tled against appellant in Glos v. Patterson, 195 Ill. 530, 533, 63 N. E. 272, 273, where it was said: "The competency of these exhibits under the preliminary proof is not denied; but it is insisted that 'they fail to show that the copies contain all the entries in relation to the lot in question.' They did show all that was necessary to make out plaintiff's chain of title. Defendant was at liberty to offer other parts of them, if he chose to do so. It was not necessary for the plaintiff to introduce more than the nature of her case required."

These copies of abstracts showed title from the government by patent in 1842, through regular chain, to George Peterson. on January 28, 1869. From George Peterson to appellee the title was proven by the introduction of deeds and certified copies of deeds. Appellee also offered in evidence the record of a burnt-record decree of the circuit court of Cook county, entered in 1878 pursuant to a mandate of this court, finding and adjudging George A. Springer and Frederick W. Springer to be the owners in fee simple of the premises described in this case. This decree was sufficient to establish title in the Springers at the time it was entered, and if appellee succeeded to their title by regular chain that would have justified the decree, in the absence of proof of title prior to that time.

Appellee introduced in evidence certified copies of deeds from Peterson to Springer, from Springer to Wilson, from Wilson to Springer, from Springer to King, from King to Dale, and from Dale to Ward. The original deeds from Ward to Platt and from Platt to appellee were introduced in evidence. Appellant contends that the preliminary proof contained in the affidavit of Edmond McMahon, agent and attorney for appellee, as to the loss or destruction of the original deeds and the inability of appellee to produce them, was insufficient to authorize the introduction of the certified copies of the deeds. The affidavit, after reciting that the affiant is the agent and attorney of appellee, and that appellee wished to use on the trial of the case certain deeds (describing them particularly), states "that the originals of said deeds are each and all acknowledged and proved according to the laws of the state of Illinois and are entitled to be recorded; that the originals of said deeds are each and all lost or destroyed, and not in the power of said complainant to produce the same; and this affiant further says that to the best of his knowledge said originals of said deeds were not intentionally destroyed or in any manner disposed of for the purpose of introducing in evidence a copy or copies of them, or any of them, in place of said originals, or any of them."

Appellant insists that under the decision of this court in Scott v. Bassett, 194 Ill. 602, 62 N. E. 914, this affidavit was insufficient to authorize copies of the deeds being received in evidence. We think there is a vast difference between the affidavit in that case and the one in this case. In that case the language of the affidavit, that the party desiring to introduce the deeds in evidence was unable to produce them and that they were not intentionally destroyed or disposed of, was held to refer to all the deeds collectively, and not severally, and it was said: "For aught that appears, some one or more of the deeds may have been destroyed or disposed of for the purpose of introducing a copy of the same, and the affidavit in that respect does not comply with the statute." No such objection appears to the affidavit here involved. It states that the original deeds are each and all lost or destroyed, and that they were not intentionally destroyed or disposed of for the purpose of introducing in evidence a copy or copies of them, or any of them, in place of said originals, or any of them. This language plainly refers to and embraces the deeds collectively and severally, and to hold otherwise would be to place an absurd construction upon the affidavit. It sufficiently complies with the requirements of the statute to justify the admission in evidence of the copies of the deeds.

We find no error in the record, and the decree of the circuit court is affirmed.

Decree affirmed.

(248 Ill. 201)

PALMER v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. HIGHWAYS (§ 7*)—PRESCRIPTION—PERMISSIVE USE.

Where travel over a vacant tract originating in a desire to avoid toll gates and the payment of toll was in its beginning permissive and subsequently a drainage ditch separated a strip from the balance of the tract, and the travel continued on the strip only, the travel was presumptively permissive only, and so continued until there was some act warranting a different inference.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 10; Dec. Dig. § 7.*]

2. EVIDENCE (§ 386*)—PAROL EVIDENCE—VARYING TERMS OF JUDGMENT.

Where, on the issue of the existence of a highway over land, it appeared that a special assessment for the construction of a water supply pipe through the land was paid by the agent of the owner, evidence that the persons interested in the construction of the pipe brought before the trustees of the town a written permission of the owner for the laying of the pipe, and that after the permit was obtained the pipe was laid, and that the persons interested paid therefor because the owner would not pay, was admissible to show that the pipe was laid by permission of the owner as against the objection that it contradicted the judgment of confirmation of the assessment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1678; Dec. Dig. § 386.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. PRINCIPAL AND AGENT (§ 23*) — DOCUMENTS—EXISTENCE OF AGENCY.

An entry on the record of a town that a payment of a special assessment was made by an agent of the owner of the land assessed does not prove agency, for the entry is the mere act of the collector of the assessment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

4. TRUSTS (§ 136*)—TESTAMENTARY TRUSTS—PASSIVE TRUST—TITLE OF TRUSTEES.

Testamentary trustees who held real estate under a will whereby testator devised the real estate to the trustees to hold for eight years after his death, when the title should vest in his children, were mere naked trustees, and the title vested at once in the children on the death of the testator.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 179; Dec. Dig. § 136.*]

5. DEDICATION (§ 15*) — HIGHWAYS — ACTS CONSTITUTING DEDICATION.

A common-law dedication of a highway can be established only by clear and unequivocal proof of an intention of the owner to donate the land for a highway, but the intention may be shown by declarations or by acts which plainly manifest it, but not by the mere nonassertion of a right, unless the circumstances establish the intent to donate.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

6. DEDICATION (§ 37*) — HIGHWAYS — ACTS CONSTITUTING DEDICATION.

Where there is clear proof of an unequivocal act of dedication of land for a highway, the dedication becomes effectual on the acceptance by the public, and no definite period of use is required.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

7. DEDICATION (§ 15*) — HIGHWAYS — ACTS CONSTITUTING DEDICATION.

A finding that, when a strip of land was first begun to be used as a way for travel, it was private property, and that since that time the owner had not done any overt act which operated to estop him from claiming that the land was still private property, showed a want of an intention on the part of the owner to dedicate the land for a public highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

8. HIGHWAYS (§ 1*)—PRESCRIPTION — PUBLIC HIGHWAY.

To establish a highway by prescription, the user must be open and notorious, exclusive, continuous, and uninterrupted for 15 years under a claim of right with the knowledge of the owner, but without his consent, and the user must not be merely permissive.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

9. HIGHWAYS (§ 17*)—PRESCRIPTION—PUBLIC HIGHWAY.

Evidence *held* not to establish a highway by prescription because of a failure to show a continuous and uninterrupted use for 15 years.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24; Dec. Dig. § 17.*]

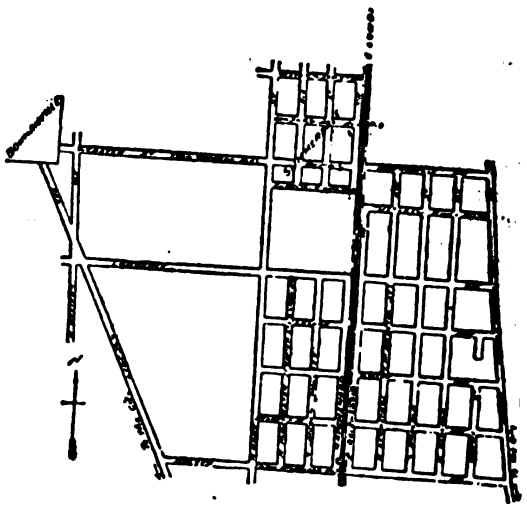
Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Suit by Stanton Palmer against the City of Chicago. From a decree of dismissal, plaintiff appeals. Reversed and remanded.

Herbert H. Reed and Tolman, Redfield & Sexton (Edgar Bronson Tolman, of counsel), for appellant. Edward J. Brundage, Corp Counsel, and Clarence N. Boord, for appellee.

DUNN, J. The question presented by this record is the existence of a highway over certain land, and it is largely a question of fact. The appellant filed a bill for an injunction restraining the appellee from interfering with his possession and control of the strip of land in question, and the appellee answered, claiming the same as a public street. A replication was filed, the cause was referred to a master to report his conclusions of law and fact, and evidence was heard by the master and reported, together with his findings. The appellant's objections, having been overruled by the master, were renewed as exceptions before the chancellor, and on the motion of the appellee to confirm the master's report they were overruled, the master's report was confirmed, and the bill was dismissed for want of equity.

The alleged street was never established by virtue of any legal proceeding or formal dedication. If it ever became a street, it was through an implied dedication or by prescription. The following plat shows the situation:



The tract bounded on the north by Clay avenue (now Argyle street), on the west by North Robey street, on the south by Lawrence avenue, and on the east by the Chicago & Northwestern Railroad is the S. W. ¼ of the S. E. ¼ of section 7. The railroad right of way occupies a strip four rods wide off the east side of the tract. Adjoining the right of way on the west is the strip 80 feet wide which the city claims as a street, extending from Lawrence avenue to Argyle street, and indicated on the plat by a dotted line. The appellant became the owner of this 40-acre tract, subject to the right of way of the railroad company in September,

1906, by virtue of a warranty deed from Malvina B. Armour. It was originally open prairie, and, together with the land north and west of it, was low and was partly under water in the spring. There was a pond in the northeast corner. It remained unbroken and unoccupied until 1885, when Jonathan Ogden, the owner, leased it to Charles Hoffmeyer, whose tenancy continued until 1905. Prior to 1870 the neighboring country was very sparsely settled; the land, when occupied, being used for farms and gardens. Lawrence avenue was not used, and no road was there. The principal roads leading into Chicago from this neighborhood were the Green Bay road (now Clark street) and Lincoln avenue. Bowmanville, which was north and west of the tract in question, was connected with the Green Bay road by the Bowmanville road (now Winnemac avenue). All these were toll roads, and there was a toll gate at the junction of the Bowmanville and Green Bay roads. For the purpose of avoiding the payment of toll by passing around this gate, persons going to and from Chicago traveled north and south over the tract in question, so that in 1871 there was a roadway there similar to an ordinary country road. West of this road a ditch ran south across the tract from near its northern boundary. This ditch was constructed many years before there was any travel over the strip of land in question, and its purpose was the general drainage of the lands, and not the road. There was also a ditch on the east side of the road, but it does not appear when, why, or by whom it was constructed. Outside the track the strip was covered with grass, willows, cottonwood trees, and undergrowth, and its surface remained in practically the same condition until 1905, and was used by people passing north and south, though much less in later years since the improvement of the adjacent streets. About 1873 some one interested in the new subdivision of Summerdale, lying immediately north of this tract, built a two-plank sidewalk along the west side of West Ravenswood Park, in that subdivision, extending south along the west side of the strip in question here, to a point opposite where Tuttle street appears on the plat, then turning east across the railroad through a break in the fence to the east side of East Ravenswood Park, and thence south.

Jonathan Ogden was the owner of this tract from 1857 to his death, in 1888. He lived in Cincinnati, Ohio, and visited Chicago twice a year during the last 10 years of his life. There is no evidence that he ever objected to or acquiesced in the travel over this land or that he ever knew of any such travel or ever saw the land. Apparently no attention was given the land, except to pay the taxes, until the lease to Hoffmeyer in 1885. After that, Charles F. Babcock acted as agent for the collection of the rent until Jonathan Ogden's death, and afterward for the subsequent owners until his own death. On Jonathan Ogden's death the title vested in his three children, of whom Malvina B. Ogden was one, and on the death of her two brothers she became the sole owner. The collection of the rent, the payment of taxes and special assessments, and the management of the property after Jonathan Ogden's death were attended to through the office of Armour & Co. until the conveyance to the appellant.

The travel over this tract, originating in the desire to avoid the toll gates and the payment of toll, was in its beginning entirely permissive. The whole tract lay vacant and unoccupied. The owner had no occasion to occupy it exclusively, and there was nothing to induce him to inclose it. The natural effect of the drainage ditch separating the strip between it and the railroad from the rest of the land was to induce the travel to go over this strip, but did not change the character of the travel. Such travel, because limited by circumstances to this narrow strip, was not, therefore, under a claim of right, but, being permissive in its origin, must be presumed to have continued so, and not to have been adverse until some act done or suffered by the owner warranted a different inference.

On October 26, 1875, an ordinance was passed for the laying of a six-inch water supply pipe in West Railroad Park from Summerdale avenue to Washington avenue, to be paid for by special assessment, and thereafter, upon application to the county court, a special assessment of $526.68 against the 40-acre tract for the laying of said water pipe was confirmed, and said assessment, being afterward returned delinquent, appears of record to have been paid on May 24, 1876, by "Jonathan Ogden, by S. Marrs, His Agent." A resolution of the board of trustees of the town of Lake View was passed on August 20, 1883, directing the town clerk to notify the owners of abutting property to build sidewalks, in accordance with the town ordinances, within 15 days on certain streets, including "the west side of Ravenswood Park from Lawrence avenue to Argyle street." The master found that a six-foot sidewalk was built along the west side of the west ditch in compliance with this ordinance. In 1891 an ordinance was passed for the construction of another six-foot sidewalk along the west side of West Ravenswood Park, for which a special assessment was levied against the Ogden 40 acres. The master finds that a sidewalk was soon after built, and that the owner put it in by private contract and paid for it.

The ordinance for the laying of the water pipe, the resolution of 1883, and the ordinance of 1891 in reference to the sidewalks are stated in the master's report to be the only formal acts proved showing notice to the owner of the adverse claim of the public to this strip as a highway. In regard to the

water pipe ordinance, it was shown by Adam J. Weckler, who was at the time of the occurrence of the events in question a member of the board of trustees and of the committee on waterworks, that prior to the passage of the ordinance the people of Summerdale north of the Ogden tract, represented by Robert Greer, petitioned the board of trustees to extend the water pipes to that subdivision. They were told that this could not be done because the water pipes could not be laid in private property. They then took the matter up among themselves, and afterward brought a written permit from the owner of the property allowing the town of Lake View to lay the water pipe in this ground. After this permit was obtained, the water pipe was laid, and the people of Summerdale had to pay for this pipe because the owner would not pay for it although he was willing to let it go through. The master refused to consider this evidence because the assessment and the payment by the owner were shown by the record. The evidence does not contradict the record. The validity of the judgment of confirmation in every particular is conceded. This testimony does not interfere with, qualify, or limit it in any way. Whatever that judgment adjudicates remains adjudicated. But the fact that before any action was taken toward laying the pipe in this strip the permission of the owner was secured may be shown to determine whether there was any adverse claim of right. The entry showing payment by an agent was the act of the collector of the assessment, and was of no validity to prove agency. Unless the testimony of this witness is rejected, it must be concluded that the water pipe was laid by the permission of the owner. There is no evidence that the assessment was paid by Jonathan Ogden personally, but the evidence is consistent with its payment by someone in his name on behalf of the people of Summerdale. There is some criticism of Weckler's testimony, and it is apparent that he is confused as to the time of some of the events he testifies about, but he is not contradicted and we see no reason to doubt the substantial correctness of his statements.

There is no evidence to show that the notice directed by the resolution of 1883 was ever given by the town clerk, or that Jonathan Ogden, or any agent for him, ever had any notice of the resolution. The evidence that any sidewalk was built in compliance with this ordinance is vague. A sidewalk was built there at some time within two or three years before or after the date of the resolution, but it would be mere conjecture to say that it was built after August 20, 1883, by the owner of this land.

The evidence as to the sidewalk claimed to have been built under the ordinance of 1891 is no more satisfactory. There is no certainty that any sidewalk was built under this ordinance. A second sidewalk was built, but the evidence is indefinite as to when it was built. Jonathan Ogden had died in 1888 leaving a will, whereby he devised this land to trustees to hold for eight years after his death, when the title was to vest in his three children. They were naked trustees and the title vested at once in the children, but by agreement they permitted the land to be managed by the trustees as directed in their father's will. If any presumption is to be indulged as to the person who built the sidewalk, it would be presumed that it was the trustees. It will not be contended, however, that they could, without the consent of the owners, dedicate a street or by their action affect the title to the land.

In 1888 and 1889 Lawrence avenue was macadamized and curbed, and the officials of the city of Lake View acted on the theory that there was no street in the strip in question. The improvement was paid for by special assessment, and the plan and profile of the improvement which were used in the special assessment proceeding indicated that the curb on the north side of Lawrence avenue would begin at the west line of the right of way of the railroad and extend west. The curb was put in, as indicated, across the south end of the strip and closed the strip entirely, so that there was no access to it without driving over the curb. The south half of the Ogden tract, including the strip in question, was assessed to pay for this improvement and the assessment was paid.

On May 1, 1905, the city council of the city of Chicago passed an ordinance for the construction of a sewer in West Ravenswood Park from Winnemac avenue to Clay street, to be paid for by special assessment. For the purpose of making this improvement a drainage district was created, and a map thereof was prepared by the city showing that the north half of the strip in question was included in the drainage district. A special assessment was levied to pay for the improvement, and the sum of $207.93 was assessed against 232 feet of the north half of the southwest quarter of the southeast quarter, described by metes and bounds, with the west line of the railroad right of way as the east line of the premises assessed. This included the whole north half of what is now claimed to have been a street. This assessment was paid.

A common-law dedication of a highway can be established only by clear and unequivocal proof of an intention of the owner to donate the land for a public street. The intention may be shown by declarations or by acts which plainly and unequivocally manifest it, but not by the mere nonassertion of a right unless the circumstances establish the intention to donate the use to the public. A dedication results from an active, and not a passive state of mind; from intention, and not inattention. Grube v. Nichols, 36 Ill. 92; City of Chicago v. Chicago, Rock Island & Pacific Railway Co., 152 Ill. 561, 38 N. E. 768; Town of Bethel v. Pruett, 215 Ill.

162, 74 N. E. 111. If there is clear proof of an unequivocal act of dedication, the dedication becomes effectual at once upon acceptance by the public, and no definite period of use is required. Marcy v. Taylor, 19 Ill. 634; Moffett v. South Park Com'rs, 138 Ill. 620, 28 N. E. 975; Seidschlag v. Town of Antioch, 207 Ill. 280, 69 N. E. 949. The master found that "when the strip of land in question first began to be used as a way for travel it was certainly private property, and that since that time no owner of the land has done any overt act which operates to estop him from claiming that said strip is still private property." Neither party made any objection to this finding. It is in accordance with the evidence. The unequivocal proof of the intention to dedicate this ground to the public use is lacking.

It is insisted by the appellee that the evidence conclusively shows that the disputed strip has become a public highway by prescription. To establish a highway by prescription the user must be open and notorious, exclusive, continuous, and uninterrupted for 15 years, adverse—that is, under a claim of right—with the knowledge of the owner but without his consent. Rose v. City of Farmington, 196 Ill. 226, 63 N. E. 631; O'Connell v. Chicago Terminal Transfer Railroad Co., 184 Ill. 308, 56 N. E. 355; Township of Madison v. Gallagher, 159 Ill. 105, 42 N. E. 316; Town of Brushy Mound v. McClintock, 150 Ill. 129, 36 N. E. 976. There must be something more than mere travel by the public. The user must be under a claim of right by the public, and not by the mere acquiescence of the owner. A permissive use never ripens into a prescriptive right. No prescriptive right was acquired, and no period of prescription began to run in Jonathan Ogden's lifetime. The travel over his unoccupied land began without any claim of right. It was a mere convenience to the farmers and others to go across this uninclosed land, which no one considered a road, and thus avoid paying toll. In the spring and in the wet seasons this way had to be abandoned and travelers were confined to the toll roads, but in dry times it served the convenience of those desiring to use it. It was a winding track through underbrush and trees, and the little work shown to have been done occasionally in cleaning out the ditch and scraping the dirt out of it upon the road and cutting some of the underbrush cannot be regarded as notice that this track was claimed as a public highway. On the other hand, the action of the authorities of the town when they declined to lay a water pipe in the strip without getting the permission of the owner, and later, in 1888, when they ran the curb on the north side of Lawrence avenue across the strip, shutting it off from Lawrence avenue, indicates their intention not to assume control of the strip and their belief that it was not a street.

After Jonathan Ogden's death the travel was not different in character from what it was before. There was less travel after the improvement of Lawrence avenue and the other streets, and as to any work done upon this strip aside from the sidewalk, after the death of Jonathan Ogden, the record is silent. There is no evidence of any claim of public right after Jonathan Ogden's death until the passage of the sidewalk ordinance of December 28, 1891. The owners of the property then were Mrs. Armour and her brothers. They never had any knowledge of the ordinance, so far as the record shows. If it be conceded that travel continued over the alleged street and that after that date it was under a claim of right, it was not uninterrupted for 15 years. In 1905 Joseph Weber was the tenant of the whole tract. Mrs. Armour desired to lease to Hanreddy & McGovern, contractors then engaged in building the Lawrence avenue intercepting sewer, a portion of the premises fronting 850 feet on the railroad and 205 feet deep on Lawrence avenue. She purchased from Weber a release of this portion of the premises, which she then leased to Hanreddy & McGovern, who in October, 1905, entered upon the premises so leased, built a switch track from the railroad across the strip in question, obstructed it with their machinery and by piling clay thereon, and continued in possession until the filing of this bill. If the prescriptive rights claimed by the appellee were made out in all other respects, it would therefore fail because not continuous and uninterrupted for 15 years.

Our conclusion is that the existence of the street claimed has not been established by the clear and unequivocal proof required by law. The decree of the circuit court will therefore be reversed and the cause remanded to that court, with directions to enter a decree granting to the complainant the relief prayed for.

Reversed and remanded, with directions.

(248 Ill. 126)

PEOPLE ex rel. LEE, County Collector, v. CHICAGO, I. & S. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. TOWNS (§ 57*)—TAXATION—PROCEEDINGS—CERTIFICATE OF TOWN CLERK—AMENDMENT.

Since, under Hurd's Rev. St. 1909, c. 139, § 121, requiring the town auditors to audit all claims, claims for bonds outstanding against the town must have been audited and allowed before a tax could be levied to pay them, the electors at the annual town meeting not having the power of auditing claims, the certificate of the town clerk upon which the tax to pay the bond was extended was defective in stating the electors elected to raise their taxation certain sums for paying the bonds, instead of showing that the claim on the bonds was audited by the board of town auditors, and an amendment thereto was properly allowed so as to make it conform to the facts by stating that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes