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Post Testamentary Statements

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that an unexpected obstruction in the direct road would have made even this detour necessary, or permissible.

A servant going upon a little longer, but permissible road, in order to mingle some purpose of his own with the master's business, does not thereby depart from the service.⁵

The suggestion that the analogy of the liability imposed by the workmen's compensation acts can be applied by the courts in these cases without a statute does not seem to be one likely to be adopted.

FLOYD R. MECHEM.

POST-TESTAMENTARY STATEMENTS TO PROVE A LOST WILL UNREVOKED.—[New York] An opinion¹ recently handed down by the New York Court of Appeals presents an interesting problem in the use of post-testamentary statements to prove that a lost will was unrevoked at the testator's death. The will was executed in May, 1923, and was in the custody of the testatrix. Immediately after her death, which occurred in November, 1923, diligent search failed to discover the missing document. A proceeding was then brought under the New York statute² to probate the instrument as a lost will. The execution and contents appear to have been satisfactorily established. The contested questions were the continued existence of the will or its fraudulent destruction by some third person. At the trial proponents were permitted to prove two statements made by the testatrix shortly before her death. One of these was a conversation with her attorney who had drawn the will, to the effect that she believed that her son-in-law knew the combination to the safe in which the will had been kept, and that she had removed it from this safe and placed it in a wall safe in her room. The other statement was made to her brother that her will was in a safe place where her son-in-law could not get at it.

The Court of Appeals, without discussion, held that such statements should have been excluded, merely observing: "That such declarations were not admissible was decided by this court in matter of *Kennedy's Will*, supra (167 N. Y. 163). See also *Throckmorton v. Holt*, 180 U. S. 552."

5. Compare *Ritchie v. Waller* (1893) 63 Conn. 155, 28 Atl. 29, 38 Am. St. 361, 27 L. R. A. 161; *Loomis v. Hollister* (1903) 75 Conn. 718, 55 Atl. 561; *Weber v. Lockman* (1902) 66 Neb. 469, 92 N. W. 591, 60 L. R. A. 313; *Hayes v. Wilkins* (1907) 194 Mass. 223, 80 N. E. 449, 120 Am. St. Rep. 549, 9 L. R. A. (N. S.) 1033; *Lovejoy v. Campbell* (1902) 16 S. D. 231, 92 N. W. 24; *Burton v. LaDuke* 61 Utah 78, 210 Pac. 970; with *McCarthy v. Timmins* (1901) 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; *Stone v. Hills* (1872) 45 Conn. 44, 29 Am. Rep. 635; *Fleischner v. Durgin* (1911) 207 Mass. 435, 93 N. E. 801, 33 L. R. A. (N. S.) 79; *Healey v. Cockerill* (1918) 133 Ark. 327, 202 S. W. 229, L. R. A. 1918-D, 115; *Carrier v. Donovan* (1914) 88 Conn. 37, 89 Atl. 894; *Colwell v. Bottle Co.* (1912) 33 R. I. 531, 82 Atl. 388; *Danforth v. Fisher* (1908) 75 N. H. 111, 71 Atl. 535, 139 Am. St. Rep. 670, 21 L. R. A. (N. S.) 93. See also *Bloodgood v. Whitney* (1923) 235 N. Y. 110, 139 N. E. 209; *Edwards v. Earnest* (1922) 208 Ala. 539, 94 So. 598.

1. In re *Staiger's Will* (1926) 243 N. Y. 468, 154 N. E. 312.

2. (1920) N. Y. Laws ch. 928 sec. 143.

The *Kennedy* case³ sustained the exclusion of similar evidence, in part on the peculiar provisions of the New York statute on lost wills, and in part on what the court accepted as the proper rule of evidence.

"The petitioners were, therefore, obliged to prove, either that the will and codicil presented for probate existed at the time of the testatrix's death or had been fraudulently destroyed in her lifetime. . . . The fact in issue was whether the instruments in question were physically in existence at the time of the death of the testatrix, and, if not, whether they had been fraudulently destroyed during her life. If the evidence offered did not prove, or tend to prove this issue, it was properly excluded. . . . The Supreme Court of the United States has recently passed upon the questions involved in this case, in a decision to which our attention was called. . . . As I read that case (*Throckmorton v. Holt* 180 U. S. 552), it is a decision of the highest court in the land that the declarations of the deceased, *when not a part of the res gestae*, are not admissible to prove the execution of the will or its revocation, or to rebut the presumption of revocation from the fact that no will is found after death."

If the statute has so limited the probate of lost wills that an unrevoked will, not fraudulently destroyed, could not be probated unless actually in existence at the testator's death, it follows as a matter of course that proof of the execution and contents and that the will was never revoked would not per se entitle the proponents to probate. But since the court in both cases invoked the presumption of revocation, it would seem that any competent evidence negating revocation would be admissible, both to rebut that presumption, and to increase the probability of the will's continued existence.

A will in existence shortly before testator's death must have continued in existence unless in the interim it was destroyed by accident, or by the intentional act of the testator, or by the fraudulent act of some third person. The elimination of one of these possibilities increases the probabilities of continued existence. Assuming, therefore, that evidence fairly tending to show that testator did not intentionally destroy his will is relevant under the New York statute, the competency of statements by the testator for this purpose becomes important.

The general rule against hearsay normally excludes the mere assertion of a past fact or event to prove the truth of the matter or fact thus asserted. There are, of course, a number of specific exceptions to this general rule of exclusion. For example, dying declarations in criminal prosecutions for homicide, statements of family relationship in pedigree cases, statements by persons since deceased against pecuniary or proprietary interest, entries in the regular course of business, etc., are well established. But until quite lately there was no peculiar exception recognized in favor of statements made by a testator not falling within one of these excepted groups. His statements that he had made a will, or had

3. In re *Kennedy's Will* (1901) 167 N. Y. 163.

destroyed his will or had not destroyed his will, would undoubtedly have been excluded by the general rule, if offered to prove the fact so asserted.

The ruling in the *St. Leonards* case⁴ in 1876, that statements by a testator of the contents of his will were admissible to prove the contents of a lost will, or at least to corroborate other evidence of contents, was a departure from the previous English doctrine. In fact the court went out of its way to overrule previous cases⁵ where such evidence had been held inadmissible for that purpose. The court was doubtless influenced by an instinctive feeling that the testator's carefully thought-out plan for the distribution of his property ought not to be frustrated by accident or spoliation if there was any possible way to discover the contents of this strangely missing instrument.

While later English cases⁶ throw more or less doubt on this innovation, it has gained a considerable acceptance in the United States, and there is an increasing number of late cases⁷ sanctioning the admission of testator's post-testamentary statements of the contents of his will to prove the contents for various purposes.

Since no substantial distinction can be drawn between the testator's statement of the contents of his will to prove its actual contents, and statements of any other past fact or event in respect to the will, statements by the testator that he had destroyed or revoked his will have been received to prove such facts.⁸

The soundness of this new exception to the hearsay rule may well be doubted. It opens up a dangerous field for the manufacture of evidence without much chance of detection. And even where such statements have undoubtedly been made, their value is hard to estimate because the testator may not remember accurately the contents of a will made long ago, or his own past conduct. From the fact that he has been unable to find his will among his papers he may erroneously conclude that he destroyed it at some prior time when he contemplated a change in the disposition of his affairs. Or the testator may have various reasons, difficult to bring to light after his death, for misleading members of his family as to the contents or destruction of his will.

Mere assertions of the existence of a will, or references to it as in existence to prove the fact so asserted, seem hardly less objectionable.

4. *Sugden v. St. Leonards* (1876) 1 Pro. & D. 154.

5. *Doe v. Palmer* (1851) 16 Q. B. 747; *Quick v. Quick* (1864) 3 Sw. & Tr. 442.

6. *Woodward v. Goulstone* (1886) 11 A. C. 469.

7. *McDonald v. McDonald* (1895) 142 Ind. 155; *Griffith v. Higginbotham* (1914) 262 Ill. 126; *Mann v. Balfour* (1905) 187 Mo. 290; *Atherton v. Gaslin* (1922) 194 Ky. 460. In *re Johnson's Est.* (1920) 170 Wis. 436 (on issue of forgery). *State v. Scott* (1926) 242 Pac. (Calif.) 939 (on issue of forgery).

8. *Leemon v. Leighton* (1924) 314 Ill. 407, 145 N. E. 631, commented on in ILLINOIS LAW REVIEW XIX 577.

A theory has sometimes been advanced to obviate the difficulties of the hearsay rule as applied to this class of statements, namely, that they might be received, not as direct evidence of the fact asserted, the existence of the will, but as circumstantial evidence of the testator's belief in the existence of the will, which he could not entertain if he had intentionally destroyed it.

The chief objection to this theory is that it involves refinements beyond the capacity of the average jury, and that its general acceptance would wipe out most of the hearsay rule. Every assertion of a fact by a person in a position to know involves an implication of his belief in the truth of the statement, a belief which he could not entertain if the fact were otherwise, provided of course that his memory is not at fault. In general the process of reasoning from the belief of an unsworn uncross-examined declarant to the truth of the thing believed, whether the belief is directly asserted or only implied, is, or has been, under the ban of the hearsay rule. Thus, on an issue of testamentary capacity, business letters from third persons, since deceased, to the testator, though implying the belief of the writers in such capacity, were held inadmissible.⁹ The letters were good evidence of the belief of the writers, if any legitimate use could have been made of such belief. But the belief was not to be used to prove that it was well founded. And the older cases certainly made no distinction between the belief of the declarant as to his own past conduct, and his belief as to any other past fact.

The use of belief as the basis for an inference as to probable subsequent conduct involves an entirely different problem. Without attempting to collect the array of cases on the point, it may be conceded that the hearsay rule should exclude post-testamentary statements that a will is in existence or is not in existence to prove such facts either directly or by inference from the belief to the truth of the thing believed.

But it does not necessarily follow that all post-testamentary statements should be excluded on the issue of revocation vel non, when not a part of the *res gestae*,¹⁰ i. e., when not made con-

9. *Wright v. Tatham* (1837) 7 Ad. & E. 313.

10. As has been pointed out many times, this nebulous phrase has been used in five or six different senses, to the great confusion of the law, viz.: (a) Where the issue involves some physical act and a manifested intent, and hence the words are provable because involved in the issue. (b) Where the issue involves some physical act and an actual or subjective intention, and the accompanying words assert or imply the intention. The words are here admitted by way of exception to the hearsay rule because of the difficulty of proving intention in any other way. (c) Where intention is relevant to the issue, and apparently natural and spontaneous statements of intention are admitted to prove it, though not connected closely in point of time with any physical act. (d) Where words are used purely circumstantially to show some mental or emotional state. (e) Where the words are apparently the natural and spontaneous reaction of the speaker to some external event, before he has had time to reflect, as in *People v. Del Vermo* (1908) 192 N. Y. 470. This attempted classification by no means exhausts the uses of this phrase, but is sufficient to indicate caution when admitting or rejecting evi-

temporarily with some act in respect to the document. When it is important to find out the actual intention with which an act was done, statements at the very time expressly or impliedly asserting the intention have always been received to prove such intention, because of the inadequacy of other means of proof. When these conditions are fulfilled admissibility is settled by countless precedents. But inadmissibility by no means follows because the statements are not contemporaneous or closely connected in point of time with some physical act. Courts have apparently thought so at times, and have struggled hard to make a strict theory fit a more liberal practice.

As a matter of fact, where intention is involved in the issue no court has consistently restricted statements to prove intention to such as accompanied, and were contemporaneous with the physical act involved. While paying lip service to the time-worn phrase, they made it indefinitely elastic. Thus, in an early bankruptcy case,¹¹ where in an action by the assignees against a third person it became necessary for the plaintiffs, under the English practice, to prove an act of bankruptcy, which was alleged to be a departure from the realm with the intent to delay creditors, it was held proper to admit statements made by the bankrupt several weeks after his departure from England, indicating that he feared to return and put himself within reach of process. The court quite naturally and legitimately argued from the bankrupt's subsequent fear of creditors and his intention to remain out their reach that he had the intention to escape from them when he left some weeks before. The admissibility of these subsequent statements troubled the court because of the supposed limitation of the *res gestae* phrase, but the difficulty was solved by calling the act *continuous*.¹² Obviously the act,

dence because it is or is not a part of the *res gestae* according to some one of its various meanings.

11. *Rawson v. Haigh* (1824) 2 Bing. 99.

12. At a much later period the Court of Appeals of New York indulged in the same sort of reasoning to avoid the supposed limitation of the *res gestae* notion. The plaintiff sued as the assignee of an insurance policy on the life of a man who had committed suicide. Under the laws of New York suicide was no defense. But the defendant set up that the policy was taken out with the intention to commit suicide and thereby defraud the insurer. Evidence was admitted of statements made by the deceased prior to the issuance of the policy indicating his purpose to obtain insurance for the benefit of various persons and then kill himself. These statements were not made contemporaneously with the act of obtaining the policy. The court disposed of the difficulty which the *res gestae* phrase seemed to create, by treating the *fraud* as the act, and thus brought the statements within the contemporaneous rule. *Smith v. National Benefit Society* (1890) 123 N. Y. 85. It is clearly a case of continuing intention instead of a continuing act.

Our law would be considerably clarified if lawyers and judges could be realists instead of fictionalists. The result of the case is entirely sound, and no continuous act was needed. Since a man's intentions can be known in most cases only from his words and his acts, either or both are admissible to prove intention at that time, provided the intention so proved will support an inference as to his intention at some other time when legally important. The *res gestae* phrase has no bearing on such problems and merely befogs the questions. If the insured had such an intention shortly before he obtained

departing the realm, was complete when the bankrupt reached France, if not when he passed beyond the three-mile limit. His fear of his creditors and his desire to avoid them was continuous, or at least might be so found under all the circumstances.

Courts came in time to ignore the *res gestae* phrase, and admit without question statements of intention, not immediately connected with any act, whenever intention at the time asserted would fairly serve as a reasonable basis for an inference as to intention at some other period when intention was legally material. Thus in actions for alienation of affection, the wife's letters to her husband and to third persons expressing her affection for her husband, and written before her acquaintance with the defendant, have been admitted to show the state of her affections at a later time when defendant began to claim her attention and interest.¹³ So in change of domicile cases where it was important to determine whether the change took place at the time of the physical act of leaving, prior statements of intention have been admitted, though certainly not a part of the *res gestae*.¹⁴ Such illustrations might be multiplied to great length from nearly every state in the Union.

It has been urged that the exception to the hearsay rule admitting statements expressly or impliedly asserting intention, or some other mental state should be limited to cases where such mental state is involved in the issue. That the frequent inadequacy of circumstantial evidence to prove purely subjective facts makes a resort to hearsay necessary when the nature of the issue requires the ascertainment of intention. But that no such inherent necessity exists where a purely evidential use is sought to be made of a mental state. For example, when it is sought to infer probable conduct from prior intent.¹⁵

Precedent furnishes little support for this view, for in general the same sort of evidence is admitted to prove a given fact, whether ultimate or evidential.

A few courts have had the peculiar notion that statements indicating some mental state are not hearsay if they accompany and explain some physical act, and are therefore inadmissible when not so made. This fog appears to have enveloped the Supreme Court of the United States in the *Throckmorton* case,¹⁶ and produced sweeping condemnation of any evidential use of a testator's statements in a will case when not connected with physical acts.

the insurance, there was a strong probability that he had the same fraudulent purpose when he applied for the policy. But his statements were not contemporaneous with anything except the mental state which they asserted or implied.

13. *Trelawny v. Coleman* (1817) 1 B. & Ald. 90; *Willis v. Barnard* (1832) 8 Bing. 376.

14. *Viles v. Waltham* (1893) 157 Mass. 542. In re *Newcomb Est.* (1908) 192 N. Y. 238 (admitting statements, after removal, of intention to make the new place a permanent home).

15. *Seligman* "An Exception to the Hearsay Rule" Harv. Law Rev. 26:146.

16. *Throckmorton v. Holt* (1900) 180 U. S. 552.

"When they are not a part of the *res gestae*, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground that they are said to indicate the condition of the mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded."

This is a strange conclusion from the court that decided *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, a few years earlier.

Obviously, a man's statements indicating his intentions or any other mental state are hearsay, and equally so, whether made in connection with an act or not. Such a sweeping generalization was not called for by the facts of the *Throckmorton* case. The main issue was the forgery of a will, and secondarily its revocation. After the death of Judge Holt, an instrument purporting to be his will, dated many years before, was received in the mail by the registrar of wills. Contestants claimed that it was a forgery, and if genuine, that it had been revoked. At the trial two classes of statements by the testator were admitted: (a) Letters indicating a friendly interest in various relatives who were not provided for in the will, and some dislike for the father of one of the principal legatees; (b) Statements made during the latter part of his life as to the provisions of his will, which were quite different from those contained in the contested instrument.

The letters were received without objection, but might well have been rejected as too colorless to warrant any inference on either issue. Friendly interest in collateral relatives did not make it improbable that he would have omitted them. Dislike for the father of Miss Throckmorton did not make it improbable that he would provide for her, since there was nothing to indicate that his dislike for the father extended to the daughter with whom he appeared to be on good terms. In other words, the mental state disclosed by the letters was too remotely relevant to be worth considering.

The statements as to the contents of his will were inadmissible as mere narratives under all the precedents prior to the *St. Leonards* case, and even under the extension of that doctrine insufficient *per se* to prove the execution and contents of an undiscovered revoking will.¹⁷ The fact that the testator had, at some time or other, made a will differing from the will in contest would not have been sufficient to throw doubt on the genuineness of that instrument. It did not make it improbable that many years before he would have had the testamentary intentions embodied in the contested instrument. On the main issue of forgery these statements were clearly inadmissible. On the secondary and practically ignored issue of revocation, these statements could not be received to prove directly that he had made a later will which impliedly revoked the contested will. And if it were conceded that toward the end of his life testator intended that certain relatives should share in his property, that would not warrant an inference that such intention had been, or was thereafter, carried out by the execution of a revoking will,

17. *Clark v. Turner* (1897) 50 Neb. 290.

in the absence of any other proof of the execution, attestation and contents of the supposed instrument.

His statements as to the provisions of some will, even if received to prove his intentions at that time in respect to the disposition of his property, could serve no useful purpose and were likely to mislead the jury. With so many easily understood objections to the evidence it is unfortunate that the court should have added confusion to a subject sadly in need of clear thinking.

At this late day it is surprising to find a lingering doubt of the admissibility of statements of intention as the basis of an inference as to probable conduct. Courts have always sanctioned inferences as to conduct based on motive, intention, belief, etc. For example, threats by a defendant to commit the crime with which he was charged have always been received as evidence tending to show his guilt, i. e., that there was a fair probability that he acted in accordance with his desires and intentions. No hearsay problem arises in such cases because the defendant's own statements are receivable as admissions.¹⁸

The validity of the argument from intention to conduct was so thoroughly recognized that it was inevitable that the difficulty of proving the basis of the inference should lead to the use of the statements of a third person to prove his intention in order to discover his probable conduct. Accordingly, at a fairly early period we find the courts admitting statements of third persons expressly or impliedly indicating their intention to do various acts, as a basis for inferring that they probably acted accordingly. Examples are found in bankruptcy cases,¹⁹ admitting prior statements by the bankrupt of his intention to create fictitious indebtedness, to prove that an acceptance was without consideration.

In will cases prior statements of the testator as to his intended disposition of his property have been admitted to prove that an interlineation in the will was made at the time of its execution;²⁰ also statements by the testator of his satisfaction with his will, to rebut the presumption of destruction *animo revocandi*.²¹

On the issue of self-defence uncommunicated threats by the deceased have been admitted to prove that he was probably the ag-

18. Admissions seem to be true exceptions to the hearsay rule. *Morgan* "Admissions as Exceptions to the Hearsay Rule" *Yale Law Jour.* 30:355, but their general admissibility is so universally recognized that no question of the hearsay rule is ever raised.

19. *Thompson v. Bridges* (1818) 8 Taunt. 336.

20. *Doe v. Palmer* (1851) 16 Q. B. 747.

21. *Whitely v. King* (1864) 17 C. B. (N. S.) 756. This has been followed in similar modern cases, in re *Page* (1886) 118 Ill. 576; *Holler v. Holler* (1921) 298 Ill. 418 (expressions of dissatisfaction with the will to prove probable revocation); *McMurtry v. Koepke* (Mo. 1923) 250 S. W. 399 (statements of satisfaction with the will to rebut presumption of revocation); *State v. Ready* (1910) 78 N. J. L. 599 (prior statements of testamentary intentions to prove probable genuineness of a will alleged to have been forged).

gressor.²² The unqualified adoption by the Supreme Court of the United States in the *Hillmon* case²³ of the rule that statements of intention are admissible to prove conduct gave to it a standing which is now practically unquestioned. For a time there was doubt and controversy over the admissibility of threats of suicide, but the courts could hardly admit threats of the deceased to kill the defendant and exclude threats of the deceased to kill himself, and at last the admissibility of threats of suicide seems settled, except in Illinois where the *res gestae* notion has produced confusing inconsistencies.²⁴

Now in the principal case sound precedents would not admit the statements of the testatrix as to the removal of the will from one safe to another, and that it was in a safe place, etc., as narratives of her past conduct, or as implying the existence of the will at the time referred to. But if threats of a deceased person to commit suicide or to assault the defendant are admissible to prove that he probably carried out the intention thus expressed, and in numerous other instances statements showing an intention to do a given act are admissible to prove the probability of corresponding conduct, it would seem that in the principal case the statements of the testatrix should have been admissible to prove that shortly before her death she was satisfied with her will and anxious to preserve it from prying curiosity or fraudulent destruction. These statements fairly implied such a state of mind, and were made under conditions which negated any motive to deceive.

If such statements fairly indicated her real mental attitude toward her will, it is extremely unlikely that she intentionally destroyed it either before or after the conversations in question. Even in Illinois, where the courts are more strongly influenced by the *res gestae* phrase than those of New York, statements of a testator expressing dissatisfaction with his will have been held admissible to prove that he probably destroyed the missing instrument.²⁵ It may be that the exclusion of the statements in question did no particular harm because of the lack of sufficient evidence of the will's continued existence as required by the statute. But the approval of the *res gestae* limitations announced in the *Kennedy* and *Throck-*

22. *Campbell v. People* (1854) 16 Ill. 17; *State v. Sloan* (1871) 47 Mo. 604; *State v. Elkins* 1876) 63 Mo. 159; *Stokes v. People* (1873) 53 N. Y. 164.

23. *Mutual Life Ins. Co. v. Hillmon* (1891) 145 U. S. 285. See *Maguire* "The Hillmon Case" Harv. Law Rev. 38:709.

24. *Commonwealth v. Trefethen* (1892) 157 Mass. 180; *State v. Ilgenfritz* (1915) 263 Mo. 615; *People v. Conklin* (1903) 175 N. Y. 333, 343; *Commonwealth v. Santas* (1923) 275 Pa. 515. Contra: *Greenacre v. Filby* (1916) 276 Ill. 294, because the threats of suicide were not made at the time of any act. The same court had reversed the case of *Nordgren v. People* (1904) 211 Ill. 425, because of the exclusion of threats of suicide. But in that case there was an act. The deceased kept poison in her room, and the threats were contemporaneous with this act of keeping poison. But according to the reasoning of the *Greenacre* case the threats would have been inadmissible if made a few hours before deceased obtained the poison.

25. *Holler v. Holler* (1921) 298 Ill. 418.

morton cases is likely to create difficulties in a case where non-revocation may be a vital issue.

E. W. HINTON.

STREETS AND HIGHWAYS—PRESCRIPTION—BURDEN OF PROOF OF ADVERSE CLAIM.—[Illinois] Two recent cases in the same volume seem to disclose two apparently diverging views upon the question of who has the burden in cases of public ways by prescription, in the matter of the element of adverse claim, which of course is one of the essentials to make out a prescriptive right.

The earlier of two cases¹ indicates that use alone for the statutory period establishes the right *prima facie*, and raises a presumption that the use was adverse, the burden to rebut such presumption being on the person who contests the prescriptive right. The later of the two cases,² on the other hand, seems to indicate that there is no such presumption from mere user, and that this element of adverse claim must be proved, as well as user, by the one claiming the prescriptive right, though express notice of such claim need not be shown, it being sufficient if the circumstances establish the existence of such a claim.

This divergence seems to originate with two cases, the one holding that user alone, no matter how long continued, does not satisfy the proof necessary to establish the right³ and the other⁴ holding, apparently, that use alone raises the presumption.⁵

As reflected by the two cases last mentioned, the apparent divergence, it seems, becomes largely one of phraseology, however, because both cases on their faces proceed as if were from the same

1. *Mudge v. Wagoner* (1926) 320 Ill. 357, 362.

2. *Giehl v. Smith* (1926) 320 Ill. 467: "The use of vacant and unoccupied land by the public is presumed to be permissive and not adverse. To establish a highway or public way by prescription it is necessary that the use shall be under a claim of right, adverse, open, notorious, exclusive, continuous and uninterrupted for the statutory period. *Doss v. Bunyan* supra; *O'Connell v. Chicago Terminal Transfer Railroad Co.* 184 Ill. 308, and cases there cited. There must be something more than mere travel by the public over unenclosed lands to create a highway by prescription. Use by a few individuals, and not by the public generally, does not constitute such use by the public as creates title by prescription. The user must be under claim of right in the public and not by mere acquiescence on the part of the owner. Express notice of such claim is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right. *Town of Brushy Mound v. McClintock* 150 Ill. 129. The record contains no proof of any act on the part of the municipality or its officials in either accepting, improving or maintaining the alley in question. It does show that when First Street was paved the curb was built straight along the street and no provision was made to permit access to or from the alleged alley. This act indicates the municipal authorities had no intention of assuming control of the strip and their belief that it was not an alley. *Palmer v. City of Chicago* 248 Ill. 201. The proof contained in this record is insufficient to establish a public alley by prescription."

3. *Doss v. Bunyan* 262 Ill. 101.

4. *Thorworth v. Sheets* 269 Ill. 573.

5. 269 Ill. 582.