

Revenue (1898) Department.

MISCELLANEOUS SERIES.

G.O., No. 3148

DATED 27th July 98.

[Despatch Abstract.]

Expressing the Govt's concurrence with the majority of the Board of Rev and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.
Cus	1975/99						

Government (1898) of Madras. REVENUE.

Recd.

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G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 627, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 21st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

Mis. No. 3148, REVENUE, 27TH JULY 1898.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. June
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June
1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assess- ment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.--Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur† improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee.* The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895. Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession. G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amson adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law.

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Starrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

?

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the sale.

Revenue Inspector's letter reporting result of sale. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
	Marakar	35	15	4
80	The said Avalankutti Marakar	23	1	0
77	Ahamad Marakar	91	6	1
112	Ahamad Marakar and Syed Ali Kutti	295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

G.S.F.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Rule (und) no. 1/5108/7-6-98

B.P. Ref. No. 321 d/7-6-98 (c.No.4210)

1658 mi 227-6-98 (Cm 4583)

14- Made for the Revenue Secretary

And reference to the fact that
arise between the Government and the
country, as to the manner in which
should be adopted in respect of a
measure for the cancellation of a
venue sale, the Board of Revenue submits
the case for the orders of Govt., under
sec.20, Regulation I of 1803. The facts
are as follows
of the case which are fully set out in
the B.P. case referred to -

para 3 of the Tahsildars report
of the Revenue Secretary
filed

Name of field	Intest.	Acres	Arrear due	Price realized
1. Kodaupala	2.50	3-2-10	4-4-5	170-0-0
2. Kaniakudi	0.50	2-10-1	not known	40-0-0
3. Munnai Kudi	1.68	5-3-6	do	130-0-0

2. Ahmed Harakar
P. Anasau Kutta Harakar Parappanavayal

2. Two joint pattadars and janmis in the
Parappanavayal amson of Ernad in Malabar
fell into arrears of revenue amounting
(vide. however para 10 below)
to Rs.295-14-2. A long list of lands
standing in their names, almost all of
which were encumbered, were attached and
notified for sale; and the marginally
noted lands were sold on the 25th May '97
in realization of the arrear.

1. The present suit relates only to the
item No. 1; but as the facts connected

21/7/98
22/7/98
23/7/98
25/7/98
Sale of

with the other two items throw light on the
the allegation of fraud made by the plain-
tiff, and ^{are} ~~illustrative of~~ illus-
trative of ^{similar cases} ~~illustrative of~~

~~the facts known in~~
connection with all ^{the} three items ^{are summarized}

3. The following persons sent objection
petitions to the Collr. or the Divisional
officer, and contended that the sales
should not be confirmed.

(a) Ahamed Marakar
~~one of the joint patta-~~
dars describing himself as a wealthy
landlord paying an annual revenue of
Rs.1500 and as such possessed of much per-
sonal property. The grounds of his objec-
tion were:—

- (i) that he was not aware of the sale
- (ii) that his personal property and the
produce of his lands should have been
proceeded against first, and

auda janni of the lands

*Para 5 of the Tahsildar's report;
flag H.*

Para 10 of Tahsildar's report

*Para 8 of the Tahsildar's
Report
flag I.*

*vide also their subsequent
petition to the Collector (flagged A)*

*But he was present at
the sale (para 8 of Tahsildar's report)*

Para 9. do.

flag I.

(iii) that the sale of the lands was
brought about by collusion between the
subordinate Rev. official and a person
(Kumheli Kulli)
who coveted these lands. This person was not,
however, the successful bidder at the auction
(b) Komurutti and his brother

Claiming a perpetual (kanon) mortgage
right of Rs.87-8-0 over field No.1, and
alleging that they had executed ~~improvements~~
improvements therein to the value of
Rs.750. They appear to have stated that
there was no formal attachment of the
land or proclamation of sale, and that
they were not aware of the sale, and
prayed to have the sale set aside on
the ground of material irregularity and
fraud in conducting it.

(c) The Parappana Elava Rajah ^{alleged}
(by his agent Ittirania Panikar) ^{alleged} that he
had purchased item No.1 on the 22nd
April 1897 when ^{it} was sold by the Civil
Court for a debt due by one of the de-
faulters, and that it was sold subsequently
for Revenue arrears without any notice
to him.

(d) Ayidross Haji alleging that he had

mortgage right with possession over item No.2 under another who held a panayam right over the land under its jenni. He *Ahmad Karakar.* was not liable to pay the Govt.assessment under the terms of the mortgage but was obliged to pay it for the previous 3 years as the produce of the field was attached ~~to the~~ arrears; in 1897 the produce was not attached but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P.K.Panhan claiming mortgage right over item No.3.

4. These petitions were referred by the special Asst. Collr. the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated ~~that~~ that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 & 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to

*Para 7 of the Tahsildar's letter
flag I*

*Para 3 of Tahsildar's report
flag U*

Para 5

Para 8

Para 9

Para 6

3
to the petition of defaulter (a) Ahmad Karakar the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed ^{the} ~~that~~ sale list, that Govt. was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) Kumu Kutti and his brother the Tahsildar reported that Kumu Kutti was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act, ^{As regards} ~~it was also reported~~ ^{the Tahsildar stated} ~~the~~ the Parappanah Rajah that he must have been aware at the time of the court sale that arrears of revenue were due on ^{the lands and} ~~it~~ that the Rajah's agent was present at ^{Revenue} the sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No.1. The Tahsildar's report says that Ayidress Hajee mortgagee of item No.2 was

also present at the sale.

5. On receipt of this report the special

Asst. Collr. dismissed the petition

and ~~continued~~ ^{confirmed} the sale. None of the pe-

titioners took any further action except

Komukutti and his brother ^{the perpetual mortgagors} who sent a

second petition to the Collr. which was

rejected. They have now filed a suit in

the Dt. Munsiff's court of Shernad for

the cancellation of the sale on the

grounds

(1) that the sale was fraudulent and col-

lusive, ^{that} and the necessary processes were

not issued and published according to law.

(2) that the plaintiff's ^{Kulikar} ~~Kulikar~~ im-

provements which were worth Rs. 750 were

not liable to be sold for arrears due by

the pattadars and were not attached or

advertised for sale, and that the ^{paramba} ~~param~~

was sold for an utterly inadequate

price

(3) that the ~~joint~~ ^{joint} moveable properties

were not proceeded against before the

plaint land was sold.

6. The Collr. requested the sanction

Vide S a c's process flagged B

flagged A

flag Y

* Kulikar improvements are
improvements in planting trees
or making plantations

N.P.

7.

flag T I

4
requested the sanction of the Board to de-

fend the suit and forwarded a draft

written statement, in which it was stated

that there was no fraud or collusion in

the matter of the sale, that the sale was

conducted with all the necessary proceed-

ings in due course of law, that the

plaintiffs' ^{Kulikar} ~~Kulikar~~ improvements were

duly attached and advertised for sale,

that the defaulters had no moveable pro-

perty sufficient for payment of the reve-

nue in arrears and that even if they had

it was optional with Govt. to proceed

against any kind of property moveable or

immoveable, and that no notice of attach-

ment or sale was served on the plaintiff

as it was not required by law. The Board

as then constituted (Mr. Winterbotham was

then acting 1st Member and in charge of

Land Revenue) was of opinion that though

the sale of the land might be shown to

have been perfectly legal, a great in-

justice had been done to the mortgagee by

the sale of his land for no fault of his.

It observed that the local officials had

contravened the principles underlying
para 8 of S.O. No.106 and S.O.No.108
which require that "every reasonable fa-
cility" should be given to tenants and
mortgagees to save their interests, and
that Collectors should not "sell lands in
the possession of alienees until all the
other lands and property in the possess-
ion of the registered holder are first
sold unless the arrear due was caused by
the default of the alienee. ^{The Board} ~~is also directed~~
^{also advised} attention to the special rule devised in
Malabar for the protection of tenants, viz
that a separate patta should be given to
the jammi for every tenant's holding and
remarked that although this rule did not
apply in the ^{letter} ~~latter~~ to the unsettled ta-
luku, scrupulous care had been taken for
a long series of years to ^{prevent} ~~prevent~~ a jammi
pattadar from getting the better of his
tenants or mortgagee by procuring the sale
of the latter's interest on account of
arrears accruing on other portions of the
holding. It was therefore of opinion that
even though the sale may be legal and

para 8 of B.S.O. 106

B.S.O. 108

~~X~~ Rule 5, clause (m) on rule 17

f. No. 394
25-6-95 f. No. P.P.

Also para 10 of B. Pat page 6
of memo.

But in this case the jammis
were the putthahdars them-
selves. The plaintiffs in the
suit are the mortgagees
in possession

G.P.

The collector afterwards pointed
out (D 22/3/98) that this
was not correct, & that an
arrear was actually due
on the land sold

S.P.

fig. W.

Why not?
It does not appear
that any were
from this office

5
and the plaintiffs have no remedy every
effort should be made to prevent the injus-
tice involved in calling upon a tenant to
pay up a large amount of arrear not due
on his land on pain of having his holding
assessed at a very small sum sold over
his head, and directed the Collector to
make an amicable settlement with the pur-
chaser to set aside the sale on repayment
to him of the purchase money and of any
legitimate costs to which he might have
been put.

8 Again in its reference of the 31st
arch on the Collr's letter of the 22nd
of
idem, it remarked that the fact ^{would} ~~the~~ mortga-
gees having been present at the sale ~~did~~
not alter the case ^{as they could not have} ~~unless they were~~
released ~~the~~ the lands in their possession
the opportunity of releasing the lands
unless they were given the option of ^{paying}
in their possession by the payment of the
the arrear due thereon.
assessment due thereon, that the records
connected with the sale showed that the
local officials were fully aware of the
(Vide previous para).
district usage violated by the sale, that
on the back of the list of lands submitted
by the amson adhighari the Tahsildar had

endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands and that if this order had been carried out the sale would have been averted.

9. The Collr. ^{has reported} ~~reports~~ that the purchaser is unwilling to come to terms. There is ^{thus} ~~now~~ no alternative but to allow the suit to proceed and the question is what is the ^{line} ~~line~~ of defence to be adopted by Govt. The written statement submitted by the Collr. is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's 1st & 4th members (who with the former's ^{casting} vote constitute the majority) agree with

the Collr. and approve the draft written statement subject to slight alterations shown ^{in red pencil} ~~in red pencil~~. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained, and ^{that} if the subordinate officials wilfully or carelessly fail to com-

flag. C

1. The Hon Mr Cole
4. Mr James Thomson }
Current para 5.

flag. M

clearly
MA

flag G

But a mortgagee's interest is in danger of being sold in every revenue sale this is the Presidency. This law is 100 years old & is known to everybody

8/7 Messrs Cole & Thomson point out that the remedy in this case is to punish the revenue officers at fault. If this is done, why should the universal effect deplored by Mr Winterbotham occur?

6
comply with the orders issued by the Board for the purpose of remedying any defect in law, or with timehonoured local usage, the proper course would be to punish the officials ^{at} ~~at~~ default, ~~and~~ not to sacrifice the law. The 2nd & 3rd members have recorded minutes of dissent. The Hon. Mr. Winterbotham one of the dissentient members lays much stress upon the necessity for observing local usage which ~~he~~ ^{actually} ~~he~~ points out was followed in respect of two items ~~of~~ ^{in the present sales} lands which had been attached in connection with the arrears in question; and further urges that, if Govt is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, ^{that} and the District would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done

nothing to merit and for which they are denied a remedy. His conclusion is that Govt should not by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court, but that on the other hand Govt. should admit that the sale was conducted in violation of the custom of the Dist. and request the Court to investigate the plaintiff's allegation of fraud and collusion, and pass such orders as it deems right. The Hon. Mr. Sturrock concurs in the view taken by Mr. Winterbotham but is of opinion that the court cannot interfere if it finds no fraud.

In these circumstances the Board at the ^{instance} assistance of the Hon. Mr. Winterbotham submits the case to Govt. under sec. 20 of Reg. I of 1803.

The case is posted for hearing on the 2nd August. 1898.

9. In connection with the allegation of fraud and collusion attention is invited to the following considerations:-

(1) The land in question appears to have

But if the law is invoked, the law must be pleaded. The purchaser at the Rev. sale (who is made 2^d copy) refused to agree to Mr. Winterbotham's compromise (from Col. 2 1674 (98 flag 2))

877 MB

Vide C. No 4583

Para 4 of Komukutti's petition A

Para 6 of the B's Refers 3, 31-3-98 flag W.

There may have been good reasons as they may have been cut off.

Para 8 of Taluk report flag 3.

Anyhow he didn't here is no reason to doubt his having present.

Para 9

Translation attached

have formed the subject of ~~the~~ suits ^{in which} ~~unsuccessful attempts were made to oust the plaintiffs~~ ~~from the land~~

(2) The Tahsildar's order on the back of the list of lands that the standing crops should be proceeded against was not carried out.

(3) Komukutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest ^{in it} by the payment B. 4-4-5, he would certainly have paid the amount

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, ^{he not} would have saved his master's interest by the payment of the arrears? *He was either not present or attended with those who covered the land.*

10. So much as regards the land which forms the subject of the suit:-

The vernacular records forwarded with the Board's Proceedings bring out the following facts:-

The amount of arrears for which processes under Secs. 25, 27 & 33 were

issued was Rs. 192-1-2, and thirtyseven fields comprised in the joint patta No. 81 of Avalankutti Marakar and ~~Ahamad~~ Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given, as Rs. 295/14/2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0. (i.e. 295-14-2 minus 192-1-2)

Pattah No.	Name of Pattadar
81	Padiyakutti Avalakutti Marakar and Ahamad Marakar
80	he said Avalakutti Marakar
77	he said Ahamad Marakar
112	he said Ahamad Marakar and Ali Mahomed Ali Kutti

Amount of arrears.

145	7	9
35	15	4
23	1	0
<u>91</u>	<u>6</u>	<u>1</u>

295 14 2

The three items sold were Nos. ~~4, 5 & 6~~ ^{1, 2 and 7} on the list advertised. The Rev. Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale, that Nos. 4 & 5 had been released by the persons in possession on payment of the arrears due there on, that Nos. 6 & 7 were in the possession of the same person and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above ^{additional} sum of Rs. (1) 103-13-0 does not appear to have been

Vide notices under sections 25, 27 & 36 flagged C

Rev. Inspector's letter reporting result of sale. Flagged D

Perhaps all the notices have not been sent up? The Bd wd hardly have failed to notice so important an irregularity. Vide entries on the margin of para 2 of this note.

We have nothing to do with the sale of field item no 7. The suit relates to item no 1. S.F.

Vide spl. asst. Collr's proc. flagged B

demanded from the defaulter, and the sales are legal only to the extent necessary to recover the original arrear of Rs. 192-1-2; items 1 & 2 sold for Rs. 210 so that the sale of item No. 7 was illegal. Further the interest in patta N^o 81 is not identical with that in N^o 80, N^o 77 or N^o 112 and it is doubtful whether the lands included in it can be proceeded against for arrears due on any of the other three. However this may be, the

sale of item N^o 7 could have been set aside on the above grounds, if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864 - six months; and Article 12^(c) of Schedule II of India Act XV of 1877 - twelve months)

The ~~fact~~ illegality referred to in the previous para has, of course, no bearing on the ^{present} suit which relates solely to the sale of field N^o 1, but taken with the facts connected with the sale of this field it shows ~~that~~ what a ~~helpless~~ ^{helpless} ~~state~~ ^{state} the malakar ~~has~~ ^{are} Hasaondars and mortgagees are. If the report of the Sahildar is to be believed, the persons affected by the sale have ~~attained~~

73
Has any more than any other mortgages in Chingleput or Tanjore so far as the facts of the case go? S.F.

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73
Has any more than any other mortgages in Chingleput or Tanjore so far as the facts of the case go? S.F.

afforded ^{to be} their interests sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the ~~defendants~~ defaulters.

RS
7-7-98

Levy
We would obtain no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done and it is submitted that the law should not be stultified to enable the civil court to apply a remedy. The power of the civil court to apply a remedy seems moreover very doubtful because it is not contended (I submit cannot on the present facts, be contended) that there was fraud or collusion on the part of the revenue authorities conducting the sale.

It does not appear that the ~~plaintiffs~~ ^{plaintiffs} have been so very badly ^{off} in the matter. Had they paid the arrears, it would have constituted a debt due by the defaulters (see 38 of the Act)

By the Hon. Mr. Justice (By Mr. Justice)

*According to Sec 38 (1) of Act II of 1864
"Application may be made to the collector to set aside the sale on the ground of some material irregularity or mistake or fraud in conducting it, but he shall not set aside the sale on the ground of such irregularity or mistake unless the applicant proves to the satisfaction of the collector that he has sustained substantial injury by reason thereof."
Could a civil court set aside a sale on other grounds?

74

They don't seem to be people for whom Govt need have any special consideration vide Collector's letter 22/2/98. Stopped E. para 6.

Alie
10/7/98

Hu.
It is submitted that in this case Govt must agree with the Board's decision as determined by the casting vote of the 1st Member.

There was no irregularity in the procedure connected with the sale; & there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, & hence

the Court in a vague way
 to do "justice" is not a line
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 submitted, be opposed. This
 wd. be to set aside the law
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 Moreover it wd. be in the
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 the purchaser so that made
 that of removing the hardship
 so which the rev. sale law
 the way have done in this case,

take
 the
 or under
 to
 director
 stipulated
 a sale

I quite agree with
 the Secy's note.

The law is wrong
 it can perhaps be altered,
 as long as it exists
 it must be carried out.

Let the Hon. Sir H. Bliss
 see this however.

At 22.7.98.

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 abandon the principle that the
 Govt Revenue is the first charge
 on the land - mortgages, in that
 as elsewhere, must take care
 of the creditors - It seems to me that the
 Govt stands, giving them ample
 time as going so. I can see no
 evidence of fraud or collusion.

RS
 25/7/98

75

(and ^{must} occasionally do in every
 country, where Crown rights
 take precedence of private
 interests) is not now new
 to the Govt.

S. 2 10/7/98

To the Hon. Sir H. Bliss

S. 2 25/7/98

Secy
 Please see draft on the
 docket

all
 25/7/98

Dispatch urgent

27/7/98

Revenue (1898) Department.

CURRENT No. 4210.

Read Bd Ref No 621
and also 2148

From

The Board of Revenue
Land Revenue
Madras.

Order No. 2148 d/27th July 98

The Govt ^{concerns} ~~affairs~~ with
the majority of the Bd
and approves of the
draft Resolution it
is proposed to issue

Ref No. 621

Dated 7 June 1898.

Received 12

Registered 14

Enclosures 9

Spare copies

file

26/7/98

27/7/98

Done by L.R.

with encls.

Despatch sharp after

passed by Secy

27/7/98

SUBJECT.

Submitting for the orders of
Government certain papers
relating to the defence of A. S.
to 611 of 1897 on the file of the
Shenaid Arunsiff's Court for
the Cancellation of a Sale
for arrears of revenue in
the Madras District.

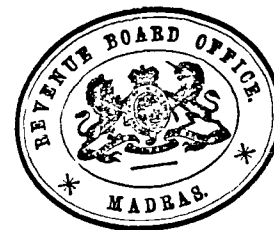
56

BACK PAPERS.

G.O.	No.	Department.	

FURTHER PAPERS.

G.O.	No.	Department.	Date.



Proceedings of the Board of Revenue (Land Revenue).

Read again Proceedings of the Board of Revenue
Land Revenue No. 790 dated 17th March 1898.
Read also reference No. 380 dated 31st March 1898.
Read letter from G. V. Danner Esq. Collector of Malabar
Refon Car. No. 264 P. 98. dated 16th April '98.

Draft. Resolution approved by the Majority of the Board

As it has been found impracticable
to effect a compromise, the Board approves the draft
Statement of defence submitted by the Collector
subject to the omission of the portions underlined
with red ink, and the verbal alterations noted
in para 4.

(True Extract)

Local Director.
Ag. Secretary.

I.

The Collector of Malabar
with the written Statement
as revised returned.

Thus attached, and Plaintiff's garden comes first on the list-

3

5. A long list of fields, dry, wet and garden, -were thus attached, and Plaintiffs' garden comes first on the list-

PP no 790 his
 17-3-58.
 B³⁵ Refer no 380 his
 31-3-58

448

FOREST CULTURE

2000

129 - 129 - 129

The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which Plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 & 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed-

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 & 5 on the sale list came forward & paid up the fraction due on the said items, and that he therefore released those items from attachment-

He thus shows his acquaintance with the District practice above alluded to-

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the District, and I shall be surprised if any precedent can be quoted since-
The Acting Special Asst Collector & the Collector confirmed the sale on appeal.
The Acting Special Assistant Collector possibly did not know the District practice, sale of land for arrears being very rare-

His order shows no acquaintance with it-

Mr. Dance must have known the District practice, and I can only express my surprise that he should have overlooked so patent & flagrant a breach of it-

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the District practice, and I don't see how it can be denied that the Plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well known and long established District rule-

8. If our Settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings-As regards the only Taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patfa issued to him for every tenant's holdings-The District practice effects the same object by arranging that every tenant should be able to procure ^{the} release of his holding from attachment by paying up the assessment due thereon-

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no incumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we

shall soon have the District full of evicted ^{ruined} tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy-

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees & is entitled on redemption of the mortgage to a ^a large sum as compensation for improvements-The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and Taluk officers so that this mortgaged garden may be attached & sold for the ^{get} arrear he will ^{get} the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances-

This is exactly what the Plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree-

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court-

I think that we should admit that the sale was conducted in violation of the custom of the District, and that we should request the Court to investigate the Plaintiff's allegations of ^{fraud} ~~fraud~~ and collusion and to pass such orders as it deems right-

/Initialled/ H.M.W. *interbhatia*
11-5-98 *ad*

Id.R.H.

(True copy)

Kone Doochen
By = Secretary

Minute
4110

I dissent from part of the Resolution as I consider that is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member ^{3 (now 2)} A. The draft written statement approved in the Resolution is therefore in my opinion defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, - but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, - and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought - but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member 3's Minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly - but still within their legal rights - and there has been no fraud in collusion with the purchaser - the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud, and dismisses the suit we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect.

or carelessness.

/Snd/ J. Sturrock

6/6

(True Copy)

W. H. D. S. M.

Ag. Secretary.

Translation of the Rev. Inspector's Report

No. 214.

The Revenue Inspector in charge of No. 3 Range begs to report to the Ernad Taluk office as follows:-

Order No. 36 dated 17th May 1897, with the connected records, for (sic) the sale of the lands belonging to Pudiya-kath Avaran Kutti Marakkar and Ahmed Marakkar, of Parappan-gadi Anson, who had allowed the revenue to fall into arrears was received.

The arrears of Pudiya-kath Avaran Kutti Marakkar accrued

Patta No. 81 Pudiya-kath Avaran Kutti
Marakkar- Ahmed Marakkar arrears
Rs. 145- 7-9

,, 80 The said Avaran-
Kutti Marakkar. 35-15-4

,, 77 The said Ahmed Marakkar
23- 1-0

,, 112 The said Ahmed Marakkar-
Kar--Syed Ali Kutti 91- 6-1
Total 295-14-2

on the marginally noted four
items of assessed lands. Of
these, deducting the amount al-
ready collected the balance
which remained amounted to (Rs.)
295-14-2. In (the case of) item

No. 112 the share of Syed Ali Kutti has been fully paid up.
The amount (Rs.) 91-6-1 shown against the item is what was due
from Ahmed Marakkar alone. For the balance of (Rs.) 295-14-2
lands Nos. 1, 2, and 7 shown in the schedule of property at-
tached were sold by auction after going to the respective
places. Land No. 3 was destroyed by the sea. The assessment
on items Nos. 4 and 5 have already been realized. Nos. 6 and
7 are in the possession of a single individual. It was be-
cause item No. 6 was comparatively large and of greater
value that item No. 7 was sold (At).

Item No. 1- Kantappaadon wet land converted into dry
and planted (with trees)- was purchased at the auction sale
by Parayarakat Avu Kader Kutti Marakkar for Rs. 170, out of
which at the time of the sale he deposited Rs. 160 as advance.

Item No. 2-- Kanissa Kandi parambu-- was purchased at
auction by Kizhakkiniyakath Kungi Koya Ahnutti for Rs. 40, out
of which he advanced at the time of the sale Rs. 30.

Item No. 7- Tunnan's Kandipalamba was purchased at
auction by Eramaveetil Pudiya-kath Kutti Ali Kutti Marakkar
for Rs. 130, out of which he advanced at the time of the sale
Rs. 103.

A large number of people gathered together for the auction and prior to its commencement, the sale notice was read aloud so as to be heard by all. There was no irregularity or collusion in (connection with) the auction sale. I am of opinion that considering the quality of the lands the prices realized were to a large extent adequate. In the sale list, the assessee Pudiyaikath Avaranuttu Parakkal has been made to sign first.

In the circumstances, the confirmation of these sales is requested. The sale lists and the records are returned herewith. I beg also to report that the amount realized has been handed over to the monigar for being remitted to the Treasury and that his receipt therefor has been taken below the sale list.

(signed) C. Sankara Panikkar,
Revenue Inspector.

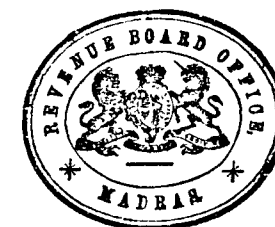
26th May 1897.

(True Translation.)

B.M.
9.01.98

Reference on No. of 1897.
In replying the above should be quoted.

(LAND REVENUE)



Read the following :-

1. Again Board's Proceedings No. 790 Misc., dated 17th March 1898.

2. Letter from G.W. Dance, Esquire, Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C.No. 264/P-98, dated 22nd March 1898, and Reference No. 380, dated 31st March 1898.

3. Letter from G.W. Dance, Esquire, Collector of Malabar to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C.No. 264/P-98, dated 16th April 1898.

And the following Reference No. 572, dated 21st May 1898.

With reference to the correspondence ending with his letter Ref. on C.No. 264/P-98, dated the 16th ultimo the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in O.S.No. 611 of 1897 on the file of the Shernad District Munsiff for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380 dated 31st March 1898.

4. Also letter from C. Parsons Esquire, Acting Collector of Malabar to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C.No. 264/P-98, dated 23rd May 1898.

-----:0:-----

Resolution

Reference No. 621, dated 7th June 1898.

The papers read above relate to a suit

for the cancellation of a Revenue sale.

2. The facts of the case are as follows:-

The marginally noted three items of land were sold on the 25th May 1897 for the recovery of an arrear of Rs.295-14-2 due from the jenmis thereof in respect of these and other 1.Kadampata Paramba lands included in their pattas. The first piece 2.Kanisakandi paramba of land, Kadampata paramba, when put up for sale was knocked down for Rs.170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897 as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the grounds that the requirements of the law had been complied with and because one of the appellants was reported to have been present at the Revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:-

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs.750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs.170;

(3) that the arrears due on the plaint paramba being only Rs.4-4-4, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No.2875/P-97, dated 11th February 1898 directed of in the first of the papers read above, the Collector asked for

sanction for the defence of the suit and submitted a draft written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs.3-12-10 had been sold for the recovery of an arrear of Rs.295-12-11, of which Rs.292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying para 8 of Standing Order No.106 and Standing Order No.108 as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the Revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the 3rd Member (the Honorable Mr. Winterbotham).

5. The 1st and 4th Members, (The Honorable Mr. Crole and Mr. J. Thomson) who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to ser-

as
certain alterations indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honored local usage which is calculated to make the law work more equitably, the proper course, in the opinion of the Board's 1st and 4th Members, is to punish the officials at fault; and not to sacrifice the law by allowing the legality of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, ^{form} ~~the~~ subject of enquiry after the suit is decided, but the Board's 1st and 4th Members can see no ^{justification} ~~jurisdiction~~ for questioning the legality of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security ^{to} the interests of such persons.

6. The Board's 2nd and 3rd Members have recorded separate minutes of dissent and copies of these are enclosed.

6. The orders of Government are accordingly solicited. The suit was posted for hearing on 1st instant but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

Lonel Davidson
Ag. Secretary.

To

The Secretary to Government, Revenue Department, with a file of Collector's letters & records to be returned & copies of the draft Resolution & revised written statement, B.P. 790/17-3-98 & Ref No. 380/31-3-98 & with copies of minutes of Members 2 & 3.

Id. P. H.

No. 4210
Revenue (1898) Department.

CURRENT No. 4583



The Board of Revenue, Land
Revenue, Madras.

No. 1658 Misc.

Dated 27th June 1898.

Received 30

Registered 30

Enclosures

Spare copies

SUBJECT.

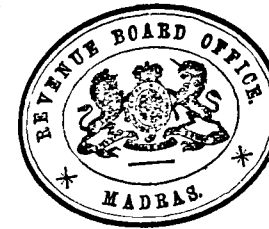
Submitting for the information of Government letter from the Collector of Malabar stating that O.S. No. 611 of '97 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

BACK PAPERS.

G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.



Proceedings of the Board of Revenue (Land Revenue).

No. 1658 Misc., dated 27th June 1898.

Read the following letter from F.C. Parsons, Esquire, Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C.No. 264/P-98, dated 20th June 1898.

In continuation of my letter dated 23rd May 1898 Ref on C.No. 264/P-98, I have the honor to report that O.S.No. 611 of 1897 on the file of the District Munsiff, Shernad has been adjourned to 2nd August 1898 and the Court has ordered that no further adjournment will be granted under any circumstances.

-----:0:-----

Resolution

Submitted for the information of Government in continuation of para 6 of Board's reference No. 621, dated 7th June 1898, upon which it will be necessary to pass final orders in sufficient time to permit of instructions reaching the Collector before the close of July

(True Copy & Extract)

Donald Davidson

Ag. Secretary.

To

The Secretary to Government, Revenue Department. ✓

Hd.R.H.

When given for copying _____
When copied _____
When examined _____
When signed _____ } 189 .

READ AGAIN G.O., No.
189

DATED

CURRENT No.

ENCLOSURES TO G. No.

ORDER OF GOVERNMENT A A A A A A A

LETTER OF GOVERNMENT.

STATEMENT WITH DITTO.

PAPERS NOT FILLED UP, BEING MEANT FOR DESPATCH
IN ORIGINAL.

N.B.—
A = Copy in full.
R = Not to be copied.
P = Copy abstract only.
Q = Copy heading only.

Regular No.
Miscellaneous .

of 189 .

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

ing
the

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621 dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immovable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiff's garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. June
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal

property. The grounds of his objection were—

- (i) that he was not aware of the sale;
- (ii) that his personal property and the produce of his lands should have been proceeded against first; and
- (iii) that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They

Vide also their subsequent petition to the Collector. appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangal Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangal Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

- (1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;
- (2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;
- (3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895. Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

The Collector afterwards pointed out (dated 22nd March 1893) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the

A.T.A.

remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803. The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble

members, lays much stress upon the necessity of being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale. Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that the sales are legal only to the extent necessary to recover the original arrear of Rs. 192-1-2; items 1 and 2 sold for Rs. 210 so that the sale of item No. 7 was illegal. Further the interest in patta No. 81 is not identical with that in No. 80, No. 77 or No. 112, and it is doubtful whether the lands included in it can be proceeded against for arrears due on any of the other three. However this may be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.

7-7-98.

197

6

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

* "According to section 38(1) of Act II of 1864, ** application may be made to the Collector to set aside the sale on the ground of some material irregularity or mistake or fraud in publishing or conducting it; but *** no sale shall be set aside on the ground of such irregularity or mistake unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason thereof". Could a Civil Court set aside a sale on other grounds?

N.E.M.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

To the Honorable Member—

N. E. MARJORIBANKS.
10-7-98.

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

198

7

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

186

Government (1898) of Madras.
REVENUE.

Recd.

Enclosures

1898.

Regd.

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority
and approving of the draft resolution proposed to be issued by it
a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897,

- | | |
|----------------------------|---|
| 1. Kadampata paramba. | for the recovery of an arrear of Rupees |
| 2. Kanisakandi paramba. | 295-14-2 due from the jenmis thereof in |
| 3. Tunnandaikaudi paramba. | respect of these and other lands included |
| | in their pattas. The first piece of land, |

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

- (1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;
- (2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;
- (3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and
- (4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted

Board's Proceedings, Mis. No. 790, dated 17th March 1898
Board's Reference, Mis. No. 380, dated 31st March 1898.

in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I. of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

190

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Mansiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Encl. C. Parthasarathy.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1864.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898.
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisabandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They *vide* also their subsequent petition to the Collector.

appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangal Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) *P. K. Panhan* claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangal Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

194 3
were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.
Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.
But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.
G.S.F.

also adverted to the special rule * devised in Malabar for the protection of tenants, viz., that a separate patta should be given to the janmi for every tenant's holding, and remarked that although this rule did not apply in the letter to the unsettled taluks, scrupulous care had been taken for a long series of years to prevent a janmi pattadar from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the *amsom adhigari* the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

Why not?
N.E.M.
It does not appear that they were not given this option.
N.E.M.
First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the

A.T.A.

remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	" Ahamad Marakar	23	1	0
112	" Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.

7-7-98.

197

6

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

* "According to section 38(1) of Act II of 1864, ** application may be made to the Collector to set aside the sale on the ground of some material irregularity or mistake or fraud in publishing or conducting it; but *** no sale shall be set aside on the ground of such irregularity or mistake unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason thereof". Could a Civil Court set aside a sale on other grounds?

N.E.M.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

198

7

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

186
777
Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

20 Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898.
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
1. Kadampata ..	ACS. 2-50	RS. A. P. 3 2 10	RS. A. P. 4 4 5	RS. A. P. 170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad anson of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They

Vide also their subsequent petition to the Collector. appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale

* But he was present at the sale. set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 103 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895. Also paragraph 10 of Board's Proceedings at page 6 of the Government Order. But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

former's casting vote constitute the majority)

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9a. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

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Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

?

N.E.M.

10. So much as regards the land which forms the subject of the suit.

proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale.

time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

File entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought vide Special Assistant Collector's proceedings. in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

R.S.

7-7-98.

197
To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

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The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1861, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

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4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th ~~July~~ ^{June} 1898.
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutli and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not reserved of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) Komu Kutti and his brother the Tahsildar reported that Komu Kutti was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the Parappanangad Raja the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that Ayidross Haji mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except Komu Kutti and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

First and Fourth Members (who with the former's casting vote constitute the

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

(b) *Komukutti and his brother*.—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They file also their subsequent petition to the Collector.

appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not reserved of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

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G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

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settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

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Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsoni adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

First and Fourth Members (who with the former's casting vote constitute the

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law,

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems right.

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9a. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

?

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

G.S.F.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue,
and approving of the draft resolution proposed to be issued by it in regard to the defence of
a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees

1. Kadampata paramba.	295-14-2 due from the jenmis thereof in
2. Kanisakandi paramba.	respect of these and other lands included
3. Tunnandaikandi paramba.	in their pattas. The first piece of land,

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

II. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Erd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th ~~July~~ 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2.50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0.50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1.68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by and had also been published and served on and acknowledged by the defaulters the mortgagees were not entitled to any notice under the Act, and that the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements, which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 103 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the

A.T.A.

remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present

N.E.M.

proper course would be to punish the officials at fault, not to sacrifice the law.

The Second and Third Members have recorded minutes of dissent. The Hon'ble

arrear in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and

right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

(2) The Tahsildar's order on the back of the list of lands that the standing crops should be proceeded against was not carried out.

been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

or colluded with those who coveted the land.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale.

time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that the sales are legal only to the extent necessary to recover the original arrear of Rs. 192-1-2; items 1 and 2 sold for Rs. 210 so that the sale of item No. 7 was illegal. Further the interest in patta No. 81 is not identical with that in No. 80, No. 77 or No. 112, and it is doubtful whether the lands included in it can be proceeded against for arrears due on any of the other three. However this may be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

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Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

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If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

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[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

186
Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1861, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Government (1898) of Madras. REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Exd. C. Parthasarathy.

20 Copies.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264 P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assess- ment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

(b) *Komukutti and his brother*.--Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They

Vide also their subsequent petition to the Collector.

appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) Komu Kutti and his brother the Tahsildar reported that Komu Kutti was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the Parappanangad Raja the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that Ayidross Haji mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except Komu Kutti and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amson adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the
Clearly.
A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?
G.S.F.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).
G.S.F.
A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

N.E.M.
G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that the sales are legal only to the extent necessary to recover the original arrear of Rs. 192-1-2; items 1 and 2 sold for Rs. 210 so that the sale of item No. 7 was illegal. Further the interest in patta No. 81 is not identical with that in No. 80, No. 77 or No. 112, and it is doubtful whether the lands included in it can be proceeded against for arrears due on any of the other three. However this may be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.
N.E.M.

Vide entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.
G.S.F.

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?
G.S.F.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.
REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act 11 of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar,
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assess- ment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2.50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0.50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1.68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amson of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They *Fide* also their subsequent petition to the Collector. appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the

A.T.A.

remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

?

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the

?

N.E.M.

10. So much as regards the land which forms the subject of the suit.

proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble

arrear in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the

time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	" Ahamad Marakar	23	1	0
112	" Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MAJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees

1. Kadampata paramba.	295-14-2 due from the jenmis thereof in
2. Kanisakandi paramba.	respect of these and other lands included
3. Tunnandaikandi paramba.	in their pattas. The first piece of land,

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted

Board's Proceedings, Mis. No. 790, dated 17th March 1898, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Encl. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1864.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th ~~July~~ 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 6	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.--Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They also their subsequent petition to the Collector.

appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangal Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangal Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements.

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law.

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the

A.T.A.

remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale.

time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity. N.E.M.

Vide entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1. G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go? G.S.F.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there

N.E.M.

was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted

Board's Proceedings, Mis. No. 790, dated 17th March 1898, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangal Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) *P. K. Panhan* claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangal Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the

First the Hon'ble Mr. Crole.

Fourth Mr. James Thomson.

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law.

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(2) The Tahsildar's order on the back of the list of lands that the standing crops should be proceeded against was not carried out.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that the sales are legal only to the extent necessary to recover the original arrear of Rs. 192-1-2; items 1 and 2 sold for Rs. 210 so that the sale of item No. 7 was illegal. Further the interest in patta No. 81 is not identical with that in No. 80, No. 77 or No. 112, and it is doubtful whether the lands included in it can be proceeded against for arrears due on any of the other three. However this may be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORDES.
20-7-98.

I quite agree with the Secretary's note.
If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[REUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. BLISS.
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Erd. C. Parthasarathy.

Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not reserved of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the *Raja's* agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' *kulikur*† improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' *kulikur* improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

First and Fourth Members (who with the former's casting vote constitute the

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems right.

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803. The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale. Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar ...	145	7	9
80	The said Avalankutti Marakar ...	35	15	4
77	" Ahamad Marakar ...	23	1	0
112	" Ahamad Marakar and Syed Ali Kutti ...	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought *Vide* Special Assistant Collector's proceedings. since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.

2. Kanisakandi paramba.

3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karriakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad anson of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not reserved of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears, and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari, the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's

First the Hon'ble Mr. Crole.

Fourth Mr. James Thomson.

First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the
Clearly.
A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble members, however, lays much stress upon the necessity of being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?
G.S.F.
A.T.A.
N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

collusion, and pass such orders as it deems right.
G.S.F.
A.T.A.
N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803. The case is posted for hearing on the 2nd August 1898.

9a. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(2) The Tahsildar's order on the back of the list of lands that the standing crops should be proceeded against was not carried out.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.
G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale.

time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.
File entries on the margin of paragraph 2 of this note.
We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.
be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought *Vide* Special Assistant Collector's proceedings. since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Enclosures

1898.

Regd.

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1893.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

- (1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;
- (2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;
- (3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and
- (4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 21st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer:

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution, it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C, Parthasarathy.

Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1864.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. June
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Trears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2.50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0.50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1.68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.--Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They *Vide* also their subsequent petition to the Collector.

appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alicenees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alicenee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's

First the Hon'ble Mr. Crole.

Fourth Mr. James Thomson.

First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems right.

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803. The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti ...	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

File entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing

N.E.M.

on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

G.S.F.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

9715
Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue,
and approving of the draft resolution proposed to be issued by it in regard to the defence of
a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897,

1. Kadampata paramba.
2. Kanisakandi paramba.
3. Tunnandaikandi paramba.

for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1864.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th ~~July~~ ^{June} 1898.
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2.50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0.50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1.68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrears.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895. Also paragraph 10 of Board's Proceedings at page 6 of the Government Order. But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amson adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

First and Fourth Members (who with the former's casting vote constitute the

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the

remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1893).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1893.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he

?

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(2) The Tahsildar's order on the back of the list of lands that the standing crops should be proceeded against was not carried out.

was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present

?

N.E.M.

or colluded with those who coveted the land.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the Revenue Inspector's letter reporting result of sale.

time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that

Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing

N.E.M.

the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

To the Hon'ble Sir H. Bliss—

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

To Secretary—

Please see draft on the docket.

Despatch urgent.

N.E.M.
26-7-98.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

N. E. MAJORIBANKS.
10-7-98.

G. S. FORBES.
20-7-98.

A. T. A[RUNDEL].
22-7-98.

G.S.F.
23-7-98.

H. W. B[LISS].
25-7-98.

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.
REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land,

1. Kadampata paramba.

2. Kanisakandi paramba.

3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 29 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II. of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1864.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amson of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother.*—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the *Raja's* agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895. Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

also adverted to the special rule * devised in Malabar for the protection of tenants, viz., that a separate patta should be given to the janmi for every tenant's holding, and remarked that although this rule did not apply in the letter to the unsettled taluks, scrupulous care had been taken for a long series of years to prevent a janmi pattadar from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the *ansom adhigari* the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the *ansom adhigari* the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.
Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble members, lays much stress upon the necessity of observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and collusion, and pass such orders as it deems right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity of observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and collusion, and pass such orders as it deems right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems right.

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 10 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note. We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

N.E.M.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

To the Honourable Member—

N. E. MARJORIBANKS.
10-7-98.

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 261-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 261-P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the legality of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the legality of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

20 Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.--Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur† improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immoveable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.

Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and collusion, and pass such orders as it deems right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems right.

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	" Ahamad Marakar	23	1	0
112	" Ahamad Marakar and Syed Ali Kutti ...	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that the sales are legal only to the extent necessary to recover the original arrear of Rs. 192-1-2; items 1 and 2 sold for Rs. 210 so that the sale of item No. 7 was illegal. Further the interest in patta No. 81 is not identical with that in No. 80, No. 77 or No. 112, and it is doubtful whether the lands included in it can be proceeded against for arrears due on any of the other three. However this may be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

File entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

How any more than any other mortgagees in Chingleput or Tanjore—so far as the facts of the case go?

G.S.F.

no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

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GOVERNMENT OF MADRAS.
REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 330, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

- The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1861.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *ju*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assess- ment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	8 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They

Vide also their subsequent petition to the Collector.

appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) Komu Kutti and his brother the Tahsildar reported that Komu Kutti was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the Parappanangad Raja the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that Ayidross Haji mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except Komu Kutti and his brother, the perpetual mortgagees who sent a second petition to Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur † improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaint land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

Why not?
N.E.M.
It does not appear that they were not given this option.
N.E.M.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

First the Hon'ble Mr. Crole.

Fourth Mr. James Thomson.

purpose of remedying any defect in law, or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law.

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(2) The Tahsildar's order on the back of the list of lands that the standing crops should be proceeded against was not carried out.

(3) Komu Kutti is stated to have been present at the sale. If so, and if he

?

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

was aware that all the property in the land was being sold away and that he could save his interest in it by the payment, Rs. 4-4-5, he would certainly have paid the amount.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (*i.e.* Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.
		RS. A. P.
81	Pudiyakath Avalankutti Marakar and Ahamad Marakar	145 7 9
80	The said Avalankutti Marakar	35 15 4
77	„ Ahamad Marakar	23 1 0
112	„ Ahamad Marakar and Syed Ali Kutti ...	91 6 1
		<hr/> 295 14 2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that Perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.

Vide entries on the margin of paragraph 2 of this note.

We have nothing to do with the sale of fields. Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought *Vide* Special Assistant Collector's proceedings. in time. But it is now more than a year since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (*vide* section 59 of Madras Act II of 1864, *six months*; and article 12 (c) of schedule II of India Act XV of 1877, *twelve months*).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.

7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N.E.M.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government (1898) of Madras.
REVENUE.

Recd.

Regd.

1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897,

- | | |
|----------------------------|---|
| 1. Kadampata paramba. | for the recovery of an arrear of Rupees |
| 2. Kanisakandi paramba. | 295-14-2 due from the jenmis thereof in |
| 3. Tunnandaikandi paramba. | respect of these and other lands included |
| | in their pattas. The first piece of land, |

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1861, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

- To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad, has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

20 Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED 27TH JULY 1898.

[SUBJECT.—*Cancellation of revenue sale ordered under Act II of 1864.*]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th ^{June} July 1898.
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assessment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord paying an annual revenue of Rs. 1,500 and as such possessed of much personal property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother.*—Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 106 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895.

Also paragraph 10 of Board's Proceedings at page 6 of the Government Order.

But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession.

G.S.F.

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold.

G.S.F.

involved in calling upon a tenant to pay up a large amount of arrear* not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the

Why not?

N.E.M.

It does not appear that they were not given this option.

N.E.M.

sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (vide previous paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were

First the Hon'ble Mr. Crole.

Fourth Mr. James Thomson.

perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honorable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

GOVERNMENT OF MADRAS.
REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 380, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

1. Kadampata paramba.

2. Kanisakandi paramba.

3. Tunnandaikandi paramba.

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

20 Copies.

Government (1898) of Madras. REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 380, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

Mis. No. 3148, REVENUE, 27TH JULY 1898.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Encl. C. Parthasarathy.

20 Copies.

REVENUE DEPARTMENT.

NOTES CONNECTED WITH G.O., No. 3148, REVENUE, DATED
27TH JULY 1898.

[SUBJECT.—Cancellation of revenue sale ordered under Act II of 1864.]

Reference from Board of Revenue (Land Revenue), No. 621, dated 7th July 1898. *June*
Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

To Under Secretary—

A difference of opinion having arisen between the Members of the Board of Revenue as to the line of defence that should be adopted in respect of a certain suit for the cancellation of a revenue sale, the Board of Revenue submits the case for the orders of Government under section 20, Regulation I of 1803. The facts of the case are as follows.

* Ahmad Marakar and P. Anaran Kutti Marakar.
† Paragraph 3 of the Tahsildar's report.

Name of field.	Extent.	Assess- ment.	Arrears due.	Price realized.
	ACS.	RS. A. P.	RS. A. P.	RS. A. P.
1. Kadampata ..	2-50	3 2 10	4 4 5	170 0 0
2. Karrisakandi ..	0-50	2 10 1	not known.	40 0 0
3. Thunnadaikandi ..	1-68	5 3 6	do.	130 0 0

2. Two joint pattadars * and janmis † in the Parappanangad amsom of Ernad in Malabar fell into arrears of revenue, amounting to Rs. 295-14-2 (*vide* however paragraph 10 below). A long list of lands standing in their names, all of which were encumbered, were attached and notified for sale; and the marginally-noted lands were sold on the 25th May 1897 in realization of the arrear.

The present suit relates only to the sale of item No. 1; but as the facts connected with the other two items throw light on the allegation of fraud made by the plaintiff, and are illustrative of similar cases, the facts known in connection with all the three items are summarized.

3. The following persons sent objection petitions to the Collector or the Divisional officer, and contended that the sales should not be confirmed:—

(a) *Ahmad Marakar*.—One of the joint pattadars and a janmi of the lands, describing himself as a wealthy landlord, paying an annual revenue of Rs. 1,500 and as such possessed of much personal

property. The grounds of his objection were—

- that he was not aware of the sale;
- that his personal property and the produce of his lands should have been proceeded against first; and
- that the sale of the lands was brought about by collusion between the subordinate Revenue officials and a person (Kunhali Kutti) who coveted these lands. This person was not, however, the successful bidder at the auction.

(b) *Komukutti and his brother*.---Claiming a perpetual (kanom) mortgage right of Rs. 87-8-0 over field No. 1, and alleging that they had executed improvements therein to the value of Rs. 750. They appear to have stated that there was no formal attachment of the land or proclamation of sale, and that they were not * aware of the sale, and prayed to have the sale set aside on the ground of material irregularity and fraud in conducting it.

Vide also their subsequent petition to the Collector.

* But he was present at the sale.

(c) *The Parappanangad Elaya Raja* (by his agent Ittiramia Panikar) alleged that he had purchased item No. 1 on the 22nd April 1897 when it was sold by the Civil Court for a debt due by one of the defaulters and that it was sold subsequently for revenue arrears without any notice to him.

(d) *Ayidross Haji* alleging that he had mortgage right with possession over item No. 2 under another who held a panayam right over the land under its janmi Ahmad Marakar. He was not liable to pay the Government assessment under the terms of the mortgage, but was obliged to pay it for the previous three years as the produce of the field was attached for the arrears; in 1897 the produce was not attached, but the janmam right was sold without any notice to him and without any reservation of his right.

(e) P. K. Panhan claiming mortgage right over item No. 3.

4. These petitions were referred by the Special Assistant Collector to the Tahsildar of Ernad for enquiry and report. In his report the Tahsildar stated that there was no irregularity in the attachment or sale of the land, that the notices prescribed by sections 25, 27 and 36 had all been served on and acknowledged by the defaulters and had also been published and proclaimed as required by the Act, and that the mortgagees were not entitled to any notice under the Act. In regard to the petition of defaulter (a) *Ahamad Marakar* the Tahsildar also said that the petitioner's statement that he was not aware of the sale was simply audacious as he had signed all the notices, that his co-pattadar was present at the sale and signed the sale list, that Government was not bound to proceed first against the moveable property, and that there was no collusion. In regard to the petition of (b) *Komu Kutti* and his brother the Tahsildar reported that *Komu Kutti* was present at the sale and could have got the land released from attachment if he chose, and that he was not entitled to a separate notice under the Act. As regards the *Parappanangad Raja* the Tahsildar stated that he must have been aware at the time of the court sale that arrears of revenue were due on the land, and that the Raja's agent was present at the revenue sale and could have got the lands released by paying down the arrears as he did other lands attached along with item No. 1. The Tahsildar's report says that *Ayidross Haji* mortgagee of item No. 2, was also present at the sale.

5. On receipt of this report the Special Assistant Collector dismissed the petition and confirmed the sale. None of the petitioners took any further action except *Komu Kutti* and his brother, the perpetual mortgagees who sent a second petition to the Collector which was rejected. They have now filed a suit in the District Munsif's Court of Shernad for the cancellation of the sale on the grounds—

(1) that the sale was fraudulent and collusive, and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikur + improvements which were worth Rs. 750 were not liable to be sold for arrears due by the pattadars and were not attached or advertised for sale, and that the paramba was sold for an utterly inadequate price;

(3) that the janmis' moveable properties were not proceeded against before the plaintiff land was sold.

6. The Collector requested the sanction of the Board to defend the suit and forwarded a draft written statement, in which it was stated that there was no fraud or collusion in the matter of the sale, that the sale was conducted with all the necessary proceedings in due course of law, that the plaintiffs' kulikur improvements

were duly attached and advertised for sale, that the defaulters had no moveable property sufficient for payment of the revenue in arrears and that even if they had it was optional with Government to proceed against any kind of property, moveable or immovable, and that no notice of attachment or sale was served on the plaintiffs as it was not required by law.

7. The Board as then constituted (Mr. Winterbotham was then acting 1st Member and in charge of Land Revenue) was of opinion that though the sale of the land might be shown to have been perfectly legal, a great injustice had been done to the mortgagee by the sale of his land for no fault of his. It observed that the local officials had contravened the principles underlying paragraph 8 of S.O. No. 103 and S.O. No. 108, which require that "every reasonable facility" should be given to tenants and mortgagees to save their interests, and that Collectors should not "sell lands in the possession of alienees until all the other lands and property in the possession of the registered holder are first sold unless the arrear due was caused by the default of the alienee." The Board

* Rule 5, clause (m), on page 17 of G.O., No. 394, dated 25th June 1895. Also paragraph 10 of Board's Proceedings at page 6 of the Government Order. But in this case the janmis were the pattadars themselves. The plaintiffs in the suit are the mortgagees in possession. G.S.F.

also adverted to the special rule * devised in Malabar for the protection of tenants, viz., that a separate patta should be given to the janmi for every tenant's holding, and remarked that although this rule did not apply in the letter to the unsettled taluks, scrupulous care had been taken for a long series of years to prevent a janmi pattadar

from getting the better of his tenant or mortgagee by procuring the sale of the latter's interest on account of arrears accruing on other portions of the holding. It was therefore of opinion that even though the sale may be legal and the plaintiffs have no remedy, every effort should be made to prevent the injustice involved in calling upon a tenant to

The Collector afterwards pointed out (dated 22nd March 1898) that this was not correct, and that an arrear was actually due on the land sold. G.S.F.

pay up a large amount of arrear * not due on his land on pain of having his holding assessed at a very small sum sold over his head; and directed the Collector to make an amicable

settlement with the purchaser to set aside the sale on repayment to him of the purchase money and of any legitimate costs to which he might have been put.

8. Again in its reference of the 31st March on the Collector's letter of the 22nd idem, it remarked that the fact of the mortgagee's having been present at the sale would not alter the case as they could not have released the lands in their possession unless they were given the option of paying the arrear due thereon, that the records connected with the sale showed that the local officials were fully aware of the district usage (*vide* previous

Why not?

N.E.M.

It does not appear that they were not given this option. N.E.M.

paragraph) violated by the sale, that on the back of the list of lands submitted by the amsom adhigari the Tahsildar had endorsed an order that he should attach the produce of the cocoanut and areca palms and other fruit trees on the defaulters' lands, and that if this order had been carried out, the sale would have been averted.

9. The Collector has reported that the purchaser is unwilling to come to terms. There is thus no alternative but to allow the suit to proceed, and the question is what is the line of defence to be adopted by Government. The written statement submitted by the Collector is to the effect that the proceedings taken by the local officials were perfectly legal and that the plaintiffs are not entitled to any remedy. The Board's First and Fourth Members (who with the former's casting vote constitute the

First the Hon'ble Mr. Crole. Fourth Mr. James Thomson.

majority) agree with the Collector and approve the draft written statement subject to slight alterations. They are of opinion that where the law is clear, acts done in accordance with its strict letter should be maintained; and that if the subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the

purpose of remedying any defect in law,

Clearly.

A.T.A.

Mr. Winterbotham, one of the dissentient members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the

But a mortgagee's interest is in danger of being sold in every revenue sale throughout the Presidency. This law is 100 years old and is known to everybody.

G.S.F.

Messrs. Crole and Thomson point out that the remedy in this case is to punish the executive officers at fault. If this is done, why should the universal effect deplored by Mr. Winterbotham occur?

A.T.A.

N.E.M.

But if the law is invoked, the law must be pleaded. The purchaser at the revenue sale (who is made second defendant) refused to agree to Mr. Winterbotham's compromise (from Collector, dated 16th April 1898).

G.S.F.

A.T.A.

collusion, and pass such orders as it deems

N.B.

In these circumstances the Board, at the instance of the Hon'ble Mr. Winterbotham, submits the case to Government under section 20 of Regulation I of 1803.

The case is posted for hearing on the 2nd August 1898.

9A. In connection with the allegation of fraud and collusion, attention is invited to the following considerations:—

(1) The land in question appears to have formed the subject of suits in which unsuccessful attempts were made to oust the plaintiffs.

There may have been good reasons, e.g., they may have been cut.

N.E.M.

(3) Komu Kutti is stated to have

?

Anyhow he did not. There is no reason to doubt his having been present.

N.E.M.

G.S.F.

(4) The Parappanangad Raja's agent is also said to have been present at the sale. If so, would he not have saved his master's interest by the payment of the arrear? He was either not present or colluded with those who coveted the land.

N.E.M.

10. So much as regards the land which forms the subject of the suit.

or with time-honoured local usage, the proper course would be to punish the officials at fault, not to sacrifice the law. The Second and Third Members have recorded minutes of dissent. The Hon'ble members, lays much stress upon the necessity for observing local usage which he points out was actually followed in the present sales in respect of two items which had been attached in connection with the arrears in question; and further urges that, if Government is to make the settlement with the janmi, it is absolutely necessary to protect the tenant from being sold up for arrears not due on their holdings, that if the suit be defended on the ground that the procedure was within the letter of the law, no incumbrancer or tenant whom a big janmi wished to injure could keep his holding, and that the district would soon be full of evicted and ruined tenants smarting under a sense of injury which they have done nothing to merit and for which they are denied a remedy. His conclusion is that Government should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the civil court, but that on the other hand Government should admit that the sale was conducted in violation of the custom of the district and request the court to investigate the plaintiffs' allegation of fraud and right. The Hon'ble Mr. Sturrock concurs in the view taken by Mr. Winterbotham, but is of opinion that the court cannot interfere if it finds no fraud.

The vernacular records forwarded with the Board's Proceedings bring out the following facts:—

The amount of arrears for which processes under sections 25, 27 and 36 were issued was Rs. 192-1-2, and thirty-seven fields comprised in the joint patta No. 81 of Avalankutti Marakar and Ahamad Marakar were advertised for sale in April 1897. The amount of arrears at the time of sale in May is however given as Rs. 295-14-2 made up the following details, and it does not appear that any processes were issued with respect to the addition of Rs. 103-13-0 (i.e. Rs. 295-14-2 minus Rs. 192-1-2):—

Patta No.	Name of Pattadar.	Amount of arrears.		
		RS.	A.	P.
81	Padiyakath Avalankutti Marakar and Ahamad Marakar	145	7	9
80	The said Avalankutti Marakar	35	15	4
77	Ahamad Marakar	23	1	0
112	Ahamad Marakar and Syed Ali Kutti	91	6	1
		295	14	2

The three items sold were Nos. 1, 2 and 7 on the list advertised. The Revenue Inspector says that No. 3 had been encroached upon by the sea and was consequently not put up for sale; that Nos. 4 and 5 had been released by the persons in possession on payment of the arrears due thereon; that Nos. 6 and 7 were in the possession of the same person, and that the latter of the two was sold as it was smaller and less valuable.

The first remark that these facts call for is that the above additional sum of Rs. 103-13-0 does not appear to have been demanded from the defaulter, and that perhaps all the notices have not been sent up? The Board would hardly have failed to notice so important an irregularity.

N.E.M.
Vide entries on the margin of paragraph 2 of this note.
We have nothing to do with the sale of fields Item No. 7. The suit relates to Item No. 1.

G.S.F.

be, the sale of item No. 7, could have been set aside on the ground stated above if a proper representation had been made to the Collector, or if a suit had been brought since the sale was confirmed on the 29th June 1897 and any suit will be barred by limitation (vide section 59 of Madras Act II of 1864, six months; and article 12 (c) of schedule II of India Act XV of 1877, twelve months).

11. The illegality referred to in the previous paragraph has, of course, no bearing on the present suit which relates solely to the sale of field No. 1, but taken with the facts connected with the sale of this field it shows what a helpless lot the Malabar Kanomdars and mortgagees are. If the report of the Tahsildar is to be believed, the persons affected by the sale have allowed their interests to be sold away under their very nose, and made no attempt to save them although they could have done this by the payment of a few rupees which they could have subsequently recovered from the defaulters.

R.S.
7-7-98.

To Secretary—

Mr. Winterbotham no doubt points out clearly the evils which would ensue if the procedure which obtained in this case was applied universally. But there is no question of applying it universally. In this particular case the evil has been done, and it is submitted that the law should not be stultified to enable the Civil Court to apply a remedy. The power of the Civil Court to apply a remedy seems moreover very doubtful because it is not contended (by Mr. Winterbotham) (and I submit cannot, on the present facts, be contended) that there was fraud or collusion * on the part of the revenue authorities conducting the sale.

It does not appear that the plaintiffs have been so very badly treated in the matter. Had they paid the arrear, it would have constituted a debt to them by the defaulter (section 35 of the Act). They do not seem to be people for whom Government need have any special consideration—*vide* Collector's letter, dated 22nd March 1898.

N. E. MARJORIBANKS.
10-7-98.

To the Honourable Member—

It is submitted that in this case Government must agree with the Board's decision as determined by the casting vote of the first Member.

There was no irregularity in the procedure connected with the sale; and there is no ground to assume that there was fraud or collusion.

As I have already noted in the margin above the law has been invoked, and we can rely on the law only for our defence. To plead that some district custom has not been observed, and leave the court in a vague way to do "justice" is not a line of defence which can, it is submitted, be approved. This would be to set aside the law enacted by the legislature. Moreover it would be in the highest degree inexpedient and would land us in inextricable confusion. If departmental orders have been violated those who violated them may be dealt with departmentally, but they cannot be brought into this case. The law lays down definitely and distinctly the procedure to be adopted and defines clearly how the rights of parties are affected.

If Mr. Winterbotham's compromise had been accepted, well and good, but it has not been accepted by the auction purchaser and so that mode of removing the hardship which the revenue sale law may have done in this case (and must occasionally do in every country, where Crown rights take precedence of private interests) is not now open to the Government.

G. S. FORBES.
20-7-98.

I quite agree with the Secretary's note.

If the law is wrong it can perhaps be altered, but so long as it exists it must be carried out. Let the Hon'ble Sir H. Bliss see this however.

A. T. A[RUNDEL].
22-7-98.

To the Hon'ble Sir H. Bliss—

G.S.F.
23-7-98.

I also agree. We cannot abandon the principle that the Government Revenue is the first charge on the land. Mortgagees in Malabar, as elsewhere, must take care of themselves. It seems to me that the law as it stands, gives them ample means of doing so. I can see no evidence of fraud or collusion.

H. W. B[LISS].
25-7-98.

To Secretary—

Please see draft on the docket.

N.E.M.
26-7-98.

Despatch urgent.

G.S.F.
27-7-98.

[Issued as G.O., No. 3148, Revenue, dated 27th July 1898.]

Government {1898} of Madras.
REVENUE.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

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With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

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The papers read above relate to a suit for the cancellation of a revenue sale.

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The marginally-noted three items of land were sold on the 25th May 1897, for the recovery of an arrear of Rupees 295-14-2 due from the jenmis thereof in respect of these and other lands included in their pattas. The first piece of land, Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikbur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikbur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

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law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 21st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal.

The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

I dissent from part of the resolution as I consider that this is a case in which, while guarding all the technical rights possessed by Government, we ought specifically to ask the Court to investigate the charge of fraud as suggested by Member, third (now second). The draft written statement approved in the resolution is therefore, in my opinion, defective without the addition proposed by Mr. Winterbotham.

2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

3. From some remarks in Member's (third) minute I gather that he anticipates that the Court may, and ought to, grant redress even if fraud be not proved. In this I am unable to agree with him, and therefore approve of the draft written statement so far as it goes. If our subordinates have acted mistakenly—but still within their legal rights—and there has been no fraud in collusion with the purchaser, the Court cannot interfere, and the particular relief sought would be unfair to the purchaser, and has a damaging effect on revenue sales generally.

4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

20 Copies.

Government (1898) of Madras. REVENUE.

Recd.

Regd.

1898.

Enclosures

Spare copies

G.O., Mis. No. 3148, 27th July 1898.

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1. Kadampata paramba.

2. Kanisakandi paramba.

3. Tunnandaikandi paramba.

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2. In order to enable Government to cope with fraud directed against it, the law has vested it with very wide powers with regard to the sale of land registered in the name of a defaulter, but in every district precautions of some kind are taken to prevent this power being misused by the unnecessary sale of land in the occupation of one person for arrears due on land in the occupation of others, and in the present case the district practice in this respect has been ignored to such an extent as to give colour to the plaintiff's plea that there has been fraudulent collusion with the purchaser. Unfortunately the matter has reached a stage in which the Board is not in a position itself to grant the redress sought, but an uncompromising adoption of a line of defence which assumes the good faith of all the other defendants does not seem to me to be called for.

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4. If the Court finds there has been no fraud and dismisses the suit, we can then hold any further enquiry that may be necessary, and consider whether we should order our subordinates to indemnify the plaintiff for any injustice he has suffered through their neglect or carelessness.

J. STURROCK.

Read—Proceedings of the Board of Revenue (Land Revenue), Mis. No. 1658, dated 27th June 1898.

ABSTRACT.—Submitting, for the information of Government, letter from the Collector of Malabar stating that O.S. No. 611 of 1897 on the file of the District Munsiff of Shernad has been adjourned to 2nd August 1898.

Order—Mis. No. 3148, Revenue, dated 27th July 1898.

The Government concurs with the majority of the Board and approves of the draft resolution it is proposed to issue.

(True Extract.)

(Signed) G. S. FORBES,
Secretary to Government.

To the Board of Revenue (Land Revenue), with enclosures.

Exd. C. Parthasarathy.

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Government (1898) of Madras. REVENUE.

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G.O., Mis. No. 3148, 27th July 1898.

JULY.

Expressing the Government's concurrence with the majority of the Board of Revenue, and approving of the draft resolution proposed to be issued by it in regard to the defence of a suit in Malabar for the cancellation of a revenue sale.

GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 621, dated 7th June 1898:—

Read—again Board's Proceedings, Mis. No. 790, dated 17th March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 22nd March 1898, and Ref. No. 350, dated 31st March 1898.

Read—letter from G. W. DANCE, Esq., Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264-P. of 1898, dated 16th April 1898.

Read—the following Reference from the Board of Revenue (Land Revenue), No. 572, dated 21st May 1898:—

With reference to the correspondence ending with his letter Ref. on C. No. 264/P. of 1898, dated the 16th ultimo, the Collector of Malabar is requested (a) to apply for an adjournment of the hearing in Original Suit No. 611 of 1897 on the file of the Shernad District Munsif for two months from the 1st proximo, as orders cannot be passed in the matter at once and (b) to re-submit the records which were returned to him with Board's Reference No. 380, dated 31st March 1898.

Read—also letter from F. C. PARSONS, Esq., Acting Collector of Malabar, to the Secretary to the Commissioners of Land Revenue, Madras, Ref. on C. No. 264/P. of 1898, dated 23rd May 1898:—

Reference—No. 621, dated 7th June 1898.

The papers read above relate to a suit for the cancellation of a revenue sale.

2. The facts of the case are as follows:—

The marginally-noted three items of land were sold on the 25th May 1897,

- | | |
|----------------------------|---|
| 1. Kadampata paramba. | for the recovery of an arrear of Rupees |
| 2. Kanisakandi paramba. | 295-14-2 due from the jenmis thereof in |
| 3. Tunnandaikandi paramba. | respect of these and other lands included |
| | in their pattas. The first piece of land, |

Kadampata paramba, when put up for sale was knocked down for Rs. 170; and the sale thereof was confirmed by the Special Assistant Collector on the 29th June 1897, as the Tahsildar's report showed that the proceedings connected with the attachment and sale had been conducted in accordance with the provisions of the Revenue

Recovery Act. The plaintiffs in the present suit, who claim a perpetual kanam right over the land, thereupon preferred an appeal to the Collector on the grounds that the paramba had been sold without any formal attachment or proclamation, and that, if they had known that the property was going to be sold for arrears of revenue, they would have paid up the demand. Their appeal was rejected, however, on the ground that the requirements of the law had been complied with, and because one of the appellants was reported to have been present at the revenue sale and must have had an opportunity of procuring the release of the land by paying up the arrear. On receipt of the appeal order the appellants filed a suit for the cancellation of the sale on the following grounds:—

(1) that the sale of the plaint paramba was fraudulent and collusive and that the necessary processes were not issued and published according to law;

(2) that the plaintiffs' kulikhur improvements were not liable to be sold for the recovery of the arrears due from the pattadars and were not actually attached or advertised for sale, such improvements being alone worth Rs. 750, while the paramba was purchased at the revenue sale for the utterly inadequate price of Rs. 170;

(3) that the arrears due on the plaint paramba being only Rs. 4-4-5, the plaintiffs' improvements were practically sold for the arrears of revenue due from the jenmis in respect of other lands owned by them; and

(4) that the jenmis' moveable properties were not proceeded against before the sale of the plaint land.

3. In his letter No. 2875/P. of 1897, dated 11th February 1898, disposed of in the first of the papers read above, the Collector asked for sanction for the defence of the suit and submitted a draft-written statement for approval. It was proposed to urge on behalf of Government that the proceedings connected with the attachment and sale of the plaint land had been conducted in strict accordance with law and without any collusion, deceit or fraud, that the plaintiffs' kulikhur improvements had been duly attached and advertised for sale, that the pattadars did not possess sufficient moveable property for distraint and that even if they had, it was at the option of Government to proceed against either the moveable or the immoveable properties of the defaulters, and as the sale of the plaint paramba was valid, it had extinguished all the plaintiffs' rights and encumbrances thereon.

4. As the facts of the case showed that the plaint paramba which was assessed at only Rs. 3-12-10 had been sold for the recovery of an arrear of Rs. 295-12-11, of which Rs. 292 were due from the pattadars in respect of other lands in which the plaintiffs had no concern, the Board, as then constituted, considered that the local officials had contravened the principles underlying paragraph 8 of Standing Order No. 106 and Standing Order No. 108, as well as the established custom of the district, and called upon the Collector to make an amicable arrangement with the purchaser at the revenue sale for the surrender of the plaint land to the plaintiffs on payment of the purchase money and legitimate costs. The Collector, however, has since reported in the third paper read above that the purchaser is unwilling to come to terms. It is, therefore, necessary to allow the suit to proceed and to decide what line of defence to adopt. In regard to this question a difference of opinion has arisen between the Members of the Board, and a reference to Government under section 20 of Regulation I of 1803 is now made at the instance of the Third Member (the Hon'ble Mr. Winterbotham).

5. The First and Fourth Members (the Hon'ble Mr. Crole and Mr. J. Thomson), who with the President's casting vote constitute a majority, are of opinion that the sale is legally valid under Act II of 1864, even though the district usage and the Board's Standing Orders may have been contravened, and approve the lines of defence recommended by the Collector, subject to certain alterations as indicated in the attached copy of the Resolution approved by them. They consider that where the law is clear, acts done in accordance with the strict letter thereof should be maintained. If the law is defective, and subordinate officials wilfully or carelessly fail to comply with the orders issued by the Board for the purpose of remedying such defect, or with a time-honoured local usage which is calculated to make the

law work more equitably, the proper course, in the opinion of the Board's First and Fourth Members, is to punish the officials at fault; and not to sacrifice the law by allowing the *legality* of their action to be questioned. In this case, enquiry as to the conduct of the officials concerned may, if necessary, form the subject of enquiry after the suit is decided, but the Board's First and Fourth Members can see no justification for questioning the *legality* of the sale. They observe that sections 35 and 37 afford protection to mortgagees in the position of the plaintiffs and that legal force cannot be attached to the executive orders intended to afford additional security for the interests of such persons.

6. The Board's Second and Third Members have recorded separate minutes of dissent and copies of these are enclosed.

7. The orders of Government are accordingly solicited. The suit was posted for hearing on the 1st instant, but the Collector has issued instructions to the local pleader to apply for an adjournment for two months.

(Signed) LIONEL DAVIDSON,
Acting Secretary.

To the Secretary to Government, Revenue Department,
with a file of Collector's letters and records
to be returned and copies of the draft resolution
and revised written statement, Board's Proceedings,
No. 790, dated 17th March 1898, and
Ref. No. 380, dated 31st March 1898, and
with copies of minutes of Members 2 and 3.

ENCLOSURE.

Note by Member 3 (now 2), dated 11th May 1898.

The question before the Board in this case is what defence should be made to a suit brought by a Malabar kanamdar (mortgagee) to set aside the sale of his land under Act II of 1864, for a large arrear due by the janmipattadar on land in which the kanamdar had no interest.

2. The Collector proposes to plead that the sale was held in strict accordance with Act II of 1864, and that the suit should accordingly be dismissed.

A majority of the Board resolves to approve the draft answer.

3. The Proceedings of the Board already issued with reference to this suit, and quoted in the margin, contain the reasons which compel me to dissent from the majority of the Board, and induce me to move, under section 20 of Regulation I of 1803, that the Proceedings be referred for the orders of the Governor in Council.

4. The following is a brief statement of the facts. The revenue defaulters (defendants 3 and 4 in the suit) are large janmis (landholders) with numerous tenants holding lands on kanam and other tenures.

For some reason they (the janmipattadars) allow the revenue due from them to fall into arrears to the amount (as is reported) of about Rs. 296. Under an old and well established practice of the district the village officers, as a step towards recovering the arrear, attached all the lands in the defaulters' patta because the defaulters possessed no land unencumbered. The object of this practice is to give each tenant of the defaulter the opportunity of paying up such fraction of the total arrear as is due on his holding, and of thus procuring the release of his land.

5. A long list of fields, dry, wet and garden, were thus attached, and plaintiffs' garden comes first on the list. The assessment on it is Rs. 3-12-10, and it was sold for an arrear of Rs. 295-14-2, for Rs. 292-1-4 of which plaintiff was in no way answerable.

Complete satisfaction of the arrear was obtained by further selling items 2 and 7 on the list, in respect of which (for whatever reason) no complaint has been made, and the sale of the other fields under attachment was then stayed.

It is noteworthy that in his report on the sale the Revenue Inspector states that the tenants of items 4 and 5 on the sale list came forward and paid up the fraction due on the said items, and that he therefore released those items from attachment.

He thus shows his acquaintance with the district practice above alluded to.

6. I can remember no instance of such a sale being allowed during the period of nearly 12 years that I served in the district, and I shall be surprised if any precedent can be quoted since.

The Acting Special Assistant Collector and the Collector confirmed the sale on appeal. The Acting Special Assistant Collector possibly did not know the district practice, sale of land for arrears being very rare.

His order shows no acquaintance with it.

Mr. Dance must have known the district practice, and I can only express my surprise that he should have overlooked so patent and flagrant a breach of it.

7. In the records connected with the sale the village officers, the Revenue Inspector and the Tahsildar all disclose their knowledge of the district practice, and I don't see how it can be denied that the plaintiff is the victim of a grave injustice perpetrated by conducting the sale in defiance of a well-known and long-established district rule.

8. If our settlement is to be with the janmi (as it happens to be in this instance) it is absolutely necessary to protect the tenants from being sold up for arrears not due on their holdings. As regards the only taluk which has been settled (Wynaad) this necessity has been recognized by a rule directing that the janmi should have a separate patta issued to him for every tenant's holding. The district practice effects the same object by arranging that every tenant should be able to procure the release of his holding from attachment by paying up the assessment due thereon.

9. If the procedure followed in this case be defended on the ground that it is within the letter of the law, no encumbrancer or tenant whom a big janmi wishes to injure can keep his holding, and we shall soon have the district full of evicted and ruined tenants smarting under the sense of injury which they have done nothing to merit and for which they are denied a remedy.

10. Suppose a big janmi has granted a piece of land on mortgage, and that the mortgagee has planted fruit trees and is entitled on redemption of the mortgage to a large sum as compensation for improvements. The janmi has only to allow arrears on his other property to accumulate, and if he can then square the village and taluk officers so that this mortgaged garden may be attached and sold for the arrear he will get the whole benefit of the improvements and of the mortgage amount, for the land is sold free of encumbrances.

This is exactly what the plaintiff in effect alleges to have occurred in this case.

11. I (when acting as First Member) endeavoured to bring about a compromise of the suit; but the auction purchaser will not agree.

What I now urge is that we should not, by pleading the letter of the law, raise any unnecessary obstacle to the sale being set aside by the Civil Court.

I think that we should admit that the sale was conducted in violation of the custom of the district, and that we should request the Court to investigate the plaintiff's allegations of fraud and collusion and to pass such orders as it deems right.

H. M. WINTERBOTHAM.

MINUTE.

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