarations. In Labounty, it may be contended that the self-serving declarations, which were made for a nominal consideration, and which appeared in the probate petition for a license to release the right of way over the Manchester parcel, to the effect that the reason for such way "no longer exists, a new right of way having been laid out by the petitioner," were erroneously admitted into evidence in violation of the hearsay rule.

The hearsay rule renders inadmissible extra-judicial statements or

32 "The rights of way appurtenant to these lots being defined by the deed, no implied easement can arise." Prentiss v. Gloucester, 236 Mass. 56, 127 N.E. 796, 799 (1920).
declarations containing assertions of fact, if offered to prove the truth of the matters asserted in the statements. The matter asserted in the probate petition to the effect that the guardian had another right of way to the beach was the cardinal issue involved in this case, the proof of which was indispensible to the plaintiffs' cause of action. The probate petition was obviously offered into evidence in an effort to prove the truth of that statement. It is irrelevant that the declaration appeared in a written document. The hearsay rule also proscribes the admission of hearsay declarations which appear in written documents.

The statement does not fall within the scope of any of the exceptions to the hearsay rule. The declaration should not qualify under the exception pertaining to statements of mental condition. Since the key issue before the Court was the intent of the grantor when he conveyed to the defendant's predecessors in title in 1900, the subsequent declaration in 1903 in the probate petition is inadmissible to prove that intent. Thus, Wigmore states, "subsequent declarations of a past intent are, furthermore, of course not admissible under the present exception...." Professor McCormick, who is perhaps the leading advocate of this exception, concedes that courts generally do not apply this exception to subsequent declarations offered to show previous conduct. The rationale for not admitting subsequent statements into evidence under this exception is well founded, as such subsequent declarations do not contain the guaranty of having been made "in a natural manner and not under circumstances of suspicion."

The Massachusetts decisions have repeatedly refused to admit such subsequent declarations into evidence. The Massachusetts practice has been summarized by one leading commentator as follows:

"[O]ur Court appears to be particularly adamant against reception of self-serving declarations only where offered to show circumstantially the State of Mind or Feelings of the Declarant. The decisions cited to that observable and maintained practice operate on the assumption that because made by a party, and offered on his own behalf, these declarations are so likely to have been made for an ulterior purpose as to call for their automatic rejection."

The Court has summarized its reluctance to admit such statements into evidence as follows:

37 See Wigmore, note 35 supra, §1725, at 85.
38 Id. §1729, at 91.
40 Wigmore, note 35 supra, §1725, at 80.
41 19 Hughes, Massachusetts Practice, Evidence §455, at 605 (1961).
Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention. . . . But, on grounds of public policy, declarations in one's own favor by a party to a suit are not ordinarily received in evidence. In the first place, so far as they purport to be a mere narrative of past events, they are not primarily an expression of present feeling, but a recital of what has been, which for its value depends upon the truthfulness of the speaker. . . . Thirdly, the danger that declarations may have been made for a purpose, when they are sought to be introduced as evidence in favor of the person making them, has led to the exclusion of them, even on the issue of what was the intention or state of mind of the declarant. . . . 42

Nor should the probate petition be admissible as an official written statement. Under that exception, the only statements admissible are those made by a public official in pursuance of a duty imposed by law.43 The statement in this case was not made by a public official, but by Patience Gardner's guardian. In addition, this exception does not make admissible conclusions or opinions arrived at by public officials.44 The statement that the reason for such way "no longer exists" is a conclusion which would, even if made by a public official, not be admissible. Furthermore, only statements of public officials required by public duty are admissible.45 Even if it could be contended that the guardian was a public official, the statement in the petition of the reason for releasing the right of way was not required by a public duty.

No effort was made in the lower court to sanction the admission of the probate petition under General Laws, Chapter 233, Section 65, as a declaration of a deceased person. It was not offered under that statute. The findings failed to indicate that the declarant, the guardian, was deceased, which is a prerequisite to the application of the statute. Furthermore, the statute condones the admission of statements of deceased persons only when "made in good faith and upon the personal knowledge of the declarant." It is apparent from the probate petition itself that it is not within the purview of the statute. The statement in the petition that the "reason for reserving said right of way no longer exists, a new right of way having been laid out by said petitioner" was clearly a statement of a legal opinion insofar as it relates to the issue of whether the grantor impliedly, rather than expressly, reserved an easement. Such statements of opinion are not admissible under the statute.46

Nor can one sustain the admission of this statement on the theory that it formed part of the res gestae. As a matter of law, the statement fails to come within the limitations that "there must be some occur-

42 Viles v. City of Waltham, 157 Mass. 542, 543, 32 N.E. 901, 902 (1892).
43 Leach and Liacos, note 35 supra, at 242-247.
44 Id. at 244.
45 Id. at 243.
rence, startling enough to... render the utterance spontaneous and unreflecting... The utterance must have been before there has been time to contrive and misrepresent..."47 The Supreme Judicial Court has recognized Wigmore's statement to be the "guiding principle" in this area of the law.48

It cannot be contended that this self-serving statement, which was made three years after the first deed out to the defendants' predecessors in title, was "spontaneous and unreflecting" and "made before there has been time to contrive and misrepresent." The most important factor is the time element.49 To be admissible under this exception, it must be demonstrated that "there has not been time for the exciting influence to lose its sway and to be dissipated."50

Nor can it be contended that the statement was part of the res gestae on the theory that it was contemporaneous with the act of filing the probate petition. To be admissible as part of the res gestae, the statement must relate to the circumstances of the occurrence preceding it and not be an utterance relating to some distinct prior circumstance.51 In offering the statement in the petition into evidence, the plaintiffs did not hope to elucidate the act of filing the probate petition, but rather the grantor's intent three years earlier. The statement was, therefore, inadmissible, since it was a narrative of a past event.

The Court's opinion is of interest also because of its interpretation of the recently enacted Marketable Title Acts, General Laws, Chapter 184, Section 25, which provides in material part:

No indefinite reference in a recorded instrument shall subject any person not an immediate party thereto to any interest in real estate, legal or equitable, nor put any such person on inquiry with respect to such interest, nor be a cloud on or otherwise adversely affect the title of any such person acquiring the real estate under such recorded instrument if he is not otherwise subject to it or on notice of it. An indefinite reference means (1) a recital indicating directly or by implication that real estate may be subject to restrictions, easements, mortgages, encumbrances or other interests not created by instruments recorded in due course, ... and (4) any other reference to any interest in real estate, unless the instrument containing the reference either creates the interest referred to or specifies a recorded instrument by which the interest is created and the place in the public records where such instrument is recorded. No instrument shall be deemed recorded in due course unless so recorded in the registry of deeds for the county or district in which the real estate affected lies as to be indexed in

47 Wigmore, note 35 supra, §1750, at 142.
49 Hughes, note 41 supra, §569, at 792-793; McCormick, note 35 supra, §§272, at 580.
50 Wigmore, note 35 supra, §1750, at 142. See Lane v. Moore, 151 Mass. 87, 23 N.E. 828 (1890); Davis v. Davis, 123 Mass. 590 (1878); Inhabitants of Salem v. Inhabitants of Lynn, 54 Mass. 544 (1847).
51 See Wigmore, note 35 supra, §§1750(c), 1754.
the grantor index under the name of the owner of record of the real estate affected at the time of the recording.

The Court held that the easement involved in the instant case was not an "indefinite reference." There are two alternative bases for the Court's decision. First, the Court held that to the extent that the language in the deeds to the defendants' predecessors in title showed an intent to reserve an easement, "that easement was created by the very deed containing the recital and 'recorded in due course.'"52 Alternatively, the Court held that "even if the plan is thought to 'create' the easement, it was a 'recorded instrument' referred to in the deed and its 'place of public records' was specified in the deed."53 The latter conclusion appears to be inconsistent with the provision in the statute which defines proper recordation as follows: "No instrument shall be deemed recorded in due course unless so recorded . . . as to be indexed in the grantor index under the name of the owner of record of the real estate affected at the time of the recording."54 Since the plan was not recorded with a deed, it obviously was not indexed in the grantor index, but rather was recorded in a plan book. Thus, the alleged implied easement should be considered an "indefinite reference," which is not enforceable.

Although at first glance this appears to be a strict and literal interpretation of the statute, it is submitted that it is consistent with and truly effectuates the legislative purpose. In recommending its adoption, the Judicial Council stated that the "exact" purpose of the statute was to "restore in practice and in the doubting minds of the bar and the courts, the original legislative 'intent' of our recording act of 1697,"55 which was described as being an intent to make it "better known what right, title or interest persons have in or to such estates as they shall offer for sale."56 The alleged implied easement involved in Labounty is one of the most latent and obscure type of defects in title, since it requires subsequent purchasers to draw legal conclusions (based on a number of legal requisites pertaining to the creation of implied easements) from factual inferences to be derived from a perusal of a general plan of an area. The enforcement of such an implied easement as against subsequent purchasers is precisely the evil which this statute was designed to eliminate.

It is true, however, that the Court did note the extreme results which could flow from a literal interpretation of the statute. It stated:

The instrument creating an easement by reservation, whether express or implied, would never be indexed in the grantor index under the name of the owner of record of the real estate affected.

53 Id. at 617-618, 225 N.E.2d at 340.
54 G.L., c. 184, §25.
56 Id. at 28.
at the time of the recording. Rather, it would be indexed in the
grantor index under the name of the person who benefits from
the easement. If we were to interpret this statute so as to destroy
all easements created by reservation grave constitutional issues
would be created.\textsuperscript{57}

Unfortunately, the Court failed to specify and elaborate upon the
"grave constitutional issues" which would be created by that inter­
pretation.

It was also contended that the easement would not be enforceable,
due to the failure of the plaintiffs to comply with the provisions of
General Laws, Chapter 184, Sections 28 and 30 (as added by Acts of
1961, Chapter 448, Section 1). Section 28 of that chapter provides that
"no restriction imposed before January first, nineteen hundred and
sixty-two shall be enforceable after the expiration of fifty years from its
imposition unless a notice of restriction is recorded before the expira­
tion of such fifty years or before January first, nineteen hundred and
sixty-four, whichever is later..." There was nothing in the record to
indicate that the type of notice required by Section 28 was ever filed.
All that the record indicated in this respect was that the plans were filed
in 1887 and 1899. In addition, Section 30 of that chapter provides that
"no restriction shall in any proceeding be enforced or declared to be
enforceable... unless it is determined that the restriction is at the
time of the proceeding of actual and substantial benefit to a person
claiming rights of enforcement." No such determination was made in
the case at bar. Since the continued existence of the easement upon
which the plaintiffs sued depended upon their having complied with
these statutory provisions, the burden was upon them to show com­
pliance with these statutes.\textsuperscript{58}

General Laws, Chapter 184, Sections 26 through 30, regulates "all
restrictions on the use of land or construction thereon which... are
imposed by covenant, agreement or otherwise, whether or not stated
in the form of a condition, in any deed, will or other instrument..."
\textsuperscript{59} It was contended that an implied easement, such as the one involved
in the case at bar, would be within the broad coverage of these sections.
The theory behind this argument is that an implied easement in the
forty-foot section must operate as a restriction on the ability of the
defendants to use an area in which all parties had agreed that the de­
defendants had a fee simple absolute. The Court, however, held that the
statute was applicable only to negative easements, equitable servitudes,
and covenants running with the land, and that the statute did not
encompass affirmative easements.\textsuperscript{60} In reaching this conclusion, the
Court relied on a Judicial Council report which in the Court's opinion

\textsuperscript{58}See Copeland v. Boston Dairy Co., 184 Mass. 207, 68 N.E. 218 (1903); Kendall
v. Jennison, 119 Mass. 251 (1876); Mottla, Proof of Cases in Massachusetts §11 (2d
ed. 1966).
\textsuperscript{59}G.L., c. 184, §26.
\textsuperscript{60}1967 Mass. Adv. Sh. at 619, 225 N.E.2d at 341.
“makes clear that this legislation was not concerned with affirmative easements.” More persuasive to this writer is the negative inference the Court draws from the failure of the legislature to specifically refer to easements in this statute as they did in the “indefinite reference” statute. It was also argued that no prescriptive rights were acquired because of the undeveloped, wild and unenclosed character of the land. “It is generally held that title by adverse possession cannot be shown to wild or woodland that has always been open and unenclosed.” The leading authorities and commentators have applied a similar principle to the question of acquiring easements by prescription. “Where the alleged servient tenement is wild or unenclosed some act in addition to mere use is necessary to indicate that the use was had under a claim of right and not as a mere privilege revocable at the pleasure of the owner.” The application of the principle to the question of easements by prescription has been rationalized on the basis that the “claimants’ use can be better regarded as permissive until affirmatively shown to be adverse.” The Court, however, limited this principle to adverse possession cases:

The reason for this rule in the case of adverse possession is that the possession must be shown to be exclusive. Acts of enclosure or cultivation are evidence of exclusive possession. . . . It is not necessary, on the other hand, for one claiming an easement by prescription to show that his use has been “exclusive” in that sense. He must show that his use has been exclusive in the sense that he relies on his own use or those under whom he claims and not on the use by third parties.

The plaintiffs, in their bill of complaint, alleged that the area in dispute has been used by them, “together with the general public, openly, continuously and notoriously.” Generally speaking, American courts have denied the existence of an easement by prescription in the public based upon long-term use. There are a number of sound policy justifications for this rule. It has been suggested that the Recording Acts preclude the recognition of such an interest. Another rationale for the rule is that such easements impose a clog on use and alienability that far outweighs any advantage that could be acquired from

---

61 Id.
63 See 3 Powell, Real Property §413, n.72 (1952); 2 Thompson, Real Property §343 (1961 rep1.); 4 Tiffany, Real Property §1196a (3d ed. 1939).
64 2 Thompson, note 63 supra, §343, at 236.
65 3 Powell, note 63 supra, §413, at 446-447.
them. They are said to form perpetuities of the most objectionable character.\textsuperscript{69}

In a number of recent cases, the Supreme Judicial Court has had occasion to consider this question and has aligned itself solidly with this general rule. Thus, in *Ivons-Nispel, Inc. v. Lowe*,\textsuperscript{70} the Court held that "'persons of the local community' and the 'general public' are too broad a group to acquire by prescription an easement to use private beaches for bathing and for recreational purposes." Interestingly enough, in that case, as in *Labounty*, those claiming an easement by prescription alleged in their pleadings that "'such use was under a prescriptive right established by and for them and other members of the public.'"\textsuperscript{71}

In the instant case, the Court adhered to the general rule and held that evidence of some use by unidentified lot owners in "a way which would have given them an easement by prescription if they had been identified was not sufficient to conclude that all the lot owners had acquired such rights . . . [and that] rights acquired by the identified lot owners were not similarly acquired by all the lot owners."\textsuperscript{72}

\section*{B. Legislation}

\textbf{§1.3. Deeds: Formalities of execution.} Until this year, Chapter 183, Section 6, of the General Laws required that every deed presented for recordation contain the full name, residence and post office address of the grantee, and a statement of the grantee's marital status. As then worded, the statute did not provide any sanctions for nonconformance. Rather it provided: "Failure to comply with this section shall not affect the validity of any deed or prevent it from being recorded." Nevertheless, as a common law proposition, it has been held that a deed in which the name of the grantee was left blank was invalid.\textsuperscript{1}

This year, the Legislature added teeth to the statute by amending it to provide: "No register of deeds shall accept a deed for recording unless it is in compliance within the requirements of this section."\textsuperscript{2} The statute explicitly also provides, however, that the failure to comply with the requirement does not affect the validity of the deed as between the immediate parties (the grantor and grantee) to the transaction. The statute appears to be ambiguous to this writer. It is unclear as to whether the statutory bar to the acceptance of a deed which does not comply with these requisites is merely a statutory mandate directed

\begin{itemize}
\item \textsuperscript{69} Gray, The Rule Against Perpetuities §586 (4th ed. 1942).
\item \textsuperscript{71} Id. See, in accord, that such an easement does not exist, Garrity v. Sherin, 346 Mass. 180, 190 N.E.2d 871 (1963).
\item \textsuperscript{72} 1967 Mass. Adv. Sh. at 621, 225 N.E.2d at 342.
\end{itemize}

\textsuperscript{2} Acts of 1967, c. 381.
to the register and that if the register nevertheless records a deed in violation of the statute, it will still afford constructive notice, or whether the reach of the statute is so broad as to affect the issue of constructive notice.

It is interesting to compare the language used in this statute with the language employed in General Laws, Chapter 183, Section 29. The latter statute provides: "No deed shall be recorded unless a certificate of its acknowledgement or the proof of its due execution ... is endorsed upon or annexed to it. ..." It has been held under that statute that an unacknowledged deed does not afford constructive notice. There is a significant difference in language between the two statutes. The new amendment to Chapter 183, Section 6, refers merely to the register not accepting a deed, whereas Chapter 183, Section 29, explicitly bars recordation. It remains to be seen whether the courts will consider this change in language significant enough to demand a different result on the question of constructive notice.

The new statute contains a number of relatively minor innovations. It is no longer necessary for the deed to contain a reference to the grantee's marital status. This is, of course, consistent with and symmetrical with the statutory curb on dower and curtesy. In addition, the earlier version of the statute provided that if the statements are not contained in the body of the deed, but are endorsed upon it, they are to be entered in the margin of the record. The new statute makes no distinction between statements contained in the deed and statements endorsed thereon.

C. STUDENT COMMENT

§1.4. Landlord and tenant: Implied warranty of habitability: Horten v. Marston. The plaintiff leased a furnished cottage from the defendant for a period of nine months. She was injured when an accumulation of gas above the stove in the cottage exploded as she was attempting to light one of the burners. In an action against the landlord to recover for personal injuries, the trial court allowed recovery on a theory of breach of warranty of fitness for immediate habitation. The court found that the explosion was due to defective insulation and the fact that "the wall cabinets and side cabinets were too close to the burner, closer than allowed by law." The Appellate Division reversed. The plaintiff appealed, and the Supreme Judicial Court, reversing the Appellate Division, HELD: a lease of furnished premises, for a period of nine months was of sufficiently short duration to imply a warranty of habitability.

The primary issue on review was whether a lease for a nine-month


2 Id. at 592, 225 N.E.2d at 311.

http://lawdigitalcommons.bc.edu/asml/vol1967/iss1/4
period came within the implied warranty rule. This rule states that where a landlord leases a dwelling complete with furnishings he impliedly warrants that it is fit for immediate occupation and habitable as a residence. Previous to Horton the rule was held applicable only to "short term" leases. The Supreme Judicial Court reasoned that "the length of the term in the case at bar was not such as to place the risk of concealed defects on the tenant."

The Court did not, however, state a rationale for allowing recovery on a warranty theory for a nine-month lease, but instead quoted from a sequence of precedents showing the development and extension of the warranty rule since its initial application in Massachusetts in 1892. The Court merely concluded that the facts in Horton did not prohibit invocation of the rule and, in fact, offered substantial justification for its further extension.

The Court in Horton adopted the rule of the Maine Supreme Court in Young v. Povich. Povich involved the lease of a furnished dwelling for an eight-month period. The plaintiff-tenant brought an action to recover an advance payment of rent on the ground that the dwelling was unsuitable for occupancy because of bedbugs. The Povich court proposed that "the phrase 'for a temporary purpose' instead of the phrase 'for a short term' . . . would more definitely present the question of fact. . . ." In light of the importance attached to the Povich case by the Horton court it would appear that the "temporary purpose" test is now the rule in Massachusetts.

The relation between landlord and tenant has traditionally been one of caveat emptor: the tenant taking his estate as he finds it and the landlord being held to no implied warranties or covenants as to the condition of the premises. The first important exception to this rule in Massachusetts was Ingalls v. Hobbs. Ingalls concerned a short-term lease (for the summer season) of a furnished dwelling for which the tenant refused to pay rent because the dwelling was infested with bugs. In allowing recovery, the Court held that a dwelling's fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to con-

---

3 In Massachusetts previous to Horton v. Marston, the longest lease to which the warranty theory might have been applicable was three-and-a-half months. See Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947).
4 Id. at 632, 70 N.E.2d at 794.
7 Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).
8 121 Me. 141, 116 A. 26 (1922).
9 Id. at 145, 116 A. at 27.
10 E.g., Borden v. Hirsh, 249 Mass. 205, 210, 143 N.E. 912, 914 (1924).
11 156 Mass. 348, 31 N.E. 286 (1892).
tract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. . . . It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time.\textsuperscript{12}

Since \textit{Ingalls} represented an exception to the general rule of caveat emptor, subsequent cases gave its rationale very narrow interpretation. Earlier cases did not invoke the warranty theory if the fact situation varied significantly from that of \textit{Ingalls}. For example, in \textit{Bolieau v. Traiser},\textsuperscript{13} the plaintiff was a tenant under a four-month lease. She was injured because of a defective closet floor. Relief was denied under the warranty theory because the premises were only partially furnished by the defendant. The Court reasoned that unless the tenant relied on the habitability of the premises solely as they were offered to him by the landlord no warranty would arise.\textsuperscript{14} It would appear that \textit{Horton} does not affect this requirement, and that the requirement that the premises be fully furnished still prevails.\textsuperscript{15}

The \textit{Bolieau} case is also notable in that it explicitly limited recovery to instances where the defect existed precedent to the formation of the lease: "[T]he condition is implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later."\textsuperscript{16} In \textit{Bolieau}, the tenant's rooms were fit for habitation when the plaintiff took possession. The rule in Massachusetts remains that no recovery under a warranty theory will be allowed for injuries caused by defects arising after the lease begins to run.\textsuperscript{17}

There have been several attempts to extend the \textit{Ingalls} warranty to rentals of business property, but the courts have been adamant in holding to caveat emptor in such cases.\textsuperscript{18} It would seem, however, that if the premises were furnished or otherwise prepared for immediate business use, and if the letting was for a temporary purpose, that the rationale of the warranty theory should be just as applicable to such situations as to those where residential premises are involved. Indeed, the emphasis which both the \textit{Horton} and \textit{Povich} courts put on "temporary purpose" as the essential criterion for determining the existence of an implied warranty tends to strengthen such a view. Perhaps the courts have made a policy judgment here that an individual needs more judicial protection in his capacity as lessee of a residence than one

\textsuperscript{12}Id. at 350, 31 N.E. at 286.
\textsuperscript{13}253 Mass. 346, 148 N.E. 809 (1925).
\textsuperscript{14}Id. at 349, 148 N.E. at 810.
who rents for business purposes. In the latter case, there is at least a presumption of some bargaining power. The distinction between business and residential property would still, however, appear questionable.

The Court first departed from its rigid policy of recognizing an implied warranty only when the case presented a fact pattern very closely akin to that of Ingalls in Hacker v. Nitschke. In that case, the warranty was extended to apply to an action of tort by the tenant to recover for injuries caused by a defective ladder included in the furnishings. This was the first case to allow damages for personal injury, as previous cases had restricted recovery to recoupment of rental payments.

Later, Ackarey v. Carbonaro allowed recovery in tort for consequential damages resulting from injuries to the tenant's child when he fell because of a defective porch rail. No negligence was shown on the part of the landlord. Recovery was allowed on the theory that personal injury was a natural and proximate result of the landlord's breach of the implied warranty of habitability. The Ackarey case also solidified the proposition that any condition which renders the dwelling uninhabitable, whether it be in the structure or in the furnishings, will bring the case within the Ingalls rule.

The Horton court based its extension of the time element on the Povich case, in which a lease of eight months was held to fall within the implied warranty rule. Neither the Povich nor Horton courts have set an absolute time limitation beyond which they will refuse to hold the implied warranty of habitability applicable. Prospective tenant plaintiffs have to depend upon a warranty criterion which states only that "the circumstances of each case should be determinative." A closer look, however, at the Horton and Povich opinions indicates a willingness to extend the time element beyond nine months.

The Povich test of a "temporary purpose" may be an attempt to form a more flexible guideline. In adopting the "temporary purpose" test in Horton, the Court impliedly rejected the "short term" test of Ingalls v. Hobbs. Ingalls defined a "short term" as "a few days or a few weeks or months." In attempting to give an idea of what a short term would not be, the Povich court cited Davis v. George, which held that a warranty theory does not apply to leases for a term of five years. The implication is that the idea of "temporary" might well embrace a period of a single year or more.

The Supreme Judicial Court in Horton also indicated that a nine-

21 Id. at 540, 70 N.E.2d at 420. But see Davis v. George, 67 N.H. 393, 39 A. 979 (1893): "Want of repair and structural defects in the house, do not depend upon the furnishings; and there is no more reason why a landlord should bind himself by a warranty against such imperfections in a lease of a furnished house, than there is in a lease of an unfurnished house." Id. at 396, 39 A. at 981.
month period is not necessarily the limit to which it would be willing to extend the implied warranty. This may be inferred from the Court's statement that "we have no occasion to consider whether the doctrine . . . would apply when a house is rented for a year." There seems to be no other purpose for this in the opinion except intentionally to leave open the question as to whether the Ingalls rule applies to a one-year term. A decision that a one-year lease falls within the rule of implied warranty would be significant if only for the great increase in the number of transactions the rule would reach.

It is evident that the principal difficulty the courts will encounter in dealing with the implied warranty of habitability in future cases is determination of whether the length of the lease meets the "temporary purpose" requirement. That expression is not so precise as to enable a case to be readily categorized as either within or without the rule. Perhaps a more satisfactory guideline can be formulated by looking at the rationale behind the warranty theory.

The warranty theory is justified by the presumption that "[a]n important part of what the [tenant] pays for is the opportunity to enjoy . . . [a dwelling] without delay, and without the expense of preparing it for use." It can be assumed that the same dwelling without furnishings would be rented at a lower rate. For the additional consideration which the tenant is paying, he receives the implied warranty that the dwelling is fit for immediate occupation and habitable as a residence. If this is the rationale for allowing an exception to the general rule of caveat emptor, it follows that the warranty should be in effect only so long as the lessee is paying the additional compensation. Under this reasoning, the warranty should run for the entire term of the lease, unless the landlord subsequently effects a downward adjustment of the rent.

Whether the tenant is renting the premises for a "temporary purpose" appears immaterial in light of the rationale for invoking a war-

---


26 Other jurisdictions have already liberalized the implied warranty of the habitability rule to cover one-year leases. E.g., Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In that case, the Wisconsin Supreme Court allowed recovery where a written lease covered a twelve-month term. The court reasoned as follows: "Legislation and administrative rules, such as . . . building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment — that it is socially (and politically) desirable to impose these duties on a property owner — which has rendered the old common-law rule obsolete. To follow the rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor. Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blights, juvenile delinquency, and high property taxes for conscientious land owners." Id. at 595, 596, 111 N.W.2d at 412, 415.

ranty theory. This rationale is not based on time or a "temporary purpose," but rather is based on the ability to occupy immediately for which the tenant is paying. It is, therefore, submitted that the invocation of a warranty theory should no longer be a function of the duration of the rental period. The liability of the landlord is sufficiently limited by the requirement that the defect exists at the time of the letting. This qualification and the rule that the warranty is only implied when the landlord has provided furnishings, seem to be the only limitations consistent with the reasoning behind the warranty.

DANA H. GAEBE