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The plaintiff appealed in *Special Appeal No.* 401.

At the first hearing of the appeals the High Court referred the following issue to the Civil Judge.—"Whether there was a binding and peculiar custom in the family, depriving the senior member of all management of the property and vesting it in the branch karnavans." The Civil Judge found that there was no such custom.

S. A. *Nos.* 359, 401, 358 *and* 372 *of* 1870; 449 *of* 1869 & C. M. S. A. *No.* 56 *of* 1870.

Upon this return the appeals came on again for hearing together with the following—

Special Appeal Nos. 358 *and* 372 *of* 1870.

THIPEN'S son CHELEN and another } *Special Appellants in No.* 358, *and Special Respondents in No.* 372.

ÁYANEPALLI EKANATHA THAVAI KARNAVAN SHANGUNI..... } *Special Respondent in No.* 358, *and Special Appellant in No.* 372.

These were Special Appeals against the decision of G. R. Sharpe, the Civil Judge of Calicut, in Regular Appeal No. 320 of 1869 ; modifying the decree of the Court of the Principal Sadr Amin of Calicut in Original Suit No. 16 of 1863.

Special Appeal No. 449 *of* 1869.

EKANATHA SHANGUNI.....*Special Appellant.*

AYAMPALLI EKANATHA APPUNI. } *Special Respondent.*

This was a Special Appeal against the decision of I. V. K. Ramen Náir, the Principal Sadr Amin of Calicut, in Regular Appeal No. 66 of 1869, confirming the decree of the Court of the District Munsif of Pattambi in Original Suit No. 64 of 1860.

Civil Miscellaneous Special Appeal No. 56 *of* 1870.

SHANGUNI..... ....*Appellant.*

APPUNI..... .....*Respondent.*

This was an appeal against the order of C. R. Pelly, the Civil Judge of Calicut, dated 12th November 1869, confirming the order of the Court of the District Munsif of Pálghát, passed on Miscellaneous Petition No. 1242 of 1869.

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S. A. Nos. 359, 391, 358 *and* 372 *of* 1870; 449 *of* 869 & C. M. A. No. 56 *of* 1870.

The same question being at issue in all these suits, the appeals were heard together.

The Advocate-General, for the appellants in Special Appeals Nos. 491 and 449, and in C. M. S. A. No. 56 ; and for the respondents in S. A. Nos. 359.

O'Sullivan, for the appellants in Special Appeals Nos. 358 and 359, and for the respondents in Special Appeals Nos. 491 and 449 and in C. M. S. A. No. 56.

J. H. S. Branson, for the appellants in S. A. No. 372, and for the respondents in S. A. No. 358.

Sanjiva Rau, for the respondents in S. A. No. 372.

The Court delivered the following judgments :—

HOLLOWAY, J.—On the issue referred the question is whether there is a binding and peculiar custom in this family depriving the senior member of all management of the property and vesting it in two persons called the branch karnavans. The Civil Judge has found the contrary on a considerable amount of evidence, and his decision is conclusive unless,as the Advocate-General contended, the contrary has been so irrevocably fixed by judicial decision as to prevent the matter from now being open to question, and this decision on the matter of fact bad in law as opposed to binding decrees of competent Courts.

The basis of all these decrees is a certain arrangement alleged to have been made by a former head of the family. The document by which this arrangement was made and upon which all the decrees unfavourable to the senior member are based following C (1826), is a document by which the management of certain items of property is assigned to a particular person, called for the purposes of this case the branch karnavan. There appears to have been a second of the same purport in favor of another. It must be observed that such arrangements are not uncommon in families following the ordinary rule, and their existence is not the most slender evidence of the prevalence of anything but the usual custom of the family. Further, it is undoubted law, as stated in the earliest of these documents, that the head may modify such

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arrangement when he pleases, and we have recently expressed a strong inclination of opinion that the doctrines as to the power of renunciation do not apply to a person in the position of a Malabar karnavan (*a*). This was the distinct opinion of the Provincial Court in the earliest of those documents, and the Provincial Court was at that time composed of men (among them Stevens, a friend of the Duke of Wellington) very well acquainted with the custom of Malabar. This doctrine is repeated by the Sadr Court, by the Principal Sadr Amin of Calicut, who goes on the agreement not having been set aside, and by Mr. Strange, in his judgment, who treats the agreement as being merely a specific declaration of what the Law of Malabar would otherwise have enforced, that the sale or encumbering of property without the assent of the junior members, or at all events of the senior anandravan, is not permissible (D). This opinion as to the Law is important when we come to scrutinize the binding character of the judgment in question. It is another very curious rule of Law, long supposed to be binding, that a man cannot turn out his own agent without a special suit for the purpose. I have seen many decrees based upon this strangely absurd doctrine. One, I remember, in which the Zamorin wanted to disallow further acts of his predecessor's agent, and the suit was got rid of because this could only be done by first removing the agent by regular suit and paying a stamp on the whole property, which must be included. Dozens of Pagoda cases have been decided in the same way, and show an opinion as to the effect of contracts which must have an important influence in determining the weight to be given to these decisions as to status. The same doctrine runs through the decision of Mr. D'Silva, the late Principal Sadr Amin of Calicut. He admits the power of the head to get rid of his delegating order, but states that he has not done so,—an opinion which would be incomprehensible without understanding the strange views of the law of agency for many years administered by the Malabar Courts. I remember producing a startling effect upon all the practitioners before me when I decided, I am

(*a*) See p. 145 of this Volume.

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afraid with no respectful expressions as to the venerable doctrine, that a man could remove his own agent. Reading all these judgments, with the views of the Judges as to the binding character of such agreements, it seems to me quite impossible to say that a binding decision upon the status of the family could alone have led to the decrees passed.

Further, there are conflicting decisions on this very point of status, and with conflicting decisions in English Law there can be no pretence of an estoppel. The order of the Provincial Court is a distinct decision that this family is bound by the ordinary law of Malabar.

The question of how far the matters of fact which are stated as objective grounds of the decision are *res judicata* is still a matter of warm controversy, and Unger, supported by several other great jurists, has in his cogent manner (§ 132) strongly attached the doctrines propounded by Savigny and supported by Vangerow, Windscheid and others. It is undoubted that Unger's views are more accordant with the view of the law entertained by DeGrey, C. J., while those of Savigny are more accordant with the modern English cases. It is impossible to mistake the extreme danger of so great an extension, but I will only say, as it is sufficient for the present case to say, that those who follow Savigny admit that it must be confined to such grounds as the Judge has determined because he must determine them. Now, any one of these Judges who entertained the prevalent views of the law of agency and erroneous views of the power of renunciation both for himself and his successors would have had ample ground for sustaining any one of these decisions. The mischief to this family from breaking down the plain rule of the Provincial Court is perfectly manifest. They have been for 70 years worrying one another, litigating, admitting and denying.

I am of opinion—1. That there is nothing compelling us to decide contrary to the plain rules of law that this delegation is irrevocable, perhaps it is not so even by the delegator and still less is it so by his successors.—2. That the fact of the setting apart of stánám property, if it was set apart, can make no difference, and as little can the cir-

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cumstance of the income reserved—3. That there is nothing to prevent us from deciding that the Civil Judge is right in saying that this is an ordinary Malabar tarwád, and if I were at liberty to go into the fact I should entertain no doubt of it—4. That the renunciation before the Sadr Court is, I am disposed to think, not even irrevocable as against him who made it, and certainly could not have the effect of depriving the senior member for all future time of the rights which the law of the country conferred upon him with the correlative duties upon his becoming senior.

With so peculiar a condition of property as that of Malabar, it is most essential for the avoiding of complete anarchy and consequent ruin to maintain the distinct rule as to the karnavan's powers. Wherever it is infringed, the miserable consequences apparent in the present case immediately result. The declaration of the Principal Sadr Amin must, therefore, be confirmed in all respects, for his finding, confirmed by the Civil Judge, is that the perpetual kánam is void as not made for a family purpose, and this can both be raised by a junior member and decided in a suit by him.

In S. A. No. 401 *of* 1870.—The result of the judgment in No. 359 of 1870 will be the dismissal of this appeal.

In S. A. Nos. 358 & 372 *of* 1870.—Following the judgment in 359, the decree of the Civil Judge so far as it alters that of the Principal Sadr Amin must be reversed.

In S. A. No. 449 *of* 1869.—The dismissal follows the decision in 359 of 1870.

In Civ. Mis. S. A No 56 *of* 1870.—The result of the judgment in 359 of 1870 will be the dismissal of this appeal.

SCOTLAND, C. J.—Having considered these cases since the argument, I concur in the conclusions that we are not constrained to hold that the irrevocability of the arrangement effectep in 966 by the former head of the family as to the apportionment of the family property between two Taverais, and the management of each Taverai's allotment by its senior

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member, is a matter conclusively adjudicated in the course of the litigation of which there is proof in the records: that such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then head of the tarwád; and that assuming it to have been irrevocable by him (a point on which I entertain at present doubts) it is not binding on the 3rd defendant, who is admittedly the head of the family by right of seniority.

Upon these grounds, and the conclusive finding of the Court below against the existence of any governing custom in the family making the position of the 3rd defendant different as respects the right to the management of the whole of the family property from that of an ordinary karnavan of a Malabar tarwád, I agree in the opinion that the claim of the plaintiff to recover the lands held by the 1st and 4th defendants is not maintainable; and that, consequently, the decree of the Civil Court, so far as it orders the restoration of those lands to the plaintiff, must be reversed, and that it must be declared that the 3rd defendant is the karnavan of the tarwád, and as such entitled to the management of the whole of the tarwád property. The other portion of the Civil Court's decree cancelling the perpetual kánam granted by the 3rd defendant, and adjudging the parties to bear their own costs, will stand affirmed. I think the parties should bear their own costs in this Court.