no debt though the breach of it may give rise to a claim for damages: see *South African Territories* v. *Wallington*[1].

We hold that the document is only liable to duty as a transfer of mortgage and as an agreement, *i. e.*, to Rs. 5-8-0 in all.

Order accordingly.

G. B. R.

(1) [1898] A. C. 309.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

TRIMBAK MAHADEV TILAK (ORIGINAL OPPONENT No. 3), APPLICANT, v. NARAYAN HARI LELE AND ANOTHER (ORIGINAL PETITIONER AND OPPONENT No. 1), OPPONENTS.*

1909. *April* 2.

Indian Trusts Act (II of 1882), section 34—Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such—Administration suit.

So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. A. Kincaid, District Judge of Poona.

The facts of the case were that on the 25th April 1900 one Vishnu Mahadev Tilak made a will appointing under it Narayan Hari Lele and Ganesh Narayan Khare executors and his brother Lakshman Mahadev Tilak *alias* Anna Tilak residuary legatee. In the will the property of the testator was valued at Rs. 7,100 and the directions as to its disposal were as follows:—

Rs. 2,000 for the marriage of the testator's daughter Varubai.

* Application No. 72 of 1909 under Extraordinary Jurisdiction.

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Rs. 4,000 to be given to the testator's wife Yamunabai.
Rs. 2,000 ornaments.
Rs. 2,000 cash.

4,000

Rs. 500 to be given to Varubai—ornaments on her person.

Rs. 300 to be given to Sonubai.

Rs. 300 to be given to Lakshman Mahadev *alias* Anna Tilak.

7,100

The testator died on the 25th February 1903 and the said Narayan Hari Lele obtained probate of the will on the 29th July 1904. When the executor began to administer the estate, he found difficulty in giving effect to the instructions in the will. He therefore submitted the following points for advice and guidance by the District Judge:—

(1) The testator had insured his life for Rs. 3,500 and the life policy was assigned by him to his wife Yamunabai who, after her husband's death, recovered the amount of the policy. This being so, whether Yamunabai should be paid Rs. 4,000 as directed in the will over and above the amount of the policy, or whether the difference in that amount and the amount of the policy, namely, Rs. 500 only.

(2) Rs. 800 only were spent on account of the marriage of Varubai, while the will directed that Rs. 2,000 should be spent for that purpose. Therefore, whether she should be paid Rs. 1,200 more.

(3) In the will the estate was valued at Rs. 7,100 while when the probate was taken the value of the property was found to be Rs. 5,104. Thus the estate being not sufficient to meet the legacies, whether the legatees should be given rateable distribution.

On the above points the Judge expressed his opinion as follows:—

(1) Yamunabai was entitled to receive Rs. 4,000 independently of the amount of the life policy which was not mentioned in the particulars of property given in the will.

(2) Rs. 800 only being spent for Varubai's marriage she was not entitled to the balance of Rs. 1,200, because Rs 2,000 were specifically granted for her marriage.

(3) If the estate had so shrunk that the legacies could not be paid, the legatees must be contented with rateable distribution.

Further the Judge opined that Trimbak Mahadeo Tilak, who claimed as the undivided heir and brother of the testator, had no *locus standi* as a residuary legatee. He was entitled only to a rateable distribution of the specific legacy of Rs. 300. All the legacies must be satisfied in full before he could claim as a residuary legatee.

Being dissatisfied with the above expression of opinion, Trimbak Mahadeo Tilak preferred an appeal and in the alternative an application for revision under the extraordinary jurisdiction, section 622 of the Civil Procedure Code, Act XIV of 1882.

K. H. Kelkar (with *P. D. Bhide*) appeared for the applicant Trimbak Mahadev Tilak:—We submit that the Judge had no jurisdiction under section 34 of the Indian Trusts Act to move in the matter. This contention was raised in the lower Court. Section 34 of the Act applies to trustees and not to executors. An executor is not a trustee under the section and so he cannot ask for the opinion of the Court. The powers of an executor are given in section 90 of the Probate and Administration Act and there are similar provisions in section 269 of the Indian Succession Act. There is a distinction between the office of an executor and that of a trustee: see Snell's Equity, pp. 165 and 169 (12th Edn.). An executor can at the most be said to be a constructive trustee. But section 34 of the Indian Trusts Act does not apply to constructive trustees. The term trustee is defined in the Act. See also Walker on Executors, p. 308 (3rd Edn.), and Godefroi and Lewin on Trusts. These authorities bear out our contention that an executor is not a trustee. The ruling in *In the Goods of Nundo Lall Mullick*[1] lays down the distinction between an exceutor and a trustee. An executor has the widest powers of disposition and is not subject to the authority of the Court. He cannot ask the opinion of the Court on any point. The legatees can seek redress

(1) (1896) 23 Cal. 908.

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by bringing a suit. In the present case the executor's opinion was in favour of the applicant. Moreover all the parties concerned were not before the Court. Therefore, the Judge had no jurisdiction to express his opinion in the matter. The executor becomes a trustee after he has given full effect to the terms of the will. See *In re Mackay*[1].

There was no appearance for the opponents.

SCOTT, C. J.:—The executor of one Vishnupant Tilak applied to the District Court of Poona for its opinion under section 34 of the Indian Trusts Act with regard to the administration of the trust property of the testator.

Some of the parties interested as beneficiaries under the will were present at the time of the application, and those parties appear to have agreed that the Court should advise the executor under section 34 of the Trusts Act. An opinion was accordingly expressed by the District Judge upon the points preferred for the Court's opinion by the executor, but one at least of the beneficiaries was absent and not consenting.

One of the parties who had consented to this method of disposal of the question having found that the opinion of the Court was unfavourable to his interests preferred an appeal against that opinion, and, in the alternative, has asked this Court to entertain his objection as made under the revisional jurisdiction of the Court conferred upon it by section 622 of Civil Procedure Code, 1882.

We think that assuming that an opinion was expressed which fell within the powers of the Court under section 34, there is no appeal from such an opinion. We hold, however, that the case presented to the District Judge was not a case falling under section 34; for, the executor who asked for the opinion of the Court had not become a trustee with regard to any of the property in his hands on behalf of the legatees. His difficulty was to decide how much of the property in his hands he should allocate for the benefit of each of the persons named as legatees, and it is in consequence of his inability to decide that that he

(1) [1906] 1 Ch. 25 at p. 31.

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came to the Court. It is no doubt true that an executor, when he has assented to a legacy and set aside funds to meet it, becomes a trustee, but, as observed by Mr. Justice Kekewich, in *In re Mackay*(1), the exact moment of passage from the character of executor to that of trustee is difficult to define.

The applicant in this case had not in our opinion become a trustee so as to incur all the liabilities of a trustee. He was still an executor and could as an executor have pleaded limitation against the claims of beneficiaries, and so long as he occupied that position he could not claim the advantages provided for trustees by section 34 of the Indian Trusts Act. His remedy, if he felt any doubt as to the manner in which he should administer the estate come to his hands, was to file an administration suit.

We hold that the opinion of the District Judge was given without jurisdiction, and we therefore direct that the proceedings be set aside.

Proceedings set aside.

G. B. R.

(1) [1906] 1 Ch. 25 at p. 31.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.
April 5.

CHUNILAL PRANSHANKAR (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* SURAJRAM HARIBHAI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT No. 1), RESPONDENTS.*

BHOGILAL VALABHRAM (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* SURAJRAM HARIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.†

Hindu Law—Marriage—Asura form—Brahma form—Construction of texts.

Under Hindu Law, where the paternal or maternal relation of a girl, who is given in marriage, receive money consideration for it, the substance of the

* Second Appeal No. 252 of 1908.

† Second Appeal No. 392 of 1908.