

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

R. McKay, K.C., for the plaintiffs.

G. F. Shepley, K.C., for the defendant.

RIDDELL, J.:—In April, 1906, the defendant entered into an agreement with the plaintiff Thomas Burney for sale to him of a part of lot 10 in the 5th concession of the township of Burke, which is wholly landlocked. The agreement—it is under seal—concludes: “The party of the first part further agrees to give the party of the second part a right of way across lot number 11 . . . from the Haileybury and New Liskeard Road to the property above described, and agrees to make a grant of such right of way when and as soon as the same is surveyed.”

The agreement was transferred by Burney to his wife, the other plaintiff—and the defendant duly conveyed the land to her on the 6th April, 1907.

Before the conveyance was made, and shortly after the execution of the agreement, the parties agreed as to the location of the way—the only convenient location, it would seem, on the servient tenement. No survey was made and no conveyance given.

Some time thereafter, the defendant sold part of the land over which ran the way, to one Gillies: but the continual use of the way by the plaintiffs was not interfered with by Gillies. It would seem that the female plaintiff has attempted to sell the property, but failed, as the proposed purchasers objected that she “had no legal right to the right of way.” The property is worth about \$500 if the right of way be secure, and it is not far from Haileybury.

According to the evidence of Mrs. Burney, which is not contradicted, in the spring of the year 1910 the defendant absolutely refused to give her a grant. He said: “I can’t give you the right of way now, because I sold it, but later on I will give you the right of way over another portion of the land.” “I told him then that what he proposed to give at a future date was also Mr. Gillies’. This was in May last, after I threatened action, but before the writ was issued.”

This action was begun in May, 1910, both husband and wife suing as plaintiffs. They set up the agreement; that the defendant, in 1906, laid out the right of way pursuant to the agreement, and placed them in possession thereof; that they have daily used it: that they have requested him to have it “surveyed and conveyed as agreed;” but the defendant neglects and re-