

“(1) An appeal shall also lie to a Divisional Court at the instance of any party to a cause or matters from (c) Every decision or order in any cause or matter disposing of any right or claim, if the decision or order is in its nature final and not merely interlocutory.”

I do not think that this objection is well founded. Section 34, sub-sec. 1, gives a very wide right of appeal to a Divisional Court from any order made in a Surrogate Court, and sub-sec. 3 does not, I think, restrict this in any way, but merely prescribes that the practice and procedure upon and in relation to an appeal shall be the same as provided by the County Courts Act as to appeals from the County Court. But there is perhaps a serious objection to the order on this ground, that the application under which the order directing the issue was made being in the High Court, and the only matter sent to the Surrogate Court to be dealt with therein being that issue, the Judge of that Court had no power to make the order in question at all. I am inclined to think that on this ground the order appealed from cannot stand.

I think also that the appellants should succeed upon the ground set forth in the second clause of the notice of motion, in which they say that they did not come into Court voluntarily, but were brought into Court by and at the instance of the defendants.

The issue directed as above was in consequence of the action taken by the administrator of the estate, and the motion made by him. While it is true that in the issue the appellants are made plaintiffs, that does not affect at all the question involved in this motion. But for the action of the administrator in launching the motion in which the issue was directed, the proceedings in question would not have been taken.

[Reference to *Ward v. Benson*, 2 O.L.R. 366, per Moss, C.J.O., at p. 368.]

In this case the plaintiffs in the issue directed as above, have been brought into Court at the instance of the administrator of the estate, who is one of the defendants contesting the right of the plaintiffs to succeed in the issue so directed.

The appellants have not come into Court voluntarily, but have been brought into Court by and at the instance of the administrator, who has the same interest in the estate as, and is no doubt working in conjunction with the other defendants.

I think the appeal must be allowed and the order in question set aside with costs throughout.

FALCONBRIDGE, C.J.K.B., and SUTHERLAND, J., concurred.