

ask the Divisional Court to hear the case on the merits, either party may, without leave, appeal to the Court of Appeal for Ontario from the judgment of the Divisional Court.

*Robinson, Q.C., and D. Meek, for the appellants*

*J. A. McLean, and W. K. Cameron, for the respondent.*

Moss, J.A.]

IN RE SHERLOCK.

[Nov. 22, 1897

*Executors and administrators—Application by executor under Rule 938 (a)—Appeal to Divisional Court—Leave to appeal to Court of Appeal—Interest of executor—Reimbursement of costs—Security for costs.*

Under Con. Rule 938 (a), an executor applied in Chambers by way of originating notice, and obtained a determination of a question affecting the rights of legatees under the will, which involved the construction of the will, but, upon appeal by residuary legatees, the order in Chambers was reversed by a Divisional Court, which put a different construction upon the will.

*Held*, that the judgment of the Divisional Court was a sufficient protection to and indemnity of the executor, and if he sought to appeal to the Court of Appeal, he must do so at his own risk as to reimbursement of the costs, in the event of failure; and his application for leave to appeal could be granted only upon the usual terms as to giving security for costs under Con. Rules 826 et seq.

*McBrayne, for the applicant. S. Price, for the residuary legatees.*

Moss, J.A.]

IN RE SHERLOCK.

[Dec. 10, 1897.

*Appeal—Leave—Status of appellants—Con. Rule 938—Will—Contending beneficiaries—Security on appeal.*

Application by the daughters of Samuel L. Sherlock, who were the legatees interested in the bequest in question, for leave to intervene and appeal from the decision of a Divisional Court (see ante) and to dispense with the security required by Con. Rule 826.

It was objected on behalf of the residuary legatees, who opposed the application, that the intervention of the applicants raised a question between contending beneficiaries, and that there was no jurisdiction to deal with such a question under Con. Rule 938.

*Held*, that the question was one which a Master, by taking the accounts and making the enquiries directed to be taken and made in an administration proceeding, would have jurisdiction to deal with; see form of administration order (No. 157); Con. Rule 953; form of Master's report (No. 84); and if, for the purpose of ascertaining and determining the persons to whom legacies are payable, and the amount of the legacies, it should become necessary incidentally to place a construction on the will, the Master has jurisdiction to do so; and the test of jurisdiction under Con. Rule 938 was whether the question was one which, before the existence of the Rule, could have been determined under a judgment for the administration of an estate or execution of a trust: *Re Davies*, 38 Ch. D. 210; *Re Royle*, 43 Ch. D. 18.

The will having been construed in the first instance favorably to the