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A further contention was raised that the plaintiff should not be allowed interest at a higher rate than that allowed by the decree to which we have referred. As to this we may mention in the first place that no such contention was raised either in the court below or in the memorandum of appeal to this Court. Further, as the plaintiffs are entitled to sue upon their mortgage they have a right to claim interest at the stipulated rate up to the date fixed for pay ment. This part of the defendant's case is as untenable as the rest.

As to the costs of the previous suit in regard to which a contention was put forward on behalf of the appellants, we may observe that the plaintiffs will not be entitled to recover those costs, having regard to the terms of the decree passed in this case by the court below. The costs of the present suit were incurred by the plaintiffs because the appellants did not discharge the money decree which was passed against them, and the plaintiffs have, therefore in our opinion, been rightly awarded the costs of the present litigation.

We accordingly dismiss the appeal with costs. We extend the time for payment for six months from this date. Interest at the stipulated rate will run to the extended date. No further interest will be allowed after such date.

Appeal dismissed.

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March, 11.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

ABDUL AZIZ AND OTHERS (DEFENDANTS) *v.* MASUM ALI AND OTHERS (PLAINTIFFS.).*

Committee for collection of subscriptions to rebuild a mosque—Neglect of treasurer to pay his own subscription and to collect other subscriptions promised—Treasurer not legally liable.

A movement having been set on foot for re-constructing a mosque, A and J promised to subscribe Rs. 500 each. A was appointed treasurer of the committee for collecting subscriptions. J gave a cheque for his promised subscription of Rs. 500, but owing, first, to some defect in the endorsement, and later on to its having become out of date, it was never cashed. The mosque also was never re-constructed. A having died, his heirs were sued by the members of the committee for the amount of the unpaid subscriptions. *Held*, that neither A nor his heirs were liable for payment of the money.

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* Second Appeal No. 1536 of 1912 from a decree of H. M. Smith, District Judge of Agra, dated the 7th of September, 1912, modifying a decree of Kalka Singh, Subordinate Judge of Agra, dated the 26th of September, 1910.

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THE facts of this case were as follows:—

There was an Islam Agency Local Committee at Agra. A certain mosque had to be repaired and subscriptions were raised for the repairs. Munshi Hafiz Abdul Karim was appointed treasurer, and money was to be realized by, and deposited with, him. He himself promised to pay Rs. 500. Another sum of Rs. 500 was promised by one Jan Muhammad, who sent a cheque for the amount to the treasurer. The treasurer sent it for collection to the bank in September, 1907, but they returned it as it was not properly endorsed. It was again presented to the Bank nearly a year and a half afterwards, in January, 1909, but was returned as being out of date. Hafiz Abdul Karim died on the 20th of April, 1909. This suit was brought against the heirs of Hafiz Abdul Karim for the recovery of this Rs. 1,000, that is, Rs. 500 promised by him, and Rs. 500, the amount for which Jan Muhammad had paid a cheque which was not cashed in time, and another item the liability for which was not disputed. The court below made the heirs liable for the Rs. 1,000. The defendants appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* (Maulvi *Muhammad Ishaq* with him), for the appellants:—

In the case of the money promised by the treasurer himself there was nothing to show that it went beyond the stage of promise. He had of course all the money in his hands, but he had not transferred it to the account of the fund from his private account. Nor could the committee say that they had incurred any liability on the strength of that promise. There was a case—*Kedar Nath Bhattacharji* v. *Gorie Mahomed* (1), but it has been criticized by Sir Frederick Pollock in his Indian Contract Act, at page 15. See also Page on Contracts, Sec. 298, page 441. No question of estoppel could arise, as the committee had done nothing in pursuance of that promise, and this distinguished the present case from the case in 14 Calcutta. As to the second item, the heirs of the treasurer could only be liable for his neglect in collecting the money of the cheque if they had benefited by his neglect. The action was a personal one and died with the person; *actio personalis moritur cum personâ*. Besides the treasurer was an

(1) (1886) I.L.R., 14 Calc., 64.

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honorary treasurer and could scarcely be held liable as an agent, and even of he could be treated as an agent he was a gratuitous agent, and as such neither he nor his heirs could be held liable upon the facts found. The lower appellate court had relied on Act XII of 1855. In that Act the term "wrong" was used in the sense of "tort," and the wrong, if any, was committed in September, 1907, when the cheque was returned by the bank and the Hafiz took no further steps to realize the money. The plaintiffs had to show that their action was within a year of the alleged tort. He cited *Krishna Behary Sen* v. *The Corporation of Calcutta* (1) and *Sreemutty Chunder Monee Dassee* v. *Santo Moonee Dassee* (2).

Dr. *S. M. Sulaiman*, for the respondents:—

As to the promise by the treasurer himself, the money would in any case have gone to him, and the account, if any, would be in the possession of the defendants. The Hafiz must be deemed to have paid the money, he had the intention of paying it, his name appeared in the list of subscribers prepared at the time and the presumption was that he paid it. He could not do any overt act to mark the payment. As to the second item paid by cheque the Committee suffered loss through his negligence. The question was would he have been liable if he were alive. He was appointed an agent to realize the money and spend it on a particular purpose. He would be liable even if he were a gratuitous agent: Pollock on the Indian Contract Act, page 568. He not only was appointed agent but he undertook to do the work; that made a difference. And there was no doubt that it was a case of gross negligence. He left the committee under the impression that the money had been realized.

RICHARDS, C. J., and BANERJI, J.— This appeal arises out of a suit brought by the plaintiffs against the heirs of Munshi Abdul Karim. The plaintiffs are the members of the Islam Local Agency Committee, Agra. It appears that in the year 1907 a movement was set on foot to collect money for repairing and re-constructing a mosque known as Masjid Hammam Alawardi Khan. The Local Agency Committee themselves sanctioned a subscription of Rs. 3,000; besides this amount Rs. 100 were paid in cash at that time by Hakim Shafi-ul-lah; Rs. 500 were promised by Munshi

(1) (1904) I. L. R., 31 Calc., 406. (2) (1864) 1 W. R., C. R., 251.

Abdul Karim; and another sum of Rs. 500 was promised by Munshi Jan Muhammad. Munshi Abdul Karim was appointed treasurer. The Local Agency Committee handed over their contribution of Rs. 3,000 to Munshi Abdul Karim and he also received the donation of Rs. 100 from Hakim Shafi-ul-lah. Munshi Jan Muhammad gave a cheque for Rs. 500, dated the 12th of September, 1907. On the 29th of September, 1907, the cheque was presented for payment, but it was returned by the bank with a note that the endorsement was not regular. It was again presented on the 12th of January, 1909, when the bank returned the cheque with a note that it was out of date. Munshi Abdul Karim died on the 20th of April, 1909. The present suit was instituted against his heirs on the 14th of April, 1910. Munshi Jan Muhammad died in May 1910. The defendants do not dispute the right of the plaintiffs to recover the sum of Rs. 3,100; they have admitted this part of the plaintiffs' claim all along. It is admitted on both sides that nothing has been done to carry out the repairs and re-construction of a part of the mosque. Defence is, however, taken to two items, viz. the Rs. 500, represented by the cheque of Munshi Jan Muhammad and the subscription of the deceased Munshi Abdul Karim. The court of first instance granted a decree for the subscription promised by Munshi Abdul Karim, but dismissed the suit in so far as it related to the claim for Rs. 500, the subscription of Munshi Jan Muhammad. The lower appellate court granted a decree for the entire claim. It appears to us that the suit cannot be maintained in respect of either item. With regard to the subscription of Munshi Abdul Karim, this was a mere gratuitous promise on his part. Under the circumstances of the present case it is admitted that if the promise had been made by an outsider it could not have been enforced. We cannot see that it makes any difference that Munshi Abdul Karim was himself the treasurer. There is no evidence that he ever set aside a sum of Rs. 500 to meet his promised subscription. As to the other item, viz. the amount of Munshi Jan Muhammad's cheque, we see great dificulty in holding that a suit could have been brought against Munshi Abdul Karim in respect of this cheque during his life-time. His undertaking of the office of treasurer was purely gratuitous. He might at any

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time have refused to go on with the work. It is said that he must be regarded as the agent of the committee, and that if he was the agent he was guilty of gross negligence and accordingly would have been liable for any loss the Committee sustained. In our opinion Munshi Abdul Karim cannot be said to have been an agent of the committee: even if he was, it is very doubtful that he could have been held guilty of gross negligence. He had presented the cheque for payment, the mistake in the endorsement was a very natural one and the delay in re-presenting the cheque or getting a duplicate from the drawer may well be explained by the delay which took place in carrying out the proposed work. In our opinion, under the circumstances of the present case Munshi Abdul Karim could not have been sued in his life-time. It is quite clear that if no suit lay against Munshi Abdul Karim in his life-time, no suit could be brought after his death against his heirs. The result is that we allow the appeal to this extent that we vary the decree of the court below by dismissing the claim in respect of the two items of Rs. 500 each. The appellants will get their costs of this appeal. In the court below the parties will pay and receive costs in proportion to failure and success.

Decree varied.

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March, 16.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BHAGWAN SINGH AND OTHERS (DEFENDANTS) *v.* MAZHAR ALI KHAN (PLAINTIFF)*

Act No IV of 1882 *(Transfer of Property Act), section* 82—*Mortgage—Contribution—Principle upon which contribution should be assessed—Civil Procedure Code* (1908), *order XXI, rule* 89.

Where a co-mortgagor is suing the other co-mortgagors for contribution upon the allegation that the portion of the mortgaged property in which he is interested has been made to discharge more than its proper share of liability under the mortgage, the Court in assessing contribution has first to ascertain the values of the various items of property in question as they stood at the date of the mortgage: next the rateable liability of each item for the amount payable under the decree: next how much each item has contributed to the payment of the decretal amount, disregarding any purchase money which any of the purchasers has paid or retained, and it should then proceed to apportion the liability between the different items.

*First Appeal No. 261 of 1912 from a decree of Abdul Hasan, Additional Subordinate Judge of Moradabad, dated the 20th of May, 1912.