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have received from it but for his wilful default. See *Williams* v. *Price*[1]; *Mayer* v. *Murray*[2]; *Peacock* v. *Pursell*[3]; *Yglesias* v. *The Mercantile Bank of the River Plate*[4].

On the ground that the money mentioned in exhibit 184 was held by Apte as a stakeholder, and was validly assigned by the defendant to the plaintiff in satisfaction of the balance due on the agency account, being the purpose for which it was agreed to be held by Apte, and that the plaintiff being able to recover the amount so assigned, neglected to do so, we are of opinion, that he is chargeable with the amount. We, therefore, find on the 7th and 8th issues, in favour of the defendant.

With regard to the remaining items decided in the lower Court against defendant, we do not think, there is any ground for disturbing that decision. Costs throughout payable in proportion to the success of the parties.

Decree varied.

G. B. R.

(1) (1824) 1 S. and S. 581.
(2) (1878) 8 Ch. D. 424.
(3) (1863) 32 L. J. C. P. 266.
(4) (1878) 3 C. P. D. 330.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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July 8.

CHUNILAL, SON AND HEIR OF ISHWARLAL BHOGIDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHUNILAL, SON AND HEIR OF ISHWARLAL BHOGILAL (ORIGINAL DEFENDANT), RESPONDENT.*

Maxim—Actio personalis moritur cum persona—*Maxim applies to actions in tort—No application to actions where contractual obligation implied by law—Government—Employment of shroff to accept Babashai coins—Shroff accepting Shikkai coins instead—The coins accepted by Mint officers—Loss to Government—Measure of damages—Acquiescence or ratification by Government.*

On the occasion of calling in the Babashai coins from the British villages in the Kaira District, the plaintiff was employed by Government as a shroff to

* Joint Appeals Nos. 38 and 42 of 1908.

examine and accept the Babashai coins only. The plaintiff worked for about a month, during which period he passed 12,170 Shikkai coins as Babashai coins. At that date the Shikkai coins were not current and had only bullion value. The coins were finally sent to H. M.'s Mint, where they were melted. Government alleged that by the shroff's neglect in accepting Shikkai coins they suffered a loss of Rs. 1,758-15-1, which they asked the shroff to pay. The shroff paid Rs. 1,095. To recover the remaining Rs. 663-15-1 Government filed a suit against the shroff. The shroff also filed a counter suit against Government to recover Rs. 1,095 which he alleged were wrongfully recovered from him. Both suits were heard together. The District Judge dismissed both suits holding that Government had suffered a loss by the shroff's action, but it was compensated by the money already paid by the shroff. Against this decision both parties appealed. While the appeals were pending in the High Court, the shroff died and his son was brought on the record as his legal representative :—

Held, that the maxim *actio personalis moritur cum persona* did not apply to the case, as there was an obligation implied by law. The shroff undertook to pass only Babashai coins ; and it was an implied term of that contract that if he passed any other, and Government suffered loss, he should make it good (section 211 of the Indian Contract Act, 1872).

Held, further, that the fact that Government had kept and had the benefit of Shikkai coins was not sufficient by itself to raise any presumption of either estoppel or acquiescence or ratification on the part of Government.

Held, also, that the action of the Mint officers in accepting the Shikkai coins could bind Government only so far as they had derived benefit from the action of the Mint officers ; that that benefit made them liable only so far that it was to be taken into account in measuring the damages for the loss sustained by Government in consequence of the shroff's deviation from the directions given to him and the purpose of his employment.

Held, therefore, that in estimating the loss suffered by Government owing to the shroff's action, the bullion value of the Shikkai coins must be taken into account, for they had, on the date they were accepted, ceased to be current coin.

It is a principle that nominal damages are awarded only where there is failure to prove any appreciable damage in fact.

JOINT appeals from the decision of Dayaram Gidumal, District Judge of Ahmedabad.

Ishwardas Bhogidas, the defendant in one suit and plaintiff in the other, was employed by Government at their sub-treasury at Nadiad, to examine and pass the Babashai coins that might be brought to the treasury. The Babashai coins were called in by Government and they were exchanged at the rate of 130

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Babashai coins for every 100 British rupees. Ishwardas, the shroff, was employed to examine and see that none except Babashai coins were accepted at the treasury. The shroff was employed for about a month. It was found that during this period, he had allowed to be accepted at the treasury 12,170 Shikkai coins.

The Shikkai coins were at one time the current coin in that part of the country; but they had long ceased to be current and on the dates in question they had only bullion value, which was Rs. 62-7-6 for every 100 Shikkai coins. The coins in question were finally sent to His Majesty's Mint where they were accepted by the Mint officers. At the period in question the value of 100 Babashai coins was Rs. 76-14-9. Thus, in having Shikkai coins instead of Babashai, Government suffered a loss of Rs. 14-7-3 for every 100 Shikkai coins accepted by the shroff. The loss on the 12,170 Shikkai rupees amounted to Rs. 1,758-15-1.

The Government then asked the shroff to recoup the loss which they had sustained by the action of the shroff. He paid Rs. 1,095 in satisfaction of the claim. The remaining Rs. 665-15-1 were still demanded by Government, to recover which they filed a suit against the shroff. The shroff contended in that suit *inter alia* that he was ready and willing to exchange the Shikkai coins for the Babashai coins; and that Government suffered no loss by his action for, they melted both Babashai and Shikkai coins and the latter yielded more silver than the former. Subsequently, the shroff also filed a suit against Government to recover Rs. 1,095, which he alleged were wrongfully recovered from him.

The District Judge heard both suits together and disposed of them by one judgment. He dismissed both suits holding that the loss to Government had been assessed at 9 per cent., which was covered by the amount paid in by the shroff. His reasons were as follows:—

"The suit is based on a contract, not on a tort. Damages are claimed not on account of a fraud but on account of a breach of contract. Now the breach took place in January and February and it has not been satisfactorily proved

that in those months Shikkais were worth less than the defendants, who purchased privately, paid for them. The learned Government Pleader wanted me to assess the damages on a different principle. He contended that when the fraud was discovered the Shikkais were only worth their bullion value, and, therefore, damages should be awarded at the rate claimed. But it has not been even satisfactorily proved that on that date Shikkais were worth only their bullion value. They were good for hoarding and the Government Pleader himself admitted that some people bought Shikkais as auspicious coins. . . . . I do not consider the evidence sufficient for holding that when the breach of duty took place the Shikkais were worth more than the value fixed under Mr. Bamanji's order. Mr. Bamanji himself was under the impression that Government was not entitled to recover more than 9 per cent., and it has not been pressed that as a matter of fact the Shikkais were worth less than the price paid by the defendant, and Government has sustained a greater loss."

The Government as well as the shroff appealed to the High Court.

Whilst the appeal was pending, the shroff Ishwardas died. His son Chunilal was thereupon brought on the record as his legal representative.

L. A. Shah, for the shroff:—In appeal by the shroff.—

As the Shikkai coins were retained by the Mint authorities, we are absolved from liability. At the most, there is a technical breach of contract and under section 211 of the Indian Contract Act, 1872, Government can only claim nominal damages. See *The Maneckji Petit Manufacturing Company, Limited* v. *The Mahalaxmi Spinning and Weaving Company, Limited*[1] and Mayne on Damages, p. 633. Government have in fact suffered no loss for, they used both Babashai and Shikkai coins for melting into silver and the latter yielded more silver than the former.

In appeal by Government.—This is a case of personal action the shroff having been engaged for his personal skill. The shroff having died, the action does not survive against his heir and legal representative. See Broom's Legal Maxims, pp. 683, 684; and *Haridas Ramdas* v. *Ramdas Mathuradas*[2].

G. S. Rao, Government Pleader, for the Secretary of State:—

The shroff was engaged only to pass Babashai coins; there was therefore an implied contract between him and Government

(1) (1835) 10 Bom. 617. (2) (1889) 13 Bom. 677.

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that he was to accept Babashai coins and none else. When he accepted Shikkai coins he clearly committed a breach of contract. The mere fact that the Mint officers retained the coins does not exonerate him from liability. There was no acquiescence or ratification on the part of Government, nor was there any estoppel. As to the measure of damages the Government had to pay for the Shikkai coins, the artificial high value fixed for the Babashai coins, whereas they had only then bullion value, the loss caused is the difference between the two values. The maxim *actio personalis*, etc., does not apply to cases of contract and to actions for damages in respect of wrong done to the property. See Broom's Legal Maxims, p. 613; *Morgan* v. *Ravey*(1); *Blyth* v. *Fladgate*(2); *Batthyany* v. *Walford*(3).

CHANDAVARKAR, J.:—In Appeal No. 38 of 1908, the learned District Judge's finding that the appellant was employed by Government as shroff to examine and pass only *Babashai* silver coins and not to accept Shikkai coins, has not been made the subject of any convincing argument. But it is urged that the right of Government to complain that the appellant as their agent has acted contrary to the directions given to him and the purpose of his employment is lost by reason of their conduct in keeping the Shikkai coins, instead of returning them to the appellant, and in allowing without objection such coins to be remitted to the Mint. This defence, if it means anything, must amount to a plea of estoppel, acquiescence, ratification, or novation, that is, a new contract of agency, barring the right of Government to claim damages from the appellant on the specific contract of agency on which the action was founded. In the Court below, no such defence was set up in the pleadings, unless we are to understand the 3rd issue as covering them. But it cannot be so understood. That issue merely raised the question whether the appellant was misled by the action of the Revenue authorities in reference to the coins in such a way as to exonerate him from responsibility. Assuming that the pleas in question did arise on the issue, the evidence falls far short of what the law requires to sustain them.

(1) (1861 6 H. & N. 265. (2) (1891) 1 Ch. 337, 366.
(3) (1887) 36 Ch. D. 269, 279.

The appellant was employed as an expert to pass Babashai silver coins only. If he passed other coins, the fact that his employer appointed others, such as appraisers at the Mint, and the Mamlatdar, and the Aval Karkun at the sub-treasury at Nadiad, to see whether the appellant did his duty according to the directions, and that those others allowed Shikkai coins to be passed by him, cannot relieve him from his duty as agent. There was no contract between him and Government that he should be held to have fulfilled his duty, if other servants employed by them to inspect his work allowed him to depart from directions given to him. As for the fact that Government have kept and had the benefit of the Shikkai coins, that by itself raises no presumption of either estoppel or ratification. The directions given to the appellant when he was employed were specific; he was to pass Babashai silver coins only. That was his duty, irrespective of supervision or inspection. If he, or any other person similarly employed, remitted other coins and the Mint officers kept and used them for Government, it cannot be said either that Government caused the appellant intentionally to believe and to act upon the belief that their specific directions were modified by them, and that the original purpose of the agency was changed, or that they acquiesced in or ratified the appellant's acts. Ratification and acquiescence mean a full knowledge of the facts. The Mint officers were agents of Government to receive Babashai coin; they were not agents to contract for and on their behalf in the matter. Their action cannot bind Government, except so far as Government have derived benefit from the action of the Mint officers. That benefit makes them liable only so far that it is to be taken into account in measuring the damages for the loss sustained by Government in consequence of the appellant's deviation from the directions given to him and the purpose of his employment.

The next question is as to the measure of damages. The lower Court has taken as the measure the difference between the price actually paid by Government for the Shikkai coins (Rs. 100 for 130 Shikkais as if they were Babashai) and their market value. Calculating the damages on this principle, the lower Court has held that the amount paid by the

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appellant to Government under protest fully represented the loss incurred by them owing to his breach of the contract of agency. The appellant seeks by his claim to recover a portion of that amount on the ground that Government, having retained and made use of the Shikkai coins, are entitled only to nominal damages. This contention ignores the principle that nominal damages are allowed only where there is failure to prove any appreciable damage in fact. That cannot be said to have been the case here. For the Shikkai coins which were let in by the appellant in breach of his duty, Government paid at a certain rate and had to suffer actual loss in money. That is found by the Court below and we have heard no argument against that finding. It is a question whether the lower Court is right in estimating that loss sustained by Government by the difference between what Government paid for the coins and their market value. That question is raised by Government in their Appeal (No. 48 of 1900) from the decree in the suit brought by them against the present appellant Ishwardas. But the question does not arise in this appeal.

On these grounds the decree in Appeal No. 38 of 1908 must be amended as to costs which are to be paid by the appellant. In other respects the decree must be confirmed with costs.

Dealing now with Appeal No. 42 of 1908, it arises out of a suit brought by the Secretary of State for India in Council to recover from the defendant Ishwardas Bhogidas, a certain amount as representing the loss caused by him by passing a certain number of Shikkai coins as genuine Babashais, contrary to his contract of agency with Government. The defendant had paid to Government under protest a sum in satisfaction of the loss, but Government claimed more and filed the suit.

The lower Court disallowed the claim on the ground that the sum paid by the defendant under protest fully represented the loss.

After Government had preferred this appeal from the lower Court's decree, the defendant (respondent) Ishwardas Bhogidas died, and his legal representative was brought on the record in his place.

A preliminary objection to the hearing of the appeal is raised on the ground that the action, being of a personal character, does not survive owing to the death of the original defendant, Ishwardas Bhogidas, according to the maxim "*actio personalis moritur cum persona.*"

"The application of that maxim is limited to actions in which remedy is sought for a tort, or for something which involves, at any rate, the notion of wrong-doing": per Lord Macnaghten in *The United Collieries Ld.* v. *Simpson*(1). But it does not apply to actions in which compensation is claimed for injury to property on the strength of an express or implied contract: *Phillips* v. *Homfray*(2). "It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position, then on *assumpsit* the executor might still be held liable. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken to one another": *Batthyany* v. *Walford*(3). See also *Bunbury* v. *Hewson*(4).

The present is one of such cases, because here the defendant Ishwardas undertook to pass only Babashai coins. It was an implied term of that contract that, if he passed any other and Government suffered loss, he should make it good. (Section 211 of the Indian Contract Act.) Government complain and have proved that, owing to his default, they have been out of pocket inasmuch as they had to pay in their own currency for Shikkai, instead of Babashai coins. The injury complained of is to their personal estate, and the action is one on *assumpsit*, since the defendant, by the term of his employment, annexed by law to the contract, agreed to indemnify Government for the loss.

The action, therefore, survives. The next question in this appeal is whether damages have been estimated by the lower Court on a correct principle. That Court has held that Govern-

(1) (1909) A. C. 383 at p. 391.
(2) (1883) 24 Ch. D. 439.
(3) (1887) 36 Ch. D. 269.
(4) (1849) 3 Exch. 558.

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ment are entitled to damages, being the difference between the money they paid actually, (100 for 130 Shikkai coins, as if they were Babashais) and the market value of the Shikkai coins at the date of the remittance of the latter to the Mint. Government object to the market value being taken into account and contend, that only the bullion value of the Shikkai coins must be deducted. The principle adopted by the lower Court treats the transaction as one between vendor and vendee, not as between principal and agent. In *Cassaboglou* v. *Gibbs*[1] the plaintiff appointed defendant as his agent to select opium of a certain description; the defendant selected and sent opium of a different description, part of which the plaintiff sold. The plaintiff sued the defendant for loss and claimed damages on the footing of the difference between the market price of the article ordered and the proceeds of the sale of the drug actually sent. But it was held that he could not so claim and treat his agent as vendor of the opium to him, and that all the plaintiff was entitled to was the actual loss and damage sustained by him through the defendant's negligence and breach of duty. In the present case the Shikkai coins had ceased to be a legal tender, and the evidence adduced by the respondent to show that people were buying them in market is not satisfactory. The evidence adduced for Government to prove that the market rates relied upon by the respondent were inflated and fictitious is not contradicted; and the experts examined state that since Shikkai ceased to be a legal tender, its price has been reckoned according to the bullion value (see Exhibits 116 and 69).

The other appeals by Government follow suit.

The result is:—

Appeal No. 38 of 1908. Decree amended as to costs which are to be paid by the appellant. In other respects confirmed with costs.

Appeal No. 55 of 1908. Do. do.

Appeal No. 44, 45 and 47 of 1908. Decree reversed and claim awarded with costs throughout.

(1) (1882) 9 Q.B.D. 220.

Appeal No. 42, 43 and 46 of 1908. Decree reversed and claim awarded with costs throughout against the legal representative of the deceased defendant in each suit to the extent of the assets received and not duly accounted for.

In Appeal No. 43 of 1908 the decree is also against defendant No. 2.

HEATON, J. :—In a series of suits the Secretary of State for India in Council claimed against certain shroffs for damages for breach of a duty they had contracted to perform. Briefly stated, the facts are these : on the occasion of the substitution of British Indian for Baroda Babashai rupees, the Government treasuries undertook to accept all genuine Babashai rupees at the rate of 100 British Indian for 130 Babashai. The defendant-shroffs were employed at the treasuries to scrutinize the coins offered and to pass only genuine Babashai. As a fact they passed large numbers of Shikkai rupees, and thereby, it is alleged, caused a loss to the Secretary of State for India in Council. Subsequently the shroffs paid certain sums by way of damages, but the Secretary of State, deeming the amounts so paid insufficient, has sued to recover further damages. The shroffs sued separately to recover what they had paid.

The suits were heard by the District Judge, Ahmedabad, who, by consent, disposed of all the contested points in one judgment. He dismissed all the suits and ordered the parties to bear their own costs, holding that though the shroffs were liable in damages, they had paid enough.

Both parties have appealed, and here, as in the Court below, one judgment will suffice. The District Judge has dealt adequately and convincingly with the appellant-shroffs' defence that they believed the expression "genuine Babashai" included Shikkai rupees, and that they did not disobey their instructions in accepting Shikkai rupees. There can be no doubt in my mind, on the evidence, that the shroffs deliberately accepted Shikkai rupees knowing that they ought not to do so and understanding why they ought not. This defence is so disingenuous and without merit that I am surprised that we were troubled with it in appeal.

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The defence that had Government returned the Shikkai rupees the shroffs could have minimised their obligation to make good the loss to Government is almost as disingenuous and quite as unconvincing. The idea underlying this defence is that had the Mint returned the Shikkai rupees, the shroffs could have exchanged them for Babashai, have changed the latter for British and so have reduced their losses to something far short of what they have been required to pay to the Government. How far the arithmetic of the defence is good I do not enquire. At what rate the shroffs could have got rid of the Shikkai rupees had they been returned, is a matter of pure imagination and conjecture on which we need not occupy our minds. It will suffice to say that the Government were not under any obligation, express or implied, to return, without any demands from the shroffs, the Shikkai rupees, which they had accepted; not even for the purpose of enabling these shroffs who had deliberately failed to fulfil their duties, to escape some part of the loss which such action entailed.

We are only concerned to find out what was the loss to Government entailed by this neglect of duty on the part of their agents. The plaintiff Government found themselves burdened with a large number of Shikkai rupees for which they had paid Rs. 76-14-9 British per 100: though for coining purposes they were worth only Rs. 62-7-6. Their loss clearly was the difference between these two sums for each 100 Shikkai rupees. This is their loss because they can only do one of two things. They can coin the Shikkai rupees into Indian currency; in which case they are worth to Government no more than the cost of buying an equivalent amount of silver in the open market and that is Rs. 62-7-6 for each 100 Shikkai rupees. Or they can sell the Shikkai rupees in the open market, in which event they will fetch only Rs. 62-7-6 for each hundred. The rate of Rs. 62-7-6 is that which prevailed some time shortly after the acceptance of Babashai rupees at the treasuries and when consequently the duties of the shroffs had come to an end. That rate varies; but no objection has been taken by either side to the rate of Rs. 62-7-6 if it be determined that the rate to be taken is a rate subsequent to the last acceptance of Babashai

rupees at the treasuries. The shroff-appellants, however, contend that the rate which ought to be taken is the price of Shikkai rupees at the time the breach of duty by the shroffs occurred. That rate would be Rs. 67 or perhaps something more, and if that rate be taken, the loss payable by the shroffs is materially reduced. That is the rate at which the District Judge has estimated the loss. It seems to me he has proceeded on a wrong principle. The actual loss to Government is what I have stated—that to my mind is clear beyond question. The Government are entitled to be recouped that loss, (sections 73 and 211, Contract Act) unless it be shown that but for want of reasonable care or but for failure to perform some duty they owed the shroffs, they would have incurred a smaller loss. There was no failure on the part of Government in the performance of their duties to the shroffs. Was there any want of reasonable care? I cannot see that there was. What is it that the Government failed to do which they ought to have done? The only thing suggested is that they should have returned the Shikkai rupees to the shroffs. This point I have dealt with in so far as it is a matter of obligation. Is their anything in it regarded as a matter of reasonable care? I think not. I do not think it was unreasonable to retain the Shikkai rupees and I am unable to conceive of any reason for which it can be said to be unreasonable. It is useless for me to deal further with the argument on this point addressed to us, for I am unable to see anything in it whatever deserving of serious consideration.

The arguments in these appeals have occupied us for a long time and have covered a variety of points as to which discussion is unnecessary. The case is really very simple indeed. The shroffs deliberately and knowing they were wrong to do so, accepted Shikkai rupees and thereby induced the Government to pay for them far more than they were worth, besides burdening Government with a commodity they had never undertaken to buy and did not want. The loss caused to Government is unmistakeable and easy to ascertain. Nevertheless the defendants have striven to minimise their liability, first by asserting entirely false defences, and then by the exercise of ingenuity in devising worthless legal arguments. Had they been well advised they would not have appealed.

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One other point remains. In two of the cases the shroffs died during the pendency of the suit or appeal, and it is urged that the right to sue did not survive. This contention is based on the maxim *"actio personalis moritur cum persona"*. This maxim does not apply where, as here, the plaintiff has sustained a pecuniary loss arising out of a breach of obligation or contractual duty, by the person sued. This seems to me to be clear from a study of the three English cases: *Phillips* v. *Homfray*(1) and *Batthyany* v. *Walford*(2) and *United Collieries Ld.* v. *Simpson*(3). I would dismiss the appeals of the shroffs with costs throughout, and allow the appeals of the Secretary of State and award the claims with costs throughout as proposed by my learned colleague.

Decree accordingly.

R. R.

(1) (1883) 24 C. D. 439. (2) (1887) 36 C. D. 269.
(3) (1909) A. C. 36 C. D. 383, 391.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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July 12.

JOSE ANTONIO BARETTO (ORIGINAL DEFENDANT), APPELLANT, *v.* FRANCISCO ANTONIO RODRIQUES AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Jurisdiction—Court—Consent of the parties as to jurisdiction—Suit of value beyond the jurisdiction of the Court—Trial of suit—Jurisdiction cannot be questioned in appeal—Evidence Act (I of 1872), section 58.

The plaintiffs filed a suit for partition in the Court of the Subordinate Judge, First Class, valuing their claim at an amount which made the suit triable by that Court alone. The Judge, however, made over the trial of the suit to the Joint Subordinate Judge. In the latter Court, neither party raised any objection on the ground of jurisdiction; nor was any issue raised relating to it. The trial proceeded on merits: and a decree was passed in favour of plaintiffs. The defendant appealed to the lower appellate Court, where, he for the first time raised the question of jurisdiction on the strength of the market value stated in the plaint. The objection was overruled. On appeal:—

*Appeal No. 573 of 1909.