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## PART VI.

### BILLS OF THE GOVERNMENT OF INDIA.

#### LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 20th August, 1884, and was referred to a Select Committee:—

#### Bill No. 10 of 1884.

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

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

1. For the fifth clause of section 1 of the said Act the following shall be substituted, namely:—

“And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette,—

“(a) exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely:—

“Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three; or

“(b) direct, either retrospectively or prospectively, that section forty-one shall not apply throughout any part of those territories to any property in which a member of any race, sect,

tribe or class specified in the notification is interested.”

2. The following clause shall be deemed to have been added to the first section of the said Act from the date on which it came into force, namely:—

“Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise.”

3. To section 4 of the said Act the following shall be added, namely:—

“And sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877.”

4. In section 69 of the said Act—

(a) after the words “is valid in the following cases” the words “and in no others” shall be inserted; and

(b) after the words “Hindu, Muhammadan or Buddhist,” in both places where they occur, there shall be inserted the words “or a member of any other race, sect, tribe or class from time to time specified by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette in this behalf.”

III of 1877.

III of 1877.



## STATEMENT OF OBJECTS AND REASONS.

The last clause of section 1 of the Transfer of Property Act, 1882, provides that any Local Government may, with the previous sanction of the Governor General in Council, exempt, either retrospectively, or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections 41, 54 (paragraphs 2 and 3), 59, 69, 107 and 123.

54. \* \* Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon.

107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by an instrument or by oral agreement.

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

in which is a member of such race, sect, tribe or class, while the other party does not belong to an exempted class.

3. To this reference the Government of India, on the 13th December, 1882, replied that the precise manner in which the exemption would operate under the circumstances described was a matter of some difficulty; and the only satisfactory means by which an intelligible operation might be given to section 1 of the Act seemed to be the amendment of that section so as to make the exemption from sections 54, 59, 107, and 123 local and not personal.

4. The Chief Commissioner, in a letter dated 12th January 1883, suggested as an alternative, and in his opinion a preferable one, a power to exempt not persons or places but transactions in which one or both of the parties might be members of the race, sect, tribe or class for which the sections in question might be deemed unsuitable.

5. It was thought desirable to obtain the opinions of the other Local Governments on the two alternative proposals thus put forward, and accordingly, on the 7th May, 1883, a circular was issued for this purpose.

6. It will be observed that the question thus raised was confined to the power conferred by section 1 of the Act to exempt from the operation of sections 54, 59, 107 and 123; but, attention having been once drawn to the subject, it was natural that the effect of an exemption from the other two sections of the Act (41 and 69) mentioned in section 1 and set out in the margin should also be considered; and, on looking into the matter, it was found that, while an exemption under either of those sections would give rise to questions very similar to those raised by the Chief Commissioner of Assam in the case of the sections referred to by him, there was this further difficulty in regard to section 69 that the object of allowing any

of the parties concerned in the matter, it was found that, while an exemption under either of those sections would give rise to questions very similar to those raised by the Chief Commissioner of Assam in the case of the sections referred to by him, there was this further difficulty in regard to section 69 that the object of allowing any

41. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgaged-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist;

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage-money and costs and other money, if any due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustee's and Mortgagee's Powers Act, 1866, shall be deemed to apply to English mortgages, wherever mortgaged is a Hindu, Muhammadan or Buddhist.

power to exempt from it was not apparent. The circular accordingly asked for the opinions of the Local Governments in regard to these sections also.



7. The replies of the Local Governments have now been received and considered by the Government of India, and the following are the conclusions to which they seem to point.

8. In the first place, as regards the power of exempting from the operation of sections 54, 59, 107 and 123, it seems to the Governor General in Council best to make it simply a power of exempting locally, that is to say, the exemption should be absolute and cover transactions relating to any immovable property within the specified area, whether both or one or none of the parties may belong to those races or tribes for whose benefit the exemption is intended. To give a personal character to the exemption and restrict it, as some suggest, to transactions within the area, to which either both parties or one of the parties are of particular races, would give rise to uncertainty of title and other difficulties and doubts noticed by Sir C. Turner and others. With a local exemption clause of an absolute character an intending purchaser has to look to nothing but the situation of the property.

9. It is true that there may be advanced people living in exempted localities for whom the sections in question would provide a law more suitable than that which prevails where they do not apply, but it must be remembered that these people always could, and Europeans, it is believed, generally would, follow the practice of having formally executed and registered documents, and this would to a great extent give them the benefits aimed at by the Act; for it must be borne in mind that in the places in question titles would not usually be complicated, and in any case the sections of the Act referred to are not an essential part of the law, but merely an improvement of it, which is not in force as yet in great provinces like Bombay, the Panjáb and British Burma. Again, on the other hand, it is true that there may be members of wild tribes settled in some non-exempted localities, and that they may find it difficult to learn to act up to the law; but, as has been observed by some of the authorities consulted, wild people scattered in this way among a population the great mass of which is civilized soon get into the ways of the people among whom they live.

In either case the objection is one that must apply to most of our enacted laws, and indeed to a good deal of the customary law of the country. We cannot get a law that will suit everybody; we must be content with a reasonably close approximation.

10. The first section of the Bill accordingly amends section 1 of the Act so as to empower a Local Government, with the previous sanction of the Governor General in Council, to exempt any part of the territories under its administration from the operation of any of these sections.

11. Next, as regards the powers to exclude the operation of section 41, the considerations to be borne in mind are fully stated by the Chief Justice of Madras in his opinion.

Sir C. Turner observes that the general rule that no one can confer a higher right in property than he himself possesses in some cases worked obvious hardship; and, as the science of jurisprudence advanced, it was limited by the exception declared in section 41, on the principle that, where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud. To races which have not made a substantial progress in civilization, this rule appears to Sir Charles Turner to be unsuited for the following reasons, as stated in his own words:—

‘Regarding the question in its sentimental aspect, it is certain that a member of a race unacquainted with the refinements of equity would fail to recognize the justice of a rule which caused him to be deprived of his property by what is *ex hypothesi* a fraud.

‘I do not contend that legislation is to be governed by sentimental considerations, but I have heretofore asserted, and still hold, that legislation should only be so far in advance of the general understanding that its justice should be recognized by the more enlightened.

‘There is, however, a substantial reason to be deduced from the rule itself, which shows its inapplicability to uncivilized races. The rule affords protection only to a purchaser for consideration who acts in good faith after reasonable inquiry.

‘The imposition of these conditions on the purchaser suggests to persons, who have occasion to create an ostensible ownership of their property in others, the prudence of providing certain safeguards. If they are well advised, they are careful to secure evidence of the actual ownership, so that a purchaser, on making due inquiry, must either ascertain the true character of the transaction, or entertain such suspicion of its character that he can no longer assert that he acted in good faith.

‘The transactions of uncivilized races in the matter of property are of the simplest character; they are unacquainted with the precautions which technical skill has devised to secure property.

‘Again, as society progresses, men are habituated to exercise greater caution in their dealings with their fellows, and have larger opportunities for selecting agents who are reputed either to be worthy of confidence or to be in a position to answer for a breach of confidence. A prudent man selects for an office of trust a person of tried probity and some substance. The uncivilized races have less choice in the selection of agents and less opportunity for forming a judgment of the character and position of their agents.’

12. The conclusion to which these remarks seem to point is that the Government should be empowered to direct that section 41 should not apply throughout any particular local area to any property in which a member of any particular race, sect, tribe or class is interested and it is on these lines that sub-clause (b) of the new fifth clause which the Bill proposes to insert in the first section of the Act has been framed.

13. The discussion regarding section 69 has opened out questions extending beyond the particular difficulty first brought to notice, and it is fortunate that the Government have had in considering them the assistance of Sir C. Turner, who was a member of the Commission by which the Transfer of Property Bill was settled.

The circumstances under which the section was enacted will be found stated in the following extract from his Minute:—

‘In England, it is usual to confer on a mortgagee, in case of default, a power to sell the mortgaged property without the intervention of a Court of justice; and, where the instrument of mortgage does not in express terms negative it, a mortgagee is empowered by statute to sell on the expiry of twelve months



after the date of default and of six months from the date on which notice is given of his intention to exercise the power—23 & 24 Vic., c. 145. This statutory provision was, by Act XXVIII of 1866, extended to mortgages in this country to which the English law is applicable.

‘On the other hand, the simple mortgage in India did not authorize a sale without the order of a Court, and by Regulation XVII of 1806 in the Bengal Presidency it had been enacted that a mortgage by conditional sale should not become foreclosed without the service of a notice through the District Court, and on the expiry of a year of grace. Inferring the policy of the legislature from this Regulation, the *Sadr Dīwānī Adālat* refused to give effect to an express power of sale—S. D. A., 1847-354. In the Bombay Presidency, Mr. Justice Melville expressed a doubt whether a private sale of property in the Mufassal, effected by a mortgage under a power, would be valid—VIII Bombay H. C. A. C., 143.

‘On the order hand, I entertained the opinion, and I believe acted on it before the Transfer of Property Act came into operation, that, in the absence of a prohibition of law, the owner of property was competent to confer on a mortgagee what powers he himself possessed, and that, if a mortgagor having, as owner, authority to sell, created a power of sale in a mortgagee, and the mortgagee duly exercised the power, the Courts were bound to recognize the validity of the sale.

‘In *Bhanoomutty Chawdīam vs. Premchund Nesgee*, XV B. L. R. 28, property in the Mufassal had been mortgaged by an instrument in the English form containing a power of sale, and subsequently mortgaged to a third party by a conditional sale. The first mortgagee then exercised his power of sale, and subsequently to the sale the second mortgagee took proceedings to foreclose. It was held that the purchaser under the power was entitled to notice of foreclosure, and impliedly that a sale under a power might be valid.’

‘In this state of the authorities,’ Sir Charles Turner continues, ‘it fell to the Law Commission to offer for the acceptance of the legislature a proposal to settle the law. It was felt that, in accordance with the principles of freedom of contract, an owner of property should be at liberty to confer on a mortgagee any of the powers which he could himself exercise, and that a borrower might more readily obtain accommodation, or obtain it on easier terms, if he could offer a security which would be speedily converted by the tender without the delay and the cost of an application to a Court of justice. On the other hand, it was recognized that in this country the large majority of mortgage-securities are created by persons who are poor and illiterate in favour of more sharpwitted creditors, and that, in an agricultural country, landed securities are subject to sudden and excessive variations in value, which are rarely foreseen by borrowers. The Commission came to the conclusion that, while more wealthy borrowers in the country and all borrowers in the presidency-towns might be left to deal with their property as they pleased, it was necessary in the present state of British India to create a legislative safeguard for the poorer classes in the country. They, therefore, proposed that the creation of a power of sale should be declared invalid except in mortgages where the principal money secured exceeded Rs. 500, or in mortgages to the Secretary of State or in mortgages of property in the presidency-towns. In Committee, the Section was recast. Instead of declaring that a power of sale conferred by the instrument of mortgage is invalid except in the cases specified, the section, as it now stands, declares that in certain cases it is valid.’

Sir Charles Turner adds—

‘Unless it be held that the express declaration of the validity of such a power in certain cases is tantamount to a declaration of its invalidity in other cases, which I incline to doubt, the object sought by the Law Commission has not been attained, and the validity of the power in cases other than those specified is still left an open question.

‘It may have been desirable that the protection the Law Commission intended to confer in the case of mortgages for small amounts should have been extended to mortgages for somewhat larger sums, but I think it is to be regretted that the amendment should have been effected in such terms as to leave the question doubtful whether any protection is given to mortgages of any class or amount, and I trust advantage may be taken of the opportunity to re-consider the provisions of the section. It will be seen that the section, as it now stands, affects only—

- ‘(1) parties to an English mortgage, *i. e.* a mortgage in the English form, who are not Hindūs, Muhammadans or Buddhists (an inexact enumeration of the creeds held by natives of India);
- ‘(2) parties to a mortgage to the Secretary of State;
- ‘(3) parties to mortgages of property in the presidency-towns.

‘As the section now stands, I do not see any reason for including it in the class of sections for which certain races may be exempted; I apprehend it was included before it was recast.’

14. Section 4 of the Bill accordingly amends section 69 of the Act so as to express clearly what was actually intended, and no power to exempt from the main provisions of the section has been retained; but, as Mr. Justice Muthuswami Aiyar has pointed out that there are other classes whom it is even more necessary to exclude from the operation of the exceptional provision in clause (a) than Hindūs, Muhammadans and Buddhists, words have been added to that clause to provide a power of excluding them.

15. Section 2 of the Bill is intended merely to remove a formal defect in the Act which has been brought to notice in the course of the recent discussions. It was of course never intended that the provisions of the Act which assume the existence of a registration system should take effect in those tracts which are excluded from the operation of the Registration Act; but the Act omitted to make any express provision to that effect, and that omission is now supplied.

16. The addition which it is proposed to make to section 4 of the Act by section 3 of the Bill has for its object merely to remove a difficulty which has been felt in some quarters as to the bearing which the provisions of the Act relating to registration and the Registration Act have on one another.

(Signed) C. P. ILBERT.

D. FITZPATRICK,  
Secy. to the Govt. of India.

The 9th August 1884.



## LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 20th August, 1884, and was referred to a Select Committee:—

## Bill No. 11 of 1884.

*A Bill to facilitate the construction of Telegraphs, and to amend the Indian Telegraph Act, 1876.*

WHEREAS it is expedient to give power to place and maintain telegraph lines and posts under, over, along, across, in or upon immoveable property;

And whereas it is also expedient to amend the Indian Telegraph Act, 1876;

It is hereby enacted as follows:—

*Preliminary.*

1. (1) This Act may be called the Indian Telegraph Act, 1884.

Short title, local extent and commencement.

(2) It extends to the whole of British India; and

(3) It shall come into force at once:

Provided that nothing in this Act shall affect any right acquired by the Government or a licensee under section 4 of the Indian Telegraph Act, 1876, or any contract entered into before the passing of this Act.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "Telegraph line" means a wire or wires used for the purpose of a telegraph as defined in the Indian Telegraph Act, 1876, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for that purpose.

(2) "Post" means a post, pole, standard, stay, strut or other above-ground contrivance for carrying, suspending or supporting a telegraph line.

(3) "Telegraph authority" means—

(a) the Director General of Telegraphs or any officer appointed by him in this behalf; and

(b) in respect of any particular matter, any person holding a license from the Governor General in Council under section 4 of the Indian Telegraph Act, 1876, and empowered, by such authority as the Governor General in Council may, from time to time, appoint in this behalf, to discharge the functions of a telegraph authority in respect of that matter.

(4) "Local authority" means any municipal committee, local board, body of port commissioners or other body created for the public benefit and legally entitled to any immoveable property or the control thereof.

*Power to place Telegraph Lines and Posts.*

3. A telegraph authority may, from time to time, place and maintain a telegraph line under, over, along or cross, and posts in or upon, any immoveable property, and repair, alter or remove the same:

Power for telegraph authority to place and maintain, alter and remove a telegraph line and post.

Provided that—

(a) a telegraph authority shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which it places any telegraph line or post;

(b) in the exercise of the powers conferred by this section, a telegraph authority shall do as little damage as possible;

(c) a telegraph authority shall not exercise those powers in respect of any property vested in or under the control of any local authority except with the consent of the local authority;

(d) a telegraph authority shall not exercise those powers in respect of any other property unless it has paid or tendered full compensation to all persons interested for all damage which will be sustained by them by reason or in consequence of the exercise of those powers.

*Provisions applicable to Property of Local Authorities.*

4. Any consent given by a local authority under section 3 may be given subject to such reasonable conditions as to the payment of any expenses to which it is estimated the local authority will be put in consequence of the exercise of the powers, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work, as the local authority giving consent thinks fit to prescribe.

5. (1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by a telegraph authority under, over, along, across, in, or upon any property vested in or under the control of a local authority, and the local authority, having regard to circumstances which have arisen since the telegraph line or post was so placed, considers it expedient that it should be removed or altered, the local authority may call upon the telegraph authority to remove or alter it, and, if the telegraph authority refuses or omits to do so, may apply to the Local Government to order its removal or alteration.

(2) A Local Government receiving an application under this section may in its discretion reject the same, or make an order for the removal or alteration of the telegraph line or post, absolutely or subject to such conditions as it thinks fit; and the decision of the Local Government shall be final and conclusive.

6. A telegraph authority may, for the purpose of exercising the powers conferred upon it by this Act in respect of any property vested in or under the control of a local authority, alter the position thereunder of any pipe (not being a main) for the supply of gas or water:

Power to alter position of gas or water pipes.

Provided that—



(a) when a telegraph authority desires to alter the position of any such pipe, it shall give reasonable notice of its intention to do so, specifying the time at which it will begin to do so, to the local authority, and, when the pipe is not under the control of the local authority, to the person under whose control the pipe is;

(b) a local authority or person receiving notice under clause (a) may send a person to superintend the work, and the telegraph authority shall execute the work to the reasonable satisfaction of the person so sent.

7. If any dispute arises between a telegraph

Disputes between telegraph authorities and local authorities.

authority and a local authority in consequence of the local authority refusing its consent under section 3 or prescribing any condition under section 4, or otherwise in respect of the exercise of the powers conferred by this Act, it shall be determined by the Local Government, and the decision of the Local Government thereon shall be final and conclusive.

8. A telegraph line or post placed by a telegraph authority before the passing of this Act under, over, along, across, in or upon any property vested in or under the control of a local authority shall be deemed to have been placed in exercise of the powers conferred by this Act.

*Provisions applicable to other Property.*

9. If any dispute arises concerning the sufficiency of the amount of the compensation paid or

Disputes as to compensation under section 3.

tendered under section 3, clause (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him, and his determination thereof shall be final and conclusive.

10. (1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by a telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control of a local authority, and any person entitled to do so desires to deal with that property in such a manner as to render it necessary or convenient that the

telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form, he may tender to the telegraph authority the amount requisite to defray the expense of the removal or alteration and call upon the telegraph authority to remove or alter the line or post accordingly, and, if the telegraph authority refuses or omits to do so, may apply to the District Judge within whose jurisdiction the property is situate to order the removal or alteration.

(2) A District Judge receiving an application under this section may, in his discretion, reject the same or make an order absolutely or subject to conditions for the removal of the telegraph line or post to any other part of the property or to a higher or lower level or for the alteration of its form, and the order so made shall be final and conclusive.

*Amendments of the Indian Telegraph Act, 1876.*

11. To the definition of "telegraph" in section 3 of the Indian Telegraph Act, 1876, the following shall be added, namely:—

"and includes any apparatus for transmitting or making telegraphic, telephonic or other communications by means of electricity."

12. To clause (a) of section 8 of the same Act the following shall be added, namely:—  
"or of any telegraph established by Government and leased to any person."

13. To the same section the following words shall be added, namely:—  
"When prescribing rules under clause (a) of this section, the Governor General in Council may by the rules impose fines for any breach of the same:

"Provided that the fines so imposed shall not exceed the following limits, namely:—

"(1) when the licensee or lessee is punishable for the breach, one thousand rupees, and in the case of a continuing breach a further fine of two hundred rupees for every day after the first during the whole or any part of which the breach continues;

"(2) when a servant of the licensee or lessee or any other person is punishable for the breach, one-fourth of those amounts."

#### STATEMENT OF OBJECTS AND REASONS.

The main object of this Bill is to give power to the Government, and to any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially empowered in this behalf, to place telegraph lines under or over property belonging whether to private persons or to public bodies.

2. The attention of the Government has recently been directed to the fact that, as the law now stands, the Governor General in Council and his licensees have no power to place telegraph lines upon the land of municipal or other similar bodies or of private persons. In England the requisite powers are conferred on the Postmaster General, who works and maintains the telegraphs in that country, by 26 & 27 Vic., cap. 112, as amended by 41 & 42 Vic., cap. 76; and as it seems desirable that the Government in which the exclusive privilege of establishing telegraphs in this country is vested should possess somewhat similar powers, the present Bill has been prepared.

3. Section 3 empowers the Government or any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially authorized by a Government officer to place and maintain telegraph lines and posts under, over, along, across, in or upon the property of any "person", which term includes a body corporate. It is considered that licensees should have these powers, because the licenses granted always strictly limit the area of the operations of the licensees, and it would be some-



what anomalous for local bodies and private persons to have the power to neutralize the licenses granted by the Governor General in Council by objecting to the licensees' operations, or by hampering them by the exaction of fees for permission to work under their licenses. The powers thus given are, however, to be exercised so as to do as little damage as possible, and their exercise is moreover made subject to important restrictions and conditions.

4. When the property belongs to a municipal board or other local authority, the powers conferred by the Act cannot be exercised over it without the consent of that authority; and that consent may be given subject to conditions. Among other conditions which can be imposed is one requiring that any expenses to which the local authority may be put by the exercise of the power shall be made good; but it will be observed that no provision is made for the payment of compensation on any other account to a local authority whose property is made use of for this purpose, it being considered that, as the construction of telegraphs is a matter in which the public are interested, no charge should be made for accommodation of this sort when it can be granted without inconvenience to the public or expense to the local authority concerned.

5. It may sometimes happen that, though at the time when a telegraph authority desires to exercise its powers over some property of a local authority there may be no reasonable ground for objecting, and the local authority may thus find itself compelled to consent, a state of things may subsequently arise under which the continued exercise of the powers would be felt as a grave public inconvenience or a cause of serious loss. Land, *e.g.*, which was waste at the time the telegraph line was constructed over it might afterwards be required for some important public object or might acquire great value for building purposes, and, as no compensation (except for actual expenses out of pocket) would have been paid to the local authority at the time the line was constructed, it is but just that provision should be made for the removal or alteration of the line in such an event. This accordingly is done by section 5 of the Bill, which empowers the local authority to call upon the telegraph authority to remove or alter its telegraph or post, and, in the event of the telegraph authority refusing or neglecting to do so, gives an appeal to the Local Government.

6. In the event, which it is believed will be rare, of a local authority arbitrarily refusing its consent to the exercise by a telegraph authority of the powers conferred by the Bill or clogging its consent with unreasonable conditions, it will (section 7) be open to the telegraph authority to appeal to the Local Government, whose decision will be final.

7. Turning now to the case in which it may be desired to exercise the powers given by the Bill over the property of private persons, it will be seen that here provision is made for the payment of full compensation, the amount of which in the event of dispute will (section 9) be determined by the Civil Court, and that, in the event of a person upon whose property a telegraph line or post has been placed desiring subsequently to deal with the property in such a way as would make it necessary or convenient that the line or post should be removed to another part of it or to a higher or lower level or altered in form, he can (section 10) tender the cost of the work and call upon the telegraph authority to remove or alter the line or post, and, if that authority refuses to do so, can appeal to the Civil Court.

8. It may be observed, however, that in practice in this country the power of taking telegraph lines through private property is not likely to be exercised either by the Government or by its licensees except on rare occasions, and then as a rule only to the extent of crossing with the wire, a post being scarcely ever erected on private land. Private property has hitherto been always avoided as much as possible, and it is likely to be still more carefully avoided in future if it is made clear, as it is proposed to do by this Bill, that full compensation will have to be paid for exercising the power over private and not for exercising it over public property.

9. The present opportunity has been taken to make three amendments of the Indian Telegraph Act, 1876, which experience has shown to be desirable. The first has for its object the emendation of the definition of "telegraph" so as to bring it into more exact conformity with the construction put upon the definitions in the English Acts by a recent decision of the High Court of Justice in England.

10. The second is intended to provide for the regulation of telegraph lines constructed by the Government but leased to companies or individuals by whom they are worked. The position of such lines under the Act as it at present stands is far from clear, and the object of the amendment proposed in section 12 of the Bill is to put them on much the same footing as licensed lines.

11. The object of the third amendment, which is made by section 13 of the Bill, is to prescribe penalties for the breach of the rules made under section 8 of the Act for the conduct of telegraphs worked under license or lease. In such cases, as the Act now stands, the only remedy is to revoke the license or lease, but this course would in most cases cause such great public inconvenience that it is impracticable. The result is that at present there is virtually no penalty for the infringement of the rules made under section 8 of the Act. To remedy this state of things, the Bill adds a clause to that section empowering the Governor General in Council to prescribe by the rules moderate fines for the breach of them.

*The 12th August 1884.*

(Signed) T. C. HOPE.

D. FITZPATRICK,  
*Secy. to the Govt. of India.*



[Published with the "Bombay Government Gazette" on the 4th September 1884.]

## PART VI.

### BILLS OF THE GOVERNMENT OF INDIA.

#### LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 20th August, 1884, and was referred to a Select Committee:—

#### Bill No. 10 of 1884.

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

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

1. For the fifth clause of section 1 of the said Act the following shall be substituted, namely:—

"And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette,—

(a) exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely:—

"Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three; or

(b) direct, either retrospectively or prospectively, that section forty-one shall not apply throughout any part of those territories to any property in which a member of any race, sect,

tribe or class specified in the notification is interested."

2. The following clause shall be deemed to have been added to the first section of the said Act from the date on which it came into force, namely:—

"Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise."

3. To section 4 of the said Act the following shall be added, namely:—

"And sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877."

4. In section 69 of the said Act—

(a) after the words "is valid in the following cases" the words "and in no others" shall be inserted; and

(b) after the words "Hindu, Muhammadan or Buddhist," in both places where they occur, there shall be inserted the words "or a member of any other race, sect, tribe or class from time to time specified by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette in this behalf."

#### STATEMENT OF OBJECTS AND REASONS.

THE last clause of section 1 of the Transfer of Property Act, 1882, provides that any Local Government may, with the previous sanction of the Governor General in Council, exempt, either retrospectively, or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections 41, 54 (paragraphs 2 and 3), 59, 69, 107 and 123.

54. \* \* Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

in which is a member of such race, sect, tribe or class, while the other party does not belong to an exempted class,

2. In a letter dated the 6th September, 1882, the Chief Commissioner of Assam asked for an expression of opinion from the Government of India as to the effect which the exemption under that clause, of "any race, sect, tribe or class" from the provisions of section 54 (paragraphs 2 and 3) and sections 59, 107 and 123, which are set out on the margin, has upon transactions, one of the parties concerned



3. To this reference the Government of India, on the 13th December, 1882, replied that the precise manner in which the exemption would operate under the circumstances described was a matter of some difficulty; and the only satisfactory means by which an intelligible operation might be given to section 1 of the Act seemed to be the amendment of that section so as to make the exemption from sections 54, 59, 107, and 123 local and not personal.

4. The Chief Commissioner, in a letter dated 12th January 1883, suggested as an alternative, and in his opinion a preferable one, a power to exempt not persons or places but transactions in which one or both of the parties might be members of the race, sect, tribe or class for which the sections in question might be deemed unsuitable.

5. It was thought desirable to obtain the opinions of the other Local Governments on the two alternative proposals thus put forward, and accordingly, on the 7th May, 1883, a circular was issued for this purpose.

6. It will be observed that the question thus raised was confined to the power conferred by section 1 of the Act to

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist;

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage-money and costs and other money, if any due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustee's and Mortgagee's Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist.

power to exempt from it was not apparent. The circular accordingly asked for the opinions of the Local Governments in regard to these sections also.

7. The replies of the Local Governments have now been received and considered by the Government of India, and the following are the conclusions to which they seem to point.

8. In the first place, as regards the power of exempting from the operation of sections 54, 59, 107 and 123, it seems to the Governor General in Council best to make it simply a power of exempting locally, that is to say, the exemption should be absolute and cover transactions relating to any immoveable property within the specified area, whether both or one or none of the parties may belong to those races or tribes for whose benefit the exemption is intended. To give a personal character to the exemption and restrict it, as some suggest, to transactions within the area, to which either both parties or one of the parties are of particular races, would give rise to uncertainty of title and other difficulties and doubts noticed by Sir C. Turner and others. With a local exemption clause of an absolute character an intending purchaser has to look to nothing but the situation of the property.

9. It is true that there may be advanced people living in exempted localities for whom the sections in question would provide a law more suitable than that which prevails where they do not apply, but it must be remembered that these people always could, and Europeans, it is believed, generally would, follow the practice of having formally executed and registered documents, and this would to a great extent give them the benefits aimed at by the Act; for it must be borne in mind that in the places in question titles would not usually be complicated, and in any case the sections of the Act referred to are not an essential part of the law, but merely an improvement of it, which is not in force as yet in great provinces like Bombay, the Panjab and British Burma. Again, on the other hand, it is true that there may be members of wild tribes settled in some non-exempted localities, and that they may find it difficult to learn to act up to the law; but, as has been observed by some of the authorities consulted, wild people scattered in this way among a population the great mass of which is civilized soon get into the ways of the people among whom they live.

In either case the objection is one that must apply to most of our enacted laws, and indeed to a good deal of the customary law of the country. We cannot get a law that will suit everybody; we must be content with a reasonably close approximation.

tion 1 of the Act to exempt from the operation of sections 54, 59, 107 and 123; but, attention having been once drawn to the subject, it was natural that the effect of an exemption from the other two sections of the Act (41 and 69) mentioned in section 1 and set out in the margin should also be considered; and, on looking into the matter, it was found that, while an exemption under either of those sections would give rise to questions very similar to those raised by the Chief Commissioner of Assam in the case of the sections referred to by him, there was this further difficulty in regard to section 69 that the object of allowing any of the opinions of the



10. The first section of the Bill accordingly amends section 1 of the Act so as to empower a Local Government, with the previous sanction of the Governor General in Council, to exempt any part of the territories under its administration from the operation of any of these sections.

11. Next, as regards the powers to exclude the operation of section 41, the considerations to be borne in mind are fully stated by the Chief Justice of Madras in his opinion.

Sir C. Turner observes that the general rule that no one can confer a higher right in property than he himself possesses in some cases worked obvious hardship; and, as the science of jurisprudence advanced, it was limited by the exception declared in section 41, on the principle that, where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud. To races which have not made a substantial progress in civilization, this rule appears to Sir Charles Turner to be unsuited for the following reasons, as stated in his own words:—

‘Regarding the question in its sentimental aspect, it is certain that a member of a race unacquainted with the refinements of equity would fail to recognize the justice of a rule which caused him to be deprived of his property by what is *ex hypothesi* a fraud.

‘I do not contend that legislation is to be governed by sentimental considerations, but I have heretofore asserted, and still hold, that legislation should only be so far in advance of the general understanding that its justice should be recognized by the more enlightened.’

‘There is, however, a substantial reason to be deduced from the rule itself, which shows its inapplicability to uncivilized races. The rule affords protection only to a purchaser for consideration who acts in good faith after reasonable inquiry.

‘The imposition of these conditions on the purchaser suggests to persons, who have occasion to create an ostensible ownership of their property in others, the prudence of providing certain safeguards. If they are well advised, they are careful to secure evidence of the actual ownership, so that a purchaser, on making due inquiry, must either ascertain the true character of the transaction, or entertain such suspicion of its character that he can no longer assert that he acted in good faith.

‘The transactions of uncivilized races in the matter of property are of the simplest character; they are unacquainted with the precautions which technical skill has devised to secure property.

‘Again, as society progresses, men are habituated to exercise greater caution in their dealings with their fellows, and have larger opportunities for selecting agents who are reputed either to be worthy of confidence or to be in a position to answer for a breach of confidence. A prudent man selects for an office of trust a person of tried probity and some substance. The uncivilized races have less choice in the selection of agents and less opportunity for forming a judgment of the character and position of their agents.’

12. The conclusion to which these remarks seem to point is that the Government should be empowered to direct that section 41 should not apply throughout any particular local area to any property in which a member of any particular race, sect, tribe or class is interested and it is on these lines that sub-clause (b) of the new fifth clause which the Bill proposes to insert in the first section of the Act has been framed.

13. The discussion regarding section 69 has opened out questions extending beyond the particular difficulty first brought to notice, and it is fortunate that the Government have had in considering them the assistance of Sir C. Turner, who was a member of the Commission by which the Transfer of Property Bill was settled.

The circumstances under which the section was enacted will be found stated in the following extract from his Minute:—

‘In England, it is usual to confer on a mortgagee, in case of default, a power to sell the mortgaged property without the intervention of a Court of justice; and, where the instrument of mortgage does not in express terms negative it, a mortgagee is empowered by statute to sell on the expiry of twelve months after the date of default and of six months from the date on which notice is given of his intention to exercise the power—23 & 24 Vic., c. 145. This statutory provision was, by Act XXVIII of 1866, extended to mortgages in this country to which the English law is applicable.

‘On the other hand, the simple mortgage in India did not authorize a sale without the order of a Court, and by Regulation XVII of 1806 in the Bengal Presidency it had been enacted that a mortgage by conditional sale should not become foreclosed without the service of a notice through the District Court, and on the expiry of a year of grace. Inferring the policy of the legislature from this Regulation, the Sadr Dīwānī Adālat refused to give effect to an express power of sale—S. D. A., 1847-354. In the Bombay Presidency, Mr. Justice Melville expressed a doubt whether a private sale of property in the Mufassal, effected by a mortgage under a power, would be valid—VIII Bombay H. C. A. C., 143.

‘On the other hand, I entertained the opinion, and I believe acted on it before the Transfer of Property Act came into operation, that, in the absence of a prohibition of law, the owner of property was competent to confer on a mortgagee what powers he himself possessed, and that, if a mortgagor having, as owner, authority to sell, created a power of sale in a mortgagee, and the mortgagee duly exercised the power, the Courts were bound to recognize the validity of the sale.

‘In *Bhanoomutty Chawdian vs. Premchand Nesgee*, XV B. L. R. 28, property in the Mufassal had been mortgaged by an instrument in the English form containing a power of sale, and subsequently mortgaged to a third party by a conditional sale. The first mortgagee then exercised his power of sale, and subsequently to the sale the second mortgagee took proceedings to foreclose. It was held that the purchaser under the power was entitled to notice of foreclosure, and impliedly that a sale under a power might be valid.’



'In this state of the authorities,' Sir Charles Turner continues, 'it fell to the Law Commission to offer for the acceptance of the legislature a proposal to settle the law. It was felt that, in accordance with the principles of freedom of contract, an owner of property should be at liberty to confer on a mortgagee any of the powers which he could himself exercise, and that a borrower might more readily obtain accommodation, or obtain it on easier terms, if he could offer a security which would be speedily converted by the tender without the delay and the cost of an application to a Court of justice. On the other hand, it was recognized that in this country the large majority of mortgage-securities are created by persons who are poor and illiterate in favour of more sharpwitted creditors, and that, in an agricultural country, landed securities are subject to sudden and excessive variations in value, which are rarely foreseen by borrowers. The Commission came to the conclusion that, while more wealthy borrowers in the country and all borrowers in the presidency-towns might be left to deal with their property as they pleased, it was necessary in the present state of British India to create a legislative safeguard for the poorer classes in the country. They, therefore, proposed that the creation of a power of sale should be declared invalid except in mortgages where the principal money secured exceeded Rs. 500, or in mortgages to the Secretary of State or in mortgages of property in the presidency-towns. In Committee, the Section was recast. Instead of declaring that a power of sale conferred by the instrument of mortgage is invalid except in the cases specified, the section, as it now stands, declares that in certain cases it is valid.'

Sir Charles Turner adds—

'Unless it be held that the express declaration of the validity of such a power in certain cases is tantamount to a declaration of its invalidity in other cases, which I incline to doubt, the object sought by the Law Commission has not been attained, and the validity of the power in cases other than those specified is still left an open question.

'It may have been desirable that the protection the Law Commission intended to confer in the case of mortgages for small amounts should have been extended to mortgages for somewhat larger sums, but I think it is to be regretted that the amendment should have been effected in such terms as to leave the question doubtful whether any protection is given to mortgages of any class or amount, and I trust advantage may be taken of the opportunity to re-consider the provisions of the section. It will be seen that the section, as it now stands, affects only—

'(1) parties to an English mortgage, *i. e.* a mortgage in the English form, who are not Hindús, Muhammadans or Buddhists (an inexact enumeration of the creeds held by natives of India);

'(2) parties to a mortgage to the Secretary of State;

'(3) parties to mortgages of property in the presidency-towns.

'As the section now stands, I do not see any reason for including it in the class of sections for which certain races may be exempted; I apprehend it was included before it was recast.'

14. Section 4 of the Bill accordingly amends section 69 of the Act so as to express clearly what was actually intended, and no power to exempt from the main provisions of the section has been retained; but, as Mr. Justice Muthuswami Aiyar has pointed out that there are other classes whom it is even more necessary to exclude from the operation of the exceptional provision in clause (a) than Hindús, Muhammadans and Buddhists, words have been added to that clause to provide a power of excluding them.

15. Section 2 of the Bill is intended merely to remove a formal defect in the Act which has been brought to notice in the course of the recent discussions. It was of course never intended that the provisions of the Act which assume the existence of a registration system should take effect in those tracts which are excluded from the operation of the Registration Act; but the Act omitted to make any express provision to that effect, and that omission is now supplied.

16. The addition which it is proposed to make to section 4 of the Act by section 3 of the Bill has for its object merely to remove a difficulty which has been felt in some quarters as to the bearing which the provisions of the Act relating to registration and the Registration Act have on one another.

(Signed) C. P. ILBERT.

The 9th August, 1884.

D. FITZPATRICK,  
Secy. to the Govt. of India.



## LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 20th August 1884, and was referred to a Select Committee:—

### Bill No. 11 of 1884.

*A Bill to facilitate the construction of Telegraphs, and to amend the Indian Telegraph Act, 1876.*

WHEREAS it is expedient to give power to place and maintain telegraph lines and posts under, over, along, across, in or upon immoveable property;

And whereas it is also expedient to amend the Indian Telegraph Act, 1876;

It is hereby enacted as follows:—

#### *Preliminary.*

1. (1) This Act may be called the Indian Telegraph Act, 1884.  
Short title, local extent and commencement.

(2) It extends to the whole of British India; and

(3) It shall come into force at once:

Provided that nothing in this Act shall affect any right acquired by the Government or a licensee under section 4 of the Indian Telegraph Act, 1876, or any contract entered into before the passing of this Act.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "Telegraph line" means a wire or wires used for the purpose of a telegraph as defined in the Indian Telegraph Act, 1876, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for that purpose.

(2) "Post" means a post, pole, standard, stay, strut or other above-ground contrivance for carrying, suspending or supporting a telegraph line.

(3) "Telegraph authority" means—

(a) the Director General of Telegraphs or any officer appointed by him in this behalf; and

(b) in respect of any particular matter, any person holding a license from the Governor General in Council under section 4 of the Indian Telegraph Act, 1876, and empowered, by such authority as the Governor General in Council may, from time to time, appoint in this behalf, to discharge the functions of a telegraph authority in respect of that matter.

(4) "Local authority" means any municipal committee, local board, body of port commissioners or other body created for the public benefit and legally entitled to any immoveable property or the control thereof.

#### *Power to place Telegraph Lines and Posts.*

3. A telegraph authority may, from time to time, place and maintain

power for telegraph authority to place and maintain, alter and remove a telegraph line and post. a telegraph line under, over, along or cross, and posts in or upon, any immoveable property, and repair, alter or remove the same:

Provided that—

(a) a telegraph authority shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which it places any telegraph line or post;

(b) in the exercise of the powers conferred by this section, a telegraph authority shall do as little damage as possible;

(c) a telegraph authority shall not exercise those powers in respect of any property vested in or under the control of any local authority except with the consent of the local authority;

(d) a telegraph authority shall not exercise those powers in respect of any other property unless it has paid or tendered full compensation to all persons interested for all damage which will be sustained by them by reason or in consequence of the exercise of those powers.

#### *Provisions applicable to Property of Local Authorities.*

4. Any consent given by a local authority under section 3 may be given subject to such reasonable conditions as to the payment of any expenses to which it is estimated the local authority will be put in consequence of the exercise of the powers, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work, as the local authority giving consent thinks fit to prescribe.

5. (1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by a telegraph authority under, over, along, across, in, or upon any property vested in or under the control of a local authority, and the local authority, having regard to circumstances which have arisen since the telegraph line or post was so placed, considers it expedient that it should be removed or altered, the local authority may call upon the telegraph authority to remove or alter it, and, if the telegraph authority refuses or omits to do so, may apply to the Local Government to order its removal or alteration.

(2) A Local Government receiving an application under this section may in its discretion reject the same, or make an order for the removal or alteration of the telegraph line or post, absolutely or subject to such conditions as it thinks fit; and the decision of the Local Government shall be final and conclusive.

6. A telegraph authority may, for the purpose of exercising the powers conferred upon it by this Act in respect of any property vested in or under the control of a local authority, alter the position thereunder of any pipe (not being a main) for the supply of gas or water:

Power to alter position of gas or water pipes.

Power to alter position of gas or water pipes. of exercising the powers conferred upon it by this Act in respect of any property vested in or under the control of a local authority, alter the position thereunder of any pipe (not being a main) for the supply of gas or water:

Provided that—



(a) when a telegraph authority desires to alter the position of any such pipe, it shall give reasonable notice of its intention to do so, specifying the time at which it will begin to do so, to the local authority, and, when the pipe is not under the control of the local authority, to the person under whose control the pipe is;

(b) a local authority or person receiving notice under clause (a) may send a person to superintend the work, and the telegraph authority shall execute the work to the reasonable satisfaction of the person so sent.

7. If any dispute arises between a telegraph authority and a local authority in consequence of the local authority refusing its consent under section 3 or prescribing any condition under section 4, or otherwise in respect of the exercise of the powers conferred by this Act, it shall be determined by the Local Government, and the decision of the Local Government thereon shall be final and conclusive.

8. A telegraph line or post placed by a telegraph authority before the passing of this Act under, over, along, across, in or upon any property vested in or under the control of a local authority shall be deemed to have been placed in exercise of the powers conferred by this Act.

*Provisions applicable to other Property.*

9. If any dispute arises concerning the sufficiency of the amount of the compensation paid or tendered under section 3, clause (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him, and his determination thereof shall be final and conclusive.

10. (1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by a telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control of a local authority, and any person entitled to do so desires to deal with that property in such a manner as to render it necessary or convenient that the

telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form, he may tender to the telegraph authority the amount requisite to defray the expense of the removal or alteration and call upon the telegraph authority to remove or alter the line or post accordingly, and, if the telegraph authority refuses or omits to do so, may apply to the District Judge within whose jurisdiction the property is situate to order the removal or alteration.

(2) A District Judge receiving an application under this section may, in his discretion, reject the same or make an order absolutely or subject to conditions for the removal of the telegraph line or post to any other part of the property or to a higher or lower level or for the alteration of its form, and the order so made shall be final and conclusive.

*Amendments of the Indian Telegraph Act, 1876.*

11. To the definition of "telegraph" in section 3 of the Indian Telegraph Act, 1876, the following shall be added, namely:—

"and includes any apparatus for transmitting or making telegraphic, telephonic or other communications by means of electricity."

12. To clause (a) of section 8 of the same Act the following shall be added, namely:—

"or of any telegraph established by Government and leased to any person."

13. To the same section the following words shall be added, namely:—

"When prescribing rules under clause (a) of this section, the Governor General in Council may by the rules impose fines for any breach of the same:

"Provided that the fines so imposed shall not exceed the following limits, namely:—

"(1) when the licensee or lessee is punishable for the breach, one thousand rupees, and in the case of a continuing breach a further fine of two hundred rupees for every day after the first during the whole or any part of which the breach continues;

"(2) when a servant of the licensee or lessee or any other person is punishable for the breach, one-fourth of those amounts."

STATEMENT OF OBJECTS AND REASONS.

THE main object of this Bill is to give power to the Government, and to any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially empowered in this behalf, to place telegraph lines under or over property belonging whether to private persons or to public bodies.

2. The attention of the Government has recently been directed to the fact that, as the law now stands, the Governor General in Council and his licensees have no power to place telegraph lines upon the land of municipal or other similar bodies or of private persons. In England the requisite powers are conferred on the Postmaster General, who works and maintains the telegraphs in that country, by 26 & 27 Vic., cap. 112, as amended by 41 & 42 Vic., cap. 76; and as it seems desirable that the Government in which the exclusive privilege of establishing telegraphs in this country is vested should possess somewhat similar powers, the present Bill has been prepared.

3. Section 3 empowers the Government or any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially authorized by a Government officer to place and maintain telegraph lines and posts under, over, along, across, in or upon the property of any "person", which term includes a body corporate. It is considered that licensees should have these powers, because the licenses granted always strictly limit the area of the operations of the licensees, and it would be some-



what anomalous for local bodies and private persons to have the power to neutralize the licenses granted by the Governor General in Council by objecting to the licensees' operations, or by hampering them by the exaction of fees for permission to work under their licenses. The powers thus given are, however, to be exercised so as to do as little damage as possible, and their exercise is moreover made subject to important restrictions and conditions.

4. When the property belongs to a municipal board or other local authority, the powers conferred by the Act cannot be exercised over it without the consent of that authority; and that consent may be given subject to conditions. Among other conditions which can be imposed is one requiring that any expenses to which the local authority may be put by the exercise of the power shall be made good; but it will be observed that no provision is made for the payment of compensation on any other account to a local authority whose property is made use of for this purpose, it being considered that, as the construction of telegraphs is a matter in which the public are interested, no charge should be made for accommodation of this sort when it can be granted without inconvenience to the public or expense to the local authority concerned.

5. It may sometimes happen that, though at the time when a telegraph authority desires to exercise its powers over some property of a local authority there may be no reasonable ground for objecting, and the local authority may thus find itself compelled to consent, a state of things may subsequently arise under which the continued exercise of the powers would be felt as a grave public inconvenience or a cause of serious loss. Land, *e.g.*, which was waste at the time the telegraph line was constructed over it might afterwards be required for some important public object or might acquire great value for building purposes, and, as no compensation (except for actual expenses out of pocket) would have been paid to the local authority at the time the line was constructed, it is but just that provision should be made for the removal or alteration of the line in such an event. This accordingly is done by section 5 of the Bill, which empowers the local authority to call upon the telegraph authority to remove or alter its telegraph or post, and, in the event of the telegraph authority refusing or neglecting to do so, gives an appeal to the Local Government.

6. In the event, which it is believed will be rare, of a local authority arbitrarily refusing its consent to the exercise by a telegraph authority of the powers conferred by the Bill or clogging its consent with unreasonable conditions, it will (section 7) be open to the telegraph authority to appeal to the Local Government, whose decision will be final.

7. Turning now to the case in which it may be desired to exercise the powers given by the Bill over the property of private persons, it will be seen that here provision is made for the payment of full compensation, the amount of which in the event of dispute will (section 9) be determined by the Civil Court, and that, in the event of a person upon whose property a telegraph line or post has been placed desiring subsequently to deal with the property in such a way as would make it necessary or convenient that the line or post should be removed to another part of it or to a higher or lower level or altered in form, he can (section 10) tender the cost of the work and call upon the telegraph authority to remove or alter the line or post, and, if that authority refuses to do so, can appeal to the Civil Court.

8. It may be observed, however, that in practice in this country the power of taking telegraph lines through private property is not likely to be exercised either by the Government or by its licensees except on rare occasions, and then as a rule only to the extent of crossing with the wire, a post being scarcely ever erected on private land. Private property has hitherto been always avoided as much as possible, and it is likely to be still more carefully avoided in future if it is made clear, as it is proposed to do by this Bill, that full compensation will have to be paid for exercising the power over private and not for exercising it over public property.

9. The present opportunity has been taken to make three amendments of the Indian Telegraph Act, 1876, which experience has shown to be desirable. The first has for its object the emendation of the definition of "telegraph" so as to bring it into more exact conformity with the construction put upon the definitions in the English Acts by a recent decision of the High Court of Justice in England.

10. The second is intended to provide for the regulation of telegraph lines constructed by the Government but leased to companies or individuals by whom they are worked. The position of such lines under the Act as it at present stands is far from clear, and the object of the amendment proposed in section 12 of the Bill is to put them on much the same footing as licensed lines.

11. The object of the third amendment, which is made by section 13 of the Bill, is to prescribe penalties for the breach of the rules made under section 8 of the Act for the conduct of telegraphs worked under license or lease. In such cases, as the Act now stands, the only remedy is to revoke the license or lease, but this course would in most cases cause such great public inconvenience that it is impracticable. The result is that at present there is virtually no penalty for the infringement of the rules made under section 8 of the Act. To remedy this state of things, the Bill adds a clause to that section empowering the Governor General in Council to prescribe by the rules moderate fines for the breach of them.

*The 12th August 1884.*

(Signed) T. C. HOPE.

D. FITZPATRICK,  
Secy. to the Govt. of India.



[Published with the "Bombay Government Gazette" on the 11th September 1884.]

## PART VI.

### BILLS OF THE GOVERNMENT OF INDIA.

#### LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 20th August, 1884, and was referred to a Select Committee:—

#### Bill No. 10 of 1884.

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

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

1. For the fifth clause of section 1 of the said Act the following shall be substituted, namely:—

"And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette,—

"(a) exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely:—

"Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three; or

"(b) direct, either retrospectively or prospectively, that section forty-one shall not apply throughout any part of those territories to any property in which a member of any race, sect,

tribe or class specified in the notification is interested."

2. The following clause shall be deemed to have been added to the first section of the said Act from the date on which it came into force, namely:—

"Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise."

3. To section 4 of the said Act the following shall be added, namely:—

"And sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877."

4. In section 69 of the said Act—

(a) after the words "is valid in the following cases" the words "and in no others" shall be inserted; and

(b) after the words "Hindu, Muhammadan or Buddhist," in both places where they occur, there shall be inserted the words "or a member of any other race, sect, tribe or class from time to time specified by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette in this behalf."

#### STATEMENT OF OBJECTS AND REASONS.

THE last clause of section 1 of the Transfer of Property Act, 1882, provides that any Local Government may, with the previous sanction of the Governor General in Council, exempt, either retrospectively, or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections 41, 54 (paragraphs 2 and 3), 59, 69, 107 and 123.

54. \* \* Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

in which is a member of such race, sect, tribe or class, while the other party does not belong to an exempted class.



3. To this reference the Government of India, on the 13th December, 1882, replied that the precise manner in which the exemption would operate under the circumstances described was a matter of some difficulty; and the only satisfactory means by which an intelligible operation might be given to section 1 of the Act seemed to be the amendment of that section so as to make the exemption from sections 54, 59, 107, and 123 local and not personal.

4. The Chief Commissioner, in a letter dated 12th January 1883, suggested as an alternative, and in his opinion a preferable one, a power to exempt not persons or places but transactions in which one or both of the parties might be members of the race, sect, tribe or class for which the sections in question might be deemed unsuitable.

5. It was thought desirable to obtain the opinions of the other Local Governments on the two alternative proposals thus put forward, and accordingly, on the 7th May, 1883, a circular was issued for this purpose.

6. It will be observed that the question thus raised was confined to the power conferred by section 1 of the Act to exempt from the operation of sections 54, 59, 107 and 123; but, attention having been once drawn to the subject, it was natural that the effect of an exemption from the other two sections of the Act (41 and 69) mentioned in section 1 and set out in the margin should also be considered; and, on looking into the matter, it was found that, while an exemption under either of those sections would give rise to questions very similar to those raised by the Chief Commissioner of Assam in the case of the sections referred to by him, there was this further difficulty in regard to section 69 that the object of allowing any power to exempt from it was not apparent. The circular accordingly asked for the opinions of the Local Governments in regard to these sections also.

41. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgaged-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist;

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustee's and Mortgagee's Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist.

power to exempt from it was not apparent. The circular accordingly asked for the opinions of the Local Governments in regard to these sections also.

7. The replies of the Local Governments have now been received and considered by the Government of India, and the following are the conclusions to which they seem to point.

8. In the first place, as regards the power of exempting from the operation of sections 54, 59, 107 and 123, it seems to the Governor General in Council best to make it simply a power of exempting locally, that is to say, the exemption should be absolute and cover transactions relating to any immovable property within the specified area, whether both or one or none of the parties may belong to those races or tribes for whose benefit the exemption is intended. To give a personal character to the exemption and restrict it, as some suggest, to transactions within the area, to which either both parties or one of the parties are of particular races, would give rise to uncertainty of title and other difficulties and doubts noticed by Sir C. Turner and others. With a local exemption clause of an absolute character an intending purchaser has to look to nothing but the situation of the property.

9. It is true that there may be advanced people living in exempted localities for whom the sections in question would provide a law more suitable than that which prevails where they do not apply, but it must be remembered that these people always could, and Europeans, it is believed, generally would, follow the practice of having formally executed and registered documents, and this would to a great extent give them the benefits aimed at by the Act; for it must be borne in mind that in the places in question titles would not usually be complicated, and in any case the sections of the Act referred to are not an essential part of the law, but merely an improvement of it, which is not in force as yet in great provinces like Bombay, the Panjáb and British Burma. Again, on the other hand, it is true that there may be members of wild tribes settled in some non-exempted localities, and that they may find it difficult to learn to act up to the law; but, as has been observed by some of the authorities consulted, wild people scattered in this way among a population the great mass of which is civilized soon get into the ways of the people among whom they live.

In either case the objection is one that must apply to most of our enacted laws, and indeed to a good deal of the customary law of the country. We cannot get a law that will suit everybody; we must be content with a reasonably close approximation.



10. The first section of the Bill accordingly amends section 1 of the Act so as to empower a Local Government, with the previous sanction of the Governor General in Council, to exempt any part of the territories under its administration from the operation of any of these sections.

11. Next, as regards the powers to exclude the operation of section 41, the considerations to be borne in mind are fully stated by the Chief Justice of Madras in his opinion.

Sir C. Turner observes that the general rule that no one can confer a higher right in property than he himself possesses in some cases worked obvious hardship; and, as the science of jurisprudence advanced, it was limited by the exception declared in section 41, on the principle that, where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud. To races which have not made a substantial progress in civilization, this rule appears to Sir Charles Turner to be unsuited for the following reasons, as stated in his own words:—

“Regarding the question in its sentimental aspect, it is certain that a member of a race unacquainted with the refinements of equity would fail to recognize the justice of a rule which caused him to be deprived of his property by what is *ex hypothesi* a fraud.

“I do not contend that legislation is to be governed by sentimental considerations, but I have heretofore asserted, and still hold, that legislation should only be so far in advance of the general understanding that its justice should be recognized by the more enlightened.

“There is, however, a substantial reason to be deduced from the rule itself, which shows its inapplicability to uncivilized races. The rule affords protection only to a purchaser for consideration who acts in good faith after reasonable inquiry.

“The imposition of these conditions on the purchaser suggests to persons, who have occasion to create an ostensible ownership of their property in others, the prudence of providing certain safeguards. If they are well advised, they are careful to secure evidence of the actual ownership, so that a purchaser, on making due inquiry, must either ascertain the true character of the transaction, or entertain such suspicion of its character that he can no longer assert that he acted in good faith.

“The transactions of uncivilized races in the matter of property are of the simplest character; they are unacquainted with the precautions which technical skill has devised to secure property.

“Again, as society progresses, men are habituated to exercise greater caution in their dealings with their fellows, and have larger opportunities for selecting agents who are reputed either to be worthy of confidence or to be in a position to answer for a breach of confidence. A prudent man selects for an office of trust a person of tried probity and some substance. The uncivilized races have less choice in the selection of agents and less opportunity for forming a judgment of the character and position of their agents.”

12. The conclusion to which these remarks seem to point is that the Government should be empowered to direct that section 41 should not apply throughout any particular local area to any property in which a member of any particular race, sect, tribe or class is interested and it is on these lines that sub-clause (b) of the new fifth clause which the Bill proposes to insert in the first section of the Act has been framed.

13. The discussion regarding section 69 has opened out questions extending beyond the particular difficulty first brought to notice, and it is fortunate that the Government have had in considering them the assistance of Sir C. Turner, who was a member of the Commission by which the Transfer of Property Bill was settled.

The circumstances under which the section was enacted will be found stated in the following extract from his Minute:—

“In England, it is usual to confer on a mortgagee, in case of default, a power to sell the mortgaged property without the intervention of a Court of Justice; and, where the instrument of mortgage does not confer the power, but does not in express terms negative it, a mortgagee is empowered by statute to sell on the expiry of twelve months after the date of default and of six months from the date on which notice is given of his intention to exercise the power—23 & 24 Vic., c. 145. This statutory provision was, by Act XXVIII of 1866, extended to mortgages in this country to which the English law is applicable.

“On the other hand, the simple mortgage in India did not authorize a sale without the order of a Court, and by Regulation XVII of 1806 in the Bengal Presidency it had been enacted that a mortgage by conditional sale should not become foreclosed without the service of a notice through the District Court, and on the expiry of a year of grace. Inferring the policy of the legislature from this Regulation, the Sadr Dīwānī Adālat refused to give effect to an express power of sale—S. D. A., 1847-354. In the Bombay Presidency, Mr. Justice Melville expressed a doubt whether a private sale of property in the Mufassal, effected by a mortgage under a power, would be valid—VIII Bombay H. C. A. C., 143.

“On the other hand, I entertained the opinion, and I believe acted on it before the Transfer of Property Act came into operation, that, in the absence of a prohibition of law, the owner of property was competent to confer on a mortgagee what powers he himself possessed, and that, if a mortgagor having, as owner, authority to sell, created a power of sale in a mortgagee, and the mortgagee duly exercised the power, the Courts were bound to recognize the validity of the sale.

“In *Bhanoomutty Chawdiam vs. Premchund Nesgee*, XV B. L. R. 28, property in the Mufassal had been mortgaged by an instrument in the English form containing a power of sale, and subsequently mortgaged to a third party by a conditional sale. The first mortgagee then exercised his power of sale, and subsequently to the sale the second mortgagee took proceedings to foreclose. It was held that the purchaser under the power was entitled to notice of foreclosure, and impliedly that a sale under a power might be valid.”



"In this state of the authorities," Sir Charles Turner continues, "it fell to the Law Commission to offer for the acceptance of the legislature a proposal to settle the law. It was felt that, in accordance with the principles of freedom of contract, an owner of property should be at liberty to confer on a mortgagee any of the powers which he could himself exercise, and that a borrower might more readily obtain accommodation, or obtain it on easier terms, if he could offer a security which would be speedily converted by the tender without the delay and the cost of an application to a Court of justice. On the other hand, it was recognized that in this country the large majority of mortgage-securities are created by persons who are poor and illiterate in favour of more sharpwitted creditors, and that, in an agricultural country, landed securities are subject to sudden and excessive variations in value, which are rarely foreseen by borrowers. The Commission came to the conclusion that, while more wealthy borrowers in the country and all borrowers in the presidency-towns might be left to deal with their property as they pleased, it was necessary in the present state of British India to create a legislative safeguard for the poorer classes in the country. They, therefore, proposed that the creation of a power of sale should be declared invalid except in mortgages where the principal money secured exceeded Rs. 500, or in mortgages to the Secretary of State or in mortgages of property in the presidency-towns. In Committee, the Section was recast. Instead of declaring that a power of sale conferred by the instrument of mortgage is invalid except in the cases specified, the section, as it now stands, declares that in certain cases it is valid."

Sir Charles Turner adds—

"Unless it be held that the express declaration of the validity of such a power in certain cases is tantamount to a declaration of its invalidity in other cases, which I incline to doubt, the object sought by the Law Commission has not been attained, and the validity of the power in cases other than those specified is still left an open question.

"It may have been desirable that the protection the Law Commission intended to confer in the case of mortgages for small amounts should have been extended to mortgages for somewhat larger sums, but I think it is to be regretted that the amendment should have been effected in such terms as to leave the question doubtful whether any protection is given to mortgages of any class or amount, and I trust advantage may be taken of the opportunity to re-consider the provisions of the section. It will be seen that the section, as it now stands, affects only—

"(1) parties to an English mortgage, *i. e.* a mortgage in the English form, who are not Hindús, Muhammadans or Buddhists (an inexact enumeration of the creeds held by natives of India);

"(2) parties to a mortgage to the Secretary of State;

"(3) parties to mortgages of property in the presidency-towns.

"As the section now stands, I do not see any reason for including it in the class of sections for which certain races may be exempted; I apprehend it was included before it was recast."

14. Section 4 of the Bill accordingly amends section 69 of the Act so as to express clearly what was actually intended, and no power to exempt from the main provisions of the section has been retained; but, as Mr. Justice Muthuswami Aiyar has pointed out that there are other classes whom it is even more necessary to exclude from the operation of the exceptional provision in clause (a) than Hindús, Muhammadans and Buddhists, words have been added to that clause to provide a power of excluding them.

15. Section 2 of the Bill is intended merely to remove a formal defect in the Act which has been brought to notice in the course of the recent discussions. It was of course never intended that the provisions of the Act which assume the existence of a registration system should take effect in those tracts which are excluded from the operation of the Registration Act; but the Act omitted to make any express provision to that effect, and that omission is now supplied.

16. The addition which it is proposed to make to section 4 of the Act by section 3 of the Bill has for its object merely to remove a difficulty which has been felt in some quarters as to the bearing which the provisions of the Act relating to registration and the Registration Act have on one another.

(Signed) C. P. ILBERT.

The 9th August 1884.

D. FITZPATRICK,  
Secy. to the Govt. of India.



## LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 20th August 1884, and was referred to a Select Committee:—

### Bill No. 11 of 1884.

*A Bill to facilitate the construction of Telegraphs, and to amend the Indian Telegraph Act, 1876.*

WHEREAS it is expedient to give power to place and maintain telegraph lines and posts under, over, along, across, in or upon immoveable property;

And whereas it is also expedient to amend the Indian Telegraph Act, 1876;

It is hereby enacted as follows:—

#### *Preliminary.*

1. (1) This Act may be called the Indian Telegraph Act, 1884.

Short title, local extent and commencement.

(2) It extends to the whole of British India; and

(3) It shall come into force at once:

Provided that nothing in this Act shall affect any right acquired by the Government or a licensee under section 4 of the Indian Telegraph Act, 1876, or any contract entered into before the passing of this Act.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "Telegraph line" means a wire or wires used for the purpose of a telegraph as defined in the Indian Telegraph Act, 1876, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for that purpose.

(2) "Post" means a post, pole, standard, stay, strut or other above-ground contrivance for carrying, suspending or supporting a telegraph line.

(3) "Telegraph authority" means—

(a) the Director General of Telegraphs or any officer appointed by him in this behalf; and

(b) in respect of any particular matter, any person holding a license from the Governor General in Council under section 4 of the Indian Telegraph Act, 1876, and empowered, by such authority as the Governor General in Council may, from time to time, appoint in this behalf, to discharge the functions of a telegraph authority in respect of that matter.

(4) "Local authority" means any municipal committee, local board, body of port commissioners or other body created for the public benefit and legally entitled to any immoveable property or the control thereof.

#### *Power to place Telegraph Lines and Posts.*

3. A telegraph authority may, from time to time, place and maintain a telegraph line under, over, along or cross, and posts in or upon, any

Power for telegraph authority to place and maintain, alter and remove a telegraph line and post.

immoveable property, and repair, alter or remove the same:

Provided that—

(a) a telegraph authority shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which it places any telegraph line or post;

(b) in the exercise of the powers conferred by this section, a telegraph authority shall do as little damage as possible;

(c) a telegraph authority shall not exercise those powers in respect of any property vested in or under the control of any local authority except with the consent of the local authority;

(d) a telegraph authority shall not exercise those powers in respect of any other property unless it has paid or tendered full compensation to all persons interested for all damage which will be sustained by them by reason or in consequence of the exercise of those powers.

#### *Provisions applicable to Property of Local Authorities.*

4. Any consent given by a local authority under section 3 may be given subject to such reasonable conditions as to the payment of any expenses to which it is estimated the local authority will be put in consequence of the exercise of the powers, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work, as the local authority giving consent thinks fit to prescribe.

Power to local authority to consent under section 3 subject to condition.

section 3 may be given subject to such reasonable conditions as to the

payment of any expenses to which it is estimated the local authority will be put in consequence of the exercise of the powers, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work, as the local authority giving consent thinks fit to prescribe.

5. (1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by a telegraph authority under, over,

Removal or alteration of telegraph line or post on property of local authority.

along, across, in, or upon any property vested in or under the control of a local authority, and the local authority, having regard to circumstances which have arisen since the telegraph line or post was so placed, considers it expedient that it should be removed or altered, the local authority may call upon the telegraph authority to remove or alter it, and, if the telegraph authority refuses or omits to do so, may apply to the Local Government to order its removal or alteration.

(2) A Local Government receiving an application under this section may in its discretion reject the same, or make an order for the removal or alteration of the telegraph line or post, absolutely or subject to such conditions as it thinks fit; and the decision of the Local Government shall be final and conclusive.

6. A telegraph authority may, for the purpose of exercising the powers conferred upon it by this Act in respect of any property vested in or under the control of a local authority, alter the position thereunder of any pipe (not being a main) for the supply of gas or water:

Power to alter position of gas or water pipes.

Act in respect of any property vested in or under the control of a local authority, alter the position thereunder of any pipe (not being a main) for the supply of gas or water:

I of 1876.

I of 1876.

[cf. 26 & 27 Vic., c. 112, s. 3.]  
I of 1876.

[cf. 26 & 27 Vic., c. 112, s. 3.]

[cf. 26 & 27 Vic., c. 112, s. 3.]

I of 1876.



Provided that—

- (a) when a telegraph authority desires to alter the position of any such pipe, it shall give reasonable notice of its intention to do so, specifying the time at which it will begin to do so, to the local authority, and, when the pipe is not under the control of the local authority, to the person under whose control the pipe is ;
- (b) a local authority or person receiving notice under clause (a) may send a person to superintend the work, and the telegraph authority shall execute the work to the reasonable satisfaction of the person so sent.

7. If any dispute arises between a telegraph

Disputes between telegraph authorities and local authorities. authority and a local authority in consequence of the local authority refusing its consent under section 3 or prescribing any condition under section 4, or otherwise in respect of the exercise of the powers conferred by this Act, it shall be determined by the Local Government, and the decision of the Local Government thereon shall be final and conclusive.

8. A telegraph line, or post placed by a telegraph authority before the passing of this Act, under, over, along, across, in or upon any property vested in or under the control of a local authority shall be deemed to have been placed in exercise of the powers conferred by this Act.

*Provisions applicable to other Property.*

9. If any dispute arises concerning the sufficiency of the amount of the compensation paid or tendered under section 3, clause (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him, and his determination thereof shall be final and conclusive.

10. (1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by a telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control of a local authority, and any person entitled to do so desires to deal with that property in such a manner as

to render it necessary or convenient that the telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form, he may tender to the telegraph authority the amount requisite to defray the expense of the removal or alteration and call upon the telegraph authority to remove or alter the line or post accordingly, and, if the telegraph authority refuses or omits to do so, may apply to the District Judge within whose jurisdiction the property is situate to order the removal or alteration.

(2) A District Judge receiving an application under this section may, in his discretion, reject the same or make an order absolutely or subject to conditions for the removal of the telegraph line or post to any other part of the property or to a higher or lower level or for the alteration of its form, and the order so made shall be final and conclusive.

*Amendments of the Indian Telegraph Act, 1876.*

11. To the definition of "telegraph" in section 3 of the Indian Telegraph Act, 1876, the following I of 1876. Amendment of the definition of "telegraph" in Act I of 1876. shall be added, namely:—

"and includes any apparatus for transmitting or making telegraphic, telephonic or other communications by means of electricity."

12. To clause (a) of section 8 of the same Act the following shall be added, namely:—  
"or of any telegraph established by Government and leased to any person."

13. To the same section the following words shall be added, namely:—  
Addition to section 8 of same Act. ly:—

"When prescribing rules under clause (a) of this section, the Governor General in Council may by the rules impose fines for any breach of the same :

"Provided that the fines so imposed shall not exceed the following limits, namely:—

"(1) when the licensee or lessee is punishable for the breach, one thousand rupees, and in the case of a continuing breach a further fine of two hundred rupees for every day after the first during the whole or any part of which the breach continues;

"(2) when a servant of the licensee or lessee or any other person is punishable for the breach, one-fourth of those amounts."

STATEMENT OF OBJECTS AND REASONS.

THE main object of this Bill is to give power to the Government, and to any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially empowered in this behalf, to place telegraph lines under or over property belonging whether to private persons or to public bodies..

2. The attention of the Government has recently been directed to the fact that, as the law now stands, the Governor General in Council and his licensees have no power to place telegraph lines upon the land of municipal or other similar bodies or of private persons. In England the requisite powers are conferred on the Postmaster General, who works and maintains the telegraphs in that country, by 26 & 27 Vic., cap. 112, as amended by 41 & 42 Vic., cap. 76; and as it seems desirable that the Government in which the exclusive privilege of establishing telegraphs in this country is vested should possess somewhat similar powers, the present Bill has been prepared.

3. Section 3 empowers the Government or any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially authorized by a Government officer to place and maintain telegraph lines and posts under, over, along, across, in or upon the property of any "person", which term includes a body corporate. It is considered that licensees should have these powers, because the licenses granted always strictly limit the area of the operations of the licensees, and it would be some-



what anomalous for local bodies and private persons to have the power to neutralize the licenses granted by the Governor General in Council by objecting to the licensees' operations, or by hampering them by the exaction of fees for permission to work under their licenses. The powers thus given are, however, to be exercised so as to do as little damage as possible, and their exercise is moreover made subject to important restrictions and conditions.

4. When the property belongs to a municipal board or other local authority, the powers conferred by the Act cannot be exercised over it without the consent of that authority; and that consent may be given subject to conditions. Among other conditions which can be imposed is one requiring that any expenses to which the local authority may be put by the exercise of the power shall be made good; but it will be observed that no provision is made for the payment of compensation on any other account to a local authority whose property is made use of for this purpose, it being considered that, as the construction of telegraphs is a matter in which the public are interested, no charge should be made for accommodation of this sort when it can be granted without inconvenience to the public or expense to the local authority concerned.

5. It may sometimes happen that, though at the time when a telegraph authority desires to exercise its powers over some property of a local authority there may be no reasonable ground for objecting, and the local authority may thus find itself compelled to consent, a state of things may subsequently arise under which the continued exercise of the powers would be felt as a grave public inconvenience or a cause of serious loss. Land, *e.g.*, which was waste at the time the telegraph line was constructed over it might afterwards be required for some important public object or might acquire great value for building purposes, and, as no compensation (except for actual expenses out of pocket) would have been paid to the local authority at the time the line was constructed, it is but just that provision should be made for the removal or alteration of the line in such an event. This accordingly is done by section 5 of the Bill, which empowers the local authority to call upon the telegraph authority to remove or alter its telegraph or post, and, in the event of the telegraph authority refusing or neglecting to do so, gives an appeal to the Local Government.

6. In the event, which it is believed will be rare, of a local authority arbitrarily refusing its consent to the exercise by a telegraph authority of the powers conferred by the Bill or clogging its consent with unreasonable conditions, it will (section 7) be open to the telegraph authority to appeal to the Local Government, whose decision will be final.

7. Turning now to the case in which it may be desired to exercise the powers given by the Bill over the property of private persons, it will be seen that here provision is made for the payment of full compensation, the amount of which in the event of dispute will (section 9) be determined by the Civil Court, and that, in the event of a person upon whose property a telegraph line or post has been placed desiring subsequently to deal with the property in such a way as would make it necessary or convenient that the line or post should be removed to another part of it or to a higher or lower level or altered in form, he can (section 10) tender the cost of the work and call upon the telegraph authority to remove or alter the line or post, and, if that authority refuses to do so, can appeal to the Civil Court.

8. It may be observed, however, that in practice in this country the power of taking telegraph lines through private property is not likely to be exercised either by the Government or by its licensees except on rare occasions, and then as a rule only to the extent of crossing with the wire, a post being scarcely ever erected on private land. Private property has hitherto been always avoided as much as possible, and it is likely to be still more carefully avoided in future if it is made clear, as it is proposed to do by this Bill, that full compensation will have to be paid for exercising the power over private and not for exercising it over public property.

9. The present opportunity has been taken to make three amendments of the Indian Telegraph Act, 1876, which experience has shown to be desirable. The first has for its object the emendation of the definition of "telegraph" so as to bring it into more exact conformity with the construction put upon the definitions in the English Acts by a recent decision of the High Court of Justice in England.

10. The second is intended to provide for the regulation of telegraph lines constructed by the Government but leased to companies or individuals by whom they are worked. The position of such lines under the Act as it at present stands is far from clear, and the object of the amendment proposed in section 12 of the Bill is to put them on much the same footing as licensed lines.

11. The object of the third amendment, which is made by section 13 of the Bill, is to prescribe penalties for the breach of the rules made under section 8 of the Act for the conduct of telegraphs worked under license or lease. In such cases, as the Act now stands, the only remedy is to revoke the license or lease, but this course would in most cases cause such great public inconvenience that it is impracticable. The result is that at present there is virtually no penalty for the infringement of the rules made under section 8 of the Act. To remedy this state of things, the Bill adds a clause to that section empowering the Governor General in Council to prescribe by the rules moderate fines for the breach of them.

*The 12th August 1884.*

(Signed) T. C. HOPE.

D. FITZPATRICK,  
*Secy. to the Govt. of India.*