

But there is more in the case. The agreement provides for the defendant giving a deed of the right of way "when and as soon as the same is surveyed." It is plain that the survey was required, not that the parties should know the position on the ground, but that a proper conveyance could be made, and it is equally plain that no proper conveyance could be made without a survey. The parties might have agreed to define the extent of the right of way by fences, stakes, or other marks on the ground, but they chose—and wisely chose—to have the right of way defined by survey.

Where one person is entitled to a right of way over the land of another, the precise location not having been determined, it is the grantor who has the right and duty to select the precise location, to "define" the way.

This is so in rights of way by necessity.

*Clarke v. Ruggie*, 2 Roll. Abr. 60 p. 17, where it is said: "The feoffor shall assign the way where he can best spare it."

*Packer v. Welsted*, 2 Sid. 111; *Pearson v. Spencer*, 1 B. & S. 511, 3 B. & S. 761; *Bolton v. Bolton* (1879), 11 Ch. D. 968, and also in cases of contract: *Deacon v. S. E. R. Co.* (1889), 61 L. T. n. s. 377; *Metropolitan, etc., Rv. v. G. W. R.* (1900), 82 L. T. n. s. 451; and once the way is "defined," it cannot be changed by the grantor.

*Deacon v. S. E. R. ut supra.* It is to my mind clear that the parties agreed that the way should be "defined" by a survey—this I think made it the duty of the defendant to have the survey made. When he refused, I think an action lay at the instance of the female plaintiff. Moreover, a survey being a prerequisite to a conveyance, the refusal to make a survey was a waiver of the conveyance.

We need not consider whether the defendant should have the deed prepared, as the plaintiffs express their willingness to have that prepared at their own expense.

I think the defendant must have a proper survey made of the way already agreed upon (which is said to be 16 feet wide), and furnish the correct description to the plaintiffs and pay the costs of the action and appeal. He must also execute a proper deed of conveyance, if and when tendered him on behalf of the plaintiffs—if the parties cannot agree the conveyance to be settled by the Judge.

Some argument was advanced—perhaps it is better to say some regret was expressed that the Court should be troubled with this matter, which was described as petty. For my