be occasioned by the estate remaining unadministered than by rewarding an executor for administering it. In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that, under the circumstances, the agreement entered into between him and the Maharani was unlawful. On the whole, we think that the decree of the Judge of the Small Cause Court ought not to be interfered with, and accordingly the rule will be discharged with costs.

J. V. W. *Rule discharged.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

NIM CHAND BABOO AND OTHERS (PLAINTIFFS) *v.* JAGABUNDHU GHOSE (DEFENDANT.) *

1894 *July* 20.

Limitation Act, 1877, Arts. 57, 120—Suit on pledge of moveable property—Prayers in plaint both for personal decree, and for right to enforce charge against property pledged.

A suit on a pledge of certain moveable property, made in respect of a loan of money on the 10th February 1887, was instituted on the 14th December 1891. The plaint prayed for a decree for the money lent against the defendant personally, and also that the charge might be enforced against the article pledged. *Held* that, so far as the prayer for a personal decree was concerned, the suit was governed by article 57 of schedule II of the Limitation Act, and was barred; but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell, not within that article but within article 120 of the same schedule and was therefore not barred.

IN this case the defendant on 29th Magh 1293 (10th February 1887), borrowed from the plaintiffs the sum of Rs. 825, at the same time pledging to them certain ornaments, a list of which was written out, and at the foot a memorandum was made, "I take a loan of Rs. 825 on the pledge of these articles; I will pay interest on this at the rate of one rupee per cent. per mensem," and signed by the defendant. The plaintiffs alleged that at the time

* Appeal from Appellate Decree No. 352 of 1893 against the decree of J. Kelleher, Esq., District Judge of Burdwan, dated the 25th of February 1893, reversing the decree of Babu Rajendra Kumar Bose, Subordinate Judge of that District, dated the 1st of March 1892.

1894

NIM CHAND BABOO v. JAGABUNDHU GHOSE.

the loan was made there was a verbal promise by the defendant to repay it in Aghran 1295 (November-December 1888), but this was denied by the defendant.

The suit was instituted on the 14th December 1891 for the sum of Rs. 1,315 then due, the plaint praying—(1) "that the Court may be pleased to award a decree for the said sum of Rs. 1,315, together with costs and interest from the date of the institution of the suit until realization; (2) that the Court may be pleased to award a decree for realization of the decretal amount together with interest until realization and costs of the suit from the said pledged ornaments, and by sale of the other properties belonging to the defendant." The only material defence was that the suit was barred by the law of limitation.

The Subordinate Judge found that the verbal agreement alleged by the plaintiffs was proved, and held that the suit (which he considered was governed by article 120 of schedule II of the Limitation Act) was not barred.

The Judge on appeal found that the alleged verbal agreement was not sufficiently made out. As to the plea of limitation he observed as follows:—

"Then comes the question as to the period of limitation applicable. Appellants' pleader contends that it is three years under article 57, schedule II of the Limitation Act, while respondent's pleader maintains that the case falls under article 120 of the same schedule, giving a period of six years. His argument is that the suit was something more than one for money lent under article 57. He says it was really a suit to enforce payment of money charged upon moveable property, for which no period of limitation is provided elsewhere in the schedule, and that article 120 therefore applies; that such a suit, with respect to immoveable property, is provided for by article 132, and that it could not have been the intention of the Legislature to make no provision for a similar suit with respect to moveables. The pleader also referred to section 176 of the Contract Act. It appears to me that the suit was one for money lent, and that the period of limitation is that prescribed by article 57, namely, three years from date of loan. The only authority on the point is a decision of *Villa Kumti* v. *Kalekura* (1). Though the decision is not precisely in point, the reasoning would apply to the facts of the present case. I hold, therefore, that the suit was barred by limitation. The appeal will be allowed and plaintiffs' claim dismissed with costs of both Courts and interest at 6 per cent. Respondent's pleader contends

(1) I. L. R, 11 Mad., 153.

that his client should at least be allowed to retain the sale proceeds of the ornaments, if not as his own, at least by way of pledge in substitution of the ornaments. The obvious answer to that is that the pledge was put an end to by the sale of the ornaments on respondent's own application. Another answer is that the pledge was extinguished by limitation of the debt, for the security of which it was created. I hold that the respondent must repay the sale proceeds of the ornaments."

The plaintiffs appealed from this decision mainly on the ground of limitation.

Mr. *Jackson*, Dr. *Rash Behari Ghose*, and Babu *Taruck Nath* ...*len* for the appellants.

Dr. *Trailakhya Nath Mitter*, and Babu *Nalini Ranjan Chatter*...*e* for the respondent.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

This appeal arises out of a suit upon a pledge of certain moveable property. The pledge in question was made on the 29th Magh 1293, corresponding to the 10th February 1887.

The suit was instituted on the 14th December 1891, that is to say, within six years, but beyond three years, from the date of the pledge. The lower Appellate Court has dismissed the suit upon the ground that it is barred under article 57 of the second schedule of the Limitation Act; and the main question that we have to determine in this appeal is whether the case is governed by article 57 or article 120 of the Limitation Act.

So far as the plaint prays for a decree for the money lent against the defendant personally, we are of opinion that it is barred under article 57. That article runs as follows : "For money payable for money lent : three years from the time that the loan is made ;" and it seems to us that so far as the claim is for recovery of the money against the defendant, it falls under that article. But we are not prepared to agree with the lower Appellate Court in holding that so far as the plaintiff asks to enforce his charge against the article pledged, the case falls within the said article.

There can be no doubt that when moveable property is pledged to a person for money lent, he acquires a special property therein :

1894

NIM CHAND BABOO v. JAGABUNDHU GHOSE.

he has a charge upon it for the satisfaction of the loan advanced, and he is entitled, under section 176 of the Contract Act, either to bring a suit against the owner upon the debt or promise, retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale. And when he brings a suit for the purpose of a declaration of his right to sell the article pledged for the satisfaction of his claim, the suit is one to enforce his charge upon the said articles.

It is, we believe, now well settled that when a mortgagee of immoveable property brings a suit to recover the money advanced by sale of the property pledged, it is a suit to enforce his charge upon the said property; and we should think, by analogy, the claim of a pawnee for a similar relief in respect of moveable property is a suit to enforce his charge upon that property.

In this view of the matter it seems to us that the case does not fall within article 57 of the Limitation Act, and there being no other article in the said Act applicable to it, we should think that it falls within article 120 which provides for six years limitation.

The view that we adopt is one which we find was accepted by the Punjab High Court in the case of *Dowlath Ram* v. *Jewan Mal* (see Mr. Rivaz's edition of the Indian Limitation Act, 2nd Edition, p. 154, as also Branson's Digest, p. 219).

We ought here to mention that the learned Judge of the Court below, in support of his view, has referred to the case of *Vitla Kamti* v. *Kalekara* (1). That was a suit upon a bond whereby certain moveable property in the possession of the debtor was pledged as security, and the question that was discussed was whether article 80 or article 120 of the Limitation Act was applicable, and the learned Judges held that, so far as the suit was to recover a debt due under the bond, it was governed by article 80, and that "the power to bring moveable property to sale is an incident in the nature of an accessory to the right to recover the debt, and if that right becomes incapable of being enforced owing to the lapse of three years, the power to sell the security must likewise cease to be capable of being exercised."

We are, however, unable to agree in this view, and in this

(1) I. L. R., 11 Mad., 153.

connection we might refer to the observations of Sir Barnes Peacock in the case of *Surwan Hossain Khan* v. *Golam Mahomed* (1), decided by a Full Bench of this Court, where that eminent Judge (see p. 173 of the Report) in referring to a similar argument that was put forward in respect of a suit to enforce a lien upon immoveable property disapproved of that view, and he observed as follows : " If land is mortgaged as security for a loan, in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to us that the charge upon the land created an equitable interest upon the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest."

In the view which we have just expressed the other questions that have been discussed before us do not arise.

The result is that this appeal will be allowed so far as the plaintiff seeks to enforce his charge against the articles pledged. Each party will bear his own costs.

J. V. W. *Appeal allowed in part.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

TOKHAN SINGH *alias* ROOP NARAIN SINGH AND OTHERS (DECREE-HOLDERS) *v.* UDWANT SINGH (JUDGMENT-DEBTOR.)*

1894 *August* 16.

Surety—Enforcement of Security—Surety for amount of decree pending appeal —Execution of Decree—Separate suit—Civil Procedure Code, sections 244, 253.

Where a surety has become security for the appellant in an Appellate Court, under section 545 of the Code of Civil Procedure, the security bond cannot be enforced in execution of the decree under section 253, but a separate suit must be brought against the surety. *Kali Charan Singh* v. *Balgobind Singh* (2) referred to.

* Appeal from Appellate Order No. 287 of 1893, against the order of H. Holmwood, Esq., Officiating Judge of Bhagulpore, dated the 1st of July 1893, reversing the order of Babu Parbutty Kumar Mitter, Subordinate Judge of Monghyr, dated the 20th of May 1893.

(1) 9 W. R., 171 ; B. L. R., Sup. Vol. 879. (2) I. L. R., 15 Calc., 497.