

view expressed in *Sita Ram v. The Crown* (1) that morphia is not a preparation or admixture of opium, we are unable to concur in the conclusion that it is not a drug prepared from the poppy.

Upon the evidence we are of opinion that morphia is an intoxicating drug prepared from the poppy, and that it fulfils the requirements of the definition of 'opium' contained in section 3 of the Opium Act, I of 1878.

We may point out that the notification No. 954, dated the 16th October 1916, referred to in the aforesaid judgment, has since been cancelled; and we do not think that it can affect the conclusion reached by us on the strength of the expert evidence.

The result is that we accept the appeal, and, setting aside the order of the lower Court, convict the respondent Robinson of an offence under section 9 (c) of the Opium Act. Having regard to the delay in the disposal of the case and to other circumstances, we do not consider it necessary to impose a sentence of imprisonment. We accordingly sentence him to a fine of Rs. 100. In default of payment of the fine he shall undergo rigorous imprisonment for a period of three months.

Appeal accepted.

A. R.

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Campbell.

UTTAM CHAND (PLAINTIFF) — *Appellant,*

versus

Mst. THAKUR DEVI AND OTHERS (DEFENDANTS) —
Respondents.

Civil Appeal No. 2219 of 1917.

Civil Procedure Code, Act V of 1908, Order VII, rule 6—Limitation—no ground of exemption claimed in plaint—Whether plaintiff can in appeal set up a ground of exemption by reason of an acknowledgment.

Plaintiff, a sub-mortgagee, sued defendants, one of whom was the widow of the original mortgagor and the others the representatives of the original mortgagee, to recover his mortgage money by sale of the property mortgaged. There was no prayer

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in the plaint for a personal decree against the prior mortgagees. The first Court held, that article 132 of the Limitation Act was applicable to the case and not article 147, and dismissed the plaintiff's suit as barred by time. In appeal to the High Court it was admitted that article 132 applied, but it was urged that the suit was not barred by time as there was an acknowledgment. No ground of exemption from the law of limitation had been set up in the plaint.

Held, that having regard to the provisions of Order VII, rule 8, of the Code of Civil Procedure the plaintiff could not be allowed to set up a ground of exemption for the first time in appeal. It would not be fair to the defendants to allow the plaintiff an opportunity of proving that there had been an acknowledgment, as now alleged.

Permeshri Das v. Fakria (1), distinguished.

Jogeshwar Roy v. Raj Narain (2), *Hingu Miah v. Heramba Chandra (3)*, and *Gobinda Mal v. Sautia (4)*, followed.

First appeal from the decree of Lala Ganga Ram Wadhwa, Senior Subordinate Judge, Amritsar, dated the 5th May 1917, dismissing the claim.

JAGAN NATH, AMAR NATH CHOPRA, and MELA RAM, for Appellant.

BADRI DAS, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—This is an appeal by the plaintiff from the order of the Subordinate Judge, Amritsar, dismissing the plaintiff's claim as barred by time under article 132 of the second Schedule of the Limitation Act. The suit was one by a sub-mortgagee to recover his mortgage money by sale of the property mortgaged and was brought against *Mussammatt Thakur Devi*, the widow of the original mortgagor, and *Mussammatt Kahn Devi* and *Bakhshi Ram*, the representatives of the original mortgagee. There was no prayer in the plaint for a personal decree against the prior mortgagees. The point argued before the trial Court was whether the suit was governed by article 132 or 147 of the Limitation Act. Before us it is admitted by counsel for the appellant that article 147 does not apply and that article 132 does, and that the suit is time-barred unless the plaintiff can prove an acknow-

(1) (1920) I. L. R. 2 Lah. 13.

(2) (1908) I. L. R. 31 Cal. 195.

(3) (1910) 18 Cal. L. J. 139.

(4) 83 P. R. 1914.

ledgment within the meaning of section 19 of the Limitation Act. It is, however, contended that there is evidence on the record in proof of such an acknowledgment which has not been considered by the trial Court. To this it is replied on behalf of the respondents that there is nothing in the plaint to show that any exemption from the Law of Limitation was claimed. Order VII, rule 6 of the Civil Procedure Code is referred to, in which it is laid down that where the suit is instituted after the expiration of the period prescribed by the Law of Limitation, the plaintiff shall show the ground upon which the exemption from such law is claimed. For the respondents *Jogeshwar Roy v. Raj arain* (1) is relied upon, wherein it was held that under section 50 of the former Civil Procedure Code the plaintiff cannot take advantage of any ground of exemption from the Law of Limitation which has not been set up in the plaint. This authority and several others were fully considered in the case of *Parmeshri Das and another v. Fakiria and others* (2). In that case it was held that the plaintiff, having mentioned one ground of exemption in the plaint, was not debarred by the provisions of Order VII, rule 6, of the Civil Procedure Code from taking another and inconsistent ground to get over the bar of limitation, and could consequently rely upon the acknowledgment made in the pleas of a previous case. The case reported as *Hingu Miah v. Heramba Chanara* (3), which has been cited before us by counsel for the appellant was followed, whilst *Jogeshwar Roy v. Raj Narain* (1), and *Gobinda Mal v. Santa* (4), were distinguished.

In our opinion, the present case is clearly distinguishable from that of *Parmeshri Das and another v. Fakiria and others* (2), because here no ground of exemption from the Law of Limitation at all was claimed in the plaint. In fact, it is clear to us that the plaintiff never intended to set up any acknowledgment as entitling him to an exemption from that law. In the trial Court the arguments turned entirely upon the question whether article 132 or 147 was applicable.

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(1) (1903) I. L. R. 31 Cal. 195.

(3) (1910) 13 Cal. L. J. 139.

(2) (1920) I. L. R. 2 Lah. 13.

(4) 89 P. R. 1914.

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We have been referred by counsel for the appellant to certain documents printed on pages 4-8 of Paper Book A in proof of an acknowledgment. The documents, of which these are translations, are contained in certain records which were sent for in the trial Court, but it was not stated there with what object these were sent for. In our opinion it is quite clear that they were not sent for for the purpose of proving an acknowledgment within the meaning of section 19 of the Limitation Act. The law as laid down in Order VII, rule 6 of the Civil Procedure Code is quite clear, and, in our opinion, it would not be fair to the defendants to allow the plaintiff an opportunity of proving that there had been an acknowledgment as now alleged. To allow him to do so would mean that the case would have to be remanded for further enquiry. Unless an acknowledgment be proved the suit is time-barred not only against the property, but also as regards the personal liability of defendants 2 and 3. The appeal accordingly fails and is dismissed with costs.

M. R.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Le Rossignol and Mr. Justice Abdul Qadir.

SHADI (PLAINTIFF)—*Appellant,*

versus

MST. JEONI AND OTHERS (DEFENDANTS)—

Respondents.

Civil Appeal No 2173 of 1917.

Custom—widow of a co-sharer in a joint estate—right of, to obtain partition—parties of Jullundur District—onus probandi—Riwaj-i-am—Punjab Land Revenue Act, XVII of 1887, section III.

Held, that as the *Riwaj-i-am* of the Jullundur District to which the parties belong is in favour of a widow's right to claim partition of her husband's share in a joint estate the *onus* of proving the negative was on the plaintiff-collateral who alleged it.

Parshotam v. Raj Devi (1), distinguished.

Mussanmat Bhay Bhari v. Wazir Khan (2) and *Abdul Qadir v. Mst. Rabia* (3), referred to, also Rattigan's Digest of Customary Law, article 15.

(1) 219 P. L. R. 1913.

(2) 70 P. R. 1912.

(3) 4 P. R. (Rev.) 1917.

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