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Decedent Estates—Summary Judgment

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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 Division[30] 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*

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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).

execution."[32] Formerly, it was provided that the Surrogate must be satisfied with the "genuineness and validity" of the will; thus, the Surrogate could pass on the validity of the substantive content of the will in the probate proceeding.[33] The provisions of section 144 of the Surrogate's Court Act, as now worded, "look only to the formal validity of the will's execution and it is immaterial . . . that, the will, if probated, may be wholly inoperative by reason of the invalidity of its provisions or of subsequent events making it ineffective."[34]

Contestants here did not question the genuineness and validity of the execution of the will, but sought an adjudication that the holographic instrument offered for probate was not a will and never became effective as such. The Appellate Division saw no triable issue, since the condition did not occur, but the Court of Appeals agreed with the Surrogate that the question of the effect of the alleged condition upon the validity of the will should be determined on the trial of the probate, or subsequently in accordance with section 145 of the Surrogate's Court Act, rather than in the probate proceeding under section 144.[35]

It is suggested that while summary judgment is theoretically possible in a probate proceeding, as a practical matter the occasion for granting such relief may be rare, since any triable issue of fact would justify denial of summary judgment.[36] Here, the question of whether the instrument was a will was found to be a question of fact preventing summary judgment, despite the apparently clear provision for a condition which never occurred. Under this decision, the purpose of rule 113 has been sacrificed in probate proceedings to provide a better opportunity of finding the true intent of the testator.

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32. SURROGATE'S COURT ACT § 144, Probate not allowed, unless surrogate satisfied. 1. "Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution. 2. If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will . . . ."

33. L. 1837, ch. 460, § 17; *Matter of Davis' Will,* 182 N. Y. 468, 75 N. E. 530 (1905).

34. *Matter of Higgins' Will,* 264 N. Y. 226, 190 N. E. 417 (1934); *Matter of Davis' Will, supra* note 33; *Matter of Crounse's Estate,* 168 Misc. 359, 6 N. Y. S. 2d 32 (1938); see also *Ex parte Lindsay,* 2 Bradf. 204 (1852).

35. SURROGATE'S COURT ACT § 145 provides for the *construction* of a will, and so far as pertinent reads as follows: "If a party expressly puts in issue in a proceeding for the probate of a will the *validity, construction,* or *effect of any disposition of property,* contained in such will, the surrogate may determine the question, upon rendering a decree, after notice . . . or . . . may admit the will to probate and reserve the question so raised for future consideration and decree." (Emphasis supplied.)

36. *Re Walsh,* 163 Misc. 104, 296 N. Y. Supp. 542 (1937), *aff'd* 255 App. Div. 709, 6 N. Y. S. 2d 644 (2d Dep't 1938); *Curry v. MacKenzie,* 239 N. Y. 267, 146 N. E. 375 (1925).