recovered any part of the proceeds of the property in dispute, then such possession is good proof of a separation of interests and will bar the action." This principle was followed by the High Court in *Rane* v. *Rane* (*d*,) Between these cases and the case before us, there is however this distinction: In the former the party claiming was out of possession altogether; and therefore, according to the ruling of this Court in *Guravi* v. *Guravi* (*c*) it would not be necessary that actual separation should be proved. It would be enough to show that the defendants had been in uninterrupted possession for more than thirty years. But in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made, and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred, and we confirm the Lower Court's decree.

1869

Sakho Narayan Khandalkar v. Narayan Bhikaji Khandalkar.

Dec. 7.

Referred Case.

Lachhman Joharmal... ... ...*Plaintiff.*
Bapu Khandu, and Tukaram Khandoji ... ...*Defendants.*

Nandram Sardarmal ... ... *Plaintiff.*
Bhavani Haibati, and Bhau Tuka ... ...*Defendants.*

Surety—Liability of surety to be such.

Held, that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and that when a decree is obtained against a surety it may be enforced in the same manner as a decree for any other debt.

This was a reference under Act X, of 1867 from J. L Warden, Judge of the Court of Small Causes at Ahmednagar for the opinion of the High Court.

(d) 3 Bom. H. C. Rep. A. C. J. 173. (c) Ibid, 170.

1869

Lachhman Joharimal v. Bapu Khandu and Surety Tukaram Khandoji

"I have the honour to solicit the opinion of Her Majesty's High Court of Judicature on the subject of the liability of sureties, the judgment creditors in two suits decided in this Court (Nos. 2,121 of 1866 and 2,732 of 1868) having presented applications for the imprisonment of the sureties to the bonds on which they sued.

"The Madras High Court ruled in a case referred to in Norton's Topics of Jurisprudence, page 365, that the creditor was bound to exhaust his remedy against the principal debtor before his right against the surety arose; and it is stated in the *Times of India* of the sixth November 1869 that the same Court has lately ruled that a surety cannot be imprisoned under any circumstances.

"The practice of this Court has been to restrain a judgment-creditor from recovering from a surety until he has exhausted his remedy against the principal. Failing to recover from the principal, he is allowed to go the length of imprisoning the surety alone to obtain satisfaction of his decree.

"In England as long as imprisonment for debt existed, I believe that the surety was held to be liable to be sued in the first instance, and that he was not protected by the solvency of the principal. If in this view I am correct, I think that, by parity of reasoning, the surety should be liable to imprisonment while the principal is at large."

PER CURIAM (COUCH, C. J., and MELVILL, J.):—The Court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.