APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar, and Mr. Justice Davies.

VASUDEVAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SANKARAN AND OTHERS (DEFENDANTS NOS. 1 TO 14 AND 17 AND 18), RESPONDENTS.*

1896. April 23. 1897. January 27.

Malabar law—Decree against karnavan binding on tarwad.

A decree in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 343 of 1893, confirming the decree of A. N. Anantarama Ayyar, District Munsif of Angadipuram, in original suit No. 673 of 1892.

Suit to recover certain land of which defendant No. 18 was in possession. The land was formerly the property of a Nambudri illom which had become extinct. A conflict as to the right of succession to its property arose between the illom to which the plaintiffs belonged and of which defendants Nos. 15 and 16 were respectively, the karnavan and the senior anandravan on the one hand, and that of which defendant No. 17 was karnavan and defendants Nos. 1 to 14 were members on the other hand. In 1876 the karnavan of the plaintiffs' illom sued the karnavan and senior anandravan of the rival illom for partition of the properties in dispute, and in a subsequent suit of 1878 against the same parties he obtained a decree for possession of the land now in question. The junior members of the unsuccessful defendants' illom brought a suit in 1877 against the decree-holder and his senior anandravan to recover the land now in question and for a declaration of their right of succession to the property of the extinct illom. In that suit the present sixteenth defendant was described as the karnavan and manager of the illom, and the present plaintiffs Nos. 1 and 2,

* Second Appeal No. 501 of 1895.

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who were then minors, were sued by him as their guardian *ad litem*. That suit was determined on second appeal in favour of the then plaintiffs. See *Shankaran* v. *Keswan*(1). The present plaintiffs now sued to recover the land, alleging that they were not parties to that suit and that the decree was not binding on them.

The District Munsif held that the question was *res judicata* and dismissed the suit, and his decree was affirmed on appeal by the District Judge.

The plaintiffs preferred this second appeal.

This second appeal having come on for hearing before Mr. Justice Shephard and Mr. Justice Subramania Ayyar, their Lordships made the following order of reference to Full Bench :—

ORDER OF REFERENCE TO FULL BENCH.—Vakils on both sides agreeing to this form of question, we refer it to a Full Bench having regard to the importance of the matter and the conflict of decisions : Whether the decree, made in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties ?

The case came on for hearing before the Full Bench consisting of COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYAR and DAVIES, J.J.

Mr. *J. Adam* and *Sankaran Nayar* for appellants.

Krishnasami Ayyar for respondents.

Sankaran Nayar for appellants.

Ittiachan v. *Velappan*(2) decides that a decree against a karnavan as such alone, is not binding on the tarwad see *Sri Devi* v. *Kelu Eradi*(3). *Subramanyan* v. *Gopala*(4). In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(5), Kernan, J., upholds the contention that the decree is binding. These decisions proceed on a consideration of Civil Procedure Code, section 13, explanation 5, relating to cases where a private right is claimed for the plaintiff in common with others. The position of a karnavan is defined in *Kombi* v. *Lakshmi*(6); see also

(1) I.L.R., 15 Mad., 6.
(2) I.L.R., 8 Mad., 484.
(3) I.L.R., 10 Mad., 79.
(4) I.L.R., 10 Mad., 223.
(5) I.L.R., 2 Mad., 328.
(6) I.L.R., 5 Mad., 201.

Kalliyani v. *Narayana*(1). A karnavan cannot alienate land directly, and he cannot do it indirectly by suffering a decree to be passed against him. He is not the agent of the family to make alienations. In each case he must have actual authority. Supposing a suit is brought by a creditor against a karnavan for a debt alleged to be due by a tarwad and a decree is passed and tarwad property is attached, it is open to the Judge to go behind the decree and see if it is binding on the property. Where the debt is contracted for the benefit of the tarwad the consent of the anandravans is implied *Vasudeva* v. *Narayana*(2). In that case the decree was passed for land in possession of the karnavan, who alleged that it belonged to his tarwad. The tarwad having been dispossessed in execution the junior members were permitted to sue. In *Thenju* v. *Chinnu*(3) the karnavan offered to be bound by an oath as to whether or not the decree so obtained was binding on the tarwad. *Kombi* v. *Lakshmi*(4) was the case of a defendant. By analogy with the law relating to members of a numerous partnership, all the members of a tarwad should be served. The question referred should, on the principles now established, be answered in the negative.

Krishnasami Ayyar for respondent.

It is not open to the plaintiffs to re-open the suit. Assuming, of course, that the karnavan has been guilty of no fraud, the decree against him cannot be impeached. The claim in *Ittiachan* v. *Velappan*(5) raised a question of the character of the debt, and the plaintiffs sought a declaration that it was not binding on them the decision in that case was followed in *Subramanyan* v. *Gopala*(6) and also in *Sri Devi* v. *Kelu Eradi*(7) where the limitations of the rule are explained. The result of the authorities is that where a suit is brought as here against a karnavan in his capacity as such the other members are bound by the decree is binding unless fraud is proved. Under Hindu Law one member of the family could only impugn the decree to the extent of his share. Here one member seeks to set aside the decree, not in part but in its entirety. The distinction between cases where the karnavan is plaintiff or defendant is pointed out in *Vasudeva* v. *Narayana*(2)

(1) I.L.R., 9 Mad., 266.
(2) I.L.R., 6 Mad., 121, 124.
(3) I.L.R., 7 Mad., 413.
(4) I.L.R., 5 Mad., 201.
(5) I.L.R., 8 Mad., 484.
(6) I.L.R., 10 Mad., 223.
(7) I.L.R., 10 Mad., 79.

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se also *Cockburn* v. *Thompson*(1). Under Civil Procedure Code, section 13, persons who were represented by parties to the former action may be bound by the decree. A suit on behalf of a minor brought by his guardian is really a suit by a guardian representing the minor, but the adjudication is binding as against the minor. Compare *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*(2) which was a case of Hindu Law. The present case is stronger one, because the karnavan has larger powers than the managing member of a Hindu family, *Narayan Gop Habbu* v. *Pandurang Ganu*(3), *Gansavant Bal Savant* v. *Narayan Dhond Savant*(4): see also *Harrison* v. *Stewardson*(5) 1 Daniell's Chancery Practice, chapter IV, section 1. Section 13, explanation 5, is not confined to cases under section 30. See *Madhavan* v. *Keshavan*(6), *Chandu* v. *Kunhamed*(7), *Latchanna* v. *Saravayya*(8). Hukum Chand on *Res judicata*, paragraph 89. Where it is an indivisible right, one party represents the others. It is otherwise where the right is divisible. *Hazir Gazi* v. *Sonamonee Dassee*(9), *De Hart* v. *Stevenson*(10). If such a decree is not final, further suits will be instituted on the chance of a different conclusion being arrived at, *Dawan Singh* v. *Mahip Singh*(11).

Mr. *J. Adam* in reply—

Moidin Kutti v. *Krishnan*(12) re-affirms *Ittiachan* v. *Velappan*(13) and to disturb the rule there laid down and to revert to what may have been the law before, would disturb many rights and give rise to much litigation. The possession for which the appellants contend involves no hardship, as persons desirous of binding a tarwad can always adopt the procedure provided by section 30, see *Komappan Nambiar* v. *Ukkaran Nambiar*(14).

COLLINS, C.J.—The question referred to the Full Bench is, whether the decree, made in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties. I take it that the word 'honestly' means that the karnavan acted in good faith and in what he believed to

(1) 16 ves. 321. (2) 14 M.I.A., 36. (3) I.L.R., 5 Bom., 685.
(4) I.L.R., 7 Bom., 467. (5) 2 Hare., 530. (6) I.L.R., 11 Mad., 191.
(7) I.L.R., 14 Mad., 324. (8) I.L.R., 18 Mad., 164. (9) I.L.R., 6 Calc., 31.
(10) 1 Q.B.D., 313. (11) I.L.R., 10 All., 441. (12) I.L.R., 10 Mad., 322.
(13) I.L.R., 8 Mad., 484. (14) I.L.R., 17 Mad., 214.

be the interest of the tarwad. The karnavan of a Malabar tarwad is, except under certain circumstances, the eldest male member of the tarwad; in him is vested actually all the property movable and immovable belonging to the tarwad; he manages the property of the tarwad and can invest the money of the tarwad either on loans or other security as he may think fit. He can also grant the land on kanom or on otti mortgage. No member of the tarwad can call for an account of the income, nor can a suit be maintained against him for an account of the tarwad property in the absence of fraud on his part. He can sue in his own name for the purpose of recovering or protecting the property of the tarwad, and none of his acts in relation to the above matters can be questioned, provided he has acted in good faith. He is restrained, it is true, from alienating the lands of the tarwad in his capacity as manager except in certain instances, *e.g.*, when a decree is in course of execution against the tarwad property and against the karnavan, and he alienates such property in good faith there being no other means available, and in the case where it is absolutely necessary to do so to pay arrears of revenue. The karnavan is not a mere trustee of the property of the tarwad; he is the natural guardian of every member within the family, and it was well said by Mr. Holloway in appeal suit No. 120 of 1862 (Malabar) "a Malabar family speaks through its head the karnavan, and in "Courts of Justice except in antagonism to that head can speak "in no other way." It appears that, during the time Holloway, J., was in the High Court, the proposition that the members of the tarwad were bound by the acts of the karnavan in cases in which he sued or was sued in his representative capacity was never seriously disputed, and the cases cited at the bar do not appear to me to overrule the proposition. I would adopt the view of the powers of the karnavan as laid down in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1), and there are many cases quoted by Mr. Wigram in his work on Malabar Law and Custom which support the proposition.

I would hold, therefore, that when a karnavan sues or is sued in his representative capacity and acts, in the terms of the order of reference, 'honestly,' the other members of the tarwad are bound

(1) I.L.R., 2 Mad., 328.

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by the decision. I answer, therefore, the order of reference to the Full Bench in the affirmative.

The sections of the Code of Civil Procedure cited in argument do not affect the matter one way or the other.

SHEPHARD, J.—The question raised by the reference is one of considerable importance. Since 1880 it has constantly been discussed in this Court. Different views have been propounded, and it would not be easy to reconcile all the decisions. I propose first to examine these decisions and afterwards to consider the question from other aspects, and also with reference to the arguments which are urged against the admission of the principle that a karnavan can properly represent his tarwad in suits professedly brought by, or against, the tarwad.

In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1), the senior member of an illom had been sued as such for the recovery of land alleged by him to belong to the illom. A decree having been passed against him, a junior member of the illom, alleging fraud, sued for a declaration with regard to the same land as against the plaintiff in the first suit. It was held that the junior was properly represented by his senior in the first suit, and that therefore having failed to prove fraud, he could not succeed in the second suit. In *Kombi* v. *Lakshmi*(2) a decree for money had been obtained against the karnavan and a suit was brought by the anandravan to set aside the sale in execution of the decree. It does not seem to have been proved that the karnavan was sued or sought to be made liable otherwise than in his personal capacity. The Court distinguished the case of a debt from the case of land such as was under consideration in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1). It held that the junior members were entitled to a decree on the creditor failing to prove that the debt was properly incurred for the purposes of the tarwad. It was in effect said that if the creditor intended to make the tarwad liable he ought to have made them parties or applied under section 30 of the Code.

In *Vasudeva* v. *Narayana*(3) Mr. Justice Innes, who was a party to the last decision, expresses the same view again. That was a case in which a member of an illom, apparently the eldest, was

(1) I.L.R., 2 Mad., 328. (2) I.L.R., 5 Mad., 201.
(3) I.L.R., 6 Mad., 121.

defeated in a suit brought against him for redemption of certain land. In the second suit brought by his brother to recover the same land, it was held by Innes, J., that, although no fraud was alleged the brother was not bound by the former decree. Mr. Justice Kernan, who had taken part in the judgment in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1), considered that it was unnecessary to decide the question whether the case of a Malabar tarwad was an exception from the ordinary rule that all persons sought to be affected by a suit should be made parties to it. The learned Judges agreed that the case was distinguishable from that in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1). With all deference, I must say that, assuming that the elder brother in *Vasudeva* v. *Narayana*(2) was sued in his representative capacity, I can see no material distinction between the two cases. The circumstance that, in the earlier case, the plaintiff alleged fraud and left it to be assumed that otherwise he was bound by the decree is suggestive as indicating the opinion entertained by him and his advisers as to the position of the head of a Malabar family. But I do not understand why, because he failed to prove the alleged fraud, he should not have had relief on the simple ground that he was not duly represented in the former suit, if that ground was considered tenable. It appears to me that the judgment in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1) was clearly intended to show that that ground was not tenable. In *Thenju* v. *Chimmu*(3) the two extreme views are stated : *First*, "a judgment is only binding *inter partes* and the judgment against the karnavan is in no case binding on the anandravans"; *Second*, "a karnavan is the head and representative of the family, and the judgment against him binds the anandravans unless he was guilty of fraud or collusion." It was not necessary in that case to attempt a reconcilement of the decisions.

In *Hoji* v. *Atharaman*(4) it appears to have been assumed that a decree against the karnavan for a debt alleged to be the tarwad debt was binding on the tarwad. There was no actual decision. In *Ittiachan* v. *Velappan*(5) the question came before a Full Bench with reference to decrees for debt. The question stated in the

(1) I.L.R., 2 Mad., 328. (2) I.L.R., 6 Mad., 121. (3) I.L.R., 7 Mad., 413.
(4) I.L.R., 7 Mad., 512. (5) I.L.R., 8 Mad., 484.

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judgment was as follows:—"Under what circumstances a decree "passed against a karnavan of a Malabar tarwad will be binding "on the other members of the tarwad who may not have been made "parties to the suit, so that a sale in execution will convey the rights "of the tarwad in the property sold in execution to a purchaser?" As might have been expected no definite answer was given to this question. The general effect of the observations made in the first part of the judgment seems to be that, in the opinion of the Court, the admitted practice of treating the karnavan as a sufficient representative of the tarwad was not strictly regular, but that notwithstanding it must be tolerated within certain bounds. In dealing with the particular cases under reference, the Court treated the circumstance that the karnavan had or had not been sued in his representative character as the cardinal point on which to decide whether or not the tarwad was bound by the decree. The next case *Sri Devi* v. *Kelu Eradi*(1) is of importance because, in deciding it, the Court considered the Full Bench decision and acted upon their view of it. At the same time it must be said that, having regard to the facts found by the District Judge, the observations made on the general question of the force of decrees against a karnavan were not strictly necessary. The District Judge on appeal held that the karnavan had, in the first suit in which he was impleaded as defendant, fraudulently admitted the plaintiff's title. But the Court decided the case on the ground that apart from fraud the anandravans were entitled, notwithstanding the decree, to have the question of title examined and to show that the decree was erroneous in point of fact. They considered that they were precluded by the Full Bench decision from holding that the anandravans were bound by the decree against their karnavan unless they proved *mala fides* on his part.

The next case *Subramanyan* v. *Gopala*(2) was heard by a Court composed of the same Judges as those who took part in the last cited case. This case differs from the former cases in the circumstance that the manager of the family had figured as plaintiff in the former suit. It was found that she had sued not on her own account, but on behalf of the tarwad and that she had contested the suit honestly and with due diligence. On this finding returned in answer to questions sent down by the Court on the

(1) I.L.R., 10 Mad., 79. (2) I.L.R., 10 Mad., 223.

first hearing of the second appeal, the Court dismissed the suit brought by the junior members of the tarwad, founding their judgment on the fact that the manager had been the plaintiff in the first suit and thus distinguishing the case from *Sri Devi* v. *Kelu Eradi*(1).

Some other cases were cited, but they have no immediate bearing on the point now under discussion. One negative proposition is clearly established by the cases to which I have referred—a decree made against a karnavan is clearly not binding on the tarwad, unless he sued or was sued in his representative character. It is also difficult to avoid the admission that the cases justify this further proposition that, in some cases, a decree against the karnavan may be binding on the tarwad and unimpeachable save on the ground of fraud. This limited proposition is admitted in *Subramanyan* v. *Gopala*(2). The distinction there insisted upon I fail to understand or appreciate. If the tarwad may be adequately represented by their karnavan in litigation promoted by him, I cannot see why this may not equally be represented by him in proceedings which are directed against the tarwad. The distinction between the case of the karnavan sued for debt and the karnavan sued for property is also, I think, one which cannot be maintained. It is suggested in the case in *Kombi* v. *Lakshmi*(3), but since then does not seem to have been insisted upon. I concede that distinctions founded on the nature of the right or the way in which it comes to be litigated may be material in considering whether the karnavan really did represent the tarwad and honestly represent it; but otherwise I fail to see how they can be material. There are, it appears to me, only two alternatives. We must either hold that the status of the karnavan has nothing in it to make a decree against him binding on the tarwad, or that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted. Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it would not be easy to reconcile with the Full Bench decision, which alone is binding on us.

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(1) I.L.R., 10 Mad., 79. (2) I.L.R., 10 Mad., 223. (3) I.L.R., 5 Mad., 201.

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I will now consider the question apart from the recent cases and with reference to the position of karnavan as understood in Malabar. I believe there can be no doubt that, prior to 1880, the theory that the tarwad was fully represented by the karnavan was universally admitted (see *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1), *Kombi* v. *Lakshmi*(2), Wigram's Malabar Law). It is noteworthy that, as long as Mr. Justice Holloway, who was intimately acquainted with Malabar Law, was in this Court, the theory does not seem to have been questioned. In the Travancore State, I find from a recent judgment of the Court there that it is maintained to the present day (*Narayana* v. *Narayana*(3)). It is unnecessary to repeat at length what has been said in several cases as to the rights and duties of the karnavan. He is the manager of the tarwad property; he is entitled to possession of it even against the anandravans; he is authorized, subject to certain limitations, to alienate the family property and to pledge the credit of the family. He cannot be removed from office at the instance of the junior members and dispossessed of the family property except on proof of gross maladministration. Apart from this, the junior members have no other claim against him except for maintenance. No claim for division of the property is admissible (*Eravanni Revivarman* v. *Ittapu Revivarman*(4), *Varanakot Narayanan Numburi* v. *Varanakot Narayanan Numburi*(1), *Tod* v. *Kunhamod Hajee*(5), *Kannan* v. *Tenju*(6)). If the karnavan being so placed with regard to the tarwad, was, for many years prior to 1880, universally regarded as the person through whom the tarwad should speak in courts of law and was so treated by the courts, the remaining question is whether the Code of Civil Procedure forbids us to continue to treat him in the same way. This is a question which ought to be argued without reference to considerations of convenience or expediency, which, however, in my opinion, favour the maintenance of the old practice rather than its abolition. The argument used in several of the cases seems to have been that, because the Civil Procedure Code does not provide for the case of karnavans as it does, for instance, for the case of executors, and does contemplate the joinder of all parties interested in the sub-

(1) I.L.R., 2 Mad., 328. (2) I.L.R., 5 Mad., 201. (3) 11 Travancore, L.R., 112.
(4) I.L.R., 1 Mad., 153. (5) I.L.R., 3 Mad., 176. (6) I.L.R., 5 Mad., 1.

ject matter of the suit, the anandravans of a tarwad cannot be affected by a decree to which they are not parties either actually or constructively under the provisions of section 30. The general proposition that all persons intended to be prejudicially affected by a decree ought to be joined as parties to the suit cannot be denied; but there are exceptions from this rule, and the question whether one person represents another is rather a question of substantive law than of procedure. One of the classes of exception consists of the cases of which *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*(1) is an instance. Another consists of the cases in which the principle is admitted that the female heiress under Hindu Law represents the estate in such a manner that a decree against her in a suit properly framed may bind the reversioner. These exceptions have been allowed and maintained, notwithstanding the provisions of the Civil Procedure Code. The section of the code to which we are specially referred are the 30th and the 13th, explanation V. The 30th section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted on before the code of 1877 came into force (*Srikhanti Narayanappa* v. *Indupuram Ramalingam*(2)). If it were shown to have been invoked, in the case of the karnavan and his tarwad, it might be said that a decree against a karnavan could, since the enactment of the Code, be no longer held binding on the tarwad, unless the procedure prescribed by the section were followed. But this is not so, and I do not think it can properly be said that a karnavan and his anandravans have 'the same interest' in a suit brought by, or against, the tarwad. The interest of the former, with his right of management and possession and his obligation to maintain the junior members, is surely not identical with the interest of a junior member, who has a claim for maintenance only. The whole contention in favour of the view that the karnavan represents the tarwad rests on the fact that he is in a position of authority having obligations and duties to perform, for discharge of which superior rights in the tarwad property are conferred upon him. With regard to section 13, explanation V, if it has any application to the case of a Malabar tarwad, it rather supports the view that the tarwad may be bound by a decree against the karnavan *bonâ fide*

(1) L.R., 6 I.A., 233. (2) 3 M.H.C.R., 226.

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litigating on its behalf. I am disposed to agree with Kernan, J., in thinking that the explanation refers alike to claims made by a defendant and claims by a plaintiff. The conclusion at which I arrive is that the Code of Civil Procedure does not prevent our giving effect to the theory of the karnavan's representative character. I cannot help thinking that learned Judges have been induced to discountenance the theory on the ground that the interests of the tarwads require that all their members should be joined in suits concerning their property or obligations. It was observed in some of the cases that to allow the karnavan to represent the tarwad in suits would practically amount to allowing him to alienate tarwad property indiscriminately. No doubt, the remedy by suit impeaching the decree against their karnavan on the ground of his fraud or collusion, would not afford the anandravans a complete indemnity against the possible misconduct of the karnavan. But the inconvenience resulting is, I think, more than counterbalanced by the evil consequences, which have resulted from the departure from the old practice. The result has been that, although a man may have obtained a decree for a debt or for property against the karnavan and some of his anandravans, he has been exposed to successive suits by the remaining members of the tarwad. It is always open to some unconsidered infant to re-open the litigation and insist on having the whole question re-tried. The rule of impartibility, which prevails according to Malabar Law, renders the consequences of an omission to join all the members of the tarwad, if they are to be deemed necessary parties, much more serious than it is in a similar case under the ordinary Hindu Law. Whereas, according to the latter, the creditor or the purchaser might, at least retain under his decree against the manager, the share of that manager in the family property, in Malabar he is deprived even of that consolation when the court holds that a junior member of the tarwad may re-open a litigation which has been fairly conducted by his karnavan and is persuaded to upset the former decree. In such a system it is not astonishing that a rule making the karnavan the exclusive representative of the tarwad should find a place.

For these reasons I am of opinion that the question must be answered in the affirmative.

SUBRAMANIA AIYAR, J.—I have also arrived at the same conclusion, and, in my opinion, that is the conclusion to which the

principle governing the case leads, there being nothing in the Code of Civil Procedure to preclude effect being given to that principle.

The question here really turns upon the peculiar characteristics of a Malabar family and the unique position which its karnavan holds. The family property is not liable to partition, except with the consent of all; the right of the members other than the karnavan being practically limited to claim maintenance and to prevent the karnavan from wasting or improperly alienating the family property; and the title to hold possession of the estate and to receive and expend its income is vested in the karnavan, not by the sufferance of the other members, but of right, which is indefeasible so long as he exercises his functions without injury to the family. Therefore according to the substantive law to which he is subject, a karnavan is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsiders on the other.

The question is whether in litigation also, when it concerns the family, a karnavan is not entitled to represent all the other members so as to bring cases like the present within the exception to the general rule requiring all persons materially interested in the subject of a suit to be made parties to it, viz., even those not actually before the court are bound by the judgment given in a suit, if their interest was sufficiently represented therein. Now it is conceded that, when a karnavan sues on behalf of the family, he fully represents all its other members and an adjudication therein, if there is no fraud or collusion, is binding on the whole family (*Subramanayan* v. *Gopala*(1)). It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the karnavan, it is not open to the party sued by him to raise any objection to the action on the ground of the non-joinder of the other members, *Byathamma* v. *Avulla*(2). A defendant in that position cannot, in common fairness, be allowed to be sued again and again by each and every member of the family after a suit instituted by a karnavan had been properly tried and adjudicated upon. By parity of reasoning, then, it follows that a karnavan can be sued on behalf of the family. It is difficult to see how this conclusion can be avoided,

(1) I.L.R., 10 Mad., 223. (2) I.L.R., 15 Mad., 19.

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unless the argument of the defendant based on the provisions of the Civil Procedure Code were correct.

The argument seems to be that, only when the special procedure prescribed by section 30 has been adopted, the members of a family not actually parties to the suit are bound by the decision pronounced in it, but not otherwise. Now, it must be remembered that section 30 provides only for that class of cases in which, owing to the circumstance that the persons interested are too numerous to be all conveniently brought before the court, and therefore the rigorous application of the general rule as to parties would work injustice, the rule has, as pointed out by the Lord Chancellor in *Mozley* v. *Alston*(1) see also *Richardson* v. *Hastings*(2), been relaxed in comparatively modern times. It has also to be remembered that the representative under that section is constituted and appointed by the court in the suit. But there are instances where, even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons interested are numerous, yet the law does allow, apart from statute, certain persons to prosecute or defend suits in their representative capacity, *e.g.*, Hindu widows with reference to reversioners; other persons having an estate, analogous to that of a Hindu widow with reference to those entitled to take after such qualified owners, and so on. In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown, is eminently true in the case of a karnavan. Consequently he does not require the aid of section 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family.

Nor does section 13, the only other provision relied upon, affect the validity of the conclusion arrived at. If the present case falls within explanation V, that explanation fully sustains the view taken, since, with all deference to the opinion of Innes, J., in *Vasudeva* v. *Narayana*(3), I think the explanation is certainly applicable to claims by a defendant as well as to those by a plaintiff. But if that explanation does not apply, the case is one not strictly covered by any other part of the section. And,

(1) I. Phillips' Reports, 798, 799. (2) L.J., 13 Ch., 142. (3) I.L.R., 6 Mad., 121.

as the section is not exhaustive as to *res judicata*, I think it does not affect the correctness of the view taken here. Therefore, unless there is shown in the words of Jessel, M.R., "fraud or collu- "sion or anything of that sort or that the Court was cheated into "believing that the case was fairly fought or fairly represented "when in point of fact it was not" (*Commissioners of Sewers of the City of London* v. *Gellatly*(1)), a decision in a suit, defended by a karnavan in his representative capacity, must be held to be binding upon all those represented by him.

The rule governing the present case being thus clear, arguments against it founded on expediency have no force. If it be said that to recognise the right of a karnavan to represent his juniors in litigation would prove detrimental to the welfare of Malabar families, it must be admitted it would be equally so in cases in which a karnavan sues as when he defends. Yet, in the former case, the objection has not been considered good enough to hold that junior members are not bound by a decision obtained in the suit by the karnavan. How then can the argument prevail in the latter case? No doubt, in particular instances, it is possible and not improbable that junior members might find themselves unable to establish fraud, collusion or the like on the part of the karnavan. But I have no doubt that the hardship, likely to be so caused, will be small indeed when compared with that which would result from answering the question before us in the negative; since experience shows that, in the large majority of cases, the attempts made to re-open litigation once concluded after real and genuine contest are made by the same parties, the names of persons (possibly of those who had been fully cognizant of and who had acquiesced in the karnavan's management of the previous litigation) who unfortunately, for the successful party, had not been actually impleaded, being used for the promotion of such subsequent suits. No doubt representative litigation of the kind under notice is attended with some degree of difficulty. The difficulty however may, to some extent, be met by a judicious exercise of the discretion vested in the Courts in the matter of adding parties. But the difficulty cannot afford any justification for discarding the principle applicable to such cases. A departure from it, in some of the decisions of this court which have been fully considered

(1) L.R., 3 Ch. D., 616.

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by my learned colleague Shephard, J., and which I therefore refrain from discussing, has, I am afraid, tended to foster unjust and vexatious litigation which can, I think, be stopped to a considerable degree by again enforcing the principle accepted and uniformly acted upon up to 1880.

I concur therefore in answering the question referred in the affirmative.

DAVIES, J.—I was at first disposed to adopt the view that all members of the tarwad ought to be impleaded either individually when few in number, or under the provisions of section 30 of the Code of Civil Procedure when numerous, for the simple reason that this course would have the effect of preventing any further litigation in connexion with the same subject matter.

But now having regard to the representative character which the karnavan undoubtedly holds in all other affairs connected with the tarwad, it seems to me that if we overlooked that character in our courts of law we should be unjustly derogating from his status.

Moreover, the only litigation that would be possible upon the judicial recognition of his representative character would be confined to actions founded in fraud on his part. The inconvenience caused thereby would, in my opinion, be far less than what would follow from an inflexible rule requiring that in every case in which a tarwad was concerned all its members should be made parties, entailing in nine cases out of ten needless trouble and expense.

I therefore also concur in answering the question in the affirmative.

This second appeal coming on for final disposal, the Court (*Shephard* and *Subramania Ayyar*, JJ.) delivered the following judgment:—

JUDGMENT.—It is said on the appellants' behalf that there was a prior judgment in their favour, of which they might have availed themselves if they had known that the view of the law now taken would be maintained. But this prior judgment was not pleaded, though it was open to the appellants to put it forward.

On the facts as found by the District Judge, we must hold that he was right in dismissing the suit, and therefore the appeal is dismissed, but without costs.