SE2d 329; and Packard v Smart, 224 NC 480, 31 SE2d 517, 155 ALR 536, cited and relied upon by the plaintiffs, are distinguishable and not controlling on the present record.

The judgment of the court below is affirmed.

ANNOTATION

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way

[See ALR Digests, Easements § 41.]

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Michigan.—Smith v Lock (1869) 18 Mich 56; Karrer v Berry (1880) 44 Mich 391, 6 NW 853; Haab v Moorman (1952) 332 Mich 126, 50 NW2d 856 (recognizing rule).

Minnesota.—Dawson v St. Paul Fire & M. Ins. Co. (1870) 15 Minn 136, Gil 102, 2 Am Rep 109 (recognizing rule); Long v Fewer (1893) 53 Minn 156, 54 NW 1071.

Mississippi. — Skrmetta v Moore (1947) 202 Miss 585, 30 So2d 53 (recognizing rule).

Missouri.—Carlin v Paul (1847) 11 Mo 32, 47 Am Dec 139 (recognizing rule); Moses v St. Louis Sectional Dock Co. (1884) 84 Mo 242 (recognizing rule).

Montana.—McPherson v Monegan (1947) 120 Mont 454, 187 P2d 542.

Nevada.—Lindsay v Jones (1890) 21 Nev 72, 25 P 297 (recognizing rule).

New Hampshire.—Greenwood v Wilton R. Co. (1851) 23 NH 261.

New Jersey.—Seibert v Graff (1897, NJ Eq) 38 A 970; Imperial Realty Co. v West Jersey & S. R. Co. (1910) 78 NJ Eq 110, 77 A 1041, revd on other grounds 79 NJ Eq 168, 81 A 837 (recognizing rule); National Silk Dyeing Co. v Grobart (1934) 117 NJ Eq 156, 175 A 91; William Dahm Realty Corp. v Cardel (1940) 128 NJ Eq 222, 16 A 2d 69 (recognizing rule). But see Hopkinson v McKnight (1866) 31 NJL 422, infra, § 3[b].

New Mexico. — Nickson v Garry (1947) 51 NM 100, 179 P2d 524 (recognizing rule); Hughes v Lippincott (1952) 56 NM 473, 245 P2d 390.

New York. — Huttemeier v Albro (1858) 18 NY 48, affg 2 Bosw 546; Wiggins v McCleary (1872) 49 NY 346; Re Eleventh Ave. (1880) 81 NY 436; Holloway v Southmayd (1893) 139 NY 390, 34 NE 1047; Holloway v Delano (1893) 139 NY 412, 34 NE 1052; Re St. Nicholas Terrace (1894) 143 NY 621, 37 NE 635 (recognizing rule); Re One Hundred & Sixteenth Street (1896) 1 App Div 436, 37 NYS 508 (recognizing rule); Ranscht v Wright (1896) 9 App Div 108, 41 NYS 108, affd without op 162 NY 632, 57 NE 1122; Mott v Eno (1904) 97 App Div 580, 90 NYS 608, revd on other grounds 181 NY 346, 74 NE 229 (recognizing rule); Lewisohn v Lansing Co. (1907) 119 App Div 393, 104 NYS 543, revg 51 Misc 274, 100 NYS 1077; Re Sixty-Seventh Street (1881) 60 How Pr 264; Kenyon v Hookway (1896) 17 Misc 452, 41 NYS 230, affd 21 App Div 342, 47 NYS 1138; Re New York (Thirty-first [Patterson] Ave.) (1934) 152 Misc 849, 273 NYS 757. But see Re Brook Ave. (1899) 40 App Div 519, 58 NYS 163, affd without op 161 NY 622, 55 NE 1093, infra, § 6.

Ohio.—Finlaw v Hunter (1949) 87 Ohio App 543, 43 Ohio Ops 355, 96 NE 2d 319 (dictum); O'Ferrall v Chase's

Heirs (1877) 7 Ohio Dec Reprint 242, 2 WL Bull 4; Harrison v Pike's Heirs (1879) 7 Ohio Dec Reprint 603, 4 WL Bull 156; Kneisel v Krug (1883) 8 Ohio Dec Reprint 581, 9 WL Bull 38; Lyon v Fels (1901) 8 Ohio NP 450, 11 Ohio Dec NP 706 (recognizing rule). But see Bailey v Copeland (1832) Wright 150, infra, § 3[a].

Pennsylvania.—Plitt v Cox (1862) 43 Pa 486; Spackman v Steidel (1879) 88 Pa 453 (recognizing rule); Re Brooklyn Street (1888) 118 Pa 640, 12 A 664, 4 Am St Rep 618 (recognizing rule); Hawkes v Philadelphia (1919) 264 Pa 346, 107 A 747; Philadelphia Storage Battery Co. v Philadelphia (1936) 323 Pa 17, 186 A 103; Hogan v Burneson (1910) 44 Pa Super 409; Rhoads v Walter (1915) 61 Pa Super 43; Rhoads v Walter (1918) 70 Pa Super 25; Maier v Walborn (1925) 84 Pa Super 522 (recognizing rule); Holmes v Longwill (1926) 89 Pa Super 1; Ulrich v Grimes (1927) 94 Pa Super 313; Schmidt v Forster (1930) 99 Pa Super 545; Tursi v Parry (1939) 135 Pa Super 285, 5 A2d 399; Vinso v Mingo (1948) 162 Pa Super 285, 57 A 2d 583; Hoover v Frickanisce (1951) 169 Pa Super 443, 82 A2d 570; Philadelphia Tapestry Mills, Inc. v Philadelphia Storage Battery Co. (1928) 11 Pa D & C 153 (recognizing rule); Crow v Wolbert (1869) 7 Phila 178 (recognizing rule); American Steel Foundries v Sibley Soap Co. (1921, CA 3d Pa) 270 F 70. But see the Pennsylvania case in § 6, infra.

Rhode Island.—Abney v Twombly (1916) 39 RI 304, 97 A 806, reh den 98 A 803, reh gr 98 A 803 (recognizing rule).

Texas.—Wolf v Brass (1888) 72 Tex 133, 12 SW 159; Barclay v Dismuke (1918, Tex Civ App) 202 SW 364, error dismd (recognizing rule).

Virginia.—Gish v Roanoke (1916) 119 Va 519, 89 SE 970.

West Virginia.—Clayton v Gilmer County Court (1905) 58 W Va 253, 52 SE 103, 2 LRA NS 598 (recognizing rule).

England.—Roberts v Karr (1809) 1 Taunt 495, 127 Eng Reprint 926 (recognizing rule); Harding v Wilson (1823) 2 Barn & C 96, 107 Eng Reprint 319 (recognizing rule); Espley v Wilkes (1872) LR 7 Exch 298.

A deed conveying a lot of land described as fronting on "the continuation of a strip of ground 60 feet by 330 feet intended and reserved for the continuation of South Street," was held in Teasley v Stanton (1903) 136 Ala 641, 33 So 823, 96 Am St Rep 88, to have given the grantee an appurtenant right of way over the reserved strip.

Although it was contended that sales of the lots in question were made in accordance with maps on file in the probate office which did not show two streets described in the deeds as being boundaries of the lots, the court in Malone v Jones (1924) 211 Ala 461, 100 So 831, held that the grantees acquired an easement over the streets described as boundaries, even though the streets had never existed, pointing out that the grantees purchased with the understanding that these streets were contiguous to the property conveyed to them, and holding that the grantor and those claiming under him were estopped from denying the validity of such easement.

In Hamilton v Smith (1948) 212 Ark 893, 208 SW2d 425, the plaintiff purchased the last numbered block in a platted addition, together with the remainder of the land in the addition comprising an unnumbered irregular tract, the deed, after the description of the property conveyed, stating: "Leaving a street sixty feet wide between Block Five . . . and the last described tract herein conveyed." The plat of the addition showed a tract between the two parcels conveyed to the plaintiff 60 feet wide and 240 feet long, which had boundary lines on all four sides and was not designated as a street, although it was apparently the width of the north and south streets in the addition, and the grantor testified that he had reserved this area in his deed to the plaintiff for an outlet to acreage owned by him north

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of the addition. This acreage was subsequently conveyed to the defendant and, assuming that the defendant wanted it for the same purpose of an outlet, the grantor conveyed to the defendant also the 60-by-240-foot strip, on which the defendant subsequently constructed a dwelling house, the removal of which was sought by the plaintiff. Although holding that the plaintiff was not entitled to an injunction calling for removal of the house, because of his laches, the court stated that even though the plat did not reflect a dedication of the area as a street, and no formal dedication as such had been intended by the grantor, the deed from the grantor to the plaintiff, showing that the disputed tract was to be a street, was sufficient to vest in the grantee an easement over this area which could not be revoked by any subsequent action of the grantor.

The fact that a thirty-five foot strip left between two parcels of land conveyed by the grantor, and referred to as a street, extended only one hundred feet along the property conveyed and went nowhere else, being merely a cul-de-sac, was said to be immaterial by the court in Petitpierre v Maguire (1909) 155 Cal 242, 100 P 690, which held that by virtue of the reference to it as a street the grantees received an easement over such strip.

In McCarthy Co. v Moir (1910) 12 Cal App 441, 107 P 628, a contract of sale was entered into with the defendant by which the owner of a large tract of land agreed to sell him property described as two numbered lots on a proposed map of the tract and further as fronting one hundred feet on Burnett Avenue. The seller did not subdivide the property, but thereafter conveyed the entire tract, including the lots sold to the defendant, to the plaintiff, subject to the rights and interests of the defendant under the contract. The plaintiff proceeded to subdivide and plat the property, indicating two lots corresponding to those sold to the defendant, but omitting Burnett Avenue as called for in the contract, replacing such street with additional lots. In upholding the defendant's claim to an easement over the lots which replaced Burnett Avenue, the court held that the recorded contract was notice to the plaintiff of the conveyance as made by the original grantor and that such contract of sale was made upon the representation of the seller that the lots were bounded by Burnett Avenue, thus giving to the buyer an easement in such street.

A deed describing land as running 150 feet along a certain street to a twenty-foot alley, to be laid out, was held in Garstang v Davenport (1894) 90 Iowa 359, 57 NW 876, sufficient to give the grantee a right to the alley as appurtenant to her land against a subsequent grantee from the same grantor of all the remainder of his land.

A deed which described land conveyed to the plaintiff as bounded "on the west by the driveway to the Manor Inn," was held in Young v Braman (1909) 105 Me 494, 75 A 120, to give the grantee therein a right of way over the driveway named for the length of the boundary against the contention that the words of the deed, "driveway to the Manor Inn" necessarily implied a private driveway, one reserved for the grantor's personal use and convenience, and not intended to be used by others. The court held that while the words used doubtless implied that the driveway ran over private land and was not a public way, they could not be held to imply that it was intended to be exclusive. The fact that the property also bordered on a public road was held immaterial, the court pointing out that the estoppel to deny the easement was created by the deed since the grantor had title to the driveway, and was not in any way based upon necessity.

The right of a purchaser of a lot described as bounded by a particular street, to the use of such street was recognized in Moale v Baltimore (1854) 5 Md 314, 61 Am Dec 276, where the plaintiff had acquired a lot, which was in the bed of a newly

opened street, subsequently to the acquisition of an adjoining lot described as fronting on the newly opened street, both conveyances being from the same grantor. In determining the compensation due for the taking of lots in order to open the street, the court held that the plaintiff was entitled only to nominal damages for his lot in the bed of the street, inasmuch as by the previous conveyance the purchaser of the adjoining lot had acquired the right to the use of such street, as a result of which the plaintiff had acquired only the naked fee to the lot, subject to an easement or right of way, not only in the purchaser, but also in the public.

The plaintiff in Parker v Smith (1821) 17 Mass 413, 9 Am Dec 157, was held entitled to maintain an action against the defendant for obstructing a way by erecting a building thereon. where the deed to the plaintiff from the defendant's predecessors stated that the lot conveyed "bounds southward and westward on ways or streets left for the use of the lots in said settlement." In upholding a judgment for the plaintiff, the appellate court said: "By this description the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets. It probably entered much into the consideration of the purchase, that the lot fronted upon two ways which would be always kept open, and, indeed, could never be shut without a right to damages in the grantee or his assigns." The fact that part of the land conveyed and described as bounded by the ways was below the high-water mark was held to have no effect on the grantee's right to the use of the way and to have it unobstructed by the grantor or his successors. Nor was the grantee's right to the way covering the full extent of his property affected by the fact that subsequently a public street laid out in one of the ways had stopped at the high-water mark, the court holding that this did not bring the case within the principle that, if at the time of the grant there was a way in fact existing, corresponding to that mentioned in the deed, and this way did not extend through the entire line of the land granted, the parties should be supposed to have had reference to the actual existing way as a boundary, so far as it extends, and not to have contemplated a way coextensive with the land.

Conveyances of land on each side of a forty-foot strip owned by the grantor, in one of which the land was described as bounded on a "street," and in the other as bounded on "an intended street," were held in Van O'Linda v Lothrop (1839) 38 Mass (21 Pick) 292, 32 Am Dec 261, to give the grantees an easement in the forty-foot strip. The court stated that there was no express grant of a right of way, nor did any way pass as appurtenant to the land granted, inasmuch as at the time of the conveyance the way was not in use or in existence, but held that the grantees had acquired an easement in the strip inasmuch as the grantor was estopped by his deed from denying that there was a street or way as called for in his deeds.

A deed which described one boundary of the premises conveyed as "on a passage way two rods wide, which is to be laid out," and which provided further that the grantor was "to make and maintain all the fences between the said contemplated passage way and the premises," was held in Tufts v Charlestown (1854) 68 Mass (2 Gray) 271, to give the grantee and his successors a perpetual easement, or right of passing and repassing over the contemplated passageway, from which they could not be excluded and which could not be shut up against them by their grantor or those in privity with him. The court held that the description of the way in the deed as a "contemplated passage way" showed the agreement of the parties that there should be such a way as distinctly as if it had already been laid out, and had the like effect, by way of covenant and estoppel, as a description of a way already in existence. A contention that the provision that the grantor

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should make and maintain the fence between the passageway and the premises indicated that the grant was not intended to include any right in the passageway was rejected by the court, which held that the provision merely indicated the intention of the parties that the passageway should be fenced off from the land described, but did not have the effect of limiting the previous description or the covenant implied therein.

The plaintiff was held to have acquired an easement in a way in Lewis v Beattie (1870) 105 Mass 410, where the owner of two lots of land and of a way separating them conveyed one of the lots to the plaintiff's predecessor bounding it by the way, and on the same day conveyed the other lot to the defendant's predecessor bounding it by the land first conveyed, and also describing it as including a way which "runs along the side of this lot and adjoining" the land previously conveyed. The court stated that it was unnecessary to decide whether the conveyances had vested title to the entire way in the defendant, pointing out that even if this were the case the plaintiff would still have acquired an easement over the way by virtue of the use of it as a boundary in his deed and by the reference to the way in the other deed under which the way, if it passed, would be subject to such use by the first grantee and his successors.

A description of the western boundary of a lot conveyed as "in the line of Meade street," was said in Burnham v Mahoney (1915) 222 Mass 524, 111 NE 396, to establish the existence of a way contiguous to the western boundary of the lot where the grantor at that time was the owner of the adjacent land, the court holding that the words of the deed were equivalent to a covenant that the way was there and estopped the grantor from denying its existence.

A description in a deed by which the land conveyed was described as bounded "along the line of said avenue," which referred to an existing way running through remaining property of the grantor, was held to make the grantee therein entitled to appurtenant rights of way over the named avenue even though it varied somewhat from the avenue as drawn on a subsequently recorded plan of the area. Hill v Taylor (1936) 296 Mass 107, 4 NE2d 1008.

It was held in Long v Fewer (1893) 53 Minn 156, 54 NW 1071, that the grantee acquired an easement in an alley where the grantor owned two lots and conveyed part of them to the plaintiff's grantor, describing them as fronting a certain distance on a public street and running back one hundred feet "to an alley, reserved by John Kopp [the grantor]. Said alley is twelve (12) feet wide, and said alley to be used as such said alley, to be used for no other purpose." Although recognizing that a strict literal meaning of the word "reserved" was to hold back or except from the conveyance, and hence the deed could not be construed as granting an easement, the court held that the literal meaning of a particular word in a deed would not be controlling against the plain intention of the parties, and that the expression "reserved" was not used in the sense of excepting something, inasmuch as the description of the alley would have been entirely unnecessary if it was not intended that the conveyance should be bounded thereby.

Where the description in a deed ran to and along an intended street line, an extension of an existing street which all the parties anticipated would be made, it was held in Seibert v Graff (1897, NJ Eq) 38 A 970, that the grantee acquired an easement over the proposed extension of the street, and could restrain the grantor, and one claiming under him by virtue of a deed purporting to convey the strip included in the proposed street extension, from closing such way. The court held that even though there was no reference to a map the description of the land in the deed as bounding upon a street, and the fact that there were marked upon the ground adjacent to the land sold traces of the existence of a street, meant that the grantor and those in privity with him were es-

topped to deny the existence of the street.

In determining compensation for the taking of land for a city street it was held in Re Sixty-Seventh St. (1881, NY) 60 How Pr 264, that the owner of the fee in the street was entitled to only nominal damages where it appeared that he had conveyed land on both sides of the street, bounding it as on the street, the location of which had been determined earlier by the city and designated on a map showing the proposed growth of the city, the court finding that by the description of the land as bounded by the street the grantees in the deeds had acquired a perpetual easement over the area designated as a street, thus leaving only the bare legal title in the grantor and giving him no right to substantial damages.

A conveyance of land describing it as running to a private alley, and thence along said private alley, was held in Rhoads v Walter (1915) 61 Pa Super 48, to have given the grantee the right to use the alley, the court finding that the alley had been opened for use and apparently basing its decision on this fact, implying that the grantee's right would be limited to the edge of the alley if the alley had not been opened. See also Rhoads v Walter (1918) 70 Pa Super 25.

In Holmes v Longwill (1926) 89 Pa Super 1, the plaintiff, to whom land had been conveyed as bounding upon an alley, was held entitled to prevent another abutting owner, whose title was derived from the same grantor, from constructing a house across the alley, regardless of whether the dedication of the alley to public use was sufficient or not, the court stating that in a suit between private parties claiming under the same predecessor in title, who had created the alley when he conveyed land on both sides of it with reference to the alley, there was at least an easement for the benefit of the grantees and their successors in title, giving them a right to keep the alley open.

The fact that a common grantor had in various deeds described the conveyances as being bounded by an alley taken from other property of the grantor was held sufficient to give the grantees and their successors an easement in the land designated as an alley, the court in Wolf v Brass (1888) 72 Tex 133, 12 SW 159, stating that in such a situation it was immaterial whether there was a dedication of the alley to the use of the public or not.

A deed which described the property conveyed as beginning at the corner of two streets, one of which was a public highway, and described one boundary as running with the nonexistent street to the place of beginning, was held in Gish v Roanoke (1916) 119 Va 519, 89 SE 970, to have given the grantee in the deed and his successors a right of way over the area referred to as a street, particularly in view of the fact that there was in fact a private roadway in use by the grantors over this area at the time of the conveyance. The court held that a private right to the use of this area was vested in the grantee and his successors by way of estoppel, and that it was immaterial that the way had not been dedicated to the public or that the street had not been shown upon any map or plat.

A lease which described premises as bounded on the east and north by newly made streets, which were the property of the lessor, gave the lessee the right to an easement on both sides of the property conveyed, the lessor being estopped from denying that there were streets on those two sides of the property conveyed. Espley v Wilkes (1872, Eng) LR 7 Exch 298.

§ 3. View denying easement.

[a] Generally.

For various reasons, as indicated in the cases following, the right of a grantee to an easement in a way described in his deed as a boundary has been denied.[4]

Delaware.—Kelley v Phillips (1922) 13 Del Ch 261, 118 A 230.

Georgia. — Wimpey v Smart (1912) 137 Ga 325, 73 SE 586. But see the Georgia cases in § 2, supra.

4. See also the cases in § 6, infra.

[§ 3]

Kentucky.—Brizzalaro v Senour (1884) 82 Ky 353; Bates v Johnson (1927) 217 Ky 673, 290 SW 474.

Maine.—State v Clements (1850) 32 Me 279.[5] But see the Maine cases in § 2, supra.

Massachusetts. — Clap v M'Neil (1808) 4 Mass 589; Brainard v Boston & New York C. R. Co. (1859) 78 Mass (12 Gray) 407; Howe v Alger (1862) 86 Mass (4 Allen) 206; Cole v Hadley (1895) 162 Mass 579, 39 NE 279; Ralph v Clifford (1916) 224 Mass 58, 112 NE 482; Wood v Culhane (1929) 265 Mass 555, 164 NE 622. But see the Massachusetts cases in § 2, supra.

Nebraska. — Bushman v Gibson (1884) 15 Neb 676, 20 NW 106.

New Jersey. — Hopkinson v McKnight (1866) 31 NJL 422. But see the New Jersey cases in § 2, supra.

New York.—Re Brook Ave. (1899) 40 App Div 519, 58 NYS 163, affd without op 161 NY 622, 55 NE 1093. But see the New York cases in § 2, supra.

North Carolina. — Milliken v Denny (1904) 135 NC 19, 47 SE 132; Green v Barbee (1953) 238 NC 77, 76 SE2d 307, 46 ALR2d 455.

Ohio.—Bailey v Copeland (1832) Wright 150. But see the Ohio cases in § 2, supra.

Oregon. — Lankin v Terwilliger (1892) 22 Or 97, 29 P 268.

Pennsylvania.—Neely v Philadelphia (1905) 212 Pa 551, 61 A 1096; Henderson v Young (1918) 260 Pa 334, 103 A 719; Pennsylvania Co. for Insurances, etc. v Philadelphia (1935) 318 Pa 209, 178 A 129. But see the Pennslyvania cases in § 2, supra.

It was held in Clap v M'Neil (1808) 4 Mass 589, that the grantee, to whom land had been conveyed by the defendant as bounded on one side by a thirty-foot street on land owned by the defendant, could not compel the defendant to remove a shed which projected into such street a distance of ten feet and which was in existence at the time of the conveyance to the plaintiff. Noting that the conveyance used these words: "Then turning and running southerly by land of said M'Neil, seventy feet to a thirty feet street, then turning and running westerly by said thirty feet street fifty feet," the court stated that by these words the plaintiff could not claim even a right of way in that street, but held that by the addition of the words: "With the privilege of passing in the said thirty feet street," the plaintiff was given a right of way in that street, as it was then opened as a way, but that there was no covenant on the part of the defendant that it should be everywhere thirty feet in width, and no requirement that he remove the fixture already in the street.

Although it was found that the common grantor, at the time of the conveyance to the plaintiff, showed her a plan on which was marked a forty-foot street adjoining the land conveyed and running from a public street along the boundary of the plaintiff's land and adjoining land subsequently conveyed by the same grantor to the defendant, it was held in Ralph v Clifford (1916) 224 Mass 58, 112 NE 482, that the plaintiff had acquired no rights to the contemplated street where the only reference to such street in the plaintiff's deed was: "Beginning on said Avenue at a corner of a street," the court holding that the defendant was charged only with notice that the plaintiff's lot began at the corner of a street, but not with notice that it ran along the defendant's land, since it appeared that the plan was never placed on record and the defendant had no knowledge of it.

In Green v Barbee (1953) 238 NC 77, 76 SE2d 307, 46 ALR2d 455, a common grantor conveyed a lot fronting on a public street to the plaintiffs, the deed describing the eastern boundary of the lot conveyed as being on a ten-foot alley extending the entire depth of the lot, and subsequently conveyed a similar lot on the other side of the alley to the defendant, this deed calling for the alley as the west-

5. The Clements Case, supra, was said in Young v Braman (1909) 105 Me 494, 75 A 120, to have been overruled by a long line of intervening Maine and Massachusetts decisions cited therein.

ern boundary of the lot conveyed. Later another lot in the rear of the first two was conveyed by the same grantor to the plaintiffs, this lot having no frontage on the public street and being described partly as "fronting a 10-foot alley" described as running between the two lots conveyed to the plaintiff and the defendant. In an action brought by the plaintiffs to determine their right to an easement in the alley, it was agreed that the original grantor retained the fee to the alley, and the court held that by virtue of the various conveyances neither the plaintiffs nor the defendant had acquired any easement in the alley. The court held that since the strip of land lying between the original conveyance to the plaintiffs and that to the defendant was not a way of necessity, inasmuch as both the lots were bounded on the public highway, the language in the respective deeds was insufficient to create an easement therein in favor of the grantees by implication or otherwise. With regard to the plaintiffs' claim of an easement in connection with the rear lot, the court held that it was not shown that the use of the alley had been so long continued and so obvious or manifest as to show that it was meant to be permanent, or that the easement was necessary to the beneficial enjoyment of the lot conveyed, pointing out that there was no evidence from which an intent on the part of the grantor to establish the easement could be inferred, except the bare reference to the alley for descriptive purposes, which the court held was insufficient. It appeared that after the plaintiffs had acquired the rear lot they had conveyed away part of the original lot, including all of their frontage on the public street, and the plaintiffs therefore alleged that the alleyway was the only means of ingress and egress to the public street from that portion of the original lot retained by them, but the court held that the conduct of the plaintiffs in isolating themselves from the public street by their conveyance could not change the status of the retained portion of their original lot with respect to an easement in the alley from that which existed when it was originally conveyed. The court rejected the contention that the alley constituted the only means of access to a public street from the rear lot, pointing out that there was no allegation in the complaint that the alleyway in question was the only means of access at the time when it was originally conveyed to the plaintiffs' predecessor in title, or that an easement therein was necessary to the beneficial enjoyment of the property conveyed at that time, the court noting that certainly the alley was not a way of necessity to and from the rear lot so long as the plaintiffs owned both the front and the rear lots.

In Bailey v Copeland (1832, Ohio) Wright 150, the common grantor had originally laid out his land on a plat with one lot fronting on Main Street and a ten-foot alley running from the northeast corner of this lot across other lots of the grantor to Second Street, but made no sales under the plat and never recorded it. Subsequently the Main Street lot was sold to the plaintiff and the deed, in describing the boundary, called for the head of a ten-foot alley on the northeast; the residue of the property was conveyed to the defendant by a deed which included the ground described as an alley but made no mention of the alley. The plaintiff then built a house covering the entire front of his lot on Main Street and the defendant built a warehouse covering the land marked as an alley leading to Second Street, although it was shown that when the defendant purchased he had notice that the plaintiff claimed an alley. In holding that the plaintiff had no right to the use of the alley, the court noted that there could be no way by necessity, since the land conveyed to the plaintiff was on a street, and rejected the contention that the right to the use of the alley was included in the plaintiff's deed, the court stating that the call in the deed for a nonexisting object neither created nor passed any interest in such object, indicating that the call in the deed was to designate the outer limit of the

grant and not to convey anything beyond it.

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It has been held that the estoppel against the grantor was ineffective against his successor where the alley referred to as a boundary did not in fact exist, the court stating that the naming of the alley did not amount to a grant of an easement in it, and that nothing short of a grant could adversely affect an innocent purchaser.

The plaintiff in Brizzalaro v Senour (1884) 82 Ky 353, sought to restrain the defendant from obstructing an alley over which the plaintiff claimed a right of way by virtue of a deed of a certain lot described as running to a ten-foot alley with one boundary running along the said alley, the defendant having by a subsequent conveyance from the same grantor obtained title to the grantor's remaining property which included the alley referred to. Noting that no such alley had been actually laid out or indicated by any plat or map, and that it was not necessary to the use of the plaintiff's premises, the court held that while the recitals in the conveyance to the plaintiff would estop the grantor and his heirs and privies from controverting the plaintiff's right to the alley, this estoppel did not apply to the defendant merely because the defendant had purchased other land from the same grantor not embraced in the grant to the plaintiff. The court held that if the plaintiff's deed granted the right of way over the alley this deed, having been first executed and recorded, would be notice to the defendant of the existence of such right, but pointed out that the description in the plaintiff's deed was a mere recital that an alley existed at a particular place, when such was not the fact, and amounted to nothing more than an estoppel against the grantor, but was not a grant of the alley or the easement, as appurtenant to the premises. Since there was no grant of the land constituting the alley, or of the easement, the court held that the conveyance to the plaintiff could not affect an innocent purchaser, even though recorded. The court added: "When parties enter into written agreements respecting the title to realty, it is easy for them to express its terms in language so plain as not to mislead others, and a court ought not, as against a third party, imply a grant unless such must be the necessary conclusion from the language used. . . . If Arnold, the common grantor, when purchasing this entire property, had inserted in his conveyance recitals that would work an estoppel, then it would affect all who purchased from him. An estoppel affects parties and privies, but not strangers. The original grantor owning in fee this entire block, having sold a part to A, another to C, and another to B, the latter purchasers would not be affected by a recital in the deed to A, unless it amounted to a grant."

And it was held in Hopkinson v McKnight (1866) 31 NJL 422, that a conveyance of land as bounded on an alley, even taken in connection with a similar description in another deed by the same grantor, did not amount to a grant to the plaintiff of the alley described or of a right of way or a covenant that the plaintiff should have such a right. The court stated that a reference in a conveyance of land by definite metes and bounds to an alley or road, as abutting on the premises conveyed, where no such alley or road existed, could not be construed to be a grant of such an alley or road.

See also Harding v Wilson (1823) 2 Barn & C 96, 107 Eng Reprint 319, infra, § 8.

[b] Way not dedicated to public.

It has been held that no easement was created where the named street or alley had not been dedicated to the public, even though it was called for as a boundary in a deed.

The defendant's conviction for an assault and battery was upheld in State v Clements (1850) 32 Me 279,[6]

6. The Clements Case, supra, was said in Young v Braman (1909) 105 Me 494, 75 A 120, to have been overruled by a long line of intervening

where the defendant claimed the right to use a certain road under a conveyance to him of certain land bounded on one side by such road, and had struck the complaining witness with an iron crowbar when he attempted to prevent the defendant's use of such road. It was shown that the victim had contracted to purchase a strip of land on which to build a road from the public highway to his mill, and that he built the road and received the title deed of the land on which the road was built five months after the defendant had purchased the land adjacent to the road and had received his deed thereto, both deeds being from the same grantor. In affirming the trial court's refusal to instruct the jury as to the defendant's right of way over the road by virtue of his deed, the appellate court held that the defendant had acquired no right to use the road, pointing out that there was nothing to prove that the public had any right of any way there, since the road was nothing more than a private way, owned by the victim. The court indicated that the defendant's deed, though bounded by the road, did not necessarily constitute the road a public one and therefore the defendant had failed to show that he had any right of way over such road.

A judgment restraining the defendant from obstructing an alley was reversed in Bushman v Gibson (1884) 15 Neb 676, 20 NW 106, where the defendant had conveyed part of a tract of land to the plaintiff describing it as running to the alley in question, indicated as being twenty feet wide, and "thence east along said alley." Pointing out that the alley was not a public alley, the court stated that for the plaintiff to prevail it must appear that the defendant was estopped from denying the description in the deed. Since the land had been conveyed by metes and bounds, it being well known to all the parties that there was no public alley adjoining the plaintiff's land, although a space twenty feet wide was left to be used for that purpose when the city limits extended to the land in question, the court held that it was clearly the intention of the parties at the time the deed was made out not to pass any interest to the plaintiff beyond the metes and bounds described in the deed, with the result that the plaintiff had acquired no easement in the alley.[7]

In Hopkinson v McKnight (1866) 31 NJL 422, the owner of a large tract of land sold part of it to the plaintiff, the deed describing the land conveyed as bounded on an eight-foot alley, and thence running along said alley, and later sold another part of the tract, described as bounded on the opposite side of the alley, which latter parcel eventually passed into the ownership of the defendant, who had also acquired the remainder of the tract. The street or alley referred to in the deeds had never been opened or used as a street, and the defendant, claiming ownership, fenced and enclosed the alley, denying that the plaintiff had any interest therein. In holding that the plaintiff had by his deed acquired no rights in the nonexistent alley, the court implied that such a description could have conferred a right on the plaintiff only if there was evidence that the alley or street had been dedicated to the use of the public.

A judgment for the plaintiff, in which the defendant was ordered to keep an alley open and was restrained from interfering with the free use of such alley by the plaintiff and the public, was reversed in Milliken v Denny (1904) 135 NC 19, 47 SE 132, where both parties claimed from a common grantor and the plaintiff claimed the right to use the alley by

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Maine and Massachusetts decisions cited therein.

7. In denying a motion for rehearing the appellate court in Bushman v Gibson (1884) 15 Neb 678, 20 NW 289, pointed out that there was evidence that the defendant, before the sale was made, had offered to sell the plaintiff the land to the alley for a certain sum, or to the middle of the proposed alley for a proportionate increase of the price, and that the plaintiff had purchased and paid for the land only to the alley.

virtue of a deed describing the property conveyed as running "along the south side of the ten-foot alley." The court stated that such a call in the deed, in the absence of any allegation that an alley of that width had been opened and dedicated for the use of the owners of the property conveyed, was insufficient to pass an easement to the grantee, or to entitle him to enjoin the closing of such alley, pointing out that since the property conveyed was bounded on two sides by public streets no easement by necessity could be implied. The court recognized that it had upheld easements in various cases where conveyances had been made with reference to a map or plat, but pointed out that the right of purchasers to have such streets or alleys kept open for their own use was based, not upon the theory that they had an easement, but on the dedication of such streets as indicated by the map or plat estopping the grantor from closing them or interfering with their use.

[c] Way not owned by grantor.

Although it seems obvious that the grantor cannot by his deed describing a way as a boundary thereby create an easement in such a way if he does not own the fee to the way, or a right over it, the effect of such lack of ownership has been considered in a few cases.

In Kelley v Phillips (1922) 13 Del Ch 261, 118 A 230, the plaintiff sought to prevent the defendant from obstructing a street which was described as a boundary in the deed to the plaintiff from two grandchildren of the original owner. The defendant, who was the owner of property on the other side of the named street, which had never been opened, traced his title back to the original owner, the deeds also describing the property as bounded by the particular street, and the defendant later had obtained a deed from the administrator of the original owner covering the bed of the unopened street. The court held that the rule under which a grantor, or anyone claiming under him, was estopped from denying the existence of a street described as a boundary, or the rights of his grantee in such street, was applicable to the conveyance to the defendant, but was inapplicable to the conveyance to the plaintiff, inasmuch as he failed to trace his title back beyond the grandchildren, and there was nothing to indicate that the conveyance to them described the property as bounded by the street in question. The court held, therefore, that since the plaintiff's grantor was not the owner of the street the plaintiff, by his deed, could not have acquired any rights therein.

In Wimpey v Smart (1912) 137 Ga 325, 73 SE 586, a judgment was sought against the grantee of certain land, described as bounded on one side by a ten-foot alley, for the balance of the purchase price, and the grantee pleaded partial failure of consideration, in that an abutting landowner had made a permanent encroachment on the alley, which had existed for more than twenty years. The evidence showed that the owner of land which had been received from an ancestor of the common grantor, on the opposite side of the alley from the present grantee's land, had constructed a building which encroached four and one-half feet on the alley, and that this encroachment had existed for more than twenty years before the conveyance to the present grantee. Under the circumstances, the court held that the grantee was liable for the full purchase price, inasmuch as his grantor's right to the part of the alley covered by the encroachment had been lost by prescription prior to the conveyance to the present grantee, thus making inapplicable the rule under which the grantor was estopped to deny his grantee's right to an easement over a way described as a boundary in the conveyance, since the grantor was no longer the owner of that part of the way.

The right of the petitioner to recover damages for the taking of a street in front of his property for the construction of a railroad was denied in Brainard v Boston & N. Y. C. R. Co. (1859) 78 Mass (12 Gray) 407, where

the deed to the petitioner described the land as running to a point on the side of a thirty-foot street, which was the land taken for the railroad, and by its terms excluded any part of the street from the conveyance. The court held that by this conveyance the grantee could obtain rights in the street only if his grantor at the time owned the street or had a right of way over it, and noted that there was no evidence to show that the petitioner's grantor ever had or claimed to have any right or interest in the street adjoining the property conveyed.

Judgment for the defendant was held properly entered in Howe v Alger (1862) 86 Mass (4 Allen) 206, in an action where it was alleged that the defendant by his deed of certain land to the plaintiff covenanted that the land conveyed was bounded on two sides by streets, whereas there was no street on either side thereof and the plaintiff had no access to the property from any highway except by passing over private property. It was shown that the defendant never owned the land described in the conveyance as the streets bounding the property conveyed on the north and south, and the court stated that the implication of a covenant in a deed referring to a street as a boundary that the street existed was applicable only where the conveyance was by a grantor who owned the fee in the streets so named in the deed. The basis of this doctrine was said to be that the grantor was estopped to deny the existence of such way or street described as a boundary, or to interfere in any way with the grantee's use of such street, but this estoppel could arise only in the event that the grantor owned the fee to such street.

In Cole v Hadley (1895) 162 Mass 579, 39 NE 279, where the defendant's deed to the plaintiff described the land conveyed as running fifty feet along a street, and the defendant owned the land opposite that conveyed only for thirty feet along the proposed street, it was held that there was no implied covenant that such a street existed beyond the boundaries of the land owned by the grantor, inasmuch as the estoppel to deny the existence of such a street as against the grantee exists only when the grantor owns the street or has the right to grant a right of way therein.

§ 4. Side line of way as boundary.

A distinction has been made in some cases between deeds which describe the property conveyed as bounded by a street or way, and deeds which describe the property as bounded by or running along the side line of such a way.

In the former case, the courts generally have held that the grantee acquires an easement over the way, unless some special circumstances surrounding the transfer make such a result inequitable.

In the latter case the results have not been uniform. In some cases the courts have regarded such a reference to the side line of a way as substantially the same as bounding the land by the way and have found the grantee entitled to an easement.

In other cases, however, particularly if the property has been described by metes and bounds which by their terms exclude the area of the way, it has been held that the grantee has acquired no rights in the adjoining way.

§ 5. — Easement acquired.

Deeds describing the property conveyed as running to or along the side line of a street or way have frequently been held to give the grantee an easement over the way referred to.

United States.—For federal cases involving state law, see state headings infra.

California.—Petitpierre v Maguire (1909) 155 Cal 242, 100 P 690.

Delaware.—Betley v Gordy Constr. Co. (1955) — Del Ch —, 115 A2d 475.

Massachusetts.—Franklin Ins. Co. v Cousens (1879) 127 Mass 258; Casella v Sneirson (1949) 325 Mass 85, 89 NE 2d 8. But see Wood v Culhane (1929) 265 Mass 555, 164 NE 622, infra, § 6.

Michigan.—Smith v Lock (1869) 18 Mich 56.

Montana.—McPherson v Monegan (1947) 120 Mont 454, 187 P2d 542.

New Mexico.—Hughes v Lippincott (1952) 56 NM 473, 245 P2d 390.

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New York. — Ranscht v Wright (1896) 9 App Div 108, 41 NYS 108, affd without op 162 NY 632, 57 NE 1122; Lewisohn v Lansing Co. (1907) 119 App Div 393, 104 NYS 543, revg 51 Misc 274, 100 NYS 1077; Kenyon v Hookway (1896) 17 Misc 452, 41 NYS 230, affd 21 App Div 342, 47 NYS 1138; Re New York (Thirty-first [Patterson] Ave.) (1934) 152 Misc 849, 273 NYS 757. But see Re Brook Ave. (1899) 40 App Div 519, 58 NYS 163, affd without op 161 NY 622, 55 NE 1093, infra, § 6.

Pennsylvania.—Hawkes v Philadelphia (1919) 264 Pa 346, 107 A 747; Philadelphia Storage Battery Co. v Philadelphia (1936) 323 Pa 17, 186 A 103; American Steel Foundries v Sibley Soap Co. (1921, CA3d Pa) 270 F 70. But see the Pennsylvania cases in § 6, infra.

Where a thirty-five-foot strip between two parcels of a lot separately conveyed was described as a street, and each deed described the property conveyed as running to the side line of such street and thence along such line, the fee to the strip remained in the grantor but was subject to an easement in the grantees and their successors. Petitpierre v Maguire (1909) 155 Cal 242, 100 P 690.

In Betley v Gordy Constr. Co. (1955) — Del Ch —, 115 A2d 475, an easement in a private road owned by the grantor was held to have been conveyed by a deed to the plaintiffs' predecessor in title which transferred to the grantee two parcels of land running back 560 feet from a public highway and separated by the private road, where the deed, in describing the first parcel, used as a reference "the southwesterly side of a 70 feet wide street newly established" and, in describing the second parcel, referred to "the said northeasterly side of the first mentioned newly established 70 feet wide street." The court held it must be assumed that the parties to the original deed intended that the grantee should have an easement in the way as described in the deed since without it there would be no way to cross from one parcel to the other without recourse to the public highway.

In Franklin Ins. Co. v Cousens (1879) 127 Mass 258, the owner of a rectangular tract of land known as Cedar Square, which was bounded on the east by Cedar Street, built a hotel on land also owned by him immediately adjoining the Cedar Square property and thereafter constructed a thirty-foot way on part of Cedar Square adjoining the hotel property, which was used as a carriage way for the hotel. Later the hotel property was mortgaged under a description which excluded the way, the description starting "at the corner of Cedar Square and Cedar Street," and finishing "by said Cedar Square one-hundred and twenty-five feet to the point of beginning," and subsequently the owner mortgaged the balance of his property, comprising the Cedar Square area, the metes and bounds description including the way without specifically mentioning it. After both mortgages were foreclosed, the defendant, who had acquired the Cedar Square area, fenced off the way and refused to permit its use by the plaintiff in connection with the hotel. A judgment confirming the plaintiff's right to use the way in connection with the hotel property was upheld, the appellate court finding that by the transfer describing the property as bounded on Cedar Square a right of way by implication over the passageway was conveyed. The court noted that if the property had been described as bounded upon a way or passageway thirty feet wide there would be no question that the grantor and those claiming under him would be estopped to deny the plaintiff's right to a way thirty feet wide adjoining the property, and held that it could make no difference that the way was called by another name, pointing out that the parties must have understood and intended the northerly boundary of the hotel property to be upon a way thirty feet wide called Cedar Square, even though this was also the name by which the larger area was known.

Although Wall Street as laid out

ended at the point where the plaintiff's property began, a description in the plaintiff's deed of the land conveyed as "running northerly in the easterly line of said Wall Street" gave the plaintiff an easement in the street as extended to the limit of the property conveyed, the court in Casella v Sneirson (1949) 325 Mass 85, 89 NE2d 8, finding that the grantor, who also owned the property including the way, was estopped to deny its existence. The court held that although there was some authority to the contrary it must be regarded as settled that a description which bounds property by the side line of a way is no less effective to give the grantee an easement in the way than a description which bounds the property by or on a way, and that it was immaterial that the way was not actually in existence.

A deed describing the property conveyed as running along the line of a creek until it intersected the line of Front Street, "thence westerly along said line of said street," was held in Smith v Lock (1869) 18 Mich 56, to have given the grantee an easement along the boundary of his land described as on Front Street, where it was shown that Front Street extended to the edge of the plaintiff's or grantee's land, the court holding that the description estopped the grantor from disposing of the area described as Front Street for purposes adverse to the rights of the grantee.

A deed describing property as running to an iron stake "on the south side of the county road; thence south . . . following the south side of the county road," was held in McPherson v Monegan (1947) 120 Mont 454, 187 P2d 542, to have given to the grantee a fee title to the center of the road together with an easement over such road, where it appeared that the grantor owned the land included in such road.

A deed which described the property conveyed by metes and bounds, with one side running "along the West side of Plaza Balentin," and which further described the property as bounded east by Plaza Balentin, was held in Hughes v Lippincott (1952) 56 NM 473, 245 P2d 390, to have given the grantee therein and his successors an easement for a right of way in the named plaza, against the claim that the deed did not bound the property by a way but merely mentioned the way for purposes of description or location without any intention of making it the actual boundary of the land.

A right of way in a lane which had been used for many years in connection with the premises conveyed, and which was owned by the grantor, was held in Ranscht v Wright (1896) 9 App Div 108, 41 NYS 108, affd without op 162 NY 632, 57 NE 1122, to have passed to the grantee where the property was described as beginning at the corner where the line of the lane intersected the line of a public highway and thence running "along the westerly side of said lane or right of way." The court held that the question of whether a right of way arose by implication depended on the intent of the parties as determined from the language of the grant, and that a description making the lane a boundary indicated an intent that the way should remain open, as appurtenant to the premises conveyed.

The grantee in Kenyon v Hookway (1896) 17 Misc 452, 41 NYS 230, affd 21 App Div 342, 47 NYS 1138, was held to have acquired a right of way over an unopened street adjacent to his property by virtue of the description in the conveyance of the property to him stating that it began "at a point in the west side of what appears to be the extension of Lemon street," and the contract of sale previously entered into between the parties describing the property as bounded "on the east by west line of Lemon street," the deed further describing the premises conveyed as being at the corner of East Water Street and the continuance of Lemon Street, although the grantor, before entering into the contract for sale of the premises, had informed the grantee that no street existed there and that he intended to hold the property adjacent to that conveyed. It

[§ 5]

was admitted that the grantor before the transfer had said to the grantee: "Mr. Hookway, I want you to understand frankly that I claim that land adjoining this property that we are talking about. There has never been a street there. I have always used it for a lumber yard, and it was used for a lumber yard before I got it; and there is no street there, and I intend to hold it," and that in response "Mr. Hookway laughed, and said he would take his chances on that." The court held that the conversation amounted in substance merely to a statement that the grantor had always used the space adjacent for his private purposes and intended to continue to do so, but pointed out that it could hardly be said that the grantee by his reply had assented or agreed to this future holding of the land. Pointing out that the grantor had a right to convey to the grantee so as either to exclude him from any right or claim to a street, or to give him a right or claim to one, the court held that by the description of the property the grantor had conveyed an easement in the adjoining space referred to as a continuance of the existing street.

Where the grantor owned the fee to the center line of a street, which had not yet been laid out, and conveyed property as bounded on the side line of said street, it was held in Lewisohn v Lansing Co. (1907) 119 App Div 393, 104 NYS 543, revg 51 Misc 274, 100 NYS 1077, that the grantee by virtue of the deed acquired a private easement for street purposes of air, light, and access over the land laid out or designated as a street, of which the grantor had retained the fee.

It was held in Re New York (Thirty-first [Patterson] Ave.) (1934) 152 Misc 849, 273 NYS 757, that the grantee in a deed describing the property conveyed as starting on the line of a projected avenue, and further as running "along the southerly side of Burnside Avenue," while excluding from the grant the fee of the street, created an easement in favor of the grantee over the full width of the street, thus precluding the owner of the fee from obtaining more than nominal damages when the bed of the street was taken by the city for use as a public highway.

A grantor who had sold land described as running along the north side of Arch Street, which was a plotted but unopened public street, was held in Hawkes v Philadelphia (1919) 264 Pa 346, 107 A 747, to have given his grantee a right of way in the street fronting the property, and was, therefore, not entitled to any substantial damages as a result of the taking of the bed of the street by the city. The court held that where land was conveyed as bounded by an unopened street projected by a municipality the grantee, by implication, acquired an easement over the bed of that street unless the circumstances attending the conveyance and the description of the grant negatived such implication. It was noted by the court that the original grantor, soon after conveying the land on the north side of the street in question, conveyed his remaining land on the other side of the street to another, the latter deed describing the land conveyed as running along the middle line of Arch Street, thus leaving the fee to only half of the bed of the street in the grantor.

The implication that conveyances bounding land on a plotted but unopened street conveyed an easement over the bed of the street was held in Philadelphia Storage Battery Co. v Philadelphia (1936) 323 Pa 17, 186 A 103, to make the bed of the street valueless when taken by the city, where it appeared that in one conveyance by the common grantor the land conveyed was described as along the middle of the street, and in subsequent conveyances the land conveyed was described as along the side of the street. The court held that in the absence of circumstances showing a contrary intention, these conveyances created in the grantees implied easements in the portions of the street bed abutting the properties conveyed, and that the implication of such an intention was strengthened by the fact that entrances into buildings constructed along the street had been provided, and a sidewalk and curb had been laid

along the street, and during part of the time a road in from another public street had been laid within the bed of the street taken.[8]

A description of the land conveyed as starting at a point in a forty-foot street and running "by the east line of said 40 foot street," was held in American Steel Foundries v Sibley Soap Co. (1921, CA3d Pa) 270 F 70, to have given the grantee an easement over such street by operation of law, and to preclude the grantor from denying the existence of such street, thus estopping a subsequent holder of the adjoining property, including the street, who acquired title through the common grantor, from interfering with the grantee's use of the easement.

§ 6. — Easement denied.

An easement to the grantee was denied in the following cases where the property conveyed was described as running to or along the side line of a way.

Kentucky. — Brizzalaro v Senour (1884) 82 Ky 353.

Massachusetts. — Wood v Culhane (1929) 265 Mass 555, 164 NE 622. But see the Massachusetts cases in § 5, supra.

New York.—Re Brook Ave. (1899) 40 App Div 519, 58 NYS 163, affd without op 161 NY 622, 55 NE 1093. But see the New York cases in § 5, supra.

Oregon. — Lankin v Terwilliger (1892) 22 Or 97, 29 P 268.

Pennsylvania. — Neely v Philadelphia (1905) 212 Pa 551, 61 A 1096; Henderson v Young (1918) 260 Pa 334, 103 A 719; Pennsylvania Co. for Insurances, etc. v Philadelphia (1935) 318 Pa 209, 178 A 129. But see the Pennsylvania cases in § 5, supra.

In Brizzalaro v Senour (1884) 82 Ky 353, a boundary described as "to a ten-foot alley thence eastwardly with south line of said alley forty-eight feet," was held to constitute a mere recital that an alley existed at a particular place, when such was not the fact, and did not give the grantee any rights to the alley against a subsequent purchaser from the common grantor of property which included the alley.

It was held in Wood v Culhane (1929) 265 Mass 555, 164 NE 622, that the defendant acquired no rights in connection with a way running from a public street parallel to one line of the defendant's lot, where the defendant's deed described the land as beginning at a point in the street where it meets the southerly line of a forty-foot way, then running along the public highway, then turning and running away from the public highway, then turning again parallel to the public highway back to the southerly line of the way, and "thence turning and running southeasterly on the southerly line of said forty-foot way . . . to the point of beginning." The court stated that it was manifest from this particular description that the grant excluded the way and that the grantor retained the fee in it, so that a subsequent conveyance of other land of the grantor, including the way, gave the exclusive right to its use to the later grantee.

Where a public street had been projected on the map of a city but had not yet been opened, it was held in Re Brook Ave. (1899) 40 App Div 519, 58 NYS 163, affd without op 161 NY 622, 55 NE 1093, that a conveyance describing the property conveyed as running to the "southeasterly side or line of Brook avenue, as laid out by the department of public parks of the city of New York; thence northeasterly, along said southeasterly side of Brook avenue," did not give the grantee any easement in the strip of land laid out upon the city map as Brook Avenue. The court noted that the land conveyed

8. See also Philadelphia Tapestry Mills, Inc. v Philadelphia Storage Battery Co. (1928) 11 Pa D & C 153, where an injunction to restrain the erection of a building in the bed of the same street was denied on the ground that no sufficient dedication of the street to the public had been shown, although the court stated that its action did not necessarily mean that the plaintiffs had no rights whatever over that part of the bed of the street as plotted which lay along the side of their respective properties. . . . .

fronted upon a public highway from which there was access to the property and held that no greater covenant could be implied under the circumstances than that if the city, by proper proceedings, established Brook Avenue as laid out upon the map as a public street, the land conveyed to the grantee should abut upon it.

It was held in Lankin v Terwilliger (1892) 22 Or 97, 29 P 268, that the grantee acquired no easement in a county road by virtue of a deed which described the property as starting at a particular point in the county road and thence running with the meander of the road for a certain distance, even though the grantor owned the fee in the road, where other rights of way had been conveyed to the plaintiff at the same time, thus eliminating the creation of a way by necessity. In holding that when the county road was discontinued the grantor and his successors acquired full rights in the area, not subject to any easement by the plaintiff grantee, the court recognized the rule that a grantor conveying land, describing it as bounded expressly on a street or way over his other lands, was forever estopped to deny the existence of such way, but held that this doctrine rested upon the fact that the grantor by such a description, intended to confer upon the grantee the right to use such way. Holding that this rule was inapplicable to the present case, the court said: "Where the land is conveyed by a certain and definite description, as by metes and bounds, the fact that the boundary, as described in the conveyance, may be coincident with the line of the way, does not of itself raise the implication that such way was intended as the actual boundary, or confer upon the grantee the right to use such way as appurtenant to the granted premises; but it must appear from the convenyance, either directly or by fair inference, that it was intended to bound the land by the road or way. . . . The land is definitely described by metes and bounds, which carefully exclude the road, and which are complete and certain without reference to it. . . . The only reference to the road in the deed is for the purpose of description, as any other mark or monument might have been referred to, and with no intention of making it the actual boundary of the land, unless it should be coincident with the description as given in the deed. Such a description of the granted premises does not convey an easement in an adjoining highway. Merely referring to a highway for the purpose of description, as any other mark or monument, is very different from bounding the granted premises by a highway over the other lands of the grantor, and thereby exposing himself to the equities of an estoppel."

A deed which described land conveyed as starting at a point on the side of an unopened street and as running along the side of such street, and described another boundary on an opened public street as extending to the center thereof and thence running along the center line of such opened street, did not convey to the grantee an easement over the unopened street referred to in the deed. Neely v Philadelphia (1905) 212 Pa 551, 61 A 1096.

The question for decision in Henderson v Young (1918) 260 Pa 334, 103 A 719, as stated by the court, was whether a deed describing property as bounded by a street plotted on the city plan, but not opened, conveyed to the grantee an easement over the bed of the proposed street, and entitled him to a right of passage even though the street was not opened and was subsequently vacated by the city. The deed to the plaintiff's predecessor described the land conveyed as extending "to the northeast side of Arbutus Avenue thence along the said side of Arbutus Avenue," the street named being on the city plan but not opened, and the land over which it was plotted belonging to the grantor, and there was no evidence that the grantor had ever made a plan of his own or adopted the city plan as part of a development for the abutting tract. In holding that the plaintiff had no right to an easement over the street named, as against the successor of the original grantor, the court stated that there was a distinction between the case where the owner

of land lays it out in lots abutting on a street of his creation, and one where he merely recognizes in his conveyance a street plotted by a municipality. Pointing out that if the grantor had laid out these lots abutting on a street in accordance with a plan of his own making, neither he nor his privies in title could be heard to deny to a subsequent purchaser of a lot abutting on such streets the right to a continued existence and use of the street, the court held that in the absence of such a plan a mere reference to a street as a boundary conveyed no easement over it other than that which would follow as a result of the subsequent action of the city in opening the street for public use.[9]

The intention of the grantor was said to be the controlling factor in determining whether a conveyance of land bounded on a plotted but unopened city street gave an easement in such street to the grantee, in Pennsylvania Co. for Insurances etc. v Philadelphia (1935) 318 Pa 209, 178 A 129, where the appellate court awarded substantial damages for the taking of land comprising the new street, holding that prior conveyances by the plaintiff had not created an easement in the street. After the city, by ordinance, had plotted an avenue through the plaintiff's land, the plaintiff conveyed part of the tract, bounded by the unopened avenue, to a railroad company, the measurements and the description being exact to the side of the avenue. Subsequently the plaintiff conveyed another part of the tract to a third person, bounding it by the side lines of three other streets and the side line of the proposed new avenue, and contemporaneously with this conveyance the plaintiff by deed dedicated half of the bed of two of the streets named as boundaries and all of the bed of the third street to the city. In holding that the plaintiff was entitled to substantial damages for the taking of land for the new avenue, the court noted that in each of the conveyances made by the plaintiff the grantee had the advantage of other streets, thus precluding any necessity of a right of way over the new avenue, and observed that the dedication in the later conveyance of three of the four streets, together with the failure to dedicate the new avenue, was strong evidence negativing any implication of an easement in the new avenue in the grantees. The court distinguished this case from Hawkes v Philadelphia (1919) 264 Pa 346, 107 A 747, supra, § 5, pointing out that in this case the plaintiff had limited the actual grant to the land which was not part of the opened street, whereas in the Hawkes Case the grantor by one of his conveyances had specifically included the land lying between the street line and and the center of the street, thus rendering the fee of the other half of the street valueless. The court held that this case was controlled by its decision in Neely v Philadelphia (1905) 212 Pa 551, 61 A 1096, supra.

9. See, however, Hawkes v Philadelphia (1919) 264 Pa 346, 107 A 747, supra, § 5, where it was stated that the general rule that a grantee acquires an easement in a street which is named as a boundary in his deed, provided the grantor owns the bed of the street, was not affected by the case of Henderson v Young (Pa) supra, the court noting that the easement or implied covenant of a way was not without limitation, and pointing out that ir the Henderson Case the obstructions complained of were not on the portion of the street adjoining the grantee's premises, and there was another street at one end of his lot that could be used, and a part of the plotted street in front of the complainant's land, connecting with still another street, was open to his use. The court stated that the language used in the earlier case where it was said that "a reference to the street as a boundary conveyed no easement over it other than that which would follow as a result of the subsequent action of the city in opening it as plotted to public use," did not mean that the grantor or his assigns could close up the streets vacated and deprive a lot owner of access to his property.

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§ 7. Way described as boundary but not adjoining land conveyed.

[a] Easement denied.

In some cases it has been held that no easement is given to the grantee by a deed which describes the land conveyed as bounded by a way if the balance of the description indicates that the land so conveyed does not actually abut on the way named in the deed.

Although a deed to another party in the same action was held to have given the grantee therein an easement over the strip reserved for a street (see the same case in § 2, supra), a deed which described the lot conveyed as fronting on a "reserve . . . to be a connection and continuation of South Street," was held to have given the grantee no rights in the reserved strip in Teasley v Stanton (1903) 136 Ala 641, 33 So 823, 96 Am St Rep 88, where the rest of the description in the deed showed that the lot conveyed was 105 feet distant from the strip reserved, the court pointing out that the description of the lot as fronting on a reserve was palpably false, and stating that no implied covenant could arise out of it.

It was held in Bates v Johnson (1927) 217 Ky 673, 290 SW 474, that no easement in a road or street was conveyed by a deed which described the property as running "to a point near the road or street running around the foot of the hill; thence running around the hill just below the said street." The court held that it was apparent that the land conveyed did not extend to the road or street and that the reference thereto was really for purposes of description and was therefore not sufficient to pass an easement in such road to the grantee.

[b] Easement upheld.

In other cases, however, even though the way was not actually contiguous to the property conveyed, it has been held that an easement passed to the grantee.

A conveyance which described land as running four rods along a main road and "thence easterly by a way," was held in Lemay v Furtado (1902) 182 Mass 280, 65 NE 395, to give the grantee a right in the way mentioned even though the distance from the starting point as described in the deed did not quite reach the place where the way was intended to be, the court finding that this was evidently due to the mistake of taking the perpendicular measurement from side to side of the lot conveyed, and of not noticing that the line of the road was diagonal and a little longer.

A right to the use of a way was held to have passed to the grantee in McKenzie v Gleason (1904) 184 Mass 452, 69 NE 1076, 100 Am St Rep 566, where the property was described as running from a cedar post "to a stake and stones near an old road leading to the shore; thence by said road . . . to a stake by a pair of bars," where the effect of excluding a right to the way from the conveyance would have made the property conveyed inaccessible. The court held that this fact negatived the argument that the running of the side lines to a stake and stones near the way and to a stake near a pair of bars indicated an intention by the grantor to exclude the way from the conveyance.

In Roberts v Karr (1809) 1 Taunt 495, 127 Eng Reprint 926, land was conveyed as abutting on a certain highway, although by the measurements a strip of land was left between the land conveyed and the highway, and this strip was subsequently conveyed by the grantor to another who enclosed it. In holding that the original grantee had a right of way over the strip to the highway, the court pointed out that the grantor would not have described the property conveyed by specific distances and as abutting on the highway if he had intended to reserve a strip between the highway and that conveyed, and stated that the grantor, having said in his conveyance, "This land abuts on the road," could not thereafter be heard to say that the land on which it abutted was not the road.

§ 8. Extent of grantee's rights in way; generally.

A grantee of land bounded by a street has been held entitled to use the street for all reasonable and proper purposes.

A conveyance to the plaintiffs' predecessor in title of two parcels of land located on opposite sides of a newly established seventy-foot wide street, one side of which was described as a boundary of each parcel, was held in Betley v Gordy Constr. Co. (1955) — Del Ch —, 115 A2d 475, to have given the grantee a right of access to the street from the property conveyed. The successor in title to the bed of the street had subsequently paved the middle thirty feet of it, using it as an entrance to a development at the rear of the plaintiffs' land, and had planted evergreens and shrubbery along the twenty feet of the private road on each side of the paved portion, thus preventing access by vehicle from the paved road to the plaintiffs' land. Although finding that the plaintiffs had a right to the use of the entire seventy-foot street, the court held that, in view of the delay in seeking relief, their rights would be protected by granting them reasonable access roads from their land to the paved portion thereof.

In Van O'Linda v Lothrop (1839) 38 Mass (21 Pick) 292, 32 Am Dec 261, where the grantee was found to have acquired an easement in a certain way by virtue of a deed describing his land as being bounded by the intended way, the court rejected a contention that if the right existed it had been lost because the grantee had abused it and so had become a trespasser. The court said that the grantee was entitled to a reasonable and proper use of the way, which must depend on the local situation and on public usage, and held that it was not unreasonable for the grantee to place gates and doors so near the street that when opened they swung over it, suffer horses and carriages occasionally to stand in the street near his premises, place timber and other building materials on the street preparatory to building on his own land, throw earth out of his cellar onto the street for the purpose of removing it, and spread materials on the street to make it more level and to make his own barn more accessible.

And it has been held that a grantee has the right to use a strip of land, referred to in his deed as a street bounding the land conveyed, for all street purposes even though the so-called street had been relocated in the development of the tract so that the grantee's land was only partly bounded by it.

Following the conveyance to the plaintiff of certain land bounded on one side by a "Proposed Extension of Gardner Avenue," shown on an unrecorded map prepared by the original grantor as being fifty feet wide, the common grantor in Buckley v Maxson (1935) 120 Conn 511, 181 A 922, conveyed the remaining land, including the reserved strip, to the defendant, who had knowledge of the map and the extent of the proposed extension of Gardner Avenue. The defendant later laid out and built an extension of Gardner Avenue, which abutted on the plaintiff's land for only about forty-four feet instead of one hundred feet, and then curved away from it leaving a strip of land gradually increasing in width to fifty-three feet between the highway and the plaintiff's line. The defendant placed obstructions which prevented access from the plaintiff's driveway across the reserved strip and the other land of the defendant lying between the highway and the plaintiff's land. The appellate court held that while the plaintiff had no right of action because of the relocation by the defendant of the proposed extension of Gardner Avenue, she did, as a result of the description in her deed, have the right to use the fifty-foot strip mentioned therein for all the purposes that a city street might be used by the abutting owner, and the right to have any obstructions placed in the strip by the defendant removed.

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But a reference to a street as a boundary does not give the grantee a right to have the street continued the same width as originally intended by

the grantor, or as shown on a plan prepared by the grantor, where the sale is not made by reference to the plan.

The plaintiff in Walker v Worcester (1856) 72 Mass (6 Gray) 548, by virtue of a description in his deed describing the property conveyed to him as bounded "westerly on Park Street one hundred and fifty feet," claimed to be entitled to a street on this boundary sixty feet wide, which was the width of Park Street as originally shown on a plan for the development drawn by a previous owner and which had been shown to the plaintiff's predecessor in title at the time of the original conveyance. The court held that admission of the plan in evidence was merely by way of showing what the parties intended by the use of the term "Park Street" in the deed, and that the lower court had erred in refusing an offer of proof by the original grantor that at the time of the original sale he informed the grantee that he would open Park Street as a street forty feet wide, whenever requested, and that he did not intend to be bound by the plan. The court pointed out that under the deed the grantee was entitled to a right to convenient passage over a street but that there was nothing to designate or limit the dimensions of the way thus granted by implication.

In Harding v Wilson (1823) 2 Barn & C 96, 107 Eng Reprint 319, a lease described the premises as abutting on "an intended way of 30 feet wide," and in a subsequent underletting of the premises they were described as abutting on "an intended way," not mentioning the width. Later a grantee from the original owner acquired adjoining land and the soil of the way and built a wall in such a manner as to reduce the width of the way to twenty-seven feet, and the sublessee claimed damages for this obstruction to the way. In ordering a new trial after a jury had awarded nominal damages to the plaintiff, the appellate court stated that the description in the lease did not grant a way thirty feet wide, but only described the land demised as bounded by an intended way of that width, which was merely an expression of the lessor's intention and not a grant, thus not entitling the plaintiff to judgment in the absence of a showing of actual damage.

And in one case it was held that only the original grantee had the right to enforce the implied covenant resulting from naming a prospective street as a boundary, at least where the covenant was immediately broken.

A deed which described the lot conveyed as bounded by a named street "to be laid open fifty feet wide" was held in Dailey v Beck's Exrs. (1847, Pa) 4 Clark 58, to have amounted to a covenant by the grantor to open the street. The court held, however, that the plaintiff, who was the successor in title to the original grantee, could not enforce the covenant since it ran with the land only while it remained unbroken, and the pleading indicated that it was broken in the time of the original grantors before the plaintiffs purchased the property, with the result that action for the breach could be maintained only by the original grantee.

§ 9. — Easement for travel over entire route of way.

[a] Right upheld.

Where a deed which describes land as bounded by a way indicates that the way extends beyond the land conveyed, or there has been some other indication of the extent of the way, the grantee acquires a right to the way, not merely in front of his property but also to the full extent of the way as indicated.

Massachusetts. — Thomas v Poole (1856) 73 Mass (7 Gray) 83; Tobey v Taunton (1876) 119 Mass 404; Crowell v Beverly (1883) 134 Mass 98; Lefavour v McNulty (1893) 158 Mass 413, 33 NE 610; Driscoll v Smith (1903) 184 Mass 221, 68 NE 210; Flagg v Phillips (1909) 201 Mass 216, 87 NE 598; Hobart v Towle (1915) 220 Mass 293, 107 NE 954; Teal v Jagielo (1951) 327 Mass 126, 97 NE2d 421.

New Jersey.—National Silk Dyeing Co. v Grobart (1934) 117 NJ Eq 156, 175 A 91. But see Stevens v Headley (1905) 69 NJ Eq 533, 62 A 887, infra, § 9[b].

Ohio. — Harrison v Pike's Heirs (1879) 7 Ohio Dec Reprint 603, 4 WL Bull 156.

In Thomas v Poole (1856) 73 Mass (7 Gray) 83, land conveyed to the plaintiff was bounded upon a new way or street described as "extending from said Main Street along on the northerly side of said lot hereby conveyed," and westerly to land of others. At the time of the conveyance the grantor owned the land adjoining that tranferred to the plaintiff and west of it, over which the way was then staked out, and he subsequently changed the course of the way over this adjoining lot but left the part of it which bounded on the land of the plaintiff unchanged, later conveying the adjoining land to the defendant, bounding it on the way as subsequently laid out. In upholding a judgment for the plaintiff in an action brought for the obstruction of the way, based on the fact that the defendant's house encroached on the way as described in the plaintiff's deed, the court held that the plaintiff was entitled to the use of the way as described in his deed, not only in front of his own premises but for the full extent of the way as therein indicated. The court pointed out that the grantee might have had an interest in having the street in front of his house run in a straight line as staked out and that the stipulation in the deed was not merely coextensive with the granted property but extended for the entire distance of the way as indicated in the deed.

The extent to which a grantee acquired a right in a way by which land conveyed to him was bounded was involved in Tobey v Taunton (1876) 119 Mass 404, where a landowner, to whom land had been conveyed on the same street, sought damages for the taking of part of his land when the street was officially laid out by the defendant city. To show that the land taken was encumbered by a right of way and therefore of less value, the city introduced a deed from the common grantor showing an earlier conveyance of land on the same street, one of the bounds of which was "thence with the line of said street eighty feet," and offered evidence that the grantor at the time of the earlier conveyance was the owner of the land which constituted the street and of the land of the petitioners. It was shown that at that time the street was in use and that its boundaries were marked out and defined by rows of trees and fences, and that such boundaries included a portion of the land which was afterward sold to the petitioner and which was being condemned. It was shown also that a plan of the land made after the first conveyance but before the conveyance to the petitioner showed the street as thirty-one feet wide until it reached the petitioner's land, after which it narrowed to seventeen feet, continuing at that width until it reached another street. The court held that the petitioner's land was subject to an easement, pointing out that at the time of the original conveyance to the other grantee on the same street, the way was marked out by the trees and fences and could fairly be supposed to have entered into the consideration of the purchase, thus giving the grantee a right over the entire way as it then existed, and adding: "When a grantor conveys land bounding on a street or way, he and his heirs are estopped to deny the existence of such street or way, and the right thus acquired is not only coextensive with the land conveyed, but embraces the entire length of the way as it is then actually laid out or clearly indicated and prescribed." The court conceded that the petitioner did not have as clear a notice as he would have had if a plan had been made and recorded at the time of the fee to the original grantee, instead of a definition of the street by perishable monuments, but pointed out that he had notice by the record that his grantor had earlier sold a tract of land bounded on the same street, and it was therefore for him to inquire what that street then was.

A conveyance by the petitioner of land as bounded by an existing way was held in Crowell v Beverly (1883) 134 Mass 98, to give the grantee a

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right of way over the petitioner's land, even though that part of the way which bounded the land conveyed was not owned by the petitioner but by an adjoining landowner who had laid out the way from a street through his property to the petitioner's property, where it was shown that the way as laid out had been extended with the acquiescence of the petitioner across his property to another street. The court held that while it was true that the grantee could acquire no right to use the way in front of the granted premises, except through the other adjoining landowner, he had a right to assume that the petitioner, having bounded the property sold to him on a street running largely over the petitioner's land, would not close up such street or deny him the use of it. This case arose on the question of damages to be paid the petitioner for taking the land comprised in the way for a city street, the court holding that the existence of the easement in favor of the petitioner's grantee reduced the value of the land taken.

It was held in Lefavour v McNulty (1893) 158 Mass 413, 33 NE 610, where the common owner of three lots, with a way from a street running between two of them to the third lot in the rear, used the way as a means of access to the rear lot, that on the sale separately of the three lots by the owner's estate the purchaser of the rear lot, whose conveyance was described as running partly by the way, acquired a right to use the way to reach the street, even though the conveyances of the other two lots included the words "with all the rights in common on said court," which words were not included in the conveyance of the rear lot. The court held that construing all the deeds together it seemed plain that it was the intention of the grantors that the way should continue to be used by all their grantees in common, and that the use of the words "by said way" in the conveyance of the rear lot gave the right to use the court or way to the street so far as it was within the power of the grantors to convey such right.

In Driscoll v Smith (1903) 184 Mass 221, 68 NE 210, a deed bounding land conveyed in part as "on the northerly line of Smith street," was held to give the grantee a right of way over the entire length of what was commonly known as Smith Street to another existing street, where it was shown that the grantor owned all of the land included in the street described in the deed, despite the defendant's contention that Smith Street at the time of the conveyance was forty-two feet wide to a certain point and only ten or twelve feet wide from that point to the other public street, and that the latter section should not be included in the easement granted by the deed. The court found that there was sufficient evidence to indicate that the name "Smith Street" was given to the way extending to the public street, and that the defendant had represented to the plaintiff and other parties that it was his intention to make this street a main thoroughfare leading to the other, thus estopping the defendant to deny that Smith Street extended all the way to the other street.

It was said in Flagg v Phillips (1909) 201 Mass 216, 87 NE 598, where the plaintiff's title deed described a boundary upon a passageway as "westerly by a passageway laid out from said Winter Street to Hamilton Place," that this language conveyed at least a right of way over the entire extent of the passage.

Where a plan drawn up for the sale of a large tract of land showed various streets running through the tract and an undesignated parcel at one end with one of the streets on the plan ending at the edge thereof, and subsequently the grantors conveyed land as bounded on the easterly line of this street a distance of "409.90" feet, which was sufficient to carry the avenue to the public street at the end of the development, the grantees of such lots, having no other means of access shown by the plan, were entitled to an easement over the entire length of the extended street, the grantors being estopped to deny that the land for the entire distance had not been appropriated as a part of the street shown on the plan. Hobart

v Towle (1915) 220 Mass 293, 107 NE 954.

A conveyance to the plaintiff in 1943 of land as bounded by "the old Dudley Road" was held in Teal v Jagielo (1951) 327 Mass 126, 97 NE2d 421, to have given the grantee an easement of way in that road for the general purposes of a street appurtenant to the plaintiff's land, even though it was shown that the road had been discontinued in 1833, the court holding that the plaintiff had acquired an easement in the road as it was originally laid out.

In National Silk Dyeing Co. v Grobart (1934) 117 NJ Eq 156, 175 A 91, the owner of a large tract of land conveyed part of it which fronted on a public street to the predecessor of the defendant, together with the right to the use of a lane extending from a public street along the property conveyed and beyond it to other property of the grantor. Subsequently the grantor conveyed other property described as bounded by the lane to the predecessor of the complainant, and after the lapse of many years, the defendant sought to prevent the use by the complainant of the lane adjoining the defendant's property. In holding that the complainant had acquired by the deed the right to use the lane all the way to the public street, the court said: "This conveyance of land expressly bounding on a street or lane, covered not only the land particularly described, but carried with it Addy's implied covenant that there was a street or lane which Taylor had the right to use for access to the land. It would be absurd to think that such right of passage was limited to a way directly in front of the land, which led nowhere, so that the necessary and further implication is that the easement thus granted Taylor carried beyond the street or lane in front of his property to such connection as it had to a way, of which it was a continuation, in order to afford Taylor access and egress by means of the whole way to and from the street front of his land and a public street."

It was said in Harrison v Pike's Heirs (1879) 7 Ohio Dec Reprint 603, 4 WL Bull 156, that a grantee whose deeds described the land conveyed as bounding on a private alley acquired the right to use the surface of such alley, not merely in front of the lot granted, but for its entire length. See also Harrison v Craighead (1880) 8 Ohio Dec Reprint 35, 5 WL Bull 270, where an injunction requiring removal of obstructions in the alley was denied on the ground that the right of way had not been used for thirty years and the parties entitled to the use of it had expressly renounced and abandoned their rights therein.

[b] Right limited.

In other cases it has been held that the grantee acquires a right in a way described as a boundary only to the extent necessary to give him access to a public street.

It was held in Brooks-Garrison Hotel Corp. v Sara Invest. Co. (1952, Fla) 61 So2d 913, where the plaintiff claimed under a deed describing the property as bounded by a certain street, which had been dedicated to the public by the original grantor, that the plaintiff had no rights in the street beyond his property where it appeared that the defendant had acquired title to the land on both sides of the street, including a "disclaimer and quit claim" deed from the city and county. Noting that the dedicated area at the point in question provided access only to the defendant's property, the court pointed out that the implied easement resulting from a conveyance as bounding on a street was based on the principles of estoppel, and held there was no reason to extend the implied easement to any portion of the street beyond that which was reasonably or materially beneficial to the grantee.

Where lots sold to the defendant and others were described as bounded by a street which had not been opened, it was said in Neal v Hopkins (1898) 87 Md 19, 39 A 322, where it appeared that the vendor owned the land described as a way, that the purchasers were entitled to a right of way over such street only until it reached some

subject for a decree for specific performance, the court said: "In one sense the deed operates as a conveyance of a right of way over the street; that is to say, the grantors and all claiming under them are estopped to deny the existence of the street, or do any act inconsistent with the plaintiff's use of it as such. But the plaintiff's right is in the nature of an executed grant. He holds under a conveyance which has taken full effect, and which contains no stipulation or assurance that the grantors are to do anything, at any time after the date of the deed, to add to what has been actually conveyed, or to render it more effective."

§ 11. — Easement of light and air.

The question whether a grantee in a deed describing the land conveyed as bounded by a way acquires an easement of light and air has arisen only infrequently, and the courts have indicated a lack of agreement on this point.

It was said in Petitpierre v Maguire (1909) 155 Cal 242, 100 P 690, where a strip of land adjoining the property conveyed was described in the deed as a street, that the grantee and his successors acquired a right of way over such strip for purposes of travel, light, and air, and as a means of ingress to and egress from their respective lots.

But the grantee's right in a private alley by virtue of deeds describing the land conveyed to him as being bounded on the alley was held in Harrison v Pike's Heirs (1879) 7 Ohio Dec Reprint 603, 4 WL Bull 156, to be limited to the right to use the surface of the way, since it was a private alley not dedicated to the public, the court holding that while the grantee could not require removal of a structure extending over the alley above the street, the grantee could require the removal of obstructions on the surface. See also Harrison v Craighead (1880) 8 Ohio Dec Reprint 35, 5 WL Bull 270, where an injunction requiring removal of obstructions in the alley was denied on the ground that the right of way had not been used for thirty years and the parties entitled to the use of it had expressly renounced and abandoned their rights therein.

§ 12. — Right to compensation where way is taken for public highway.

In determining compensation for land taken for city streets, where conveyances had been made by the owner of land abutting the street, and of the land included in the bed of the street, describing the proposed street as a boundary in the same manner as if it had already been laid out, it was held in Re Eleventh Ave. (1880) 81 NY 436, that the grantees under such deeds acquired an easement in the streets described as boundaries by their deeds, and had the right to share in the compensation for the street when taken by the city along with the owner of the fee in such street.

And in Re St. Nicholas Terrace (1894) 143 NY 621, 37 NE 635, it was said that by virtue of the private easements created in the grantees by a deed describing property conveyed to them as bounded by a street, the grantees were entitled to share with the grantor when the street was subsequently taken by the city in laying out a public street.

§ 13. — Use of way in connection with other land.

The courts have generally held that a grantee acquiring an easement against the grantor as the result of the naming of a way as a boundary in his deed has no right to use the way in connection with land acquired from other sources.

Under a deed describing land conveyed as bounded on a passageway reserved by the grantor for his own use and that of his grantees in common, it was said in Stearns v Mullen (1855) 70 Mass (4 Gray) 151, that the grantee, after acquiring additional land at the end of the passageway from other sources, had no right to permit his tenants on such other land to use the passageway, the court holding that the right to passage over such way was appurtenant only to the land conveyed with reference thereto.

It was held in National Silk Dyeing Co. v Grobart (1934) 117 NJ Eq 156,

175 A 91, that a grantee who had acquired the right to use a lane or street on which his property was described as abutting had no right to use such way in connection with other property adjoining that originally conveyed to him, which he had acquired from another source.

And in Walker v Walker (1943) 153 Pa Super 20, 33 A2d 455, a common grantor conveyed a part of his land without reference to an alley, and subsequently conveyed an adjoining parcel describing it as bounded on one side by "an alley common to the lot hereby conveyed" and the lot previously conveyed. The grantor also owned other land in the rear of the lots conveyed. It was held that by the second conveyance the grantee in that and the prior conveyance became jointly entitled to the use of the alley lying between their properties, but when one of them later acquired other land originally owned by the common grantor and sought to extend the alley and use it for access to such other land, the court said that he had no right to do so, pointing out that the right to use the alley was appurtenant to the original conveyances and not personal to either of the grantees, and the alley could not be used in connection with land otherwise acquired, inasmuch as the original grantor had not indicated an intention that the alley should be used in connection with his other land.

But it was held in Maier v Walborn (1925) 84 Pa Super 522, that the designation of an alley as a boundary in conveyances of land on both sides thereof, was an implied covenant by the grantor that the alley should be open for the use of the grantee as a public way, and was also a dedication of the alley to public use, thus precluding the grantees from preventing use of the alley by others who had acquired land from a different source and who constructed an extension of the alley into their property.

§ 14. Loss of rights in way.

[a] Generally.

An easement acquired by virtue of the designation of a way as a boundary in a deed will not ordinarily be lost because of excessive use of the easement or nonuser.

In National Silk Dyeing Co. v Grobart (1934) 117 NJ Eq 156, 175 A 91, a lane over which the grantee had acquired a right of way by virtue of its use as a boundary in his deed was used by him in connection with a large manufacturing plant built on the land to which the easement was appurtenant and on another tract acquired from an outside source. The court held that the excessive use of the easement had not worked a forfeiture thereof but refused to restrain interference by the owner of the fee in the way with the grantee's use of it unless the grantee could separate his operations so as to make the use of the way applicable only to the original property to which it was appurtenant.

Where it was shown that the original owner had laid out a tract of land into lots, and laid out an alley on such land with the lots bounding upon the alley, and purchases were made with reference to the alley, the deeds describing the lots as bounding on the alley, each grantee acquired an easement in the alley which would not be lost by nonuser, as against the owner of the fee in the alley. Wiggins v McCleary (1872) 49 NY 346.

But it has been held that the right to the use of a way may be lost by failure to assert the right seasonably where the use of the way by the original grantor and his successors has been adverse to the grantee's right to the way by virtue of its use as a boundary in his deed.

In Galveston v Williams (1888) 69 Tex 449, 6 SW 860, the owner of a large square of land bounded on four sides by city streets conveyed a part of it to the intervenor's predecessor, describing it as bounded by another street which, if projected beyond its existing bounds would have bisected the tract. Subsequently the grantor conveyed the balance of the tract to the defendant by a description which omitted any reference to the projected street and included the area covered by such street. There was evidence

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that at the time of the first conveyance the grantor agreed that a street coinciding with the prolongation of the existing street should be opened through his portion of the tract. In an action brought by the city for the purpose of having the property in controversy declared a street, in which the present owner of the tract allegedly bounded by the street intervened, the court upheld a judgment for the defendant, pointing out that there had been no dedication to public use and no acceptance of the property by the city. The court stated that the language in the first deed might be sufficient to invest the grantee therein, and those holding under him, with an easement in the property described as a street, but held that if so, the right had been lost by the failure to bring suit within five years from the date of the subsequent conveyance by the original grantor to the defendant, since the latter's possession and enclosure of the proposed street was hostile to the easement claimed and precluded the right of the claimant to assert it.

[b] Abandonment of public highway designated as boundary.

The private right of way acquired by virtue of a deed describing property as bounded by a public highway has been held to survive the abandonment of the highway by the public authorities, so far as the grantee's rights against his grantor and successors are concerned.

In McPherson v Monegan (1947) 120 Mont 454, 187 P2d 542, the plaintiff and defendant each owned land on opposite sides of a public highway by conveyances from the same grantor, and on their petition the highway was abandoned by the county, whereupon the defendant obtained a deed from the descendants of the original grantor of all their interest in the original property and claimed title to the entire highway. In affirming a judgment for the plaintiff, the appellate court held that by the original conveyances, bounding the land conveyed as on the county road, the plaintiff had acquired an easement in such highway entirely independent of the public right to use such road, which right survived the extinguishment of the public easement.

The private easement which grantees acquire by virtue of conveyances describing property as bounded by or running along a public highway the fee in which is owned by the grantor is retained by such grantees when the public highway is discontinued, and they still have a right of easement over such highway, even though the original grantor may still retain the fee title thereto. Holloway v Southmayd (1893) 139 NY 390, 34 NE 1047. To the same effect see Holloway v Delano (1893) 139 NY 412, 34 NE 1052.

Where lots had been taken by the commonwealth along a canal basin for the purpose of constructing a railroad, and the owner subsequently sold lots between the railroad and the canal, access to such lots being possible only over the space occupied by the railroad, the grantor, by such sale, annexed the use of the space occupied by the railroad to the lots sold and had no right to use it for other purposes upon the discontinuance of the railroad and the reversion of the space to him. Plitt v Cox (1862) 43 Pa 486.

W. J. Dunn.