

[FILE No.  $\frac{A}{19}$  J. OF 1916.]

1916.

# ASSAM SECRETARIAT.

JUDICIAL DEPARTMENT.

LEGISLATIVE—A.

July 1916.

Nos. 12-34.

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Bill further to amend the Transfer of Property Act, IV of 1882.

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REFERENCES TO FORMER CASES.	
Department, date, and Nos., or File No. and year.	Brief Title of File.
1. Leg., A, Mar. 1910, Nos. 4-26 L (File No. —L). 12	Same case.
2. Ditto, Nov. 1915, Nos. 3-15 (File A No —J). 24	" "
D--6.	

REFERENCES TO LATER CASES.	
Department, date, and Nos.	Brief Title of File.
<div>Just a July 1916 = 5-1</div>	
(To be continued on back, if necessary.)	

PAPERS OTHER THAN PROCEEDINGS.

I.—Printed.

Notes and orders.

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II.—Not printed.

Unimportant papers.

[FILE No. <sup>A</sup>—J OF 1916.]  
19

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ASSAM SECRETARIAT.

JUDICIAL DEPARTMENT.

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LEGISLATIVE—A.

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JULY.

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Nos. 12-34.

Bill further to amend the Transfer of Property Act, IV of 1882.

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# NOTES.

LEGISLATIVE—A, JULY 1916.

Nos. 12-34.

Bill further to amend the Transfer of Property Act, IV of 1882.

FROM THE SECRETARY TO THE GOVERNMENT OF INDIA, LEGISLATIVE DEPARTMENT, No. 2500, DATED THE 4TH MAY 1916.

FROM THE SECRETARY TO THE GOVERNMENT OF INDIA, HOME DEPARTMENT, No. 347, DATED THE 11TH MAY 1916.

Chief Commissioner,

The Bill has not been modified in any way. The Hon'ble Pandit's speech in support of it strikes me as a miserable production it entirely begs the point at issue. It met with the treatment it deserved at the hands of Mr. Lowndes.

We may send copies of the correspondence including Mr. Wheeler's letter and of the Council }  
proceedings to the two Judges and Messrs. Steel and Hadow and ask whether they desire to add } A  
anything to the opinions already expressed by them. We may }  
ask the Judges to consult representatives of the bar. I am inclined  
\* A.—24J., Leg., A, Nov. 1915, Nos. 3-15. to think that we might send copies of our letter\* too.

Yes.—A. E.—18-5-1916.  
A. E.—18-5-1916.

We might also perhaps consult Commissioners. We may ask for replies by July 7th.

18th May 1916.

B. C. ALLEN.

1. See above.

2. Secretary II may see. In the case of the Indian Registration (Amendment) Bill perhaps we might also consult Messrs. Steel and Hadow as in this case and Mr. Moore of Tezpur possibly in both cases.

18th May 1916.

A. E[ARLE].

Secretary II,

Will you kindly note. I did not suggest Mr. Moore, before as he is I understand a single individual and possibly to single him out in this manner might give rise to jealousy amongst individual members of the bar. Messrs. Steel and Hadow are however a firm which differentiates them to some extent. I am not certain whether we should regularly consult even Messrs. Steel and Hadow direct. It might lead to claims from Government Pleaders, Barristers like Mr. Phukan and others for direct consultation. A reference to Mr. Moore might quite conceivably make Mr. Phukan ask why he was not consulted.

19th May 1916.

B. C. ALLEN.

Take extract from Chief Commissioner's order, Chief Secretary's note above and put up with Registration Bill file please.

19th May 1916.

A. W. BOTHAM.

Chief Commissioner,

With regard to consulting Mr. Moore would Chief Commissioner kindly see my note above. I venture to think that references to a single individual might create an inconvenient precedent, as others might also ask to be consulted or say that a European Solicitor is consulted direct and an Indian Barrister is not.

26th May 1916.

B. C. ALLEN.

I agree.

26th May 1916.

A. E[ARLE].

No need then to consult Mr. Moore. Let Secretary II see.

26th May 1916.

B. C. ALLEN.

Thanks. Seen.

27th May 1916.

A. W. BOTHAM.

TO THE COMMISSIONER, ASSAM VALLEY DISTRICTS, — No. 3253-54L., DATED THE 26TH MAY  
SURMA VALLEY AND HILL DISTRICTS,  
 1916.

TO THE JUDGE, ASSAM VALLEY DISTRICTS, No. 3255-56L., DATED THE 26TH MAY 1916.  
SYLHET,

TO MESSRS. STEEL AND HADOW, DIBRUGARH, No. 3257L., DATED THE 26TH MAY 1916.

FROM MESSRS. STEEL AND HADAW, SOLICITORS, DATED THE 31ST MAY 1916.

FROM THE COMMISSIONER, SURMA VALLEY AND HILL DISTRICTS, No. 3934, DATED THE 10TH JUNE 1916.

FROM THE JUDGE, SYLHET AND CACHAR, No. 710-III—5, DATED THE 26TH JUNE 1916.

FROM THE COMMISSIONER, ASSAM VALLEY DISTRICTS, No. 530C., DATED THE 30TH JUNE 1916.

Chief Secretary,

We are not much concerned, and it will perhaps suffice to reply that the Chief Commissioner has again circulated the Bill, that it finds practically no support and that he has nothing to add to his former letter, nor reason to modify the criticisms made in that letter.

8th July 1916.

G. C. KERWOOD.

Chief Commissioner,

There is nothing in the correspondence to suggest that Chief Commissioner need alter the views expressed in his former letter, which commands general assent in this province. I venture to submit a draft for Chief Commissioner's approval.

8th July 1916.

B. C. ALLEN.

The draft should state more clearly what *non-officials* say. We should also send copies of any important opinions, *e.g.*, of the Tea Associations, if consulted.

8th July 1916.

A. E[ARLE].

Chief Commissioner,

The Tea Associations were not consulted. It is hardly a matter in which they are likely to be concerned in any way. The only non-officials [who have replied separately are the Government Pleader, Gauhati, and Messrs. Steel and Hadow. With the draft it is proposed to forward both their letters and I have now referred to the opinion of the Government Pleader. But I agree with Mr. Bentinek that his reasoning is unsound.

9th July 1916.

B. C. ALLEN.

9th July 1916.

A. E[ARLE].

TO THE SECRETARY TO THE GOVERNMENT OF INDIA, LEGISLATIVE DEPARTMENT, No. 5L.T., DATED THE  
 10TH JULY 1916.

FROM THE JUDGE, ASSAM VALLEY DISTRICTS, No. 1692, DATED THE 14TH JULY 1916.

Chief Commissioner,

Both the letter and enclosure seem sensible and may be forwarded.

21st July 1916.

B. C. ALLEN.

21st July 1916.

A. E[ARLE].

TO THE SECRETARY TO THE GOVERNMENT OF INDIA, LEGISLATIVE DEPARTMENT, No. 129L.T., DATED THE  
 23RD JULY 1916.



# ASSAM SECRETARIAT PROCEEDINGS.

## JUDICIAL DEPARTMENT.

### LEGISLATIVE—A.

JULY 1916.

Bill further to amend the Transfer of Property Act, IV of 1882.

No. 12.

No 2500, dated Simla, the 4th May 1916.

From—The Hon'ble Mr. A. P. MUDDIMAN, C.I.E., I.C.S., Secretary to the Government of India, Legislative Department,

To—The Hon'ble the Chief Commissioner of Assam.

With reference to the proceedings of the Imperial Legislative Council on the 21st March 1916, published in Part VI of the *Gazette of India* of the 1st April 1916, I am directed to forward herewith 6 copies of the papers noted in the margin, and to request that you will favour the Government of India in this Department with an expression of your opinion on the provisions of the Bill and with the opinions of such selected officers and other persons as you may think fit to consult on the subject.

2. The reply to this letter should be sent in by the 31st July 1916.

No. 13.

A Bill further to amend the Transfer of Property Act, 1882.

Whereas it is expedient further to amend the Transfer of Property Act, 1882; IV of 1882. It is hereby enacted as follows :—

Short title.

1. This Act may be called the Transfer of Property (Amendment) Act, 1915.

2. In section 3 of the Transfer of Property Act, 1882 (hereinafter called "the said Act") after the definition of the word "instrument", the following shall be inserted, namely :—

" 'attest,' with its grammatical variations when used with reference to any instrument means to sign such instrument as a witness in the presence of the executant thereof after having seen the executant sign the same, or after having received from the executant a personal acknowledgment of his signature to the same."

3. Every mortgage deed or deed of gift which is required under the said Act to be attested by at least two witnesses, and which has been attested before the commencement of this Act, shall be deemed to have been sufficiently attested if two attesting witnesses signed the deed in the presence of the executant after having received from the executant a personal acknowledgment of his signature to the same.

4. Where a claim under a mortgage deed or a deed of gift, attested by witnesses, has been wholly or in part dismissed, rejected, or withdrawn, after the 30th day of July 1912, and before the commencement of this Act, in a Court of first instance or of revision or of appeal, by reason only of the failure of

Attestation of mortgage deeds and deeds of gift prior to commencement of the Act.

Restoration of claims dismissed, rejected, or withdrawn by reason of defect in attestation of mortgage deed or deed of gift.

[Cf. s 50 of Act X of 1865, s. 2 (2) of United Provinces Act III of 1910.]

[Cf. s. 31 (2) of Act IX 1908.]

a party to prove that an attesting witness signed the deed in the presence of the executant after having seen the executant sign the same the case may, if the dismissal, rejection, or withdrawal has had the effect of invalidating, in whole or in part, the said deed as between persons claiming and liable thereunder, be restored on review in the manner provided by the Code of Civil Procedure, 1908, for review of V of 19 8. judgments, on application in writing made within six months from the commencement of this Act; and, on such restoration, the provisions of section 3 shall apply to the said mortgage deed or deed of gift, as the case may be.

#### *Statement of Objects and Reasons.*

Their Lordships of the Privy Council have held in *Shama Patter v. Abdul Kadir* (I.L.R. 35, Mad., p. 607) that the word "attested" used in section 59 of Act IV of 1882 (the Transfer of Property Act) means signed by a witness who saw the actual execution of the deed, and that the attestation of a mortgage deed on a mere acknowledgment of his signature by the executant is not sufficient. Until this decision was passed, there was a divergence of opinion among the Indian High Courts on the meaning to be attached to the word "attested" referred to above. The Calcutta High Court and the Madras High Court took the view which their Lordships of the Privy Council have now taken. The Bombay High Court had, at one time, held that the word "attested" included attestation upon acknowledgment, but in a subsequent case that Court also arrived at the same conclusion as the Calcutta and the Madras High Courts. The Allahabad High Court had, on the contrary, held that the word "attested" would include attestation upon a personal acknowledgment by the executant of his signature. The effect of the decision of their Lordships of the Privy Council is that money-lenders seeking redress in Courts of law for the recovery of monies advanced on mortgage securities, often find themselves at the mercy of attesting witnesses, who, if they should be dishonestly inclined, will be able to utilise the occasion to extract payment from one party or the other. This will particularly be the case when most of the attesting witnesses are dead, and only one or two are left alive. It is apprehended that many claims have already been dismissed on the authority of the decision above mentioned, and while redress has thus been denied to those rightfully entitled to recover their debts, dishonest debtors have found a new method available to them of avoiding payment, by trying to tamper with the evidence. In the United Provinces and the Punjab, in the case of mortgage deeds executed by *Pardanastin* ladies, who, according to the custom of the country, do not appear, except before very near relations, the hardship caused by the restricted interpretation of the word "attested" will be still greater. The word "attested" has been the subject of interpretation in several English cases. In *Grayson v. Atkinson*—(2 Ves. Sen, 455 Sc.—28 English Reports, 201 at pages 292-293) decided in 1752, Lord Hardwick said:—"It is insisted that the word *attested* superadded to *subscribed* imports they shall be witnesses to the very act and *factum* of signing, and that the testator's acknowledging that act to have been done by him, and that it is his hand-writing, is not sufficient to enable them to attest; that is, it must be an attestation of the thing itself, not of the acknowledgment. To be sure, it must be an attestation of the thing in some sense; but the question upon this clause, as abstracted from the subsequent, is, if they attest on the acknowledgment of the testator that that is his hand-writing, whether that is not an attestation of the act, and whether not to be construed as agreeable to the rules of law and evidence as all other attestation and signing might be proved? At the time of making that Act of Parliament, and ever since, if a bond or deed is executed by the person who signs it: afterwards the witnesses are called in; and before these witnesses he acknowledges that to be his hand; that is always considered as an evidence of signing by the person executing, and is an attestation of it by them." A similar view was taken in *Ellis vs. Smith* decided in 1754. These cases were followed in *White vs. Trustees of the British Museum* (6 Bing, 319-Sc. 130 English Reports, 1303) (decided in 1829). In that case Tindal C. J. said:—"It has been held in so many cases that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is subscription of the witnesses complete. The case of *Ellis vs. Smith*, which was decided by Lord Chancellor Hardwicke assisted by the Master of the Rolls, Sir J. Strange, Lord Chief Justice Willis, and Lord Chief Baron Parker, all persons of high and eminent authority, is express to the latter point."

In some subsequent cases a different view was taken, *viz.*, that "attested" meant that the witnesses should have been present as witnesses, and should have seen the executant sign the document.

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The Indian Legislature has used the word "attested" in several of its enactments. It has been evidently used in the larger sense in section 50 of the Indian Succession Act, 1865 (X of 1865), and in section 2 (2) of the Oudh Estates Act III of 1910. Dealing with the attestation of a will, paragraph 3 of section 50 lays down: "The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will ..... or have received from the testator a personal acknowledgment of his signature or mark."

The Allahabad High Court has expressed the opinion that it was reasonable to suppose that the interpretation put upon the word "attest" in section 50 of the Indian Succession Act should, in the absence of good, technical or substantial reason to the contrary, be taken to be the meaning in which the word is used in section 59 of the Transfer of Property Act (I. L. R. 24, All. 69). Their Lordships of the Privy Council have, on the contrary, held that the Indian Legislature used the word "attested" in section 59 (of Act IV of 1882), in the sense in which it has been construed through a series of decisions in the English Courts, namely, that the person attesting should have been present as a witness and seen the executant sign the document which he attests. It has, therefore, become necessary, in the interests of justice, that the Indian Legislature should authoritatively lay down in what sense the word "attested" used in section 59 of the Transfer of Property Act is to be understood. Section 2 (2) of the Oudh Estates Act (III of 1910, of the United Provinces Council), contains a definition of the word 'attest' as follows:—

"'Attest' with its grammatical variations, when used with reference to any instrument other than a will, means to sign such instrument as a witness, in the presence of the executant after having seen the executant sign the same, or after having received from the executant a personal acknowledgment of his signature to the same."

It seems desirable that a definition similar to the one quoted above should be inserted in the Transfer of Property Act also. If this is done, the hardship, which is likely to result from the decision of their Lordships, in *Shama Patter v. Abdul Kadir* (I. L. R. 35, Mad. 607) will be avoided. This is what the Bill proposes to do. It proposes to give retrospective effect to the amendment in order that miscarriages of justice should be obviated.

MADAN MOHAN MALAVIYA.

No. 14.

No. 347, dated Simla, the 11th May 1916.

From—The Hon'ble Mr. H. WHEELER, C.S.I., C.I.E., Secretary to the Government of India, Home Department,

To—The Hon'ble the Chief Commissioner of Assam.

With reference to Mr. Allen's letter No. 8148L., dated the 9th October 1915, on the subject of the Bill promoted by the Hon'ble Pandit Madan Mohan Malaviya to amend the Transfer of Property Act, 1882 (IV of 1882), I am directed to invite attention to the proceedings in the Imperial Legislative Council on the 21st March 1916 (*vide* the *Gazette of India* of the 1st April 1916) in which the motion to refer the Bill to Select Committee was approved. The Bill will be circulated in ordinary course in the Legislative Department, to which replies will doubtless be duly sent; to the present communication no separate answer is desired, but it is thought that it may assist you in further considering the Bill if the general tenor of the opinions received in answer to my letter No. 955-967, dated the 14th August 1915, is known.

2. Apart from the Punjab and the North-West Frontier Province which expressed no opinion on a matter of which they had no experience, Madras (supported by its High Court), Bengal, the Central Provinces, Coorg, and Ajmer-Merwara expressed themselves generally in favour of clauses 2 and 3 of the Bill; but in Bombay, the United Provinces (apart from the local demand for a Validating Bill), Burma, Bihar and Orissa, Assam, and Delhi, an adverse view was maintained, while the Calcutta High Court held that the proposal would come up more appropriately in connection



with a general amendment of the Transfer of Property Act. The line of argument of the dissentients was broadly as follows :—

- (a) That the present law gives rise to no practical inconvenience ;
- (b) that it affords a protection against fraud ;
- (c) that weighty English opinion is against the suggested interpretation of the word "attest" ;
- (d) that the analogy of the Indian Succession Act (section 50) is invalid ; and
- (e) that the Hon'ble Mover is relying on an Allahabad ruling which is contrary to those of other High Courts.

Clause 4 was criticised even more unfavourably, and only found a general support in Bengal, the Central Provinces, and Coorg. The majority regard retrospective validation as unsound and unusual, and likely merely to have a disturbing effect.

3. It will be observed that in the Legislative Council the Hon'ble Mr. Lowndes dwelt upon the objections to the Bill, especially in so far as it might facilitate fraud, and suggested that a simpler course might be to enact a validating measure in the United Provinces applicable to the particular local difficulties. However the Government of India acquiesced in the discussion of the different aspects of the Bill in Select Committee, but in so doing reserved a decision as to their final attitude towards the Bill.

No. 15.

No. 3253-54L., dated Shillong, the 26th May 1916.

From—G. C. KERWOOD, Esq., I.C.S., Under-Secretary to the Chief Commissioner of Assam,  
Legislative Department,

Assam Valley Districts.

To—The Commissioner, \_\_\_\_\_  
Surma Valley and Hill Districts.

I am directed to forward a copy of the correspondence noted in the margin

(1) Letter No. 2500, dated the 4th May 1916, from the Government of India, Legislative Department, and enclosures.

(2) Letter No. 347, dated the 11th May 1916, from the Government of India, Home Department.

(3) Letter No. 8148L., dated the 9th October 1915, to the Government of India, Home Department.

(4) Proceedings of the Imperial Council of 21st March 1916.

regarding the amendment of the Transfer of Property Act, 1882 (IV of 1882), and to request that you will be so good as to favour the Chief Commissioner with an expression of your opinion on the proposals made in the correspondence.

2. I am to request that the reply to this letter may be sent by the 7th July 1916.

No. 16.

No. 3255-56L., dated Shillong, the 26th May 1916.

From—G. C. KERWOOD, Esq., I.C.S., Under-Secretary to the Chief Commissioner of Assam,  
Legislative Department,

Assam Valley Districts.

To—The Judge, \_\_\_\_\_  
Sylhet and Cachar.

I am directed to forward a copy of the correspondence noted in the margin

(1) Letter No. 2500, dated the 4th May 1916, from the Government of India, Legislative Department, and enclosures.

(2) Letter No. 347, dated the 11th May 1916, from the Government of India, Home Department.

(3) Proceedings of the Imperial Legislative Council on the 21st March 1916.

(4) Letter No. 8148L., dated the 9th October 1915, to the Government of India, Home Department.

regarding the amendment of the Transfer of Property Act, 1882 (IV of 1882), and to enquire whether you desire to add anything to the opinion already expressed by you on the subject. I am to request that you will be so good as to consult the representatives of the Bar Associations.

2. The Chief Commissioner would be glad if a reply to this letter were sent by the 7th July 1916.

No. 17.

No. 3257L., dated Shillong, the 26th May 1916.

From—G. C. KERWOOD, Esq., I.C.S., Under-Secretary to the Chief Commissioner of Assam, Legislative Department,

To—Messrs. STEEL AND HADOW, Solicitors, Dibrugarh.

I am directed to forward a copy of the correspondence noted in the margin

(1) Letter No. 250<sup>n</sup>, dated the 4th May 1916, from the Government of India, Legislative Department, and enclosures.

(2) Letter No. 347, dated the 11th May 1916, from the Government of India, Home Department.

(3) Letter No. 8148L., dated the 9th October 1915, to the Government of India, Home Department.

regarding the amendment of the Transfer of Property Act, 1882 (IV of 1882), and to enquire whether you desire to add anything to the opinion already expressed by you on the subject.

2. I am to request that the reply to this letter may be sent by the 7th July 1916 and am to request that you will be so good as to return with your reply the copy of the proceedings of the Imperial Legislative Council.

No. 18.

Dated Dibrugarh, the 31st May 1916.

From—MESSRS. STEEL & HADOW, Solicitors,

To—The Under-Secretary to the Chief Commissioner of Assam, Legislative Department.

We have the honour to acknowledge receipt of your letter No. 3257L. of the 26th instant with enclosures.

We have carefully considered the enclosures to your letter, and in view of the further light thrown on the proposed Bill by the Indian Legislative Council Meeting of the 26th March 1916 are of opinion that the difficulty that has arisen in the United Provinces would be better met by provincial legislation rather than by Imperial: but should it be decided to carry through the proposed Bill in the Government of India, Legislative Council, we are still of opinion, the provisions of Sections 2 and 3 of the Bill should not be made retrospective.

The Proceedings of the Imperial Council of the 21st March 1916 are returned as requested.

No. 19.

No. 3934, dated Silchar, the 10th June 1916.

From—W. J. REID, Esq., C.S.I., I.C.S., Commissioner, Surma Valley and Hill Districts,

To—The Chief Secretary to the Hon'ble the Chief Commissioner of Assam.

I have the honour to return the proceedings of the Imperial Legislative Council of the 21st March 1916, which were received with Mr. Kerwood's letter No. 3253-54L., dated the 26th May 1916, and to submit a copy of a note recorded by the Deputy Commissioner of Sylhet on the proposed amendment of the Transfer of Property Act, 1882.

2. I have nothing to add to what is stated in Mr. Allen's letter No. 8148L., dated the 9th October 1915, to the Government of India in the Home Department, and it may I think be accepted that in this province the difficulties outlined by the framer of the Bill have not been experienced. The suggestion of the Hon'ble the Legal Member that any difficulties experienced in the United Provinces might be met by the passing in the Legislative Council of that province of a validating Act appears to be the best solution of the difficulty.

No. 20.

Unofficial No. 7799R., dated the 2nd June 1916.

From—J. E. WEBSTER, Esq., Deputy Commissioner, Sylhet,

To—The Commissioner, Surma Valley and Hill Districts.

The sole object of attestation is to obtain proof that the document really was executed by the person whose name appears as an executant and this object should be secured as well by the signature of a witness who has received from the executant a

personal acknowledgment of his signature to the deed as by a signature made after having seen the executant sign, but I am by no means confident that the relaxation of the rule may not make forgery easier. When witnesses have to sign in the presence of one another and of the executant they can be cross-examined as to the circumstances, and their statements compared, and when material discrepancies are found a suspicion as to the truth of their statements is roused. This is the common line that cross-examination takes; but when witness may sign and attest at different times and places it will be far more difficult to check the truth of their statements. It is doubtful whether this consideration should outweigh that of the inconvenience caused at times by the law as it now stands, but on the whole I do not think that in the present state of this part of India it would be safe to relax any of the safeguards against forgery.

No. 21.

No. 710.III—5, dated Sylhet, the 26th June 1916.

From—H. C. LIDDELL, Esq., I.C.S., District Judge of Sylhet and Cachar,

To—The Under-Secretary to the Chief Commissioner of Assam, Legislative Department.

With reference to your letter No. 3255-56L., dated the 26th May 1916, I have the honour to say that I have consulted the local Bar. Their opinion is that the meaning of the word "attest" as interpreted by the Privy Council in the case reported in 35 Madras, is the natural interpretation of the word: that such meaning has been accepted by the Calcutta High Court for years: that no hardship has been shown to result therefrom: that it is desirable to remove the safeguard against fraud which the interpretation by the Privy Council imposes: that no case whatever is made out for altering the meaning in the case of gifts: that in case of any difficulty such as gaining over of witnesses, etc., recourse may be had to section 71, Evidence Act: that testamentary instruments require special provisions.

They consider that no change in the existing law is necessary: that if the Provinces under the Allahabad High Court have experienced hardship, that can be dealt with by a local Act and that in any case the proposed change should not have retrospective effect.

With this I am in entire agreement.

No. 22.

No 530C., dated *S. L. Kestrel*, the 30th June 1916.

From—The Hon'ble Lieut.-Colonel P. R. T. GURDON, C.S.I., I.A., Commissioner, Assam Valley Districts,

To—The Under-Secretary to the Hon'ble the Chief Commissioner of Assam, Legislative Department.

With reference to your letter No. 3255-56L., dated the 26th May 1916, I have the honour to say that the District Officers in my Division were consulted on the Bill, the result being that replies were received showing that a unanimous feeling exists amongst District officers against the Bill. The only opinion in favour is that of Babu Kali Charan Sen, Government Pleader, Gauhati. This I attach, together with the opinions of the Deputy Commissioners. My own view is that the opinions expressed in the Chief Secretary's No. 8148L., dated the 9th October 1915, if I may venture to say so, are correct, in particular that with regard to Section 4. If the change were introduced with retrospective effect the result would give rise, as stated, to considerable confusion and would form a most inconvenient precedent.

No. 23.

No. 350J., dated Dibrugarh, the 12th June 1916.

From—L. O. CLARKE, Esq., I.C.S., Deputy Commissioner of Lakhimpur,

To—The Commissioner of the Assam Valley Districts.

With reference to your memorandum No. 2255-61G., dated the 2nd June 1916, I have the honour to say that I do not approve of the proposed Bill to amend the Transfer of Property Act.



The Law as it now stands ensures a certain amount of publicity in the transaction at the time when the mortgager or donor first enters into his engagement, and this seems very desirable both as a check on unfair pressure being exerted on the mortgager, and as a safeguard against a dishonest mortgager subsequently repudiating his signature—if it was not witnessed at the time when he actually made it.

The Law in its present form was, I think, designedly so drawn up, and should not be altered.

No. 24.

No. 1385M., dated Jorhat, the 17th June 1916.

From—Lieut.-Colonel A. PLAYFAIR, I.A., Deputy Commissioner of Sibasgar,

To—The Commissioner of the Assam Valley Districts.

With reference to your memorandum No. 2255-61G., dated the 2nd June 1916, asking for an expression of my opinion on the subject of the amendment of the Transfer of Property Act, 1882, I have the honour to say that I see no reason for an amendment of the existing rule in connection with the attestation of mortgage bond. The change, if introduced, may be productive of serious inconvenience in this province.

No. 25.

No. 1006M., dated Tezpur, the 12th June 1916.

From—F. E. JACKSON, Esq., I.C.S., Deputy Commissioner, Darrang,

To—The Commissioner, Assam Valley Districts.

With reference to your memorandum No. 2255-61G., dated the 2nd June 1916, asking for an expression of opinion on the bill regarding amendment of the Transfer of Property Act of 1882, I have the honour to say that I perfectly agree with the views expressed by the Local Administration on the subject. So far as this district is concerned, there is no need for the alteration proposed. It was held by the Privy Council that "the attestation of a mortgage deed on a mere acknowledgment of his signature by the executant was not sufficient." The alteration proposed is evidently to avoid that ruling. If a document may be attested after getting personal acknowledgment of the executant, it might as well be signed by a witness after registration, which is absurd.

Besides, to give effect to this legislation with retrospective validation is to validate an invalid proceeding. This is extremely unsound in principle.

No. 26.

No. 17C., dated Nowgong (at Camp Messa), the 14th June 1916.

From—J. A. DAWSON, Esq., M.A., I.C.S., Deputy Commissioner, Nowgong,

To—The Commissioner, Assam Valley Districts.

With reference to your memorandum No. 2255-61G., dated the 2nd June 1916, I have the honour to say that I think the proposed Bill should be entirely rejected. The members of the Bar also agree.

No. 27.

No. 724J., dated Gauhati, the 21st June 1916.

From—A. BENTINCK, Esq., I.C.S., Deputy Commissioner, Kamrup,

To—The Commissioner, Assam Valley Districts.

With reference to your memorandum No. 2255-61G., dated the 2nd June 1916, regarding the amendment of the Transfer of Property Act, I have the honour to forward herewith the opinion of the Government Pleader.

I do not agree with his reasoning: where there is delivery of property by the vendor or mortgager there can be no suggestion of want of attestation but in other cases it appears to me that a relaxation of the meaning of the term "attest" would make fraud more practicable.

No. 28.

Dated Gauhati, the 17th June 1916.

From—Babu KALI CHARAN SEN, Government Pleader,

To—The Deputy Commissioner, Gauhati.

The Chief Commissioner has already given his opinion on the Bill.

I do not understand on what point Deputy Commissioner wants my opinion.

In India very few deeds require attestation; they are wills, mortgage and gift. A sale-deed does not require any attestation. The law as regards mortgage has been changed by Act VI of 1904. Now where the principal sum is less than Rs. 100 a mortgage can be effected either by a registered instrument or by delivery of possession of the mortgaged property. Where the principal money secured by a mortgage bond is Rs. 100 or upwards a mortgage can be effected only by a registered deed (*vide* section 59 of the Transfer of Property Act). Over and above this precaution the law requires that all mortgage deed must be attested by two witnesses. The Privy Council has held (I. L. R. 35 Mad. 609) that attestation in this section does not include the attestation of the executant's admission of having signed the document. In will however the attestation of the acknowledgment of the testator will be good attestation.

In case of sale of property of the value of less than Rs. 100, it can be done either by registered document or by delivery of property. This provision is quite similar to mortgage deed. If in case of sale possession or registration is considered sufficient I do not see why attestation should be insisted in the case of mortgage. If the mortgage has no possession he must show a registered document, so there is little room for any fraud. If registration is considered a sufficient safe-guard in sales I do not see why the same should be considered otherwise in case of mortgage.

The present Bill does not seek to do away with attestation it simply seeks to make, as altogether in the case of will, attestation of acknowledgment to be sufficient. Before the passing of Act VI of 1904 there might have been some room for fraud and therefore a stringent form of attestation might have been required. But now that the law has been made just similar to that of a sale I do not see any necessity for hard-and-fast rule for attestation.

The Privy Council ruling will cause some hardship and it is for that reason that this Bill has been framed. I do not see any objection to the Bill.

The Chief Commissioner thinks that the community being largely composed of illiterate person, any relaxation in the matter of attestation is not advisable.

But now as the law stands all mortgage deeds where there is no possession are to be registered. I therefore think that there will be no hardship if the manner of attestation is relaxed as indicated in the Bill.

No. 29.

No. 625M., dated Dhubri, the 21st June 1916.

From—A. J. LAINE, Esq., B.A., I.C.S., Deputy Commissioner, Goalpara,

To—The Commissioner of the Assam Valley Districts.

With reference to your memorandum No. 2255-31G., dated the 2nd June 1916, regarding Bill No. 17 of 1915 introduced in the Imperial Legislative Council by the Hon'ble Pandit Madan Mohan Malabiya for further amending the Indian Transfer of Property Act (IV of 1882), I beg to state that I agree with views expressed in the Chief Secretary's letter No. 8148L., dated the 9th October 1915. I do not think that any change in the law in order to bring about a modification of the meaning attached to the word "attest" by the Calcutta High Court, which interpretation of the word has now been confirmed by the highest judicial authority, is desirable. I am not aware of any practical inconvenience or miscarriage of justice having resulted from the existing law on the subject and no relaxation of the restricted but well understood significance of the word "attest" appear to be called for. Parties to documents requiring attestation do, as a matter of fact, take care to carry out the whole transaction in the immediate presence of witnesses and it is very desirable that such care should always be exercised and that nothing should be done to alter the well established practice unless very special circumstances warrant such a course.

No. 30.

No. 36J.—V.-2 of 1916-17, dated Tura, the 16th June 1916.

From—Lieut.-Col. H. M. HALLIDAY, I.A., Deputy Commissioner, Garo Hills,

To—The Commissioner of the Assam Valley Districts.

With reference to your memorandum No. 2255-51G., dated the 2nd instant, forwarding a copy of a letter No. 3255-58L., dated the 26th May 1916, from the Under-Secretary to the Chief Commissioner of Assam, together with its enclosures, regarding the amendment of the Transfer of Property Act, 1882 (IV of 1882), I have the honour to say that I am in accord with the opinion of the Hon'ble the Chief Commissioner of Assam as expressed in Chief Secretary's letter No. 81482 of 9th October 1915.

No. 31.

No. 5L.T., dated Shillong, the 10th July 1916.

From—The Hon'ble Mr. B. C. ALLEN, I.C.S., Chief Secretary to the Chief Commissioner of Assam,

To—The Secretary to the Government of India, Legislative Department.

With reference to your letter No. 2500, dated the 4th May 1916, I am directed to say that the Chief Commissioner has again consulted selected officers and the public on the Bill mentioned in the margin and that he sees no reasons to modify the opinions expressed in my letter No. 8148L., dated the 9th October 1915. The opinions of officials are unanimously against the Bill. I am to enclose a copy of a letter from the District Judge of Sylhet, from Messrs. Steel and Hadow, Solicitors, and of a note from the Government Pleader, Gauhati. The last named gentleman apparently sees no objection to the Bill holding that the procedure which is prescribed for sales is good enough for mortgages. The Chief Commissioner has already explained in paragraphs 3 and 4 of my letter No. 8148L., dated the 9th October 1915, why he is unable to accept this view and the arguments adduced by the Government Pleader do not affect his opinion as to the merits of the proposal.

No. 32.

No. 1692, dated Gauhati, the 14th July 1916.

From—The Hon'ble Mr. J. F. GRAHAM, I.C.S., Judge of the Assam Valley Districts,

To—The Under-Secretary to the Chief Commissioner of Assam, Legislative Department.

With reference to your letter No. 3255-56L. of the 26th May last, I have the honour to state that in addition to the opinions already obtained the Bar Associations of Dhubri and Jorhat were consulted and I have now received a reply from the Secretary of the Dhubri Bar Association, a copy of which is forwarded herewith. No reply has been received from Jorhat, and as the time for submitting my report has more than expired I do not consider it advisable to wait any longer.

2. I have already submitted my own opinion on the Bill, and only desire to add that the arguments which have been advanced against it (*vide* paragraph 2 of the Hon'ble Mr. Wheeler's letter No. 347 of the 11th May last) seem to me to carry a great deal of weight. I think too that the proposals which have been brought forward might be more appropriately considered in connection with a general amendment of the Transfer of Property Act as suggested by the Calcutta High Court.

3. With regard to clause 4 I am of opinion that the proposal with regard to retrospective validation is unsound, and would have a disturbing effect.

No. 33.

Dated Dhubri, the 10th June 1916.

From—Babu KEDAR NATH GUHA, Secretary to the Bar Association, Dhubri,

To—The District and Sessions Judge, Assam Valley Districts.

In reply to your letter No. 1249, dated the 31st May 1916, I beg to state that the Bar Association has carefully considered the question of the proposed amendment of



the Transfer of Property Act, and that the Association is of opinion that, on the following grounds, the proposed amendment should not be passed into law:—

- (1) The first reason adduced by the mover in support of the proposed amendment is that the present law is conducive of dishonesty on the part of the mortgager (executant) and the attesting witnesses. The same argument would apply with greater force, if the proposed amendment is passed into law, as regards the case of dishonest mortgagees, working in collusion with professional prejurors.
- (2) The second reason adduced is the inconvenience caused to *purdanashin* executants of mortgage-deeds. The proposed amendment would not relieve the situation, because the persons to whom a *purdanashin* executant could make a "personal acknowledgment" can possibly be no others than those before whom she could herself execute the deed.
- (3) The third reason adduced is as to the meaning which has all along been attached to the word "attest" by the Indian Legislature. It is not necessary to give any opinion on this point because the normal conditions necessarily attending the execution of a will and a mortgage deed are essentially different, and, safe-guards which would be very desirable in the latter case, would not be possible always in the case of the former.
- (4) Even assuming the grievances under the present law to be real the proposed amendment does not conduce in any way towards their remedy.
- (5) Under the circumstances the Association did not consider it necessary to enter into the question of the retrospective effect of the amendment.
- (6) This Association however does not see any objection to a purely Provincial Validating Act for the United Provinces.

I beg to enclose herewith the enclosures to your letter as requested.

No. 34.

No. 129L.T., dated Shillong, the 23rd July 1916.

From—The Hon'ble Mr. B. C. ALLEN, I.C.S., Chief Secretary to the Chief Commissioner of Assam,

To—The Secretary to the Government of India, Legislative Department.

In continuation of the correspondence resting with my letter No. 5L.T., dated the 10th July 1916, on the subject of a Bill further to amend the Transfer of Property Act, 1882, I am directed to forward a copy of a letter, with enclosure, received from the Judge of the Assam Valley Districts, from which it will be seen that neither the Judge nor the Bar Association at Dhubri are in favour of the Bill.