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.\textsuperscript{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.\textsuperscript{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 \textit{In re Pascal's Will},\textsuperscript{28} contestants made a motion for summary judgment in a probate proceeding\textsuperscript{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\textsuperscript{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.\textsuperscript{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..."
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. 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."

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.

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. 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.