

10-1-1955

Decedent Estates—Non-Final Order

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Recommended Citation

James Lindsay, *Decedent Estates—Non-Final Order*, 5 Buff. L. Rev. 88 (1955).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss1/40>

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banking institution as trustee and placed it in the hands of an individual, the same person who had been deprived of his beneficial interest in the trust. "(I)t is a well-settled principle that a trustee . . . is under a duty to deal impartially with . . . beneficiaries . . . and successive interests . . ." ²⁰ The court's decision admits of the possibility of a violation of the trustee's duty as to impartiality and seeks to avoid this by the substitution of trustees. However, by making this substitution the court has probably increased the possibility of impartiality, but to the beneficiaries rather than to the remaindermen. Its holding would seem to suggest that since there is a danger of partiality, the remaindermen's superior interests deserve protection over the beneficiaries' without regard for the degree of possible partiality to each. The writer suggests that the banking institution would have been the more impartial of the two trustees in this case, and that the degree of impartiality to each interest should have been the chief consideration rather than a mere protection of the remaindermen from the possibility of partiality without regard for the danger to the beneficiaries.

Non-Final Order

*Construction of Hallock's Will*²¹ was an appeal from an order of the Appellate Division²² unanimously reversing, on the law, a decree of the Surrogate's Court in a will construction proceeding. The Appellate Division remitted the proceeding "to the Surrogate's Court for the *determination of allowances, costs and interest, and the entry of decree.*" (Emphasis supplied).

Where the Appellate Division order is final within the meaning of the Constitution,²³ its order would be appealable, notwithstanding the fact that it remitted the case to the Surrogate's Court for entry of a decree.²⁴ Remission for the determination of costs and allowances would not affect finality, since the Surrogate in his decree expressly reserved these matters "for supplemental decree."²⁵ However, remission for the purpose of determining interest rendered the Appellate Division order nonfinal.

20. 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 216 (1941).

21. 308 N. Y. 299, 125 N. E. 2d 578 (1955).

22. 283 App. Div. 1091, 131 N. Y. S. 2d 585 (2d Dep't 1954).

23. N. Y. CONST. art. VI, § 7. Jurisdiction of court of appeals: "In civil cases and proceedings as follows: (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which *finally* determines an action or special proceeding . . . where the judgment or order is one of reversal or modification" (Emphasis supplied). Also, C. P. A. § 588.

24. C. P. A. § 591, subd. 2, as amended by L. 1953, ch. 417. The rule was otherwise prior to the 1953 Amendment, *Matter of Mittelstaedt's Will*, 304 N. Y. 795, 109 N. E. 2d 86 (1952); *Matter of Bishop's Will*, 301 N. Y. 498, 95 N. E. 2d 817, (1950).

25. SURROGATE'S COURT ACT § 278.

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The determination of interest is governed by the second paragraph of section 218 of the Surrogate's Court Act, which involves some discretion on the part of the Surrogate.²⁶ Because of this, the Court of Appeals found that it had no power to determine interest, and until it was fixed by the Surrogate there was "clearly" the absence of finality in the order appealed from.²⁷

Since the determination of interest involves a discretionary choice on the part of the Surrogate, more is involved than merely a "ministerial" act of the Surrogate. Therefore, even though the discretionary area is as limited as it is, an exercise of discretion is still required, which provides adequate ground for a finding of a non-final order.

Summary Judgment

In *In re Pascal's Will*,²⁸ contestants made a motion for summary judgment in a probate proceeding,²⁹ based on the argument that the instrument offered for probate was never effective as a will. It was to take effect only on condition that decedent died on "this my trip to India," and contestants argued that the condition never occurred since decedent died before the trip, and therefore there was no triable issue of fact.

The Court of Appeals reversed the Appellate Division³⁰ which had granted the motion. The courts were in agreement that a contestant in a surrogate's proceeding could invoke the provisions of rule 113 of the Rules of Civil Practice whenever appropriate.³¹ However, a will is properly admitted to probate when the Surrogate is "satisfied with the genuineness of the will, and the validity of its

26. *Id.* § 218, interest on a legacy shall be "at the rate of three per centum per annum unless the delay in payment was unreasonable, in which event interest shall be at the legal rate for the period of such unreasonable delay."

27. COHEN & KARGER, POWERS OF THE NEW YORK COURT OF APPEALS, § 11 (2d ed. 1952), especially at 45-46. "As in actions, finality is held to be absent though the remission for a new hearing or for further proceedings is limited to one of several issues, the remaining being concluded by the Appellate Division. Thus, the Appellate Division may sustain the right of a claimant to relief and remit solely for the purpose of fixing the amount to be awarded or allowed; the order is nevertheless *not* final."

28. 309 N. Y. 108, 127 N. E. 2d 835 (1955).

29. Under RULES CIV. PRAC. 113.

30. 285 App. Div. 456, 137 N. Y. S. 2d 386 (1st Dep't 1955).

31. SURROGATE'S COURT ACT § 316; RULES CIV. PRAC. 3; 113 (4); *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 12 N. E. 2d 544 (1938); *Riley v. Southern Transp. Co.*, 278 App. Div. 605, 101 N. Y. S. 2d 906 (3rd Dep't 1951); *Matter of Fishkind*, 271 App. Div. 1013, 68 N. Y. S. 2d 247 (2d Dep't 1947); see *People ex rel. Lewis v. Fowler*, 229 N.Y. 84, 127 N. E. 793 (1920).