the examination of witnesses are Sections 175—179, inclusive, and a state of circumstances under which a commission might issue are three: 1st, when a witness is resident more than a hundred miles from the place where the Court is held; 2nd, when the witness is unable to attend before the Court from sickness or infirmity; and 3rd, when a witness is specially exempted by reason of rank or sex. In all these cases it is impossible or inconvenient for the witness to be examined personally by the Court. The Court, therefore, allows a commission to issue. But in the case of a witness being about to leave the jurisdiction of the Court, there is no reason why the Court should not itself examine him. The Legislature has, accordingly, made this distinction; not being willing to forego the advantage of giving the Court the opportunity of observing the demeanour of a witness, except where constrained by necessity so to do.

Mr. Phillips, contra.—The 173rd Section has a different object. It provides for the admissibility of depositions without proof that the witness is out of the jurisdiction at the time of the trial. The 174th Section provides for the general case, where the witness is unable to attend at the trial from sickness and other sufficient causes, and the terms of the Section are wide enough to include the case of a witness leaving the jurisdiction, and to entitle the Court to issue a commission. The practice has been to issue commissions in such cases as the present, and no doubt has ever been raised as to the powers of the Court.

Mr. Hyde in reply.

Phear, J. said, after some consideration, he was of opinion that the evidence was not admissible. Not having been taken before the Court, the deposition was not admissible, except by consent. It was usual, in cases of this sort, for parties to waive objection on this ground at the time that the order for the commission was obtained; but it appeared that nothing of the kind took place in this instance. (1)

Attorneys for Plaintiff: *Messrs. Robertson and Co.*

Attorney for Defendant: *Mr. Leslie.*

(1) The attention of the Court does not appear to have been called to the inherent jurisdiction of a Court of Equity to issue a Commission to take evidence *de bene esse*. See Gresley on Evidence in Courts of Equity, p. 90; *Bowden* v. *Hodge*, 2 Swanston, 258; *Cox* v. *Champneys*, 6 Mad. and Gel., 262; and see Mitford on Pleading (fourth edition), pp. 52, 149, 150, and cases there cited; and Jeremy's Equity, p. 272.

B. L. R. Vol. V, p. 254.

(Original Civil.)

The 9th June 1870.

Before Mr. Justice Norman.

RUPLAL KHETTRY and another,

versus

MAHIMA CHANDRA ROY (1)

Interim Injunction to stay Sale.

The plaintiffs, who were in possession of certain premises, brought a suit to restrain the defendant from selling a share in them which he had attached in execution of a decree upon a mortgage to him of that share, and to set aside the deed of mortgage. According to the plaintiffs' case, they (the plaintiffs) were in possession under a decree of Court obtained upon a mortgage executed to them by the executor of the will of the last proprietor under a power contained in the will, and the mortgagors to the defendant, who were the brother and the son of the testator, had no interest in the property at the time of their mortgage to the defendant. The plaintiffs applied for an *ad interim* injunction, and the Court granted the application.

THIS was an application for an injunction to restrain the defendant from selling certain property, *viz.*, a house No. 8-12, in Raja

(1) In an application of the same kind made before Markby, J., in *Sreenarain Chuckerbutty* v. *A. B. Miller*, on March 22nd, 1870, it appeared that the plaintiff was formerly a member of a joint Hindu family, but that many years ago partition had taken place; that subsequently to the partition, the plaintiff had purchased the property, consisting of certain houses, with his own money, and had been in undisputed possession of it ever since; that the property had been attached by the defendant, the assignee of the estate of R. Dodd and other insolvents, in execution of a decree obtained by the insolvents against one Mirtunjoy Chuckerbutty, the brother of the plaintiff; that the plaintiff had filed a claim which had been disallowed; and that the plaintiff had then brought the present suit to have his right, title, and interest in the said property declared, and for an injunction to restrain the defendant from selling it. The property was at the time of the application advertized for sale by the defendant. Markby, J., said, he thought the real question was whether the interests of the parties would suffer by the sale; the plaintiff might be injured by the sale, but the creditors could not be prejudiced by staying the sale. He, therefore granted the application. Costs to be costs in the cause.

Gurudas's Street, until the suit in which the plaintiffs claimed an interest in the property should have been heard.

One Kisto Chandra Das died in 1865, leaving three sons, Radhanath, Bonomali, and Troyluckonath. He left a will, by which he left his son, Radhanath, absolute devisee of his property which included the said house, and against which his son, Bonomali, caused a *caveat* to be entered, but he afterwards withdrew it, and probate was granted of the will on April 28th, 1865. In August 1866, Radhanath died, leaving a will, by which he made Troyluckonath his executor, giving him under certain circumstances, the power to mortgage the said house. He left one son, Megnath, by whom a *caveat* was entered against the will, but probate of the will was granted on August 18th, 1866. Troyluckonath, under the power given him in the will of Radhanath, mortgaged the said house to the plaintiffs, to secure an advance of rupees 6,500, on August 17th, 1867. Default was made in the payment of the mortgage money, and the property was put up for sale by auction, by the plaintiffs, under the power of sale contained in their mortgage deed, but was not sold as the defendant set up a claim to it. The plaintiffs thereupon brought a suit for foreclosure, on May 16th, 1868, in which they obtained a decree for foreclosure on June 11th, 1868, which was made absolute on July 15th, 1869, and they obtained a decree for possession on September 9th, 1869, and were in possession at the time of the present suit. Megnath and Bonomali had, meanwhile, on March 26th, 1867, executed a mortgage of two-thirds of the said premises to the defendant. Default being made in payment of the mortgage money, the defendant brought a suit, to which the plaintiffs were not made parties, and obtained a decree for sale on January 6th, 1868. On April 23rd, 1870, the defendant advertized that two thirds of the said house would be sold in pursuance of his decree. The plaintiffs thereupon brought the present suit for an injunction to restrain the sale, and they prayed that the mortgage deed of March 26th, 1867, might be brought into Court and cancelled.

Mr. Kennedy, for the plaintiffs, contended that these mortgagors had absolute property in the premises he mortgaged to them, under the wills of Kisto Chandra and Radhanath; that a cloud would be thrown on the plaintiffs' title by allowing the mortgage of the 26th March 1867 to stand good, and permitting a sale of the premises —*Hone* v. *O'Flahertie* (1); that the plaintiffs should have been made parties to the foreclosure suit in which a decree had been obtained on January 6th, 1868; that considerable injury would result to the plaintiffs by the sale, but that the defendant would not be injured by an injunction being granted to restrain the sale until the title had been tried; and that if the Court refused the injunction, it would be permitting the sale of property to which no title had been shown by the decree-holders.

Mr. Woodroffe, for the defendant, contended that the case of *Hone* v. *O'Flahertie* (1) laid down no general principle, and did not apply as an authority to the present case; that the decree for foreclosure obtained by the plaintiffs had been obtained by them with knowledge of the defendant's claim, and without notice to him, or making him a party to the suit; that the executors being merely Hindu executors took no estate in the property left by the will—*S. M. Jaykali Debi* v. *Shibnath Chatterjee* (2); that it was necessary to show that irreparable injury would be done by the sale, and that the person asking for an injunction had acted with promptitude, which had not been done in this case, as the cloud on the plaintiffs' title arose, if at all, in May 1868, when the defendant interfered to prevent the sale by the plaintiffs, yet until now they had taken no steps to remove it.

Mr. Kennedy in reply.—If the plaintiffs had made the defendant a party to their suit, it would have been multifarious; but the defendant might have made the plaintiffs parties to his suit. It is not necessary to show that irreparable injury would be done by allowing the sale; it is enough that the plaintiffs would be injured as to their title; they will be in a worse position if the sale is permitted. There has been no delay on the plaintiffs' part, as they were not bound to take any steps until now. The delay, if any, has been rather on the part of the defendant, who having obtained a decree in January 1868 does not proceed to execution of it until April 1870. The balance of inconvenience is in our favour, for a postponement of the sale would not injure the defendant, nor deteriorate the property, while

(1) 9 Ir. Ch. Rep. 119; S. C., on appeal, *id.*, 497.
(2) 2 B. L. R., O. C., 1 or I Suppl. Vol., p. 143.

a sale before title was proved would do plaintiffs considerable injury. [NORMAN, J., referred *to Best* v. *Drake* (1).]

Norman, J. (after stating the facts).—The case, by arrangement of the parties, stood over till to-day and the question is now whether the plaintiffs are entitled to an injunction to restrain the sale until the rights of the parties are determined by this suit. The case is one of considerable difficulty. Mr. Kennedy for the plaintiffs could not support his contention by any case bearing directly on the point, and Mr. Woodroffe has argued with great force and ingenuity that the Court has no power or ought not to interfere. It is not without very considerable hesitation that I have come to the conclusion that I ought to stay the sale until the rights of the parties have been determined. I think it would be an abuse of the process of this Court, and would tend to create mischief, if I were to allow the sale to proceed by the Registrar under the decree in the suit upon the mortgage, when it is made plain to me that there is the strongest reason for supposing that the defendants have no title. This is not a case in which the Registrar sells the right, title, and interest of a person only. By the form of the decree he is to sell the mortgaged hereditaments, or a part thereof. On the same principle, that it is the duty of a person, who has rights in property advertized for sale in execution of a decree, to claim the property under Section 246 of Act VIII of 1859, and if his claim is disallowed to bring a suit within one year, from the time of the disallowance, which would be probably before the sale took place, it appears to me that it was the duty of the plaintiffs to set up their title to prevent the public from being defrauded, or themselves from having to litigate with a pauper. It appears to me that I must be guided by the question of convenience, or inconvenience which was the principle in the case of *Bacon* v. *Jones* (2), and I, therefore, grant the injunction. Great injury might result to the plaintiffs if I did not interfere, and a great fraud may be committed on the purchaser. I think no injury can result to the defendant by my granting this injunction. On these grounds, therefore, though with some hesitation, I grant the injunction until the rights of the parties have been determined. The costs of both parties will be costs in the cause.

(1) 11 Hare, 369.
(2) 4 M. & Cr., 433.

B. L. R. Vol. V, p. 258.

(Original Civil.)

The 5th May 1870.

Before Mr. Justice Phear.

In the Matter of the SHIP "PORTUGAL."

Bottomry Bond-holder—Ship, Sale of—Master's Lien for Wages—Priority.

The charterer of a ship advanced money to enable her to complete the voyage, and obtained as security a "bottomry bond" signed by both the master and owner. On the completion of the voyage, the charterer got the ship arrested and sold, and the money was brought into Court. Before any order had been made for the payment of the proceeds out of Court, the master also had got the ship arrested at his suit for wages due, but no decree had been obtained. Subsequently, the charterer, without notice to the master, obtained an order of Court for the payment of the proceeds of sale to satisfy his bottomry bond. Thereupon, the master applied to restrain the charterer from taking the money out of Court, until the claim for wages had been first satisfied. *Held*, that the master had a lien on the proceeds for wages due to him at the time of the sale of the ship, prior to that of the bottomry bond-holder, and that he was entitled to have the proceeds retained in Court until the hearing of his claim.

Mr. Phillips had, in this case, obtained a rule *nisi* for an injunction to restrain the holder of a decree obtained in a suit on a bottomry bond on a certain ship, called *The Portugal*, from taking out of Court the proceeds of the sale of the ship, which sale had been made by order of the Court passed in the said suit.

The ship had been chartered by one Mahomed Hossein, for a voyage from Calcutta to Jedda and back, with the option of calling at certain ports, both going to and returning from Jedda. On the voyage to Jedda, the ship put into one of the intermediate ports, where it was found necessary that she should undergo some repairs, for which the necessary funds were supplied by the agent of the charterer at that port. The master had also been compelled to borrow from the passengers during the subsequent voyage to Jedda, in order to