HIGH COURT DIVISION.

BOYD, C. SEPTEMBER 18TH, 1913.

GOLDSMITH v. HARNDEN.

Will—Power of Appointment—Exercise of—Validity—Subsequent Attempted Exercise of Power—Revocation—Title to Land—Action for Possession.

Action to recover possession of land, tried at Belleville.

BOYD, C.:—The land in question was owned by John Flatt, who by his will devised it for life to his brother Daniel Flatt, and after his death he devised a further life estate therein to Homer Flatt, and in case Homer Flatt should leave offspring surviving, the ultimate devise was to such of his offspring as Homer should appoint. On the 23rd November, 1880, Homer exercised his power of appointment in favour of one of his offspring, Luella Sweet, who has survived him. In November, 1889, Luella conveyed for value all her rights in the land to P. D. Goldsmith, and he conveyed all to his wife, the plaintiff, in October, 1901.

Homer, life tenant, died last year, and this action is brought to get possession of the land as against the defendants.

They claim under a subsequent appointment of the same land made by Homer of the 28th April, 1900. By the defence the effect of the earlier appointment is sought to be avoided by allegations that the first appointment was not valid and irrevocable, that it was made without consideration and without the knowledge of the appointee, and that it is void as against the subsequent appointment, which was for valuable consideration.

These matters of defence, whatever their importance, were none of them proved by any evidence. On the present record and evidence there is nothing to invalidate the first deed of appointment made in 1880, and the registered title of the plaintiff under that would seem to be unimpeachable by the defendants.

Apart from this record, however, the defendants in argument set up the invalidity of the plaintiff's title because of the circumstances under which the first deed of appointment was made, as disclosed in the report and judgment of the case Sweet v. Flatt, reported in 12 O.R. 229 (1886). That happens to be