

TEETZEL, J.:—The applicant is a devisee under the will, and the question is whether she takes a fee simple or a fee tail or a fee simple with an executory devise over, or whether in any case, under the terms of the will, she has during her lifetime an absolute power to sell.

The executors made a conveyance of the lands to her, so far as they had power to do under the will.

The will, *inter alia*, provided that if the applicant should die without lawful issue, any of the devised property then remaining should go to her sister Mary Ann Cafferty, if she survived, or to her lawful issue, and that if both daughters should die without issue, the property should go to the Roman Catholic Episcopal Corporation of the Diocese of Toronto.

Mary Ann Cafferty has since died, leaving a husband and one daughter.

The only parties served with notice of the application are John and Mattie Tobin (the husband and daughter of Mary Ann Cafferty) and the Roman Catholic Episcopal Corporation, and they and the applicant are the only persons interested in the application.

Objection was taken by counsel for the Tobins that the question cannot be disposed of under Rule 938, citing *In re Davies*, 38 Ch. D. 210; *Re Martin*, 8 O. L. R. 638, 4 O. W. R. 429; *In re Newman's Trusts*, 29 L. R. Ir. 9.

I am of opinion that the objection must prevail. Adopting the language of Street, J., in *Re Martin*, *supra*, the question propounded is one with which the executors have nothing to do, and does not in any way relate to the administration of the estate.

*In re Davies*, *supra*, decided that under the English Rules (which, so far as affects an application like this, are, I think, as comprehensive as our own Rules 938 and 939) there is jurisdiction to determine such questions only as before the existence of the Rules could have been determined under a judgment for the administration of an estate or execution of a trust, and consequently that there is no jurisdiction upon an originating summons to decide a question arising between legal devisees under a will.

See also *In re Royle*, 43 Ch. D. 18; *Re McDougall*, 8 O. L. R. 640, 4 O. W. R. 428.

The costs of the respondents will be costs in the cause, to them only, in any other proceeding which the applicant may be advised to adopt.